IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 5 1996
CLERK, SUPREME COURT
By
Chief Deputy Clerk

TERANCE VALENTINE,

Appellant,

v.

Case No. 84,472

STATE OF FLORIDA,

Appellee.

_______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE NO.

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 10

ARGUMENT 14

ISSUE I 14

WHETHER THE TRIAL COURT ERRED BY RULING THAT THE HUSBAND-WIFE PRIVILEGE OF SECTION 90.504, FLORIDA EVIDENCE CODE, WAS INAPPLICABLE WITH RESPECT TO THE COUNTS WHERE FERDINAND PORCHE WAS THE VICTIM.

ISSUE II 28

WHETHER THE TRIAL JUDGE SHOULD HAVE GRANTED VALENTINE'S MOTION TO SUPPRESS STATEMENTS MADE SUBSEQUENT TO HIS ILLEGAL ARREST DURING INTERROGATION BY DETECTIVE FERNANDEZ.

ISSUE III 40

WHETHER THE TRIAL JUDGE ERRED BY DENYING APPELLANT'S MOTION TO STRIKE THE FOOTPRINT EXHIBITS BECAUSE THE EXPERT'S OPINION WAS SO SPECULATIVE THAT IT COULD NOT REASONABLY LINK PRINTS TO VALENTINE.

ISSUE IV 45

WHETHER THE TRIAL COURT'S REFUSAL TO APPOINT AN EXPERT IN JURY SELECTION WAS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF LAW UNDER THE EXTRAORDINARY CIRCUMSTANCES OF THIS CASE.

ISSUE V 54

WHETHER THE TRIAL JUDGE ERRED BY DENYING APPELLANT'S MOTION TO GRANT DEFENDANT THE CONCLUDING ARGUMENT TO THE JURY BECAUSE HIS PRESENTATION OF ALIBI WITNESSES CAUSED HIM TO LOSE THIS VALUABLE PROCEDURAL RIGHT IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

ISSUE VI 57

WHETHER THE TRIAL COURT ERRED BY GIVING THE STANDARD REASONABLE DOUBT INSTRUCTION RATHER THAN THE ONE PROPOSED BY APPELLANT BECAUSE THE LANGUAGE OF THE STANDARD INSTRUCTION ALLOWS THE JURY TO CONVICT A CRIMINAL DEFENDANT WHERE A REASONABLE DOUBT EXISTS, CONTRARY TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

ISSUE VII 61

WHETHER APPELLANT'S CONVICTION FOR ATTEMPTED MURDER IN THE FIRST DEGREE SHOULD BE VACATED BECAUSE IT MAY REST ON A THEORY OF ATTEMPTED FELONY MURDER - A NONEXISTENT OFFENSE.

ISSUE VIII 65

WHETHER THE SENTENCING JUDGE ERRED BY FINDING THAT THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS PROVED.

ISSUE IX 70

WHETHER THE SENTENCING JUDGE FAILED TO FIND SEVERAL MITIGATING CIRCUMSTANCES WHICH APPELLANT HAD ESTABLISHED BY A REASONABLE QUANTUM OF EVIDENCE.

CONCLUSION 78

CERTIFICATE OF SERVICE 78

TABLE OF CITATIONS

CASES:

Ake v. Oklahoma,
470 U.S. 68, 105 S. Ct. 1087,
84 L. Ed. 2d 53 (1985) 47,48,49,50,52

Arbelaez v. State,
626 So. 2d 169 (Fla. 1993), cert. denied,
___ U.S. ___, 128 L. Ed. 2d 678 (1994) 68

Armstrong v. State,
642 So. 2d 730 (Fla. 1994), cert. denied,
___ U.S. ___, 131 L. Ed. 2d 726 (1995) 51

Barwick v. State,
660 So. 2d 685 (Fla. 1995) 69

Blakely v. State,
561 So. 2d 560 (Fla. 1990) 73

Blanco v. State,
452 So. 2d 520 (Fla. 1984),
cert. denied, 469 U.S. 1181 (1985) 63

Bolin v. State,
642 So. 2d 540 (Fla. 1994) 26

Bolin v. State,
650 So. 2d 19 (Fla. 1995) 25,26

Bolin v. State,
650 So. 2d 21 (Fla. 1995) 18,25,26

Brooks v. Tennessee,
406 U.S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972) . . . 56

Brown v. Illinois,
422 U.S. 590, 95 S. Ct. 2254,
45 L. Ed. 2d 416 (1975) 32,33,35,36

Brown v. State,
565 So. 2d 304 (Fla.),
cert. denied, 498 U.S. 992 (1990) 57,67

Bryan v. State,
533 So. 2d 744 (Fla. 1988),
cert. denied, 490 U.S. 1028 (1989) 43

Caldwell v. Mississippi,
472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) . . . 49

Castor v. State,
365 So. 2d 701 (Fla. 1978) 40

Combs v. State,
403 So. 2d 418 (Fla. 1981),
cert. denied, 456 U.S. 984 (1982) 73

Correll v. State,
523 So. 2d 562 (Fla.),
cert. denied, 488 U.S. 971 (1988) 28,29

DeAngelo v. State,
616 So. 2d 440 (Fla. 1993) 66

Delap v. State,
440 So. 2d 1242 (Fla. 1983),
cert. denied, 467 U.S. 1264 (1984) 35

Donaldson v. State,
369 So. 2d 691 (Fla. 1st DCA 1979) 26

Douglas v. State,
575 So. 2d 165 (Fla. 1991) 65

Esty v. State,
642 So. 2d 1074 (Fla. 1994), cert. denied,
___ U.S. ___, 131 L. Ed. 2d 234 (1995) 57

Proffitt v. State,
315 So. 2d 461 (Fla. 1975),
affirmed, 428 U.S. 242 (1976) 19,23

Ford v. Seabold,
841 F.2d 677 (6th Cir.)
cert. denied, 488 U.S. 928 (1988) 50

Foster v. State,
614 So. 2d 455 (Fla. 1992), cert. denied,
___ U.S. ___, 126 L. Ed. 2d 346 (1993) 59

Gaines v. Lane,
790 F.2d 1299 (7th Cir. 1986) 22

Geralds v. State,
21 Fla. L. Weekly S85 (Fla. February 22, 1996) 68

Hamilton v. Hamilton Steel Corp.,
409 So. 2d 1111 (Fla. 4th DCA 1982) 25

Harris v. State,
658 So. 2d 1226 (Fla. 4th DCA 1995) 62

Herbert v. Lando,
441 U.S. 153, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979) . . . 20

Holland v. McGinnis,
963 F.2d 1044 (7th Cir. 1992) 34

Hudson v. Palmer,
468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) . . . 22

Jackson v. State,
648 So. 2d 85 (Fla. 1994) 65

Johnson v. Louisiana,
406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) . . . 35

Johnson v. State,
608 So. 2d 4 (Fla. 1992), cert. denied,
___ U.S. ___, 124 L. Ed. 2d 273 (1993) 70

Johnson v. State,
660 So. 2d 637 (Fla. 1995) 15,39

Joiner v. State,
618 So. 2d 174 (Fla. 1993) 47

Kearse v. State,
662 So. 2d 677 (Fla. 1995) 43

Kerlin v. State,
352 So. 2d 45 (Fla. 1977) 16,18,20

Klokoc v. State,
589 So. 2d 219 (Fla. 1991) 67

Koon v. State,
463 So. 2d 201 (Fla.),
cert. denied, 472 U.S. 1031 (1985) 26

Larkins v. State,
655 So. 2d 95 (Fla. 1995) 51

Libby v. State,
561 So. 2d 1253 (Fla. 2d DCA 1990) 36

Lowder v. State,
589 So. 2d 933 (Fla. 3d DCA 1991) 42

Lucas v. State,
568 So. 2d 18 (Fla. 1990), cert. denied,
___ U.S. ___, 126 L. Ed. 2d 99 (1993) 77

Maulden v. State,
617 So. 2d 298 (Fla. 1993) 36,66

McKinley v. Smith,
838 F.2d 1524 (11th Cir. 1988) 49

Medina v. California,
505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992) . . 55

Mendyk v. State,
545 So. 2d 846 (Fla.),
cert. denied, 493 U.S. 984 (1989) 59

Mercer v. State,
40 Fla. 216, 24 So. 154 (Fla. 1898) 19

Mills v. Maryland,
486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988) . . 62

Moore v. Kemp,
809 F.2d 702 (11th Cir.),
cert. denied, 481 U.S. 1054 (1987) 50,52

Occhicone v. State,
570 So. 2d 902 (Fla. 1990),
cert. denied, 500 U.S. 938 (1991) 67

Oregon v. Elstad,
470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985) . . . 34

Porter v. State,
564 So. 2d 1060 (Fla. 1990),
cert. denied, 498 U.S. 1110 (1991) 67

Preston v. State,
260 So. 2d 501 (Fla. 1972) 54,55,56

Proffitt v. State,
315 So. 2d 461 (Fla. 1975),
affirmed, 428 U.S. 242 (1976) 19,23

Rogers v. State,
511 So. 2d 526 (Fla. 1987),
cert. denied, 484 U.S. 1020 (1988) 69,77

Ross v. Moffitt,
417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974) . . 51,52

Ruth v. State,
610 So. 2d 9 (Fla. 2d DCA 1992) 42

Salvatore v. State,
366 So. 2d 745 (Fla. 1978),
cert. denied, 444 U.S. 885 (1979) 73

Santos v. State,
591 So. 2d 160 (Fla. 1991) 66

Savino v. Luciano,
92 So. 2d 817 (Fla. 1957) 25

Sireci v. State,
587 So. 2d 450 (Fla. 1991),
cert. denied, 503 U.S. 946 (1992) 25

Smith v. State,
344 So. 2d 915 (Fla. 1st DCA 1977) 19,20

Spencer v. State,
645 So. 2d 377 (Fla. 1994) 57

Speiser v. Randall,
357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) 56

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1986) 27

State v. Rogers,
427 So. 2d 286 (Fla. 1st DCA 1983) 35

State v. Wimberly,
498 So. 2d 929 (Fla. 1986) 59

Steinhorst v. State,
412 So. 2d 332 (Fla. 1982) 21,29

Stevens v. State,
552 So. 2d 1082 (Fla. 1989) 75

Taylor v. Alabama,
457 U.S. 687, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982) . . . 35

Teffeteller v. State,
439 So. 2d 840 (Fla. 1983),
cert. denied, 465 U.S. 1074 (1984) 73

Thompson v. State,
667 So. 2d 470 (Fla. 3d DCA 1996) 62

Traylor v. State,
596 So. 2d 957 (Fla. 1992) 38

Trepal v. State,
621 So. 2d 1361 (Fla. 1993),
cert. denied, ___ U.S. ___, 127 L. Ed. 2d 85 (1994) 57

Trucking Employees of North Jersey Welfare Fund, Inc.
v. Romano, 450 So. 2d 843 (Fla. 1984) 29

United States v. Edmondson,
791 F.2d 1512 (11th Cir. 1986) 33,34

United States v. Harrelson,
754 F.2d 1153 (5th Cir.),
cert. denied, 474 U.S. 908 (1985) 22

United States v. Leon,
468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) . . . 37

United States v. Whalen,
940 F.2d 1027 (7th Cir.),
cert. denied, 502 U.S. 951 (1991) 22

Valentine v. State,
616 So. 2d 971 (Fla. 1993) 46

Walton v. State,
547 So. 2d 622 (Fla. 1989),
cert. denied, 493 U.S. 1036 (1990) 72,73

Wolfle v. United States,
291 U.S. 7, 54 S. Ct. 279, 78 L. Ed. 617 (1934) 20

OTHER AUTHORITIES:

Art. I, Sec. 16(b), Fla. Const. 25

§90.504, Fla. Stat. 14,19,20,23,24,26

Fla.R.Crim.P. 3.111(d) 38

Fla.R.Crim.P. 3.153 23

Fla.R.Crim.P. 3.250 12,54,55,56

STATEMENT OF THE CASE AND FACTS

The following is offered to supplement and/or clarify the statement of the case and facts recited by the appellant:

The appellant's statement of the case describes his Motion Regarding Jury Selection as "essentially" requesting the assistance of a jury consultant expert (Appellant's Initial Brief, p. 2). Actually, the motion was seeking to preselect and sequester the jury nearly two weeks before the start of the trial, in order to avoid contamination from exposure to the O. J. Simpson case, which was about to be tried (R. 346-351; SR. 131-150). The request for a jury selection expert was an ancillary remedy sought by the defense at that time.

The appellant's statement of the case also indicates that footprint evidence was received over a defense objection (Appellant's Initial Brief, p. 4). In fact, the record reflects that nearly all of the evidence recited in the appellant's brief relating to the shoeprint evidence was admitted without objection (T. 403, 409, 1082, 1084-1087, 1091, 1111-1114, 1117-1118, 1193-1196, 1286, 1343-1345). The motion to strike exhibits which was made after the close of the state's case did not address much of the testimony discussed in the appellant's brief, but related to

six exhibits: 9A, 9B, 9C, 82, 83, and 85 (T. 1384). Of these six, 9A, 9B, and 9C were admitted without objection (T. 1084-1087), as were 83 and 85 (T. 1194-1195, 1343). The only objection had been to Ex. 82, which contained castings of footprint impressions found outside Livia's residence just after the crime, based on relevance (T. 1194). Although there was an objection to Ed Guenther being qualified as a witness, the argument on appeal does not challenge this qualification but disputes the admissibility of the footprint exhibits, which were not objected to at trial until after the state rested its case.

Although the appellant raises an issue concerning the trial court's denial of one of his motions to suppress, he does not include any facts from either suppression hearing in his statement of the facts. Prior to trial, the appellant moved to suppress statements which he had made upon his arrest to FBI Special Agent Charles McGinty (R. 352-354). The motion alleged that the statements were made pursuant to an illegal arrest, in that the arrest warrant incorporated a criminal complaint for the federal offense of unlawful flight to avoid prosecution which failed to establish probable cause for that offense (R. 352-354). The complaint alleged that the appellant had been charged in a state warrant with enumerated felonies including first degree murder on

September 10, 1988; briefly recited the incident of September 9, 1988, giving rise to the felony charges; noted that information had been received from Hillsborough County Sheriff's Detective Jorge Fernandez that the appellant had been living in Fort Worth, Texas immediately prior to the offense and had been seen after the offense in a vehicle with Texas or Louisiana license plates; and asserted that the State of Florida would extradite the appellant from wherever he was located (R. 364).

A hearing was held on the motion after the jury was sworn for trial (T. 243, 247). Lawrence Curtin, FBI Special Agent, testified that he sought a federal arrest warrant from United States Magistrate Elizabeth Jenkins for the federal charge based on a copy of the Hillsborough County Indictment against the appellant; the state warrant that had been issued from the Indictment; and a conversation with Hillsborough County Sheriff's Detective Jorge Fernandez (T. 253-255). He swore to the facts in the affidavit and Jenkins issued the warrant on October 24, 1988 (T. 258-259).

FBI Special Agent Charles McGinty of New Orleans, Louisiana, testified that he arrested the appellant pursuant to the federal warrant for unlawful flight. McGinty testified that the federal offense of unlawful flight is a locator statute which gives authorization for federal officers to arrest local fugitives that

have fled the state, and once the defendant is arrested and returned to the appropriate state for the outstanding local charges, the federal charge is dismissed (T. 261-262, 269). McGinty recognized the appellant walking in a public parking lot in Kenner, Louisiana on February 26, 1989, and was aware of the outstanding state warrant for various felonies including first degree murder (T. 261-262, 273).

McGinty arrested the appellant and advised him of his constitutional rights about 5:05 p.m. (T. 262-263). The appellant granted permission for a search of his residence and was transported to the FBI office in New Orleans (T. 263). After arriving at the office, McGinty again advised the appellant of his rights at 5:41 p.m., using an Interrogation form which the appellant did not want to sign but later initialed (T. 263-264, 266). The appellant was calm and appeared to understand his rights; there was no language difficulty between McGinty and the appellant (T. 267-268). The appellant had been advised of the state charges which were the subject of the interview (T. 274). McGinty also added advice that the appellant did not have to answer any question he didn't want to, just because he agreed to talk didn't mean he had to answer everything (T. 266). There were no threats or promises made to the appellant and he was given the

opportunity to go to the bathroom and make phone calls, even to Costa Rica (T. 267). The interview was relaxed and not continuous as there were interruptions for the appellant's fingerprints and photograph to be taken, and the interview concluded at 8:06 p.m.

The trial judge found that the warrant was insufficient because there was no probable cause to believe that the appellant had left the state with the intent to evade the outstanding charges, and granted the motion to suppress (T. 306, 329). Two days later, defense counsel announced that, in light of that ruling, he had filed a second motion with regard to statements that the appellant made to Hillsborough County Detective Jorge Fernandez (T. 595). The court held a hearing on the second motion the following day. At that hearing, McGinty testified that on Monday, February 27, the day after the appellant's arrest, the appellant was taken before a federal magistrate (T. 1042). Also on that day, Det. Fernandez arrived in New Orleans from Tampa (T. 1043, 1046). Fernandez testified that he was present when the appellant was before the magistrate on February 27 about 2:00 p.m., and that the appellant had another federal hearing about 9:00 a.m. on February 28, regarding his transfer from federal custody to state custody to begin extradition proceedings (T. 1046-1047). Following this second hearing, Fernandez met with the appellant in a New Orleans

correctional facility and began interviewing him around 1:40 p.m. (T. 1047, 1049). Hillsborough Detective Albert Frost was also present (T. 1048). Fernandez advised the appellant of his constitutional rights, and the appellant understood his rights and agreed to speak with the detectives (T. 1048). No threats or promises were made to the appellant (T. 1049).

The trial judge denied the motion to suppress, finding that the appellant's statements to Det. Fernandez were sufficiently attenuated from the illegal arrest so as to be free of any taint (T. 1059-1060). Following this ruling, there were nine witnesses presented by the state before Det. Fernandez was called to testify before the jury (T. 1064-1244). The appellant did not renew his motion to suppress or object to the testimony about his statements during the course of the state's questioning of Det. Fernandez (T. 1287-1294).

The appellant's statement of the facts minimizes the importance of Louise Soab's testimony that the appellant made travel arrangements through Soab's travel agency using the names T.G. Harper, Luis Valentine, Terry Harper, and Herbert Bush, and that the appellant picked up all of the airline tickets and paid for them in cash. The appellant never mentions that FBI Special Agent Charles McGinty testified that, when he was attempting to

locate the appellant in New Orleans, he used an application form for a State of Louisiana identification card for Herbert Bush.[1] Soab testified that, about two weeks after she heard that Livia had been the victim of a shooting, she saw the appellant in New Orleans (T. 539). The appellant paid cash for tickets for "T. G. Harper" to travel to Costa Rica on October 22, 1988, then to Panama on October 24, back to Costa Rica on October 27, and to New Orleans October 29 (T. 542-543). The appellant also paid cash and picked up a ticket for Luis Valentine to go from Costa Rica to Panama on October 24, returning to Costa Rica on October 27 (T. 544). The appellant also bought tickets for T. G. Harper to leave New Orleans on November 9, 1988 for the Honduras, then Panama, then returning to New Orleans the same route (T. 546). He also purchased tickets for T. G. Harper and Dell Nolli to leave Miami for New Orleans on December 5, 1988 (T. 546). Another ticket was purchased for Herbert Bush, leaving New Orleans for Miami on December 29, 1988 (T. 546). Another ticket was purchased for Herbert Bush to leave Miami for Costa Rica on December 30, 1988 (T. 546). Soab had never known the appellant to use the names T. G. Harper or Herbert Bush

---

[1]Although the application form was excluded from evidence, there was no objection to McGinty's testimony about the form.

prior to September, 1988, and never asked him why he was making the arrangements in other names (T. 548-549).

The timing and details of the tickets purchased by the appellant is significant, particularly when compared with the timing and content of his telephone calls to Livia after the murder. The first call Livia received from the appellant was collect from Costa Rica, and was recorded on a tape retrieved from Livia's residence on November 1, 1988 (T. 621, 796). The appellant told Livia at that time that he had never been out of Costa Rica; that he had no way of getting out because "I don't have anything and I am broke" (T. 800). In a second conversation, the appellant again tells Livia that he has not been to the United States, stating that he cannot leave Costa Rica and denying that he killed Ferdinand (T. 819-820). The next day, the appellant made a local call to Livia from Tampa (T. 842, 847).

The appellant's description of his attempt to impeach Livia fails to provide her explanation of facts elicited during cross-examination. For example, she acknowledged that she had previously said that she told a judge that the appellant had abused her, despite the fact that she had not appeared in court, because she knew these facts had been recited in pleadings which she believed had been presented to a judge (R. 984-985).

Finally, the appellant's statement of facts includes improper conclusions which do not accurately reflect the evidence presented. The appellant asserts "The physical evidence did not support Romero's testimony" (Appellant's Initial Brief, p. 22), and proceeds to recite Det. McGill's testimony that he looked, but could not find any projectiles in the Blazer, or any powder burns or holes to support Livia's testimony that the appellant leaned in and shot her twice in the neck while she was in the back of the Blazer. The appellant's conclusion fails to take into account the fact that two bullets were found in Ferdinand's body, near his left elbow (which would have been in front of Livia's neck, according to her description of their positions), which were deformed as if they had passed through something, such as another person, prior to entering Ferdinand (T. 1150-1152, 1171). Accepting the reasonable assumption that the bullets that appellant put through Livia's neck ended up in Ferdinand's arm, the appellant's conclusion that the physical evidence was not consistent with Livia's testimony is clearly mistaken.

SUMMARY OF THE ARGUMENT

Issue I: The appellant is not entitled to a new trial due to the trial court's admission of statements that he made to his wife. Any marital privilege was waived when Livia was permitted to testify in the initial trial of this case without the appellant asserting the privilege. In addition, many of the statements were not privileged as marital communications because the appellant did not have a reasonable expectation of privacy at the time they were made. The appellant admits that this evidence was properly admitted for consideration of the offenses in which Livia Porche was a victim, and he waived any right to have the counts of the Indictment involving Ferdinand Porche severed when he did not move for severance prior to trial. Furthermore, since Livia and Livia's child Emily were also victims of the offenses committed against Ferdinand, the evidence was properly admitted on those counts as well. Finally, any possible error in the admission of the appellant's statements is clearly harmless beyond any reasonable doubt on the facts of this case.

Issue II: The appellant's argument as to the trial court's denial of his motion to suppress has not been preserved for appellate review, since there was no contemporaneous objection made

when the appellant's statements were admitted into evidence. Even if the issue is considered, the trial court properly denied the appellant's motion to suppress statements made to Hillsborough County Sheriff's Detective Jorge Fernandez two days after his arrest. Even if the trial court's finding the appellant's arrest to have been illegal is correct, the testimony supported the court's further finding that there were sufficient intervening events between the arrest and the interview by Fernandez to remove any taint flowing from the arrest. In addition, the facts surrounding the appellant's arrest indicate that the trial court's ruling of illegality was incorrect. This Court has previously rejected the appellant's argument that suppression was required because only one attesting witness signed his waiver of rights form. Therefore, the appellant's statements to Fernandez were properly admitted. Furthermore, any possible error in this issue is clearly harmless.

Issue III: The appellant's argument regarding the admissibility of the footprint exhibits is also barred by the lack of a contemporaneous objection. In addition, the trial court properly denied the appellant's untimely motion to strike the exhibits. The expert testimony relating to the exhibits had sufficient probative value to be admitted and the appellant's

concerns with the ability to specifically link the exhibits to the appellant are matters affecting the weight, not the admissibility, of this evidence. The testimony provided was clearly not speculative but was within the witness' expertise.

Issue IV: The appellant has failed to establish that he was denied due process or equal protection by the trial court's denial of his motion to permit the defense to spend $10,000 on the assistance of an expert in jury selection. He has shown no more than a vague assertion that this assistance may have been beneficial to the defense, which is insufficient to establish a due process violation.

Issue V: The appellant's claim that the trial court erred in denying him a concluding argument has not been preserved for appellate review, since the appellant did not request the opportunity to offer a concluding argument during trial. Even if his claim is considered, the appellant has not offered a persuasive reason to recede from this Court's prior holding that Florida Rule of Criminal Procedure 3.250 is constitutional.

Issue VI: The trial court did not err in giving the standard jury instruction on reasonable doubt rather than the one proposed by the defense. This Court has repeatedly upheld the validity of the standard instruction given in this case.

Issue VII: The appellant is not entitled to reversal of his conviction for attempted murder in the first degree under the theory that it may rest on the nonexistent offense of attempted felony murder. The overwhelming evidence of premeditation with regard to the attempted murder of Livia Porche clearly supports the propriety of his attempted murder conviction.

Issue VIII: The trial court did not err in finding the murder of Ferdinand Porche to be cold, calculated, and premeditated. There was no evidence presented to support the appellant's suggestion that this murder was so motivated by inflamed emotions that a finding of this aggravating factor was precluded.

Issue IX: The trial court did not err in rejecting some of the mitigating evidence offered by the appellant. A review of the penalty phase evidence and the trial court's sentencing order clearly reflects that the court gave appropriate weight to all of the mitigation that was reasonably established.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY RULING THAT THE HUSBAND-WIFE PRIVILEGE OF SECTION 90.504, FLORIDA EVIDENCE CODE, WAS INAPPLICABLE WITH RESPECT TO THE COUNTS WHERE FERDINAND PORCHE WAS THE VICTIM.

The appellant initially challenges the admissibility of statements which he alleges should have been excluded under the marital privilege codified in Section 90.504 of the Florida Evidence Code. The appellant's argument on this issue encompasses several evidentiary portions of the trial. Specifically, the appellant attacks the admission of Livia Romero's testimony about abuse during her marriage to the appellant; her testimony about the appellant's statements when he found out about her purported marriage to Ferdinand; letters written by the appellant to Livia when they were in separate prisons; and taped telephone conversations between the appellant and Livia following the shooting of Livia and Ferdinand. Before considering whether any of this evidence was precluded under the spousal privilege, it is necessary to determine to what extent, if at all, any of the appellant's claims are properly before this Court.

The appellant's brief contains two paragraphs suggesting that his marital privilege argument has never been waived because prior to the initial trial in this cause, he filed two written motions to suppress, one directed to the letters and the other to the recorded phone conversations, which specifically incorporated a marital privilege claim (Appellant's Initial Brief, p. 38). Clearly the denial of these two motions, which were not challenged in the appellant's prior appeal, could not have preserved for all time the myriad arguments presented in the instant appeal. To the contrary, a review of all of the facts demonstrates that many of the appellant's arguments have been waived in several different ways. Each of the appellant's contentions will be examined in turn.

A. Livia's testimony

The first objection based on an alleged violation of the marital privilege was made shortly into Livia Porche's testimony (T. 469). However, in the initial trial, the appellant had permitted Livia to testify, without any claim of marital privilege.[2] Livia testified at that time that the appellant had

---

[2]The appellant's brief includes a request for this Court to take judicial notice of the prior record on appeal in this case, Florida Supreme Court Case No. 75,985 (Appellant's Initial Brief, p. 2). Although this Court expressed disapproval of taking judicial notice of records in *pending* cases in Johnson v. State, 660 So. 2d 637 (Fla. 1995), the state agrees with the request for

threatened her and Ferdinand, and described threats against her and Ferdinand that were contained in letters that the appellant wrote to her from a Costa Rican prison (OR. 198, 201-202, 837-838; App. pp. 3, 6-7, 10-11). In addition, as noted above, the appellant sought (and received) a new trial from this Court in his prior appeal, without asking this Court to exclude any marital privileged communications in the new trial. This is particularly significant since this Court addressed the evidentiary issues raised in the appellant's prior appeal in order to assist the trial court and parties on remand. Thus, any argument relating to Livia's testimony in the instant case has been waived. See, Kerlin v. State, 352 So. 2d 45, 52 (Fla. 1977) (marital privilege waived if not asserted during court proceeding when witness is testifying to privileged matter).

In the retrial below, Livia was permitted to testify, without objection, that her marriage to the appellant had not been a happy one because the appellant was angry with her about their inability to have children, and that the appellant became abusive to her when

---

judicial notice of the prior record in this case, where pertinent portions of that record are attached as an appendices to the briefs. References to the prior record in this brief will be designated by "OR" with the appropriate page number, followed by "App" with the relevant appendix location.

they lived in Miami (T. 469). Defense counsel objected to anything that the appellant may have told Livia during the course of their marriage, and, although recognizing such statements would be admissible in the charges relating to Livia as a victim, noted that other counts of the Indictment listed a nonspouse (Ferdinand Porche) as a victim (T. 469-471). The prosecutor responded that, if the appellant wanted a severance based on that position, it was incumbent on him to have requested the severance prior to trial (T. 471-472). The court overruled the objection, but noted that the witness had not been asked about marital communications, the prosecutor's question had been "When did the abuse start?" and Livia responded when they lived in Miami, that the appellant would tell her -- when defense counsel cut off her answer with his objection (T. 469, 474). So the court ruled that the witness could answer the question of when the abuse started, and defense counsel asked if this meant he had to object again if Livia was asked what the appellant had told her, to which the court replied "that is up to you." (T. 475-476). Thereafter, counsel did not object when Livia explained the abuse that she had initially been subjected to was verbal; "He would just tell me that I wasn't any good, that I don't have any children, that I wasn't able to have -- I wasn't going to have any children." (T. 477). Livia then stated that the

abuse escalated from verbal to physical, that the appellant would hit her, hold her by the neck, "that kind of stuff" (T. 477).

Clearly, as to this testimony, there is no marital privilege issue properly before this Court. Although the appellant's brief suggests that the court below erred in admitting "testimony by Livia Romero about spousal abuse," (Appellant's Initial Brief, p. 38), there was no objection when Livia testified that the appellant was abusive towards her (T. 469), and no objection, despite the court's telling defense counsel it was "up to" him, when Livia stated that the appellant would tell her she wasn't any good because she couldn't have children (T. 477). Even if an objection had been made to that testimony, Livia was clearly describing conduct by the appellant rather than revealing confidential communications, and therefore the spousal privilege would not have applied. See, Bolin v. State, 650 So. 2d 21, 23 (Fla. 1995) (testimony about observations during course of marriage not excluded by spousal privilege); Kerlin, 352 So. 2d at 51-52 (testimony as to event rather than communication is admissible).

Defense counsel did timely object, on marital privilege grounds, to the prosecutor's question to Livia as to what the appellant said to her regarding her marriage to Ferdinand Porche

(T. 486). In response, Livia was permitted to testify that the appellant said

> Something to the effect of, "You S.O.B., you are not in your mind. You cannot be getting married to anybody. You belong to me and I can do whatever I want with you. How could you just leave me alone and marry somebody else? What do you think, I'm just going to let this go? You are going to pay for this."

(T. 486). Since the purpose of this communication was to demonstrate the appellant's displeasure with his belief that Livia had married another man, it is clear that the parties did not subjectively believe that they were married at the time and therefore the statements could not have been intended as confidential marital communications. As such, they were not excludable under the spousal privilege doctrine. §90.504, Fla. Stat.; Proffitt v. State, 315 So. 2d 461, 465 (Fla. 1975), (statements properly admitted where clear there was no attempt to make the communication in confidence), affirmed, 428 U.S. 242 (1976). The purpose of the marital privilege is to preserve "the peace of families" and to maintain "the sacred institution of marriage; ... its strongest safeguard is to preserve with jealous care any violation of those hallowed confidences inherent in, and inseparable from, the marital status." Smith v. State, 344 So. 2d 915, 919 (Fla. 1st DCA 1977), quoting Mercer v. State, 40 Fla. 216,

24 So. 154 (Fla. 1898). Clearly, this purpose would not be served by excluding the appellant's expressed disapproval of her purported marriage to Ferdinand, since his statements were not "hallowed confidences" from their marital status, as both Livia and the appellant believed Livia was married to Ferdinand.

The appellant notes that the First District cited the "strong public policy supporting the protection of private communications within a marriage" (Appellant's Initial Brief, p. 33), in Smith. However, this Court has recognized that public policy also demands a "restrictive construction" of the privilege in some instances.

> Public policy favors such a restrictive construction of the privilege since observations of criminal actions is not the type of communication contemplated by the privilege of confidential communication as being in the public interest to preserve a well-ordered, civilized society by preserving the peace and harmony of a family.

Kerlin, 352 So. 2d at 52. Generally, privileges are disfavored because they suppress relevant evidence and impede the full and free discovery of the truth. See, Herbert v. Lando, 441 U.S. 153, 175, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979); Wolfle v. United States, 291 U.S. 7, 17, 54 S. Ct. 279, 78 L. Ed. 617 (1934).

Under the express language of §90.504, the only communications protected by the spousal privilege are those which were intended to

be confidential. Nothing about the circumstances of the appellant's statements to Livia or the content of the statements themselves suggests that the communications admitted over the appellant's marital privilege objection were ever intended to be confidential.

B. Appellant's letters to Livia

As to the letters that the appellant wrote to Livia while he was in jail in Costa Rica and she was in a federal prison in West Virginia on an immigration violation, no issue has been preserved for appellate review because defense counsel never objected to the letters on marital privilege grounds (T. 490-500). Although defense counsel objected to introducing the letters into evidence based on his claim that some portions of the letters were irrelevant, the specific contention now argued on appeal was never presented to the trial judge, and therefore the marital privilege argument has been waived as to the letters. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Even if the admissibility of the letters are considered, the appellant has failed to demonstrate that he is entitled to relief. Since the letters were written from the appellant's jail cell in Costa Rica to Livia, while she was imprisoned in the United States, the appellant did not maintain a reasonable expectation of privacy

with regard to the letters. Ample case law recognizes that prison inmates have no reasonable expectation of privacy. Hudson v. Palmer, 468 U.S. 517, 527-528, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984). This is true as to incoming and outgoing mail, which, unless "privileged" (defined as addressed to an attorney or governmental or judicial officer), may be inspected and read. Gaines v. Lane, 790 F.2d 1299, 1304 (7th Cir. 1986); United States v. Whalen, 940 F.2d 1027, 1035 (7th Cir.), cert. denied, 502 U.S. 951 (1991). There is also no reasonable expectation of privacy between a husband and wife as to conversations held in a jail cell. United States v. Harrelson, 754 F.2d 1153, 1169-1171 (5th Cir.), cert. denied, 474 U.S. 908 (1985). Since the appellant could not possess a reasonable belief that his letters would be kept confidential under this scenario of reduced privacy, he was not entitled to have the letters excluded as violative of the marital privilege.

C. Recorded telephone conversations

The last evidentiary ruling challenged pertains to the tape recordings of the appellant's telephone calls to Livia shortly after these offenses. Although the appellant raised a marital privilege objection to these recordings, he did not do so until after the tapes had been admitted into evidence, and one tape had

been played and translated for the jury (R. 768-794, 796-801, 804). Thus, the claim may only be considered with respect to the last four tapes admitted into evidence.

As to any of the tapes, however, no error has been demonstrated. As previously noted, the only communications protected by the spousal privilege are those which were intended to be confidential. §90.504, Fla. Stat.; Proffitt, 315 So. 2d at 465. The content of the recorded telephone conversations clearly establishes they were never intended to be confidential. The appellant specifically acknowledges that he believes Livia is recording him, stating in the first tape "And if somebody is taping this shit, they can have it, I don't give a shit" (R. 800) and in a later tape "And record whatever you want, okay?" (R. 819). On these facts, no error has been demonstrated with regard to the recorded telephone conversations admitted into evidence.

D. Right to severance

The appellant concedes that all of the evidence challenged in this issue was properly admitted for those offenses to which Livia was a victim, but claims that the appropriate action by the court below should have been to sever those counts of the Indictment where Ferdinand was the named victim. Under Rule 3.153, Florida Rule of Criminal Procedure, the appellant's motion for severance

was clearly untimely and his right to a separate trial on the counts of the Indictment charging offenses against Ferdinand Porche was waived by his failure to file a timely motion for severance. Obviously, the appellant was aware of any basis for severance prior to trial, since he contends that he attempted to assert the privilege during the initial trial. He has offered no explanation, on appeal or to the trial court, for failing to move for severance prior to trial. Therefore any right to severance was clearly waived.

In addition, severance on this basis would be futile. Since Livia was permitted to testify about marital communications as a victim, such testimony is a matter of public record and any communication disclosed has necessarily lost is confidential nature. Put another way, the appellant waived the marital privilege with respect to related offenses against nonspouse victims when he committed a crime against his spouse. By committing a crime against his spouse, he channeled his privileged communications into one of the recognized exceptions, insuring that the communications would be admitted into evidence under Section 90.504(3)(b), and in doing so must be deemed to have waived the privilege since the communications would lose their confidential nature once admitted. Although the appellant may argue this would

result in an unwarranted judicial expansion of the exceptions to the marital privilege, it is clearly consistent with well-established case law that when a party takes actions which will result in confidential communications being admitted into evidence, he has waived the privilege; and that once waived, a privilege cannot be reinvoked. Savino v. Luciano, 92 So. 2d 817, 819 (Fla. 1957); Hamilton v. Hamilton Steel Corp., 409 So. 2d 1111 (Fla. 4th DCA 1982). Furthermore, as this Court recognized in the Bolin cases, a privilege holder's waiver need not be knowing. Bolin v. State, 650 So. 2d 19, 20, n. 1 (Fla. 1995); Bolin, 650 So. 2d at 24, n. 5.

Finally, severance was not necessary since Livia, and Livia and Ferdinand's baby, were clearly "victims" as surviving next of kin to Ferdinand. The trial judge below did not want to get into this issue since Livia and Ferdinand were not married (T. 813), but even if Livia is not considered a victim of Ferdinand's murder, their child clearly must be. Sireci v. State, 587 So. 2d 450, 454 (Fla. 1991), cert. denied, 503 U.S. 946 (1992) (wife and son of homicide victim were properly allowed to remain in courtroom under Art. I, Sec. 16(b) of the Florida Constitution). Thus, the trial below fell within the statutorily defined exception to the application of the marital privilege as "a criminal proceeding in

which one spouse is charged with a crime committed at any time against ... the person or property of a child of either [spouse]." §90.504(3)(b), Fla. Stat.

D. Harmless error

Finally, it must be noted that any possible error in the admission of any of this evidence was clearly harmless beyond any reasonable doubt. See, Donaldson v. State, 369 So. 2d 691 (Fla. 1st DCA 1979). The state takes issue with the appellant's assertions that this evidence was a significant portion of the state's case, highly prejudicial, and undoubtedly considered by jury in deliberations. To the contrary, the evidence pales in significance to Livia's eyewitness testimony to the horror that was perpetrated upon herself and Ferdinand.

This is not a case like Koon v. State, 463 So. 2d 201 (Fla.), cert. denied, 472 U.S. 1031 (1985); Bolin v. State, 642 So. 2d 540 (Fla. 1994), Bolin, 650 So. 2d at 19; or Bolin, 650 So. 2d at 21, where the confidential communications included direct admissions of having committed murder. Those cases also lacked any eyewitness testimony about the murders such as that present in the instant case. On these facts, there is no reasonable possibility that any error in the admission of this evidence contributed to the jury's

verdict, and any error must therefore be deemed harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE II

WHETHER THE TRIAL JUDGE SHOULD HAVE GRANTED VALENTINE'S MOTION TO SUPPRESS STATEMENTS MADE SUBSEQUENT TO HIS ILLEGAL ARREST DURING INTERROGATION BY DETECTIVE FERNANDEZ.

The appellant next challenges the trial court's denial of his motion to suppress statements he made to Hillsborough County Detective Jorge Fernandez several days after his arrest. It must be noted initially that the appellant did not object when his statements to Det. Fernandez were admitted, and therefore this issue has not been preserved for appellate review (T. 1287-1294). Correll v. State, 523 So. 2d 562 (Fla.), cert. denied, 488 U.S. 971 (1988). In addition, there is no merit to the appellant's argument. Therefore, he is not entitled to a new trial on this issue.

During trial, Fernandez testified that the appellant told him that the appellant was in Costa Rica on September 9, 1988, although the appellant did not mention Children's Day or indicate who he was with; he did not name anyone that could verify his presence in Costa Rica (T. 1290). The appellant also said that he was divorced from Livia, and stated that he had a friend in Virginia that drove a red Bronco but would not identify the friend when asked, because

he did not want to get the friend involved (T. 1290-1291). He stated that he had not been to Livia's house in Tampa and that he knew .22 caliber bullets had been used in the homicide, although at the time of the appellant's arrest the bullets had not been tested and this information had not been given to the media (T. 1292).

The lack of a contemporaneous objection at the time that Det. Fernandez' testimony was introduced relating these statements precludes this Court from reviewing this issue. Correll; Steinhorst. In addition, the challenge presented below should have been rejected under a theory of res judicata. In his 1990 trial, the appellant claimed that his statements should be suppressed as "illegally obtained," although defense counsel never really elaborated on the precise nature of the alleged illegality (OR. 1445; App. p. 12). The appellant's 1990 motion to suppress was denied; the denial of that motion was never challenged in his appeal from that trial. On these facts, his attempt to have his statements excluded from evidence in his retrial should have been rejected as res judicata. See, Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843, 845 (Fla. 1984) (res judicata bars subsequent suit and is conclusive as to all matters that were or could have been raised).

Even if the appellant's argument is considered, however, no error has been demonstrated in the admission of Fernandez' testimony. The appellant was indicted for several felonies based on these offenses, including first degree murder, and a state arrest warrant was issued on September 10, 1988 (R. 364). FBI Special Agent Lawrence Curtin obtained a federal arrest warrant for the appellant on October 24, 1988, based on the Indictment and state warrant and a conversation with Det. Fernandez (R. 364; T. 253-255). The federal warrant was obtained for the federal offense of unlawful flight to avoid prosecution, a federal "locator" statute typically used to give federal agents authority to arrest local fugitives that have fled the jurisdiction (T. 261-262).

FBI Special Agent Charles McGinty arrested the appellant near New Orleans, Louisiana, about 5:05 p.m. on February 26, 1989, and advised him of his constitutional rights (T. 262-263). After arriving at the FBI office, McGinty again advised the appellant of his rights at 5:41 p.m. (T. 263-264, 266). The appellant had been advised of the state charges which were the subject of the interview; he was calm and voluntarily waived his rights (T. 267-268; 274).

The trial judge found that the warrant was insufficient because there was no probable cause to believe that the appellant

had left the state with the intent to evade the outstanding charges (T. 306, 329). Two days after that ruling, defense counsel announced that, in light of the ruling, he had filed a second motion with regard to statements that the appellant made to Det. Fernandez (T. 595). At a hearing the following day, McGinty testified that on Monday, February 27, the appellant was taken before a federal magistrate (T. 1042). Fernandez went to New Orleans and was present when the appellant was before the magistrate on Febrary 27 about 2:00 p.m. (T. 1046). The appellant had another federal hearing about 9:00 a.m. on February 28, regarding his transfer from federal custody to state custody to begin extradition proceedings (T. 1046-1047). Following this second hearing, Fernandez met with the appellant in a New Orleans correctional facility and began interviewing him around 1:40 p.m. (T. 1047, 1049). Hillsborough Detective Albert Frost was also present (T. 1048). Fernandez advised the appellant of his constitutional rights, and the appellant understood his rights and agreed to speak with the detectives (T. 1048). No threats or promises were made to the appellant (T. 1049).

The trial judge denied the motion to suppress, finding that the appellant's statements to Fernandez were sufficiently attentuated from the illegal arrest so as to be free of any taint

(T. 1059-1060). There were nine witnesses presented by the state before Fernandez was called to testify before the jury (T. 1064-1244). The appellant did not renew his motion to suppress or object to the testimony about his statements during the state's questioning of Det. Fernandez (T. 1287-1294).

The appellant's first contention in this regard, disputing the trial court's finding that the statements were sufficiently attenuated from his arrest, is refuted by the testimony presented. The appellant's statements were taken nearly forty-eight hours after his arrest; the appellant had waived his constitutional rights repeatedly and been before a federal magistrate twice during that time. The trial judge carefully reviewed each factor discussed in Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), and determined that the statements given were a product of the appellant's free will, and were not affected by the illegal arrest (T. 1059-1060).

The appellant's challenge to the trial court's analysis under Brown is not persuasive. The appellant agrees that the alleged misconduct in this case was "minimal" but asserts that the length of his detention, should have weighed against a finding of attenuation. Although the appellant suggests that a long detention may itself compel an involuntary confession, it obviously did not

in his case since he did not confess but maintained his innocence to Fernandez (T. 1290-1294). The fact that the appellant's statements were not facially incriminating, but simply attempted to support his innocence, does not compel a finding that the statements were improperly induced by a lengthy detention.

The appellant also claims that the fact he had been given Miranda warnings repeatedly "does not necessarily weigh in favor of admissibility" (Appellant's Initial Brief, p. 43). The state agrees that Miranda warnings in and of themselves are not sufficient to dissipate the taint of an illegal arrest, but surely they do not weigh *against* a finding that subsequent statements were the product of a free will. In this case, neither the state nor the trial judge relied exclusively on the repeated provision of Miranda warnings to authorize the admission of the appellant's statements. The giving of Miranda warnings was recognized as an "important" factor in Brown. 422 U.S. at 622-623; see also, United States v. Edmondson, 791 F.2d 1512, 1515-1516 (11th Cir. 1986) (interrogation which began 45 minutes after illegal arrest, away from scene of arrest, after defendant was twice advised of his rights, sufficiently attenuated and admissible).

Finally, the appellant suggests that the intervening circumstances of having been before a magistrate on two occasions

is not persuasive where he was not released from custody and did not consult with counsel. There is no authority for the suggestion that a sufficient break in the chain of illegality only occurs when an accused is released or consults with an attorney. To the contrary, other cases have found the necessary intervening circumstances to vitiate any taint when no attorney consultation or release from custody took place. See, Edmondson, 791 F.2d at 1515; Holland v. McGinnis, 963 F.2d 1044, 1050 (7th Cir. 1992).

The fact that the statements to Fernandez were given in a different place and to different interrogators than his initial statements to FBI Special Agent McGinty is also significant. In Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 1293, 84 L. Ed. 2d 222 (1985), the United States Supreme Court held that a subsequent statement can be admitted even if an initial confession was coerced. Factors which should be considered in determining whether the "coercive impact" of the first confession carried over to the second include the time that passes between confessions, the change in place of the interrogation and the change in identity of the interrogators.

However, the most compelling aspect of the "intervening circumstances" factor is clearly a magistrate's participation in the appellant's continued detention. Since the appellant was

before a magistrate on two occasions, his detention was no longer under the authority of an illegal arrest, but was authorized by the magistrate's commitment. Johnson v. Louisiana, 406 U.S. 356, 365, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972). Therefore, his statements to Fernandez were not obtained by exploitation of any illegality relating to his arrest, and no basis for suppression existed.

In Delap v. State, 440 So. 2d 1242, 1251 (Fla. 1983), cert. denied, 467 U.S. 1264 (1984), this Court identified the relevant inquiry as whether, given a finding of illegality, the challenged evidence "has been come at by exploitation of that illegality or instead by being sufficiently distinguishable to be purged of the primary taint." The facts of this case clearly demonstrate that the challenged statements were sufficiently attenuated from the appellant's arrest to have been purged of any taint, and no new trial is warranted on this issue.

The cases cited by the appellant do not establish any error in the trial court's analysis under Brown. In Taylor v. Alabama, 457 U.S. 687, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982), the defendant was arrested without probable cause, fingerprinted, given Miranda warnings, and confessed within six hours. In State v. Rogers, 427 So. 2d 286 (Fla. 1st DCA 1983), the defendant was illegally arrested, made an incriminating statement, talked to an attorney

briefly and received vague advice to keep his mouth shut, then confessed again the next morning. In Libby v. State, 561 So. 2d 1253 (Fla. 2d DCA 1990), the defendant was arrested due solely to her presence in a high crime area, and illegally searched. She was taken to a police station and confessed when she was asked about a pipe found in the illegal search. The court noted that no intervening circumstances "such as" consultation with counsel or release from custody had occurred. The appellant describes Libby as a "comparable" case and concludes that because he was not released from custody and did not consult with an attorney, the result herein should be the same as that in Libby. Libby, however, is distinguishable on every factor included in a Brown analysis. None of the cases cited by the appellant include the significant fact of appearing before a magistrate between the alleged illegality and the subsequent challenged statements.

In addition, the state disputes the trial court's finding that the appellant's arrest was illegal. Agent McGinty was aware of the outstanding local charges against the appellant when he recognized the appellant walking across a public parking lot (T. 261-262, 273). As the prosecutor below pointed out, given these facts, McGinty could have legitimately arrested the appellant, even without a warrant. Maulden v. State, 617 So. 2d 298, 300-301 (Fla.

1993). Since no warrant was necessary, any invalidity found in the warrant is of no consequence.

Furthermore, McGinty's good faith reliance on the warrant was demonstrated. The warrant established that the appellant was believed to have left the jurisdiction, in that he did not live in Florida before the crime and he had not been apprehended in the six weeks following the issuance of the state arrest warrant to the date the federal warrant was issued. These facts were sufficient to establish probable cause to believe that the appellant had committed the federal offense of unlawful flight; even if probable cause is deemed to have been lacking, the warrant was not so defective as to preclude McGinty's reasonable reliance on it. Thus, no suppression was required. United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

Since the trial court's ruling to grant the appellant's motion to suppress his statements to Agent McGinty was erroneous, his later statements to Det. Fernandez were not required to be suppressed as fruit of the poisonous tree. Even if this Court agrees with the lower court's ruling on the initial motion, however, the second motion to suppress was properly denied as the statements to Fernandez were sufficiently attenuated from the arrest.

The appellant also contends that there was no valid waiver of counsel under Florida Rule of Criminal Procedure 3.111(d). This argument was never presented to the court below and is clearly procedurally barred. The appellant claims in a footnote, apparently to excuse counsel's failure to raise the issue, that the basis to present this claim did not arise until this Court's decision in Traylor v. State, 596 So. 2d 957 (Fla. 1992), and that "counsel evidently felt that he was bound by the earlier ruling" denying the appellant's motion to suppress in his 1990 trial. This statement has no support in the instant record. The basis argued for the motion to suppress which was granted below -- that the federal warrant was lacking in probable cause, and consequently the appellant's arrest was illegal -- had never been argued at the 1990 trial, and counsel obviously did not feel restricted from raising that issue. Furthermore, Traylor did not announce a new legal theory to require the suppression of statements so as to excuse the appellant's failure to raise the issue prior to that decision. The failure to raise the issue below has clearly prejudiced the state in this case, since it is clear there were two detectives present that could have verified the appellant's waiver (T. 1048).

In addition, the appellant's claim that his waiver of counsel was invalid because only Det. Fernandez signed the waiver as a

witness does not compel relief. In Johnson v. State, 660 So. 2d 637, 643 (Fla. 1995), this Court held that the fact that the waiver form was only signed by one attesting witness did not render the subsequent confession inadmissible.

Finally, any potential error in permitting Fernandez to testify to the appellant's statements must be considered harmless beyond any reasonable doubt. None of the appellant's statements were directly incriminating; they were consistent with the appellant's theory of defense that he was in Costa Rica at the time of the crimes. Fernandez was aggressively impeached by defense counsel, with the defense prominently accusing Fernandez of having committed perjury in the initial trial (T. 1294-1329). Given the strength of the state's evidence and the limited probative value of the appellant's statements to Fernandez, there is no reasonable possibility that any error in this testimony contributed to the jury's verdict.

On these facts, the appellant has failed to demonstrate any reversible error in the trial court's denial of his motion to suppress statements to Det. Fernandez. Therefore, he is not entitled to relief on this issue.

ISSUE III

WHETHER THE TRIAL JUDGE ERRED BY DENYING APPELLANT'S MOTION TO STRIKE THE FOOTPRINT EXHIBITS BECAUSE THE EXPERT'S OPINION WAS SO SPECULATIVE THAT IT COULD NOT REASONABLY LINK PRINTS TO VALENTINE.

The appellant's next issue asserts that the court below erred in denying his motion to strike the footprint exhibits submitted by the state. It must be noted initially that this argument has not been preserved for appellate review and must be deemed procedurally barred. The appellant's motion to strike was not a contemporaneous objection; it was made after the state rested its case and well after the admission of the exhibits in question (T. 1084-1087, 1194-1195, 1343). The record clearly reflects that the only timely objection was to Ex. 82, the footprint castings taken from outside the house, on the grounds of relevancy (T. 1084-1087, 1194-1195, 1343). Thus, the only question properly before this Court is the relevancy of footprint castings taken at the crime scene which were similar to impressions left on the kicked-in sliding glass door and near the Blazer where Livia was found. Castor v. State, 365 So. 2d 701 (Fla. 1978). Such evidence was clearly relevant to assist the jury in determining how this crime occurred by tracing the perpetrator's path of access into the house.

In addition, the appellant has failed to demonstrate any error in the denial of his motion to strike the footprint exhibits. Although this issue, as framed by the appellant, challenges the expert's opinion relating to the footprints as "speculative," the appellant's claim focuses on the alleged lack of relevancy, not the speculative nature of the expert opinion.[3] According to the appellant, "the shoeprint evidence was probably not relevant," (Appellant's Initial Brief, p. 50) because there was no evidence that the appellant was wearing a shoe with a lug type tread pattern of the same size as that in the impressions. However, the evidence established that the shoeprints found at Livia's house, both on the sliding glass door and outside the residence, shared similar characteristics with one found near where the Blazer with Ferdinand's body was discovered (T. 1343-1345). Also, Livia testified that the appellant was wearing tennis shoes at the time of the attack, and she had given a description of the perpetrator, including his shoes, to the officer that found her at the scene (T. 530, 1026). Thus, this testimony was relevant; any concern that it was not sufficiently tied to the appellant is a consideration of weight rather than admissibility.

---

[3]Relevancy is the appropriate focus, since that was the basis for the motion to strike argued below (T. 1384-1386).

All of the case law cited in the appellant's brief concerns expert testimony which was speculative rather than irrelevant. These cases are consistent with the defense concern below that the footprint expert would speculate that the appellant had left the shoe impressions found at both crime scenes (T. 1188-1192). The expert was not asked to draw this conclusion, which may reduce the potential probative value of this type of evidence, but would not make it irrelevant. Since the expert did not improperly speculate that the appellant was the person that left the prints, the appellant's cases are not persuasive.

The appellant also asserts that this evidence was not helpful to the jury and would have confused or misled them into believing that it incriminated him, but he fails to explain what was confusing or misleading about the testimony. The expert merely offered his opinion as to the approximate shoe size and tread design on the prints, and stated that the three footprints identified shared these characteristics. Certainly these facts were not deceptively incriminating, as the testimony in Lowder v. State, 589 So. 2d 933 (Fla. 3d DCA 1991), that people carrying cash were probably buying drugs, or that in Ruth v. State, 610 So. 2d 9 (Fla. 2d DCA 1992), that an airplane had been modified to transport drugs.

The appellant claims the testimony "was as worthless as fingerprints of no comparison value," yet such testimony is routinely admitted to demonstrate the thorough nature of the police investigation. In this case, the defense was critical of the investigation, accusing Det. Fernandez of blindly accepting Livia's identification of the appellant without an independent investigation (T. 1301-1310, 1317-1319).

The focus of the appellant's claim seems to be that since the issue at trial was whether Livia was telling the truth (Appellant's Initial Brief, p. 51), any evidence which did not prove that the appellant was the perpetrator was not relevant. This perspective overlooks the fact that relevance, not necessity, is the test for admissibility of evidence. See, Bryan v. State, 533 So. 2d 744 (Fla. 1988), cert. denied, 490 U.S. 1028 (1989). Furthermore, since this evidence corroborated Livia's testimony, it was relevant to show that she was telling the truth.

In order to prevail on this issue, the appellant must demonstrate that the trial court abused its discretion in admitting this evidence. Kearse v. State, 662 So. 2d 677 (Fla. 1995) (rulings on the admissibility of evidence will not be disturbed absent an abuse of discretion). On the facts of this case, no such abuse has been demonstrated. Even if it were, any error in

admitting this evidence would not be harmful, since, as the appellant recognizes, it did not directly incriminate him, it just corroborated Livia's account of the crime and description of the perpetrator. Therefore, the appellant is not entitled to a new trial on this issue.

<u>ISSUE IV</u>

WHETHER THE TRIAL COURT'S REFUSAL TO APPOINT AN EXPERT IN JURY SELECTION WAS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF LAW UNDER THE EXTRAORDINARY CIRCUMSTANCES OF THIS CASE.

The appellant next contends that the trial court's denial of his motion to appoint an expert in jury selection was a violation of his constitutional rights. It is important to note that the facts relied upon in the appellant's brief on this issue are not supported by the record. For example, the appellant claims that this case was uniquely similar to the O.J. Simpson trial because both Simpson and Valentine "had been prominent athletes" (Appellant's Initial Brief, p. 54). There is no record cite provided to support this assertion, and although the appellant's sister testified that he was a good basketball player in high school "because he was tall, and most Costa Ricans are short" (T. 1831), there was no other evidence that Terance Valentine ever achieved the level of athletic recognition that clearly contributed to the notoriety of the O.J. Simpson trial. Additionally, the appellant blatantly attempts to inject a racial issue that did not exist, claiming that "Both Simpson and Valentine were of negroid racial heritage while their victims were caucasoid" (Appellant's

Initial Brief, p. 54). In support of this assertion, the appellant cites two places in the record where the defense attorney and the prosecutor disagreed as to racial characterizations of the parties involved in this case. Of course, this Court's prior opinion quotes the appellant's defense attorney stating that both victims in this case were black and Costa Rican. Valentine v. State, 616 So. 2d 971, 973 (Fla. 1993). There is no dispute that the appellant, Livia and Ferdinand were all of Costa Rican descent, and whether this makes them "black" to some people and "white" to others is not really significant; this case clearly lacks the racially charged Simpson scenario on this point, and the appellant is not persuasive in relying on the racial heritage of the parties involved in trying to create similarities between this case and the Simpson trial in support of his argument on this issue.

The only other similarities noted in the appellant's brief are that both this case and the Simpson trial involved the homicide or attempted homicide of an ex-wife and her present lover, prior instances of abuse, and the use of a sports utility vehicle. It is an unfortunate fact that cases involving domestic violence that ultimately culminates in murder are hardly unique. The state below pointed out that fourteen women had been killed in domestic violence in Hillsborough County in the first six months of 1994,

just before this case was tried (SR. 145-146); and this Court is no stranger to the ominous role that domestic violence plays in our society. The fact that this case was tried for six days during the "Trial of the Century" and involved domestic violence did not require the trial judge to approve the request for $10,000 for a jury selection assistant in order to comply with due process or equal protection rights.

Furthermore, the appellant waived any claim of error in the denial of his request when he did not object to the jury selected (T. 241-243). Joiner v. State, 618 So. 2d 174 (Fla. 1993). As in Joiner, it is reasonable to conclude that the conduct of jury selection, even without the assistance of an expert, was not objectionable; and that the appellant was satisfied with the jury about to be sworn.

The appellant presents this issue as a due process claim under Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), but that decision does not demonstrate that a constitutional violation occurred in this case. In Ake, the United States Supreme Court considered an indigent defendant's entitlement to expert assistance in establishing the sole defense of insanity. Ake was not merely seeking funds to assist his attorneys with trial strategy, as in the instant case, he was pursuing the only

opportunity to present information to the jury on the ultimate issue being tried. The Court held that by depriving him of expert psychiatric assistance, the state had denied Ake any fair opportunity to present his defense, or any meaningful access to justice. 470 U.S. at 77. Recognizing that a defendant must be provided "access to raw materials integral to the building of an effective defense," the Court compared the denial of assistance to the denial of effective counsel, transcripts or the waiver of filing fee for an appeal.

As the appellant notes, the Ake Court suggested three factors for identifying "basic tools of an adequate defense" necessary to provide a criminal defendant with a fair opportunity to present his claims. The first of these is the private interest, which the state agrees is the same "compelling" interest at issue in Ake. However, the other factors clearly weigh against the appellant's argument. The governmental interest, according to the appellant, is not significant since "this would simply be a one-time expense for the county" (Appellant's Initial Brief, p. 57).[4] Even as a one

---

[4]It is curious that the appellant takes that position, when three pages later in his brief he argues that he was entitled to these funds since "other indigent defendants have been provided with Rebecca Lynn's services as a jury consultant" (Appellant's Initial Brief, p. 60).

time expense, however, $10,000 is a significant burden as an incidental expense in a criminal case. In Ake, the governmental financial burden was greatly discounted by the Court due to the recognition that many states and the federal government currently provided for psychiatric assistance for indigent defendants. 470 U.S. at 78. No such showing has been made with regard to the assistance sought in this case.

The third factor, the probable value of the assistance sought, is the one primarily discussed by the Court in Ake. The appellant concedes that the value of an expert in jury selection is "speculative," (Appellant's Initial Brief, p. 58), but asserts that experienced trial attorneys, being "Jack-of-all-trades," may not have the special expertise required to select a fair and impartial jury under the facts of this case. Such assertion is no more than the "undeveloped assertions that the requested assistance would be beneficial," which were rejected as insufficient to establish a due process violation in Caldwell v. Mississippi, 472 U.S. 320, 324, n. 1, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). This is clearly a far cry from the crucial nature of the assistance sought in Ake, which was necessary to provide information to support the only viable defense to the jury. See also, McKinley v. Smith, 838 F.2d 1524, 1530 (11th Cir. 1988) (denial of funds for pathologist to assist

defense counsel in understanding autopsy report did not violate due process).

In Ford v. Seabold, 841 F.2d 677 (6th Cir.) cert. denied, 488 U.S. 928 (1988), the court rejected, after applying the three-factor test from Ake, a claim that due process was violated when Ford's trial judge denied his request for funds to employ experts to conduct statistical research to support his constitutional jury challenges. Acknowledging that both Ford and the state maintained a "great" interest in the issue, the court concluded that the most important factor, the risk of an erroneous deprivation of Ford's liberty, was slight. The same determination is clearly applicable in the instant case.

In order to establish a due process violation for the denial of funds to the defense for expert assistance, a defendant must show "more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand." Moore v. Kemp, 809 F.2d 702, 712 (11th Cir.), cert. denied, 481 U.S. 1054 (1987). In Moore, the Eleventh Circuit upheld a state trial court's denial of a request for a criminologist "or other expert witness." The court noted that, to prevail on such a claim, a defendant must show the trial court that there exists the

reasonable probability both that the expert would assist the defense and that the denial of the expert would result in a fundamentally unfair trial. The appellant has failed to make such a showing in this case.

Since the expert assistance requested in this case would have assisted the appellant's attorneys with their trial strategy, the request is comparable to situations where a defendant seeks to have a second attorney appointed to represent him. This Court has routinely rejected the suggestion that the Constitution requires the appointment of a second attorney for capital defendants. Larkins v. State, 655 So. 2d 95 (Fla. 1995); Armstrong v. State, 642 So. 2d 730 (Fla. 1994), cert. denied, ___ U.S. ___, 131 L. Ed. 2d 726 (1995). It is worth noting that the appellant had two attorneys representing him below.

The fact that some wealthier defendants may secure such assistance is also unpersuasive. In Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974), the Court held that the Constitution did not require the appointment of counsel for discretionary appeals to review criminal convictions and sentences. The Court specifically noted that "the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required," and that states

were not required "to duplicate the legal arsenal that may be privately retained by a criminal defendant." 417 U.S. at 616. Accord, Moore, 809 F.2d at 709.

The appellant's equal protection claim asserting that indigents in Florida represented by public defenders have received this type of assistance is unavailing for the same reason. In addition, there is no indication in the record of other indigent criminal defendants having been provided a jury selection expert. The appellant relies on the affidavit by the consultant sought below to support this assertion, but the affidavit merely identifies Florida as a state from which the consultant had received public funds. There is nothing to suggest that these funds were expended for the defense of indigent criminal defendants.

The pivotal question, under the reasoning in Ake, is whether the denial of the requested funds in this case rendered the appellant's trial "meaningless." Other than the vague claim that a jury selection expert would have been helpful, the appellant has not offered any reason to believe that he was denied a fair trial by the court's ruling on his request for this assistance. He has not identified any shortcomings or limitations in the jury selection, or any particular juror that he has any reason to

believe should not have served on his jury. In addition, although he expresses concern that his case could have been tainted by the trial of O. J. Simpson, his attorney was the one that referred to the Simpson matter during closing arguments, apparently not afraid to invite the jury to compare the cases (T. 1677, 1690). On these facts, no constitutional violation has been shown, and the appellant is not entitled to a new trial on this issue.

ISSUE V

WHETHER THE TRIAL JUDGE ERRED BY DENYING APPELLANT'S MOTION TO GRANT DEFENDANT THE CONCLUDING ARGUMENT TO THE JURY BECAUSE HIS PRESENTATION OF ALIBI WITNESSES CAUSED HIM TO LOSE THIS VALUABLE PROCEDURAL RIGHT IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

The appellant's next issue challenges the validity of Florida Rule of Criminal Procedure 3.250. It should be noted initially that this claim was waived when defense counsel did not request the opportunity to address the jury last when closing arguments were presented. In addition, the appellant has not provided a compelling reason to recede from the case law rejecting his claim.

Although the appellant concedes that this Court upheld Rule 3.250 in Preston v. State, 260 So. 2d 501 (Fla. 1972), he suggests that the Preston holding must be revisited due to intervening case law from the United States Supreme Court. None of the intervening cases that he relies on, however, have anything to do with a rule of procedure governing a defendant's right to a concluding final argument. Instead, the cases all discuss constitutional rights. In Preston, this Court expressly held that, while the concluding

argument was a substantial procedural right, it was not a constitutional one. 260 So. 2d at 504-505.

The appellant presents this issue as an evidentiary limitation which necessarily curtails his right to present witnesses to establish his defense. Rule 3.250 is not a rule of evidence, however, it is a rule of procedure, and the United States Supreme Court has clearly recognized the state's right to regulate the orderly presentation of trials. In Medina v. California, 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992), the Court outlined the appropriate inquiry when a state criminal procedural rule is challenged as violative of due process. The Court noted that the area of criminal law presented a different focus, recognizing it has "defined the category of infractions that violate 'fundamental fairness' very narrowly," as the due process clause has "limited operation" beyond the specific guarantees enumerated in the Bill of Rights. 112 S. Ct. at 2576. Thus, the Court was reluctant to "construe the Constitution so as to intrude upon the administration of justice by the individual states" and noted that a state criminal rule of procedure would not be invalidated unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." 112 S. Ct.

at 2577, quoting Speiser v. Randall, 357 U.S. 513, 523, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958).

The appellant's argument that Rule 3.250 operates to "chill" a defendant's Sixth Amendment right to present witnesses was explicitly rejected in Preston. 260 So. 2d at 504. This Court expressly recognized that the rule merely presents one of many factors to be balanced in making the strategic decision of whether to present witnesses, and did not offend the Constitution on that basis.

The appellant's attempt to analogize this issue with that in Brooks v. Tennessee, 406 U.S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972), is unpersuasive. In Brooks, the Court struck a state rule that a defendant that did not testify as his own first witness forfeited his right to testify altogether. The right lost under Rule 3.250 when defense witnesses are presented is not the constitutional right to testify, but only the right to have the last word when closing arguments are made to the jury.

The appellant as failed to offer a compelling reason to recede from this Court's opinion in Preston. No new trial is warranted on this issue.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY GIVING THE STANDARD REASONABLE DOUBT INSTRUCTION RATHER THAN THE ONE PROPOSED BY APPELLANT BECAUSE THE LANGUAGE OF THE STANDARD INSTRUCTION ALLOWS THE JURY TO CONVICT A CRIMINAL DEFENDANT WHERE A REASONABLE DOUBT EXISTS, CONTRARY TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The appellant next challenges the trial court's denial of the jury instruction defining reasonable doubt that was requested by the defense. This argument is premised on the theory that the standard reasonable doubt instruction violates due process, despite the fact that the instruction has been repeatedly upheld against such a claim. See, Spencer v. State, 645 So. 2d 377, 382 (Fla. 1994); Esty v. State, 642 So. 2d 1074 (Fla. 1994), cert. denied, ___ U.S. ___, 131 L. Ed. 2d 234 (1995); Brown v. State, 565 So. 2d 304 (Fla.), cert. denied, 498 U.S. 992 (1990). In Esty, this Court noted that, taken as a whole, the instruction correctly conveys the concept of reasonable doubt, and that there was no reasonable likelihood that the jury applied the instruction in a way that violated the Constitution. See also, Trepal v. State, 621 So. 2d 1361 (Fla. 1993) (instruction given was sufficient; although not the standard instruction, the instruction in Trepal was the same as

that given below as to the point challenged in the appellant's brief), cert. denied, ___ U.S. ___, 127 L. Ed. 2d 85 (1994).

In light of the above authorities, the appellant has failed to prove that he is entitled to a new trial due to the court's denial of his requested jury instruction. The appellant's primary contention is that the instruction's direction that a jury should convict the defendant if there is no reasonable doubt and acquit the defendant if reasonable doubt exists is not strong enough to advise a jury of their mandatory duty to acquit in the face of reasonable doubt. The appellant would prefer an instruction which highlights the jury's ability to pardon a defendant by directing that the jury *should* convict in the absence of reasonable doubt but *must* convict if any reasonable doubt is present. He equates the distinction between "should" and "must" with that between "may" and "shall," and suggests that the instruction violates due process by inferring that the duty to convict or acquit is basically optional. However, "should" clearly imposes a stronger obligation than "may" in ordinary usage; there is no merit to the suggestion that the jury would believe their ability to acquit when reasonable doubt existed to be discretionary.

Although the appellant believes that the standard instruction is unconstitutional because it "implies that the jury has equal

powers to convict or acquit contrary to the evidence," a jury's decision to ignore the law and return a verdict contrary to the evidence is a miscarriage of justice, regardless of whether the verdict is one of guilt or innocence. The only difference is that an improper guilty verdict can be remedied by an appellate court's finding insufficient evidence to support the verdict; an improper verdict of innocence cannot be remedied since the state has no recourse. No defendant has a constitutional right to have a jury return a verdict of innocence which is contrary to the evidence; and any instruction highlighting the jury's power to ignore the evidence and create a miscarriage of justice is not constitutionally required. See, State v. Wimberly, 498 So. 2d 929, 933 (Fla. 1986) (Shaw, J., dissenting).

A trial court may deny a defendant's request to instruct his jury on its right to exercise a jury pardon. Foster v. State, 614 So. 2d 455, 462 (Fla. 1992), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 346 (1993); Mendyk v. State, 545 So. 2d 846, 850 (Fla.), cert. denied, 493 U.S. 984 (1989). The appellant was not entitled to have his jury instructed that its obligation to acquit an innocent man is not mirrored by an obligation to convict a guilty man. Even if he were, he has not demonstrated that the standard reasonable doubt instruction given in this case violated due process. In

addition, the appellant's jury was advised, as part of the instruction on the defense of alibi, that it was their duty to find the defendant not guilty if they had a reasonable doubt of his presence at the scene (T. 1753). To the extent that the appellant now claims that the reasonable doubt instruction did not sufficiently convey a jury's obligation to acquit, this instruction cured any possible error. Therefore, he is not entitled to relief on this issue.

ISSUE VII

WHETHER APPELLANT'S CONVICTION FOR ATTEMPTED MURDER IN THE FIRST DEGREE SHOULD BE VACATED BECAUSE IT MAY REST ON A THEORY OF ATTEMPTED FELONY MURDER - A NONEXISTENT OFFENSE.

The appellant's next issue claims that he must be retried on his attempted murder conviction since the jury did not specify whether their verdict relied upon a theory of attempted premeditated murder or attempted felony murder. However, the facts of this case clearly demonstrate that the jury would not have convicted the appellant solely on the theory of attempted felony murder, and the error in giving the instruction defining this offense to the jury must be deemed harmless beyond any reasonable doubt.

As the appellant concedes, there was clearly sufficient evidence of premeditation for the jury to have convicted the appellant of attempted first degree premeditated murder based on his shooting of Livia (Appellant's Initial Brief, p. 70). The evidence of premeditation was not only sufficient, it was overwhelming. The appellant had previously threatened to kill Livia; he had driven hundreds of miles to accomplish his mission, forcefully breaking into her house armed with a gun, a knife, and

baling wire and wire cutters (T. 507-508, 513-514, 557-558). After kidnaping Livia and Ferdinand, he shot Ferdinand to death in front of her and then told her it was her turn (T. 579-581). He told her he was going to kill her, put the gun to the back of her neck, and shot her twice (T. 581). At that point, she heard the appellant comment, "That's it. Two shots did it" (T. 581).

Instructing the jury on the nonexistent offense of first degree felony murder does not require that a general verdict of guilt to first degree murder be vacated; the error is subject to an analysis of harmlessness. Thompson v. State, 667 So. 2d 470, 471 (Fla. 3d DCA 1996); Harris v. State, 658 So. 2d 1226 (Fla. 4th DCA 1995) (applies but rejects possibility of harmless error, as court could not conclude that instruction did not contribute to jury's verdict); see also, Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 1867, 100 L. Ed. 2d 384 (1988) (must remand for resentencing unless court can rule out possibility that jury rested verdict on improper ground). This case is unique in that the prosecutor never suggested to the jury that the facts amounted to anything other than first degree premeditated murder. Not once in the state's closing argument did the prosecution allude to the possibility of attempted felony murder for Livia's shooting (T. 1660-1666, 1706-1727). To the contrary, the prosecutor consistently maintained

that first degree murder "is simply killing someone after consciously deciding to," and that was what had happened in this case with both victims (T. 1665).

The appellant's claim that the jury may have concluded that he only intended to scare, not to kill Livia, is unpersuasive. No one ever suggested to the jury that the intent to kill Livia did not exist. Certainly the facts of the offense show otherwise -- if the appellant merely wanted to scare her, he would not have put a loaded gun to her neck and pulled the trigger twice. He would not have commented that "two bullets did it." The intent only to scare is simply not credible on these facts, particularly when it was never offered for the jury's consideration.

At any rate, striking the aggravating factor of prior violent felony conviction is not necessary in this case, since even if the appellant's act of shooting Livia was not attempted first degree premeditated murder, it was clearly a violent felony. Thus, even if the appellant is retried on this charge, he may be reconvicted of attempted first degree murder or a lesser violent felony without any impact on the sentence in this case. See, Blanco v. State, 452 So. 2d 520 (Fla. 1984), cert. denied, 469 U.S. 1181 (1985). The appellant does not claim he is immune from prosecution for this offense, only that it must be retried. Furthermore, he remains

convicted of other violent felonies -- armed burglary and kidnapping -- arising out of this criminal episode.

On these facts, the appellant has failed to demonstrate that he is entitled to a new trial, or any other relief, due to the jury having been instructed on attempted first degree felony murder.

ISSUE VIII

WHETHER THE SENTENCING JUDGE ERRED BY FINDING THAT THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS PROVED.

The appellant next challenges the applicability of the aggravating factor that the homicide was committed in a cold, calculated and premeditated manner. According to the appellant, the murder in this case was calculated and premeditated, but under the reasoning of Douglas v. State, 575 So. 2d 165 (Fla. 1991), it was not cold.

The cases where this Court has found that the "cold" element of this factor did not apply are those where the murder was committed in an "emotional frenzy, panic, or a fit of rage." Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). The trial court's sentencing order expressly rejects that this was such a murder; it finds the killing to have been "carefully planned and prearranged with a design to commit murder." (R. 494).

> The coldness of Mr. Valentine's acts can be found in his preparation, his planning, his statements, and the ruthless carrying out of his goal. His acts were not prompted by "emotional frenzy, panic, or a fit of rage." These were the actions of a man who had a goal, prepared for it, enlisted the aid of an accomplice, and accomplished the goal -

> failing only in actually killing his ex-wife
> despite his best efforts.

(R. 495).

The appellant's reliance on Douglas is misplaced. Douglas is factually distinguishable, particularly as it relates to the time involved in planning the offense and the evidence of heated passion involved. In Douglas, the crime occurred eleven days after Douglas' girlfriend left him to return to her husband. Here, there were several years between the time Livia had last seen the appellant and the date of the crime (T. 509). The appellant relies on the letters which he wrote to Livia while in prison to establish his heightened emotional state but again, those letters were written years before the offense. In addition, the appellant traveled hundreds of miles in order to commit these acts. There was no testimony below, similar to that presented in Santos v. State, 591 So. 2d 160 (Fla. 1991) and Maulden, 617 So. 2d at 302, relating to the appellant's state of mind at the time of the offense.

Douglas does not stand for the proposition that a killing can never be "cold" where the defendant and the victim knew each other. In DeAngelo v. State, 616 So. 2d 440 (Fla. 1993), this Court upheld the finding of cold, calculated and premeditated for a murder

"grounded in passion" where the killing had clearly been contemplated well in advance. Other cases have also upheld this factor when applied to crimes of passion. Klokoc v. State, 589 So. 2d 219, 222 (Fla. 1991) (CCP applied where defendant killed his 19-year-old daughter to spite his wife); Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990) (CCP applied where defendant killed his former girlfriend's parents; this Court noted the case involved "more than a passionate obsession; it was the culmination of avowed threats to terminate the lives of parents standing between Occhicone and his former girlfriend"), cert. denied, 500 U.S. 938 (1991); Brown, 565 So. 2d at 308-309 (CCP applied where defendant killed his girlfriend's daughter, despite testimony defendant was under severe mental strain at time of homicide); Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990) (CCP applied where defendant killed his former girlfriend and her male companion; despite recognition that motivation for homicide may have been "grounded in passion"), cert. denied, 498 U.S. 1110 (1991).

The appellant's own statements indicated that this killing was an act of revenge, not of jealousy (T. 529). Revenge is more a conscious act of retaliation than an emotional act of resentment. The totality of the circumstances of this offense indicate that this murder was not an act of heated emotional release but was cold

as well as being calculated and premeditated. This is similar to Arbelaez v. State, 626 So. 2d 169 (Fla. 1993), cert. denied, ___ U.S. ___, 128 L. Ed. 2d 678 (1994), wherein this Court upheld the application of the cold, calculated and premeditated factor where the defendant killed his former girlfriend's five-year-old son. This Court twice characterized the circumstances of the crime as demonstrating a carefully premeditated plan of revenge. 626 So. 2d at 177. Given the absence of any evidence of an emotional frenzy or passionate rage in this case, this Court must affirm that application of this factor.

Finally, it must be noted that any error in the finding of this aggravating factor must be deemed harmless. Given the three other strong aggravators of heinous, atrocious and cruel (the validity of which is not even challenged in this appeal); committed during the course of a burglary and kidnapping; and prior violent felony conviction; and the lack of significant mitigation, there is no reasonable possibility that the appellant's sentence would have been any different had this factor been rejected below. Compare, Geralds v. State, 21 Fla. L. Weekly S85 (Fla. February 22, 1996) (this Court struck CCP, leaving aggravating factors of heinous, atrocious and cruel and committed during course of burglary; mitigation of 22 years old; love of family; bipolar manic

personality); Barwick v. State, 660 So. 2d 685 (Fla. 1995) (improper finding of CCP harmless where five aggravating factors remained). In Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), this Court affirmed the death sentence after striking three of the five aggravating factors found by the trial court, including cold, calculated and premeditated. In doing so, this Court noted that the reversal of a sentence is only warranted when the correction of errors could reasonably result in a different sentence. There is no reasonable likelihood of a different sentence in this case, even without consideration of the cold, calculated and premeditated factor. Therefore, no new sentencing is required on this issue.

ISSUE IX

WHETHER THE SENTENCING JUDGE FAILED TO FIND SEVERAL MITIGATING CIRCUMSTANCES WHICH APPELLANT HAD ESTABLISHED BY A REASONABLE QUANTUM OF EVIDENCE.

The appellant's final challenge concerns the trial judge's rejection of several proposed mitigating circumstances. Specifically, the appellant disputes the court's failure to find and weigh the statutory mitigator of no significant prior criminal history, and the nonstatutory mitigators of the potential for rehabilitation; being a caring and financially supportive parent to his daughter, Giovanna; and the prior domestic relationship between the appellant and Livia. Of course, it is the trial court's duty to decide if mitigating factors have been established, and when there is competent, substantial evidence to support a trial court's rejection of mitigators, that rejection must be upheld. Johnson v. State, 608 So. 2d 4, 12 (Fla. 1992), cert. denied, ___ U.S. ___, 124 L. Ed. 2d 273 (1993).

The trial court's reasons for rejecting the mitigating circumstances urged by the appellant are clearly supported by the record. As to the statutory mitigator of no significant history of criminal activity, the trial court noted that the appellant had

been incarcerated in Costa Rica, that he was in a federal prison on an immigration violation, and that the PSI references various arrests for DUI, public drunkenness, criminal trespass, resisting an officer, and auto theft (R. 496). The court also noted that the appellant claimed to have been involved in other illegal activities.

The appellant disputes the court's rejection of this factor by challenging the evidence of his prior criminal activities, although he did not challenge this evidence when presented to the court below. The appellant concedes that his sentence for the immigration violation was properly considered by the court, but claims that his incarceration for drug charges "was vacated by the Costa Rican court." The record citations offered to support this allegation do not establish that his narcotics convictions were vacated. The reference to S116 is simply the notation in the PSI that the appellant claimed this conviction to have been vacated, although the PSI author could not verify this claim. The reference to T. 1467-71 is where defense witness Carlos Mora testified that he knew the appellant was released from the Costa Rican jail on December 21, 1987; and that Mora had been in court when the appellant was sentenced to jail in November, 1985. Mora did not testify that the appellant's conviction for possession and

trafficking in cocaine had been vacated. Thus, the court below properly considered this evidence in rejecting the factor of no significant criminal history.

The appellant also questions the court's reliance on his lengthy arrest record, as described in the PSI, suggesting that this factor may only be rebutted by "direct" evidence in the form of judgments or testimony under Walton v. State, 547 So. 2d 622 (Fla. 1989), cert. denied, 493 U.S. 1036 (1990). It should be noted that the appellant never disputed any of the arrests at the time the parties were discussing the PSI. This is particularly significant in this case, where the defense attorney went painstakingly page by page through the PSI, pointing out inaccuracies to the court, such as the appellant's middle initial; the indication that the defense attorneys were retained rather than appointed; and the repeated references to Livia Romero as the appellant's ex-wife (T. 1887-1897). In fact, defense counsel acknowledged that the appellant had "some things in his background" but argued that they did not amount to a significant history of criminal activity (T. 1895).

Furthermore, it is important to remember that there was direct evidence in this case of the federal immigration violation and the narcotics conviction. Therefore, although the hearsay from the PSI

may have been used to support the trial court's rejection of this factor, the factor was not rejected solely on the basis of hearsay. Of course, Walton did not expressly prohibit the trial court's reliance on the appellant's arrest record as recited in the PSI, it merely held that once a defendant claims this mitigating factor applied, the state was entitled to rebut it with direct evidence of criminal activity. 547 So. 2d at 625.

The appellant relies on three cases where a criminal record did not refute this mitigating factor, apparently believing that this Court should conduct a de novo review of the record for the existence of mitigation. See, Blakely v. State, 561 So. 2d 560 (Fla. 1990) (defendant had one prior DUI conviction from 1969); Salvatore v. State, 366 So. 2d 745 (Fla. 1978) (defendant had one prior burglary and had stolen a boat as part of homicide), cert. denied, 444 U.S. 885 (1979); and Combs v. State, 403 So. 2d 418 (Fla. 1981) (defendant had one prior third degree burglary and had used alcohol and cocaine in this homicide), cert. denied, 456 U.S. 984 (1982). He does not cite any authority where this Court reversed a trial court's rejection of this factor based on similar facts, he only cites cases where the trial court found the factor based on less criminal activity than that demonstrated in this case. In Teffeteller v. State, 439 So. 2d 840, 846-847 (Fla.

1983), *cert. denied*, 465 U.S. 1074 (1984), this Court upheld a trial court's rejection of this factor based on the defendant's prior record of one forgery and an escape, noting that it is within a trial court's province to decide whether a mitigating factor has been proven and the weight to be given it.

Finally, the appellant argues that his age of 39 must be considered in conjunction with this issue, because his criminal record might not be mitigating for a young man, but was not as significant for a man that had lived longer and had more chances to commit crimes. The appellant's argument might be persuasive for a trial judge considering what weight to allocate to this factor once properly found, but is not compelling for finding a factor which would not otherwise exist.

Since the trial court's reasons for rejecting this factor are supported by the record, this Court should not disturb the finding that the appellant had a significant criminal history. In addition, since the trial court gave weight to the nonstatutory mitigating factor of no prior violent crimes, any error in the court's rejection of this factor could only be harmless.

The appellant also claims that the court erred in rejecting the nonstatutory mitigator of his potential for rehabilitation. The factor, as presented below, was actually that the appellant was

"rehabilitable," but the appellant has expanded what was argued below to suggest that the court should have viewed his good prison record and ability to adjust to prison life as a potential for rehabilitation. Clearly, if the appellant intended to rely on the testimony of Dr. Gamache to establish that he could be rehabilitated, he should have proposed that the stipulation to the court regarding Gamache's testimony include such a conclusion. Instead, he has waited until his appeal to attack the trial court for not reading more into a three-line stipulation about a witness that did not even testify at trial. If a potential for rehabilitation is the same as having a good prison record and adjusting well to prison life, as suggested by the appellant, then this factor was given weight when the trial court weighed in mitigation the appellant's being a model prisoner (T. 1952-1955).

The appellant also claims that testimony about his positive character traits and employment history showed his potential for rehabilitation under Stevens v. State, 552 So. 2d 1082, 1086 (Fla. 1989). Of course, the quote from Stevens recited in the appellant's brief is that such testimony "may" show potential for rehabilitation; it does not mandate that a court errs in not finding rehabilitation any time such evidence has been presented.

The next factor rejected below which the appellant discusses is being a caring parent and financially supporting his daughter Giovanna. The appellant claims that testimony that he had a "very nice" relationship with his daughter, was not seen by Frances Valentine to have mistreated Giovanna, and that Frances believed the appellant loved Giovanna should have compelled the court to find that he was a caring parent. Of course, one might argue that a caring parent would not try to kill his daughter's mother, leaving his daughter to be raised in an "institution for children in social danger," according to Frances (T. 1840). Frances also testified that she had never seen the appellant act with violence toward Livia (T. 1833). She noted that when the appellant returned to Costa Rica as an adult, he did not especially help the family financially (T. 1833). She stated that he has never given money to the family for Giovanna; that although the appellant "sometimes used words that are not nice" with Giovanna, that their relationship was "good" (T. 1836-1837). She said that no one pays for the home where Giovanna is currently, but that the family makes a contribution, different amounts, every month, from the appellant's money (T. 1840-1841).

The appellant criticizes the judge for concluding that there was no evidence that Giovanna would be deprived of any income in

the event of his death when, in fact, there was no such evidence presented below. Nor was there any evidence that the appellant "chose" to have his income go to Giovanna, as asserted in the appellant's brief. Rather, Frances testified that the family made contributions to Giovanna's residence from the money they got from the appellant's rental properties (T. 1840-1841).

The final mitigating factor suggested by the appellant, prior domestic relationship, is one which he concedes was never presented to the court below. Clearly, he cannot now fault the trial court for failing to consider this factor. Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 99 (1993).

In conclusion, the appellant has failed to establish any error in the trial court's findings relating to the mitigating factors proposed by the defense. Furthermore, any error in the treatment of these mitigating factors must be deemed harmless, since a remand on this basis would not reasonably result in a different sentence. Rogers, 511 So. 2d at 535. Therefore, the appellant is not entitled to be resentenced, and this Court must affirm the imposition of the death sentence in this case.

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Douglas S. Connor, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000--Drawer PD, Bartow, Florida, 33830, this 3rd day of June, 1996.

COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

TERANCE VALENTINE,

Appellant,

v. Case No. 84,472

STATE OF FLORIDA,

Appellee.

_______________________/

INDEX TO APPENDIX

Documents and Transcript from prior record on appeal, Florida Supreme Court Case No. 75,985:

a. Excerpt of transcript, testimony of Livia Romero, January 23, 1990 ....A1 - A7

b. Excerpt of transcript, testimony of Livia Romero, March 27, 1990 ....A8 - A11

c. Motion to suppress A12