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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,569

FRANK VALDES,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

****

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee was the prosecution and Appellant the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

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

The following symbols will be used:

"R" Record on Appeal

"A.B." Appellant's Initial Brief

All emphasis has been added unless otherwise indicated.

STATEMENT OF THE FACTS AND CASE

Appellee generally accepts appellant's statement of the facts to the extent that they represent an unbiased and accurate accounting of the evidence adduced at trial. Appellee does not accept appellant's "characterization" or "editorialization" of same. Appellee will supplement the statement of the facts with either relevant facts omitted from appellant's statement or correction of certain statements.

1. Contrary to assertions otherwise, juror Stezel was not challenged for cause based on her views regarding the death penalty. (R 1760-61, 1768).

2. Turner testified that appellant ordered Officer Griffis out of the van at gunpoint and brought him (Griffis) to the back of the vehicle. (R 1937-38).

3. Turner testified that Van Poyck repeatedly kicked Turner and stopped doing so just before Griffis was killed. (R 1940).[1]

4. Appellant left his home the morning of the murder with Van Poyck. Appellant was carrying the gun he had purchased. That gun ultimately became the murder weapon. (R 2597-99).

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[1] In appellant's statement of the facts, he states that "a few minutes" had passed between the time Van Poyck stopped kicking Turner and the time Griffis was shot. (A.B. 16).

5. Eyewitnesses testified that Appellant was carrying two guns and smashing the van windows during the escape attempt. (R 1865, 1951, 2152). Both appellant and Van Poyck were armed. (R 1835).

6. Another witness testified that after he heard numerous shots, he saw one of the gunman standing over the body of Griffis. (R 2047). The other gunman was still around the side of the van. (R 2048). Turner testified that appellant was with Griffis behind the van before the shooting. (R 1937-38).

7. Two other witness, Dr. Brown and Jullie Hutter positively identified appellant as one of the gunman involved in the shooting/escape attempt. (R 2143-71, 2436-64).

8. Ms. Peacock, an employee at GCI left information for O'Brien that he was going to the doctor's office the next day. (R 2081-89). Ms. Polloway, an employee for Southern Bell, testified that two collect calls were made from GCI. One the evening of June 23, at 8:55 P.M. and one at 6:59 A.M. on June 24. One of the calls was made to appellant's home, the other to Van Poyck's home. (R 2333-46).

9. Several Officers testified that they pursued appellant and Van Poyck in a high speed chase. Van Poyck shot at the officers as appellant drove the car. Four bullets were recovered from several of the pursuing police cars. (R 2175-2275, 2316-22).

10. When apprehended, appellant was carrying a knife on his person. (R 2097). Several guns and a bolt cutter were also found. (R 2290-2305).

11. The medical examiner testified that the contact wound to the head was probably the first shot. The two remaining shots to the heart were fired while the victim was down on the ground. (R 2646-49).

12. Appellant repeatedly refused to be examined by a mental health expert. (R 2880).

13. Appellant's sister Frances Valdez testified that their father was hard working and ran a very successful business. (R 2926, 2949). Appellant was raised in a middle class neighborhood in a loving family. (R 2426). Appellant's parents tried to do what was best for appellant. (R 2951). When appellant's parents were not at home, appellant was cared for by his sister. (R 2935). Although appellant's father has been described a abusive, he was only home three to four months of the year. (R 2973).

SUMMARY OF THE ARGUMENT

ISSUES I thorough III. The trial court conducted an adequate hearing regarding appellant's motion to dismiss counsel based on ineffective assistance of counsel. Appellant was well aware of his right to self representation. The trial court properly denied appellant's request for appointment of counsel regarding his motion to dismiss.

ISSUE IV and XX. These two issues are not properly preserved for appeal and therefore review by this Court is precluded. In any event, the trial court properly denied appellant's request to excuse two prospective jurors for cause.

ISSUE V. Following appellant's physical attack upon a state's witness the trial court did not abuse its discretion in removing appellant from the court until he was able to conduct himself in an appropriate manner.

ISSUE VI. Appellant was properly convicted of both felony murder and the underlying felony of robbery.

ISSUES VII and VIII. The State Attorney's Office did not err in charging appellant with armed robbery. The State Attorney's Office has the discretion to charge or not to charge a defendant with a particular crime. There was sufficient evidence to sustain a conviction for the underlying felony of armed robbery.

ISSUE IX. The trial court did not err in denying appellant's request to vacate the judgment of aggravated assault.

ISSUE X. The trial court properly denied appellant's request to vacate his conviction for aiding in an escape.

ISSUE XI. There was sufficient evidence to convict appellant of six counts of attempted first degree murder.

ISSUE XII. Simply because appellant's co-defendant was convicted of six counts of attempted manslaughter, does not render his attempted murder convictions fundamentally unfair.

ISSUES XIII through XV. Appellant's claim of ineffective assistance of counsel at the penalty phase is not cognizable on direct appeal. Furthermore, appellant cannot demonstrate from the record where counsel was deficient.

ISSUE XVI. There was sufficient evidence to sustain a finding that the murder was committed in a cold, calculated and premeditated manner.

ISSUE XVII. The trial court did not abuse its discretion in failing to find as a mitigating factor that appellant was merely an accomplice. This Court's opinion that Van Poyck was a major player does not negate appellant's equal,active and willing participation.

ISSUE XIX. The trial court did not abuse its discretion in failing to find the mitigating factor that appellant was acting under an emotional disturbance at the time of the murder.

ISSUE XXI. The trial court did not err in admitting into evidence Officer Gaglione's testimony. This issue is not

preserved for appeal as the grounds now raised on appeal were not raised at trial. Furthermore there was never any objection to the actual testimony, or any objection to the state's characterization of same. Any "weakness" in the testimony was certainly established on cross-examination.

ARGUMENT

(Appellant's Issues I through III restated).

AFTER CONDUCTING A FAIR AND ADEQUATE HEARING REGARDING HIS MOTION, THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS COUNSEL

Appellant claims that the trial court failed to conduct an adequate inquiry into all the reasons alleged in his motion to dismiss counsel. (R 4010-11). A review of the record demonstrates that the trial court was aware of his duty under Hardwick v. State, 521 So.2d 1071, 1073, cert. denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed. 2d 154 (1988) and made the proper inquiry. Based on the allegations presented it was clear that appellant was merely dissatisfied with counsel's strategy. (R 3976-92) As such appellant did not establish that he was receiving ineffective assistance of counsel. Appellant's motion was properly denied. Bowden v. State, 588 So.2d 225 (Fla. 1991).

On two prior occasions the trial court granted appellant's motion to dismiss counsel. (R 103-08, 822-25, 829-30, 841-69, 1080-82, 1100). Both times the trial court had to coax and prod appellant into stating his reasons. (R 103, 795, 810, 813, 825). After granting the second request for substitute counsel, appellant was told that he did not have a right to substitute counsel and if his actions persisted he would have to represent himself.[2] (905-06, 1136). Almost nine months later,

[2] The record belies appellant's contention that the trial court did not advise appellant of right to represent himself.

appellant again filed a motion to dismiss counsel. (R 1276). The trial court's denial of the third request for counsel gives rise to this issue on appeal.

Upon the filing of appellant's motion to dismiss counsel, the trial court conducted a hearing to allow appellant the opportunity to establish his claim. (R 1283, 1294). When asked to present his argument/reasons, appellant refused to answer or speak to the court. (R 1292). Appellant argued that he was entitled to counsel at the hearing to prove why he was entitled to new counsel. The state was then allowed to present evidence to rebut the specific charge that appellant's trial attorney committed a battery upon him. (R 1295-1302).[3] Appellant refused to cross-examine any of the state's witness when invited to do so by the court. (R 1297, 1300, 1303). The trial court interpreted appellant's refusal as a desire not to question the witnesses. (R 1297). At one point, appellant physically attacked one of the state's witnesses forcing the judge to have him removed from the court room. (R 1301). Prior to resuming the proceedings, the trial court asked appellant if he could behave appropriately. Appellant was argumentative and called the judge an "asshole". (R 1304-05). The trial court was unable to further inquire of appellant based on appellant's own actions and obstructions. (R 1309-10). Based on what was presented, including the state's witnesses, defense counsels'

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[3] Trial counsel also submitted affidavits rebutting appellant's allegation. (R 4008-12).

affidavits, appellant's motion and case law, the judge denied appellant's motion. (R 1309-10). A review of the record supports the trial court's findings and ruling. (R 1203-06). The trial court also found that appellant:

> "has engaged in and embarked upon a purposeful and willful course of conduct to frutrate this Court and the trial of this case. And were this Court to grant either one of these two motions, it, the Court is of the opinion that six, eight months down the pipe, we would be faced with exactly the same situation. It would be just different counsel involved. Therefore, both of these motions are denied." (1309-10).

Appellant has failed to establish any error in the trial court's rulings. Ventura v. State, 560 So.2d 217, 220 (Fla. 1990); cert. denied, 111 S.Ct. 372, 112 L.Ed.2d 334 (1990). Capehart v. State, 583 So.2d 1009, 1014 (Fla. 1991) cert. denied, __ U.S. __, 112 S.Ct. 955, 117 L.Ed.2d 122 (1992). Unlike the situation in Scull v. State, 533 So.2d 1137, 1140 (Fla. 1988), cert. denied, 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989), appellant had every opportunity to establish his claim including his allegations that counsel did not pursue various leads and strategies. Appellant chose not to do so. Furthermore, the trial court did advise appellant that self-representation was an option. (R 905-06, 1136, 1200). Appellant made it very clear that he did not want to represent himself. (R 1136, 1200). The trial court conducted an adequate inquiry and properly denied appellant's motion. Koon v. State, 513 So.2d 1253, 1255 (Fla. 1987); Hill v. State, 549 So.2d 179, 181 (Fla.

1989), cert. denied, 485 U.S. 943, 108 S.Ct. 1124, 99 L.Ed.2d 284 (1988).

Appellant claims that the trial court erred in not reopening the issue regarding his claim of ineffective assistance of counsel once appellant decided to act appropriately in court. As conceded by appellant, the trial court was correct in removing appellant from the courtroom given his violent outburst. (R 1304-05). On at least four subsequent occasions, the trial court inquired of the appellant whether or not he is willing to behave in the appropriate manner and come back into the courtroom. (R 1311, 1319, 1349, 1430-32). Appellant was clearly told that he may at anytime advise the judge when he ready to conduct himself appropriately (R 1311). Given his explicit and continued refusal to be apart of the proceedings, the trial court's actions were appropriate and clearly within his discretion. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

Furthermore, appellant's absence from the courtroom did not preclude him from establishing his claim under Hardwick. It was appellant's refusal to discuss the motion and meet his burden of proof that resulted in the denial of his claim. (R 1292). He could have changed his mind at any time during that hearing to discuss and establish his claim. Ventura. Appellant was not removed from the courtroom until he had already decided not participate in the litigation of his own motion.(R 1303-05). Appellant's refusal to state his reasons to the court why counsel should be dismissed occurred during the hearing regarding that

motion on May 29, 1990. (R 1292). A review of the record illustrates that on May 30, 1990 during voir dire appellant was still absent from the court. (R 1663). Sometime on May 31, 1990, two days after the hearing was completed, appellant was then back in the courtroom. (R 1756). At that time the trial court was not required to ask appellant if now decided to articulate his reasons for filing the motion to dismiss cousel.Ventura. The time to do so was during the hearing held for that purpose. Since appellant chose not to do so, he waived his right to complain at a later date. See generally, Gunsby v. State, 574 So.2d 1085, 1088 (Fla. 1991) cert. denied, __ U.S. __, 112 S.Ct. 136, 116 L.Ed.2d 103 (1991), (defendant waives right to challenge the excusal of potential jurors for failing to make inquires during voir dire).

Appellant contends that the trial court erred in denying his request for counsel to represent him at the hearing. Appellant can site to no authority which requires appointment of counsel for such a proceeding. The trial court is required to inquire of the defendant as to the reasons why new counsel is required. Hardwick. To require "appointment of counsel" to "litigate" the issue regarding "appointment of counsel" exacerbates delay and renders moot any meaningful attempt to determine the legitimacy of the initial claim of ineffectiveness. Appellant was very capable of articulating on his own why he felt prior counsel, Goldstein and Wilensky, were ineffective. (R 822-61).

Furthermore there was no conflict of interest which would have warranted the appointment of independent counsel. Carried to its logical conclusion, appellant's argument would require the appointment of independent counsel every time a defendant does not get along with present counsel or he decides he does not like his current attorney. This is so because a conflict of interest is inherent in every claim of ineffective assistance of counsel.

There has been no showing that counsel was serving a dual and adverse interests as in Bellos v. State, 508 So.2d 1330 (Fla. 2nd DCA 1991). Appellant's counsel did not attempt to represent Valdes during that portion of the hearing. Appellant was perfectly capable of cross-examining the witnesses if he so desired. Appellant has failed to demonstrate what an independent counsel would or could have done that appellant himself was incapable of doing. See generally, Waterless v. State, 596 So.2d 1008, 1011-15 (Fla. 1992).

In conclusion the trial court properly denied appellant's motion to dismiss counsel. The procedure under which that determination was made was adequate under Hardwick.

ISSUE IV

THE TRIAL COURT DID ERR IN DENYING APPELLANT'S REQUEST FOR CAUSE REGARDING TWO PROSPECTIVE JURORS

Appellant argues that the trial court erred in failing to excuse for cause two prospective jurors; Garko and Stezel. Garko was struck with a peremptory challenge (R 1766) and Stezel ultimately sat on the jury. (R 1779). Appellant never attempted to strike Stezel with a peremptory challenge.

Appellant is precluded from raising this issue as the ground for a cause challenge to excuse Stezel raised on appeal is different from the ground on which she was challenged at trial. At trial, appellant challenged Stezel twice based solely on pre-trial publicity regarding appellant's altercation with a witness. (R 1760-61, 1768). In this proceeding however, appellant claims that Stezel was predisposed to the death penalty. (A.B. 55-57). Since the grounds raised for exercising the challenges at trial are different from the grounds now asserted on appeal, appellant has failed to preserve this issue for appellate review. Hitchcock v. State, 578 So.2d 685, 689 n. 4 (Fla. 1990), judgement vacated on others grounds, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992); See Sapp v. State, 411 So.2d 363, 364 (Fla. 4th DCA 1982).

Since appellant is precluded from challenging juror Stezel's place on the jury, he is also precluded from challenging the trial court's denial for cause regarding Garko. As stated

above, Garko was struck with a peremptory challenge. (R 1766). Given the procedural default with respect to Stezel, appellant cannot now demonstrate which objectionable juror sat after exhausting all his peremptory challenges. Penn v. State, 574 So.2d 1079, 1081 (Fla. 1991). Furthermore, after appellant struck Garko with his last remaining peremptory challenge, (R 1766) his request for additional peremptory challenges was not made in connection with any particular venireperson, consequently review is precluded regarding Garko. Trotter v. State, 576 So.2d 691, 693, n. 7 (Fla. 1990).

On the merits, the trial court's granting of a challenge for cause is within the trial court's discretion, and a denial of same will not be reversed on appeal unless the error is manifest. Davis v. State, 461 So.2d 67 (Fla. 1986), cert. denied, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985). As such the trial court did not abuse his discretion in refusing to strike for cause Garko and Stezel.

Contrary to appellant's assertions otherwise, a juror is not required to be free from opinion or bias. The test is whether that juror can lay aside any prejudice or bias and render a verdict solely on the evidence presented. Hitchcock, 578 So.2d at 688. A review of all of Stezel's responses demonstrate that she would be an impartial juror regardless of the fact that she favors the death penalty. In response to the question whether she would be able to weigh aggravating and mitigating factors Juror Stezel responded:

I feel you have to have all the facts before you can make a decision one way or another.

(R 1643).

After making the "objectionable" statement (R 1644), appellant's attorney and Stezel had an exchange where Stezel clearly indicated that she would not let her background influence her decision. (R 1647). She indicated that she would not lean one way or another not knowing the circumstances. (R 1647). She stated that she felt that she would need to weigh the facts and base her decision on the facts. (R 1646). Looking at all of Stezel's responses she made it clear that she would put aside her biases and base her decision on the facts. (R 1643-48). The trial court did not abuse his discretion in denying appellant's challenge for cause. Fitzpatrick v. State, 437 So.2d 1072, 1076 (1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1328, 79 L.Ed.2d 723 (1984). If this Court determines that Stezel should have been excused for cause, appellee asserts that any error should be confined to the penalty phase only.

Likewise appellant has failed to demonstrate that the trial court erred in refusing to grant a challenge for cause against Garko. When asked about pre-trial publicity, Garko remembered that she had looked at a headline regarding appellant's altercation. (R 1743). She stated that she did not think that she formed an opinion regarding appellant's guilt or innocence. (R 1743, 1744). She never expressed any negative feelings, prejudices or biases. Consequently, this was not a

situation where a venireperson had to be rehabilitated after expressing certain biases. See generally, Hamilton v. State, 574 So.2d 124 (Fla. (1991). Her use of the phrase "I don't think so" or "I think so" was not equivocal. Garko always maintained that she thought she could follow the law. Given the trial court's ability and opportunity to observe the jurors demeanor of Garko, appellant has failed to establish that the trial court abused its discretion. Davis; Hawthorne v. State, 399 So.2d 1088 (Fla. 1st DCA 1981).

ISSUE V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ORDERED THAT APPELLANT BE REMOVED FROM THE COURTROOM UNTIL APPELLANT AGREED TO CONDUCT HIMSELF APPROPRIATELY

Appellant claims that the trial court erred by keeping appellant out of the courtroom during voir dire. Appellant concedes that the trial court's actions in removing him form the courtroom after he attacked a state witness were proper. (A.B. 61). Illinois v. Allen, 397 U.S. 337 (1970). Appellant contends that a less restrictive alternative should have been utilized once appellant calmed down. Appellant has failed to establish that the trial court abused its discretion.

Although this Court has characterized shackling as less restrictive than removal from the courtroom, it is clear that shackling is inherently prejudicial. Derrick v. State, 581 So.2d. 31, 35 (Fla. 1991); Elledge v. Dugger, 823 F.2d 1439, (11th Cir. 1987),cert denied, 485 U.S. 1014, 108 S.Ct. 1487, 99 L.Ed. 2d 1715 (1988). The trial court gave appellant every opportunity to be allowed back into the courtroom. (R 1304, 1311, 1318-19, 1349, 1430,1664). Until the trial court was satisfied that appellant would not be a danger, the court did not error in keeping appellant out of the room. Allen.

Appellant claims that he was denied access to his attorney while out of the room thereby making his removal from the courtroom more restrictive than other available alternatives.

Considering that appellant repeatedly told the judge that he either did not want to be in the courtroom or that he did not recognize trial counsel as his own, appellant cannot establish that any prejudice occurred. (R 1319, 1349). The trial court told appellant that he could speak with his attorney by relaying a message through the bailiff. (R 1335-36). Furthermore when discussing what procedure would be used to conduct in-court identification of appellant, his attorney objected to the use of shackles. (R 1664). Appellant cannot complain on appeal that he was denied his state and federal constitutional rights given that removal from the courtroom was the direct result of his own actions. Robinson v. State, 17 FLW S389 (Fla. June 25, 1992).

ISSUE VI

APPELLANT'S CONVICTION FOR ARMED ROBBERY DOES NOT VIOLATE DOUBLE JEOPARDY

Appellant alleges that his conviction for armed robbery and felony murder with armed robbery as the underlying felony violates double jeopardy. Appellant is in error. A conviction and sentence for both felony murder and the underlying felony is constitutionally sound. Mills v. State, 476 So.2d 172, 177 (Fla. 1985),cert. denied, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986) State v. Enmunds, 476 So.2d 165 (Fla. 1985); Sochor v. State, 580 So.2d 595, 600 (Fla. 1991). Consequently, appellant's conviction for both armed robbery and felony murder should be upheld.[4]

Also without merit is appellant's claim that his conviction for aiding an escape is not supported by the evidence. This issue is not preserved for appeal. At the close of the state's case appellant argued that the state failed to prove that James O'Brien was in lawful custody. (R 2663). Now on appeal appellant claims that the sate failed to prove that the person inside the prison van was James O'Brien. (A.B. 65). Since this was not properly raised in appellant's JOA motion appellate review is precluded. Johnson v.State, 478 So.2d 885, 886 (Fla. 1985).

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[4] The contrary result is also not required as conviction for the underlying felony is irrelevant to a felony murder conviction. Jackson v. State, 513 So.2d 1093, 1095 (Fla. 1st. DCA

In any event there was sufficient evidence to establish that appellant was aiding in the escape of James O'Brien. James O'Brien was referred to a doctor outside the facility for treatment. (R 2076). O'Brien was told of this the night before his appointment. (R 2083-91). Officer Turner testified that he and the victim, Officer Griffis, transported O'Brien to the doctor's office that day. (R 1926, 1929). During the escape attempt Turner testified that O'Brien stated that the keys to the van were on the dead officer. (R 1945-46). The evidence presented at trial was sufficient to establish O'Brien's identity. (R 2655, 3957-63). Furthermore the identity of O'Brien was a jury question which was obviously found in the state's favor. Owen v. State, 560 So.2d 207 (Fla. 1991). Appellant's conviction for aiding an escape should be upheld. State v. Williams, 444 So.2d 13, 15 (Fla. 1984).

Lastly even if this Court were to vacate appellant's conviction for aiding an escape, his conviction for first degree murder would remain. Jackson v. State, 513 So.2d 1093 (Fla. 1st DCA 1987); Sochor, 580 So.2d 595, 600 (Fla. 1991),cert granted in part, 112 S.Ct. 116 L.Ed.2d 455, remand on other grounds, 112 S.Ct. 2214, 119 L.Ed.2d 326 (1992).

(Appellant's Issues VII and VIII restated)

APPELLANT'S CONVICTIONS FOR BOTH FELONY MURDER AND ARMED ROBBERY ARE PERMISSIBLE UNDER THE LAW

Appellant complains that the state should not be permitted to charge him with armed robbery or be allowed to use armed robbery as an underlying felony for felony murder. Appellant cites to no authority which supports his claim. The trial court properly found that the state has the discretion upon deciding which charges to file. Appellant's reliance on Peterson v. State, 542 So.2d 417 (Fla. 4th DCA 1989) is misplaced. There the court reversed a defendant's conviction for one of four charges based on a violation of double jeopardy. The State Attorney's Office is vested with a great amount of discretion in making prosecutorial decisions regarding what offenses to charge. State v. Cain , 381 So.2d 1361, 1367 (Fla. 1980); Bloom v. State, 497 So.2d 2 (Fla. 1986); State v. Furguson, 556 So.2d 462 (Fla. 3rd DCA) review denied, 564 So.2d 1085 (Fla. 1990). There is simply no impediment to the state's actions in pursuing a felony murder conviction based on the armed robbery of Officer Turner's weapon.

In any event, even absent the conviction for armed robbery appellant's conviction for felony murder must be affirmed. Besides the underlying felony of armed robbery, the state was also proceeding under the theories of aiding in an escape and the attempted robbery of Officer Griffis. (R 2683-

85). Consequently appellant's claim is without merit and his sentence of death should be upheld. Sochor v. State, 580 So.2d 595 (Fla. 1991),cert granted in part, 112 S.Ct. 116, L.Ed.2d 455, remand on other grounds, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992); Hawkins v. State, 436 So.2d 44 (Fla. 1983); State v. Aigin, 418 So.2d 245 (Fla. 1983).

Furthermore, the state never elected under which theory it was going to proceed, felony murder or premeditation. The state contend that there was sufficient evidence to sustain a finding of premeditated murder. This is especially so since this Court has made a finding that appellant's co-defendant, William Van Poyck was guilty of felony murder, consequently the state is not estopped from arguing that appellant was either the actual trigger man, or was a principle in the murder of Officer Griffis. Van Poyck v. State, 564 So.2d 1066 (Fla. 1990), cert. denied, 111 S.Ct. 1339, 113 L.Ed.2d 270 (1991); Hall v. State, 403 So.2d 1319 (Fla. 1981). Appellant took the officer out of the van at gunpoint and forced him to the back of the vehicle. While appellant was doing this, Van Poyck was forcibly removing Turner from the passenger side of the van. Turner testified that a short time after Van Poyck stopped kicking him, he heard shots and Griffis was killed. (R 1937-45) Another witness testified that after hearing several shots he looked out the window and saw one of the gunman standing over the body of Griffis. (R 2047-48) The other gunman was on the other side of the van at the time. Consequently it can be logically inferred that before Van Poyck

reached the back of the van, appellant had already shot Griffis. (R 2047-48, 1937-8 4420).

ISSUE IX

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO AGGRAVATED ASSAULT

Appellant claims that there is insufficient evidence to convict appellant of aggravated assault of Dr.Brown. Since the evidence indicates that appellant's co-defendant, Van Poyck, was the actual perpetrator of the aggravated assault, the state was relying on an aider and abettor theory. (R 2777).

The evidence established that both Van Poyck and appellant both armed attempted to break O'Brien out of the prison truck. (R 1935 -1951). Shortly after Officer Griffis was killed, appellant and Van Poyck began to leave the area since they were unable to locate the keys to the van. (R 2144-52). Appellant had a gun in each hand, Van Poyck was carrying one. (R 2146,2152). Simply because appellant walked by Dr. Brown's car does not negate his responsibility for Van Poyck's subsequent actions.

This prison break occurred in the middle of the day in the parking lot of a doctor's office. Both appellant and Van Poyck fired many shots. (R 1871-72, 1875, 1940, 2046). It was clear that they were not going to let anything get in their way, considering the number of weapons they brought, the attempt to kill Officer Turner and the high speed chase. Simply because the aggravated assault on Dr. Brown was not the common purpose of the criminal episode, it certainly was a natural probable consequence of the criminal endeavor. Beasley v. State, 360 So.2d

1276 (Fla. 4th DCA 1978). Appellant's conviction for aggravated assault must be upheld.

ISSUE X

THERE WAS SUFFICIENT EVIDENCE OF AIDING IN AN ESCAPE TO SUSTAIN HIS CONVICTION

Appellant claims that there is insufficient evidence of aiding in an escape because there was no evidence that anyone was being held in lawful custody. Appellant's reliance on Peterson v. State, 542 So.2d 417 (Fla. 4th DCA 1989) and Kyser v. State, 533 So.2d 285 (Fla. 1988) is misplaced.

The evidence establishes that Appellant was attempting to free O'Brien from the prison van. (R 1935-51) Appellant was correctly charged under Section 843.12 Florida Statutes (1987). Peterson, 542 So.2d at 417. The state must show that O'Brien was in lawful custody in order to sustain's appellant's conviction for aiding an escape. Maggard v.State, 226 So.2d 32 (Fla. 4th DCA 1969). The fact that O'Brien was in the actual confinement of the prison system is sufficient evidence to establish that he was in the lawful custody. State v. Williams, 444 So.2d 13 (Fla. 1984). Lastly, whether or not O'Brien is charged or convicted of escape is totally irrelevant to appellant's guilt. Eaton v. State, 410 So.2d 933 (Fla. 4th DCA 1982), decision approv'd, 438 So.2d 822 (Fla. 1983); Erwin v. State, 532 So.2d 724 (Fla. 5th DCA 1988), review denied, 542 So.2d 1333 (Fla. 1989). Appellant's claim is without merit and should be denied.

ISSUE XI

THERE WAS SUFFICIENT EVIDENCE OF ATTEMPTED FIRST DEGREE MURDER TO SUSTAIN APPELLANT'S CONVICTIONS

Appellant claims that there was insufficient evidence to sustain his conviction for six counts of attempted first degree murder because appellant was simply driving the getaway car. The evidence clearly establishes that appellant and his co-defendant, Van Poyck, both armed with more than one weapon each, were going to break O'Brien out of jail. (R 1935-51) Appellant supplied the eventual murder weapon, and drove the getaway car. (R 2597-2600) Each defendant took one of the guards from the van at gun point. Both men displayed and repeatedly fired their weapons. Once the escape attempt failed, both men reentered the getaway car and sped away. Clearly appellant and Van Poyck were attempting to flee the police. Since both could not drive and shoot at the same time, appellant drove the getaway car at excessive speeds and while Van Poyck tried to shoot the pursuing officers. There was sufficient evidence of appellant's participation to warrant his convictions for six counts of attempted first degree murder. Hall v. State, 403 So.2d 1319 (Fla. 1981).

ISSUE XII

APPELLANT'S CONVICTIONS FOR ATTEMPTED FIRST DEGREE MURDER ARE NOT FUNDAMENTALLY UNFAIR AS CO-DEFENDANT'S LESSER CONVICTION FOR SAME CRIMES ARE IRRELEVANT

Appellant claims that his convictions for attempted first degree murder are unfair and unjust given that Van Poyck who actually fired the shots at the pursuing officers, was convicted of attempted manslaughter. Appellant's complaint is groundless. The judgement obtained at a separate trial of a co-defendant, has no bearing on the outcome of a defendant's independent trial. Erwin v. State, 532 So.2d 724 (Fla. 5th DCA 1988), review denied, 542 So.2d 1333 (Fla. 1989); Eaton v. State, 410 So.2d 933, 935 (Fla. 4th DCA 1982), decision approv'd, 438 So.2d 822 (Fla. 1983).

B. Penalty Phase Issues

ISSUE XIII

APPELLANT'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT COGNIZABLE IN THE INSTANT APPEAL, FURTHERMORE, APPELLANT HAS FAILED TO ESTABLISH THAT HE RECEIVED INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE, FINALLY TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S PRETRIAL MOTION TO DISMISS COUNSEL
(Issues XIII and XIV restated).

Appellant claims that he received ineffective assistance of counsel at the penalty phase of his trial. He claims that such could have been avoided if the trial court had granted his motion to dismiss counsel. This issue is not cognizable on direct appeal and should therefore be summarily denied by this Court. Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1984), cert. denied, 469 U.S. 1062, 105 S.Ct. 545, 83 L.Ed.2d 433 (1984); Stewart v. State, 420 So.2d 862, 864 n. 4 (Fla. 1982), review denied, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983); Knight v. State, 394 So.2d 997 (Fla. 1981). Furthermore appellant supports his allegations of ineffectiveness with statements and "facts" not in the record. Since reversal cannot be grounded on mere speculation, this claim must be denied. Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).

Briefly on the merits appellee would rely on the argument presented in Issue I of this brief as it relates to appellant's "Nelson-Hardwick" claim. Furthermore, appellate's

argument is without merit as his motion to dismiss counsel never even mentioned any alleged deficient performance by counsel at the penalty phase. (R39). Finally trial counsel attempted to illicit the services of a mental health expert, appellant refused to be interviewed. (R 2880). As conceded by appellant, trial counsel also was meet with resistance by appellant's family when he attempted to contact them for the penalty phase. (A.B. 77). This claim is not cognizable on direct appeal, nor has appellant demonstrated on this record that he is entitled to relief.

ISSUE XV

TRIAL COUNSEL DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE PRIOR TO THE PENALTY PHASE

Appellant alleges that the trial court erred in refusing to grant a continuance after the guilt phase. The trial court had already set the penalty phase for one week after the verdict. (R 2870, 2878). Consequently appellant had seven days to prepare for the penalty phase. Furthermore, appellant had two trial attorneys who had been attorneys of record since August 1, 1989. (R 1104, 1136). Counsel was well aware of the fact that the state was seeking the death penalty. The trial did not start until ten months subsequent to the appointment of counsel. Appellant's general request for a continuance because he could not serve various family members was insufficient to warrant a continuance. Williams v.State, 438 So.2d 781, 785 (Fla. 1983), cert. denied, 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 146 (1984). Furthermore, since appellant has repeatedly refused to see a psychologist, a continuance for such purposes would have been futile. (R 2880). Appellant has failed to establish that the trial court abused its discretion in the instant case. Espinosa v. State, 589 So.2d 887, 893 (Fla. 1991) reversed on other grounds, 505 U.S. __, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992).

ISSUE XVI

THE TRIAL COURT PROPERLY FOUND THAT THE MURDER WAS COLD CALCULATED AND PREMEDITATED

Appellant claims that the trial court erred in finding that this murder was committed in a cold, calculated, and premeditated manner. The evidence at trial clearly established the finding of "cold, calculated and premeditated".

Immediately upon arriving at the doctor's office, Turner and Griffis were meet by appellant and Van Poyck. (1935). Neither defendant spoke to the other one as they forcibly removed the two guards from the van. (R 1936-38). Turner was forced to give his gun to Van Poyck, Griffis was never armed. (R 1936-37). Turner was then forced under the van as Griffis was taken to the back of the van. Shortly after that, Turner heard a series of shots and Griffis fell to the ground. (R 19945-48). Turner was then ordered out from under the van to find the keys. (R 1945-48). After being unable to find the keys, Van Poyck pointed a gun at Turner, said "Your a dead man" and attempted to shot him. (R 1951). The gun misfired. At that time, appellant began smashing the windows on the van. Van Poyck went to help him and Turner ran away. (R 1951).

O'Brien was notified the day before the murder that he was going to the doctor's office the following morning.(R 2083-91). Two collect phone calls were made from the GCI, one the night before the murder, one the morning of the murder. One

call was made to appellant's home, the other to Van Poyck's home. (R 2332-37). The morning of the killing, Van Poyck came to appellant's home around 7:45 A.M. They left together, appellant was carrying the murder weapon. (R 2599).

Prior to the murder, appellant bought a map to plan out their escape route. (R 2349-55). When finally apprehended, appellant and Van Poyck were found with four guns, a knife, and bolt cutters. (R 2290, 2300-05, 2313). Unlike the situation in Hamblen v. State, 527 So.2d 800 (Fla. 1988) where the conscious decision to kill the victim was not made until after the defendant became angry, Griffis was shot execution style and immediately upon his removal from the van. In summation, Griffin was shot at point blank range in the head and then twice in the heart, immediately after being forced from the van. The attack on Griffis was clearly without provocation, Griffis was unarmed and he never put up a struggle. The trial court properly found this aggravating factor. (R 1938-40, 2646-51, 4419-20). Rutherford v. State, 545 So.2d 853, 856 (1989),cert denied, 493 U.S. 945, 110 S.Ct. 353, 107 L.Ed.2d 341 (1989); Valle v. State, 581 So.2d 40 (1991), cert. denied, 112 S.Ct. 596, 116 L.Ed.2d 621 (1991). However if this Court finds that this factor is not supported by the record, any error must be considered harmless beyond a reasonable doubt given the strength of the remaining aggravating factors with no statutory mitigating evidence and very weak mitigating evidence. (R 4421-22).

ISSUE XVII

THE TRIAL COURT DID NOT ERR IN FAILING TO FIND THE EXISTENCE OF THE MITIGATING FACTOR OF SUBSTANTIAL DOMINATION AND CONTROL OF ANOTHER PERSON

Appellant claims that the trial court erred in failing to find the existence of the aggravating factor that appellant was under the substantial domination of another at the time of the murder. Reversal is not warranted simply because appellant arrives at a different conclusion. Sochor v. State, 580 So.2d 595, 604 (1990), cert. granted in part, 112 S.Ct. 436, 116 L. Ed.2d 455, remand on other grounds, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992). Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied, 471 U.S. 111, 105 S.Ct. 2347,85 L.Ed.2d 863 (1985).

Appellant claims that the testimony of Lorie Sondik provides the basis for this mitigating factor. The sum and substance of this claim is based on the following testimony:

Q: And, Ms. Sondik, isn't true you and Frank moved up to Fort Lauderdale--

A: It was Tamarac.

Q: __ the Fort Lauderdale area to get away from Billy Van Poyck?

A: Yes.

Q: And after you moved up to this Tamarac area, Frank had very little contact with Billy Van Poyck; isn't that true?

A: Yes.

Q: And occasionally, Billy would bother Frank to do him favors or go somewhere with him?

A: I am sorry. He had only called twice. We had moved in on June 4th and this happened on June 24th. He had been-- that was the second time he had been to the place.

Q: Okay, and would you describe Billy Van Poyck as dominant over Frank?

A: Yes.

(R 2602-03).

The trial court correctly rejected this testimony as the evidence clearly rebuts this claim. Appellant provided the murder weapon and clearly participated equally in the escape and murder. There was never any indication from any of the witness that either gunman seemed to be the dominate person. The testimony indicates that the two men acted in concert during the entire episode. Ms. Sondik's conclusory statement that Van Poyck was a dominate force over her boyfriend is not based on any evidence. The trial court's rejection of this evidence was proper. (R 4421). Hill v. State, 515 So.2d 176, 177-78 (Fla. 1987); White v. State, 403 So.2d 331 (1981), cert. denied, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983).

ISSUE XVIII

THE TRIAL COURT DID NOT ERROR IN FAILING TO FIND THE EXISTENCE OF THE MITIGATING FACTOR THAT APPELLANT WAS AN ACCOMPLICE OF HIS CO-DEFENDANT

The trial court properly rejected appellant's characterization that he was an accomplice of Van Poyck. Appellant cannot establish that the trial court's ruling was incorrect. Sochor v. State, 580 So.2d. 595 (1990), cert. granted in part, 112 S.Ct. 436, 116 L.Ed.2d 455, remand on other grounds, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992). The fact that this Court characterized Van Poyck's role as major does not mean that appellant's participation was minor. This Court was unable to conclude that Van Poyck was the actual triggerman. Van Poyck, 564 So.2d. at 1069. The trial court found that it was equally possible that appellant pulled the trigger as it was that Van Poyck did so. (R 4420). Appellant provided the murder weapon, forcibly removed Griffis from the van, and took him to the back of the van where he was executed by either appellant or Van Poyck. (R 1938-51). The trial court properly found this factor to be unsupported by the evidence. Ruffin v. State, 397 So.2d. 277, 283 (1981), cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981).

ISSUE XIX

THE TRIAL COURT DID NOT ERR IN FAILING TO FIND THE MITIGATING FACTOR THAT APPELLANT ACTED UNDER THE INFLUENCE OF AN EMOTIONAL DISTURBANCE

Appellant claims that the trial court erred in not finding that he was acting under the influence of an emotional disturbance. Interestingly enough, appellant did not present this argument to the trial court, consequently he should be precluded from raising this claim on direct appeal. (R 4411-13). Edwards v. State, 530 So.2d 936, 938 (Fla. 4th DCA 1988), decision approv'd, 548 So.2d 656 (Fla. 1989). Lucas v. State, 568 So.2d 18, 23-24 (Fla. 1990).

There is absolutely no evidence to establish appellant's claim. As a matter of fact, appellant concedes that such testimony was not established. (A.B. 85). To the extent that there was any information presented, the judge did not err in failing to find existence of same. Thompson v. State, 553 So.2d. 153, 157 (Fla. 1989).

ISSUE XX

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S CHALLENGE FOR CAUSE REGARDING A PROSPECTIVE JUROR'S VIEW OF THE DEATH PENALTY

Appellee again challenges the trial court's refusal to strike juror Stezel for cause. Appellee will rely on the argument already presented at issue IV. Appellant's argument is procedurally barred and without merit.

XXI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TESTIMONY OF OFFICER GAGLIONE

Appellant claims that the trial court impermissibly allowed the state to mischaracterize or misinterpret the testimony of Officer Gaglione. This claim is not preserved for appeal as appellant never objected to any statements made by the prosecutor, nor any objections regarding the testimony. Duest v. State, 462 So.2d 466, 468 (Fla. 1985). Appellant objected to the admissibility of Officer Gaglione but not on the grounds now raised on appeal. (R 2630-31). This issue is precluded from review. Sapp v. State, 411 So.2d 363, 364 (Fla. 4th DCA 1982).

In the alternative this claim is without merit. On direct examination, Gaglione stated that he heard appellant say that he planned to shoot someone. (R 2633, 2640). During recross-examination, Gaglione stated that he did not hear the word "I" or "we". (R 2641). On redirect, Gaglione stated that the word "they" was in reference to someone other than appellant. (R 2641). During closing argument, appellant's counsel made reference to Gaglinoe's redirect testimony. (R 2805). Consequently, Gaglione's testimony was beneficial to appellant. Appellant cannot establish any error occurred, let alone that the error was not harmless. Breedlove v. State, 413 So.2d. 1, 4 (Fla. 1982), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982); Muehlman v. State, 503 So.2d 310, 317 (1987), cert. denied, 484 U.S. 882, 108 S.Ct. 39, 98 L.Ed.2d 170 (1987).

CONCLUSION

WHEREFORE, based on the above facts and relevant case law, Appellee respectfully requests that this court **AFFIRM** the conviction and sentence below.

Respectfully submitted,

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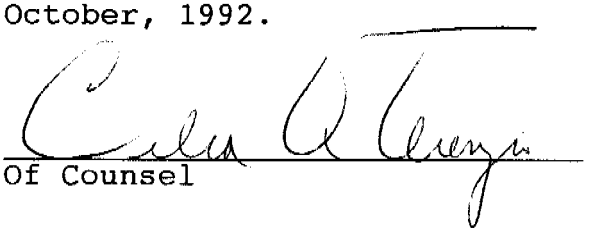
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been forwarded by United States Mail to: JOSEPH S. KARP, ESQ., P. O. Box 3225, West Palm Beach, Florida 33402, this **19th** day of October, 1992.



Of Counsel

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