IN THE SUPREME COURT OF FLORIDA

BYRON B. BRYANT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 81,862

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

Appellant, Byron B. Bryant, was the defendant in the trial court and will be referred to herein as "Appellant." Appellee, the State of Florida, was the prosecution in the trial court and will be referred to herein as "the State." References to the pleadings will be by the symbol "R" and references to the transcripts will be by the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Although accurate, Appellant's three-page statement of the case and facts is substantially incomplete. As a result, the State will offer its own statement of the case and facts as follows:

On February 6, 1992, Appellant was indicted in Palm Beach County for the first-degree murder of Leonard Andre and for the armed robbery of Leonie Andre, allegedly committed on December 16, 1991. (R 1628-29). Prior to trial, Appellant's counsel filed numerous motions on his behalf, including motions challenging the constitutionality of Florida's death penalty statute, and a motion to suppress his confession to the police, all of which were denied at hearings on the motions. (R 1694-1739, 1742-87, 1812-15, 1944; T 3-123, 139-214, 219-20).

At trial, on February 2, 1992, Appellant sought to challenge for cause jurors Gorelick, Pekkola, Fernandez, and Provenzano, based on their responses regarding the death penalty. (T 380-82). Before ruling on the challenges, the trial court indicated that it would allow the State to question the jurors again regarding this issue. (T 375). After the State did so, Appellant again challenged Gorelick, Pekkola, and Provenzano for cause, but his challenges were denied. (T 452-54). As a result, Appellant challenged, Gorelick, Fernandez, and Pekkola peremptorily.[1] (T 454-55). After questioning those jurors' replacements, juror Knowles was excused for cause by agreement of

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[1] Appellant also challenged juror Dahmus peremptorily. (T 454-55).

the parties. (T 492, 504). After further questioning, Appellant challenged jurors Rodden, McLaughlin, Mott, and Provenzano for cause, which were denied. (T 536-38). Appellant, thereafter struck all four peremptorily. (T 538). Later, Appellant struck jurors Escobar and Humphrey peremptorily. (T 588).[2]

After further questioning, Appellant challenged juror Rozier for cause, which was denied. (T 662-66). Appellant thereafter requested additional peremptory challenges to strike jurors Rozier and Batchelder. The trial court granted him one additional peremptory, which he used to excuse juror Rozier. (T 666-68). Having been refused additional peremptories, Appellant indicated that he would have stricken peremptorily jurors Batchelder, Lawrence, Leff, Turke, and Hull, had his cause challenges been granted. (T 669-70).

The State's first witness in its case-in-chief was Leonie Andre. Mrs. Andre testified that she came to the United States from Haiti in 1981 and married Leonard Andre in 1982; they had three children. In 1989, they opened Andre's Market at 11 South Swinton Avenue in Delray Beach. (T 718-19). On December 16, 1991, at approximately 8:15 p.m., Mrs. Andre, her husband, and her brother were working in the store when two black men walked in. From her position at the cash register, she saw one man go to the back of the store where her husband was working in the office, and she saw the other man go to the cooler where her

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[2] The record is unclear regarding which party struck juror Humphrey. However, the trial court notes shortly thereafter that Appellant has expended his ten peremptory challenges. Thus, since the State did not use any, it is safe to assume from the record that Appellant struck juror Humphrey.

brother was stocking it with drinks. (T 721-23). The man at the cooler said to the other man, "It's hot." He then walked to the register, pulled a gun on Mrs. Andre, and said, "Give me the money." (T 723-24). With the gun stuck in her face, Mrs. Andre opened the register, and the man took approximately $100 from the register. (T 725-26). Mrs. Andre then heard a lot of noise in the back of the store, but could not see what was happening. She then heard three shots. The man holding the gun on her then said to the other man, "Let's go. Let's go." Because she initially focused on the gun pointed at her and then kept her eyes on the ceiling, Mrs. Andre could not identify or describe either of the two suspects at subsequent photo lineups or at trial. (T 727-31).

The State's next witness was George Pacouloute, Mrs. Andre's brother. Mr. Pacouloute testified that he was putting drinks in a cooler at the store when two black men walked in. One man walked by him, patted him on the shoulder, and asked how he was doing, and then opened the next cooler, but did not remove anything. This man then went to the register and said to the other man who was in the back of the store, "Let's go because the beer are [sic] hot." (T 748-49). Mr. Pacouloute went to the rear of the store to throw an empty box outside and heard one of the black men shouting at Leonard Andre. Because the back door was locked and he did not have the key, Mr. Pacouloute went down into a small basement and shut the door, waiting for the argument to subside. After he heard several shots, he came out and saw Mr. Andre lying on the floor in a pool of blood near the cash register. Numerous items on display within the store had been

knocked to the floor or were in disarray. (T 755-58). Mr. Pacouloute was unable to identify either of the suspects in a photo lineup or at trial. (T 759-60).

Next, Ronald Held, a Delray Beach crime scene technician, testified that he took numerous photographs of the scene and made a videotape of the store, which was shown to the jury. He also lifted numerous fingerprints from various places within the store. (T 761-85). His supervisor, Sergeant Kenneth Herndon, testified that none of the fingerprints matched those of Appellant. (T 836). Officer Held also recovered a bullet fragment from inside a Wesson oil bottle sitting on one of the shelves. (T 779-80). John Hatton, another crime scene technician, recovered a second projectile from the ceiling. (T 801-04, 816). John O'Rourke, a firearms examiner, testified that none of the four bullets recovered (one from the victim's body and three from inside the store) matched a Rossi .38 caliber revolver that was submitted to him for comparison. (T 854-71).[3]

Dr. James Benz, the medical examiner, testified that Mr. Andre did from multiple gunshot wounds. According to his testimony, one bullet entered Mr. Andre's upper left back and exited his abdomen. The other bullet entered the outside of the victim's right arm, exited the inside of his right arm, reentered the victim's upper right chest and lodged in his left chest wall. Both shots were contact or near-contact shots, and both would have been fatal. (T 901-07).

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[3] The record is unclear regarding the location of the third projectile found inside the store.

The State's next witness was Sergeant James Brand of the Delray Beach Police Department. Sergeant Brand testified that Appellant was developed as a suspect and was arrested outside of the police station on January 19, 1993, when Appellant took his girlfriend to the station regarding another matter. Sergeant Brand interviewed Appellant's girlfriend first and then interviewed Appellant. According to Sergeant Brand, Sergeant Hartmann read Appellant his rights, which Appellant understood, but did not get Appellant's signature because Appellant's hands were handcuffed behind his back and the room was not secure enough to remove the handcuffs. (T 920-26).

Initially, Appellant denied involvement in the robbery and murder, but, after the officers confronted Appellant with some of the evidence against him, Appellant indicated that he would give them a statement, but that he wanted to see his mother first. At that point, Sergeant Brand called Appellant's mother, who came to the station with several other family members. After Appellant spoke to his family, he gave a detailed taped confession regarding his involvement in the robbery and murder. (T 927-31).

During a break in testimony, the parties discussed the jury instructions, and Appellant personally objected, against counsel's advice, to instructing the jury on any lesser included offenses to first-degree murder. The State requested the lesser-included instructions, however, and the trial court granted the request over Appellant's objection. (T 959-67).

The State's final witness was Sergeant Craig Hartmann of the Delray Beach Police Department. Sergeant Hartmann related the same basic sequence of events as Sergeant Brand regarding

Appellant's arrest. Sergeant Hartmann identified, however, a gun taken from Appellant's person at the time of his arrest.[4] In addition, Sergeant Hartmann identified and published Appellant's taped confession. (T 1029-58).

In his statement, Appellant indicated that he had been read his rights and understood them, and he understood that he was under arrest for the murder of Leonard Andre and the armed robbery of Leonie Andre. (T 1059-61). According to Appellant, he met with Dexter Kirkwood, a Haitian named "Menold," and a Haitian named "Jean" at his girlfriend's house on December 16, 1991. Menold told Appellant that he knew of two places to rob: a house on 9th Street and Andre's Market. They went in Menold's car, a brown Firebird, to the house on 9th Street, but there were too many people around, so they went to Andre's Market. (T 1061-65). Menold told Appellant that Mr. Andre kept a lot of money in his office in the back of the store. (T 1065).

When they got to the store, he and Dexter went inside while Menold and Jean stayed in the car. Appellant walked to the back of the store towards the office and was surprised by Mr. Andre, who was walking out. Appellant asked Mr. Andre how he was doing and asked him if he had any cold beer. He then asked Mr. Andre if he had a restroom. When Mr. Andre turned around, Appellant pulled a gun on him and told him to lie down. Mr. Andre grabbed his arm and they started to wrestle over the gun. (T 1065-68). At some point, Appellant gained control over the gun and fired

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[4] This was the gun submitted to the firearms examiner for comparison with the bullets found at the scene and removed from the victim's body.

it, but the shot did not hit Mr. Andre. They continued to wrestle and, again, Appellant gained control over the gun, this time shooting Mr. Andre. When Mr. Andre continued to struggle, Appellant shot him again. Appellant tried to pull away, but Mr. Andre held on to him, so Appellant shot a third time, then managed to free himself and ran out of the store. (T 1068-72).

Menold dropped Appellant off at his girlfriend's house, then called later to tell Appellant that his share from the robbery was $25.00. (T 1072-74). Appellant gave the gun he had used, a .357 revolver, to his girlfriend, Cheryl Evans, who in turn gave it to a man in West Palm Beach to dispose of it. (T 1074-77). Appellant admitted that his intentions were to rob the Andres, but he insisted that he did not intend to kill them. (T 1081). After the robbery/murder, Appellant told several people about it. (T 1083-84). The gun that Dexter used during the robbery was the gun that Appellant was carrying when he was arrested outside of the police department. (T 1085). After the murder, Appellant would call the police department periodically and check to see if there was an outstanding warrant for his arrest. (T 1085-86).

At the end of Appellant's statement, the following colloquy occurred regarding Appellant's understanding of his rights:

> Q. [By Detective Hartmann] These rights cards, you didn't sing these rights card because you are handcuffed, but this is the one I read you, correct?
>
> A. [By Appellant] Yeah, I had a right not to say nothing but what, the speech I -- the testimony I give was of my own free will, it wasn't no promises or nothing like that.
>
> Q. We didn't promise you anything?
>
> A. No.

> Q. You were treated fairly since we brought you in here?
>
> A. Yes.
>
> Q. Everything we talked about before the tape is pretty much the same thing we talked about on here, correct?
>
> A. Yes.
>
> Q. Nothing different?
>
> A. No. And I know I could have of just went ahead and went to jail or went to trial without giving no statement because I understand how the law work with police officer, and anything like that. And the whole thing was on my own free will.

(T 1086-87).

Following Appellant's confession, the State rested. (T 1129). At that point, defense counsel again renewed his objection to instructions on lesser-included offenses, which was overruled. (T 1135-37). On his own behalf, Appellant called Prospar Alincar. Mr. Alincar testified that he was walking by Andre's Market at the time of the robbery and murder on the other side of the street. He heard a shot and then saw someone run from inside the store and get into a light blue Camaro parked in an alley beside the store. Shortly thereafter, he saw a second person run from the store and get into the car, which then drove away. Mr. Alincar could not identify or describe either of the two persons. (T 1139-54).

Appellant's next witness was his mother, Vionece Bryant. Mrs. Bryant testified that she went to the police station to see Appellant after receiving a telephone call from one of the detectives. While she was in the interview room with Appellant, she saw Appellant's wallet laying on the table in front of him,

and he asked her to get his attorney's card out of the wallet and call him. At that point, Sergeant Brand put his hand on the wallet and told Mrs. Bryant not to worry about it, that they would take care of it. (T 1161-65). According to her, Appellant did not seem himself that night. (T 1166). Mrs. Bryant also testified that Appellant suffered from seizures and migraine headaches, and that he had meningitis and sickle cell anemia as a child. (T 1166).

Appellant's final witness was Joseph Karp, who testified that he was representing Appellant in a paternity suit at the time of his arrest, and that he was sure he had previously given Appellant his business card. He also testified that he was never called by Appellant or anyone on Appellant's behalf at the time of Appellant's arrest. (T 1173-74).

Following Mr. Karp's testimony, the defense rested. The trial court denied Appellant's special requested instruction regarding the voluntariness of Appellant's statement (R 2061; T 1183-84), and his renewed motion for judgment of acquittal[5] (T 1180-93). Thereafter, Appellant indicated to the court that he did not want to testify on his own behalf. (T 1187-88). In rebuttal, the State recalled Sergeant Brand, who testified that Appellant never requested an attorney, and never requested that anyone call an attorney for him. In fact, after his taped statement, Appellant sat in his office and talked on the

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[5] The record contains no transcription of Appellant's initial motion for judgment of acquittal.

telephone for thirty minutes, but never called an attorney. (T 1195-98).

Following the final charge conference (T 1215-22), the parties gave their closing arguments (T 1228-96), the trial court instructed the jury on the law (T 1307-35), and the jury rendered a verdict of guilty on both counts as charged (T 1397-98). Immediately following the verdicts, as the parties discussed a date for the penalty phase, Appellant threw a chair in the direction of the prosecutor and was forcibly removed from the courtroom. (T 1401-02, 1405). After the jury was excused, defense counsel described the incident and moved to discharge the jury for the penalty phase. The trial court took the motion under advisement, but indicated that it would probably deny Appellant's motion. (T 1406-11).

Four weeks later, on March 11, 1993, the trial court heard Appellant's motion for new trial. During the hearing, the trial court indicated that Appellant would be shackled during the penalty-phase proceeding, to which defense counsel objected. (T 1436-37). At the penalty-phase proceeding four days later, Appellant moved to have his counsel discharged because he did not want any evidence or argument presented on his behalf. After a lengthy discussion, the trial court denied the motion to discharge counsel after acknowledging that Appellant was waiving mitigation. (T 1474-95). Appellant thereafter apologized to the prosecutor and the trial court for throwing the chair after the verdicts were read. (T 1495). Defense counsel then requested that the trial court poll the jury regarding what effect, if any, the chair-throwing incident and the shackling of Appellant would

have on their ability to render an impartial recommendation. The trial court indicated that it would probably give the jury a curative instruction. (T 1498-99).

When the penalty-phase proceedings resumed, the trial court gave a curative instruction and then instructed the jury on the law. (T 1503-13) Thereafter, the trial court read to the jury a stipulated statement of fact that Appellant was currently serving a life sentence without parole for a previously imposed habitual offender sentence. (T 1513). The State then submitted certified copies of judgment and sentence relating to three prior violent felony convictions. (T 1513-14). On Appellant's behalf, defense counsel submitted numerous medical records relating to the illnesses described by Appellant's mother during her testimony. (T 1515). Thereafter, the parties gave their closing arguments (T 1519-44), and the jury recommended a sentence of death by a vote of nine to three. (T 1551).

At the sentencing hearing held on March 30, 1993, the trial court heard arguments from both parties relating to their sentence recommendations. (T 1566-70). On April 21, 1993, the trial court sentenced Appellant to death, finding the existence of two aggravating factors (prior violent felony and pecuniary gain), and nothing in mitigation. (R 2184-85; T 1612-15). This appeal follows.

SUMMARY OF ARGUMENT

Issue I - All of the jurors challenged for cause by Appellant indicated that they would follow the law and weigh the aggravating and mitigating factors before deciding what sentence to recommend. Thus, the trial court did not abuse its discretion in denying Appellant's cause challenges. Even if it did, however, Appellant has failed to demonstrate that the ultimate panel selected was biased.

Issue II - The State's comments in its guilt-phase closing argument were in direct response to Appellant's closing argument and were fair inferences from the evidence presented at the trial. Even if they were improper, however, they were harmless beyond a reasonable doubt.

Issue III - Although the trial court should have invoked the rule of witness sequestration upon Appellant's request at his motion to suppress hearing, Appellant has failed to show that he was prejudiced by the trial court's ruling. The witnesses' testimony was not substantially affected by the testimony they heard. Thus, a new trial is not warranted.

Issue IV - Appellant has presented no compelling reason for this Court to recede from case law that requires the trial court to instruct the jury on lesser-included offenses to first-degree murder over Appellant's objection when the State requests them.

Issue V - The trial court did not abuse its discretion in denying defense counsel's request to empanel a new jury for the penalty phase after Appellant threw a chair at the prosecutor upon rendition of the verdicts where Appellant invited the error

and where the jury indicated that it could impartially consider and recommend a sentence. Shackling Appellant was also the least restrictive method for ensuring the integrity of the courtroom after Appellant's outburst.

Issue VI - Florida's death penalty statute is constitutional. Appellant's special requested penalty-phase instructions were adequately covered by the standard instructions. Appellant's sentence was proportionate to the sentence of other defendants under similar facts.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S CHALLENGES FOR CAUSE AND IN DENYING APPELLANT'S REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES (Restated).

During voir dire, the State briefly explained the process of weighing aggravating and mitigating factors after juror Escobar indicated that he would vote for death if the State proved Appellant's guilt. (T 341-43). The defense then asked how many people believed that the death penalty was appropriate if someone is found guilty of first-degree murder. Jurors Gorelick, Pekkola, Humphrey, Fernandez, Escobar, Provenzano, Mott, McLaughlin, and McClurg responded affirmatively. (T 345-46). Juror Provenzano later clarified her answer by indicating that she would want to hear the facts before she decided and that she would be receptive to evidence mitigating against the death penalty. Jurors Dahmus, Gorelick, Pekkola, Rodden, Mott, and Fernandez agreed with her. (T 355-56). Juror Pekkola then indicated that life with a possibility for parole was too lenient for a "cold murder." Jurors Mott and Fernandez agreed. (T 359-61). At that point, the trial court interrupted and reminded the jurors that they had to weigh the aggravating and mitigating factors. (T 362-63). Defense counsel then explained the weighing process in greater detail, but did not follow up with questions relating to their ability to follow this procedure. (T 365-67).

During a recess shortly thereafter, defense counsel indicated that he wanted to challenge several jurors for cause

based on their answers regarding the death penalty. The trial court indicated, however, that either it or the State would question those jurors challenged before it ruled on the motions. Defense counsel responded that any attempt to rehabilitate them would be improper. The trial court disagreed and let the State question jurors Gorelick, Pekkola, Fernandez, and Provenzano, whom defense counsel had challenged for cause. (T 375-83).

In response to the State's questions, juror Gorelick agreed that the death penalty should not be imposed in every case, that there is a second phase where aggravating and mitigating factors are presented, and that the death penalty should not be imposed just because the jury renders a guilty verdict. (T 383-85). Similarly, juror Pekkola agreed to listen to all of the facts and weigh the aggravating and mitigating factors before deciding. (T 385-88). Jurors Fernandez and Provenzano also agreed to weigh the aggravating and mitigating factors before making a recommendation. (T 388-90). Nevertheless, defense counsel maintained that the jurors were not sufficiently rehabilitated, and he renewed his challenges for cause against jurors Gorelick, Fernandez, and Pekkola (but not Provenzano). (T 452-53). The trial court responded, "My understanding is they all said they could easily make a recommendation of life imprisonment without parole for 25 years. That was my clear understanding of their clear answers. In view of that, *I deny your good-faith request.*" (T 453-54). Defense counsel then excused jurors Gorelick, Fernandez, and Pekkola peremptorily. (T 454).

The following day, after replacements were questioned, defense counsel moved to challenge jurors Rodden, McLaughlin,

Mott, and Provenzano, who were in the original panel. He claimed that the answers they gave in their questionnaire conflicted with the answers they gave to the State during questioning. Based on case law to which he cited, the jurors' assurances that they could put aside any preconceived bias and decide the case based solely on the evidence "is not determinative of whether that juror should have been excused for cause." (T 536-37). In response, the trial court stated: "I find in rules specifically based on direct observation, hearing and presence of the jurors, that their colloquy in open court in the presence of us all is controlling as to their impartiality and objectivity. I find, further, that counsel, at counsel's request has the benefit of a written document on each juror. It's counsel's obligation to ventilate any apparent or believed disparity or inappropriate answer by any juror. Counsel has not done that. So your request is politely but firmly denied." (T 537-38). Defense counsel then struck jurors Rodden, McLaughlin, Mott, and Provenzano peremptorily. (T 538).

During the questioning of the replacements, defense counsel exhausted his peremptory challenges on jurors Escobar and Humphries. (T 588, 618). Later, juror Rozier indicated to the prosecutor that he was in favor of the death penalty for "a very heinous crime" and could recommend death if the aggravating factors outweighed the mitigating factors. (T 630-31). During questioning by the defense, juror Rozier also indicated that death was the appropriate sentence for someone found guilty of first-degree murder. Obviously unsure of the process, however, juror Rozier indicated that he would consider such things as the

defendant's background and the type of crime involved before deciding whether to vote for first-degree murder. (T 937-39). He would presume that the death penalty were appropriate if the defendant were convicted of first-degree murder, but he would consider evidence presented by the defense. (T 939-41). Upon further questioning by the State, juror Rozier stated that he would listen to the evidence during the penalty phase and weigh the aggravating and mitigating factors rather than automatically recommend a death sentence. If the mitigating circumstances outweighed the aggravating circumstances, he would recommend a life sentence. (T 945-47).

Based on juror Rozier's responses, defense counsel moved to strike him for cause. Although the trial court believed that a cause challenge was not warranted, it nevertheless asked juror Rozier if he understood that the jurors are not supposed to presume that death is the appropriate penalty following a guilty verdict, but rather they were supposed to weigh the factors. Juror Rozier indicated that he understood, and the trial court denied the motion for cause. (T 662-65). Thereafter, defense counsel requested two additional peremptory challenges for jurors Rozier and Batchelder. The trial court granted one additional peremptory for juror Rozier, who was excused. Appellant then alleged that he would have stricken jurors Batchelder, Lawrence, Leff, Turke, and Hull had he not been forced to use his peremptory challenges to strike those jurors who were not excused for cause as requested. (T 666-70).[6]

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[6] Contrary to Appellant's assertion in this appeal, **brief of Appellant** at 8-9, he was not required to use a peremptory

In this appeal, Appellant claims that the trial court erred in denying his challenges for cause against Gorelick, Pekkola, Fernandez, Provenzano, and Rozier, and in denying his request for additional peremptories.[7] **Brief of Appellant** at 7-11. It is well-established that "[t]he test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Lusk v. State, 446 So.2d 1038, 1041 (Fla.), cert. denied, 469 U.S. 873 (1984). It is solely within the trial court's discretion to determine whether the juror meets this test. Hitchcock v. State, 578 So.2d 685, 688 (Fla. 1990), cert. denied, 116 L.Ed.2d 254 (1991). As this Court recently reaffirmed,

> A prospective juror's inability to be impartial about the death penalty need not be made 'unmistakably clear.' '[T]here will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.' The trial judge's predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record, and it is the trial judge's duty to decide if a challenge for cause is proper.

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challenge against juror Knowles. This potential juror was excused for cause by agreement of the parties. (T 492, 504).

[7] Because Appellant does not challenge the trial court's rulings regarding jurors Rodden, McLaughlin, and Mott, he waives any claim that he was improperly forced to use his peremptory challenges on these jurors.

Taylor v. State, 19 Fla. L. Weekly 250, 250 (Fla. May 5, 1994) (citations and quoted sources omitted). See also Cook v. State, 542 So.2d 964, 965 (Fla. 1989) ("There is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause. Appellate courts consistently recognize that the trial judge who is present during voir dire is in a far superior position to properly evaluate the responses to the questions propounded to the jurors.").

In the present case, the trial court properly exercised its discretion in denying Appellant's challenges for cause. In Fitzpatrick v. State, 437 So.2d 1072, 1075 (Fla. 1983) (emphasis added), this Court articulated the following standard for excusing a juror for cause: "A judge need not excuse such a person unless he or she is irrevocably committed to voting for the death penalty if the defendant is found guilty of murder and is therefore unable to follow the judge's instructions to weigh the aggravating circumstances against the mitigating circumstances." From reading the record in toto, it is apparent that the jurors in this case initially did not have a clear understanding of the process. By posing the questions as they did, defense counsel took advantage of their ignorance and elicited the answers that they wanted from them. After the process was explained, the challenged jurors all agreed that they would follow the law, weigh the aggravating and mitigating factors, and recommend a sentence based on the evidence. They would not presume that death was the only appropriate penalty following a guilty verdict. Based on these indications, which the trial court was able hear and assess first hand, challenges

for cause were not warranted. See Penn v. State, 574 So.2d 1079 (Fla. 1991); Brown v. State, 565 So.2d 304, 307 (Fla. 1990).

Even if they were, however, Appellant has made no claim that the jury finally impaneled contained even one objectionable juror whom he sought to excuse but was overruled. Although defense counsel named five people whom he would have excused peremptorily had his cause challenges been granted, he made no indication how these jurors were biased against him. More importantly, Appellant makes no mention on appeal that the final jury was biased against him. Regardless, the record would belie any such claim. Thus, even if the trial court abused its discretion in refusing to excuse the aforementioned jurors for cause, such error was harmless since Appellant has demonstrated no prejudice, i.e., that he had to accept an objectionable juror. Penn, 574 So.2d 1081. Consequently, Appellant's conviction and sentence should be affirmed.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL DURING THE STATE'S GUILT-PHASE CLOSING ARGUMENT (Restated).

During Appellant's guilt-phase closing argument, defense counsel focused on the inconsistencies in the testimony and attempted to impeach the credibility of Detectives Brand and Hartmann. Specifically, defense counsel focused on the lack of evidence which led the detectives to arrest Appellant. In fact, defense counsel had a chart in the courtroom, upon which he wrote, "They could not confront Byron with the evidence against him before his statement because there was none." (T 1249). Later, defense counsel made the following comments to the jury:

> Now, Byron is not invited into the police department and 'Let's chat a little bit, let's see if you have any involvement.' He's placed under arrest. He's not interviewed to see what he knew. He's placed under arrest.
>
> And you make [the prosecutor] point out to you one bit of evidence in this record that shows there was any cause to arrest him. You make him point that out to you. You make him do that.
>
> * * * *
>
> Ask the State if they had any other evidence, do you think they'd hide it from you? Think they would not present it to you if they had some explanation for that? It ain't or it's not here before you because it didn't exist. And then they want to you [sic] convict someone of an offense for which a possible solution is the electric chair on that type of case?
>
> So, the logical construction on the evidence is they can't be telling you the truth, okay.

(T 1271-72, 1276).

In rebuttal, the State made the following comments before defense counsel interjected with an objection:

> Let's look at [Appellant's taped] statement, and let's look at the evidence that is in this statement. And let's look at who they were talking to at the Delray Beach Police Department on January 19th, 1992. In the statement Detective Hartmann states, okay, the gun that you used, where did you get the gun from?

(T 1282-83). Defense counsel objected to the State intimating from Appellant's confession that the police talked to Cheryl Evans, Appellant's girlfriend, before they talked to Appellant, and that that is where they obtained incriminating information. (T 1283-84). At the trial court's request, the State read at side-bar those portions of Appellant's statement that he wanted to read to the jury. From those statements, the State contended that it could argue reasonable inferences therefrom. (T 1284-85). Defense counsel objected to arguing inference, and the trial court agreed; the State was only allowed to read those portions of the confession. (T 1285-86).

Thereafter, the State read to the jury the applicable portions of the confession and then stated, "They were speaking to Cheryl, and then they came back in to talk to the defendant." (T 1286-87). At that point, defense counsel objected, requested a curative instruction, and moved for a mistrial, believing that the curative instruction would not be sufficient. (T 1287-88). The trial court agreed to give a curative instruction and indicated that it would consider a motion for new trial on this issue if the jury convicted Appellant. (T 1289-90). Thereafter,

the trial court instructed the jury as follows: "Ladies and Gentlemen, the Court instructs you to disregard the last comment that the prosecutor made just prior to the objection." (T 1290).

During its deliberations, the jury sent out the following messages: "The jury wants to hear the transcript of the testimony dealing with Sergeant Brand and Hartmann's reasons for the defendant's arrest. The jury is not clear as to what prompted the police to arrest Mr. Bryant." (T 1339-40). The jury also wanted a written transcript of Appellant's confession. (T 1340). In response, the trial court and parties agreed to read the testimony in full of Sergeants Brand and Hartmann. A transcript of the confession was not provided but the tape was sent back with them. (T 1340-41).

After the jury rendered its verdicts, Appellant filed a motion for new trial, claiming error in the trial court's denial of his motion for mistrial. (R 2069-72). After a hearing on the motion (T 1444-55), the trial court denied it a month later. (R 2175).

In this appeal, Appellant claims that the trial court abused its discretion in denying his motion for mistrial. **Brief of Appellant** at 12-14. The State submits, however, that the prosecutor's comment was a fair reply to defense counsel's argument, constituted a reasonable inference from the evidence, and did not impermissibly imply that the State knew of additional evidence that had not been presented.

During the State's case-in-chief, Sergeant Brand testified that Appellant was developed as a suspect, and they began to look for Appellant. On January 19, 1993, Cheryl Evans came into the

police station, and they learned that Appellant was outside waiting on her. While Detectives Brand and Hartmann interviewed her, other officers arrested Appellant. After interviewing Ms. Evans, the detectives interviewed Appellant. During the course of this interview, they "confront[ed] him with some of the evidence [they] had on him." (T 920-27). The State later published Appellant's taped confession for the jury. In the confession, Appellant admitted that he gave the gun he had used to kill Mr. Andre to Cheryl Evans to dispose of it. (T 1074-77). He also admitted that he told several people about the robbery/murder, including Cheryl Evans. (T 1083-84).

From this testimony and evidence, the State should have been allowed to argue by inference, in response to defense counsel's argument, that Cheryl Evans provided evidence to support Appellant's arrest. "Wide latitude is permitted in arguing to a jury. Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982). See also Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985) ("The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence."). Moreover, "[m]erely arguing a conclusion that can be drawn from the evidence is permissible fair comment." Mann v. State, 603 So.2d 1141, 1143 (Fla. 1992).

Even if the State's comment was improper, however, it did no substantial harm and caused no material prejudice. Breedlove, 413 So.2d at 7. The trial court gave a curative instruction. It must be presumed that the jury heeded the trial court's

instruction. Moreover, Appellant's confession, which was corroborated by other testimony and evidence, left no doubt that Appellant was guilty of first-degree murder. Thus, under the circumstances of this case, a mistrial was unwarranted. See Walker v. State, 473 So.2d 694, 697 (Fla. 1st DCA 1985) (failing to find reversible where the state improperly suggested in closing argument that it had additional knowledge or additional reasons for believing that certain witnesses were credible or believable).

To support his contention to the contrary, Appellant cites to Thompson v. State, 318 So.2d 549 (Fla. 4th DCA 1975), and Stewart v. State, 622 So.2d 51 (Fla. 5th DCA 1993). These cases, however, are easily distinguishable. In Thompson, the prosecutor openly argued that he intended to present other witnesses to testify to the defendant's statements, but that he reconsidered it because he personally believed that the single witness presented was truthful in his testimony. The Fourth District held that, where the verdict hinged on the credibility of a single state witness and a single defense witness, the prosecutor's comment could have unfairly tipped the scales. 318 So.2d at 551-52.

Similarly, in Stewart, the prosecutor told the jury that "during the next phase we'll get into more of the proof, the discussion of why he actually did it, but all we have to prove--you can determine--." The Fifth District found that the comment "clearly suggests that the State had additional evidence and proof of the defendant's guilt that it had not provided to the jury." 622 So.2d at 56. Unlike in Thompson and Stewart, the

State did not intimate that it had knowledge of facts not presented. Rather, it argued inferences based on the evidence presented which was in direct response to defense counsel's argument. Even if error, however, it was harmless at worst. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Consequently, Appellant's conviction should be affirmed.

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUEST TO INVOKE THE RULE OF WITNESS SEQUESTRATION DURING A PRETRIAL MOTION HEARING (Restated).

Prior to trial, Appellant filed a motion to suppress his confession to the police. (R 1812-15). At the hearing on the motion, defense counsel moved to invoke the rule of witness sequestration, which the trial court denied. (T 3). In this appeal, Appellant claims that the trial court erred in refusing to remove the witnesses from the courtroom. **Brief of Appellant** at 15-17. The State submits that, although § 90.616 of the Florida Evidence Code requires a trial court to order "witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses," Appellant has failed to show that he was prejudiced by the trial court's ruling.

In a case where the rule has been invoked and a witness has violated the rule, the trial court has the discretion to exclude the witness' testimony if the opposing party has been prejudiced. Steinhorst v. State, 412 So.2d 332, 336 (Fla. 1982). The test to determine prejudice is "whether the testimony of the challenged witness was substantially affected by the testimony he heard, to the extent that his testimony differed from what it would have been had he not heard testimony in violation of the rule." Id. Since the potential effect is the same whether the trial court fails to invoke the rule or a witness violates the rule, this same test should be applied to the instant case.

At the motion hearing in this case, the defense called Joseph Karp to testify that he was representing Appellant in a

paternity suit at the time of Appellant's arrest and that Appellant had previously been given one of his business cards. The State then called Sergeants Hartmann and Brand, respectively, regarding the circumstances under which Appellant confessed to the robbery and murder. Although the issue related to whether Appellant requested an attorney during questioning, or whether he asked his mother to call one for him, it can hardly be said that Sergeant Hartmann's testimony was affected by hearing Mr. Karp's testimony. Similarly, although Sergeant Brand was present to hear Sergeant Hartmann's testimony, there is no allegation that Sergeant Brand changed his testimony as a result. In fact, Sergeant Brand's testimony at the hearing is identical to his testimony at his deposition. (Depo. vol. 2, pp. 162-259). Thus, Sergeant Brand's testimony was not substantially affected by Sergeant Hartmann's testimony as evidenced by the fact that his testimony remained consistent. Consequently, since Sergeant Brand's testimony would not have been excluded from the trial had he violated the rule, a new trial is not warranted here where the trial court improperly refused to invoke the rule. See Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985) ("Because it was thus shown that Ms. Footman's testimony was not substantially different from what it would have been had she not heard Ms. Williams' testimony, the trial court did not abuse its discretion in allowing her to testify."), cert. denied, 474 U.S. 879 (1986).

This was a pretrial hearing on Appellant's motion to suppress; it was not a trial. Appellant had the opportunity, and used it, to present the grounds for the motion to suppress to the jury at his trial and argue that his confession was not

voluntary. He could have used Sergeant Brand's presence during the hearing to impeach his credibility, but he chose not to do so. Although the rule applies to pretrial proceedings and should have been followed by the trial court, the fact that it was not does not constitute per se reversible error. Under the facts of this case, Sergeant Brand's and Sergeant Hartmann's presence in the courtroom during the suppression hearing did not lead to an improper conviction. In other words, any error in the trial court's failure to invoke the rule was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). See also Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988); Randolph v. State, 463 So.2d 186, 191-92 (Fla. 1984); Lambert v. State, 560 So.2d 346 (Fla. 5th DCA 1990). Thus, Appellant's conviction should be affirmed.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN INSTRUCTING THE JURY ON LESSER INCLUDED OFFENSES (Restated).

During the guilty phase, Appellant personally objected to any instructions relating to lesser-included offenses of first-degree murder. Although defense counsel disagreed with Appellant's position, they too objected repeatedly to instructions on lesser-included offenses. The State, however, requested lesser-included offenses and the trial court agreed to give the ones proposed by the State. (T 959-67, 1135-37, 1218). In this appeal, Appellant acknowledges that the trial court can instruct on lesser-included offenses over his objection, but asks this Court to overturn well-established case law authorizing the trial court to do so. See, e.g., Fawcett v. State, 615 So.2d 691 (Fla. 1993); State v. Johnson, 601 So.2d 219 (Fla. 1992). Appellant has presented no compelling reasons, however, for this Court to recede from these cases. Thus, Appellant's conviction should be affirmed.

ISSUE V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO EMPANEL A NEW JURY FOR THE PENALTY PHASE AFTER APPELLANT THREW A CHAIR AT THE PROSECUTOR FOLLOWING THE VERDICT (Restated).

After the jury rendered its verdicts of guilt in this case, the trial court discussed with the parties and the jury a convenient time for the beginning of the penalty-phase proceeding. Without warning, Appellant threw a chair in the direction of the prosecutor, at which point, the trial court made the following comments:

> All right. For our record, in the presence of the jury, the defendant hurled his chair through the air in the direction of Mr. Johnson. And had to be forcibly --
>
> THE DEFENDANT: (While being escorted out of the courtroom at 11:32 o'clock a.m.) Motherfucking -- (inaudible).
>
> THE COURT: All right. Sorry about that, ladies and gentlemen. Nobody likes to see that sort of behavior.
>
> Mr. Harden, if you would, distribute the Kleenex. Appreciate it.
>
> [Trial court continues discussion regarding penalty-phase proceeding.]

(T 1401-05).

After the jury is released, defense counsel summarized the incident and then moved to dismiss the jury panel from the penalty-phase proceeding and have another jury empaneled. (T 1406-10). Regarding this motion, the trial court made the following comments:

> My own perception is that the focus of the outburst was towards Mr. Johnson [the prosecutor]. I realize you made the motion.

> I, in listening to you, my first thoughts were that kind of incident could generate sympathy towards the accused, too. Certainly has some sense of identification because of the violent episode.
>
> And it could work against him, too. I just -- I don't know. I think we need to research the question, gentlemen.
>
> * * * *
>
> My inclination is -- at least right now, but with all of you welcome to change my mind later -- is that we go with the same jury. I certainly will yield to reason, logic and the law. Hopefully the law.

(T 1410-11).

Several weeks later at the hearing on Appellant's motion for new trial, the trial court indicated that Appellant would be in restraints at the penalty-phase proceeding, to which defense counsel objected, and commented that Appellant had previously been held in contempt for throwing a book at another judge. (T 1636-37). At the penalty-phase hearing, defense counsel asked the trial court to question the jury regarding the chair-throwing incident to determine whether they were prejudiced by it, or by the fact that Appellant was shackled. The trial court indicated that it would "give them a little instruction, asking them to concentrate on the business at hand and appreciate its solemnity." (T 1498-99). The trial court, in fact, gave the jury the following curative instruction:

> One final thing: I realize that the trial was a difficult and arduous thing -- and it is, there is no more solemn undertaking clearly in the law than that which you have already been through. And we all appreciate that and respect you for it.
>
> I know also that events happened in conjunction with the trial that were

> traumatic and difficult. And I understand and respect that. I ask and hope that each of you will be able to address the -- this particular proceeding with your minds focused and concentrating on the issues that are a part of this proceeding only and not be affected by other events. And I assume that all of you feel that you can.
>
> Is there anyone present who feels that they cannot proceed with our proceeding, keeping in mind we have two alternates who could be utilized if that would be necessary? I mean I ask the questions even though I believe all of you are committed to this task and this responsibility.
>
> I see no activity in hands raised. And so I gather from that that each of the 12 are committed to concentrate on the legal matters that we are considering in this part of our trial?
>
> All right.

(T 1503-05). Defense counsel made no objection to the instruction. Thereafter, the penalty-phase proceeding commenced.

In this appeal, although Appellant acknowledges that he is "substantially responsible for what happened to him," he claims that the trial court abused its discretion in shackling him during the proceedings and in refusing to discharge the jury and empanel a new one. **Brief of Appellant** at 19-20. It is well-settled, however, that "a party may not make or invite error at trial and then take advantage of the error on appeal." Czubak v. State, 570 So.2d 925, 928 (Fla. 1990). See also Ellison v. State, 349 So.2d 731, 732 (Fla. 3d DCA 1977) ("Florida courts follow the 'invited error' rule, which stands for the proposition that an appellant may not take advantage of an error which he has induced."), cert. denied, 357 So.2d 185 (Fla. 1978). Here, Appellant created the situation about which he now complains. In

determining whether to empanel a new jury (in effect, grant a mistrial), the trial court gave a curative instruction, without an objection by Appellant, which adequately cautioned the jury not to allow the incident to affect its recommendation. When asked, no one on the jury indicated that they could not render an impartial recommendation. Thus, under the circumstances, the trial court did not abuse its discretion in denying Appellant's motion to empanel a new jury. See Sanchez-Velasco v. State, 570 So.2d 908, 916 (Fla. 1990) (finding no abuse of discretion in trial court's denial of motion for mistrial where defendant disrupted his capital trial by repeatedly accusing a state witness of lying); Arbelaez v. State, 626 So.2d 169, 175-76 (Fla. 1993) (finding no abuse of discretion in trial court's denial of motion for mistrial where the victim's mother called defendant a "murderer" and "son of a bitch" while testifying in a capital trial).

As for the trial court's decision to shackle Appellant during the penalty-phase proceedings over defense counsel's objection, there was no abuse of discretion.

> It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. . . . [T]rial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. . . . [T]here are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like [Appellant]: (1) bind and gag him,

> thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

Illinois v. Allen, 397 U.S. 337 (1970).

Here, the trial court took the least restrictive course and ordered that Appellant be shackled during the proceedings. By doing so, Appellant was allowed to remain in the courtroom and to communicate with his counsel. Under the circumstances, this was a proper exercise of the trial court's discretion. See Rutherford v. State, 545 So.2d 853, 857 n.4 (Fla. 1989) (upholding trial court's decision to place defendant in restraints prior to penalty-phase closing arguments because of defendant's threatening conduct); Diaz v. State, 513 So.2d 1045, 1047 (Fla. 1987) ("The court's obligation to maintain safety and security in the courtroom outweighs, under proper circumstances, the risk that the security measures may impair the defendant's presumption of innocence. . . . [T]he security measures taken were the minimum required."). Consequently, Appellant's sentence should be affirmed.

ISSUE VI

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL; WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S SPECIAL REQUESTED PENALTY-PHASE JURY INSTRUCTIONS; AND WHETHER APPELLANT'S SENTENCE OF DEATH IS PROPORTIONALLY WARRANTED (Restated).

In this appeal, Appellant renews three constitutional challenge's to Florida's death penalty statute. Without any legal argument or citation to authority, Appellant claims first that the death penalty is applied arbitrarily based on the race of the victim. **Brief of Appellant** at 21. As noted by Appellant, this Court has previously rejected such an argument. Foster v. State, 614 So.2d 455, 463-64 (Fla. 1992). Second, relying exclusively on a 1979 case from North Carolina, Appellant claims that the felony murder aggravating factor constitutes an "automatic" aggravator in felony murder cases. **Brief of Appellant** at 21. This, too, has been repeatedly rejected. Lowenfield v. Phelps, 484 U.S. 231 (1988); Parker v. Dugger, 537 So.2d 969, 973 (Fla. 1988); Bertolotti v. State, 534 So.2d 386, 387 n.3 (Fla. 1988). Finally, also without argument or legal authority, Appellant claims that the State should have to allege both premeditated and felony murder in its indictment. **Brief of Appellant** at 21. Once again, this issue has repeatedly been rejected. Young v. State, 579 So.2d 721, 724 (Fla. 1991); Bush v. State, 461 So.2d 936 (Fla. 1984), cert. denied, 475 U.S. 1031 (1986).

Next, Appellant claims that the trial court abused its discretion in denying his special requested penalty-phase jury

instructions. **Brief of Appellant** at 21-22. Appellant wanted the jury instructed as follows:

> You may not consider the death penalty as a possible punishment, unless you find this homicide is one of the most aggravated and unmitigated of all first degree murders.
>
> You are to presume BYRON B. BRYANT innocent of each alleged aggravating circumstance. The prosecution must prove aggravating circumstances beyond a reasonable doubt. You may not consider any evidence offered in aggravation unless it convinces you of the existence of an aggravating circumstance beyond a reasonable doubt.
>
> Aggravating circumstances must be proven beyond a reasonable doubt before you can give them any weight whatsoever. If evidence is introduced to support an aggravating circumstance, but that evidence fails to prove the aggravating circumstance beyond a reasonable doubt, you must totally disregard that evidence.
>
> You are strictly limited to the aggravating circumstances which have been defined for you. You may not consider any fact or circumstance, in aggravation, unless it fits within the aggravating circumstances you have been instructed on.
>
> Each of you must individually consider the evidence presented in mitigation. If you personally find a piece of mitigating evidence to be credible, you must give it independent mitigating weight, regardless of the views of your fellow jurors.

(R 2299-2303; T 1426-28). As the trial court found, the substance of these instruction are adequately addressed by the standard instructions. Thus, the trial court did not abuse its discretion in rejecting Appellant's special requested instructions. Robinson v. State, 574 So.2d 108, 113 & n.7 (Fla. 1991), cert. denied, 112 S.Ct. 131 (1992); Waterhouse v. State, 596 So.2d 1008, 1017 (Fla. 1992).

Finally, Appellant claims that the death penalty is not proportionally warranted under the facts of his case since it was merely "a robbery that went astray," and since his accomplices have not been prosecuted, much less sentenced to death. **Brief of Appellant** at 22-23. To support this contention, Appellant cites principally to Rembert v. State, 445 So.2d 337 (Fla. 1984), Lloyd v. State, 524 So.2d 396 (Fla. 1988), and Cook v. State, 542 So.2d 964 (Fla. 1989). These cases, however, are easily distinguishable. In all three cases, this Court struck several of the aggravating factors. In Rembert, the trial court had found the existence of four aggravating factors, but this Court struck three of them and then imposed a life sentence where there was evidence in mitigation. 445 So.2d at 340. Similarly, in Lloyd, the trial court found the existence of three aggravating factors, but this Court struck two of them and then imposed a life sentence where there was evidence in mitigation. 524 So.2d at 401-03. In Cook, the trial court found the existence of four aggravating factors. This Court struck two of them and then remanded the case for reconsideration because it could not be sure that the sentence would have been the same had the trial court weighed only two aggravating factors against the single mitigating factor. 542 So.2d at 970-71.

In the present case, the trial court found the existence of two aggravating factors (prior violent felony and pecuniary gain) and nothing in mitigation. Appellant does not challenge the trial court's findings. To support its position that Appellant's sentence is proportionately warranted, the State relies upon Freeman v. State, 563 So.2d 73 (Fla. 1990), and Clark v. State,

613 So.2d 412 (Fla. 1992). In Freeman, the defendant was committing a burglary when he was surprised by the owner. They struggled and Freeman gained control, beating the victim to death. The trial court imposed the death penalty, finding the existence of two aggravating factors (prior violent felony and pecuniary gain/felony murder) and very little in mitigation. This Court found the sentence proportionately warranted. Id. at 77. Similarly, in Clark, the victim gave Clark and another man a ride, and Clark decided to steal the victim's truck. When the victim stopped, Clark shot him numerous times and disposed of his body. The trial court imposed the death penalty, finding the existence of two aggravating factors (prior violent felony and pecuniary gain/felony murder) and nothing in mitigation. This Court found the sentence proportionately warranted. Id. at 415. Based on these cases, this Court should affirm Appellant's sentence of death.

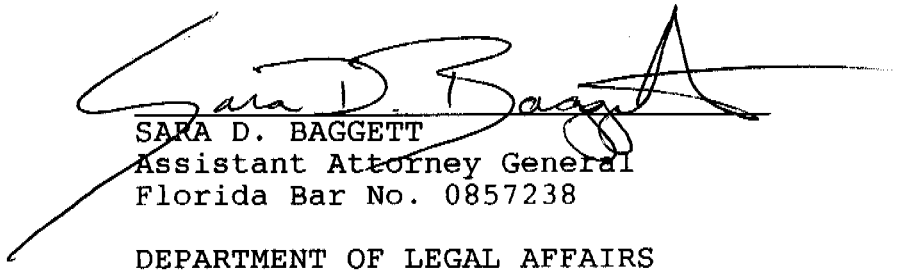
As for Appellant's contention that his sentence is disparate because his accomplices have not even been charged, much less sentenced to death, this Court has previously held that "[a]rguments relating to proportionality and disparate treatment are not appropriate . . . where the prosecutor has not charged the alleged accomplice with a capital offense." Melendez v. State, 612 So.2d 1366, 1368-69 (Fla. 1992). Regardless, there is no question that Appellant shot the victim. Thus, his sentence is not disproportionate or disparate to that of his coperpetrator. See Hayes v. State, 581 So.2d 121, 127 (Fla. 1991); Cook v. State, 581 So.2d 141, 143 (Fla. 1991). Consequently, Appellant's sentence of death should be affirmed.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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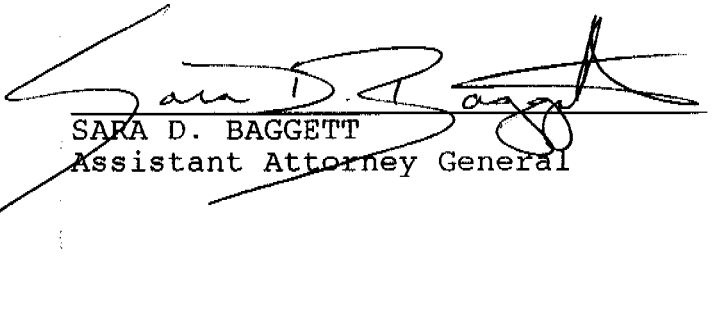
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Charles W. Musgrove, Esquire, 2328 South Congress Avenue, Suite 1D, West Palm Beach, Florida 33406, this 31st day of May, 1994.



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