

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

SEP 13 1995

CLERK, SUPREME COURT

By

Chief Deputy Clerk

CASE NO, 83,116

LEONARDO FRANQUI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

SUPPLEMENTAL BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

RANDALL SUTTON
Assistant Attorney General
Florida Bar No. 0766070
Office of Attorney General
Department of Legal Affairs
Post Office Box 013241
Miami, Florida 33101
PH. (305) 377-5441
FAX (305) 377-5655

TABLE OF CONTENTS

TABLE OF CITATIONS	iii
SUPPLEMENTAL STATEMENT OF THE FACTS	1
SUMMARY OF THE ARGUMENT	14
ARGUMENT	15
CONCLUSION	19
CERTIFICATE OF SERVICE	19

TABLE OF CITATIONS

CASES	PAGE
Christopher v. State. 586 So. 2d 642 (Fla. 1991)	15-18
Johnson v. State. 653 So. 2d 1074 (Fla. 3d DCA 1995)	18
Lucas v. State. 568 So. 2d 18 (Fla. 1990)	15

SUPPLEMENTAL STATEMENT OF THE FACTS

In addition to adopting the statement of the case and facts ~~from~~ its original answer brief, the State sets forth the following excerpts from Defendant's recorded statement, which are relevant to the **issue** addressed herein. Defendant explained the origins of the plot to rob the Cabanases:

"QUESTION: How did you **guys** first get involved with the victims in this **case**, the business owners that **you guys** attempted to **rob**? How did **you find** out **about** them?"

"ANSWER: By **my friend, Fernando.**"

"QUESTION: Is that **Fernando Fernandez**?"

"ANSWER: **Yeah.**"

"QUESTION: What did he tell **you** about the victims?"

"ANSWER: That he knew some **guys** that *carry* money, that they had a business cashing **checks.**"

"QUESTION: Did he tell you what their **name** was?"

"ANSWER: **No,** he didn't tell **me** no name."

"QUESTION: Did he ever tell you **where** they **lived** or where they had the **business**?"

"ANSWER: **Yeah.**"

"QUESTION: Who else was present when this happened?"

"ANSWER: Pablo."

"QUESTION: Which Pablo?"

"ANSWER San **Martin.**"

"QUESTION: San Martin? **Who else**?"

"ANSWER: Me."

"QUESTION: So it was the three of you?"

"ANSWER: Yeah."

"QUESTION: You, San Martin and Fernando?"

"ANSWER: Yeah."

"QUESTION: How did you get to the business?"

"ANSWER: He told me the guy was carrying checks."

"QUESTION: No, no. How did you get to the business that day that Fernando showed you?"

"ANSWER: By car."

"QUESTION: whose car?"

"ANSWER: Fernando's car."

"QUESTION: What car was that?"

"ANSWER: He had a Mustang."

"QUESTION: What color?"

"ANSWER: Black."

"QUESTION: Was he the one that drove there?"

"ANSWER: Yes."

"QUESTION: Where was the business located?"

* * *

"ANSWER: By Okeechobee and Medley. That place you mentioned earlier, Medley."

"QUESTION: So, was that Okeechobee and Medley?"

"ANSWER: Yeah, by **Medley**."

"QUESTION: **This** happened **on December** the 6th?"

"ANSWER: Yes."

"QUESTION: How long **before** that did Fernando show you where this business was at?"

"ANSWER: About five, **six months** before."

"QUESTION: Before December? So, it was the summer of 1991?"

"ANSWER: **Yeah**."

"QUESTION: Did he ever tell you what the victims' names **were**?"

"ANSWER: **No**, he never get to tell me what the victims [sic] **name**."

"QUESTION: How did he tell you? How did he know these people?"

"ANSWER: I didn't know how he **knows** them. He just showed them to me. He didn't tell me **how** he knew them or why he -- he just showed them to **me**. He told me that he **knew** them. That's all."

"QUESTION: What kind of plan did you guys come up with?"

"ANSWER: So when he **parks** right there in his business, when he used **to come** out of, get and take it away **from** him, but **we** didn't do it that **way**. We blocked him and we tried to **take** away **from** him, but **we** couldn't."

"QUESTION: Okay. When we spoke earlier, you told **me** that when **you** first planned to rob these people --"

"ANSWER: **Yeah.**"

"QUESTION: -- you had **to** postpone the robbery because **as** it turned out, somebody else robbed them and got **a** lot of money and now they were being more careful; is that correct?"

"ANSWER **Yes.**"

"QUESTION How did **you** find out that they were robbed **by** somebody else?"

"ANSWER: Fernando told me that they were robbed, so not to do it, **to** wait **until** time pass **so** we can do it."

"QUESTION: Was Fernando supposed to **take** part in this robbery with you?"

"ANSWER **No, he** was supposed to just get money out of it."

(T. 1934-37). Defendant **also** detailed the theft of the two **Suburbans** used in the attempted heist:

"QUESTION: **Who** went with you to steal this [the blue and white] **truck**?"

"ANSWER **Both** Pablos."

"QUESTION: **Both** Pablos, meaning **San** Martin and Abreu?"

"ANSWER: **Yeah.**"

"QUESTION: Who actually broke into the **truck** and stole it?"

"ANSWER: Me and Pablo, the smaller one."

"QUESTION: **San** Martin?"

"ANSWER: Yeah."

"QUESTION: That's the first truck you took?"

"ANSWER: Yeah."

"QUESTION: What day of the week did you take that?"

"ANSWER: I think it was a Wednesday."

"QUESTION: When did you take the next truck?"

"ANSWER: Thursday, in the morning."

* * *

"QUESTION: Who drove it?"

"ANSWER : I did."

"QUESTION: Are you also the one that broke into it?"

"ANSWER: Yeah."

"QUESTION: Did someone else jump in the car with you?"

"ANSWER: Pablo."

(T. 194042) Defendant then discussed their activities the morning of the ambush:

"QUESTION: So where do you meet Friday, at what time?"

"ANSWER: Okay. About 8:30, 9:00 -- I mean, no, 8:00 o'clock [sic], me Pablo San Martin and Pablo, the other one."

"QUESTION: Abreu?"

"ANSWER: Yeah. We met at Pablo's, San Martin house. From there we got in his van."

"QUESTION: You got in whose van?"

"ANSWER: Pablo's van."

"QUESTION: Abreu's van?"

"ANSWER: Yes, the big one. We drove where the two cars parked over Palm Avenue behind the building. Pablo got in one and I got in the other one. ... We drive to Palm Avenue. San Martin get in the white and blue truck. I get in the gray and blue truck. From there we all drive, me Pablo San Martin and Pablo."

"QUESTION: Abreu?"

"ANSWER: Abreu. We drive to the bank. We park the cars -- one truck close to the bank. We jump -- Pablo jump in the van. San Martin jump in the van. We drove to the expressway. Pablo --"

"QUESTION: Abreu?"

"ANSWER: Abreu left the van there and then we, all three of us, got in the -- in the blue truck, blue and gray truck, me, Pablo and Pablo San Martin. And from there we drove back all the way where we were going to meet the people. They were -- they were going to come. We were on the street straight where they were going to come out of the bank that we could have seen them."

"QUESTION: Before we go any further, you drove the blue and gray Suburban?"

"ANSWER: Yeah."

"QUESTION: And Pablo San Martin --"

"ANSWER: And Pablo--"

"QUESTION: -drove the blue and white?"

"ANSWER: Pablo."

"QUESTION: This is --"

"ANSWER: Excuse me."

"QUESTION: Listen to me a second. Pablo San Martin drove the blue and white. You went to Palm Avenue, to the area of the bank?"

"ANSWER Correct."

"QUESTION: San Martin **parked** the **blue** and white **Suburban?**"

"ANSWER: Uh-huh."

"QUESTION: He then got into the **van** with **Abreu?**"

"ANSWER: Yes."

"QUESTION: They drove off and you followed in the gray **Suburban?**"

"ANSWER: Yes."

"QUESTION: You drove **up to** the Palmetto Expressway, where Abreu **left** his **van parked on the** side of the road?"

"ANSWER: Yeah."

"QUESTION: **Then** the **two of** them **jumped** into the **blue and gray Suburban** with you?"

"ANSWER: Yes."

"QUESTION: And you **drove back** with them **to** where **you left** the **Suburban by the bank?**"

"ANSWER: **Yeah.**"

"QUESTION: By the **time** you **get back to** the **area of the bank**, what time is it?"

"ANSWER: About **10:00 o'clock** [sic]. The **person haven't** got there **yet** when we got **there.**"

"QUESTION: By **'the person,'** you mean **the** business owners?"

"ANSWER: Yes."

"QUESTION: When you got back in the **area** of the bank and you went to the Suburban that was parked, who remains in the blue and gray, and who gets in the blue and white?"

"ANSWER: **Okay.** I was still in the blue and gray. Pablo San Martin and **Pablo --**"

"QUESTION: The other one."

"ANSWER: -- the other one **get** in the car. Pablo, the other one, drives and Pablo San **Martin** is in the side."

"QUESTION: You remain in the blue and gray?"

"ANSWER: **By** myself."

"QUESTION: Abreu drives the blue and white?"

"ANSWER: Yes."

"QUESTION: And San Martin is the passenger in the blue and white?"

"ANSWER: Yeah."

"QUESTION: At this point in time **are** you **armed?**"

"ANSWER: Yeah."

"QUESTION: What do **you** have?"

"ANSWER: A .357."

"QUESTION: What kind?"

"ANSWER: Chrome."

(T. 1945-48). Defendant then described how the attempted robbery occurred:

"ANSWER: [Abreu] stopped there with **no cars** coming or nothing."

"QUESTION: Then what?"

"ANSWER: The businessmen come and park behind them."

"QUESTION: Then you come up?"

"ANSWER: Approaching the **car**."

"QUESTION: When you approach the Blazer, do you approach behind or do you **go** to the side of it?"

"ANSWER: To the side of it."

"QUESTION: What side?"

"ANSWER: **Left** side."

"QUESTION: Do you get to the left side of the Blazer?"

"ANSWER: Yep."

"QUESTION: What is the reasoning behind --"

"ANSWER: To block him."

"QUESTION: okay."

"ANSWER: So he wouldn't **go** nowhere."

"QUESTION: What were your plans once you blocked him? What did you intend to do?"

"ANSWER: To get on and take the money away **from** him."

"QUESTION: How were **you** going to **take** the money?"

"ANSWER: He was going **to** point the gun, **run** up to the car and tell the **man** to give him the package."

"QUESTION: Which Pablo **was** going **to** do this?"

"ANSWER: **San** Martin."

"QUESTION: San Martin?"

"ANSWER: Yes."

"QUESTION: And he was the **passenger**?"

"ANSWER **Yeah.**"

"QUESTION: What was Abreu supposed to do?"

"ANSWER: Just drive. Just drive to **block** him. **None of** the things that happened was planned to happen."

"QUESTION: **Okay.** All right. **Now** that -- now that Abreu stopped the Blazer and you boxed them in, what happened next?"

"ANSWER: A **car** -- a **truck** came **from** the back and hit the -- the Blazer. The victim -- the businessman's car, hit him, **boom.**"

"QUESTION: What kind **of** truck?"

"ANSWER A brown truck."

"QUESTION: Do you **know** why the brown truck hit the businessman from behind?"

"ANSWER: I didn't know why they hit him, but I **know** the guy **was** -- he came out with a gun shooting. I don't **know** if it was him shooting, but he **was** with a gun in the hands and he got out of the **car.**"

"QUESTION: When the brown truck hits the businessman, he **starts** shooting and gets out of his truck?"

"ANSWER **Yeah.**"

"QUESTION What did you do at this point?"

"ANSWER I was ducking down because Pablo **San Martin** and Pablo, the other, they were shooting, **so** the bullets were going in all kinds of directions."

"QUESTION: Do you **know** if anybody was shooting at **you**?"

"ANSWER: I couldn't tell because I was **looking** dawn. I didn't know **the** bullets, where **they** coming from. I just hear the noise when the bullets going inside the car."

"QUESTION: When **you** ducked, what else did you do?"

"ANSWER: I fired. I **fired a** shot through the window."

"QUESTION: **You** shot through the window?"

"ANSWER: **Yeah.**"

"QUESTION: And in what direction?"

"ANSWER: Outside. Outside **of** the **car.**"

"QUESTION: Outside the car towards what?"

"ANSWER: **Towards** the truck."

"QUESTION: Which direction did **you** shoot towards?"

"ANSWER: I **was** in the middle of the **red** and white truck and behind was the brown **truck**. I shoot to the -- behind, but not -- not pointing to -- to the **truck**. I shoot just to the windshield."

"QUESTION: But do you shoot towards the brown truck or to the white one?"

"ANSWER **To** the brown one."

"QUESTION: **What** else did you do?"

"ANSWER: When I shot, I left to the front. I left and **these** people **was** still shooting. So, that's how I **got in the** expressway first, **parked** the car and got in the car."

"QUESTION: When you say, 'these people were still fighting,' who was still shooting?"

"ANSWER: Pablo **San** Martin, and Pablo, the other one."

"QUESTION: Both **were** shooting?"

"ANSWER: The people **was** fighting. Apparently they were -- them three and them two were shooting at each other."

"QUESTION: Both Pablos got out of the Suburban and got to the -- behind the car?"

"ANSWER: Where the fence **was**."

"QUESTION: Both Pablos **got** out **and** they got to the **back** of their Suburban and they shot where, in the direction **of** the businessman?"

"ANSWER: Yes, and the guy behind, too. He shot when the **guy** came out of this side. They were shooting. Pablo was shooting this side and Pablo **was** shooting this side."

* * *

"QUESTION: Did you see if the man in the brown truck and the businessmen were shooting back at you guys?"

"ANSWER: Yeah."

"QUESTION: **You** saw that?"

"ANSWER: **Yeah,** I saw that."

"QUESTION: What happened next?"

"ANSWER: They were shooting and then I **tired** a shot and I left to the front because **the** shooting was on top. The bullets was coming in, **so** I step on the car **ducking down and** leave the scene. So, they just jumped in behind and leave, too."

"QUESTION: They who?"

"ANSWER: Pablo San Martin and the other
Pablo."

"QUESTION: So, they took off?"

"ANSWER: After I took off, like four or three
cars."

"QUESTION: Did they follow you?"

"ANSWER: Yeah."

"QUESTION: Where did you go then?"

"ANSWER: We jumped on the expressway."

(T. 1952-58).

SUMMARY **OF THE** ARGUMENT

Defendant has not preserved the issue of whether his subsequent statements should have been admitted for review by making an adequate proffer. Further, assuming, arguendo, that the “proffer” was adequate the statements were not admissible under the doctrine of completeness. The statements did not in any way clarify or “complete” Defendant’s previously recorded statement. On the contrary, they materially contradicted the previous statements, and were properly excluded. Finally, any error would be harmless beyond a reasonable doubt.

ARGUMENT

THE CLAIM THAT DEFENDANT'S CONFRONTATION RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO ALLOW HIM TO CROSS-EXAMINE DETECTIVE NABUT REGARDING DEFENDANT'S CONTRADICTIONARY POST-CONFESSION EXCULPATORY STATEMENT WAS NOT PRESERVED FOR REVIEW, AND IN ANY EVENT IS NOT ADMISSIBLE UNDER THE "COMPLETENESS" DOCTRINE.

As his supplemental issue, Defendant contends that he should have been permitted, under the auspices of the "completeness" **doctrine**, to cross-examine Detective Nabut about contradictory exculpatory statements he made several days after his confession. Defendant failed to make a proffer of the claimed cross-examination, and as such has not preserved the issue for review. Further, even were the issue properly before the Court, it is substantively without merit.

In order to preserve the exclusion of testimony for appellate review, the objecting party must proffer the excluded testimony on the record. Lucas v. State, 568 So. 2d 18, 21-22 (Fla. 1990). Here, although counsel requested, and was granted, permission to proffer the excluded testimony in camera, (T. 917), the record does not reflect that such a proffer was ever actually made. As such Defendant has not preserved this issue for review. As the ensuing discussion of the merits will illustrate, the admissibility of the statement in question turns on the precise contents of the statement. Thus the reasons for the preservation requirements are **particularly** relevant here, and should be applied.

Assuming, **arguendo**, that this issue were preserved for review, the record does not disclose any error. Christopher v. State, 583 So. 2d 642 (Fla. 1991), sets out the parameters

established by this court regarding the admission of statements such as those involved here. When the State offers a part of a confession or admission against interest, the defendant is entitled to bring out on cross-examination the entire confession or admission. Id., at 646. Thus other related conversations which in fairness are necessary for the jury to accurately perceive the whole context of the conversation between the witness and the defendant are admissible. Id. However, cross-examination is always subject to the limitation that it must relate to credibility or be germane to the matters brought out on direct examination. Id.

In Christopher, the witness testified on direct that the defendant had told her that he had punched the victim in the nose and the victim had begun to bleed profusely. The defense sought on cross to elicit a conversation two days later wherein the defendant told the witness that the victim had shot the other victim and then shot himself. This **court** concluded that the trial court did not abuse its discretion in excluding the later conversation:

While the two conversations referred generally to the same events, the later conversation did nothing to explain the earlier conversation. The jury could not have been misled as to the contents of the earlier conversation by the exclusion of the later conversation. Therefore the court properly excluded [the witness's] testimony with respect to what Christopher told her [in the second conversation].

Id.

Here, Defendant claims that the following statements should have been admitted:

[T]hat Fernando **Fernandez** and Pablo San Martin were the leaders and planners of the robbery, that Fernando Fernandez was actually in the Suburban with him, and that it was Fernando Fernandez who

had fired the ,357 at the deceased and not Franqui. Note this allegation was subsequently recanted as to that.

(T. 556).¹ A comparison of the later statements with Defendant's recorded statement shows that the trial court properly excluded the former in accordance with Christopher.

The first contention that Fernandez and San Martin were the leaders and planners differs from Defendants earlier description of their roles. In his first statement, Defendant explicitly stated that although Fernandez was receiving, in essence, a finder's fee for alerting them to the 'opportunity,' he was not supposed to take part in the robbery. (See excerpt from Defendant's statement, p. 4, supra). Nor was the jury misled as to San Martin's role vis-a-vis Defendant's. In the original statement Defendant stated that both he and San Martin were present when Fernandez told them about the victims. Both he and San Martin went to steal the Suburbans, but Defendant was the one who drove the stolen car. (See pp. 4-5, supra). The original statement is quite plain that this was a joint enterprise.

So too, is the claim that Fernandez was with Defendant in the second Suburban directly contradicted by Defendant's recorded statement that he was in the blue and gray "by **myself**." (See, p. 8, supra). Further, the highly detailed accounts of the stealing of the Suburbans, the

¹ The quoted material is not a defense proffer, which as noted above, does not appear of record. The words rather are those of the trial judge, who was quoting from the State's motion in limine, which also does not appear in the record. The State has discerned no clearer enunciation of Defendant's later statements in the record. As further support for its position that this claim has not been adequately preserved for review, the State points out that just what was recanted, an important point, is **not** entirely clear.

gathering for the robbery, and the actual ambush repeatedly refer to Defendant and the two Pablos. Nowhere is Fernandez mentioned. (See pp. 4-13, supra). Likewise, the (apparently recanted) contention that Fernandez fired the .357 is diametrically opposed to the original account wherein Defendant had the chrome .357, (see p. 8, supra), which Defendant “fired . . . towards the truck” which the shooting victim, Lopez, occupied. (See p. 11, supra). The subsequent statement was not a clarification or “completion, ” but clearly an entirely new and different version of events. Defendant’s reliance on Johnson v. State, 653 So. 2d 1074 (Fla. 3d DCA 1995), is thus ‘misplaced. There, the defendant amended his original statement that he had hit the victim with the additional information that he did so only after the victim threatened him. Id. Clearly the latter statement in Johnson clarified the former in an essential respect. Here, however, as in Christopher, the subsequent statement materially contradicted the former, did nothing to explain it, and was properly excluded.

Furthermore, even if it could be said that the trial court abused its discretion, any error would be harmless beyond a reasonable doubt. Unlike in Johnson, nothing in the **subsequesnt** statement could even remotely be construed as a legal excuse for Defendant’s actions. No reason for, or denial of, Defendant’s participation as a principal in the murder and attempted robbery and murders was offered. Indeed, the “proffer” states that Defendant changed his story yet again, at the very least as to the issue of the **shooting**,² which fact would have exposed the story to the jury as the second-thought, exculpatory fable it unquestionably was. It cannot reasonably

² As noted above, exactly what Defendant re-recanted is not crystal-clear. However, the claim regarding Fernando shooting undoubtedly was recanted.

be said that the exclusion of these statements could have affected the verdict. This claim should be rejected.

CONCLUSION

Based on the foregoing, and the arguments presented in the original answer brief, Defendant's convictions and sentence of death should be affirmed.

Respectfully submitted,

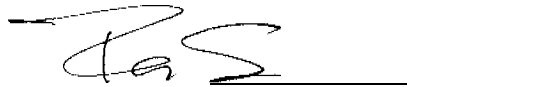
ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida



RANDALL SUTTON
Assistant Attorney General
Florida Bar No. 0766070
Office of Attorney General
Department of Legal Affairs
Post Office Box 013241
Miami, Florida 33101
PH. (305) 377-5441
FAX (305) 377-5655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing SUPPLEMENTAL BRIEF OF APPELLEE was furnished by mail to **GEOFFREY C. FLECK**, 5115 Northwest 53rd Street, Gainesville, Florida 32653, this 1 lth day of September, 1995.



RANDALL SUTTON - -
Assistant Attorney General