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IN THE SUPREME COURT OF FLORIDA

JACK R. SLINEY,

Appellant,

v.

Case No. 83302

STATE OF FLORIDA,

Appellee,

**BRIEF OF THE APPELLEE**

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## SUMMARY OF THE ARGUMENT

Appellant contends that the trial court committed reversible error in determining that the state met its burden of establishing that Sliney knowingly, intelligently and voluntarily waived his *Miranda* rights. Many of the arguments now presented to support this claim were not made to the trial court below. To the extent that Sliney is now attempting to expand the basis of his claim of involuntariness, the claims are procedurally barred. Furthermore, it is the state's contention that when each of these factors is reviewed under the totality of circumstances, the trial court properly denied the motion to suppress.

The trial court's limiting the admission of the 911 call to the transcript as opposed to the live recording and the redacting of particularly emotional sections was sufficient to eliminate any unfair prejudice and the transcript was properly admitted.

Appellant also contends that the tapes of the conversations between appellant and Thaddeus Capeles should not have been played for the jury without first having irrelevant portions containing profanity and racial epithets excised therefrom. He contends that the tapes serve only to portray appellant in an unfavorable manner, which was particularly damaging in light of the fact that appellant would later take the witness stand to testify in his own defense. It is the state's contention that the tapes were properly admitted and that the challenged portions were relevant and admissible. Appellant contends that the firearms register obtained by Sheriff's deputies from Ross' Pawn

Shop was hearsay, not admissible under any recognized exception. He contends that the evidence was critical for the prosecution as it provided a link between the guns upon allegedly sold to Capeles and the guns that were taken from the pawn shop when George Blumberg died. It is the state's contention that the trial court properly admitted the firearms register and that error if any was harmless.

Despite the fact that appellant confessed to having killed Mr. Blumberg, he testified at trial that Keith Witteman committed the murder. To support this claim he attempted to introduce evidence that three inmates had heard Keith Witteman threaten, ''I'llkill you like I did the other old bastard.'' (T 1050 - 1051) It is the state's position that the trial court properly excluded this testimony and, furthermore, that error, if any, was harmless beyond a reasonable doubt.

It is the state's contention that the trial court's denial of the motion for continuance and a special investigator was within the trial court's discretion and that appellant has failed to show an abuse of that discretion.

The trial court properly found that the homicide was committed while appellant was engaged in a robbery, and was committed to avoid or prevent a lawful arrest.

Proportionality is not a recounting of aggravating versus mitigating but, rather, compares the case to similar defendants, facts and sentences. A review of similar cases shows that the sentence in the instant case was proportionate.

The trial court properly departed from the guidelines based upon the unscored capital crime.

It is the state's contention that appellant had the opportunity to be heard at the sentencing hearing and raise any pertinent objections on the costs imposed.

# ARGUMENT

## ISSUE I

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE STATE CARRIED ITS BURDEN OF SHOWING THAT STATEMENTS MADE TO LAW ENFORCEMENT WERE MADE FREELY AND VOLUNTARILY.

Appellant contends that the trial court committed reversible error in determining that the state met its burden of establishing that Sliney knowingly, intelligently and voluntarily waived his *Miranda* rights. Appellant contends that "Appellant was but 19 years old when he was thrown into a tiny room at the police station, handcuffed to a chair, and held incommunicado for extended period of time in the early morning hours with no sleep and no nourishment except cups of coffee." (Initial brief of appellant, page 30). Appellant also contends that he was drinking and emotionally distraught, that he thought the deputies were his friends, and that his confession may have been influenced by threats Keith Witteman made against his family. And, finally, Sliney suggests that the confession is suspect because he did not sign the written waiver form. Many of these arguments were not made to the trial court below. To the extent that Sliney is now attempting to expand the basis of his claim of involuntariness, the claims are procedurally barred. Furthermore, it is the state's contention that when each of these factors is reviewed under the totality of circumstances, the trial court properly denied the motion to suppress.

The principle is well settled that a trial court's order denying a defendant's motion to suppress comes to the appellate court clothed with a presumption of correctness. Henry v. State, 586 So. 2d 1033 (Fla. 1991), Wasko v. State, 505 So. 2d 1314 (Fla. 1987); DeConingh v. State, 433 So. 2d 501, 504 (Fla. 1983), cert. denied, 465 U.S. 1005 (1984), Stone v. State, 378 So. 2d 765, 769 (Fla. 1979), cert. denied, 449 U.S. 986 (1980), McNamara v. State, 357 So. 2d 410 (Fla. 1978). While the burden is upon the state to prove by a preponderance of evidence that the confession was freely and voluntarily given, a reviewing court must interpret the evidence in the light most favorable to sustaining the trial court's ruling.[1] State v. Riehl, 504 So. 2d 798 (Fla. 2nd DCA), review denied, 513 So. 2d 1063 (1987); Williams v. State, 441 so. 2d 653 (Fla. 3d DCA 1983). A reviewing court should not substitute its judgment for that of a trial court, but, rather, should defer to the trial court's authority as a fact-finder. Wasko v. State, 505 So. 2d at 1316. The trial court's ruling on this issue cannot be reversed unless it is clearly erroneous. The clearly erroneous standard applies

[1] Appellant also suggests that because the defense assumed the burden of going forward at the motion to suppress hearing the trial court's denial of the motion to suppress was improper. The record shows, however, that defense counsel agreed to go first in lieu of the trial court denying the motion on its face because it did not set forth facts sufficient to put the state on notice as to the issues. (R. 256) After being apprised of the facts at issue, the state presented substantial evidence which established by a preponderance of the evidence that the confession was freely and voluntarily given. (R 296-364) As such, the defense's initial assumption of the burden to go forward, is harmless beyond a reasonable doubt.

with "full force" where the trial court's determination turns upon live testimony as opposed to transcripts, depositions or other documents. Thompson v. State, 548 So. 2d 198, 204, n. 5 (Fla. 1989).

In order to find that a confession is involuntary within the meaning of the Fourteenth Amendment, there must first be a finding that there was coercive police action. Colorado v. Connelly, 479 U.S. 157 (1986). The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained. When reviewed in context of the facts of this case and the relevant case law, none of the factors suggested by appellant render his statement involuntary.

At the suppression hearing, in the instant case, Sgt. Cary Twardzik and Corporal Sisk testified about Sliney's interview and confession, Twardzik testified that Sliney was arrested between 1 and 2 a.m. He had just left work and was driving his truck. Both officers testified that Sliney had no problems following their directions and that he did not appear to be intoxicated.[2] Sliney was then taken into an interview room at

[2] In the initial brief, counsel for appellant states, " . . . Deputies Twardzik and Sisk testified, as might be expected, that they did not see signs of intoxication. . . . (Initial brief of appellant, pg. 46) The state objects to the insinuation that the officers were misleading the court. If anyone had a motive to mislead the court as to the level of intoxication, the defendant surely stands at the front of the line. Furthermore, the trial court apparently assessed the credibility of all the witnesses and determined that the officers were more credible.

the police station. (R 301) Sgt. Twardzik could not remember if they uncuffed Sliney completely or if they had one handcuff on him. (R 305) At 1:55 a.m. they read Sliney his rights from the printed form. (R 305, 347) As soon as Sliney signed the top of the form, he questioned the officers about the reason for the interview. When he was told it was about stolen guns, Sliney immediately told them that some black guy he met at the mall three weeks before had forced him to buy the guns, (R 308, 354) When Twardzik challenged the story because the guns were still in the pawnshop at the time Sliney said he had purchased them, Sliney said, "I know you, and you and your son." Sliney's eyes then welled up with tears and he asked for a pen and paper. (R 309-10, 356) Sliney turned his back to them and started writing. When he finished he slid the pad to Twardzik. (R 311) Sliney then cried for a short period of time and told them verbally what had happened at the pawnshop. (R 357) Twardzik asked if he wanted water, coffee or something. He was given coffee and allowed to regain his composure. At 3:36 a.m. Sliney agreed to give a taped statement saying he wanted to get it off his chest. The statement which was played for the judge reflects that Sliney gave a very detailed description of the murder. The tape concluded at 4:09 a.m., June 28, 1992. (R 343)

Both Twardzik and Sisk testified that Sliney did not appear to be under the influence of alcohol or drugs, that there were no promises or threats used against him in any way. (R 344)

(1) <u>DURATION OF INTERROGATION, LACK OF SLEEP, SIZE OF ROOM</u>

Appellant alleges the statements he made were the result of coercion in that he was "thrown into a tiny room at the police station, handcuffed to a chair, and held incommunicado for an extended period of time in the early morning hours with no sleep and no nourishment except cups of coffee." (Brief of Appellant, pg. 30) A similar claim was rejected by this Court in Harris v. State, 438 So. 2d 787 (Fla. 1983). This Court held that even though questioning the defendant for six hours in a small room at a police station while he was handcuffed elbow to wrist and was not given any food or drink could have destroyed the admissibility of defendant's confession, there was substantial competent evidence the defendant's confession was voluntary. In the instant case, the evidence shows that the entire interrogation lasted for two hours and that during this time Sliney handwrote his confession, repeated it orally and then gave a taped statement. He was repeatedly read his rights and given the opportunity to rest. Under these circumstances where the entire interview lasted for two hours and where the defendant almost immediately confessed to the crime after repeatedly acknowledging his right to remain silent, the trial court properly denied the motion to suppress.

(2) <u>AGE, ALCOHOLIC CONSUMPTION AND PREVIOUS ACQUAINTANCE WITH OFFICERS.</u>

Sliney also contends that because of his youth (19), the fact that he had been drinking the day prior to the interview and his previous acquaintance with Twardzik and Sisk, he was incapable of waiving his rights and making a knowing and intelligent waiver. In Thomas v. State, 456 So. 2d 454 (Fla. 1984), this Honorable Court reviewed a similar claim and held:

> Appellant also says that because of his youth and his state of intoxication when questioned, he was incapable of validly waiving his rights and knowingly making voluntary incriminating statements. However, this Court has recognized that youthful age, although a factor to be considered in determining voluntariness of a statement, will not render inadmissible a confession which is shown to have been made voluntarily. *State v. Francois, 197 So. 2d 492 (Fla. 1967). Ross v. State, 386 So. 2d 1191, 1195 (Fla. 1980).* Regarding intoxication, at the suppression hearing appellant and another witness testified that appellant got drunk before he was taken in for questioning. The detectives who questioned appellant testified that he did not appear intoxicated, that they advised him of his rights, that he intelligently waived those rights, and that he voluntarily gave the statements. The mere fact that a suspect was under the influence of alcohol when questioned does not render his statements inadmissible as involuntary. 'The rule of law seems to be well settled that the drunken condition of an accused when making a confession, unless such drunkenness goes to the extent of mania, does not affect the admissibility in evidence of such confession, but may affect its weight and credibility with the jury.' *Lindsey v. State, 66 Flu. 341, 343,* 63 So. 832, 833 *(1913). See generally Deconingh v. State 433 So. 2d 501 (Fla. 1983); Reddish v. State, 167* So. *2d* 858 *(Flu. 1964); McCray v.* State, 289 So. *2d* 765 *(Fla. 3d DCA 1974).* The trial judge found that the state had carried its burden of showing that appellant's confessions were freely and voluntarily given. Appellant has failed to show that the trial judge's determination was erroneous.

Thomas v. State, 456 So. 2d at 458.

(emphasis added) See, also, Hayes v. State, 581 So. 2d 121, 125 (Fla. 1991) (rejecting claim of intoxication and low intelligence)

A review of the evidence presented at the motion hearing clearly refutes Sliney's claims. First, and foremost, the confession was taped and this tape recording did not show any evidence of intoxication much less 'drunkenness to the extent of mania.' (R 317-364) Furthermore, with the exception of Sliney, all of the witnesses testified that Sliney knew what he was doing. Twardzik and Sisk both testified that Sliney did not appear to be under the influence while he was driving or during the interview and that he had no problem following the directions to throw the keys out the car, then reach his arms out the window and unlock the door from the outside and then exit the vehicle. (R 303) Sliney then followed the command to shut the door and walk backwards toward the sound of the officer's voice. He was not staggering or stumbling. (R 304) Sliney's own witnesses testified he was drinking but that he knew who he was, who they were and he was capable of carrying on a conversation. (R 265, 276) Based on the foregoing, the trial court properly rejected the claim of intoxication.

Similarly, the claim that his confession was involuntary because he believed the officers to be friends is procedurally barred as it was not argued to the court below and, furthermore, is not supported by the record. He never testified that he was swayed to confess because he believed Sisk and Twardzik to be friends. Sliney claimed that he had no memory of the interview other than being handcuffed to a chair and throwing up. (R 280-282) As such it is procedurally barred.

Even if this claim was not barred, it is without merit. Sisk and Twardzik testified that after Sliney gave them the first story, he said, "I know you and you and your son." The officers acknowledged that they knew of Sliney but, there was no evidence that they were friends or that the confession was a result of coercion. As previously noted, in order to find that a confession is involuntary within the meaning of the Fourteenth Amendment, there must first be a finding that there was coercive police action. Colorado v. Connelly, 479 U.S. 157 (1986). The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained. When reviewed in context of the facts of this case and the relevant case law, none of the factors suggested by appellant render his statement involuntary.

(3) CODEFENDANT'S THREATS

Sliney contends that his confession may have been the result of threats made against him by Keith Witteman at the time of the murder. This argument is also procedurally barred as it was not presented to the court below. (R. 254, 360-1) Even if it was properly before this Court it is without merit. To paraphrase this Court's holding in Gardner v. State, 480 So. 2d 91 (Fla. 1991), "The fact that [Witteman] may have threatened [Sliney] earlier has no bearing on the voluntariness of his post-Miranda confessions while in police custody." Id. at 93.

(4) WRITTEN WAIVER

This claim is also procedurally barred as it was not presented to the court below. (R. 254, 360-1) Even if it was properly before this Court it is without merit. A signed written waiver is not required in order to obtain a valid confession. In Traylor v. State", 596 So. 2d 957, 966 (Fla. 1992), this Court noted that prudence suggests that where it is reasonably practical a waiver of rights should be in writing to mitigate the pitfalls of a swearing contest between the defendant and the policeman. The absence of a written waiver is not fatal to the admission of the confession, rather, it then becomes a factual question to be resolved by the trier of fact. Johnson v. State, Case No. 78,336 (Fla. July 14, 1995); Hogan v. State, 330 So. 2d 557, 559 (Fla. 2d DCA 1976) In the instant case, Sgt. Twardzik testified that he read the written waiver form to Sliney. Sliney signed the top then, before signing the bottom, he asked Sgt. Twardzik "what this was all about." when Sgt. Twardzik explained why they had brought him in, Sliney immediately told him he bought them from a black male in Punta Gorda. (T 966)[3] As soon as the officers rejected that story, Sliney handwrote a complete confession saying he wanted to get it off his chest. (R 305-311) Sliney's statement was then taped and his rights were reread to

[3] This was the same story he told Thaddeus Capeles to use if he got caught with the guns. (T 896 - 907)

him on tape. (R 317) Sliney acknowledged those rights and gave a verbal account of the murder.

In light of the foregoing, this Court should affirm the order of the Court denying the motion to suppress. Gardner v. State, 480 So. 2d 91, 93 (Fla. 1985); DeConingh v. State, 433 So. 2d 501, 504 (Fla. 1983).

ISSUE II

WHETHER THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE AT THE GUILT PHASE OF APPELLANT'S TRIAL A TRANSCRIPT OF THE 911 CALL MARILYN BLUMBERG MADE AFTER FINDING THE BODY OF HER HUSBAND IN THE PAWN SHOP.

Marilyn Blumberg, the widow of the victim, George Blumberg testified during the guilt phase of appellant's trial about discovering her husband's body. (T 670 - 677) Over defense objections as to relevancy, the prosecutor was allowed to play a tape recording of the 911 call Mrs. Blumberg made after discovering the body. (T 684 - 689) The trial court overruled the objection finding that the tape was admissible as an excited utterance and that it was relevant. To eliminate any prejudice resulting from Mrs. Blumberg's emotional state on the tape recording, the trial court admitted a copy of the transcript as opposed to the live tape recording. The court also eliminated certain words from the transcript such as "screaming" and "crying". (T 684 - 689)

On appeal, Sliney is contending that the content of the 911 call was not relevant. It is the state's contention that the testimony was clearly relevant to the question of how, when and where the body was found.

In <u>Weir v. State</u>, 596 So. 2d 1200 (3d DCA 1992), the court rejected a similar claim, stating:

> "The allegations by the appellant that the trial court erred in admitting the tape of the 911 call into evidence on the ground that the tape was almost completely irrelevant and had no real probative value, that the only

> value of the tape was to prove Valerie's state of mind immediately after the crime and tended to lend credence to Valerie's testimony, prejudicing appellant in the eyes of the jury when as in this case, Valerie's testimony is the only evidence against appellant, are without merit. The appellant does admit that portions of the tape are admissible as an excited witness exception to the hearsay rule pursuant to §90.803(2), Florida Statutes (1989), but certainly the whole tape was not admissible.
>
> The trial court was correct. The information contained on the tape was admissible as excited utterances and spontaneous statements pursuant to §90.803(1) and 90.803(2), Florida Statutes (1989). [cites omitted]

Id. at 1201.

Similarly, in Power v. State, 605 So. 2d 856 (Fla. 1992), this Honorable Court upheld the trial court's ruling allowing a deputy to testify concerning hearsay statements made to him by the victim's father. See also Garcia v. State, 492 So. 2d 360 (Fla. 1986) (surviving victims' statements made while still at the scene of the crime which were consistent with her later testimony, admissible as excited utterance).

A review of the 911 call shows the circumstances under which Mrs. Blumberg made the call were spontaneous and that the statements sprang from the stress and excitement of discovering her husband's body. As such it was admissible under the excited utterance exception to the hearsay rule. Weir v. State, 596 So. 2d 1200 (3d DCA 1992)

Furthermore, the evidence was relevant to establish how the body was discovered. The admission of the 911 call is analogous to those cases where this court has upheld the admission of allegedly gruesome photographs which were relevant to establish the circumstances and the manner of the crime.

> "Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Those whose work products are murder of human beings should expect to be confronted by photographs of their accomplishments. The photographs are relevant to show the location of the victims' bodies, the amount of time that had passed from when the victims were murdered to when the bodies were found, and the manner in which they were clothed, bound and gagged."

Henderson v. State, 463 So. 2d 196, 200 (Fla. 1985)

The trial court's limiting the admission to the transcript as opposed to the live recording and the redacting of particularly emotional sections was sufficient to eliminate any unfair prejudice and the transcript was properly admitted.

Additionally, even if this trial court had erred in admitting the 911 call, the error was harmless in that Mrs. Blumberg testified consistent with the 911 call. See, Power v. State, at 862.

## ISSUE III

WHETHER THE COURT BELOW ERRED IN ADMITTING PORTIONS OF THE TAPES OF CONVERSATIONS BETWEEN APPELLANT AND THADDEUS CAPELES.

Appellant also contends that the tapes of the conversations between appellant and Thaddeus Capeles should not have been played for the jury without first having irrelevant portions containing profanity and racial epithets excised therefrom. He contends that the tapes serve only to portray appellant in an unfavorable manner, which was particularly damaging in light of the fact that appellant would later take the witness stand to testify in his own defense. It is the state's contention that the tapes were properly admitted and that the challenged portions were relevant and admissible.

The tape recordings involved telephone calls between appellant and Thaddeus Capeles who had set up meetings with appellant in order to buy the firearms from appellant that had been taken from the pawn shop. The tape recordings were initially proffered outside of the presence of the jury (T 827 - 862). Appellant objected that the tapes were not relevant and argued that the "expletives and the references to black gentlemen in a derogatory manner are so inflammatory that they may prejudice the jury in this particular case." (T 862) The court overruled the objections and the tape were played for the jury. (T 864, 872 - 907)

Appellant appears to concede that the tapes themselves were relevant, but is limiting the challenge to the trial court's failure to redact the racial epithets and profanity. A review of the transcript however shows that the trial court did redact certain portions of the tape. (T 898) And that the portions that were left intact, were relevant. In general when those references were made, it was with regard to concocting an alibi for the purchase of the weapons. For example, several times throughout the tape recordings, Sliney told Capeles that if he was caught with the weapons for him to say that he got them from some "nigger". (T 885) In a similar case, Robinson v. State, 574 so. 2d 108 (Fla. 1991), this Court rejected as meritless Robinson's contentions that his own statement to the police officers should have been edited.

> "In giving his version of the events Robinson told police officers that he had to shoot St. George a second time, and explain: 'How do you tell someone I actually shot a white woman.' Robinson now suggest that the word 'white' should have been excluded to avoid the risk of racial prejudice, We find no error." Id. at 113.

Furthermore, even if it was error to fail to redact the epithets and the profanity, error was clearly harmless in light of Sliney's confession and the substantial evidence.

## ISSUE IV

WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE STATE'S EXHIBIT NO. 33, A FIREARMS REGISTER TAKEN FROM ROSS PAWN SHOP OVER APPELLANT'S HEARSAY OBJECTION.

During the testimony of **Deputy** Sheriff Twardzik, the state sought to introduce into evidence a firearms register that the officer obtained from the victim's pawn shop. (T 930 - 942) Defense counsel objected stating:

> "Mr. Shirley: Judge, my objection, I believe it's hearsay. It may be a business record, however, nobody has brought it in as a business record. Everything that he is testifying to is based on hearsay from some item that he obtained from the pawn shop. We don't know who compiled that information or anything else, and until we have a little bit more background, we believe it's hearsay and, therefore, inadmissible.
>
> Mr. Lee: Your Honor, the fact is we believe this witness will show that he found in the pawn shop a listing of firearms with serial numbers. Later that will be listed to the firearms and the serial numbers that were purchased from the Defendant. whether or not and who made that is not the significant point.
>
> The Court: Thank you. The purpose of the hearsay exception admitting the business records is once the predicate is established for business records, that there is [sic] records and, therefore, trustworthy and reliable. That's not the issue presented in this case at this time, merely that records found at the pawn shop and the guns ultimately seized in the case have matching descriptions, that is a circumstance for which the jury can consider whether or not the records are accurate for the purpose of being trustworthy and the hearsay exception is not a concern of the court, so I'm going to overrule the objection. (T 930 - 931)

Whereupon the officer was allowed to testify that he found the register at Ross' Pawn Shop and that he placed it into evidence at the Sheriff's Department. (T 934) Officer Twardzik testified that the gun register was removed from the shop the day after the murder. He testified that the scene was kept secure overnight so that they could go back in the morning and start looking through the records. After determining that it was a firearms register for the shop he took the serial numbers that were listed and had it entered into a national computer so that if the guns were located they would get a match through the computer. (T 940) Mrs. Blumberg was then recalled and asked to identify state's exhibit no. 33, the firearms register. She testified that it was their firearms record and that it was her husband's handwriting. Mrs. Blumberg was also shown the derringers, state's exhibits 27, 29, 30 and 31.. (T 1039) She testified that she had purchased these items and that they were in the store to the best of her knowledge before the murder. (T 1040) Defense counsel's only objection was that he did not think that there had been any testimony that these items were in the store. (T 1038) This objection was reaffirmed after Mrs. Blumberg's testimony concerning state's exhibit 27, 29, 30, 31 and 33. (T 1040)

Now on appeal appellant contends that the firearms register obtained by Sheriff's deputies from Ross' Pawn Shop was hearsay, not admissible under any recognized exception. He contends that the evidence was critical for the prosecution as it provided a link between the guns upon allegedly sold to Capeles and the guns that were taken from the pawn shop when George Blumberg died. It is the state's contention that the trial court properly admitted the firearms register and that error if any was harmless.

First, even if the register was hearsay, it was properly admitted under business records exceptions to the hearsay rule. Section 90.803(6) provides:

> "Records of regularly conducted business activity.
>
> (a) A memorandum, report, or data compilation, in any form, of acts, events, conditions, opinion or a diagnosis made at or near the time by, or from information transmitted by a person with knowledge is kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such a memorandum, report, record, or data compilation, as shown by the testimony of the custodian or other qualified witness, unless the source of information or other circumstances show lack of trustworthiness. The term 'business' as used in this paragraph includes a business, institution, association, profession, occupation, and filing of every kind, whether or not conducted for profit.

Without objection, Mrs. Blumberg testified that this was the Ross' Pawn Shop register and that it was prepared by her husband. As such, it was sufficient to establish that this was a record kept in the course of a regularly conducted business activity. The only objection made to the admission of this evidence was that it was hearsay and that nobody had attempted to present it as a business record. The prosecutor responded that if necessary he would bring Mrs. Blumberg back to identify the firearms register. Shortly thereafter, Mrs. Blumberg was recalled and identified the register. Defense counsel did not renew the objection or allege that an improper foundation had been laid. Thus, although the state contends that the foundation was sufficient to establish the business records exception, defense counsel's failure to object to the foundation waives any such objection. Phillips v. Ficarra, 618 So. 2d 312 (Fla. 4th DCA 1993) (lack of foundation can be waived or stipulated).

Furthermore, the register was not offered to prove the truth of the matter asserted and therefore, was not hearsay evidence. Rather, as the prosecutor argued to the court below, the register was being offered to show that it was found at the scene of the crime containing a listing of serial numbers prior to the purchase of the weapons from the defendants that matched the serial numbers on the weapons obtained from the defendants. In this regard, the admission of this evidence is analogous to hearing the name of a defendant at the scene of a crime. State v. Johnson, 382 So. 2d 765 (Fla. 2d DCA 1980).

Furthermore, even if the evidence did constitute hearsay and the state failed to lay the proper foundation, the admission of this record is clearly harmless in the instant case where Mrs. Blumberg was able to identify the weapons that were purchased from the defendants as having been in the pawn shop prior to the murder and where the defendant himself fully confessed to the murder and the robbery of the pawn shop.

## ISSUE V

WHETHER THE TRIAL COURT ERRED IN PREVENTING APPELLANT'S JURY FROM HEARING THE PROFFERED TESTIMONY OF APPELLANT'S WITNESSES THEREBY DEPRIVING APPELLANT OF HIS FUNDAMENTAL RIGHT GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES AND BY ARTICLE ONE, SECTION 16 OF THE CONSTITUTION OF THE STATE OF FLORIDA, TO PRESENT WITNESSES IN HIS OWN BEHALF TO ESTABLISH A DEFENSE.

Despite the fact that appellant confessed to having killed Mr. Blumberg, he testified at trial that Keith Witteman committed the murder. To support this claim he attempted to introduce evidence that three inmates had heard Keith Witteman threaten, "I'll kill you like I did the other old bastard." (T 1050 - 1051) It is the state's position that the trial court properly excluded this testimony and, furthermore, that error, if any, was harmless beyond a reasonable doubt.

In Pittman v. State, 646 So. 2d 167 (Fla. 1994), this Court rejected a similar claim:

> "In the third claim, Pittman asserts that this Court erred by excluding the hearsay testimony of George Hodges, a death row inmate who alleged that his stepson had implicated himself in the Knowles family murders. Early in the trial, the prosecutor received an unsolicited letter from Hodges. In this letter, Hodges stated that he had received a letter from his stepson in which the stepson stated that he had killed three people in a failed burglary attempt and that he had then burned the house. The trial judge gave defense counsel a few days in which to investigate the allegations. Then at a hearing on the matter, the judge held that Hodges testimony concerning what his stepson had told him was hearsay that did not fit within any exception and was therefore

> inadmissible, We find that the trial judge correctly excluded Hodges' testimony as substantive evidence under the hearsay rule and that there is no applicable hearsay exception. Id. at 172.

Similarly, in Czubak v. State, 644 So. 2d 94 (Fla. 2nd DCA 1994), the court considered the Chambers v. Mississippi[4] argument made by appellant in the instant case. Like the judge in the instant case, Czubak's trial judge found that the witness to a third party's purported confession was unreliable. The court held:

> "While we might be inclined to agree with Czubak, there is a circumstance in this case that prevents us from doing so. The trial judge in Czubak's second trial, after carefully reviewing the statements of the witnesses to Ragsdale's purported 'confessions,' found not only that there were no corroborating circumstances showing the trustworthiness of the statements, to the contrary she found the circumstances such as to render the statements unreliable and unworthy of trust. *Chambers* recognizes the necessity that an accused seeking to exercise his right to present witnesses in his own defense must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' 410 U.S. at 302, 93 S.Ct. at 1049, 35 L.Ed.2d at 313. The Court in *Chambers* (which is procedurally similar to Czubak's case) found: 'The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability.' 410 U.S. at 300, 93 S.Ct. at 1048, 35 L.Ed.2d at 311 - 312. The evidence in Czubak's case

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4 410 U.S. 284 (1973)

> amply supports the findings of the trial judge that the proffered witness statements were, contrary to the finding in *Chambers,* unreliable. Had the trial judge not made such a finding of unreliability, we would conclude, regardless of the provisions of section 90.804, that *Chambers* requires the admission of such *reliable* hearsay statements of witnesses to a third party confession even if the 'confessor' was available as a witness at the trial. *See also, Lightbourne v. State, 644 so.* 2d 54 (Fla. *1994); Johnson v. State, 647* So. 2d 016 (Fla. 1994), Harding, J., concurring in part, dissenting in part."

Id. at *95*

The trial judge in the instant case considered the alleged "confession" made by Keith Witteman and found it to be inherently unreliable. (T 1057 - 1062) Accordingly, it was within the trial court's discretion to exclude the testimony and appellant has failed to show an abuse of that discretion.

Furthermore, when the alleged "confession" is considered in context, it is clear that the exclusion of same was harmless beyond a reasonable doubt. Keith Witteman's statement, made during the heat of an argument, did not contain any facts which would lead the listener to believe that it was a "confession". He didn't even identify the person he allegedly killed. It was merely an attempt to intimidate the fellow prisoner. After all, Witteman was imprisoned on the murder charge. Furthermore, Jack Sliney fully confessed and gave details as to the commission of the murder. As such, the failure to admit the testimony was harmless beyond a reasonable doubt.

## ISSUE VI

WHETHER APPELLANT WAS PREVENTED FROM ADEQUATELY DEVELOPING AND PRESENTING MITIGATING EVIDENCE FOR THE JURY AND THE TRIAL COURT TO CONSIDER BY THE TRIAL COURT'S REFUSAL TO APPOINT A CAPITAL CASE INVESTIGATOR/MITIGATION SPECIALIST TO ASSIST THE DEFENSE AND DENIED AN EXTENDED CONTINUANCE FOR APPELLANT TO PREPARE FOR THE PENALTY PHASE.

On October 4, 1993, the day the penalty phase was scheduled to begin, a hearing was held in chambers with attorneys Lee, Harrington and Shirley present along with the defendant, Jack Sliney. At the hearing, the trial court inquired as to a representation that had been made by the defendant's parents that Sliney wished to discharge his private counsel, Mr. Shirley. (T 1342) Sliney agreed that he wished to discharge counsel and that he was unhappy with counsel's representation. He acknowledged that he was aware that it may cause a delay in the proceeding but that the proceeding would go forward nevertheless. (T 1347) The public defender's office was appointed to represent Sliney with his approval. (T 1349) Counsel was appointed on October 4, 1993 and the penalty phase was scheduled for November 4, 1993. (R 174) On October 25, 1993, the public defender filed a motion for appointment of an independent capital case investigator/mitigation specialist and for a continuance of the penalty phase. (R 173 - 177) At a hearing held on this motion the state objected to the motion stating:

> "Your Honor, the defense claims that to adequately prepare for the penalty phase, they must investigate the defendant's

> background and life history. Your Honor, this is a twenty-year-old man who has lived locally here for most of his life. The witnesses that have been listed by the defense are family members, not all of them, but all of the witnesses with the exception of one reside here in this area. The other witness, who is, I believe, his brother in Georgia was present on the day when Mr. Cooper was assigned.
>
> The background information that could be gleaned from this Defendant's life history, I think, could be obtained by either the defense attorney or an investigator for the Public Defender's office. I don't see anything unique about this person's history that would require an expert.
>
> Also in the motion it states about several witnesses that the state has disclosed. I'm not quite sure which witnesses defense is referring to or what is so unique about these two witnesses that requires an expert.
>
> What the state fears is that by requesting this expert, this is going to delay the penalty phase and at this point prejudice a great deal of the state's case and the surviving victims of this case by delaying the penalty phase even further. (R 452 - 453)

With regard to the continuance, the state further noted:

> "Yes, Your Honor. The state would like to state that we feel one month is more than adequate time to prepare for the penalty phase, which is all at this point defense counsel would be preparing for.
>
> He states that over 1300 pages of the transcript must be read; however, while that is true, it's not necessary. It's not like he's preparing for the guilt phase of the trial.
>
> In addition, this particular counsel was originally assigned to the case, is familiar with the facts of the case and was present during the depositions of all of the

> witnesses- The witnesses that had been listed were the same witnesses that were available on the day we originally were scheduled to begin this penalty phase. They have listed ten mitigation witnesses. The state, once again, feels that one month is adequate time to prepare presentation of ten witnesses.
>
> Defense also claims they need more time to research the aggravating factors. The state's only proceeding on two aggravating factors, both of which were known to this defense counsel on the day he was assigned.
>
> Jury instructions were provided to Kevin Shirley on that day. Kevin Shirley was present at the hearing when you reassigned Mr. Cooper. At that time, he could have obtained those two aggravating factors.
>
> To grant this continuance, once again, Your Honor, would prejudice the state and the surviving victims. Every day that we wait the impact of the testimony that was presented is lessened and, additionally, run the risk of loosing this particular jury panel.
>
> We have no alternates. If a juror was to become ill or there was a death we would have to, essentially pick a new panel and present the case again." (R 454 - 455)

Upon considering the motion and the argument made by counsel, the trial court found:

> "Really, we're not talking about a thirty day delay between the conviction in this case for the crime of first degree murder and an opportunity to prepare for the death penalty phase, from that date until November the 4th. We're talking in essence from the day of the arrest of Mr. Sliney on June 18, 1992, for which he was to prepare for this day, for a capital crime.
>
> As counsel, I know you are experienced in capital cases, Mr. Cooper, is aware of the Florida capital punishment law, which has

been repeatedly upheld, at the sentencing phase will follow the guilt phase, using the same jury. And although there have been delays, Espinosa is an example of a case where that possibility was considered.

Our Supreme Court back in 1984 in Jones v. State forewarned, and I quote, forewarned future defendants that both the state and the defendants are entitled to an orderly and timely proceeding.

The issue in that case was the defendant wanted to represent himself after having dismissed his counsel, and the court conducted the appropriate proceedings under the matter, as I believe this court did previously, and indicated that self-representation could even take place under certain circumstances and proceed immediately in the death penalty phase.

In this case, we have had an attorney representing this defendant, an attorney of his own choosing, who he decided to dismiss. The court conducted a Farreta inquiry and appointed a public defender.

The attorney for you, Mr. Sliney, acted immediately in ordering transcripts and requesting an order from this Court within three days of your request, October 7, 1993. He filed motions to appoint an expert at that time for an examination, prepared the orders for transport.

I think as to Espinosa that we will proceed on November the 4th, and an inability for counsel to prepare sufficiently for this matter has to be borne some responsibility not only on your counsel's effort but on your decision, Mr. Sliney, to proceed in this fashion. You are fortunate that you have counsel under these circumstances." (R 457 - 458)

It is the state's contention that the trial court's denial of the motion for continuance and a special investigator was within the trial court's discretion and that appellant has failed to show an abuse of that discretion. As the trial court noted, in Espinosa v. State, 589 So. 2d 887 (Fla. 1991), this Court rejected a similar claim noting that Espinosa and his counsel were aware for several months that the state would seek the death penalty. Noting that the granting or denial of a motion for continuance was within the discretion of the trial court, this Court held that the trial court did not abuse its discretion and any prejudice to Espinosa was a result of his own delay in preparing for the penalty phase of his trial. Sliney was advised by the trial court that there were possibly going to be repercussions resulting from the dismissal of his counsel on that late date and that the proceedings would, although delayed, nevertheless, continue, Furthermore, as noted by the trial court, the public defender's office had been previously appointed in the case and had participated in depositions. The public defender was an experienced capital attorney and no showing of prejudice has been made by appellant. Furthermore, the record shows that prior to the penalty phase defense counsel did not renew his objection to the failure to grant a continuance or to appoint an additional investigator. (R 373 - 384).

As for their appointment of a special capital investigator, this is a matter within the trial court's discretion and appellant has failed to show an abuse of that discretion. Martin v. State, 455 So. 2d 370 (Fla. 1984).

## ISSUE VII

WHETHER THE TRIAL COURT BELOW ERRED IN INSTRUCTING APPELLANT'S JURY ON, AND FINDING IN AGGRAVATION, THAT THE HOMICIDE WAS COMMITTED DURING A ROBBERY AND WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

Appellant contends that the trial court erred in finding that the homicide was committed while appellant was engaged in a robbery, and was committed to avoid or prevent a lawful arrest. He contends that there was no robbery, because the taking of the items from the pawn shop was an afterthought unconnected to the assault upon the proprietor, which resulted from a dispute over the price of a gold chain. He also contends that there was insufficient evidence to establish that the dominant or sole motive for the killing of Mr. Blumberg was to eliminate him as a witness by showing that appellant knew the victim from being a customer in his shop. And, finally, Sliney argues that there is an inconsistency in applying both factors to appellant under the facts and circumstances of this case. As will be shown below, the state contends that the trial court properly found both aggravating factors.

First, with regard to the aggravating circumstance of committed during a robbery, Sliney argues that the trial court improperly found this aggravating factor because the facts do not demonstrate that the purpose of the violence was to accomplish the taking. He contends that in both statements to law enforcement authorities and his trial testimony, he disclaimed any intention to rob Blumberg when he and Keith Witteman entered the pawn shop. He contends that the taking of the property was something that occurred as an aside or afterthought to the assault. Sliney relies on this Court's opinions in Clark v. State, 609 So. 2d 513 (Fla. 1992); Parker v. State, 458 So. 2d 750 (Fla. 1984); Knowles v. State, 632 So. 2d 62 (Fla. 1993) to support his contention that the aggravator was improperly found. In each of the cases relied upon by appellant, however, the items taken were personal to the victim leaving open the question as to whether there was ever any intent to rob.

In the instant case, however, the evidence shows that the act of force or violence was part of a continuous series of acts or events that included the taking. In his confession, Sliney told the officers that he had previously been in the pawn shop and he knew Mr. Blumberg wore glasses. (T 986) Sliney testified that on one of the days that he had gone in there Mr. Blumberg had something over his nose like it was sore or something. (T 987) Sliney told the officers that they waited until all of the people that were in the pawn shop left to talk to Mr. Blumberg about a necklace, (T 987 - 988) Sliney told them he and Mr. Blumberg got into an argument over the price of the necklace for a period of about 4 - 5 minutes. (T 988 - 989) Sliney said he was getting angry, then Keith says, "Either you hit him or I hit him." Witteman then called him a "pussy". Sliney then went through the swinging door and grabbed Mr. Blumberg by the shoulder, (T 989) Mr. Blumberg was going to weigh the grams of gold when Sliney grsbbed him. Mr. Blumberg then tripped and fell face down and then Sliney fell on top him. (T 990) Sliney said Mr. Blumberg was bleeding a lot from the head. Sliney said he then got scared and asked Keith, "What to do?" What do you do? And Witteman said, "You have to kill him now. You have to kill him now." Sliney told the officers that while he was jumping Mr. Blumberg, that Keith Witteman was going through the cabinets and put everything in a bag. (T 992) Sliney then grabbed a pair of scissors from the drawer and stabbed Mr. Blumberg in the neck. He also told them that at one point he got a camera lens and hit him with the camera lens in the back of the head. (T 993) Sliney told the officers that after he hit Mr. Blumberg with the camera lens and the scissors, that Mr. Blumberg was still moving and stuff and that he was making a wheezing sound. (T 996) Sliney then hit him twice with the hammer in the head. (T 996) When he finished, he washed his hands and told Witteman, "Let's leave, let's get out of here." (T 997) The evidence also shows that Mr. Blumberg's watch and cash in his pockets as well as a set of keys to the pawn shop were missing. (T 998) Sliney said that Keith put the closed sign on the shop and locked the front door with a set of keys. (T 998) Sliney told the officers that he came to the realization that he had to kill Mr. Blumberg when Keith said, "Well, we can't just leave him now. Somebody will find out or something. We got to kill him. We got to do this." Sliney said that they were in the pawn shop the day before and they were also there on Tuesday late in the afternoon, two days prior to the murder. (T 1006) Sliney also said that on one of the prior visits, Keith asked the old man when would be a good time to come back and talk to him when he wouldn't be busy. (T 1007)

Sliney **testified** at trial that he knew there was no security system or cameras. (T 1136) He also testified that he had a relationship with Mr. Blumberg. He said that he didn't want to fight with the victim because "I liked Mr. Blumberg and I went in there because, **like** I said Richey, we went in there all the time." (T 1140-42) He also admitted that he had martial arts training and that he was the equivalent of a black belt. (T 1118)

In Jones v. State, 20 Fla. Law Weekly S 29, S 30 (Fla. Jan, 12, 1995) this Court rejected a similar claim that the aggravator was improperly found. Jones was convicted of murdering and robbing Mr. and Mrs. Nestor in their place of business. After Mr. and Mrs. Nestor were killed, the evidence shows that Jones proceeded to take money, keys, cigarette lighters and a small change purse which was later identified as belonging to Mrs. Nestor. The Nestors' wallets were also found in the defendant's pants. Rejecting Jones claim that he was entitled to a judgment of acquittal **on the** two counts of armed robbery because the Nestors never perceived the use of force or violence in connection with **the** taking of their property, this Court held that, "A taking of property that would otherwise be considered a theft constitutes robbery when in the course of the taking either force, violence, assault, or putting in fear is used." "Under §812.13, the violence or intimidation may occur prior to, contemporaneous with, or subsequent to the taking of the property so long as both acts of violence or intimidation and the taking constitute a continuous series of acts or events." Id. at S 30. Similarly, in Jackson v. State, 575 So. 2d 181 (Fla. 1991), this Court rejected Jackson's argument that there was not an armed robbery since the state failed to prove that the owner was not shot as a part of the perpetrator's escape from the scene.

Furthermore, as noted by this Court in Jones, the crime of robbery is defined as the taking of money or property, "when in the course of the taking there is the use of force, violence, assault, or putting in fear." §812.13 Fla. Stat. The phrase, "in the course of taking" is further defined to mean any act that "occurs either prior to, contemporaneous with, OK subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events. §812.13(3)(b). Thus, when a homicide and a related theft occur in an uninterrupted series of events, the force used to commit the robbery is sufficient to aggravate the theft into a robbery.

As previously noted, there is no evidence or even the suggestion of any interruption between Mr. Blumberg's murder and the taking of the property from the pawn shop. Clearly, the murder helped facilitate the robbery, even if the intent to steal did not develop until after the assault began. But for the murder, Sliney and Witteman would not have been alone in the pawn shop when they were suddenly and spontaneously struck with the urge to ransack the pawn shop cabinets. Thus, the murder provided the impetus and the opportunity for the appellant to steal, and robbery was sufficiently established in this case. See also Randolph v. State, 463 So. 2d 186 (Fla. 1984), cert. denied, 473 U.S. 907 (1985).

In a footnote, appellant also challenges the trial court's denial of his motion for judgment of acquittal as to the robbery. It is the state's position that on these facts appellant is not entitled to acquittal from his robbery conviction. As there is absolutely no question that numerous items were removed from the pawn shop and that appellant was arrested after trying to sell these items, the only question left open was his intent. Intent is usually established by circumstantial evidence, and our courts have consistently held that a motion for judgment of acquittal should rarely come if ever, be granted on a state's failure to prove intent. Kinq v. State, 545 So. 2d 375 (Fla. 4th DCA), review denied, 551 So. 2d 452 (Fla. 1989). Taken in the context most favorable to the state, the trial court properly denied the motion for judgment of acquittal. However, even if successful, the appellant's attack on the validity of his robbery conviction could not possibly effect his first degree murder conviction since there was ample evidence of premeditation to support the conviction.

Appellant also challenges the trial court's finding that the murder was committed to avoid arrest. With regard to this aggravating factor, the trial court found:

> "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody."
>
> > Clear proof was adduced at trial establishing that the Defendant's dominant or only motive for the killing of George Blumberg was to eliminate him as a witness. The Defendant confirmed in his written and taped confessions that after throwing the victim, George Blumberg, to the floor of his establishment, Ross' Pawn Shop, he turned to his Co-Defendant, Keith Wittemen, and asked what he should do? Wittemen replied: "You've got to kill him now! We can't, you know, just leave now.' He said something about 'identifying us' or something. He goes 'we gotta kill him, we gotta do this.' " Thereafter the Defendant left the victim and found a pair of scissors with which he repeatedly used to stab George Blumberg in the neck, leaving them ultimately buried in the victim. Since the victim was still making sounds, the Defendant left him, found a hammer and returned to repeatedly strike blows to the victim's skull. The Defendant persisted in beating the victim, breaking the victim's back and fracturing several ribs. In addition, the Defendant in his own testimony during the trial, confirmed that George Blumberg was familiar with the Defendant as a result of the numerous times he'd been to Ross' Pawn Shop prior to the date of this crime, This aggravating circumstance was proved beyond a reasonable doubt.

(R 223, 473 - 474)

In Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987), this Court held that "the mere fact that the victim might have been able to identify the assailant is not sufficient to support finding this factor. In the instant case, there is no speculation that Mr. Blumberg "might" have recognized appellant. Appellant's own confession admitted that they had been the pawn shop several times that week and that he killed him because Keith Witteman told him that if they didn't they would get caught.

This Court has made it clear that it is not necessary that intent be **proven by evidence** of an express statement by the defendant or an accomplice indicating their motives in avoiding arrest. Routley v. State, 440 So. 2d 1257 (Fla. 1987). Nor is it required that the elimination of a witness be the only motive **for a murder.** Thus, there was ample basis upon which the trial court could find appellant killed George Blumberg to avoid the possibility that he would identify him and testify against him if Sliney were subsequently tried for the robbery or battery. Sliney did not just "panic" as in Shaffer v. State, 537 So. 2d 988 (Fla. 1989); Sliney's own statement showed that he made several assaults upon Mr. Blumberg's body in order to facilitate the death. Mr. Blumberg was not only beaten but he was stabbed with a pair of scissors, hit with a camera lens and bludgeoned with a hammer. That appellant disagrees with the court's interpretation of these facts does not mean the court's findings were wrong.

Accordingly, the trial court did not err in finding the defendant committed the murder for the purpose of avoiding or preventing a lawful arrest and that the murder was committed during the course of a robbery. Nevertheless, should this Honorable Court find one or the other of these aggravating factors was not established, based upon the substantial evidence in aggravation and insignificant evidence in mitigation, error if any, is harmless.

Finally, Sliney argues that under the facts and circumstances of this case the court could not find both of the aggravating circumstances as they were factually inconsistent. He contends that if George Blumberg was killed as a part of the robbery then it would appear that the robbery simply got out of hand and his killing was not an intended witness elimination. If on the other hand, Blumberg was killed to eliminate him as a witness to the assault, the initial grabbing of his person, then that killing was separate and distinct from the taking of the property that subsequently occurred and the homicide cannot be legitimately be said to have taken place during the course of the robbery. It is the state's contention that the trial court properly found both aggravators.

It was not necessary for the state to prove that either was the sole motive for the killing. The robbery statute merely requires that the theft and the violence be a continuous act and as previously noted this Court has held that the avoid arrest factor does not need to be the sole motivation for the crime. Furthermore, under the facts of this case the court could find that Sliney murdered Mr. Blumberg to avoid arrest for the robbery that was taking place during the prolonged assault on Mr. Blumberg. Accordingly, both factors should be upheld.

## ISSUE VIII

WHETHER APPELLANT'S SENTENCE IS PROPORTIONATE.

Appellant contends that death is a disproportionate punishment in this case. He contends that that aggravating circumstances were improperly found, so there is no support for the ultimate sanction. He also contends that if one or both of the aggravators was properly established, the mitigating evidence is compelling. And finally, he argues that his codefendant received a life sentence for the participation in the same offense. Accordingly, he claims appellant's sentence should be reduced to life.

Proportionality is not a recounting of aggravating versus mitigating but, rather, compares the case to similar defendants, facts and sentences, Tillman v. State, 591 So. 2d 167 (Fla. 1991). A review of similar cases shows that the sentence in the instant case was proportionate. Davis v. State, 19 Fla. Law Weekly S 55 (Fla. Feb. 2, 1995) (death sentence proportionate for murder of 73 year old woman during burglary where the trial court found two aggravating factors and little mitigation); Melton v. State, 638 So. 2d 927 (Fla. 1994) (a sentence found proportionate where defendant convicted of a fatal shooting during a robbery where there were two aggravating factors and little mitigation); Hayes v. State, 581 So. 2d 121 (Fla. 1991) (death sentence proportionate for armed robbery); Jent v. State, 579 So. 2d 721 (Fla. 1991) (sentence proportionate for murder committed during the course of burglary where court affirmed two aggravating factors balanced against little mitigation); Brown v. State, 565 So. 2d 304 (Fla. 1990) (death sentence for murder committed during the course of burglary was proportionate where there were two aggravating factors balanced against the mental mitigators). Accordingly, the trial court properly imposed the sentence in the instant case.

Appellant also contends that disparity in sentencing further renders this sentence disproportionate. The evidence shows that Sliney actually committed the murder. This Court has repeatedly held that a death sentence is not disproportionate where a less culpable codefendant receives a life sentence. Hannon v. State, 638 So. 2d 1283 (Fla. 1992); Coleman v. State, 610 So. 2d 1283 (Fla. 1992); Hayes v. State, 581 So. 2d 121 (Fla. 1991).

## ISSUE IX

WHETHER THE TRIAL COURT ERRED IN DEPARTING FROM THE SENTENCING GUIDELINES.

Appellant contends that the trial court erred in departing upward from the sentencing guidelines to impose a life sentence upon him for a robbery.

The record shows that the trial court departed from the guidelines based upon the unscored capital crime. (R 228) This is a sufficient basis for departing from the guidelines. See, e.g., Torres-Arboledo v. State, 524 So. 2d 403, 414 (Fla. 1988) (" . . . we find the fact that a defendant has been convicted of first-degree murder, a capital felony which cannot be scored as an additional offense at conviction may serve as a clear and convincing reason for departure"); Bedford v. State, 589 So. 2d 245, 252 (Fla. 1991). Accordingly, the sentence should be affirmed.

## ISSUE X

WHETHER THE TRIAL COURT ERRED IN ASSESSING THE PUBLIC DEFENDER'S FEE IN THE AMOUNT OF $3,700 AGAINST APPELLANT WITHOUT ADVISING HIM OF HIS RIGHT TO A HEARING TO CONTEST THE AMOUNT OF THE LEAN. WHETHER THE TRIAL COURT ALSO ERRED IN ASSESSING $280 IN COSTS WITHOUT CITING TO THE STATUTORY AUTHORITY FOR DOING SO, OR PROVIDING APPELLANT WITH NOTICE AND OPPORTUNITY TO BE HEARD.

It is the state's contention that appellant had the opportunity to be heard at the sentencing hearing and raise any pertinent objections. Appellant failed to make any objections to court costs at the time of sentencing. Having been given adequate constructive notice and the opportunity to be heard, the assessment of costs complied with due process. State v. Beasley, 580 So. 2d 139 (Fla. 1991). Moreover, because appellant failed to make any objection to the costs at sentencing, he by implication, agreed to the imposition of costs and therefore waived any notice claim. Arnold v. State, 596 So. 2d 486 (Fla. 2nd DCA 1992)

It is well settled law in Florida that a party cannot raise on appeal an issue not presented to the trial court. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). No motion or contemporaneous objection was made or argued at the sentencing hearing.

Appellant's failure to object when these costs were announced at the sentencing hearing should be considered a waiver. In Primm v. State, 614 So. 2d 658 (Fla. 2d DCA 1993), the Court held that court costs in excess of the statutorily permitted assessment was fundamental error. As to the other court costs in Primm, the court held that Primm had waived them by failing to object below because the record failed to demonstrate fundamental error in the assessment of the other court costs. Consequently, the court in Primm remanded the case with instructions to reduce costs accordingly.

Similarly, the court's imposition of costs did not constitute fundamental error. Appellant's failure to object at sentencing waives this issue for appellate review.

## CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

Respectfully submitted,

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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. Regular Mail to the Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 17 day of July, 1995.

CM Sabella

OF COUNSEL FOR APPELLEE.