IN THE SUPREME COURT OF FLORIDA

WILLIAM LEE STRAUSSER, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 84,371

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, WILLIAM LEE STRAUSSER, JR., was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On September 3, 1992, Appellant was indicted, along with Elec Trubilla, for the first-degree murder of Allan Trubilla, which was allegedly committed on August 18, 1992. (R 1843). Shortly thereafter, Evan Baron was appointed as a Special Assistant Public Defender. (R 1854). Prior to trial, the trial court granted Appellant's motion for a confidential expert and appointed Dr. Antoinette Appel to assess his competency and sanity. (R 1886-88). The trial court also issued numerous subpoenas duces tecum for Appellant's medical records. (R 1911, 1928-29, 1944). Funds for a private investigator were also authorized. (R 1895).

On October 15, 1993, Appellant filed his notice of intent to rely on the defense of insanity along with Dr. Appel's report. (R 1935-37). As a result, the trial court appointed Drs. Trudy Block-Garfield and Michael Walczak to examine Appellant regarding his sanity at the time of the murder. (R 1938-40; T 72-74).

Also prior to trial, Appellant filed a motion to suppress his statements to the police following his arrest for this murder. In this two-page motion, Appellant alleged without any factual support or legal analysis that his post-Miranda statements "were not freely and voluntarily given," that his statements were obtained "in violation of [his] privilege against self-discrimination [sic] and [his] right to counsel," that he "did not knowingly and intelligently waive his Miranda rights," and that his statements "constitute[d] the fruit of an unlawful arrest . . . in violation of [his] right to privacy." (R 2041-42). He claimed that his arrest was unlawful because he was "suffering from an emotional or mental illness which prevented him from fully understanding and/or comprehending his "Miranda" warnings. Therefore, he was unable to voluntarily waive his rights at that time." (R 2042).

At the hearing on the motion, Detective Robert O'Neil from the homicide unit of the Broward Sheriff's Office testified that he responded on August 18, 1992, at 2:40 a.m. to 1325 S.E. 8th Avenue, Apartment 315A to assist Detective Palmer regarding a homicide. (T 94-95). The apartment manager, Mark Chandler, reported that he saw a white male named "John" exit the victim's apartment. The victim and his son, Elec, both knew "John." (T 96). Mr. Chandler later identified the man from a photo lineup as Appellant. (T 97). Elec confessed his involvement in the murder: Elec stated that Appellant and his father were lovers, and that he and Appellant were friends. Because he was unhappy at home, he and Appellant planned to kill his father. (T 96-97). Detective O'Neil also testified that another witness saw Appellant leave the apartment complex in a blue Chevette and run a stop sign with his lights off. (T 98). Appellant's blue Chevette was later found in Punta Gorda with bloody clothes, rubber gloves, and blood inside the car. (T 98). Appellant's glasses and a bloody sock were found in the area where Appellant had parked his car at the apartment complex. (T 98). A knife was found by the victim's body. (T 98). Other witnesses had reported that Appellant left his apartment with a knife and an electrical cord. (T 99).

Based on this information, Detective O'Neil obtained local and federal arrest warrants for Appellant. (T 100). Ultimately, he learned that Appellant would be flying into Chicago, Illinois, from Jamaica, so he notified the FBI and the Chicago police, who arrested Appellant when his plane landed in Chicago. (T 103). He and Detective Palmer then flew to Chicago to interview Appellant, and he reviewed a rights waiver form that Appellant had signed earlier that evening. (T 104-07). According to Detective O'Neil, Appellant did not appear to be under the influence of alcohol or drugs, and Appellant did not complain of pain or discomfort from his ankle which he claimed to have broken in Jamaica but which had no cast. (T 108). After interviewing Appellant for approximately two hours, Detective O'Neil obtained a taped statement from him, the substance of

which was consistent with his untaped statement. (T 109-10). The taped statement was not sworn to and lasted 35 minutes. The interview ended at approximately 2:00 a.m. (T 115-18).

The next witness to testify at the suppression hearing was Detective Palmer, who conducted the interview of Appellant in Chicago. Detective Palmer testified that he told Appellant that they were investigating the death of Allan Trubilla, and Appellant stated that he understood. Appellant also indicated that he understood his Miranda rights. (T 125). According to Detective Palmer, his interview with Appellant lasted approximately two hours, which included refreshment breaks. Appellant did not appear to be under the influence of any substance and did not complain of pain from his ankle. (T 126-28).

The State then played Appellant's taped statement, which began at 11:25 p.m. on September 19, 1992. On the tape, Appellant acknowledged that he had signed the rights waiver form shown to him by Detective Palmer. (T 131). Appellant explained that he and Allan Trubilla had known each other for a couple of years and were lovers. (T 132-33). During this time, he became good friends with Allan Trubilla's son, Elec. (T 133). Several months prior to the murder, Elec began calling Appellant and claimed that his father was being abusive, treating him like a pawn with his mother. (T 133-34). Appellant wanted to help Elec, so he and his wife let Elec stay with them. As a result, Appellant was arrested for interfering with child custody. (T 134-36).

Three weeks before the murder, Appellant moved to Cape Coral. Appellant stated that Elec spoke often of killing his father. (T 136). One week before the murder, he and Elec discussed electrocuting Allan Trubilla. (T 137). On Saturday night around 11:30 p.m. or 12:00 a.m., before the murder on Monday night/Tuesday morning, Elec called Appellant, stating that he wanted to kill his father. Appellant told him to forget about it and go to bed. (T 138). Elec called Appellant again on Sunday night from a pay phone. (T 139). On Monday, Elec told Appellant that his father

had embarrassed him in front of his friends, and that he wanted him dead. (T 140). Appellant told Elec that he would come to his apartment later. Appellant said that he wanted to get Elec away from his father. (T 140). They talked, however, about killing Allan Trubilla with a baseball bat, by electrocuting him, or by stabbing him. (T 141).

On that Monday, Appellant left his home around 4:00 p.m. with a change of clothes and a kitchen knife with a black handle. (T 142-43). When Appellant got to Ft. Lauderdale, he went by his old house, then went to Eckerd's, then drove around until late in the evening. (T 144). He knew that Allan Trubilla would not be home until late. (T 144-45). Appellant was driving a dark blue 1986 Chevette. (T 146). Appellant called Elec from a pay phone, then went to Elec's apartment and Elec let him in. Allan Trubilla was asleep. (T 146). He tried to talk Elec out of killing his father. (T 147). While Appellant stood in the bathroom with the knife, Elec called his father, who came out of his bedroom. He heard Elec hit his father over the head, then Appellant stabbed him. He did not remember how many times. (T 149-50). Both he and Elec were cut on the hand. (T 151). When Elec turned on the lights, there was blood everywhere. Appellant grabbed his clothes and ran out. (T 152). He and Elec had discussed disposing of Allan Trubilla's body in a trash bag, but they had no definite plan. (T 153). Elec thought that he would live with his mother or aunt for awhile and then live with Appellant. (T 154).

When Appellant fled the apartment, he saw two people by the pool. He drove around for awhile and then drove home, arriving there around 4:00 a.m. (T 156-58). He and his wife drove to a motel in Tampa, went back to their house for clothes, then drove to Texas using money that Appellant's mother had wired to them. (T 158-60). They flew to Jamaica for several weeks, then flew to Chicago. (T 161-62). While in Jamaica, Appellant broke his ankle and had a cast put on, but his leg swelled so the cast was split and ultimately fell off prior to leaving Jamaica. (T 162).

The taped statement ended at 12:00 a.m. (T 164).

When the hearing continued following jury selection, FBI Special Agent Daniel testified that he removed Appellant from the plane when it landed at O'Hare International Airport in Chicago and took him to an area for processing through Customs. (T 448-48). At 7:14 p.m., he advised Appellant of the federal warrant for his arrest and read him his Miranda rights from a form but did not ask him to sign the form. (T 451-52). He then took Appellant to a police department holding area for fingerprinting. He showed Appellant the federal warrant, which Appellant read. (T 452). When he asked Appellant if he had ever been fingerprinted before, Appellant responded that he and his wife had decided to turn themselves in. (T 452-53). Regarding his ankle, Appellant explained that he had broken it swimming at a waterfall and had returned to the United States for medical treatment. (T 453). According to Special Agent Daniel, Appellant did not appear to be under the influence of any substance and was not acting strangely. (T 454).

When court resumed the following Monday, Officer Gail Neuman of the Chicago Police Department testified that she took Appellant's wife into custody, cleared her through Customs, then took her to a holding cell at the airport. (T 481). She then witnessed her supervisor, Sergeant Blanc, read Appellant his rights. (T 483). After every question, Sergeant Blanc asked Appellant if he understood, and Appellant indicated that he did. Appellant then signed the waiver portion of the form in her presence at 9:00 p.m. (T 484-85).

On his own behalf, Appellant called his wife, Margaret Strausser, as a witness. Mrs. Strausser testified that Appellant broke his leg in Jamaica and had a cast on it, but that it fell off during the flight. She also stated that she had given Appellant a Darvon for pain relief about two or two and a half hours prior to their arrival in Chicago. (T 497-98). The police found about six pills in her pocket and took them because she did not have a prescription bottle for them. (T 499).

She saw the police give some pills to Appellant after they had finished interviewing him. (T 499-500).

According to her, Appellant had stopped taking Prozac a few weeks prior to the murder and had become extremely irritable. (T 501). On the morning of the murder, he was "like an injured child." He was crying and "very upset." (T 502). He spoke of suicide several times while they were in Jamaica. (T 502).

Following her testimony, Appellant testified on his own behalf. He too testified that the police gave him medication after they had completed their interview. (T 513). He did not remember seeing the waiver of rights form, and he did not understand his rights. A deputy told him to sign the form. (T 516-18). He also testified that he stopped taking Prozac about two and a half weeks prior to the murder, and that he became very depressed and easily irritated. (T 513). He heard voices several times a week like people were coming to get him, and he heard voices telling him to commit suicide. (T 515). On cross-examination, Appellant claimed that he gave a taped statement because the police told him what had happened and because they were yelling at him. (T 523). Although he acknowledged on the tape that he understood his rights, he really did not. (T 528). Everything he told them, however, was the truth. (T 526). He admitted that he did not hear voices prior to the murder. (T 525).

Following legal arguments by counsel, the trial court denied the motion to suppress, finding that Appellant voluntarily, knowingly, and intelligently waived his Miranda rights. (T 529-35). Thereafter, the jury received its preliminary instructions, and the State gave its opening statement. At one point, defense counsel objected to the State's reference to Appellant's charge for interference with custody, and moved for a mistrial, which the trial court took under advisement. (T 547-48). Defense counsel reserved his opening statement. (T 555).

The State's first two witnesses were Deputy Gajate and Deputy Alvarez of the Broward County Sheriff's Office. Deputies Gajate and Alvarez testified that they were dispatched at 1:25 a.m. to 1325 S.E. 8th Avenue, Apartment 315A, in Deerfield Beach regarding a possible home invasion. (T 557, 571). When they reached the third floor, they saw a juvenile white male standing outside the apartment "covered in blood." (T 558, 572). They entered the apartment and saw blood everywhere and saw evidence of a struggle. Deputy Alvarez found the victim lying on the floor in the bathroom with a knife by his right shoulder. (T 559-60, 573). They carefully exited the apartment and saw that the juvenile, who they learned was the victim's son, Elec, had blood on his shirt and arm, and a wound on his left hand. (T 562).

Elec explained that he awoke to screaming and saw someone stabbing his father. He tried to help his father and was cut on the hand. (T 563). When Mark Chandler knocked on the door, the suspect told Elec not to say anything, so Elec told Mr. Chandler that everything was fine and closed the door. The suspect then fled. (T 563). He stated that he had never seen the suspect before. (T 566). Elec described the suspect as 5'8"-5'9" tall, slim with a muscular build, wearing black clothes. (T 564, 574). After speaking with other witnesses, however, Deputy Gajate changed the BOLO description of the suspect. (T 566). According to both deputies, Elec remained very calm. (T 565, 575).

The State's next witness was Officer Gail Neuman of the Chicago Police Department, who testified that she and other officers from her department and the FBI arrested Appellant as he was returning from Jamaica. (T 579-81). After clearing Appellant and his wife through Customs, they took them both to separate holding cells in the police department's substation at the airport. (T 582). At 9:00 p.m., Officer Neuman's supervisor, Sergeant Blanc, read Appellant his Miranda rights in her presence, Appellant affirmatively responded when asked if he understood each right

as they were read, and Appellant signed the waiver portion of the rights form. (T 582-87). Both she and Sergeant Blanc then signed the form as well. (T 587). Appellant said he had broken his ankle and complained of pain. He did not appear to be under the influence of any substance. (T 588).

Jeff Racine then testified that he was washing his clothes on the first floor of the victim's apartment building when he heard someone "screaming and carrying on." (T 603). It sounded like "somebody was getting beat up." (T 604). The screaming lasted for ten to fifteen minutes. (T 604). Mr. Racine called the apartment manager, Mark Chandler, who lived in Building B, and Mr. Chandler came right over. (T 605). He and Mr. Chandler both testified that they located the screams coming from Apartment 315A, and Mr. Chandler knocked on the door. (T 606, 620). Elec Trubilla answered the door and immediately told Mr. Chandler that he knew the music was too loud and would turn it down. (T 608, 622). Mr. Chandler had not heard any music. (T 622). When asked where his father was, Elec responded that he was "out for the night." (T 608, 622). Mr. Chandler saw blood on the side of Elec's face and asked him about it. Elec then turned his head and told someone in the apartment that "he seen the blood. What do I do?" (T 623). Mr. Chandler heard a whisper, then Elec closed and locked the door. (T 608, 623).

Mr. Racine and Mr. Chandler then went to Mr. Chandler's apartment in Building B to get the keys to his car so that he could go to the 7-Eleven where Allan Trubilla worked. As they returned to Building A, they both saw a man whom they knew as "John," but who they later identified from photo lineups as Appellant, hurriedly leaving Building A. (T 609, 612, 624-27). Mr. Chandler asked him if he was alright, but Appellant did not respond and quickly left the complex. (T 610, 624-25). He got into a dark colored Chevette with tinted windows and drove off without any lights on, nearly causing an accident as he pulled out onto the highway. (T 610-11).

Both men saw blood on a "towel or something" that Appellant was carrying. (T 613, 624-25). A day or two later, Mr. Chandler noticed that some leaves and twigs had been wedged into the hinge of the south gate to Building A, so he called the police. (T 628).

The State's next witness was Detective Kammerer from the Broward County Sheriff's Office who responded with Detective Foley to document the crime scene and collect the evidence. Detective Kammerer testified that they initially walked through the apartment to obtain an overall view of the scene, then they videotaped the apartment. (T 636-37). He saw blood on the inside of the front door and on the telephone in the kitchen, and he saw bloody footprints from the front door to the bathroom.[1] (T 638). There was "an enormous amount of blood spatter throughout the hallway area, covering all the walls, [and] most of the areas of the ceiling." (T 638). The victim was lying face down on the bathroom floor in a large pool of blood. (T 638). There were "large amounts of blood spatter throughout the bathroom area, [including] the vanity, [the] mirror and the ceiling." (T 638). In the bathroom, the detective found a palmprint in blood on the vanity, which was later determined to be Appellant's, a large knife laying next to the victim's body, and nine pieces of a cast iron skillet. (T 638, 645). A blood trail led from the bathroom to Elec's bedroom. (T 638). Blood was found on the sheets in Elec's bedroom and on the walls, all of which were caused by castoff or dripping; there was no evidence that anything occurred in Elec's bedroom. (T 647). There were bloody footprints on the kitchen floor and droplets of blood in the kitchen sink. (T 642). Blood was also found on the handle of the sliding glass door, on the curtain next to the handle, and on the railing to the balcony outside. (T 648). Sergeant Robert Haarer described the nature of the blood found throughout the apartment as spatter, castoff, transfer, or droplets. (T 679-

[1] The victim's apartment had two bedrooms and one bathroom, a living room, a small dining room, and a kitchen.

97). He also opined that the attack started in the hallway, progressed toward the living room, and ended in the bathroom. (T 698).

Next, Detective Foley testified that he collected all of the evidence at the scene. Among those items collected were a pair of eyeglasses and a bloody blue sock from behind the apartment complex, nine pieces of a broken cast iron skillet from the bathroom, a knife with a seven and three-quarter inch blade from the bathroom, and sixteen samples of blood from various places within the apartment. (T 703-04, 710, 711, 717). On a door in the victim's kitchen, he noticed several hanging pans similar to the broken one found in the bathroom and a hook where one was missing. (T 730). From Appellant's car, he collected a black bag, two pair of surgical gloves, a pair of black pants, a white shirt, a blue sock, a pair of men's briefs, a pair of white socks, a paper napkin with blood on it, a black tie, a black hat, blood swabbings, and a roll of film. (T 726-27). He also collected a wooden block containing six knives with a slot for one more. The knives were consistent with the one found in the bathroom. (T 729). Sergeant Everly of the Cape Coral police department would later testify that he recovered the block from Appellant's kitchen. (T 760-66). Finally, Detective Foley testified that he photographed Elec at the scene, who had blood on his shirt and legs, a cut on his hand, and no shoes on his feet. (T 706-07). He testified that Elec seemed more concerned about a bird that was loose than about his father's death. (T 732).

The State's next witness was Dr. Michael Bell, the medical examiner, who testified that he autopsied the victim, a 45-year-old male, 5'7" tall, weighing 160 pounds. (T 749). During the autopsy, he found 45 stab or incise wounds on the victim's body: 13 on the right side of the head and neck, 8 on the left side of the head and neck, 7 on back of the head and neck, 4 on the back, 11 on the right arm, mostly on the hand, and 2 on the left arm. (T 739-40). The wounds on the hand were consistent with defensive wounds. (T 745). One stab wound to the neck went upwards

through the tongue and severed the carotid artery. (T 750). In his opinion, such a wound would have rendered the victim unconscious within minutes. (T 750).

He also found 5 lacerations on the front of the face, 37 on the top right side of the head, and 6 on the back. (T 745). He found abrasions on the head, back, knees, and right elbow, and contusions on the back of the right hand and elbow, and on the face, all of which were caused by a blunt object consistent with the frying pan found in the bathroom. (T 746). The skull was not fractured, but was dented on the right side. (T 750). In his opinion, the cause of death was blunt and sharp force injuries to the head and neck. (T 747).

Next, the State called Detective John Palmer, the lead detective in the case. Detective Palmer testified that he responded to the scene at 2:20 a.m. (T 767). The homicide was originally related by dispatch as a home invasion. (T 848). After surveying the scene, Detective Palmer spoke to Elec, who told him that he awoke to find a man stabbing his father. He tried to help his father and was cut on the hand. (T 767-69). According to the detective, however, there was no evidence of either a forced entry or a robbery. Moreover, Elec's statements describing the suspect were not consistent with those of other witnesses. (T 770-71).

Mark Chandler related that he saw a man whom he later identified as Appellant flee the apartment. (T 771). Later that night, Elec admitted to his involvement in the murder and was arrested. (T 772). At that point, the State played the tape of the 911 call Elec made to the police wherein he told them that someone broke into the apartment and stabbed his father. (T 774-76).

Detective Palmer learned that Appellant lived in Cape Coral and dispatched that city's police department to his home, but he was not there. (T 777). Appellant's car was found the next day at an auto parts store in Punta Gorda, which is just north of Cape Coral. (T 778). After obtaining a

search warrant, he searched Appellant's car and discovered blood on the driver's door, on the inside door handle, on the light switch, and on the steering wheel. (T 781).

Thereafter, Detective Palmer related Elec's version of events: Elec stated that Appellant and his father were lovers, and that Appellant and he were friends, but that Appellant and his father broke up, and he wanted to live with Appellant. (T 792). He killed his father because his father "was always harassing him and embarrassing him in front of his friends." (T 791). Elec further stated that he unscrewed the fuses to the lights in the apartment, propped open the gate by the pool, and left the door to the apartment open so Appellant could get in. (T 789, 791). They were going to dispose of his father's body in a blue Rubbermade container which he put in the living room. (T 790).

Upon investigating, Detective Palmer learned that Appellant's mother had wired him some money, and that Appellant and his wife had driven to Texas, then flown to Jamaica. (T 794-96). On September 19, 1992, Appellant and his wife flew into O'Hare International Airport in Chicago, and Detective Palmer had the FBI and Chicago Police Department arrest Appellant on the plane pursuant to a federal warrant. (T 796-98). Detective Palmer and Detective O'Brien flew to Chicago and obtained a taped statement from Appellant, who had previously waived his Miranda rights. (T 798-808). At that point, Appellant's taped statement was played for the jury. (T 809-43).

Next, Barbara Einsmann testified that she was working at an Eckerd's drugstore in Ft. Lauderdale on the evening of August 17, 1992, when Appellant, whom she knew, came in and bought two pair of latex gloves around 6:00 or 6:30 p.m. (T 862-66).

Lloyd Pryor then testified that he met Appellant twelve years prior through the Big Brother/Big Sister Program in Maryland. (T 878). Eventually, he and his mother, Mary Smith, moved with Appellant to Florida. (T 879-83). Appellant raised him from the age of eleven and

supported he and his mother throughout that time. (T 881-82). About two years before the murder, Appellant met Allan and Elec Trubilla. (T 884). In February of 1990 or 1991, Appellant got married, and his wife moved in with the three of them. (T 885). About six months prior to the murder, Appellant and Allan Trubilla had an argument, and Allan told Appellant to leave him and Elec alone. (T 889). In July of 1992, Lloyd and his mother and Appellant and his wife all moved to Cape Coral. (T 893). Appellant, however, continued to talk to Elec over the phone. (T 894). Around this time, Lloyd got married and his wife moved in with them. Appellant was not happy with Lloyd's decision to marry and did not get along well with his Lloyd's new wife. (T 898). About a week before the murder, he and Appellant had a major argument, so Lloyd and his wife moved out of the house in the middle of the night to avoid a confrontation with Appellant. (T 899-902, 923, 938). He did not speak to Appellant again until the morning of the murder. (T 923).

On the morning of the murder, Appellant's wife called Lloyd at 7:30 a.m. Lloyd spoke with Appellant briefly, during which Appellant stated that he had stabbed Allan Trubilla to death because "he couldn't handle [it] any more." (T 907). Although Appellant did not sound like himself, Mr. Pryor believed that Appellant knew that what he had done was wrong. (T 938, 942-43). Appellant's wife called back about twenty minutes later and told Lloyd that Appellant was coming back to see a psychiatrist. (T 908-09).

In November and December of 1992, after Appellant had been arrested, Lloyd received two letters from Appellant. The first one was an angry letter in which Appellant blamed him for the murder. The second letter was apologetic, and Appellant expressed his love for Lloyd and Mary. (T 909-11, 918-19). Only a portion of the first letter, and all of the second letter, was read to the jury over Appellant's objection. (T 911-19).

On cross-examination, Mr. Pryor testified that Appellant's personality changed drastically

just before his fight with Allan Trubilla. (T 922, 925). Appellant started seeing Katrina Fritz, a mental health counselor, who recommended that Appellant see a psychiatrist, which he did. (T 925-26). After Appellant began taking Prozac, he became calmer and more pleasant to be around. (T 926). During that time, Appellant discussed his childhood with Mr. Pryor. Appellant told him that he was abused by his stepfather. Appellant stated that his stepfather once tied a string from the toilet to his penis so that Appellant would not wet the bed, that his stepfather put him in dark rooms, and that his stepfather put his hands in vices. (T 927).

According to Mr. Pryor, just before they moved to Cape Coral, Appellant could not afford to see his counselor or pay for his Prozac. (T 928-29). As a result, Appellant's personality changed for the worse. He was "stressed out" and irritable. (T 929). The calls from Elec were upsetting him too. (T 932). Appellant called HRS regarding Allan's treatment of Elec, but no one would help. Appellant also tried to get Elec's mother to seek custody of Elec, which she initially agreed to do but then reneged. (T 932-33). At one point, Elec ran away and stayed with them, but the police found him and arrested Appellant. (T 935). They moved to Cape Coral partly to distance Appellant from Allan and Elec. (T 936). Appellant once remarked to him that he could not handle all the stress. (T 940).

Lloyd's mother, Mary Smith, testified next. She stated that on the day before the murder, Appellant took her to the bank, then told her that he had a job interview, after which he was going to visit a friend in Miami and would be home late. (T 958). Appellant left for his job interview around 3:15 or 3:30 p.m. (T 959). He took a change of clothes and a brown extension cord with him. (T 959). Ms. Smith identified the wooden block knife set Sergeant Everly took from the house and stated that Lloyd noticed a knife missing the day of the murder. (T 961). A few days before the murder, Appellant got off the phone with Elec and told her that Elec was going to kill

his father by putting an electrical appliance in the shower or bath with him and electrocute him. (T 962-63).

The State's final witness was Detective George Bruder from the Broward Sheriff's Office, who testified over Appellant's objection to the events surrounds Appellant's arrest for interference with custody. Detective Bruder testified that Allan Trubilla reported Elec missing on May 20, 1992. (T 974). On May 26, 1992, Mr. Trubilla filed a complaint for interference with custody. (T 972). Detective Bruder went to Appellant's house on May 28, 1992, looking for Elec. (T 972-73). Appellant answered the door and told the detective that Elec was not there. (T 974). Appellant's wife came out of the bedroom, shut the door behind her, whispered to Appellant, and then went back into the bedroom. When Detective Bruder attempted to follow her in there, she stopped him and came back out. After she and Appellant whispered again, Appellant started toward the bedroom, and the detective followed him. (T 975). The detective found Elec standing in the closet just inside the door dressed only in his underwear. (T 975). As the detective was leaving with Elec, Appellant told Elec that he could run away any time and stay with them; then they embraced and kissed on the lips. (T 976). After defense counsel withdrew his objection, Detective Bruder testified that Elec was examined at a sexual assault treatment center and that there was no evidence of abuse by Elec's father. (T 980). He also testified that Elec did not complain of any abuse by his father. (T 980).

Following this testimony, the State rested, and Appellant moved for a judgment of acquittal, which the trial court denied. (T 985-96). Thereafter, defense counsel gave his opening statement and then called Dr. Antoinette Appel as a witness. Dr. Appel was a clinical and forensic neuropsychologist who was appointed by the court on a confidential basis to evaluate Appellant's competency and sanity. (T 1007-09). Dr. Appel testified that she met with Appellant three or four

times. The first time, she obtained the following history from him: Appellant reported that his parents divorced when Appellant was two years old and that his mother then married a man named John Foster. According to Appellant, his stepfather physically and sexually abused him from the age of five to nine and a half. His stepfather beat him, put him in showers, and sexually assaulted him. (T 1010-13). Appellant also reported that his Aunt Janet sexually abused him from the age of five to eleven and a half. (T 1013). At some point, they moved to York, Pennsylvania, where Appellant was "treated" and put on medication. (T 1014). In his late teens, Appellant joined the Air Force, but jumped out of a window, was "treated," and then discharged. (T 1014). In the early 1980's, he was admitted for four days to Johns Hopkins for suicidal tendencies. (T 1014). He later attempted suicide by shooting himself in the chest and was treated by a psychiatrist. (T 1014-15). In early 1990, Appellant began seeing Katrina Fritz, who sent him to see Dr. Diaz. Dr. Diaz placed him on Prozac, which Appellant stopped taking when he moved to Cape Coral. (T 1015).

After obtaining this history from Appellant, Dr. Appel attempted to corroborate the information through medical records provided by defense counsel. She also reviewed writings by Appellant, police reports, and the autopsy file. (T 1016).

Appellant's records begin in 1981. (T 1017). Appellant was first diagnosed in York, Pennsylvania, with a schizophreniform disorder. (T 1032). While at Johns Hopkins, Appellant was diagnosed with a borderline personality disorder, and was given neuroleptics, a major anti-psychotic drug. (T 1018-19). Dr. Appel believes, however, that Appellant has a bipolar disorder, depressive type with manic episodes. (T 1019). Appellant was diagnosed after his arrest as being in a major depressive episode. (T 1030). At various times while awaiting trial, Appellant was prescribed Haldol, Elavil, Sinequan, and Thorazine. (T 1032-33).

Regarding the murder, Dr. Appel stated that multiple stabbings are consistent with a manic

episode. (T 1034). She also believed that Appellant was affected by Elec's claims of abuse because Appellant was confronting in therapy his own abuse as a child. (T 1035-36). She also testified that Appellant's abrupt termination of his Prozac in July of 1992 could have caused a rebound effect which would have caused him to return to the same or worse manic/depressive state as before he had begun medication. (T 1038-39). In her opinion, Appellant's disorder, plus his abrupt cessation of Prozac, plus the stressful events leading up to the murder, caused a manic episode during which he killed Allan Trubilla. According to her, during that episode, Appellant did not appreciate the nature and consequences of his actions, did not understand that what he was doing was wrong, and could have been easily controlled; therefore, Appellant was legally insane at the time of the murder. (T 1040-41).

On cross-examination, Dr. Appel admitted that she was bothered by the fact that Appellant knew he was going to Ft. Lauderdale, knew he was going to see Elec, knew he was going to the victim's apartment, knew he had a knife in his bag, and knew what he was doing when he went there. (T 1050-56). She was also bothered by Appellant's immediate flight from the scene. (T 1076). She also admitted that Appellant knew it was wrong to kill Allan Trubilla because Appellant consistently told Elec that killing his father was not the way to deal with his problems, that they could go to court or to a shelter. (T 1088-89). Yet, she maintained her opinion that, because of his termination of Prozac and his bipolar disorder, he went into a frenzy and did not know what he was doing at the moment he began stabbing Allan Trubilla. (T 1053, 1074-76). Her opinion, however, was based largely on Appellant's version of events; she did not bother to corroborate that version with any other evidence in the case even though she knew Appellant frequently lied or exaggerated the truth. (T 1056- 73).

Appellant's second witness was his mother, Donna Barton. Mrs. Barton testified that

Appellant was diagnosed with "minimal brain damage" at birth. (T 1099). She divorced Appellant's natural father when Appellant was two or three years old and married John Foster in December of 1964. (T 1100). They separated in 1971 and divorced in 1972 because her husband was an abusive alcoholic. (T 1102-03). He ended up shooting himself to death sometime after their divorce. (T 1104). When Appellant was approximately six years old, he became aggressive and defiant. (T 1099).

Mrs. Barton also related that in April or May of 1992, Appellant's wife called and told her that Appellant needed her to come be with him, but she could not go. (T 1101). The following day, Appellant told her that he had been sexually abused by his stepfather, that it was all coming to the surface, and that he could not deal with it. (T 1102). He also told her that when he was eleven his Aunt Janet "was making advances or whatever to him," but he did not go into details. (T 1103). On the morning of the murder, Appellant's wife called her for money to get Appellant into a hospital, but then called later and told her they were going to "run." (T 1112-13).

On cross-examination, Mrs. Barton expressed reservations about Appellant's report of abuse. She thought he had a fairly good childhood, and thought that maybe he was having difficulty differentiating between reality and dreams he may have had as a child. (T 1115-21).

Appellant's third witness was his wife, Margaret "Peggy" Strausser. Mrs. Strausser testified that she and Appellant were married in February of 1990. Shortly after they married, Appellant began having a sexual relationship with Allan Trubilla. She encouraged Appellant to determine whether he was gay. (T 1124-27). In the Fall of 1991, Appellant began seeing Katrina Fritz several times a week. (T 1130-31). After being placed under hypnosis, Appellant remembered numerous instances of physical and sexual abuse committed by his stepfather, John Foster, which Appellant related to her. (T 1132-33). He also related sexual abuse by his Aunt Janet. (T 1133). Appellant's

personality changed drastically for the better once he began taking Prozac, but he stopped taking it in August of 1992 and became depressed and angry. (T 1135-37).

After they moved to Cape Coral, Elec continued to call Appellant. About a week before the murder, Appellant and Lloyd had an argument, and Lloyd moved out of the house. (T 1168). Around 11:00 p.m. on the Saturday night before the murder, Elec called and said he was going to kill his father. Appellant yelled at him not to and told him to go to bed. (T 1142-45). On Sunday, Appellant was working on the speakers in her car and she gave Appellant a knife from the kitchen with which to strip the speaker wires. (T 1146-47). He left the knife in the car to finish working on the speakers at a later time. (T 1148). On Monday, Appellant said he had a job interview, had to pay a bill, and wanted to visit a friend in Miami. (T 1148-49). On Tuesday morning around 2:00 a.m., Appellant called her and told her to meet him somewhere. When she did, she saw that Appellant was covered in blood. (T 1149, 1152). They rented a room for Appellant to take a shower, then she called Appellant's mother, who wired them $1,025. (T 1154-55). They went back to their house to get some clothes, then drove to Texas, and then flew to Jamaica. (T 1158-59). While sightseeing in Jamaica, Appellant fell at a waterfall and broke his ankle. (T 1159-60). They decided to leave, but were only allowed to fly to Dallas or Chicago, so they flew to Chicago where Appellant was arrested. (T 1162).

As his final witness, Appellant testified on his own behalf. He related much of the same "history" that other witnesses had related: several instances of abuse by his stepfather and aunt (T 1201-07), his suicide attempt in the Air Force (T 1207-08), his suicide attempt by shooting himself (T 1210), how he met Lloyd through the Big Brother Program and later moved with Lloyd and his mother to Florida (T 1212-14), how he met and married his wife (T 1216-17), how he met Allan Trubilla through work and how Allan "hit a lucky day" when they became lovers (T 1218-19), how

his relationship with Allan ended, and Allan's verbal and mental abuse of Elec (T 1221-25), all of the steps he took to help Elec get away from his father (T 1228-31), his treatment by Katrina Fritz and Dr. Diaz, and his violent nature before and after Prozac (T 1232-38), and his argument with Lloyd and Lloyd's moving out of the house (T 1238).

Regarding the murder, Appellant testified that Elec had been calling him repeatedly since Appellant moved to Cape Coral, complaining about his father. (T 1226). A couple of months before the "incident," Elec spoke of killing his father. (T 1239). On the Saturday before the murder, Elec called and said he was going to kill his father, but Appellant talked him out of it. (T 1240). When he left for his interview on Monday, he saw the knife that his wife had given him to strip the speaker wires in his car and he put it in the bag with his change of clothes. (T 1241-42). He drove to Ft. Lauderdale and stopped to see the house he used to rent, then he went to Eckerd's to buy two pair of latex gloves and some hair dye for his wife which they did not have, then he went shopping for his wife's birthday present, then he ate at McDonald's. (T 1242-43). It was around 10:00 p.m., and he knew Allan got home around 10:30 p.m. (T 1243). He called Elec from a 7-Eleven, and Elec let him in the apartment. (T 1243). He wanted to talk to Elec about going to Covenant House before Allan got home, but by the time he changed his clothes Allan was there, so he hid in Elec's bedroom. (T 1244). After Allan went to bed around 1:00 a.m., he tried to talk Elec into going to Covenant House, but Elec began crying and refused to go. He wanted to go home with Appellant. (T 1244). The next thing Appellant remembers is waking up on top of Allan on the bathroom floor. Elec turned on the light, and he fled. (T 1245). He knew Allan had been stabbed, there was blood everywhere, and he knew something was wrong. (T 1246). He got in his car and headed for Cape Coral, but he does not remember going there. (T 1246). Once he met his wife, she took over and made all of the decisions about where to go and what to do. (T 1248-51).

He confessed to the police because he just wanted to get out of there. He did not intend to kill Appellant. He "just lost it." (T 1253, 1256). He admitted on cross-examination, however, that he knew it was wrong to kill Allan when he went in the apartment. (T 1282).

The following day, the defense rested, and defense counsel renewed his motion for judgment of acquittal, which was denied. (T 1304-06). On rebuttal, the State presented two experts who disagreed with Dr. Appel's opinion that Appellant was insane at the time of the crime. Dr. Trudy Block-Garfield testified that, based on a test she administered, Appellant appeared to have some psychological difficulties. (T 1330). However, another test was not interpretable because the validity scales were too high, and Appellant had attempted to make himself look more psychotic than would be expected. (T 1330). She believed that Appellant was depressed at the time of the murder, was probably under a lot of stress, and suffers from a mixed bag of personality disorders. (T 1337). However, she found no evidence of psychosis. According to her, psychotics are not able to engage in organized behavior, i.e., they do not have the capacity to plan. (T 1365). She also did not believe that Appellant suffered from a bipolar disorder. (T 1340, 1351). In addition, she saw no evidence in her own patients to suggest a rebound effect when someone abruptly stops taking Prozac or similar anti-depressants. (T 1358). As for Appellant's sanity at the time of the crime, based on the degree of planning and the steps taken to evade capture, she opined that Appellant knew what he was doing, was able to appreciate the nature and consequences of his actions, and knew that what he was doing was wrong. (T 1340-41). "Had he not been able to appreciate the consequences, there would have been no reason to protect himself." (T 1341).

Similarly, Dr. Walczak disagreed with Dr. Appel's opinion. Based on his interview with Appellant, he believed Appellant was evasive and tried to mislead him intentionally. (T 1375-80). He believed that Appellant suffered from depression, and he thought that Appellant may have a

personality disorder, possibly an antisocial personality. (T 1382-83). Nevertheless, based on Appellant's demeanor and tone of voice in the interview, and the facts leading up to, and subsequent to, the murder, Dr. Walczak believed that Appellant was sane at the time of the offense. (T 1382).

The State rested its rebuttal (T 1406), the parties gave their closing arguments (T 1411-35, 1435-74, 1474-96), and the following day the jury found Appellant guilty of first-degree murder as charged (T 1535-37). Six weeks later, the penalty phase commenced and the State called Detective Robert O'Neil as its only witness. Detective O'Neil testified that after Elec waived his Miranda rights he gave Detectives O'Neil and Palmer a taped statement. (T 1582-84). Over Appellant's objection, that eighteen-minute statement was played for the jury: Elec explained that Appellant was upset at the way Allan Trubilla was treating his son, so Appellant offered to kill Allan, and Elec accepted. (T 1590-91). The plan was to kill him with a knife. (T 1591). When Appellant called Elec on Monday morning, Appellant asked him what time Allan would be home and Elec told him around 11:00 p.m. (T 1593). Appellant said he would be there at 1:00 a.m. (T 1593). Appellant left Cape Coral to come to Ft. Lauderdale to kill Allan at 3:00 p.m., and Elec let Appellant into the apartment. (T 1593). Elec did not "want to do this thing," but Appellant did. (T 1593-94). Appellant brought a knife with him. (T 1594). Appellant told Elec to unscrew the fuses to the lights, which he did. (T 1603). Allan was in bed. Appellant pushed Allan out into the hallway and started stabbing him. (T 1595-96). Elec was in his bedroom. He did not want to do it any more. He did not want his father to die. (T 1596). After Appellant stabbed Allan, Appellant changed his clothes. When Mark Chandler knocked on the door and saw blood on Elec, he asked Appellant what to do, and Appellant told him to shut the door, which he did. (T 1598-99). After Appellant left, Elec called 911. (T 1598). It was his idea to tell the police that some unknown

person broke in and killed Allan. (T 1600). Appellant was supposed to dispose of the body. They had discussed putting Allan into a "blue bin." Elec was then supposed to claim that Allan ran away. (T 1604-06). Elec thought that he would go live with his mother for awhile and then live with Appellant. (T 1601). On cross-examination, Detective O'Neil testified that Elec Trubilla was in prison and had been convicted of first-degree murder. (T 1608).

Following Detective O'Neil's testimony, the State rested, and Appellant testified in his own behalf. He denied that he instigated the plan to kill Allan, and stated that Elec had discussed killing Allan twenty times or more, but that Appellant did not take him seriously until the Saturday before the murder. (T 1612-13). On cross-examination, Appellant admitted that he wasted four hours between the time that he arrived in Ft. Lauderdale and the time he went to talk to Elec about going to Covenant House. (T 1621). Appellant did not remember how the knife got from his bag into his hand. (T 1625).

Following Appellant's testimony, Lloyd Pryor and his mother both testified that Appellant was good to them and had provided for them for the past twelve years. (T 1629-31, 1641-43). Mrs. Strausser then testified that Appellant was trying to help Elec, that Elec manipulated Appellant, and that if it were not for Elec Appellant would not be where he is. (T 1656-57). Finally, Appellant's mother testified that Appellant was a kind person and tried to held people. (T 1667).

Thereafter, the defense rested, and the parties gave closing arguments. (T 1668, 1670-97, 1697-1727). The instructions to the jury included the aggravating factors of HAC and CCP, and the mitigating factors of no significant history, extreme mental or emotional disturbance, substantial domination, substantial impairment of the capacity to appreciate the consequences, and the catchall instruction. (T 1728-33). After deliberating 80 minutes, the jury recommended a life sentence. (T 1739). At a separate sentencing hearing, the parties were given an opportunity to argue their

respective positions and submit sentencing memoranda. (T 1752-55). One year later, the trial court imposed a sentence of death, overriding the jury's life recommendation. In its 43-page sentencing order, the trial court explained its factual basis for finding the existence of the HAC and CCP aggravating factors. It also explained its rejection of all three statutory mental mitigators. In mitigation, it did find the following circumstances and noted the weight to which it gave each: no significant history (some weight); family background (little weight); Appellant suffers from depression and a personality disorder (some weight); mental, physical, and emotional abuse as a child (some weight); remorse (little weight); employment history and contribution to household (little weight); good behavior during trial (little weight); contribution to society through the Big Brother Program (some weight); good husband, parent, family man (some weight). In imposing the sentence of death, the trial court concluded that

> [t]he advisory sentence . . . was not the result of sound reasoned judgment as it must be. Having considered the aggravating circumstances and those mitigating circumstances that exist, the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. The mitigating evidence is insufficient to outweigh the aggravating circumstances in support of a life sentence. . . . [T]his heinous and torturous crime was the result of a devious, calculated plan in furtherance of an evil and unjustifiable purpose. . . . Based upon the analysis set forth above, it is therefore the sentence of this court that you, WILLIAM LEE STRAUSSER, JR. be sentenced to death for the murder of Allan Trubilla.

(R 2169-70). This appeal follows.

SUMMARY OF ARGUMENT

Issue I - Sections 90.616 and 90.704 of the Florida Evidence Code authorized the trial court to except Dr. Walczak from the rule of sequestration during Appellant's testimony. To the extent that they did not, Appellant has failed to show prejudice.

Issue II - Evidence that the victim filed a complaint against Appellant for interference with custody several months before the murder was not Williams rule evidence; rather, it was "inseparable crime evidence" which was relevant to show motive for the killing. To the extent that it was improperly admitted, it was harmless beyond a reasonable doubt.

Issue III - The trial court did not abuse its discretion in allowing Lloyd Pryor on redirect examination to give his opinion that Appellant knew what he had done was wrong. Such testimony was permissible to qualify or explain his testimony on cross-examination.

Issue IV - The record supports the trial court's determination that, under the totality of the circumstances, Appellant's confession was voluntarily, knowingly, and intelligently made.

Issue V - A. The tape of Elec Trubilla's 911 call to the police was not objected to at trial. It was relevant and admissible as an excited utterance or spontaneous statement regardless of whether Elec testified at the trial. To the extent that it was admitted in error, such error was not fundamental. As for the admission of Elec's taped statement during the penalty phase, Appellant was put on notice of its admission prior to the penalty phase and had ample opportunity to rebut it; he simply chose not to. To the extent that it was improperly admitted, it was harmless beyond a reasonable doubt. B. The trial court did not abuse its discretion in allowing the State to read portions of a letter that Appellant sent to Lloyd Pryor after his arrest. The portions that were read were relevant to show motive, and the portions that were not read were unduly prejudicial. Appellant had ample opportunity to read the entire letter or admit the letters into evidence but chose

not to do so. To the extent that the trial court erred, however, such error was harmless beyond a reasonable doubt. C. The trial court did not abuse its discretion in admitting a videotape of the crime scene which was used by the crime scene investigator to explain the crime scene. If it did err, however, such error was harmless beyond a reasonable doubt. D. Appellant concedes that he failed to preserve this issue for appeal. Regardless, the record supports the trial court's denial of Appellant's challenges for cause of two jurors whom he later struck peremptorily. E. Since none of the above issues constituted error, their cumulative effect could not have denied Appellant a fair trial. To the extent some or all of the trial court's rulings were erroneous, however, they did not rise to a level or constitute fundamental error.

Issue VI - The record supports the trial court's override of the jury's life recommendation. The facts which support such a sentence are so clear and convincing that virtually no reasonable person could differ.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING AN EXPERT WITNESS TO REMAIN IN THE COURTROOM DURING APPELLANT'S TESTIMONY EVEN THOUGH THE RULE OF SEQUESTRATION HAD BEEN INVOKED (Restated).

Prior to trial, defense counsel invoked the rule of sequestration. (T 536). Just prior to Appellant's testimony in the guilt phase, the State requested that one or both of its expert witnesses be allowed to sit in the courtroom during Appellant's testimony, as it might "contribute to their determination as to whether or not he was or was not insane." Defense counsel initially had no objection. (T 1193). After a lunch recess, and after the trial court inquired as to Appellant's decision to testify, the State renewed its request to have its two doctors sit in during Appellant's testimony. At that point, the following colloquy occurred:

> [DEFENSE COUNSEL]: The only objection is that these experts have already rendered opinions in writing, and I just feel that allowing them to sit in and then perhaps somehow to bolster their opinion or change their opinion would be improper.
>
> THE COURT: Where would an expert giving a psychological opinion differ from an expert who comes in, in the course of a civil proceeding, who sits, listens to all the evidence, then based upon the hypothetical that's given to them, is able to render an opinion?
>
> [DEFENSE COUNSEL]: I don't know, Judge. I have never had a civil trial in that regard, so.
>
> THE COURT: I think the rules do provide for you to do that. I will permit you to do it.
>
> [THE STATE]: I do have one expert, it will be Dr. Walzack [sic].

(T 1197-98). Following Appellant's testimony, the trial court noted for the record that Dr. Walczak

only sat through Appellant's direct examination. (T 1297).

In this appeal, Appellant claims that "the State failed to show that the presence of experts during [his] testimony was essential to the presentation of its cause," **brief of appellant** at 38, that the trial court failed "to conduct a hearing to determine the prejudicial effect of exempting the State's expert witnesses from the Rule of Sequestration," id. at 38, and that the trial court erred in allowing Dr. Walczak to sit in the courtroom during Appellant's testimony, id. at 34.

Section 90.616 of the Florida Evidence Code has recently codified the common-law "rule of sequestration." This provision mandates that all witnesses to an action be sequestered from the courtroom upon request by a party or upon the court's own motion. § 90.616(1), Fla. Stat. (1993). Certain exceptions, of course, may be permitted in the discretion of the trial court. Id. § 90.616(2). Of the four exceptions, one was applicable to this case. Subsection 90.616(2)(c) provides that a witness may not be excluded from the courtroom if he or she is "[a] person whose presence is shown by the party's attorney to be essential to the presentation of the party's cause."

As Appellant concedes in his initial brief, the central issue in the trial was Appellant's sanity at the time of the murder. **Brief of Appellant** at 35. To support his defense of insanity, Appellant presented the testimony of a forensic neuropsychologist, his mother, his wife, and himself. (T 1006-92, 1098-1123, 1123-92, 1198-1297). To rebut Appellant's insanity defense, the State called two doctors who had been appointed by the trial court pretrial to evaluate Appellant's competency and sanity pursuant to Florida Rule of Criminal Procedure 3.216. The two doctors were Dr. Trudy Block-Garfield, a clinical psychologist; and Dr. Michael Walczak, a forensic psychologist. (T 1318-69, 1370-86).[2]

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[2] Rule 3.216(h) provides that "[t]he experts appointed by the court may be summoned to testify at the trial, and shall be deemed court witnesses whether called by the court or by either (continued...)

As detailed in the record excerpts above, the State twice requested to except one or both of its expert witnesses from the rule of sequestration. Although it did not cite to any authority for its request, the State obviously sought authority under subsection 90.616(2)(c). It also apparently based its request on section 90.704 of the evidence code, given its stated reason for the request. Section 90.704 provides that "[t]he facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, him at or before the trial." (Emphasis added).

In discussing section 90.616(2)(c), Professor Ehrhardt has noted in his treatise that

> [t]he burden is on the party requesting the witness be permitted to stay in the courtroom to demonstrate why the presence of the witness is essential. The trial court has wide discretion in determining which witnesses are essential. Expert witnesses are the most frequently cited types of witness who would qualify.... The reasons underlying the rule of exclusion are less likely to apply to experts than to fact witnesses since experts are testifying to their opinions rather than to factual matters.

Ehrhardt, Florida Evidence § 616.1 (1995 Edition) (emphasis added; footnotes omitted). Regarding § 90.704, this Court has stated:

> A qualified expert may testify to his opinion concerning the defendant's mental condition based either upon
>
> (1) personal examination of the defendant made by the witness, or
>
> (2) the testimony in the case, if he has been in court and heard it all.
>
> (3) He may also give his opinion upon hypothetical questions propounded by counsel.

Jones v. State, 289 So.2d 725, 727 (Fla. 1974) (emphasis added; citation omitted). Although these

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[2] (...continued) party." (Emphasis added). Thus, Appellant's repeated assertion in his initial brief that Drs. Block-Garfield and Walczak were State witnesses is technically incorrect. Their testimony was presented by the State, but they were court witnesses.

three bases seem mutually exclusive, given the disjunctive "or," the State submits that any one or a combination of the three should be permissible. Moreover, although the second basis requires the expert witness to hear all of the testimony at trial, the State submits that the expert should be allowed to hear as much of the testimony as he or she believes is necessary in order to render an opinion. To the extent that the opposing party disagrees as to the quantity of testimony heard by the expert, such could be the subject of cross-examination.

As defense counsel noted in his objection before the trial court, Dr. Walczak had already provided a written report stating his opinion of Appellant's sanity at the time of the murder. The doctor obviously believed, however, that further observation of Appellant during Appellant's testimony at the trial was essential to his ultimate determination of Appellant's sanity. As this Court has held numerous times, "[t]he burden is on the complaining party to demonstrate an abuse of discretion with resultant injury." Spencer v. State, 133 So.2d 729, 731 (Fla. 1961), cert. denied, 369 U.S. 880 (1962). "The presumption is in favor of the correctness of the court's ruling and reasonable exercise of discretionary power, and the burden is upon plaintiff in error to make the alleged error in the court's ruling affirmatively to appear." Romano v. Palazzo, 91 So. 115, 116 (Fla. 1922). See also Baker v. Air-Kaman of Jacksonville, Inc., 510 So.2d 1222, 1223 (Fla. 1st DCA 1987).

As discussed above, the State submits that the trial court did not abuse its discretion in allowing Dr. Walczak to sit in the courtroom during Appellant's direct examination. Were this Court to find otherwise, however, the State submits that Appellant has failed to meet his burden of showing sufficient injury by the court's erroneous ruling so as to require a new trial. The test to determine prejudice is "whether the testimony of the challenged witness was substantially affected by the testimony he heard, to the extent that his testimony differed from what it would have been

had he not heard testimony in violation of the rule." Steinhorst v. State, 412 So.2d 332, 336 (Fla. 1982).

As detailed earlier, Appellant presented the testimony of three lay witnesses, including himself, and one expert witness to support his defense of insanity. Dr. Walczak was present only for the direct examination of Appellant. Dr. Walczak's opinion prior to trial, as evidenced by his written report, was that Appellant was sane at the time of the offense. After witnessing Appellant's direct testimony, Dr. Walczak's opinion remained the same. In discussing his observation of Appellant's testimony, Dr. Walczak commented that there were inconsistencies between Appellant's recitation of events during his interview and his recitation of events during his testimony. (T 1376). The nature of those inconsistencies were never developed. Rather, the focus of Dr. Walczak's testimony in that regard was more on Appellant's attempt to manipulate the facts, than on their truth. It was meaningful to Dr. Walczak that Appellant recited tremendous detail regarding events leading up to, and events subsequent to, the murder, but lacked any memory regarding the murder itself. (T 1378-80, 1385-86). Appellant's demeanor and tone of voice were also very important to the doctor. (T 1379). Most importantly, defense counsel alleged no inconsistencies between Dr. Walczak's trial testimony and deposition testimony or written report on cross-examination.

To support his position that he was unduly prejudiced by the trial court's exception of Dr. Walczak from the rule, Appellant cites principally to First Union National Bank of Florida v. Goodwin Beach Partnership, 644 So.2d 1361 (Fla. 5th DCA 1994). Nowhere in the majority's opinion, however, does it discuss any issue relating to the sequestration of witnesses. In Judge Sharp's lone dissent, however, she does discuss such an issue and finds that the trial court did not abuse its discretion in excluding First Union's expert witness from the courtroom. To the extent

Appellant overlooked the source of this discussion, but would nevertheless rely upon it to support his position, it is easily distinguishable. Judge Sharp wrote:

> First Union gave no explanation or made no proffer at the non-jury trial about what facts and date [the expert] would use to formulate an opinion, nor what his opinion on rebuttal might concern. The trial judge assumed [the expert] would be called on rebuttal to give his opinion of the other expert's opinions. That would not be a proper use of expert opinion, as all agreed. Since First Union failed to proffer any other basis for [the expert's] opinion testimony on rebuttal, it was proper for the trial court to rule as it did, that First Union could either sequester [the expert], if it intended to call him as a witness, or have him sit with counsel at trial in an advisor capacity, but not then be permitted to testify.

Id. at 1368 (Sharp, J., dissenting) (citations omitted). Here, Dr. Walczak did not witness Appellant's expert's testimony, the State explained why it wanted to except Dr. Walczak from the rule, and the basis for his testimony on rebuttal was to rebut the defense of insanity, not to given an opinion on Appellant's expert's opinion. Thus, Judge Sharp's dissent is inapposite to this case.

The State, on the other hand, relies on Baker v. Air-Kaman of Jacksonville, Inc., 510 So.2d 1222, 1223 (Fla. 1st DCA 1987), and Florida Motor Lines Corporation v. Barry, 27 So.2d 753 (Fla. 1946). In Baker, defense counsel furnished his expert witness, prior to his testimony, with portions of the trial transcript, which contained the testimony of the opposing party's experts. The trial judge nevertheless determined that Air-Kaman's expert witness could testify. On appeal, the First District found that the trial court did not abuse its discretion. Citing to the prejudice test in Steinhorst, as noted above, the district court found that Baker had failed to show a substantial change in the testimony of Air-Kaman's expert witness; thus, the decision to admit the expert's testimony was proper. Id. at 1223-25.

In Barry, the defendant had conceded liability, and the issue became one of damages. On appeal, the defendant claimed that the trial court had erred in allowing the plaintiff's expert witness

to hear the testimony of another of the plaintiff's expert witnesses. This Court found no abuse of discretion in the trial court's ruling, even though "[a]rguments pro and con may be made reaching the conclusion that Dr. Manson's testimony was influenced or was not influenced by what he heard from other witnesses testifying in the cause as he sat in the court room." Id. at 756.

Again, Appellant made no showing either through cross-examination at the trial, or here on appeal, that Dr. Walczak's testimony was "substantially affected by the testimony he heard, to the extent that his testimony differed from what it would have been had he not heard testimony in violation of the rule." Steinhorst, supra. Consequently, assuming that Dr. Walczak was improperly allowed to sit in the courtroom during Appellant's testimony, Appellant has failed to show prejudice. Therefore, this Court should affirm Appellant's conviction for the first-degree murder of Allan Trubilla.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO COMMENT ON AND ADMIT EVIDENCE OF THE VICTIM'S COMPLAINT AGAINST APPELLANT FOR INTERFERENCE WITH CUSTODY (Restated).

During the State's opening statement, the prosecutor explained that Appellant and the victim had a sexual relationship, and that, during that time, Appellant became good friends with the victim's son, Elec. At some point, the victim broke off the relationship and told Appellant to stay away from Elec. Elec became very angry with his father, and their relationship deteriorated. One day Elec ran away from home and took refuge in Appellant's home. "It was that relationship between Elec and Mr. Strausser that ultimately led Alan Trubilla to file an interference with child custody, a criminal charge against William and Peggy Strausser." (T 545-47).

To this comment, defense counsel objected and questioned the admissibility "of any prior criminal charges against Mr. Strausser and the jury knowing about that." (T 547). The State responded that the complaint filed by the victim against Appellant and his wife were inextricably intertwined with the facts of the case and helped to establish the motive for the killing. According to the State, it was the filing of the complaint, not the ensuing charges or disposition thereof, that were relevant. (T 547-48). Defense counsel maintained that the evidence was irrelevant, and he moved for a mistrial, which the trial court took under advisement. (T 548). The State thereafter continued with a chronology of events leading up to the murder. (T 548-50). "You will see from the evidence, as a result of this separation, as a result of his father's prohibitions, Elec Trubilla continued making contact, that there were numerous phone calls,, [sic] and over [a] period of time, it was ultimately decided that the only way . . . that those two could be together was to eventually

kill his father." (T 550).

At the beginning of the next day's session, the trial court denied defense counsel's motion for mistrial:

> With regard to the motion for mistrial that was made during the course of the State's opening, the Court at the present time is going to deny it.
>
> I believe the filing of those charges and the indication to the jury of those charges goes towards motive, not propensity. I think its [sic] proper under the theory that's being put forward in terms of the prosecution of this defendant. And accordingly, that is the reason why the Court at the present time is denying it.
>
> As to its disposition, I think that would be improper and the Court will preclude a motion in limine to avoid additional commentary as it relates to the disposition of that, unless the defense seeks to raise that.

(T 674).

Prior to the lead detective's testimony, defense counsel anticipatorily objected to the reference in Appellant's taped statement of Appellant being arrested for interference with custody. After much discussion, the trial court ultimately affirmed its previous ruling that the evidence was relevant to show motive. (T 754-60).

Shortly thereafter, Detective Palmer explained the steps in his investigation and related his discussion with Mark Chandler, the apartment manager where the victim lived:

> Mark Chandler had given a statement to me, that the person he had seen flee the apartment was a person he had known to be involved with Alan Trubilla and his son Elec, and that there was a prior police report that I could refer to get his true name. He wasn't sure of the name.

(T 771). To this testimony, defense counsel renewed his objection and his motion for mistrial, which the trial court overruled and denied. (T 771). The State continued:

Q. (By Mr. Morton) Ultimately that turned out to be an allegation of interference with custody filed?

A. Yes.

Q. That was filed by the victim, against Mr. Strausser, am I right?

A. That is correct.

(T 771).

Later in Detective Palmer's testimony, the State questioned him regarding Elec's version of events:

Q. Did you discuss with Mr. Trubilla the relationship between him and Mr. Strausser, and how it developed?

A. Yes, I did.

Q. What did he tell you?

A. He stated the Mr. Strausser was a friend of his father's, the victim in this case, Alan Trubilla, and that they were homosexual lovers.

During the relationship between Mr. Strausser and the victim, Elec had became [sic] very close with Bill Strausser. Ultimately there was a break up between Alan Trubilla and Mr. Strausser, and Elec wanted to go with Mr. Strausser.

Q. Did you ever discuss with Mr. Trubilla any attempts that he made to actually go live with Mr. Strausser prior to his father's death?

A. Yes.

Q. What did he tell you?

A. He had ran [sic] away on, I believe, it was two occasions. On one occasion he was actually living with Bill Strausser and his wife in the house in Tamarac, and that the police found him there and brought him back to his father.

Q. As a result of that incident -- By the way, do you recall when that incident occurred?

A. That was in May of 1992.

Q. Some three months before this happened?

A. Yes.

Q. As a result of that incident, were you able to determine if the deceased took any type of legal action against Mr. Strausser?

A. During that time, I believe there was a restraining order placed on Mr. Strausser.

Q. Were there any charges, a complaint filed?

A. Yes, a complaint was filed against Mr. Strausser for child interference.

MR. BARON: Judge, I renew my previously made objection and previously made motion with regard to this matter.

THE COURT: It's overruled.

(T 792-93).

Still later in Detective Palmer's testimony, just prior to the State publishing Appellant's taped statement, defense counsel renewed his objection to Appellant's reference to his arrest for interference with custody. (T 803). The trial court again overruled the objection. (T 803). Defense counsel then posed a continuing objection, which the trial court accepted. (T 803-04).

During defense counsel's cross-examination of Lloyd Pryor, however, counsel discussed the events surrounding the interference with custody and specifically asked Mr. Pryor, "Ultimately the police come, take Elec out of the house and Bill gets arrested, correct?" Mr. Pryor responds, "Yes." (T 935) (emphasis added).

Finally, the State's last witness was Detective George Bruder, who investigated the

interference with custody complaint. Prior to his testimony, defense counsel once again objected to any testimony relating to this complaint. In the alternative, defense counsel objected to any reference to sexual misconduct by Appellant. The trial court ruled that the evidence was relevant to motive and overruled defense counsel's objection. (T 965-70).

Thereafter, Detective Bruder testified that Allan Trubilla reported Elec missing on May 20, 1992. (T 974). On May 26, 1992, Mr. Trubilla filed a complaint for interference with custody. (T 972). Detective Bruder went to Appellant's house on May 28, 1992, looking for Elec. (T 972-73). Appellant answered the door and told the detective that Elec was not there. (T 974). Appellant's wife came out of the bedroom, shut the door behind her, whispered to Appellant, and then went back into the bedroom. When Detective Bruder attempted to follow her in there, she stopped him and came back out. After she and Appellant whispered again, Appellant started toward the bedroom, and the detective followed him. (T 975). The detective found Elec standing in the closet just inside the door dressed only in his underwear. (T 975). As the detective was leaving with Elec, Appellant told Elec that he could run away any time and stay with them; then they embraced and kissed on the lips. (T 976). After defense counsel withdrew his objection, Detective Bruder testified that Elec was examined at a sexual assault treatment center and that there was no evidence of abuse by Elec's father. (T 980). He also testified that Elec did not complain of any abuse by his father. (T 980).

Following this testimony, defense counsel renewed his motion for mistrial in light of the testimony that Elec was examined at a sexual assault treatment center, and the Appellant and Elec kissed on the lips. The trial court denied the motion. (T 983-84).

In this appeal, Appellant complains that the trial court abused its discretion in allowing the State to argue and present evidence relating to the interference with custody incident. **Brief of**

Appellant at 41-46. Specifically, Appellant claims that such evidence constituted Williams rule evidence, that the State failed to file a notice of intent to rely on collateral crime evidence, that the trial court failed to conduct a pretrial hearing regarding the admissibility of such evidence, that this evidence became a feature of the trial, that it lacked probative value, and that it was extremely prejudicial to the defense. Id. at 44-46.

The State submits, however, that the evidence relating to Allan Trubilla's complaint against Appellant for interference with custody was inextricably intertwined with the facts of the murder, and was relevant to show Appellant's motive for the murder and his state of mind at the time of the murder. In Griffin v. State, 639 So.2d 966, 968 (Fla. 1994), this Court distinguished between evidence admitted under section 90.404(2)(a) of the Florida Evidence Code--so-called Williams rule evidence--and evidence admitted to establish the entire context of the charged crime:

> "The Williams rule, on its face, is limited to "*[s]imilar fact evidence*." § 90.404(2)(a), Fla.Stat. (1991) (emphasis added). . . . [E]vidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule evidence. It is admissible under section 90.402 because "it is a relevant and inseparable part of the act which is in issue. . . . [I]t is necessary to admit the evidence to adequately describe the deed."

Griffin, 639 So.2d at 968 (citations omitted).

As the State argued, and the trial court ruled, the circumstances surrounding the interference with custody incident were relevant to show motive, and were necessary to describe adequately the events surrounding the murder of Allan Trubilla. Since Appellant's defense was one of insanity, his state of mind at the time of the murder was the predominate issue. Though not necessary to the prosecution, the State also wanted to show a motive for the murder. "[T]o prove its case, the State is entitled to present evidence which paints an accurate picture of the events surrounding the crimes

charged." Id. at 970.

The evidence at trial, upon which the State based its motive theory, was that Appellant became very close to Elec Trubilla during his relationship with Allen Trubilla. When Allan ended their relationship and told Appellant to stay away from Elec, Appellant became very upset and angry, as did Elec. Appellant and Elec continued to converse by telephone, and Elec began telling Appellant that his father was being abusive towards him. This angered and upset Appellant even more. Appellant called HRS, who investigated the situation between Allan and Elec Trubilla but found no evidence to support any action. Frustrated, Appellant also attempted to get Elec's mother to seek custody of Elec, but she reneged on her agreement to do so. Appellant's anger and frustration mounted. Then Elec ran away and came to stay with Appellant. Allan Trubilla filed a complaint against him, however, and Elec was ultimately returned to his father. Appellant was then arrested for interference with custody.

Appellant and his "family"--Appellant's wife, Lloyd Pryor, and Lloyd's mother--moved to Cape Coral on the west coast of Florida in July, partly to get away from the Trubillas. Elec, however, continued to call frequently and they began to discuss killing Elec's father so that Elec could live with Appellant. Meanwhile, Lloyd Pryor, whom Appellant had raised as his own child, got married against Appellant's wishes. Appellant did not get along well with his wife, who moved in with all of them. About a week before the murder, Appellant and Lloyd had an argument, and Lloyd and his wife moved out in the middle of the night. Appellant was furious and did not speak to Lloyd again until the day of the murder.

According to the State, all of these events, taken together, established Appellant's state of mind at the time of the murder and established a motive for killing Allan Trubilla. The interference with custody complaint was one link in a chain of events that led Appellant to kill. Neither

Appellant's arrest for the offense, nor the disposition of the case were important factors to the State. Rather, the fact that Allan Trubilla filed a complaint against Appellant was the important factor, for this fueled Appellant's anger towards the victim. Although the fact that Appellant was arrested for the offense was ultimately disclosed to the jury--through Appellant's taped statement to the police and through defense counsel's cross-examination of Lloyd Pryor--the State did not rely on this fact in arguing its case to the jury.

The fact that Allan Trubilla filed a complaint against Appellant was relevant to the issue of motive and was necessary to put the events surrounding the murder into context. Given the fact that the interference with custody complaint was inseparable from the murder and that its probative value was not outweighed by undue prejudice, the trial court did not abuse its discretion in admitting such evidence. Padilla v. State, 618 So.2d 165, 169 (Fla. 1993) (finding evidence admissible as inseparable crime evidence and relevant to establish defendant's mental condition during course of incident); Griffin, 639 So.2d at 969; Henry v. State, 649 So.2d 1366, 1368 (Fla. 1994); Bryan v. State, 533 So.2d 744, 747 (Fla. 1988).

Were this Court to find, however, that the trial court should not have admitted this evidence, any error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The permissible evidence upon which the jury could have relied to find Appellant guilty of the murder includes the following: Appellant confessed to the police and to Lloyd Pryor that he stabbed Allan Trubilla to death (T 809-43, 907); Appellant's patent palmprint was found in blood on the vanity in the bathroom where the victim was found dead (T 658); Appellant was seen running from the victim's apartment by two people immediately after the murder (T 609, 624-25); the knife found next to the victim's body, which was used to kill him, was consistent with a set of knives recovered from Appellant's home (T 638, 729); Appellant's glasses and a bloody sock were

found behind the victim's apartment complex where Appellant was seen getting into his car after the murder (T 610-11, 703-04).

As for Appellant's defense of insanity, Dr. Appel testified that, in her opinion, Appellant suffers from a bipolar disorder, depressive type with manic episodes. (T 1019). She also testified that Appellant's abrupt termination of his Prozac in July of 1992 could have caused a rebound effect which would have caused him to return to the same or worse manic/depressive state as before he had begun medication. (T 1038-39). In her opinion, Appellant's disorder, plus his abrupt cessation of Prozac, plus the stressful events leading up to the murder caused a manic episode during which he killed Allan Trubilla. According to her, during that episode, Appellant did not appreciate the nature and consequences of his actions, did not understand that what he was doing was wrong, and could have been easily controlled; therefore, Appellant was legally insane at the time of the murder. (T 1040-41).

On cross-examination, however, Dr. Appel admitted that she was bothered by the fact that Appellant knew he was going to Ft. Lauderdale, knew he was going to see Elec, knew he was going to the victim's apartment, knew he had a knife in his bag, and knew what he was doing when he went there. (T 1050-56). She was also bothered by Appellant's immediate flight from the scene. (T 1076). She also admitted that Appellant knew it was wrong to kill Allan Trubilla because Appellant consistently told Elec that killing his father was not the way to deal with his problems, that they could go to court or to a shelter. (T 1088-89). Yet, she maintained her opinion that, because of his termination of Prozac and his bipolar disorder, he went into a frenzy and did not know what he was doing at the moment he began stabbing Allan Trubilla. (T 1053, 1074-76). Her opinion, however, was based largely on Appellant's version of events; she did not bother to corroborate that version with any other evidence in the case even though she knew Appellant

frequently lied or exaggerated the truth. (T 1056- 73).

On rebuttal, the State presented two experts who disagreed with Dr. Appel's opinion that Appellant was insane at the time of the crime. Dr. Trudy Block-Garfield testified that, based on a test she administered, Appellant appeared to have some psychological difficulties. (T 1330). However, another test was not interpretable because the validity scales were too high, and because Appellant attemped to make himself look more psychotic than would be expected. (T 1330). She believed that Appellant was depressed at the time of the murder, was probably under a lot of stress, and suffers from a mixed bag of personality disorders. (T 1337). However, she found no evidence of psychosis. According to her, psychotics are not able to engage in organized behavior, i.e., they do not have the capacity to plan. (T 1365). She also did not believe that Appellant suffered from a bipolar disorder. (T 1340, 1351). In addition, she saw no evidence in her own patients to suggest a rebound effect when someone abruptly stops taking Prozac or similar anti-depressants. (T 1358). As for Appellant's sanity at the time of the crime, based on the degree of planning and the steps taken to evade capture, she opined that Appellant knew what he was doing, was able to appreciate the nature and consequences of his actions, and knew that what he was doing was wrong. (T 1340-41). "Had he not been able to appreciate the consequences, there would have been no reason to protect himself." (T 1341).

Similarly, Dr. Walczak disagreed with Dr. Appel's opinion. Based on his interview with Appellant, he believed Appellant was evasive and tried to mislead him intentionally. (T 1375-80). He believed that Appellant suffered from depression, and he thought that Appellant may have a personality disorder, possibly an antisocial personality. (T 1382-83). Nevertheless, based on Appellant's demeanor and tone of voice in the interview, and the facts leading up to, and subsequent to, the murder, Dr. Walczak believed that Appellant was sane at the time of the offense.

(T 1382).

Given the direct and circumstantial evidence of Appellant's guilt, the impeachment of Dr. Appel's credibility on cross-examination, and the testimony of the State's experts which rebutted Appellant's insanity defense, there is no reasonable possibility that the verdict would have been different had the evidence relating to the interference with custody not been admitted. See Bryan, supra; State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Therefore, this Court should affirm Appellant's conviction for the first-degree murder of Allan Trubilla.

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING LLOYD PRIOR TO GIVE HIS OPINION WHETHER APPELLANT KNEW THAT WHAT HE HAD DONE WAS WRONG (Restated).

During the State's case-in-chief, Lloyd Pryor testified that he had known Appellant for approximately 12 years and that Appellant had raised him. (T 878-84). Appellant and his wife lived with Mr. Pryor, and Mr. Pryor's wife and mother in Cape Coral, until he and his wife moved out several days before the murder. (T 893, 902). On the day of the murder, Appellant's wife called Mr. Pryor. Mr. Pryor spoke to Appellant as well. (T 902, 906). Appellant told him that he had stabbed Allan Trubilla to death. (T 907).

On cross-examination, defense counsel questioned Mr. Pryor at length about Appellant's state of mind in the months leading up to the murder. (T 925-40). Mr. Pryor explained that Appellant stopped seeing his psychologist and stopped taking his Prozac because he could no longer afford to do either. (T 928-29). According to Mr. Pryor, after Appellant stopped taking his Prozac, his personality changed. He was irritable and seemed like he was under a lot of stress. (T 929). The telephone calls from Elec were upsetting him, Mr. Pryor's decision to marry upset him, and Appellant did not get along well with Mr. Pryor's wife. (T 932, 936-37). When he spoke to Appellant on the day of the murder, Appellant did not seem himself; he seemed "spaced out." (T 938-39).

On redirect examination, the following colloquy occurred between the prosecutor and Mr. Pryor:

> Q. (By Mr. Morton) The phone conversations that you had with Mr. Strausser on the 18th when he told you what happened, --

A. Yes.

Q. -- you told us how he sounded, how he appeared. But when he spoke to you, did it appear to you that he knew what he had done?

A. What do you mean did he know what he had done? He told me what he did.

Q. That he killed Alan Trubilla, right?

A. Yes.

Q. And from your conversation, could you tell that he knew what he had done was wrong?

(T 941-42). At that point, defense counsel objected on the ground that the question called for a conclusion. The trial court overruled the objection, and Mr. Pryor answered, "If you kill someone would you think it was wrong? That's the way I would - I wouldn't even think like that. Because I think he knew what he did was wrong, but anybody would think that. I am not sure I went into detail with him about it." (T 942-43).

In this appeal, Appellant claims that the trial court improperly allowed Mr. Pryor to "give an expert opinion concerning [his] sanity at the time of the offense." **Brief of Appellant** at 47. Specifically, Appellant complains that Mr. Pryor was not qualified as an expert and "was wholly unqualified to provide an opinion as to [his] mental status." Id. In addition, Appellant complains that his sanity had not yet been put in issue, and thus the witness' opinion was elicited prematurely. Id. at 47-48.

"It is a well established principle of law in this state that an otherwise qualified witness who is not a medical expert can testify about a person's mental condition, provided the testimony is based on personal knowledge or observation." Rivers v. State, 458 So.2d 762, 765 (Fla. 1984). "However, the testimony must be based on observation and knowledge gained 'in a time period

reasonably proximate to the events giving rise to the prosecution.'" Cruse v. State, 588 So.2d 983, 990 (Fla. 1991) (quoting Garron v. State, 528 So.2d 353, 357 (Fla. 1988)).

Here, Mr. Pryor spoke to Appellant at approximately 7:30 a.m.; the murder occurred sometime between midnight and 1:00 a.m. earlier that day. Although Mr. Pryor did not personally observe Appellant because they spoke over the phone, he knew him well enough to be able to testify that Appellant did not seem like himself, that he seemed "spaced out." (T 938). Similarly, Mr. Pryor knew Appellant well enough to be able to testify that Appellant knew that stabbing Allan Trubilla to death was wrong. See Cruse, 588 So.2d at 990-91 (finding that the trial court should have allowed a neighbor to give her opinion of Cruse's mental condition); Garron, 528 So.2d at 356-57 (finding lay opinion of defendant's step-daughter and arresting officer properly admitted regarding defendant's sanity).

The State's question to Mr. Pryor was in direct rebuttal to defense counsel's cross-examination which placed Appellant's mental state prior to and at the time of the murder directly in issue. The fact that Appellant had not yet affirmatively presented his insanity defense is of no moment. Defense counsel questioned Mr. Pryor at length regarding Appellant's mental state, and it was wholly appropriate for the State to expound upon the mental health issue. See Tompkins v. State, 502 So.2d 415, 419 (Fla. 1986) ("Generally, testimony is admissible on redirect which tends to qualify, explain, or limit cross-examination testimony." Here, the state was properly allowed to rebut the inference that the victim never complained to her mother about the defendant).

Although not cited to by Appellant, the First District Court of Appeal held in Hansen v. State, 585 So.2d 1056, 1058 (Fla. 1st DCA), rev. denied, 593 So.2d 1052 (Fla. 1991), that the trial court properly prohibited a lay witness from opining whether the defendant "knew the consequences of his actions" when he committed a murder. In making this determination, the First District

"[could not] agree that lay testimony on the ultimate fact of whether a defendant can distinguish right from wrong is an appropriate means for a witness to convey 'what he has perceived' to the jury." Id. at 1058-59 (quoting § 90.701(1), Fla. Stat. (1989)).

For the following reasons, the State submits that the district court's ruling was incorrect. First, it is illogical to allow a lay witness to opine whether a defendant is legally sane/insane, but not allow the witness to opine whether the defendant met/did not meet the elements of insanity, i.e., that the defendant was able/unable to understand the nature and quality of his act or its consequences, or was capable/incapable of distinguishing between right and wrong. After all, the witness is being asked to render an opinion on an ultimate issue--sanity/insanity--which requires the application of a legal standard to the facts.

Second, if a lay witness is allowed to describe a defendant's behavior and demeanor and then conclude that, in his/her opinion, the defendant was sane/insane, the opposing party should be able to question the witness about the basis for that opinion, i.e., whether he/she believed the elements of insanity were met/not met.

Third, section 90.703, Fla. Stat. (1991), provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact." Thus, a lay witness should be allowed to opine that the defendant was able/unable to understand the nature and quality of his act or its consequences, or was capable/incapable of distinguishing between right and wrong. Such opinions relate no more to an ultimate issue than does a witness' opinion that the defendant was sane/insane. Similarly, such opinions no more require the application of a legal standard to the facts than does an opinion regarding the defendant's sanity/insanity. In fact, asking the witness his/her opinion regarding the elements of insanity would be far less misleading or confusing to the jury than simply asking the

witness his/her opinion regarding the defendant's sanity. Chances are the witness will apply a moral standard as opposed to a legal standard.

In sum, if the witness can communicate the defendant's behavior and demeanor based on what he or she "has perceived," and yet still opine whether the defendant was sane/insane, that witness should also be able to opine whether the defendant was able/unable to understand the nature and quality of his act or its consequences, or was capable/incapable of distinguishing between right and wrong. For these reasons, the district court's ruling was erroneous, and this Court should not adopt that ruling.

If this Court determines, however, that the trial court should not have allowed Mr. Pryor to testify that he believed Appellant knew what he had done was wrong, such error was harmless beyond a reasonable doubt. As detailed in Issue II, supra, based on the quality and quantity of permissible evidence upon which the jury could have relied to render a guilty verdict, there is no reasonable possibility that had Mr. Pryor's opinion not been admitted the verdict would have been different. See Cruse; Garron; State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS TAPED STATEMENTS TO THE POLICE (Restated).

Prior to trial, Appellant filed a motion to suppress his statements to the police. In this two-page motion, Appellant alleged without any factual support or legal analysis that his post-Miranda statements "were not freely and voluntarily given," that his statements were obtained "in violation of [his] privilege against self-discrimination [sic] and [his] right to counsel," that he "did not knowingly and intelligently waive his Miranda rights," and that his statements "constitute[d] the fruit of an unlawful arrest . . . in violation of [his] right to privacy." (R 2041-42). He claimed that his arrest was unlawful because he was "suffering from an emotional or mental illness which prevented him from fully understanding and/or comprehending his "Miranda" warnings. Therefore, he was unable to voluntarily waive his rights at that time." (R 2042).

At the hearing on the motion, Detective Robert O'Neil from the homicide unit of the Broward Sheriff's Office testified that he responded on August 18, 1992, at 2:40 a.m. to 1325 S.E. 8th Avenue, Apartment 315A to assist Detective Palmer regarding a homicide. (T 94-95). The apartment manager, Mark Chandler, reported that he saw a white male named "John" exit the victim's apartment. The victim and his son, Elec, both knew "John." (T 96). Mr. Chandler later identified the man from a photo lineup as Appellant. (T 97). Elec confessed his involvement in the murder: Elec stated that Appellant and his father were lovers, and that he and Appellant were friends. Because he was unhappy at home, he and Appellant planned to kill his father. (T 96-97). Detective O'Neil also testified that another witness saw Appellant leave the apartment complex in a blue Chevette and run a stop sign with his lights off. (T 98). Appellant's blue Chevette was later

found in Punta Gorda with bloody clothes, rubber gloves, and blood inside the car. (T 98). Appellant's glasses and a bloody sock were found in the area where Appellant had parked his car at the apartment complex. (T 98). A knife was found by the victim's body. (T 98). Other witnesses had reported that Appellant left his apartment with a knife and an electrical cord. (T 99).

Based on this information, Detective O'Neil obtained a local and federal arrest warrant for Appellant. (T 100). Ultimately, he learned that Appellant would be flying into Chicago, Illinois, from Jamaica, so he notified the FBI and the Chicago police, who arrested Appellant when his plane landed in Chicago. (T 103). He and Detective Palmer then flew to Chicago to interview Appellant, and he reviewed a rights waiver form that Appellant had signed earlier that evening. (T 104-07). According to Detective O'Neil, Appellant did not appear to be under the influence of alcohol or drugs, and Appellant did not complain of pain or discomfort from his ankle which he claimed to have broken in Jamaica but which had no cast. (T 108). After interviewing Appellant for approximately two hours, Detective O'Neil obtained a taped statement from him, the substance of which was consistent with his untaped statement. (T 109-10). The taped statement was not sworn to and lasted 35 minutes. The interview ended at approximately 2:00 a.m. (T 115-18).

The next witness to testify at the suppression hearing was Detective Palmer, who conducted the interview of Appellant in Chicago. Detective Palmer testified that he told Appellant that they were investigating the death of Allan Trubilla, and Appellant stated that he understood. Appellant also indicated that he understood his Miranda rights. (T 125). According to Detective Palmer, his interview with Appellant lasted approximately two hours, which included refreshment breaks, and Appellant did not appear to be under the influence of any substance and did not complain of pain from his ankle. (T 126-28).

The State then played Appellant's taped statement, which began at 11:25 p.m. on September

19, 1992. On the tape, Appellant acknowledged that he had signed the rights waiver form shown to him by Detective Palmer. (T 131). Appellant explained that he and Allan Trubilla had known each other for a couple of years and were lovers. (T 132-33). During this time, he became good friends with Allan Trubilla's son, Elec. (T 133). Several months prior to the murder, Elec began calling Appellant and claimed that his father was being abusive, treating him like a pawn with his mother. (T 133-34). Appellant wanted to help Elec, so he and his wife let Elec stay with them. As a result, Appellant was arrested for interfering with child custody. (T 134-36).

Three weeks before the murder, Appellant moved to Cape Coral. Elec spoke often of killing his father. (T 136). One week before the murder, he and Elec discussed electrocuting Allan Trubilla. (T 137). On Saturday night around 11:30 p.m. or 12:00 a.m., before the murder on Monday night/Tuesday morning, Elec called Appellant, wanting to kill his father. Appellant told him to forget about it and go to bed. (T 138). Elec called Appellant again on Sunday night from a pay phone. (T 139). On Monday, Elec told Appellant that his father had embarrassed him in front of his friends, and that he wanted him dead. (T 140). Appellant told Elec that he would come to his apartment later. Appellant said that he wanted to get Elec away from his father. (T 140). They talked, however, about killing Allan Trubilla with a baseball bat, by electrocuting him, or by stabbing him. (T 141).

On that Monday, Appellant left his home around 4:00 p.m. with a change of clothes and a kitchen knife with a black handle. (T 142-43). When Appellant got to Ft. Lauderdale, he went by his old house, then went to Eckerd's, then drove around until late in the evening. (T 144). He knew that Allan Trubilla would not be home until late. (T 144-45). Appellant was driving a dark blue 1986 Chevette. (T 146). Appellant called Elec from a pay phone, then went to Elec's apartment and Elec let him in. Allan Trubilla was asleep. (T 146). He tried to talk Elec out of killing his

father. (T 147). While Appellant stood in the bathroom with the knife, Elec called his father, who came out of his bedroom. He heard Elec hit his father over the head, then Appellant stabbed him. He did not remember how many times. (T 149-50). Both he and Elec were cut on the hand. (T 151). When Elec turned on the lights, there was blood everywhere. Appellant grabbed his clothes and ran out. (T 152). He and Elec had discussed disposing of Allan Trubilla's body in a trash bag, but they had no definite plan. (T 153). Elec thought that he would live with his mother or aunt for awhile and then live with Appellant. (T 154).

When Appellant fled the apartment, he saw two people by the pool. He drove around for awhile and then drove home, arriving there around 4:00 a.m. (T 156-58). He and his wife drove to a motel in Tampa, went back to their house for clothes, then drove to Texas using money that Appellant's mother had wired to them. (T 158-60). They flew to Jamaica for several weeks, then flew to Chicago. (T 161-62). While in Jamaica, Appellant broke his ankle and had a cast put on, but his leg swelled so the cast was split and ultimately fell off prior to leaving Jamaica. (T 162). The taped statement ended at 12:00 a.m. (T 164).

When the hearing continued following jury selection, FBI Special Agent Daniel testified that he removed Appellant from the plane when it landed at O'Hare International Airport in Chicago and took him to an area for processing through Customs. (T 448-48). At 7:14 p.m., he advised Appellant of the federal warrant for his arrest and read him his Miranda rights from a form but did not ask him to sign the form. (T 451-52). He then took Appellant to a police department holding area for fingerprinting. He showed Appellant the federal warrant, which Appellant read. (T 452). When he asked Appellant if he had ever been fingerprinted before, Appellant responded that he and his wife had decided to turn themselves in. (T 452-53). Regarding his ankle, Appellant explained that he had broken it swimming at a waterfall and had returned to the United States for

medical treatment. (T 453). According to Special Agent Daniel, Appellant did not appear to be under the influence of any substance and was not acting strangely. (T 454).

When court resumed the following Monday, Officer Gail Neuman of the Chicago Police Department testified that she took Appellant's wife into custody, cleared her through Customs, then took her to a holding cell at the airport. (T 481). She then witnessed her supervisor, Sergeant Blanc, read Appellant his rights. (T 483). After every question, Sergeant Blanc asked Appellant if he understood, and Appellant indicated that he did. Appellant then signed the waiver portion of the form in her presence at 9:00 p.m. (T 484-85).

On his own behalf, Appellant called his wife, Margaret Strausser, as a witness. Mrs. Strausser testified that Appellant broke his leg in Jamaica and had a cast on it, but that it fell off during the flight. She also stated that she had given Appellant a Darvon for pain relief about two or two and a half hours prior to their arrival in Chicago. (T 497-98). The police found about six pills in her pocket and took them because she did not have a prescription bottle for them. (T 499). She saw the police give some pills to Appellant after they had finished interviewing him. (T 499-500).

According to her, Appellant had stopped taking Prozac a few weeks prior to the murder and had become extremely irritable. (T 501). On the morning of the murder, he was "like an injured child." He was crying and "very upset." (T 502). He spoke of suicide several times while they were in Jamaica. (T 502).

Following her testimony, Appellant testified on his own behalf. He too testified that the police gave him medication after they had completed their interview. (T 513). He did not remember seeing the waiver of rights form, and he did not understand his rights. A deputy told him to sign the form. (T 516-18). He also testified that he stopped taking Prozac about two and a half

weeks prior to the murder, and that he became very depressed and easily irritated. (T 513). He heard voices several times a week like people were coming to get him, and he heard voices telling him to commit suicide. (T 515). On cross-examination, Appellant claimed that he gave a taped statement because the police told him what had happened and because they were yelling at him. (T 523). Although he acknowledged on the tape that he understood his rights, he really did not. (T 528). Everything he told them, however, was the truth. (T 526). He admitted that he did not hear voices prior to the murder. (T 525).

Following Appellant's testimony, defense counsel claimed that, during Appellant's interrogation by the police, Appellant was refused pain medication for his broken ankle and had not been taking his medication for depression for the previous six weeks. "Our position is that although yeah, he signed that waiver, that he spoke to the police, that he may have answered yeah or yes to some of these questions [from the rights form], he did not have the ability to voluntarily waive his rights." (T 530-31). The trial court denied the motion to suppress:

> There is a lot more that goes into the determination of whether or not an individual is capable of making a knowing, voluntary and intelligent decision. More than just the placing in front of that individual the document and asking it be signed. If that were the only criteria, if that were the only decision, it's a different set of circumstances that the Court's being presented with.
>
> Over three separate hearings, I have had an opportunity to hear the testimony that's been forthcoming as it relates to this particular motion to suppress. The Court's heard from both the State witnesses and the defense witnesses.
>
> It's very interesting that the defense maintains, or the defendant maintains that he has no knowledge of what took place once he was with the FBI and the Chicago P.D., but remembers everything that precedes, and remembers almost everything that comes after it; including his meeting with the Broward Sheriff's Officers and the treatment that took place at that time. But he doesn't remember a Rights Waiver Form. I find that very curious.

As to the evidence that's been educed in terms of his psychological problems that proceeded to giving the statement, there's been testimony by Mr. Strausser's wife of a manner in which he would continually act, that would lead somebody that was not familiar with his situation and predicament to believe that maybe there were problems that existed.

But again, from the time the Chicago Police Department and the FBI meet Mr. Strausser on the plane, to the time subsequent to that, there is no demonstration by Mr. Strausser of any irrational behavior.

I don't believe sitting and answering questions and giving a statement, where you are not indicating any type of pain, any type of psychological problems, and I think those get demonstrated in ways by which an individual who is sitting and having a conversation can determine that.

That's a situation which creates a greater amount of stress. He didn't breakdown, he didn't cry, he didn't give any indication that there was a problem psychologically.

As far as pain medication, if he took his last pills before he got on the place, and flew to Chicago, contrary to the testimony, it is not a two and a half hour flight from Jamaica to Chicago, it's two and a half hours from Fort Lauderdale to Chicago. I guess if you take into account the time differential it becomes a less time.

But it would seem that his taking of the pills, getting on the place and his getting off the place, that he may be ready to come up for his next series of pills, approximately four, four and a half hours later, both of them testified that are given at a minimum of four hours, not more than that.

So I don't believe that he was under the influence of any particular drugs. I think had the Chicago Police Department or the FBI given him those medications, you would have a great argument to say he was under the influence, and therefore, not capable of giving a knowing, voluntary and intelligent waiver.

But I find, based upon the totality of the circumstances and the testimony that's been forthcoming, that Mr. Strausser was, in fact, read his rights; that he did, in fact, acknowledge those rights; that he understood them; that he knowingly, voluntarily and

> intelligently gave the statement. There were no threats, there was no coercion, there was no interference or influence with respect to the drugs. And at this time, the Court is going to deny the defendant's motion to suppress.

(T 533-35). During the trial, Appellant's timely, renewed motion was denied without argument by defense counsel, or comment by the trial court. (T 584).

In this appeal, Appellant claims that the trial court abused its discretion in denying his motion to suppress. Specifically, he contends that "the statement given by him was not voluntary based upon the totality of the circumstances." **Brief of Appellant** at 50. According to Appellant, those circumstances include the fact that, "[a]fter being taken off the airplane at O'Hare Airport, . . . law enforcement officers withheld [his] pain medication until he provided a statement;" that Appellant had a "long history of mental illness," of which the police were aware; and that he had once been taking Prozac but had stopped taking it five or six weeks prior to his interrogation. Id. at 57. "In a fragile mental state, [he] was 'ripe for the plucking.' The added pain and wearing off of the medication heightened the problem. Knowing all this, the officers in essence 'tricked' [him] into giving a statement." Id.

It is well-established that "in matters of suppression, the trial court sits as both trier of fact and of law, and that matters pertaining to the credibility of witnesses and the weight of the evidence are exclusively within its province." Davis v. State, 606 So. 2d 460, 463 (Fla. 1st DCA 1992). Moreover, "the trial court's order comes to this court clothed with a presumption of correctness." Id. Appellant has failed to overcome the presumption.

The trial court's determination that Appellant was read his rights and knowingly, voluntarily, and intelligently waived them is supported by the record. As noted above, FBI Special Agent Daniel testified at the suppression hearing that he initially read Appellant his Miranda rights

at 7:14 p.m., but did not ask Appellant to sign the form and did not ask Appellant any questions about the case. (T 448-49, 451-52). Chicago Police Officer Gail Neuman testified that her supervisor, Sergeant Blanc, read Appellant his Miranda rights again at 9:00 p.m. in her presence, that Appellant responded affirmatively when asked if he understood his rights after each question, and that Appellant signed the waiver portion of the rights form in her presence. (T 483-85). Detective Palmer from the Broward Sheriff's Office testified that Appellant told him that he understood his rights. (T 125). Finally, Appellant acknowledged on the tape that he had been advised of his rights and that he had signed a rights waiver form. (T 131).

As for Appellant's mental state, all four officers who testified at the hearing stated that Appellant did not appear to be under the influence of any substance and was not acting strangely. (T 108, 127-28, 454, 487). Officer Neuman testified that Appellant complained that his leg was "sore" when he first entered the police room, but she did not remember whether Appellant requested or was offered any medical assistance or medication. (T 492-94). Both Appellant and his wife, however, testified that Appellant was given medication after the police questioning. (T 499-500, 519). Importantly, Appellant testified that the police did not withhold his medication in order to coerce him to speak to them. (T 526). As the trial court concluded, "[h]e didn't breakdown, he didn't cry, he didn't give any indication that there was a problem psychologically."[3]

Even if Appellant's mental health had been affected by a lack of medication, he has failed to show that there was coercive police activity, which Appellant concedes is a necessary predicate to the finding that a confession is involuntary. **Brief of Appellant** at 58 (citing Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987)). As noted, Appellant testified at the suppression hearing

[3] As the trial court noted, if the police had given Appellant a narcotic painkiller before or during their interview, he would have had a far better argument that he was under the influence and did not voluntarily waive his Miranda rights.

that the police did not withhold his pain medication as a means to coerce his confession. In fact, according to Appellant and his wife, the police gave him some pain medication immediately after their questioning. Thus, the record supports the trial court's finding that Appellant voluntarily, knowingly, and intelligently waived his rights and confessed to the crime. Under the totality of the circumstances, the trial court did not abuse its discretion in denying Appellant's motion to suppress. Jones v. State, 569 So.2d 1234, 1237 (Fla. 1990) (evidence supported court's denial of motion to suppress where judge resolved question of credibility in favor of state); Henry v. State, 613 So.2d 429, 431 (Fla. 1992) (trial court properly concluded that defendant made statements knowingly and voluntarily); Brown v. State, 609 So.2d 60 (Fla. 4th DCA 1992) (evidence supported court's conclusion that there was valid waiver even though evidence was in conflict), rev. denied, 617 So.2d 318 (Fla. 1993).

Were this Court to find, however, that the record did not support the trial court's ruling, any error in admitting Appellant's taped statement was harmless beyond a reasonable doubt. As detailed in Issue II, supra, based on the quality and quantity of permissible evidence upon which the jury could have relied to render a guilty verdict, there is no reasonable possibility that had Appellant's taped statement not been admitted the verdict would have been different. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Therefore, this Court should affirm Appellant's conviction for the first degree murder of Allan Trubilla.

ISSUE V

WHETHER APPELLANT WAS DEPRIVED OF A FAIR TRIAL BASED ON SEVERAL ALLEGED ERRORS BY THE STATE AND THE TRIAL COURT (Restated).

A. The admission during the guilt phase of Elec Trubilla's 911 call to the police, and the admission during the penalty phase of Elec Trubilla's taped statement to the police.

During the guilt-phase testimony of Detective John Palmer, the lead detective on this case, the State sought to admit into evidence and to publish a tape recording of the 911 call made by Elec Trubilla immediately after the murder. Defense counsel made no objection to the tape, and it was played for the jury. (T 773-76). In this appeal, Appellant concedes that he did not preserve this issue for appeal, but claims that the tape's admission constituted fundamental error. **Brief of Appellant** at 61 & n.26. Specifically, Appellant complains that "the 911 call was not relevant and lacked probative value. Importantly, it contained a false statement by a 14 year old which [he] was never permitted to cross-examine." Id. at 62.

In Ware v. State, 596 So.2d 1200 (Fla. 3d DCA 1992), the defendant objected to the introduction of a 911 tape on relevancy grounds. On appeal, the district court affirmed the trial court's decision to admit the tape because the tape was relevant and admissible as excited utterances and spontaneous statements. Id. at 1201. See also Allison v. State, 20 Fla. L. Weekly D1931, 1932 (Fla. 2d DCA Aug. 23, 1995); Crenshaw v. State, 570 So.2d 349, 349 (Fla. 3d DCA 1990) (refusing to consider issue because not preserved). Appellant attempts to distinguish Ware based on the fact that the person who made the call in Ware testified at the trial, whereas Elec did not. Under these two exceptions to the hearsay rule, however, the availability of the declarant is irrelevant. § 90.803(1) & (2), Fla. Stat. (1991). Thus, Appellant's distinction is unavailing.

Were this Court to find, however, that the 911 call was admitted in error, such error was harmless beyond a reasonable doubt. Given the quality and quantity of permissible evidence, as detailed in Issue II, supra, upon which jury could have relied to reach a guilty verdict, there is no reasonable possibility that the verdict would have been different had the 911 call not been admitted. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Appellant also complains that the admission of Elec's taped statement during the penalty phase, over his objection (T 1579), violated his constitutional right to confront the witnesses against him because he was denied "an adequate opportunity to cross-examine a crucial adverse witness." **Brief of Appellant** at 60-63. Appellant acknowledges, however, that section 941.141(1), Fla. Stat. (1991), authorizes the admission of hearsay testimony, and that this provision has withstood constitutional attack. Id. at 62-63. See also Waterhouse v. State, 596 So.2d 1008, 1016 (Fla. 1992); Hodges v. State, 595 So.2d 929, 933 (Fla. 1992). The record reveals that, ten days before the penalty phase, the State indicated that it was going to admit Elec Trubilla's taped statement to the police. (T 1549-50). Not only did Appellant have the opportunity, which he used, to cross-examine the officer who obtained the taped statement and identified it at trial, but he had the opportunity to rebut Elec's statement by calling other witnesses, perhaps even Elec. He chose not to do so. Under the circumstances, Appellant's rights were preserved. If, however, the taped statement was improperly admitted, there is no reasonable possibility that the jury's recommendation or the trial court's ultimate sentence been different had the tape not been admitted. Although the trial court used Elec's statement to support its override of the jury's life recommendation, the tape was cumulative to other evidence admitted at trial upon which the trial court could have relied. Consequently, Appellant's sentence of death should be affirmed.

B. The admission during the guilt phase of portions of letters sent by Appellant to Lloyd Pryor after Appellant's arrest which were read to the jury but not admitted into evidence.

During the State's direct examination of Lloyd Pryor, Mr. Pryor testified without objection that Appellant had sent him two letters after Appellant had been arrested. One letter was dated November 27, 1992, and the other letter was dated December 2, 1992. (T 909-911). When the State asked Mr. Pryor whether Appellant expressed any anger at him in the letters, defense counsel objected on relevancy grounds. (T 911). At sidebar, the prosecutor read the letter and explained that he had no intention of reading the letter to the jury, due to its prejudicial nature, but merely intended to ask Mr. Pryor questions about it. The first letter read:

> 11-27-93 [sic]. Lloyd, I thought I would have heard from you by now, I guess you feel guilty about leaving. As far as what happened, I blame you, you were the last straw and I broke. My life is gone now. If I can make your life gone, I promise you I will. You knew I was having problems, how could you leave me? Then you leave your mother on top of that. You are a self-centered little piece of shit, and I am sorry I ever helped you. I should have left you at Armstead Gardens. What goes around, comes around. Watch your back, I'll be there. Bill.

(T 911-12). The State argued that the letter was relevant to establish Appellant's motive for the murder and to establish state of mind shortly before the murder. (T 912). When asked by the trial court whether the State intended to introduce the letter into evidence, the prosecutor explained that he did not because "it might be unfairly prejudicial to Mr. Strausser to get into the total content about calling him a piece of shit and things like that. I am trying to keep that away from the jury." (T 913). Defense counsel then argued that Appellant's threats to Mr. Pryor were not relevant, and the State responded, "That's what I am trying not to introduce." The trial court agreed with the State that aspects of the letter were highly relevant to show Appellant's state of mind at the time of the crime. It expressed concern, however, about the prejudicial impact of the balance of the latter

and sought defense counsel's opinion on how best to present the relevant portion without presenting the prejudicial portion. (T 914-15).

After a brief recess, the State proposed reading select portions of the letter, namely, the date, the greeting, the first two sentences (as quoted above), then "I am sorry I ever helped you. I should have left you at Armstead Gardens," and the signature. (T 915). Defense counsel renewed his relevancy objection to the whole letter. (T 916). The trial court overruled the objection and approved those portions noted by the State. (T 916). Thereafter, the State read the second letter to the trial court, in which Appellant apologized for the first letter and expressed his love for Mr. Pryor and his mother. Defense counsel requested that the State read the entire letter, and the trial court agreed. (T 916-17).

In this appeal, Appellant complains in a two-paragraph argument without any citation to case law, that "[t]he State was permitted, over defense objection to read portions of the letters, and not introduce them into evidence (R 915)." **Brief of Appellant** at 63. To the extent Appellant has made a sufficient claim for relief, the State submits that it is wholly without merit. Appellant raised a relevancy objection below. The trial court determined that those portions read by the State were relevant to show Appellant's state of mind at the time of the offense, which was an issue at trial. The trial court agreed with the State, however, that portions of the first letter were more prejudicial than probative. Had Appellant wanted to present the whole letter, he certainly could have done so during his case. The fact that he chose not to do so does not render the trial court's ruling erroneous. See Correll v. State, 523 So.2d 562, 566 (Fla. 1988).

To the extent this Court finds that the trial court erred, such error was harmless beyond a reasonable doubt. As detailed in Issue II, supra, based on the quality and quantity of permissible evidence upon which the jury could have relied to render a guilty verdict, there is no reasonable

possibility that had the entire letters been read into the record and admitted into evidence the verdict would have been different. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Therefore, this Court should affirm Appellant's conviction for the first-degree murder of Allan Trubilla.

C. The admission during the guilt phase of a videotape of the crime scene.

Just prior to the testimony of Detective Kammerer, the first crime scene technician, the trial court asked defense counsel whether he had any objection to the admission of the crime scene video tape. Defense counsel objected only to that portion of the video which showed Allan Trubilla lying in the bathroom with the knife by his body: "My objection is, it would be duplicative [sic] [sic]." (T 631). When the trial court asked defense counsel whether he was moving to redact the video tape or to suppress it in its entirety, defense counsel stated, "I am not trying to suppress the entire thing, I think there are relevant portions." (T 632). The trial court inquired, "Just that one portion?" (T 632). Defense counsel responded, "The one portion I objected to, Judge, that would be the one portion I am objecting to." (T 633). The trial court overruled defense counsel's objection (T 633), and the videotape was played in its entirety during Detective Kammerer's testimony while the detective explained the crime scene as he found it. (T 641-49).

In this appeal, Appellant claims (1) that "the videotape was unnecessary to assist any witness in explaining the facts and circumstances of this case," (2) that "the video tape at issue was so inflammatory in nature as to outweigh its relevancy," and (3) that, "in light of the other evidence admitted, the videotape was merely cumulative." **Brief of Appellant** at 64. Given that Appellant did not challenge the admission of the videotape in its entirety in the trial court, and did not make the same arguments there that he makes here, he is procedurally barred from doing so on appeal. Tillman v. State, 471 So.2d 32 (Fla. 1985); Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Regardless, his complaints are without merit. Detective Kammerer testified that the videotape

would assist him in describing the crime scene, and he in fact used it extensively during his testimony. (T 639, 641-49). Jones v. State, 19 Fla. L. Weekly S577, 578 (Fla. Nov. 10, 1994) (finding no abuse of discretion in trial court's admission of photographs that were relevant to show the condition and location of the body when discovered). As for the videotape's prejudicial nature, "the fact that [it was] gruesome does not render [its] admission an abuse of discretion." Preston v. State, 607 So.2d 404, 410 (Fla. 1992). Regarding its duplicative [sic] nature, the videotape was properly admitted where it depicted the crime scene more broadly, and at different angles, than the photographs. See Davis v. State, 586 So.2d 1038, 1041 (Fla. 1991); Gorby v. State, 630 So.2d 544, 547 (Fla. 1993). Even were the videotape improperly admitted, however, it was harmless beyond a reasonable doubt given the quality and quantity of permissible evidence upon which the jury could have relied to convict Appellant of murder. See Issue II, supra; State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Therefore, this Court should affirm Appellant's conviction for the first-degree murder of Allan Trubilla.

D. The trial court's refusal to excuse two jurors whom defense counsel challenged for cause.

Appellant concedes that this issue was not preserved for appeal, but maintains that reversible error occurred when the trial court refused to exclude Ms. Jacobs and Ms. Renedo. **Brief of Appellant** at 65-66. Given Appellant's concession, the State will not belabor the issue beyond stating that the record supports the trial court's ruling.

E. The cumulative effect of these alleged errors.

In a single sentence, Appellant concludes this issue with the following claim: "Based upon the cumulative effect of all of the errors complained of, [he] is entitled to a new trial. Caruso v. State, 645 So.2d 389 (Fla. 1994); Jackson v. State, 575 So.2d 181 (Fla. 1991)." **Brief of Appellant** at 66. Since the State maintains that Appellant's individual claims are either not preserved or

without merit, *a fortiori* Appellant has suffered no cumulative effect which rendered his trial unfair. Even were some or all of Appellant's claims meritorious, however, they would not constitute fundamental error. Therefore, this Court should affirm Appellant's conviction and sentence of death for the first-degree murder of Allan Trubilla.

ISSUE VI

THE JURY HAD NO REASONABLE BASIS TO CONCLUDE THAT LIFE WAS THE APPROPRIATE RECOMMENDATION, THEREFORE, THE TRIAL COURT'S OVERRIDE IS VALID. (Restated)

The trial court following a careful review of the evidence presented at trial and at the penalty phase, post-hearing memorandums by the parties, argument, additional evidence presented by the defense at sentencing, and after according to the jury's sentencing recommendation great weight; concluded death was the appropriate sentence for the first degree murder of Allan Trubilla (R 2199-2170).

The trial court found two statutory aggravating factors, F.S. 921.141(5)(h) and 921.141(5)(I), to be applicable and proven beyond a reasonable doubt. As to mitigation, the Court observed that the defendant had no significant history of criminal activity pursuant to §921.141(6)(a) and accorded this fact some weight. With regard to §921.141(6)(b), the Court after discussing the facts and evidence presented, concluded "by the greater weight of the evidence, that the defendant was under the influence of extreme mental or emotional disturbance when the murder of Allan Trubilla was committed. does not exist." (R 2158). The Court also found no evidence to support that the victim was a participant in the defendant's conduct or consented pursuant to §921.141(6)(c). (R 2158). Nor did the Court find evidence that the following statutory mitigators existed, §921.141(6)(d) (R 2159); §921.141(6)(e) (R 2160); §921.141(6)(f) (R 2161); or §921.141.141(6)(g) (R 2161-2162).

As to non-statutory mitigation, the Court's Order specifically reviewed each aspect of non-statutory mitigation asserted by Strausser and found pursuant to Campbell v. Florida, 571 So.2d 415 (Fla. 1990), and Wickham v. State, 593 So.2d 191 (Fla. 1991);

(1) That as to family background, Strausser suffered from being a product of a broken home; suffered abuse at the hands of his step-father and acted as a father figure to his siblings for nine years - should be given little weight. (R 2162).

(2) That there was evidence Strausser suffered from mental depression and had a personality disorder. Evidence revealed a history of depression; suicidal ideation and attempts some years earlier and more recently treatment by Dr. Fritz and Dr. Diaz which required some weight be accorded this non-statutory mitigation. (R 2163).

(3) Strausser presented uncontroverted evidence that he suffered abuse by his stepfather. "Prior to the murder of Allan Trubilla, the defendant relayed the memories to Katrina Fritz during counseling sessions, and to his wife and Lloyd Pryor. Based on the testimony of the defendant, Dr. Appel, Peggy Strausser and Lloyd Pryor, the Court finds this mitigating circumstance to exist and gives it some weight." (R 2164).

(4) As to Strausser's remorse for the murder, the Court gave this little weight. (R 2164).

(5) Little weight was assessed Strausser's work history. (R 2165).

(6) No testimony was presented a to Strausser's rehabilitative chance - thus no weight was given. (R 2165).

(7) As to the disparate sentencing of Strausser's cohort - Elec Trubilla, the Court noted that Elec Trubilla received the maximum sentence he could receive based on his circumstances (14 years old) and therefore there was no disparate sentencing based on the facts of this case and the circumstances of each defendant. (R 2165).

(8) Because Strausser's trial behavior was excellent, the trial court gave this little weight. (R 2165).

(9) Although Strausser ultimately "confessed", the Court noted this occurred only after he fled the murder, and then apprehended three weeks later by Chicago authorities when he returned to the United States from Jamaica. No weight was given this factor. (R 2166).

(10) The fact that Strausser rendered community services and assisted Lloyd Pryor, Peggy Strausser and Mary Smith with support was given some weight. (R 2167).

(11) Lastly, the parenting, good husband and good man mitigation was given some weight. (R 2168).

Contrary to Strausser's argument that the trial court did not apply the appropriate test for assessing the jury's recommendation and determing that an override was warranted, the record reveals the Court acknowledged:

> 'After careful consideration, the facts and circumstances in this case, this Court has reacted a conclusion that the jury's recommendation of a sentence of life in prison is inappropriate and the override of the jury's advisory sentence is warranted. In doing so, the Court is not rejecting any evidence that the jury contemplated in mitigation, but rather, is finding the weight afforded these circumstances by the jury was improper and disproportionate in relation to the aggravating circumstances. The evidence in mitigation is minimal compared to the magnitude of the crime that has been committed by the defendant.
>
> In final analysis, the defendant suffered from a mental disorder, depression and a personality disorder, possibly anti-social in nature, that had no link to the crime committed to such a degree that the jury could reasonably conclude life is a proper penalty.
>
> The Court notes that both counsel for the State and the Defense have relied on the jury's hasty deliberation to support their positions on the determination of sentencing by this Court. The Court finds that the most plausible argument was made by the State. Based on the complexity of issues in the case, the amount of evidence that needed too be considered and weighed, including the statement and testimony of the defendant, the statement of Elec, the expert and non-expert testimony presented, the enormity of the forensic evidence, including the exhibits entered into evidence, the conflicts which needed to be resolved, the jury's hasty recommendation of life, eighty (80) minutes, strongly indicates that it was based upon improper emotional appeal or sympathy, and not upon the necessary weighing process of the mitigating and aggravating factors presented for their consideration.
>
> The advisory sentence, therefore, was not the result of sound reasoned judgment, as it must be " (R 1837-1838).

The trial court fully appreciated his responsibilities in assessing the Tedder v. State, 322 So.2d 908 (Fla. 1975), standard to the instant case.

Strausser does not seriously question the validity of the two statutory aggravating factors proven beyond a reasonable doubt. The trial court in minute detail set forth a plethora of evidence to support these factors in his written order. Indeed, defense counsel does nothing more than argue that the first stab wound to Allan Trubilla could have resulted in a lost of "consciousness from the time he was struck on the head by Elec Trubilla." **brief of appellant**, at 74.. In essence, Trubilla did not suffer. Such a contention is neither supported by the record or logic. See: Breedlove v. State, 413 So.2d 1 (Fla. 1992), State v. Breedlove, 655 So 2d 74 (Fla. 1995) (stabbing constitutes HAC factor); CCP valid where defendant planned murder in advance, Lamb v. State, 532 So.2d 1051 (Fla. 1988); Shere v. State, 579 So.2d 86 (Fla. 1991); Arbelaez v. State, 626 So.2d 169 (Fla. 1993); procured weapon; laid in wait and then discussed and planed disposal of the body. Harvey v. State, 529 So.2d 1083 (Fla. 1988); Shere v. State, supra; Cruse v. State, 588 So.2d 983 (Fla. 1991). Moreover, Strausser does not even suggest he had any moral or legal justification for the murder. Wuornos v. State, 644 So.2d 1000 (Fla. 199 4) and Trepal v. State, 621 So.2d 1361 (Fla. 1993).

Regarding the mitigation and whether any or all of the mitigation given "some or little" weight would overcome Tedder v. State, supra, the facts "suggesting a sentence of death are so clear that virtually no reasonable person could differ."

The most significant piece of mitigation that Strausser argues justified the life recommendation is his "mental condition." **brief of appellant** at 70-74. The record reflects however, that evidence of mental depression and anti-personality problems had nothing to do with this murder. In fact, everything relating to the Trubillas, in particular, Strausser's concerns for Elec Trubilla's welfare, reflect Strausser's efforts to help Elec by contacting social services and counseling Elec about his father. Lloyd Pryor and Peggy Strausser testified as to how Strausser

wanted to help Elec and give him a home and security away from his father. Albeit, Strausser suffered from abuse at the hand of his own step-father, he attempted to assist young men in trouble, like Lloyd Pryor and Elec. To suggest his mental state could possibly have influenced the murder is belied by the record. While mental problems clearly can formulate legitimate mitigation, everything known about the facts of this case demonstrate any reliance by the jury on this factor was erroneous. Echols v. State, 484 So.2d 568 (Fla. 1985) (age "or even mental depression, et al." should be linked with some other characteristic of the defendant (or the crime); Carter v. State, 576 So.2d 1219 (Fla. 1989) (sociopathic behavior not mitigation). Moreover, disadvantaged childhood, abusive parents, and childhood traumas must be shown to have some relevance or nexus to the defendant's character or the circumstance of the crime. Lara v. State, 511 So.2d 534 (Fla. 1987),. Kight v. State, 512 So.2d 922 (Fla. 1987) or Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988) (jury override upheld where evidence of rehabilitation plus positive intelligence from an expert witness, alone was not a reasonable basis for jury's recommendation of life.

The trial court specifically discussed the applicability of the mental health experts and concluded that Dr. Appel's conclusion were not as credible as those of Drs. Block-Garfield and Walczak. In fact, while defense counsel argued the mental mitigators, he chose not to recall any of the mental health experts at the penalty phase. Rather the record reveals Strausser took the stand at the penalty phase and testified that he only wanted to help Elec Trubilla get away from his father. (R 1615). Strausser testified that he had no plans to murder Allan Trubilla and did not want to even confront Elec's father. (R 1615-1617). He had never been in serious trouble before (R 1618) and had worked very hard over the last couple of months to help Elec get away from Allan Trubilla. (R 1621-1622). Strausser admitted he had been on Lithium and Sinequan for manic depression from Dr. Appel, but did not state that this condition made him commit the murder (R 1619). If

anything, Strausser stated he blacked-out and did not know what happened. (R 1623-1624). He stated he did not know how the knife got into his hands. (R 1625). He ultimately stated that he never planned any murder and that it was Elec who kept calling him and discussing ways Elec was going to kill Allan Trubilla. (R 1612-1614).

Additionally, Lloyd Pryor, Mary Smith and Peggy Strausser testified at the penalty phase. Each related that Strausser was responsible and had influenced their respective lives by either working as a big brother to Lloyd Pryor, (R 1626-1631) or helping Mary Smith, Lloyd's mother (R 1642-1643), or supporting his own family, Peggy Strausser. (R 1644-1657). Mrs. Strausser testified that her husband had some problem with his sexual orientation and was under stress because Lloyd Pryor had gotten married and moved away. (TR 1644, 1656). Her husband was constantly called by Elec and he voiced concerns about Elec's welfare. (R 1645-1651). She knew her husband was on medication but also stated she never heard him discuss doing harm to Allan Trubilla. (R 1647-1653). She recalled that Elec called to say he wanted to kill his father. Ultimately, she stated that Strausser would not be in trouble if it had not been for Elec, (R 1656) because her husband was extremely emotional. (R 1656). Elec Trubilla influenced her husband, because he, Strausser, put himself in Elec's shoes. (R 1657).

On cross-examination, however, Mrs. Strausser admitted that much of Strausser's problems resulted from Lloyd Pryor's marriage and his moving away (R 1658-1660). She also admitted that one month prior to the murder, Strausser was not so stressed out that he could not apply to be a big brother to another child. (R 1661). She stated that Elec Trubilla could have been the child she and her husband wanted. (R 1661).

In Thompson v. State, 553 So.2d 153 (Fla. 1989), this Court in a similar-type case concluded that the mental mitigation did not support the jury's life recommendation. In Thompson,

supra, evidence was tendered to suggest Thompson had organic brain damage and he could not conform his conduct to the requirements of the law. The Court also rejected as a lawful basis to support the jury's recommendation of life the fact that Thompson was not the triggerman, viewing culpability for the murder.

> " The record reflects that Thompson was in charge and his accomplices were subordinates. Thompson ordered that Savoy be apprehended, and it was Thompson, rather than his accomplices, who inflicted the fatal shot. The remaining evidence submitted in mitigation did not provide a reasoned basis for a jury recommendation of life imprisonment. In the final analysis, this was a contract killing conducted in a professional manner by an underworld crime boss. With five aggravating circumstances, no statutory mitigating circumstances, and very little nonstatutory mitigating evidence, the trial judge's override was legally sound."
>
> 553 So.2d at 158.

See also Zeigler v. State, 580 So.2d 127, 131 (Fla. 1991), wherein the Court observed that, "A judge's override is not improper simply because a defendant can point to some evidence in mitigation." (Court found good character, church and community service not enough to overcome enormity of crime - override valid).

Moreover, as observed in Marshall v. State, 604 So.2d 799, 806 (Fla. 1992), negative characterization of the victim can not provide a reasonable basis for the jury's life recommendation.

> " The victim received no less than twenty-five separate wounds and blood was sprayed and splattered about the cell. Death was caused by blows to the back of the head. Nothing in these facts support the notion that Marshall acted in self-defense or that he simply killed the victim in the heat of a fight. We thus conclude that the trial court did not abuse its discretion in finding the facts supporting the death sentence....."
>
> 604 So.2d at 806.

See also Robinson v. State, 610 So.2d 1288 (Fla. 1992) (co-defendant received a life sentence - not sufficient to vacate override). White v. State, 403 So.2d 331 (Fla. 1981) (same).

Viewed in its totality, the mitigation presented and articulated in the sentencing order reflects de minimus mitigation, none of which either reviewed separately or in toto provide a basis to suggest a reasonable person could rationally conclude death is not the appropriate sentence.

With regard to whether the sentence is proportionate, the State would submit two valid aggravating circumstances have been proven. When weighed against a very weak statutory mitigator, no significant criminal history and an assortment of non-compelling, non-statutory mitigation such as Strausser's history of child abuse many years earlier and depression --- personality disorder stemming from his childhood and the departure of Lloyd Pryor, the death sentence herein is appropriate. Thomas v. State, 456 So.2d 454 (Fla. 1984); Mills v. State, 476 So.2d 172 (Fla. 1985); Porter v. State,,429 So.2d 293 (Fla. 1983) Zeigler v. State, supra; Echol v. State, 484 So.2d 568 (Fla. 1985) Dobbert v. State, 328 So.2d 433 (Fla. 1976); and Hoy v. State, 353 So.2d 826 (Fla. 1977).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was sent by United States mail, postage prepaid, to Richard L. Rosenbaum, Esquire, One East Broward Blvd., Suite 1500, Barnett Bank Plaza, Ft. Lauderdale, Florida 33301, this 8th day of November, 1995.

SARA D. BAGGETT
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