9-27

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner/Cross-Respondent, :

vs. : Case No. 84,215

ALLAN G. IACOVONE, :

Respondent/Cross-Petitioner. :

_____ :

MANDATORY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT/CROSS-PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR RESPONDENT/CROSS-PETITIONER

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STATEMENT OF THE CASE

Mr. Iacovone accepts the statement of the case set forth in the Brief of Petitioner with the following additions:

At the sentencing hearing of May 15, 1992, the defense attorney argued that sentencing Mr. Iacovone pursuant to sections 784.07(3) and 775.0825 for the conviction of the lesser charge in count III would violate equal protection (R607). This issue was raised in the written motion for new trial (R725). Before imposing sentence, the trial judge, Diana Allen, made the following remarks expressing concern over the sentencing issue raised:

> I am not finding that there is an equal protection violation.
>
> I am, however, indicating on the record that it is illogical based upon Ms. Garcia's argument and inherently unfair that someone who commits the completed crime of third degree murder of a law enforcement is subject to a lesser penalty than someone who commits an attempted crime, however, I am going to follow the law for sentencing on that count as I understand the law to be pursuant to the legislature.

(R664).

After receiving the thirty-year sentence, with a twenty-five year minimum mandatory term, Mr. Iacovone timely filed a notice of appeal on May 19, 1992 (R744-745). The Second District Court of Appeal issued its opinion on July 22, 1994.

The state filed a motion to stay the mandate on August 10, 1994, which the district court denied on August 17, 1994.

On August 11, 1994, the state filed a "Notice of Appeal" in this Court which characterized the district court's opinion as "a

final order declaring invalid Sections 784.07(3) and 775.0825, Fla. Stat. (1991)." Mr. Iacovone filed a motion to dismiss for lack of jurisdiction (which, to date, this Court has not yet ruled on), and a notice of cross-appeal (in the event that jurisdiction is granted).

STATEMENT OF THE FACTS

Mr. Iacovone accepts the statement of the facts set forth in the Brief of the Petitioner.

SUMMARY OF THE ARGUMENT

The district court properly found that the Equal Protection Clause prohibits application of sections 784.07(3) and 775.0825 in this case. The jury was given a verdict form for count III that included attempted first-degree murder and several lessers. The jury chose to convict Mr. Iacovone of the lesser of attempted third-degree murder.

It makes no sense to apply the enhancement statutes to the attempted third-degree murder conviction presented at bar. The result reached is that the crime of attempted third-degree murder of a law enforcement officer is punished much more severely than the completed crime of third-degree murder of a law enforcement officer. The district court properly concluded that this result is irrational and, hence, violative of the rationality requirement contained within the equal protection clause.

Another way to analyze the sentencing enhancement statutes is to recognize that the legislature's intent in enacting the statutes was to enhance the punishment for those who attempt to commit first-degree murder of law officers. This is the logical construction of the statutes, because any other construction renders the statutes unconstitutional, as the district court correctly concluded.

The state contends that attempted third-degree murder of a law enforcement officer is punished the same as attempted first-degree murder of a law enforcement officer under the statutory sentencing scheme at issue. If, as the state argues, the sentencing enhance-

ment provisions do apply in this case, then the jury was deceived into thinking they were convicting of a lesser when, in fact, the "lesser" was really the same degree crime as attempted first-degree murder of a law enforcement officer. Taking the state's argument to its logical conclusion, attempted third-degree murder of a law enforcement officer should not have been presented to the jury as a lesser at all (although the state did not object to the instruction at the trial). If the punishment is the same for all kinds of attempted murders, the attempted third-degree murder is a non-existent lesser. One may not be found guilty of a non-existent crime; therefore, the proper remedy is to discharge Mr. Iacovone.

The district court chose not to address two evidentiary issues raised by Mr. Iacovone. Where this court has jurisdiction to review an entire case properly before it, Mr. Iacovone requests review of the these issues which substantially affected the fairness of the trial. These issues require that a new trial be granted on all the charges.

First, the trial judge erred when she allowed the state to present a good deal of evidence relating to the prior bad dealings between Allan Iacovone and his girlfriend, Lori Cuervo. This evidence was irrelevant to the charges in this case which arose from an incident on Christmas morning of 1992. The victims in this case were Lori's sister (Cindy Cuervo), her father, and Deputy Hogsten. The evidence of prior bad acts, abuse of and threats against Lori Cuervo, was irrelevant and served only to show a propensity to violence.

Second, the trial judge erred when she excluded the defense proffered testimony of excited utterances made by Allan Iacovone immediately after the incident which gave rise to the charges. Contrary to the trial judge's ruling, these excited utterances were admissible regardless of whether the content of the statements was exculpatory in nature.

ARGUMENT

ISSUE I

WHETHER THE DISTRICT COURT CORRECTLY RULED THAT MR. IACOVONE'S GUARANTEE OF EQUAL PROTECTION WAS VIOLATED WHEN THE SENTENCING ENHANCEMENT PROVISIONS OF SECTIONS 784.07(3) AND 775.0825, FLORIDA STATUTES (1991), WERE APPLIED IN HIS CASE.

In Count III, Mr. Iacovone was convicted of attempted third-degree murder of a law enforcement officer, which was charged to the jury as a lesser-included offense (R568, 571-72). The trial judge adjudicated him guilty of a life felony and sentenced him to a twenty-five year minimum mandatory, just as if he had been convicted of the main crime of attempted first-degree murder of a law enforcement officer (R663-64). In convicting and sentencing Mr. Iacovone, the trial judge relied on sections 784.07(3) and 775.0825, Florida Statutes (1991), which read:

> 784.07(3) Notwithstanding the provisions of any other section, any person who is convicted of attempted murder of a law enforcement officer engaged in the lawful performance of his duty or who is convicted of attempted murder of a law enforcement officer when the motivation for such attempt was related, all or in part, to the lawful duties of the officer, shall be guilty of a life felony, punishable as provided in s. 775.0825.
>
> . . . .
>
> 775.0825 Attempted murder of a law enforcement officer; penalty. - Any person convicted of attempted murder of a law enforcement officer as provided in s. 784.07(3) shall be required to serve no less than 25 years before becoming eligible for parole. Such sentence shall not be subject to the provisions of s. 921.001.

The district court's opinion, holding that the enhancement statutes are unconstitutional as applied, is solidly grounded, and furthers the legislative intent. The legislature never intended the statutes at issue to apply in attempted third-degree murder situations. This court should uphold the Second District Court in this case. If this Court disagrees with the result reached by the district court, then Mr. Iacovone requests discharge on the grounds that attempted third-degree murder of a law enforcement officer is a non-existent lesser offense of the main crime that he was tried for, attempted first-degree murder of a law enforcement officer.

The district courts that have analyzed the sections at issue have arrived at differing interpretations as to whether the sections create a sentencing enhancement provision or whether the sections create a new substantive offense of attempted murder of a law enforcement officer. Most of the cases that have addressed the constitutionality of sections 784.07(3) and 775.0825 have analyzed the sections as though they were intended to be sentencing enhancement provisions. See, e.g., Carpentier v. State, 587 So.2d 1355 (Fla. 1st DCA 1991)[1] and Colquitt v. State, 588 So. 2d 49 (Fla. 3d DCA 1991). When sections 784.07(3) and 775.0825 are analyzed as sentencing enhancement provisions, it is clear that these sections were not intended by the legislature to be applied

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[1]In Carpentier, the enhancement statutes were able to withstand constitutional scrutiny in an attempted first-degree murder situation. Concerns over the constitutionality of the third-degree murder situation were raised in Carpentier and Nephew v. State, 580 So. 2d 305, 306, n.1 (Fla. 1st DCA 1991). Likewise the trial judge, Diana Allen, recited a concern over the sentencing result reached in this case (R664).

in third-degree murder situations. Any other interpretation renders the statutes unconstitutional, as the district court correctly found in this case. Thus, if Mr. Iacovone's attempted third-degree murder conviction is valid, the crime is punishable as a third-degree felony only, and not as a life felony with a twenty-five year mandatory term.

An examination of the sentencing scheme for homicides indicates that it is irrational to apply sections 784.07(3) and 775.0825, Florida Statutes (1991), to attempted third-degree murder situations. First-degree murder, when the victim is a law enforcement officer, is a capital felony punishable by death or life in prison without eligibility for release. §§ 782.04(1) and 775.0823(1), Fla. Stat. (1991). Additionally, section 921.141(5)(j), Florida Statutes (1991), provides for a statutory aggravating circumstance weighing in favor of the death penalty when the victim is a law enforcement officer. Attempted first-degree murder is enhanced from a first-degree felony (§§ 782.04(1) and 777.04 (4)(a)) to a life felony with a twenty-five year mandatory when the victim is a law enforcement officer (§§ 784.07(3) and 775.0825, Fla. Stat. (1991)).

It is clear from the result that the legislature intended the enhancement statutes to apply in the attempted first-degree murder situation. The crime has been enhanced one degree and a minimum mandatory term has been added when the victim is a law enforcement officer. This result is comparable to other enhancement penalties enacted by the legislature. For example, a firearm enhancement

increases a crime one degree. § 775.087, Fla. Stat. (1991). Likewise, the hate crimes statute enhances a crime one degree. § 775.085, Fla. Stat. (1991).

In contrast, the result reached when sections 784.07(3) and 775.0825 are applied to attempted third-degree murder situations does not make sense. Third-degree murder is a second-degree felony punishable by fifteen years in prison. §§ 782.04(4) and 775.082 (3) (c), Fla. Stat. (1991). The crime is enhanced with the addition of a fifteen-year minimum mandatory when the victim is a law enforcement officer. §775.0823 (3), Fla. Stat. (1991). Attempted third-degree murder is a third-degree felony punishable by 5 years in prison. §§ 782.04 (4) and 777.04 (4) (c), Fla. Stat. (1991).

Applying sections 784.07 (3) and 775.0825 to the crime of attempted third-degree murder raises that crime from a third-degree felony to a life felony (a three-step jump in classifications) punishable outside the guidelines by a twenty-five year mandatory. The completed crime of third-degree murder of a law enforcement officer is a second-degree felony, lower in degree and penalty than the attempt.[2] It does not make sense that the legislature intended the enhancement statutes to apply in the third-degree murder situation where the completed crime is two felony classifications lower than the attempt.

If the generic term "attempted murder" used in section

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[2]Second-degree murder of a law enforcement officer, a first-degree felony under section 782.04 (2) and (3), is also lower in degree than an attempted third-degree murder enhanced under section 784.07 (3).

784.07(3) is construed as referring to any attempted murder including the crime of attempted third-degree murder, then that section is unconstitutional as violative of the Equal Protection Clause[3] because the statute creates an irrational sentencing scheme. An example of a criminal statutory scheme failing under this application of equal protection can be seen in the recent case, People v. Suazo, 867 P.2d 161 (Colo. Ct. App. 1993), which was cited by the district court. In Suazo, the court held that Colorado's assault on the elderly statute violated the defendant's right to equal protection where the penalties were not rationally related to culpability:

> As a result of the operation of s. 18-3-209, however, a person who commits second degree assault on the elderly with provocation would be convicted of a class one misdemeanor, while a person who, also with provocation, commits third degree assault on the elderly -- and thus who acted less culpably and has caused less harm -- would be convicted of a class 5 felony. This legislative scheme allows an irrational classification to occur.

Applying the same analysis used by the court in Suazo, the enhancement statutes in this case evince an equal protection violation as applied.

Where the enhancement statutes are applied in the attempted third-degree murder situation, a due process violation also occurs, as pointed out by Judge Zehmer in a concurring opinion in State v. Carpentier, 587 So. 2d at 1359, which the Second District cited in footnote three of the opinion below.

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[3]U.S. CONST. amend. XIV; FLA. CONST. art. I, §2.

Finally, the statutes as applied would also fail under the Eighth Amendment to the United States Constitution and Article 1, section 17 of the Florida Constitution. The Florida Constitution prohibits cruel or unusual punishment, "arguably a broader constitutional provision" than the Eighth Amendment. Hale v. State, 630 So. 2d 521, 526 (Fla. 1993). As described above, the enhancement statutes provide a highly unusual punishment where they produce a far greater penalty for the attempt than for the completed crime of third-degree murder.

The statutes at issue in this case do not survive an Eighth Amendment proportionality analysis. See Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed. 2d 637 (1983); see also, Hale v. State, 630 So. 2d at 525 (Fla. 1993) ("Solem is still binding and serves as a minimum standard for interpreting the 'cruel and unusual punishment' clause in the federal constitution").

In Solem, the Court held that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. 463 U.S. at 290. Objective criteria is to guide a proportionality analysis "including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Id., 463 U.S. at 292. The court stated some accepted principles that apply in a proportionality analysis:

> Few would dispute that a lesser included offense should not be punished more severely than the greater offense. . . . It also is generally recognized that attempts are less

> serious than completed crimes. . . . Most would agree that negligent conduct is less serious than intentional conduct.

Id., 463 U.S. at 293. Applying an objective proportionality analysis to the statutes at hand, it is apparent that the statutes will not pass constitutional muster under the Eighth Amendment.

The state urges this Court to adopt the view that the legislature may exercise its prerogative in enacting an irrational sentencing scheme. Mr. Iacovone urges this Court instead to adopt the view that the legislature did not intend to enact an irrational sentencing scheme. It must be assumed that the legislature did not intend sections 784.07(3) and 775.0825 to apply to third-degree murder situations.

Sections 784.07(3) and 775.0825, Florida Statutes (1991), refer to the crime of attempted murder as though there is only one type of attempted murder. This leads to ambiguity as there are, in fact, different types of murders. As this ambiguity must be resolved in favor of the accused, the correct construction of the term "attempted murder" in sections 784.07(3) and 775.0825, Florida Statutes (1991), is that the term refers to attempted first-degree murder. This is the construction that makes sense and furthers the legislative intent.

In interpreting ambiguous statutes, the law favors a rational, sensible construction; and courts are to avoid an interpretation which would produce unreasonable consequences. Wakulla County v. Davis, 395 So. 2d 540 at 543 (Fla. 1981); State v. Webb, 398 So. 2d 820 at 824 (Fla. 1981); Catron v. Roger Bohn, D.C., P.A., 580 So.

2d 814 at 818 (Fla. 2d DCA 1991). The district court recognized that upholding the statute as applied in this case produces an irrational result (which the legislature did not intend).

As the term "murder" goes undefined in section 784.07(3), the courts cannot infer that the term encompasses third-degree murder. "Where criminal statutes are susceptible to differing constructions, they must be construed in favor of the accused." Scates v. State, 603 So. 2d 504, 505 (Fla. 1992); see also Watkins v. State, 622 So. 2d 1148, 1150 (Fla. 1st DCA 1993) ("Criminal statutes are to be construed strictly in favor of the accused"); citing State v. Jackson, 526 So. 2d 58, 59 (Fla. 1988); State ex rel. Cherry v. Davidson, 103 Fla. 954, 958, 139 So. 177, 178 (1931); and § 775.021(1), Fla. Stat. (1991) (rule of lenity).

In Watkins, the court concluded that the term "manslaughter" in the habitual violent offender statute did not encompass "D.U.I. manslaughter." Just as the generic term "manslaughter" does not necessarily encompass "D.U.I. manslaughter", neither does "murder" necessarily encompass "third-degree murder." The rule of lenity requires this construction.

Sections 784.07(3) and 775.0825, Florida Statutes (1991) were enacted in Ch. 88-381 section 55 and 56 Laws of Florida 2077-78, in a section entitled "part VI Prevention of Crimes against Law Enforcement Officers." The title of the section indicates the legislative intent to prevent crimes against law enforcement officers by providing enhanced penalties for those who commit such crimes. Thus, the purpose of the statutes is to deter crimes

against law enforcement officers.

The legislature did not intend to enhance the crime of attempted third-degree murder of a law enforcement officer where that crime has no specific intent requirement and no knowledge requirement. Without these elements, no deterrent purpose can be served by enhancing the penalty.

Attempted third-degree murder is a general intent crime. Gentry v. State, 437 So. 2d 1097 (Fla. 1983); see also State v. Overfelt, 457 So. 2d 1385 (Fla. 1984). In the instant case, under the jury instructions given (R571-74, 703-706), the jury was not required to find any specific intent to kill on the part of Mr. Iacovone.

It makes sense to enhance the penalty for attempted first-degree murder to deter would-be defendants from forming the specific intent necessary to commit such a crime. On the other hand, where no specific intent is required for third-degree murder, a defendant will not be deterred from committing a third-degree murder of a law enforcement officer where the defendant does not specifically intend his actions. The fact that the deterrent value will not be served by applying the enhancement statutes to third-degree murder cases is one indication that the legislature did not intend the enhancement statutes to apply in attempted third-degree murder situations.

As evidenced by the legislative intent, and as required by the United States and Florida Constitutions as well as by the rules of statutory construction, this Court must conclude that sections

784.07(3) and 775.0825, Florida Statutes (1991), do not apply to attempted third-degree murder situations.

The state has taken the position that section 784.07(3) applies to all attempted murders regardless of degree. Isaac v. State, 626 So. 2d 1082, 1083 (Fla. 1st DCA 1993), seems to lend support to that position, wherein the court stated that section 784.07(3) "is more than simply an enhancement or a reclassification statute--it creates a separate substantive offense."[4]

In Isaac, the court upheld a trial court's refusal to instruct the jury on the lesser-included offense of attempted second-degree

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[4] In Carpentier v. State, 587 So. 2d 1355 (Fla. 1st DCA 1991), Judge Zehmer explains in a concurring opinion the problem with interpreting section 784.07(3) as creating a new offense of "attempted murder of a law enforcement officer":

> If that is the legislative intent, the section fails to specify the particular elements of the new statutory offense. Section 784.07 fails to define murder as requiring an "unlawful killing," as do the other provisions in section 782.04. Only by implication can one conclude that the term "attempted murder" means an attempt to commit an unlawful killing under circumstances that would amount to either first, second or third degree murder rather than an attempt to kill a law enforcement officer that would amount only to manslaughter or would be excused by sections 782.02 and 782.03.

Carpentier, 587 So. 2d at 1358-59 (Zehmer, J., concurring). This analysis touches on the definitional problem with the term "attempted murder" as it is used in section 784.07(3). Third-degree murder is not even a category one, necessarily included, offense of first-degree murder. See Schedule of Lesser Included Offenses, Florida Standard Jury Instructions in Criminal Cases, 603 So. 2d 1175 (1992). The first-degree murder and the third-degree murder statutes are so different that it cannot be assumed the legislature intended to include both within the generic term "murder".

murder, stating:

> Accordingly, there is no offense of attempted first-degree, attempted second-degree or attempted third-degree murder of a law enforcement officer. There is only attempted murder of a law enforcement officer. Because there is no such offense as attempted second-degree murder of a law enforcement officer, it was not error for the trial court to refuse to give an instruction on that nonexistent offense as a lesser-included offense of attempted murder of a law enforcement officer.

Isaac, 626 So. 2d at 1083. The court explained that this new substantive offense "consists of the elements of murder (in any degree), which are found by reference to section 782.04" plus the attempt element, plus the law enforcement officer element. Id.

If this Court agrees with the statement in Isaac that section 784.07(3) creates a new substantive offense, then it follows that the trial court in this case erred by giving the instruction on the lesser-included offense of attempted third-degree murder of a law enforcement officer as this was not a separate crime from attempted first-degree murder of a law enforcement officer. Mr. Iacovone was charged in the information with attempted premeditated first-degree murder of a law enforcement officer (R677).

Attempted third-degree murder of a law enforcement officer cannot be a lesser of the "new offense" created in section 784.07(3). A valid lesser-included offense must be lower in degree and penalty than the main offense. See Ray v. State, 403 So. 2d 956 (Fla. 1981); State v. Carpenter, 417 So. 2d 986 (Fla. 1982). The trial court sentenced Mr. Iacovone for a life felony to a twenty-five year minimum mandatory, although the jury had,

ostensibly, found him guilty of a "lesser" crime. As attempted third-degree murder of a law enforcement officer is not a true lesser, then, under Ray, the giving of the instruction for this crime was fundamental error.

In Achin v. State, 436 So. 2d 30 (Fla. 1986), this Court stated that "one may never be convicted of a non-existent crime." As discussed above, attempted third-degree murder of a law enforcement officer is not a true "lesser-included" offense if it is punished the same as attempted first-degree murder of a law enforcement officer. According to the Isaac opinion, attempted third-degree murder of a law enforcement officer is a non-existent crime.

Following the law in this area, the appropriate remedy is to discharge Mr. Iacovone for the attempted third-degree murder of a law enforcement conviction. This remedy is governed by Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957), discussed in Achin. By the jury's finding of guilt to the non-existent lesser, the jury acquitted Mr. Iacovone of the crime he was charged with, attempted first-degree murder of a law enforcement officer. The double jeopardy clause bars retrial for the main offense. Green.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF MR. IACOVONE'S ALLEGED PRIOR ABUSE OF AND THREATS AGAINST LORI CUERVO.

Having accepted jurisdiction, this Court has the authority to fully review Mr. Iacovone's case. Bould v. Touchette, 349 So. 2d 1181 (Fla. 1977); Freund v. State, 520 So. 2d 556 n.2 (Fla. 1988). The evidentiary issues brought here were raised in the district court, and rejected without comment. These trial court errors, however, do require that a new trial be granted on all counts.

The defense filed a written motion in limine to exclude evidence of "Defendant's prior acts of violence towards any of the victims in this case or their relatives" (R685-86). After hearing from the attorneys, the court denied the motion in limine on April 20, 1992 (R94-97). During the trial, the judge admitted testimony, over objection, of Allan Iacovone's prior threats and prior fights with his girlfriend, Lori Cuervo.

The jury heard from Lori Cuervo that things became "rocky" during her relationship with Allan (R131-33). Lori testified that Allan got mad at her while she was four or five months pregnant with their daughter (R134). Allan's anger continued throughout the rest of the relationship (R134). The two of them argued "more or less weekly" (R134). Allan would hit her and be violent (R134).

Lori eventually moved out of the apartment she shared with Allan (R135). Allan displayed anger over the break up of their relationship (R139). Allan threatened Lori's life (R139). The

first time was in May, 1991 (R139). He threatened her life again in September (R141). He also called her between May and September and threatened her over the telephone (R141).

On Christmas Eve, Lori went to stay with a friend because Allan had called and threatened her:

> A. I went to spend the night with her Christmas Eve night because I was afraid to stay in my apartment.
> Q. Why were you afraid to stay?
> A. Because he had called and threatened me.
> MRS. GARCIA: I'm going to object.
> THE COURT: Overruled.
> BY MR. ROSE:
> Q. When did Mr. Iacovone call you and threaten you?
> A. We had gotten home about 9:30 or so.
> Q. We being who?
> A. My kids. He called about 9 o'clock and called up because I hadn't been home Christmas Eve, and at first he started to say it was because he couldn't see Samantha, and then it was just he was mad at me, calling me names, I had been out with someone else.
> Q. Was it true, had you been out with someone else?
> A. No. We had been celebrating her birthday and having Christmas Eve dinner.

(R143-44).

When the defense attorney objected to evidence of Allan's threats and abuse, and renewed the motion in limine during Lori's testimony, the trial court overruled the objections (R131-34, 139-41, 143).

The trial court also overruled objections during the testimony of Lori's father, Eddie Cuervo (R281-285). Eddie Cuervo testified that Allan made "constant threats." He also testified to an incident in September 1991, between Allan and Mrs. Cuervo, several months before the charges at issue arose (R284).

> The Witness: He made a statement to me that he was going to go to the gun show and get a gun and will exterminate each and every one of us, my wife my two daughters and whoever.

(R285). In response to the defense objections, the court stated:

> The Court: Well, you can jump up and object all you like, but all you're doing is calling the jury's attention to it. I've ruled that this is relevant to the aggravated assault, and that's my ruling.

(R284).

It was error for the trial court to admit evidence of the alleged prior bad acts of Mr. Iacovone: his alleged threats and abuse of Lori over a long period of time, and his alleged threat to Eddie Cuervo in September 1991. This testimony was offered only to show the Mr. Iacovone's propensity to violence, which makes the testimony inadmissible character evidence under sections 90.404 (1) and (2)(a), Florida Statutes (1991). Admission of irrelevant similar fact evidence is presumed harmful error because of the danger that a jury will take the bad character or propensity as evidence of guilt of the crime charged. See, e.g., Keen v. State, 504 So. 2d 396, 401 (Fla. 1987).

Mr. Iacovone was charged with attempting to kill Deputy Hogsten and Cindy Cuervo, Lori's younger sister. Evidence of a defendant's prior threats may be admissible to prove premeditation. See Brown v. State, 611 So. 2d 540 (Fla. 3d DCA 1992). However, in this case, the evidence of Allan's rocky relationship with Lori was not probative of premeditation to kill Deputy Hogsten or Cindy Cuervo. See King v. State, 545 So. 2d 375 (Fla. 4th DCA 1989),

review denied 551 So. 2d 462 (Fla. 1989) (Evidence that defendant fought with ex-wife was not relevant to charge involving girl-friend), citing Donaldson v. State, 369 So. 2d 691 (Fla. 1st DCA 1979); see also Wilkins v. State, 607 So. 2d 500 (Fla. 3d DCA 1992) (Evidence that defendant had a violent temper and committed prior acts of violence was not relevant in prosecution for attempted first degree murder and aggravated child abuse).

Neither was the testimony probative of intent for the aggravated assault charge against Eddie Cuervo. Mr. Iacovone's alleged threats were made in the context of his break up with Lori - she was the victim of the threats and abuse, not Deputy Hogsten, Cindy, or Eddie Cuervo. See Johnson v. State, 432 So. 2d 583 (Fla. 4th DCA 1983) (Prior bad acts relating to a person other than the victim not admissible to show intent).

The September threat to Eddie Cuervo was irrelevant because it had no factual bearing on the December incident. See Fulton v. State, 523 So. 2d 1197 (Fla. 2d DCA), review denied 531 So. 2d 1355 (1988) (Defendant's harassment of victim not relevant to aggravated assault). Allan's threat to kill Eddie's family in September was too attenuated in time to be relevant to the December incident. The September threat involved buying a gun at the gun show; whereas, the aggravated assault at issue consisted of waiving and throwing a hammer at Eddie Cuervo as Mr. Iacovone fled from the scene. The evidence of the September threat was irrelevant and extremely prejudicial. A new trial is required due to the error of allowing the extensive evidence of Mr. Iacovone's prior threats and

abuse arising from the break up with Lori Cuervo.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN EXCLUDING THE DEFENSE PROFFERED EVIDENCE OF MR. IACOVONE'S EXCITED UTTERANCES MADE IMMEDIATELY AFTER THE INCIDENT.

At trial, the state posited that Allan intended to hit Deputy Hogsten and Cindy Cuervo with his car (R529-30,545,562); whereas, the defense contended that Allan accidentally hit the victims while he was fleeing the scene (R546,551,555). The evidence of Allan's 9-1-1 telephone call made directly after the incident was relevant to prove the theory of defense and should have been admitted into evidence. The statements tend to prove that Allan did not intend to hit Cindy or Deputy Hogsten:

> MR. IACOVONE: I got to my car. The police was already arriving, okay. I was just trying to leave. As I was coming out -- as I was trying to leave the police dashed in the way of me along with my father-in-law. I swerved. I hit my sister-in-law and another car. First I hit the other car which she was standing behind and the quick repercussion from that car hit my sister-in-law, but it knocked her for a whallop, I mean a good whallop. I was just trying to blast out of there.
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> * * * *
>
> MR. IACOVONE: Please, please help me. Tell me she's not hurt.
> 911 OPERATOR: I'm trying to find out right now.
> MR. IACOVONE: Tell me she's not hurt. I didn't want to hurt nobody, I just --
> 911 OPERATOR: I'm trying to find out now and I'll let you know something, okay?
> MR. IACOVONE: Please, please.
> 911 OPERATOR: It will be okay.
> MR. IACOVONE: Oh, hon, I'm not this kind of guy going out looking for trouble. It just seemed like it was a powder keg and it just blew.

(R778, 781).

The defense tried to admit the statements Allan made to the 9-1-1 operator through the defense witness Catherine Smith (R439, 444) and through the custodian of the 9-1-1 records, who brought a tape of the 9-1-1 call to court (R502, 507-16, 775-81). Allan's statements to the 9-1-1 operator were admissible under the hearsay exceptions for excited utterance and then existing state of mind. §§ 90.803(2) and (3)(a), Fla. Stat. (1991). The defense also argued that the statements were admissible under the business records exception in section 90.803(6), Florida Statutes (1991) (R516).

In ruling the statements inadmissible, the trial court was apparently concerned the statements were exculpatory in nature:

> THE COURT: Very interesting theory of defense. Call 911, record your statement and then offer it at trial. I'm going to deny your motion to admit the tape into evidence. I find it is not an exception to the hearsay rule under any of these provisions. It is an exculpatory statement given by the defendant at a time prior to this court proceeding and it does not come under any exception that has been cited to this Court that I'm aware of.

(R516).

It was error for the trial court to rule Mr. Iacovone's statements inadmissible because they were exculpatory in nature. "Frequently an objection will be made that out-of-court testimony is self-serving. That objection is not a valid reason to exclude otherwise admissible hearsay evidence." C. Ehrhardt, Florida Evidence, Ch. 8, § 803 at 587 (1993).

The statements in question (R775-81) were made while Mr.

Iacovone was under the stress of excitement caused by the events at issue. He was described as hysterical when he made the telephone call (R441-43, 445). In addition, the trial court found that the 9-1-1 call was made "only a short period of time, only minutes after the incident in question" (R521-22). These circumstances render the statements admissible under the excited utterance exception to the hearsay rule. § 90.803(2), Fla. Stat. (1991); See Cox v. State, 473 So. 2d 778, 782 (Fla. 2d DCA 1985); Lyles v. State, 412 So. 2d 458, 460 (Fla. 2d DCA 1982).

The 9-1-1 statements were also admissible under section 90.803(3)(a) to prove state of mind where the defendant's intent was at issue. It is clear from the statements that Allan was concerned about hitting Cindy Cuervo. As Mr. Iacovone's state of mind was at issue before the jury, the trial court erred in ruling the statements inadmissible. See Downs v. State, 574 So. 2d 1095, 1098 (Fla. 1991) (testimony concerning statements of the defendant charged with first-degree murder made on the day of the crime was admissible).

The fact that Mr. Iacovone's statements were made after the incident rather than before is not sufficient reason to exclude the statements. In Alexander v. State, 627 So. 2d 35 (Fla. 1st DCA 1993), the court reversed for a new trial where a defendant's self-serving statements made after a shooting were excluded by the trial court:

> We conclude that the trial court erred in excluding the testimony of witnesses to the shooting that described appellant Alexander's exclamations and actions immediately after

> firing the shot that killed the victim. This testimony was admissible under the res gestae rule now codified in section 90.803(1), (2), and(3), Florida Statutes (1991), which define the conditions for admissibility of (1) spontaneous statements, (2) excited utterances, and (3) then existing mental and emotional conditions of the declarant. The statements about which these witnesses could testify were made almost simultaneously with the act of shooting, a period of time too short to support a finding of fabrication that would destroy the apparent trustworthiness of this evidence. The mere fact that statements are self-serving is not, in and of itself, a sufficient evidentiary basis for their exclusion from evidence. No legal principle excludes statements or conduct of a party solely on the ground that such statements or conduct is self-serving. While exculpatory statements of the accused generally are excluded from criminal cases because of their hearsay character, the courts of this state have long recognized an exception to this rule where the statements form a part of the res gestae of the alleged offense. Furthermore, Florida has followed a liberal rule concerning the admittance of res gestae statements.

627 So. 2d at 43-44 (citations omitted).

In the case at bar, Allan Iacovone was convicted of aggravated battery in count IV for hitting Cindy Cuervo with his car. This conviction required the jury to find that Mr. Iacovone specifically intended his actions (R574). In addition, the jury may have returned a guilty verdict for attempted third-degree murder of a law enforcement officer based on the aggravated battery charge. The jury instruction for attemoted third-degree murder included a finding that "[t]he death occurred as a consequence of and while Allan Iacovone was attempting to commit or was escaping from the immediate scene of either an aggravated battery or an aggravated assault" (R572). The guilty verdict for count III may well have

depended on the aggravated battery conviction. Where the excluded statements tend to negate the evidence that Mr. Iacovone specifically intended to hit anyone with his car, it was crucial to the defense that the statements be presented to the jury. The error of excluding this crucial evidence requires that a new trial be ordered in this cause.

CONCLUSION

In light of the foregoing arguments and authorities, Mr. Iacovone requests this Court to uphold the district court's opinion, but to reverse all charges for a new trial due to the evidentiary errors discussed in Issues II and III. If this court disagrees with the holding of the district court, Mr. Iacovone requests discharge for the attempted third-degree murder conviction in count III on the grounds that the jury received an instruction for a non-existent lesser.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Kimberly D. Nolen, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 29 day of September, 1994.

Respectfully submitted,

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KK/dlc