IN THE

SUPREME COURT OF FLORIDA

STANLEY RAY ROGERS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 76,456
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

REPLY BRIEF OF APPELLANT

(On Appeal from the Seventeenth Judicial Circuit In and For Broward County, Florida)

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record on Appeal

"2SR" Supplemental Record (Pursuant to this Court's Order of December 18, 1992 -- received February, 1992).

Appellant will rely on his Initial Brief for argument on Points III, VII, X, XVII, XVIII, XIX, XXIV, XXV, XXVI, XXVII and XXVIII.

STATEMENT OF THE CASE AND FACTS

Appellant would rely on the statement of the case and facts as stated in his initial brief except to clarify a couple of matters. Dr. Vila testified that the trajectory of the bullet was "back to front, right to left and slightly upward ..." (R1351). Appellant's sister testified that Appellant's father and mother gave him every advantage and opportunity (R2737). However, Appellant's father died when he was young and Appellant became depressed and his drinking problem began (R2761-62). It should be noted that Dr. Scarlotti's testimony that Appellant's prognosis for rehabilitation was high, was based on his willingness to seek help (R2803). Dr. Scarlotti also testified that the type of incident that occurred could definitely trigger a willingness to seek help (R2803).

ARGUMENT

GUILT PHASE

POINT I

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO BOLSTER ITS CASE BY COMMENTING ON MATTERS UNSUPPORTED BY EVIDENCE PRODUCED AT TRIAL.

Appellee claims that the prosecutor's comments were proper because the defense presented evidence that Rene Daniel had made statements to Detectives Baker and Silvas. This does not address the issue! No one cares about the fact that Daniel made statements to Baker and Silvas. It is the content of the statements that is important. The prosecutor specifically told the jury that Daniel's statements to Baker and Silvas were consistent with her trial testimony:

> MR. BARLOW: ... she gives a statement to Mark Baker in the Sheriff's Department. No inconsistencies there shown by the defendant ... she gave a statement to Detective Silvas. Nothing inconsistent there.

(R2349). While evidence was produced that Daniel made statements to police, the first and only time that the jury was informed as to the content of these statements being consistent with her trial testimony was by the prosecutor.[1] Thus, the comments were clearly

[1] There was absolutely no testimony or evidence presented at trial indicating whether Daniel's statements to Silvas were consistent or inconsistent with her trial testimony. The only content of the statement to Baker that was admitted was that Daniel was sitting outside Mr. Laff's. Daniel admitted that this was inconsistent with her trial testimony (R1204-05). When the prosecutor spoke of the statements being consistent with her trial testimony he was speaking to the other parts of the statement which were not in evidence.

to facts outside of the evidence and improper. It was error to overrule Appellant's objection.

Additionally, Appellee does not address the improper comments by the prosecutor that Appellant's counsel failed to cross-examine on the statements to police, the contents of which were never in evidence. Obviously, such error is not harmless where the case rested upon the credibility of Daniel.

Appellee claims the error of improperly bolstering Daniel was harmless because Daniel made other statements consistent with her trial testimony to Laura Dunne and to Jeffrey Smith during the 911 call. Such a claim is without merit. As explained in Point II, Rene Daniel's narration to Laura Dunne constituted an improper bolstering of Daniel's trial testimony and does not make the error harmless. The statement to Jeffrey Smith during the 911 call simply did not bolster Rene Daniel's trial testimony. This statement merely indicated that Daniel had given someone a ride and that a gun was pulled (R1241). There is absolutely no mention of improper or aggressive actions by Appellant. The 911 call is not consistent with Daniel's trial testimony as to these matters and it cannot be said that the improper bolstering by the prosecutor was harmless as being merely cumulative to the 911 call.

Appellee next weighs the evidence and claims that the error was harmless because Appellant's testimony was not credible. As this Court has firmly stated, "harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence." State v. DiGuilio, 492 So. 2d 1129, 1139 (Fla. 1986). Instead, the focus needs to be on the possible

effect of the error on the trier-of-fact. Id. Of course, the error of improperly bolstering the state's star witness and improperly commenting on the defense not cross-examining alleged corroborating statements not in evidence, cannot be deemed harmless where this case rests on the credibility of Rene Daniel versus the credibility of Appellant. This is especially true where two independent witnesses -- the Bevises -- testified that they observed the struggle occurring when the shot was fired. Contrary to Appellee's opinion, Appellant's testimony of a struggle was not incredible as a matter of law.[2] The state's support for Appellant being the aggressor was Daniel's testimony of what occurred prior to the struggle. Daniel's credibility was an issue. The state has

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[2] There were facts for the jury consider other than those noted by Appellee. For example, Appellee claims that Appellant had no car problems. However, David McKenney, an auto mechanic who had worked on Appellant's car shortly before the incident, testified that he had spliced wires to get the car running but due to the condition of the car it could short out at times (R1549-50). Appellee also points out that Appellant did not have cocaine. Appellant never testified that he had cocaine. Rather, he testified he promised cocaine (which he did not have) in exchange for a ride. Finally, Appellee refers to the position of Mark Hastings to claim there was no struggle as Appellant claimed. However, there was testimony to such a struggle by independent witnesses -- the Bevises. Appellee's claim that Hastings was directly facing Appellant when the shot was fired is not necessarily true. Appellant did not describe the exact position of Hastings' head and body as he pushed him away, and more importantly, when the gun fired. Hastings' head and body could have been at an angle and when pushed could have started turning so that the shot would not hit him from the front. (Dr. Vila testified, "the projectile went through right to left back and front and had an upward trajectory (R1351) and not that the shot was directly to the rear as Appellee claims -- in fact, the position of the head could not be determined (R1373)). This would not be inconsistent with Appellant's testimony. Additionally, any alleged inaccuracy in testimony is minimal when one considers the conditions. This was a struggle. As Appellant explained, every-thing "happened in a moment" (R1703). Despite possible minor inaccuracies in the testimony of both side's witnesses, only the state improperly bolstered its witness, not the defense.

not, and cannot under these circumstances, prove beyond a reasonable doubt that the improper bolstering of Daniel was harmless. Appellant relies on his initial brief for further argument on this point.

POINT II

THE TRIAL COURT ERRED BY PERMITTING THE STATE TO INTRODUCE THE HEARSAY NARRATIVE STATEMENTS OF RENE DANIEL WHICH WAS IMPROPERLY USED TO BOLSTER HER TRIAL TESTIMONY.

Appellee addresses in a very summary manner, whether Rene Daniel's narrative to Laura Dunne qualifies under the excited utterance exception to the hearsay rule. As the party seeking the exception, Appellee has failed to prove the narrative meets the special reliability requirements of the excited utterance exception -- i.e. that it was impelled rather than the result of reflection.[3]

As explained in the initial brief, Daniel's statement to Dunne was a narrative after reflecting on events of the evening. The narrative was in response to a question as to what had happened, and included an ordered recitation of facts from the beginning of the evening (R1031-32). The narrative also includes carefully chosen details and words and quotes of what others said.[4] This narrative was not an excited utterance. Appellee's only claim is that since the statement was made 8 to 10 minutes after Daniel had arrived at the residence (R1033), there "was little if any time" to reflect. Appellee's Brief at 13. Appellee ignores that the

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[3] The rationale for the exception lies in the special reliability by excitement superseding the powers of reflection. See Hamilton v. State, 547 So. 2d 630 (Fla. 1989).

[4] For specifics, see Initial Brief at 36-37.

nature of the narrative itself shows reflection. The intervening circumstances have also been ignored. Prior to giving the narrative Daniel had called 911 and made a statement, which did not include the details of the narrative given to Dunne, and then she paced back and forth for a while and sat on the couch to relax and drink a soda (R1030,1035). There certainly was time and opportunity to reflect under these circumstances. Again, the actual narrative shows reflection in itself.[5]

Appellee claims that the bolstering of Daniel's testimony by her prior consistent statement to Laura Dunne was harmless because

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[5] Appellee mentions in a footnote that there is no possible motive for Daniel to fabricate. First, whether a motive to fabricate can be shown is not relevant to deciding this issue. Fabrication, like murder, can be found by a jury without proof of the motive. What is important is whether there was an opportunity for reflective thought which would permit fabrication. The statement at issue was not admissible under the excited utterance exception and improperly bolstered Daniel's trial testimony. Second, although one cannot read Daniel's mind to unearth her motives, it should be noted that there were potential possible motives for Daniel to fabricate prior to making her statement to Dunne. Daniel could have been motivated to hide certain facts -- such as her quest for cocaine. According to the defense, Hastings and Daniel agreed to give a ride in exchange for cocaine (R1690-91). The argument in the car, which eventually led to the struggle, was over the promised cocaine (R1693). Obviously, Daniel could be motivated to hide her quest for cocaine. This is especially true where she had a career requiring a security clearance as a technician monitoring radiation exposure levels in a nuclear power plant (R1193-94). Also, she could be hiding the extent of her relationship with Hastings. Her story was that she was getting in a car with Hastings early in the morning and was just innocently with him for a while. Contrary to Appellee's assertion, this admission is not the same as an admission to adultery, which Daniel denied (R1232). As a married woman, Daniel could want to conceal that she and Hastings were acting together as a couple trying to obtain cocaine. Again, the motives of Rene Daniel are not the easiest things to ascertain. After all, Daniel could never satisfactorily explain her motive for giving a strange man (Appellant), who she did not like, a ride home at 1:00 in the morning. Perhaps her motive would relate to something she was trying to conceal -- a quest for cocaine.

the statement was cumulative to the statement made to the 911 operator -- Jeffrey Smith. The 911 statement merely indicated that Daniel had given someone a ride and that a gun was pulled (R1241).[6] The 911 statement does not contain the details and facts that the hearsay narrative had in describing alleged aggressive actions by Appellant. In fact, the 911 statement never even mentioned Appellant. The hearsay narrative was not cumulative to the 911 call.

Appellee also claims that the error was harmless because the jury was aware that Daniel had made statements consistent with her trial testimony to police. With the exception of the prosecutor's improper comments in closing argument (see Point I), this is not true. The jury knew Daniel made some statements, but there was no evidence presented as to the content of the statements. However, the jury did hear Daniel's detailed narrative to Dunne. Thus, the error was not harmless on this ground.

Also, the error cannot be deemed harmless where the prosecutor relies on the statement in closing argument to bolster Daniel's testimony:

> MR. BARLOW: ... Laura Dunne comes in. And what Laura Dunne tells you, exactly that story. Now the defense will argue that the prosecutor in this case gave Laura Dunne the statement for Rene Daniels, but what did Laura Dunne also tell you. Laura Dunne told you that she was asked for the statement. That she was given the statement to see if there was anything inconsistent with what Rene Daniels had told her on a prior occasion, anything inconsistent to what she remembered

[6] Appellant's defense was that he was given a ride and pulled a gun after he was not allowed to exit the car. The 911 statement is not inconsistent with his testimony.

Rene Daniels saying. And there wasn't. Nothing at all.

(R2347-48) (emphasis added). As noted above, the prosecutor believed that the statement was so important to bolstering Daniel's credibility that he gave Laura Dunne her a copy of Daniel's statement to insure there were no inconsistencies. Appellant relies on his initial brief for further argument on this point.

POINT IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR THE STANDARD JURY INSTRUCTION ON PRIOR THREATS.

Appellee claims that the prior threat instruction was not warranted because Hastings' threat to Appellant occurred just prior to the shooting. However, the amount of time prior to the threat is not important. Because reasonableness of fear is an issue in Appellant's display of a gun, it is important is that Appellant knew of the threat prior to displaying the gun. There can be no litmus test for an exact amount of time before the display that the threats must occur -- it is only important that it is a prior threat. In fact, the more recent the threat, the more logical that Appellant would have reasonable apprehension of great bodily harm. The standard instruction on prior threats should have been given. Appellant relies on his initial brief for further argument on this point.

POINT V

THE TRIAL COURT ERRED IN FORCING APPELLANT TO PRESENT EVIDENCE OF HIS SILENCE AT THE ARREST SCENE.

Appellee claims it was not error to force presentation of evidence of silence under the "rule of completeness" citing this

Court's decision in Johnson v. State, 17 Fla. L. Weekly S603 (Fla. Oct. 1, 1991). However, Johnson is inapposite because the remainder of the incomplete statement in that case did not pertain to a constitutionally prohibited area. Whereas this case involves a prohibited comment on silence. In addition, the rule of completeness would only apply to the portion of the statement necessary to explain Holman's sentence, "I'm not able to tell you that." Thus, the portion of the statement about Appellant opening his eyes would be permitted, but not the comment that "He would not answer anything."

Appellee next claims that the answer "He would not answer anything" is not a comment on silence because no state action was involved. Such is not true. Appellant was in police custody at the time he "would not answer anything."[7] Also, contrary to Appellee's claim, it is impermissible to comment on a defendant's silence even in absence of Miranda warnings. Webb v. State, 347 So. 2d 1054 (Fla. 4th DCA 1977); Lee v. State, 422 So. 2d 928 (Fla. 3d DCA 1982). Holman's testimony that Appellant was in handcuffs, surrounded by deputies, and he would not answer anything -- without explanation as to who was asking him questions -- was fairly susceptible to being interpreted as a refusal to answer the deputies' questions. The fact the statement may be susceptible to alternative interpretations does not cure the error. State v. Thornton, 491 So. 2d 1143, 1144 (Fla. 1986).

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[7] Holman testified that he observed Appellant in handcuffs and surrounded by deputies (R1310-11).

Appellee also states the general comment on silence was harmless because the testimony was cumulative to Crystal Haubert's testimony that Appellant wouldn't answer questions. However, Appellant also moved for a mistrial due to Haubert's testimony (R1337). As Appellant explained in the initial brief, the error is not harmless.

POINT VI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL FOR ATTEMPTED SEXUAL BATTERY, KIDNAPING, AND MURDER.

Appellee claims that the evidence of Appellant asking Daniel to remove her clothes combined with later grabbing her left breast, and Daniel's response, "Please don't do that" (R1169), followed by no action on Appellant's part constitutes an attempted sexual battery.[8] Appellee relies on Morehead v. State, 556 So. 2d 523, 525 (Fla. 5th DCA 1991) which states that an "overt act" must be "more than mere preparation" and must be "adapted to effect the intent to commit the particular crime." Preparation is defined as "arranging the means or measures necessary for the commission of the offense." 556 So. 2d at 524. "The attempt is the direct movement toward the commission after preparations are completed." Id. at 524-525. In Morehead, the defendant was charged with attempted escape. The state claimed the overt act occurred when the defendant cut his hand in order to obtain medical treatment in a place where he would meet his girlfriend who would help him

[8] Appellant vigorously disputes the truth of Daniel with regard to this evidence (see Points I and II), but for the purpose of determining sufficiency of the evidence Appellant is resolving all conflicts in evidence in favor of Daniel's credibility as he is required to do.

escape. This was held to be preparation because the defendant was merely arranging for a means of escape, but not a movement toward committing the escape after the preparations.

Likewise, in this case the order for Daniel to remove her clothes[9] was, at best, a mere arrangement for a means of committing some crime, but is not an attempt because there was no further movement toward committing a sexual battery after preparations. In fact, the preparation in this case, the removal of clothing, was never completed. There was insufficient evidence of an attempted sexual battery.

Also, the evidence in this case shows mere preparation toward attempting something. There is not even sufficient evidence of what Appellant was preparing to do where after Daniel told Appellant "Please don't do that" there was no further action on Appellant's part. Even if Appellant's actions indicate the intent to commit "some" crime -- they are not sufficient to show that the particular crime of sexual battery was being attempted. We are left to pure speculation, rather than evidence with the potential for proving guilt beyond a reasonable doubt, as to whether an attempted sexual battery was committed.

Appellee essentially claims that the evidence was sufficient for kidnapping because the car exited the parking lot and headed away from the people at Mr. Laff's. If only this was required for kidnapping, then it occurred every time a car left the parking lot that night. Also, all the cases cited by Appellee are significant-

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[9] As stated in the Initial Brief the earlier alleged touching of the breast is not an act related to the offense of sexual battery. See Lanier v. State, 443 So. 2d 178 (Fla. 3d DCA 1983).

ly different from the instant situation. Those cases all involved successful abductions. Whereas, Appellant only tried to abduct Hastings and Daniel against their wills one time -- when he directed them to drive the car down a road.[10] Since the request was totally disobeyed, there was at best an attempted kidnapping, but not an actual kidnapping. Appellant relies on his initial brief for further argument on this point.

POINT VIII

THE TRIAL COURT ERRED IN PRECLUDING APPELLANT FROM PROFFERING TESTIMONY TO A LINE OF QUESTIONING AND IN PRECLUDING APPELLANT FROM PRESENTING LEGAL ARGUMENT.

Appellee claims to know why Appellant wanted to proffer evidence and what evidence was to be proffered even though defense counsel was prohibited from even arguing why the proffer was needed (R1199). Appellee even claims the substance of the evidence was before the court. However, Appellee is in no position to know what arguments or proffers defense counsel wanted to make where he was prohibited from making argument.[11] To assume the purpose or nature of the line of questioning, and the answer it would yield, without permitting counsel to present legal arguments and proffers is clearly wrong and constitutes reversible error. Appellant relies on his initial brief for further argument on this point.

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[10] The state's theory was that Appellant was trying to get to an isolated area by having the car go down this road. However, if true, the attempt to get to the isolated area was unsuccessful. It should also be noted that this road led directly to Appellant's house (R1391-92).

[11] Appellate counsel concedes that the explanation in the initial brief as to relevancy is pure speculation. Only defense counsel was in position to argue why the proffer was relevant, but he was prevented from making such legal argument (R1199).

POINT IX

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY PROSECUTORIAL MISCONDUCT DURING TRIAL.

Appellee condones the prosecutor's actions by claiming he simply asked Appellant if the gun belonged to him. The prosecutor's actions were not this innocent. After being told not to walk around with the gun and not to place the gun in front of Appellant (R1771), the prosecutor paraded around with the gun and handed it to Appellant (R1772).

More importantly, Appellee relies on Spriggs v. State, 392 So. 2d 9 (Fla. 4th DCA 1980) to claim the prosecutor was proper in commenting on Appellant's demeanor during closing argument. In Spriggs, such conduct was found to be improper, but the error was harmless under the particular facts of that case. Appellant relies on his initial brief for further argument on this point.

POINT XI

THE TRIAL COURT ERRED IN PROHIBITING APPELLANT FROM INTRODUCING EVIDENCE THAT MARK HASTINGS HAD A REPUTATION FOR USING DRUGS.

Appellee argues that Hastings' reputation is not relevant because there was no evidence that he ingested cocaine or that Appellant knew of his reputation. This evidence was not being offered for these purposes. Rather, the evidence was offered to show that Hastings was acting in conformity with his character. As fully explained at page 64 of the initial brief, this evidence is relevant and can be proven through reputation evidence.

Also, contrary to Appellee's argument, Appellant presented a proffer to which the state stipulated (R1599-1601).[12]

Finally, Appellee claims the error is harmless because the witness testifying to Hastings' reputation has little credibility. It is the function of the jury to determine credibility and error cannot be deemed harmless based on the perceived lack of credibility where the jury was never permitted to judge that witness' credibility. Appellant relies on his initial brief for further argument on this point.

PENALTY PHASE

POINT XII

THE TRIAL COURT ERRED IN EXCLUDING A DEFENSE WITNESS DURING THE PENALTY PHASE AND IN PROHIBITING APPELLANT FROM PROFFERING THE TESTIMONY OF THE WITNESS.

1. **IT WAS REVERSIBLE ERROR TO PREVENT APPELLANT FROM PROFFERING THE TESTIMONY OF MARSHA JONES.**

Both parties differ on whether Marsha Jones' testimony would be relevant (see Part 2 below). "Which of these two views, if either, is correct cannot be determined on this record absent the proffer." Pender v. State, 432 So. 2d 800, 802 (Fla. 1st DCA 1983). Contrary to Appellee's claim, the trial court did not narrowly rule that Jones' testimony only went to attack Appellant's prior conviction. Instead, the trial court excluded the evidence and denied the proffer on the broad ground that all that was relevant was that Appellant "was under a sentence":

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[12] The state did challenge the relevancy of Hastings' reputation in the court below and indicated that if the evidence were admitted the credibility of the witness would be challenged (R1599-1601). However, the prosecutor did stipulate to the proffer (R1600).

> THE COURT: We're not -- we're not re -- that's denied. I'm not gonna hear a proffer because I think it'd be a wasted effort to hear her proffer. Were not here to en -- engage in the retrial of the case in Virginia. All he has to prove is that he was under a sentence. That's all the State has to prove. So I'm -- I'm gonna deny your adding her to the witness list. I'm gonna deny your proffer. So you must live with those two rulings.

(R2674) (emphasis added).[13] As even Appellee concedes, the details of the prior conviction may be relevant, and not just the fact that the defendant was under sentence. Francois v. State, 407 So. 2d 885, 890 (Fla. 1982). Without permitting a proffer of Marsha Jones's testimony one cannot judge whether the evidence regarding the Virginia case was relevant. Pender, supra. It was error to preclude Appellant from proffering the testimony. Id. (error to preclude proffer of testimony which was potentially relevant).

2. IT WAS REVERSIBLE ERROR TO EXCLUDE A DEFENSE WITNESS DURING THE PENALTY PHASE.

Despite Appellee's claims otherwise, there were several reasons offered by Appellant as to why Jones' testimony might be relevant. First, Appellant would have tried to show it was relevant to rebut allegations of the beatings during the Virginia incident:

> MR. LASLEY: That her testimony would have rebut -- would have cast doubt on the credibility of the alleged victim's testimony, the Virginia rape had to the beatings inflicted upon her.
>
> THE COURT: Yeah, right.

[13] The trial court made this ruling despite the fact that the state was permitted to elicit the details of the Virginia case.

MR. LASLEY: Now that doesn't mean there's a difference between rebutting -- he was, in fact, convicted of rape, that's true.

THE COURT: And he was sentenced.

MR. LASLEY: All right.

THE COURT: And that's true.

MR. LASLEY: Yes -- yes sir.

THE COURT: Right.

MR. LASLEY: But then the Court goes on and allows the victim to recount this beating, which not only was he acquitted of, but I have a witness present which can offer testimony to rebut her testimony I'm not rebutting the rape conviction anymore, I am rebutting this beating.

THE COURT: Yes.

MR. LASLEY: That's what we would have rebutted.

(R2927-28) (emphasis added). Notwithstanding Appellee's protests, this clearly would be relevant. Francois v. State, 407 So. 2d 885, 890 (Fla. 1982) ("a defendant must be allowed to present evidence pertaining to the degree of involvement in and the circumstances of the events upon which previous convictions are based").

Secondly, Appellant could rebut that he actually committed a sexual battery. Chandler v. State, 534 So. 2d 701 (Fla. 1988), cited by Appellee, holds that redetermination of the phase I determination during the penalty phase is not proper and does not control the instant situation. In Chandler, the jury had to accept as fact the conviction for which the defendant was being sentenced. However, Chandler does not prohibit challenge of a conviction separate from the crime charged which is being utilized as an aggravating factor.

Third, due process requires that if the state informs the jury of its version of a prior offense, the defendant must be permitted to present his side. See O'Connell v. State, 480 So. 2d 1284 (Fla. 1985) (permitting one side voir dire, while prohibiting the other, violates due process); Francois v. State, supra. Essentially, a party misleads the jury by painting only a part of the true picture. The trial court errs by excluding evidence the other party offers to correct that misrepresentation. See Parker v. State, 476 So. 2d 134, 139 (Fla. 1985). Even otherwise inadmissible evidence, such as the details of prior convictions, becomes admissible when the other party opens the door by misinforming the jury. See Dodson v. State, 356 So. 2d 878, 879 (Fla. 3d DCA 1983); Nelson v. State, 395 So. 2d 176, 178 (Fla. 1st DCA 1981). It was error to exclude Appellant's version. Appellant relies on his initial brief for further argument on this point.

POINT XIII

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE FOR WHICH APPELLANT WAS ACQUITTED.

Appellee claims that the prosecutor did not introduce evidence of an attempted murder for which Appellant was acquitted. Such is not true. While the prosecutor did not introduce testimony quoting the specific words "attempted murder," the prosecutor over objection was allowed to produce evidence alleging the beating of Tia Hayes -- the evidence which made up the charge of attempted murder for which Appellant was acquitted. Detective Showalter from Virginia testified on proffer that the beating was not part of the rape, but was part of the attempted murder charge for which

Appellant was acquitted and that Appellant was "acquitted flat out of the beating":

> Q [Defense Counsel]: All right. And the attempted murder charge related to the severity of this beating, am I correct?
>
> A [Detective Showalter]: That is correct.
>
> Q All right. And he was acquitted by that jury of attempted murder, right?
>
> A Correct, sir.
>
> Q And they didn't even come back with a lesser, did they, a lesser crime. The just acquitted him flat out of that beating, is that right?
>
> A Correct, sir.

(R2704) (emphasis added). Clearly, it was error to allow the prosecutor to produce details of the beating for which Appellant was acquitted.

Appellee's reliance on Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992) is misplaced as it deals with the murder for which the defendant was convicted as opposed to an acquittal which occurred in this case.

Finally, the prejudicial value of the details of the beating for which Appellant was acquitted clearly outweigh any probative value attaching to those details. See Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). Appellant relies on his initial brief for further argument on this point.

POINT XIV

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE TESTIMONY REGARDING TORN AND DISHEVELED PANTIES WHICH WERE NOT RELEVANT.

Appellee fails to point to evidence that the panties were linked to Tia Hayes, but relies on United States v. Kubiak, 704 F.2d 1545 (11th Cir. 1983) to claim that the failure to link the evidence goes to weight and not admissibility. Appellee's reliance on Kubiak is misplaced. In Kubiak, the issue was whether marijuana was linked to the defendant and the court held that this ultimate question could be proven circumstantially which the prosecution did. In the present case the state did not even attempt to link the panties to Tia Hayes. This link was not the ultimate issue which could be proven circumstantially. Instead, this situation is like Castro v. State, 547 So. 2d 111, 114 (Fla. 1989) and Huhn v. State, 511 So. 2d 583 (Fla. 4th DCA 1987) where it was error to introduce evidence of a weapon which was not linked up to the crime charged.

Appellee next argues that the error was harmless because the panties were used by the prosecutor in detailing the facts of the prior crime. However, the prosecutor never utilized the panties in such a manner. He never connected them to the crime or linked them to Hayes. Instead, he merely introduced them into evidence without explanation. The jury was left to speculate. For the reasons stated in the initial brief the error cannot be deemed harmless.

POINT XV

THE TRIAL COURT ERRED IN FAILING TO FIND THE NON-STATUTORY CIRCUMSTANCES PRESENTED AND ARGUED IN THIS CASE.

Appellee claims that the trial court did not err in giving little weight to the non-statutory mitigating circumstances. However, Appellant is not claiming the trial court abused its discretion as to deciding how much weight to give these circumstances. Rather, the error is the trial court's failure to exercise any discretion by failing to find the non-statutory circumstances as it is required to do when such circumstances were presented and uncontroverted. The trial court was specific and unequivocal in its sentencing order that it found no non-statutory circumstances to exist:

> "This court has duly considered all the testimony and evidence regarding non-statutory mitigating circumstances but finds that none were shown by any standard of proof."

(R4368) (emphasis added). Where the existence of a proposed non-statutory mitigating circumstance is "reasonably established by the greater weight of the evidence" the trial court errs in failing to find the circumstance. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). Clearly, in this case Appellant presented a number of uncontroverted non-statutory mitigating circumstances. See Initial Brief at 72-76.[14]

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[14] Appellee has even recognized that at least three circumstances were proven by the defense -- "(1) the death of Appellant's father changed his life; (2) Appellant was good to his family and provided for his mother; (3) Appellant was severely injured during childhood and the injuries affected the rest of his life." Appellee's brief at 48. Appellee then claimed there would be no error in giving these little weight. As explained above, the error was in failing to find these uncontroverted circumstances and, because

Appellee also argues that the mitigators deserve little weight. However, it was the trial court's, and not Appellee's function, to weigh the mitigators. How can one exercise discretion in weighing the mitigators where one fails to even find them? Of course, one can't weigh something that he or she doesn't know exists. The failure to exercise any discretion in weighing the mitigators is why the failure to find the mitigators cannot be deemed harmless.

In addition, it must be noted that Appellee's discussion, as to the mitigators being insignificant, is based on inaccurate representations as to what circumstances were presented and their significance. For example, as to the non-statutory circumstance that Appellant had been drinking and his judgment was impaired at the time of the offense, Appellee argues it is of no weight because Appellant was not "extremely inebriated" and not "too drunk to know what happened." Appellee's brief at 50-51. However, Appellant is not claiming that he was so intoxicated to relieve him of legal responsibility. This is not even the purpose of the statutory circumstance of "substantial impairment." Rather, Appellant had been drinking significantly as shown by his blood alcohol level of .16 (R2795). This is significant in that alcohol consumption causes Appellant to become a "different man" and reduces his ability to make sound judgments and perceive the attitudes of others correctly (R2799). This type of mitigation is especially significant in that it can explain Appellant's poor judgment during

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of the error, the trial court failed to exercise its discretion in determining how much weight to give these circumstance.

the incident and thus reduces his moral culpability. In line with this is Appellants history of alcohol abuse and anemia which diminish his ability to withstand the effects of alcohol. The significance of this factor is that Appellant's judgment was impaired and thus is mitigating. It was never claimed that Appellant's actions were excusable because he was "extremely inebriated" and unable to control his behavior.

Appellee also claims there is no guarantee of rehabilitation from Appellant's alcohol problem. Appellant concedes there are no guarantees in life. The text Appellee refers to is where Dr. Scarlotti was asked for a definitive answer as to whether Appellant had "bottomed out." Of course, Dr. Scarlotti could not give a definitive answer. However, Dr. Scarlotti did testify the type of incident Appellant had experienced definitely could cause him to bottom out which would trigger a willingness to cooperate with rehabilitation efforts and the chances for such would be very high.[15] Thus, contrary to Appellee's claim, chances for rehabili-

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[15] Q [Mr. Lasley] Would that be such a bottom that would trigger willingness to cooperate with recovery?

A [Dr. Scarlotti] Yes, most definitely could be.

Q And what is the prognosis of Mr. Rogers' recovery given adequate help in the penal system?

A Again based on willingness in the individual the success rate is very, very high. The individual has a strong chance of success particularly if the conditions around that person are supportive of recovery.

(R2803).

tation are very high. This is true even though rehabilitation is not guaranteed.

As to the other non-statutory mitigating circumstances, Appellee basically argues they are not significant because they occurred years ago. Such is not totally true. More importantly, Appellee ignores the importance of these factors and that they impacted Appellant throughout his life. For example, Appellant was afflicted by major obstacles throughout his life such as a number of operations which affect his health to this very day (R2760). The resulting health problems were recent where Appellant was hospitalized and described as a "walking dead man" (R2727). Despite these problems there was significant evidence of good character qualities presented. See Initial brief at 74. Appellee makes the claim that Appellant "was not deprived of anything." It is true that when Appellant was young his father tried to give him advantages and opportunities (R2737). Appellant was close to his father (R2761). Contrary to Appellee's claim, the loss of his father less than two weeks prior to Appellant's high school graduation was the greatest deprivation he could suffer. As a result, Appellant took the death hard, became depressed, and his drinking problem began (R2761-62). To some extent he was able to overcome some of these problems as shown by the fact that he provided for his mother and was able to attend college (R2725-26). But to those who knew Appellant best, the death and drinking began a chaotic life from which Appellant was never fully able to recover (R2761-62). Appellant was breaking down physically and behaviorally (R2795).

Obviously, the non-statutory mitigating circumstances deserve to be given some weight. In this case, the trial court erred by specifically refusing to find any non-statutory mitigating circumstances. The error cannot be deemed harmless. Appellant relies on his initial brief for further argument on this point.

POINT XVI

THE TRIAL COURT ERRED IN FAILING TO CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES IN ITS SENTENCING ORDER.

Appellee claims that the trial court's statement that it "considered all the testimony regarding non-statutory mitigating circumstances" but found none is sufficient. However, under Campbell v. State, 571 So. 2d 415 (Fla. 1990), the trial court must "expressly evaluate in its written order" the specific mitigating circumstances presented by the defense. Since that was not done here, a new sentencing hearing is required. Appellant relies on his initial brief for further argument on this point.

POINT XX

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE JURY INSTRUCTIONS ON MITIGATING CIRCUMSTANCES REQUIRING "EXTREME" MENTAL OR EMOTIONAL DISTURBANCE AND "SUBSTANTIAL" IMPAIRMENT.

Appellee claims because defense counsel was able to argue to the jury regarding the effect of alcohol in closing, the trial court was not required to instruct the jury properly. However, an attorney's argument to the jury is not a substitute for an adequate jury instruction. Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). More importantly, Appellant's closing argument highlights why the instruction must be given without the

modifiers. Due to the instructions given, Appellant made the only possible argument within the limits of the instruction given -- that the offense was committed while under the "influence of extreme mental or emotional disturbance" (R2854-55).

Appellee's reliance on Foster v. State, 17 Fla. L. Weekly S558 (Fla. Oct. 22, 1992) is misplaced. The defendant in Foster was allowed jury instructions on the non-statutory mitigator less than an "extreme" disturbance,[16] and because of these instructions the defense attorney argued that the defendant was under an emotional disturbance even if it did not meet the level required by statute. In the instant case, there was not an instruction without the modifiers "extreme" and "substantial." The use of the modifiers restricts consideration of non-statutory mitigating evidence. Cheshire v. State, 568 So. 2d 908 (Fla. 1990). Appellant relies on his initial brief for further argument on this point.

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[16] The special instructions on mitigators included the following which were less than extreme emotional disturbance:

> Among the mitigating circumstances which you may consider are the following ...
>
> Fifth, the physical illness of the defendant ...
>
> Seventh, any alcohol or drug addiction of the defendant ...
>
> Eighth, a troubled personal life including depression and frustration ...
>
> Twelfth, the learning disability suffered by the defendant ...

17 Fla. L. Weekly at S659.

POINT XXI

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THEY COULD FIND THE AGGRAVATING FACTOR THAT THE KILLING WAS COLD, CRUEL, AND PREMEDITATED.

Contrary to Appellee's implied assertions otherwise, this Court has never held that a killing occurring during a struggle was CCP. Clearly, CCP could not apply in this case. See page 89 of Initial Brief.

Appellee also claims that instructing on CCP was harmless. However, the prosecutor heavily relied on this factor in arguing to the jury for a recommendation of death (R2845-46) and, despite significant mitigation and the interrelation of the other aggravators the jury recommended death. It cannot be said beyond a reasonable doubt that the error was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

POINT XXII

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

Appellee claims the sentence is proportional because there was more than one aggravating factor. However, deciding proportionality is not merely a function of counting aggravators. See Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988). One test for determining whether a death sentence is proportional is whether it is for one of "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). The killing, which even the state witnesses testified occurred during a struggle, at bar does not fit as "the most aggravated, the most indefensible of crimes." Thus, the death penalty is not proportionally warranted.

A second way a sentence may not be proportionally warranted is based on the quality of the mitigators and aggravators. Appellee attempts to distinguish the cases cited in the initial brief because they have different facts than the instant case. Of course the facts are not identical. But, as in those cases, significant mitigators are present while only interrelated, or duplicitous, aggravators are present in this case. Appellee claims that the significant history of alcohol affecting Appellant's life, the death of his father changing his life, severe injuries affecting his life, substantial evidence of his good character, and the fact he had been drinking at the time of the offense and his judgment was impaired, was rebutted by the facts of the case. However, Appellee is unable to recite any facts to rebut this significant mitigating evidence. Also, Appellee does not challenge the fact that the three aggravators were all interrelated and did not include the two most severe aggravators -- HAC and CCP. It cannot be said that this is one of the most aggravated and least mitigated murders for which the death penalty is reserved. Appellant relies on his initial brief for further argument on this point.

POINT XXIII

THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY DEFINE NON-STATUTORY MITIGATING CIRCUMSTANCES.

Appellee claims that the specially requested instruction on Appellant using alcohol during his youth (2SR169,207) was granted. This is not true. Appellee's requested instruction on this circumstance was #24. Appellee refers to Appellant's requested instruction #14 which deals with a different subject (R2772). Also contrary to Appellee's claim, Appellant rerequested the instruction

on being under the influence of alcohol (R2774) after the trial court indicated that the instruction should be rerequested, and the trial court denied this instruction (2SR206,R2774). Appellant relies on his initial brief for further argument on this point.

CONCLUSION

Based on the foregoing arguments, this Court should vacate Appellant's convictions, and vacate or reduce his sentences, and remand this cause for a new trial or grant other relief as it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 13th day of January, 1993.

Jeffrey L. Anderson
Of Counsel