IN THE FLORIDA SUPREME COURT

KATHLEEN WEIAND,

Appellant,

v. **CASE NO. 91, 925**

STATE OF FLORIDA,

Appellee.

DISCRETIONARY REVIEW OF A DISTRICT COURT OF APPEAL
DECISION, SECOND DISTRICT

ANSWER BRIEF OF THE RESPONDENT

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STATEMENT OF THE FACTS

The State generally accepts the statement of the case and facts set forth in Petitioner's brief with the following supplement.

Since Todd Weiand never regained consciousness after being shot, the events which occurred on the night of his murder were necessarily related by the Petitioner and the physical evidence found at the crime scene.

After her pool banquet, Petitioner and her friend, Dennis, stopped at a bar/pool hall called "Six Pockets" in order to show her pool trophy off. (TR. 1044). Petitioner consumed beer there, but thinks she only had one. (TR. 1045). She stayed there two to three hours. (TR. 1045). Petitioner then stopped at another pool hall called "Bobalouie's" where she consumed more beer. (TR. 1046-47). Petitioner testified that she left Bobalouie's at "around 8:00" p.m. (TR. 1047).

Petitioner arrived home between 8:00 and 9:00 p.m., admittedly well past the time (4:00 p.m.) she earlier told Todd she would return from the banquet. (TR. 1047). Todd was angry with Petitioner for arriving home late and Petitioner testified he "shook me by my arms, screamed things at me." (TR. 1049). After calling her mother and talking with her for fifteen minutes (TR. 1049), Petitioner testified she told Todd she was leaving. (TR. 1051). Petitioner testified that

Todd then attacked her and began choking her. (TR. 1052). After allegedly passing out, Petitioner woke up, grabbed a butcher knife and "chased Todd." (TR. 1053).

Todd retreated into a small bathroom. Petitioner retrieved a knife from the kitchen and began chopping a hole through the bathroom door. (TR. 1053). At first, Todd remained behind the locked bathroom door while Petitioner was hacking away with the knife. (TR. 1169). Petitioner admitted that she did not try to call for help when she had the victim trapped in the bathroom. (TR. 1171). Petitioner struck the door with such force that at least one knife blade broke off from the handle.[1] (TR. 1172).

After Petitioner successfully hacked a hole through the bathroom door, Todd allegedly poked a metal towel rack through the door and tried to hit her. (TR. 1054). Petitioner claimed she did not want to hurt Todd with the knife, but just wanted to "scare him." (TR. 1055). She claimed they agreed to stop fighting, but that the victim violated the agreement: "He was going to attack me. He wouldn't stop." (TR. 1056). Petitioner admitted that each time Todd came out of the bathroom she would chase him back in and "hack at the door some more."

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[1]Detective Broker observed a "rather large hole" chopped in the bathroom door and found two knife blades around the bathroom door. (TR. 444).

(TR. 1173).

When Todd left the bathroom, Petitioner claimed that he hit her on the "wrist and anywhere" with the piece of metal. (TR. 1057). At one point, Petitioner put down the knife, because she testified, "the knife wasn't scaring him." (TR. 1057). Petitioner testified Todd backed her up into the master bedroom while hitting her with the metal rod. (TR. 1058). Petitioner pulled a loaded 9mm handgun from the dresser in the master bedroom. After Petitioner pulled the gun, she claimed that the victim turned and fled "into the nursery." (TR. 1059). She recalled firing the handgun at the wall. (TR. 1058). Petitioner did not specifically recall firing a second shot. The victim was in the nursery when the fatal shot was fired. Petitioner admitted that she did not know what he was doing in the room when she fired. (TR. 1062-63). Petitioner denied attempting to shoot Todd on the night of January 23, 1994. Further, she denied even attempting to hurt him. (TR. 1059-60).

Two bullets were fired into the nursery where the victim was found. One bullet, the fatal shot, penetrated the door at four feet and one-half inch above the floor. (TR. 515). Another bullet hole was found in the wall to the nursery at five feet and one half inch above the floor. (TR. 515). A firearms/ballistics expert and the medical examiner testified that the bullet trajectory and location of

the wound on the victim's head were consistent with a bullet striking the victim through the closed door as he looked down at the door handle in an attempt to lock the door. (TR. 698, 738).

Two spent shell casings were found in the apartment. One shell casing was found on the hallway floor going into a back bedroom. The other was found in the bedroom on the northwest corner near a dresser with an open drawer. (TR. 446).

Appellant was 5'9 and weighed between 140-45 pounds in January. (TR. 1064). The victim, at 5'11, with only one leg, weighed approximately 140 pounds at the time of his murder. (TR. 736). The medical examiner testified that the victim's blood alcohol level on the night of his murder "was essentially negative." (TR. 735). While a formal blood alcohol test was not conducted on the Petitioner, Detective Baker testified that he smelled a "pretty strong odor of alcoholic beverage" emanating from the Petitioner after the murder.[2] (TR. 438-39).

Corporal Lee Baker was one of the first officers to talk with Petitioner after the murder. Corporal Baker attempted to find out who the Petitioner wanted to

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[2]Deputy Figueredo also smelled "an odor of alcohol upon her person." (TR. 470).

take care of her infant daughter. (TR. 486). She made some spontaneous statements regarding what had occurred in the apartment. Corporal Baker testified:

> The statements that I recall and documented were on the second time that I was with her. The first time was very short and in reference to the consent.
>
> The second time was when she made these statements and some of these statements that she made at that time was that she was the one that had cut the hole in the bathroom door, and that because she was trying to get at her husband with this knife.
>
> She also told me that she had told him to stay in the bathroom. She also told me the reason for the shooting was because she had lost it.
>
> And she also made a statement that the fight started because the baby -- of the baby and her going back to work. And she also made the statement that her husband would not help take care of the baby and was not helping with the housework.[3]

(TR. 487). Corporal Baker distinctly recalled Petitioner telling him that "she was trying to get at her husband" when she was hacking at the door with a knife. (TR. 498). Corporal Baker also testified that Petitioner complained of a sore wrist. (TR. 493).

Photographs of the Petitioner in various states of dress were ordered taken by

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[3]While Petitioner made several spontaneous statements to the police, Ms. Weiand declined to make a formal statement after being read her Miranda warnings by Detective Figueredo. (TR. 478). The jury, fortunately, did not learn that Petitioner had invoked her right to remain silent. Id.

a Detective on January 24th. Detective Figueredo testified that while the photographs were taken he did not notice any evidence of injuries to the Petitioner. While the Petitioner claimed of some soreness to her throat, Detective Figueredo did not observe any injuries on that area of her body.[4] (TR. 472-74). On cross-examination, Detective Figuerdeo admitted that one of the photographs may have revealed a small degree of bruising or an abrasion on one of Petitioner's fingers. (TR. 476).

On July 11, 1997, the Second District affirmed Petitioner's conviction. The court stated that it examined each of the six issues raised by the defendant and "conclude[d] that none of the errors asserted require reversal." Weiand v. State, 22 Fla. L. Weekly D1707 (Fla. 2nd DCA July 11, 1997). The Second District concluded that the trial court erred in excluding three defense witnesses but concluded the error did not require reversal of Petitioner's conviction. The Second District stated: "After examining the proffered testimony of the three excluded witnesses, together with all of the other evidence and testimony presented in this case, and applying the harmless error rule as we are required to

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[4]The Detective specifically directed that a photograph be taken of Petitioner's throat area (State's Exhibit 26) because the Petitioner claimed "of some soreness to her throat." (TR. 473).

do, we cannot conclude that the exclusion of these witnesses requires reversal.[5] *See* § 924.33, Fla.Stat. (1995); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)."

The Second District also closely examined the prosecutor's closing argument in this case. The court stated "[i]t is not so much the central points in the closing argument that are offensive, but rather the manner in which the points are presented." Although the court did not generally approve of the argument, it did not find the argument as a whole constituted fundamental error. Weiand, 22 Fla. L. Weekly at D1708.

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[5]The court subsequently certified a question to this court surrounding the self-defense instructions utilized in this case as discussed under issue one, *infra*.

ARGUMENT SUMMARY

ISSUE I--The trial court's failure to instruct on defense of home within the self-defense instructions was proper because the victim had an equal right to remain in the residence. The rule of law articulated in Bobbitt has not proved unworkable in the courts of Florida nor has it resulted in a miscarriage of justice *sub judice*.

ISSUE II--The exclusion of three defense witnesses does not require reversal of Petitioner's convictions. Petitioner's self-defense case was extremely weak and the witnesses could offer little relevant testimony.

ISSUE III--Petitioner's absence from the proceedings while two defense witnesses testified was initiated by the defense counsel and accepted by the Petitioner. If Petitioner's absence from the proceedings engendered any error, it was clearly invited by Petitioner and her defense counsel.

ISSUE IV--Even imputing knowledge of the investigation of Deputy Terry to the prosecutor, the investigation of Terry for conduct unrelated to the instant case would not have provided relevant impeachment material.

ISSUE V--The prosecutor's unobjected to comments in closing argument did not constitute fundamental error.

ISSUE VI--Ample evidence supported the trial court's denial of appellant's motion for a judgment of acquittal on second degree murder.

ARGUMENT

I.

WHETHER THE RULE OF STATE V. BOBBITT, 415 SO.2D 724 (FLA. 1982), SHOULD BE CHANGED TO ALLOW THE 'CASTLE DOCTRINE' INSTRUCTION IN CASES WHERE THE DEFENDANT RELIES ON BATTERED SPOUSE SYNDROME EVIDENCE (AS NOW AUTHORIZED BY STATE V. HICKSON, 630 SO.2D 172 (FLA. 1994) TO SUPPORT A CLAIM OF SELF-DEFENSE AGAINST AN AGGRESSOR WHO WAS A COHABITANT OF THE RESIDENCE WHERE THE INCIDENT OCCURRED?[6]

Petitioner below and before this Court acknowledges the precedent of State v Bobbitt, 415 So.2d 724 (Fla. 1982) as authority on the defense of home instruction issue. Yet Petitioner argues that Bobbitt should be disregarded in favor of allowing a co-occupant to remain in the home and utilize deadly force without considering the availability of a safe retreat from the confrontation. Petitioner has not demonstrated any compelling need for a change in the law on self-defense in Florida.

Generally, the principle of *stare decisis* serves to protect several interests: "[T]he even handed , predictable, and consistent development of legal principles, . . .reliance on judicial decisions, and . . .the actual and perceived integrity of the

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[6]As certified by the Second District.

judicial process." Payne v. Tennessee, 501 U.S. 808, 827, 115 L.Ed.2d 720, 111 S.Ct. 2597 (1991). Nonetheless, this Court has recognized that "*stare decisis* is not an ironclad and unwavering rule that the present always must bend to the voice of the past, however, outmoded or meaningless that voice may have become." Haag v. State, 591 So.2d 614, 616 (Fla. 1992). "It is a rule that precedent must be followed *except* when departure is necessary to vindicate other principles of law or to remedy continued injustice." Id. (citing McGregor v. Provident Trust Co., 119 Fla. 718, 162 So. 323 (1935)). In this case, the trial court relied upon this Court's decision in Bobbitt and denied Petitioner's requested defense of home instruction.

In Bobbit, this Court recognized the strong desire to protect the sanctity of human life. Addressing the Fourth District's retreat from the 'Castle Doctrine' in cases of cohabitants in Conner, this Court agreed with the rationale expressed by Judge Letts:

> [W]e see no reason why a mother should not retreat from her son, even in her own kitchen. Such a view does not render her defenseless against a member of the family gone berserk, because the instruction on retreat. . .concludes, "but a person placed in a position of imminent danger of death or great bodily harm to himself by the wrongful attack of another has no duty to retreat if to do so would increase his own danger of death or great bodily harm."

Bobbitt, 415 So.2d at 726. (Quoting Conner v. State, 361 So.2d 774, 776 (Fla.

4th DCA 1978), cert. denied, 368 So.2d 1364 (Fla. 1979)). This Court stressed that "this holding does not leave an occupant of a home defenseless against the attacks of another legal co-occupant of the premises since 'a person placed in imminent danger of death or great bodily harm to himself by the wrongful attack of another has no duty to retreat if to do so would increase his own danger of death or great bodily harm.'" Bobbitt, 415 So.2d at 726 (quoting Fla.Std.Jury Instr. (Crim.), 2d ed., pg. 64.).

Petitioner has cited no cases from which this Court can conclude that adherence to a duty to retreat has resulted in a miscarriage of justice in the State of Florida. See Roger v. State, 670 So.2d 160, 161 (Fla. 5th DCA 1996)("Castle" doctrine is inapplicable where "both combatants have equal rights to occupy the "castle."). And, certainly application of a duty to retreat does not result in a miscarriage of justice in this case. In Connor v. State, The Fourth District stated "[w]e agree with a recent law review author, that human life is sacred and that due regard for it far outweighs any indignity or cowardice involved in having to retreat from one's own family." 361 So.2d at 776 The reason for upholding the safe retreat requirement is clear under the facts of this case.

Even if Todd was the initial aggressor, the initiative clearly passed to the Petitioner as she brandished a knife and chased Todd into the bathroom. She then

began hacking away at the door with a knife rather than leave the apartment or even call the police from the nearby phone. When one knife blade broke, she returned to the kitchen to get another knife to continue to chop at the door. A duty to retreat recognizes that when passions become inflamed, it is often best that a party take a step back and leave.[7] Thereafter an alternative and non-violent solution may then be found.

Even Judge Overton's dissent in Bobbitt recognizes at least some duty to retreat to avoid a confrontation in the home. Judge Overton stated that a defendant attacked in his or her own home by a cotenant/family member "**has a duty to retreat to the extent reasonably possible but is not required to flee [his/her home. . .**" Bobbitt, 415 So.2d at 728. Thus, Judge Overton appears to sanction some type of retreat prior to resort to deadly force, but that the retreat need not be out of the house. Petitioner not only failed to retreat in this case, but she fired the fatal shot after the victim had fled from the confrontation.

While there are clearly arguments in favor of dispensing with the need for seeking a safe retreat before resorting to deadly force for co-occupants, the

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[7]While Petitioner claimed that one of the reasons she did not leave was because of her infant daughter. However, there was no evidence to suggest that the victim had ever harmed or even threatened to harm his daughter.

arguments in favor of such a requirement are at least as compelling. See State v. Quarles, 504 A.2d 473, 476 (R.I. 1986). As noted by the Fourth District Court of Ohio:

> The policy which underlies the view relieving an actor from the duty to retreat when assaulted by an intruder in the actor's home is simply not present when the aggressor is not an intruder, but a spouse with a right to be present in the dwelling. The policy which underlies the former is predicated upon the view that one's home is one's castle, from which a homeowner is not required to retreat in the face of force used by an aggressor which produced a reasonable fear of death or great bodily harm. This policy is not implicated where the aggressor is a cohabitant with an equal right to be in the home. In the latter circumstance, the policy supporting the retreat rule will lessen the potential for domestic violence if one can safely avoid injury by retreating.

State v. Walker, 598 N.E.2d 89, 90 (Ohio App. 3d 1991).[8]

Battered woman's syndrome and a duty to retreat are not incompatible concepts. Battered woman's syndrome testimony may help explain why a woman reasonably believed she could not safely retreat from an encounter with an abusive spouse. Nonetheless, if she could have safely retreated from the confrontation, deadly force would not be justified. Petitioner's claim that "'[t]he defendant's inability to retreat and escape without harm may be closely linked to her inability

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[8]Of course, in State v. Thomas, 673 N.E.2d 1339 (Ohio 1997), the Ohio Supreme Court dispensed with the need for retreat from one's own home even where the aggressor is a co-occupant.

to escape from the relationship'" (Petitioner's Brief at 39)(citing Elizabeth Bochnak, Women's Self-Defense Cases 47 (1981)) is already considered in the current self-defense instructions. Again, in no way can it be said that a woman who is truly in fear for her life is left defenseless against an attack by her spouse or male companion. However, where a retreat can **be safely made**, a person must choose that avenue rather than take a human life. The equities in this case clearly lie with the decedent, who, even if Petitioner's self-serving testimony is believed, had clearly retreated from the fray when he was fatally shot.

As observed by the Third District Court of Appeal in McKnight v. State, 341 So.2d 261, 262 (Fla. 3d DCA 1977), rev. denied, 348 So.2d 953 (Fla. 1977):

> In order to justify a homicide on the ground of self-defense, the situation must be such as to induce a reasonably prudent person that danger was imminent and that there was a real necessity for the taking of life. (citations omitted). One who seeks to excuse homicide on the ground of self defense must show that the killing was necessary at the time and that he did all he reasonably could do to avoid it. citing, State v. Coles, 91 So.2d 200 (Fla. 1956).

The reason for requiring a safe retreat before resorting to deadly force is clear under the facts of this case. In this case, it is apparent that Todd had thought about leaving his marriage and had even discussed living with a friend from

work.[9] (TR. 1829). Consequently, Todd and the Petitioner may have been at the end of their difficult marriage. Deadly force was simply not an appropriate response; even if we accept Petitioner's testimony at face value. Indeed, Petitioner claimed that she did not even intend to shoot Todd.[10] (TR. 1059-60).

Even assuming, *arguendo*, this Court believes Petitioner has carried her burden to show compelling circumstances for a change in the law on self-defense in Florida, the instruction requested by Petitioner would have had no impact upon the verdict in this case. Petitioner's self-defense case was extremely weak.

The initiative in the confrontation clearly passed to the Petitioner when she armed herself with a knife and chased the victim into the bathroom. (TR. 1053). Not content to leave, Petitioner began chopping at the door with a knife, eventually cutting a hole through the door. (TR. 444, 1054). The initiative again passed to the Petitioner when she pulled a handgun in the bedroom and the victim fled from her presence. (TR. 1058-59). Although she admitted she did not know

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[9]He was a responsible employee, was not known to have a drinking problem, and had recently been promoted to team leader for Audi maintenance at a Tampa Auto dealership. (TR. 1824, 1833). There was also evidence that he was very happy about the birth of his daughter (TR. 1866) and that he was a caring father (TR. 1828-29). He had a life worthy of protection under the law.

[10]This is, of course, at odds with a self-defense claim, which is a type of admission and avoidance defense.

what he was doing behind the closed door, she fired two shots, one of which struck the victim in the head.[11] The fatal shot went through the closed door to strike the victim. (TR. 698, 738). Battered woman's syndrome does not eliminate the requirement of an imminent threat of harm before resorting to deadly force. A person behind a closed door does not pose an imminent threat of harm. Consequently, the State submits that a "castle doctrine" instruction would not have had any impact upon the verdict in this case.

Since the requested instruction would not have had any impact upon the verdict, this Court may decline to answer the certified question. Alternatively, Petitioner has offered no compelling reason to depart from this Court's opinion in Bobbitt. The law articulated in Bobbitt has not proved unworkable in the courts of this state nor has it resulted in a miscarriage of justice *sub judice*.

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[11]It is not clear that both shots were fired when the door was closed. One shot may have been fired while the victim fled the master bedroom. However, there is no doubt that the fatal shot went through the closed door.

II.

WHETHER THE TRIAL COURT ERRED IN EXCLUDING CERTAIN DEFENSE WITNESSES? (RESTATED BY RESPONDENT)

Petitioner claims that the Second District erred in failing to reverse her conviction because certain defense witnesses were excluded by the trial court. The Second District concluded after reviewing the entire record that the exclusion of three defense witnesses below was harmless error. Petitioner has offered no compelling reasons for this court to review the Second District's decision on this issue.

A. Exclusion of Tracy Bowman

The prosecutor addressed her position below on being notified by the defense after voir dire that the defense counsel had listed another witness, Tracy Bowman. The prosecutor stated:

> I explained to her that I was going to move to strike, that I thought your Honor had made it very clear that there were to be no more witnesses. Ms. Morgan announced ready for trial. In fact, she argued against my request to ask the Court to grant the State a continuance in this case saying she was ready and this was the only time she was going to be ready and so and so forth. And then today right after we finish swearing in the jury panel, I get told by Ms. Morgan, and there's another witness that I have, and, here, you have the opportunity to interview her.
>
> And once again, Your Honor, I'm moving to strike both of those witnesses. I think that Your Honor made your order clear. I know

> that when we addressed the issue of my listing Dr. Saminow, Your Honor, I think reiterated it, and I think your order of pretrial conference also made it clear in addition to that Ms. Morgan announced ready for trial and she said this was the only time she was going to be ready for trial.

(TR. 2155-56).

Indeed, as defense counsel noted in her response, she had objected to the State's earlier addition of an expert witness because, she stated: "[T]he defendant would be prejudiced because there was no time to prepare cross-examine (sic) and familiarize myself with a new expert, and because the Court's order specifically dealt with a cut off on time for experts." (TR. 2156). The trial court noted, however: "I think my order in this case was for discovery, that all witnesses be exchanged by December the 9th, and I may be wrong on that date, but I feel confident that it was to conclude the exchange of discovery by December 9th. So that if there were additional depositions or anything else that had to be completed, we would have the additional month of December to conclude any of the depositions of any of the witnesses listed at that time." (TR. 2156-57). The court observed its order was not limited "to only defense experts in this case." (TR. 2157). The trial court also stated that it already altered the rules of discovery for good cause "in light of the fact that there was substantial discovery, the nature of these charges, the fact that it was going to take two weeks

to try this case." (TR. 2158).

The defense counsel attempted to explain why Tracy Bowman was not located earlier by the defense. (TR. 2158). Defense counsel claimed the difficulty in locating Ms.Bowman stemmed from her job with a traveling Carnival. She also mentioned her difficulty in obtaining tenant records from the apartment complex where Ms. Bowman resided. Finally, in an attempt to explain why Ms. Bowman's late addition would not prejudice the State, the defense counsel stated: "The State has been well-aware for a lengthy period of time that there are numerous witnesses of prior acts of domestic violence between these two people. This is merely another witness." (TR. 2160). Defense counsel, did, however, claim that Ms. Bowman was the only particular witness to some of these incidents and that her testimony was therefore essential to the defense. (TR. 2161). The defense admitted that they made no effort to subpoena Ms. Bowman or the tenant records from the apartment complex where she was living. (TR. 2163).

The prosecutor disputed defense counsel's claim the State would not suffer prejudice if Ms. Bowman is allowed to testify. The prosecutor stated:

> I think, of course, it prejudices me because at this point I've got a two day -- I'm contemplating being able to rest by the latest Thursday morning. I've got to then investigate what this woman is telling me and how am I allowed to do that unless we take a continuance in this trial, allow me to take her deposition, see if, in fact, I can do

> anything to either dispute this woman's statements that she's going to make, find out whether or not she actually lived there. . .We've waited until after our jury was sworn to surprise the State with this witness. I think it's unfair. I think Your Honor made it very, very clear when you struck Dr. Saminow, in fact, one of the comments you made when you struck Dr. Saminow was you could continue investigating this case for months and that was a concern that you addressed at that time.

(TR. 2155-56). Thus, based upon this record, it can be argued that the trial court did not abuse its discretion in excluding Tracy Bowman.[12] Nonetheless, the Second District found it was error to exclude Ms. Bowman, but that the error was harmless. The record supports the Second District's decision.

Ms. Bowman's proffer hardly established her as a relevant and material witness for the defense. Most of the proffer consisted of the following: "[T]here was days (sic) when she came over to my house and told me about him hitting her. I've seen them argue. I've actually witness (sic) him when he's gotten mad at Kathy." (TR. 2169). Yet the only actual physical violence Ms. Bowman testified that she witnessed by the victim was that he struck the dog, "he would take it out on her dog." (TR. 2169). Ms. Bowman claimed that when "she stayed out too late, he would get upset and argue at her." (TR. 2170). It is

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[12] "A ruling on whether a discovery violation calls for the exclusion of testimony is discretionary and should not be disturbed on appeal unless an abuse is clearly shown." State v. Tascarella, 580 So.2d 154, 157 (Fla. 1991).

apparent, however, she never witnessed the victim strike the Petitioner. (TR. 2170).

The most Ms. Bowman was able to observe were some marks on appellant's body which appellant claimed [hearsay] were the result of being struck by the victim. (TR. 2170). Ms. Bowman also testified that appellant told her (hearsay) that she wished she could get away from him "that if she ever left him that he would kill her, would come after her." (TR. 2171). Thus, it is apparent Ms. Bowman could add little in the way of admissible evidence but much in the way of inadmissible hearsay. The excluded witness was at best marginally relevant because she did not personally witness any acts of violence by the victim against the Petitioner.

As discussed above, Ms. Bowman's testimony was not based upon personal observations of violence but on inadmissible hearsay related by the appellant. The only corroboration of physical abuse may have been in the form of Ms. Bowman's alleged observation of injuries inflicted upon appellant by the victim with a vacuum cleaner. Given the extremely limited relevant testimony that could have been admitted through Ms. Bowman, and the extremely strong State case, any

error in excluding Ms. Bowman was harmless.[13]

The State notes that Petitioner's self-defense case was extremely weak. Petitioner's claim of self -defense suffered from evidence establishing that she repeatedly hacked at the bathroom door with a knife when the victim locked himself in the bathroom in an attempt to escape from the Petitioner. More, significantly, Petitioner's own testimony established that she was under no threat of immediate harm when she fired the fatal shot through a closed door. According to Petitioner, the victim retreated when she pulled a loaded pistol from a dresser drawer in the bedroom. (TR. 1059, 1177). When the fatal shot was fired, the victim was not even under her direct observation but was in another room behind a door. And, Petitioner even admitted she did not know what the victim was doing in the room when the fatal shot was fired. (TR. 1062-63).

When these facts are coupled with Petitioner's earlier testimony that she had

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[13]It should also be noted that much of the State's evidence regarding prior violent acts of the Petitioner was excluded by the trial court. The State was prepared to offer witnesses to prior violent acts and outbursts where Petitioner had been drinking and assaulted both men and women. (TR. 1790-91). Defense counsel successfully kept most of this evidence out and argued that she was careful not to "put the defendant's reputation for peacefulness or violence in the community in issue." (TR. 1787). The trial court excluded evidence of past violent acts by the Petitioner, stating "better safe than sorry, keep it out so we don't have to try this case over again some day." (TR. 1796).

chased the victim into a bathroom and hacked at the door with a knife with sufficient force to break a knife handle, it is quite clear that Petitioner had the opportunity to retreat during the confrontation but chose not to. Petitioner made no attempt to call for help while the victim remained in the bathroom or when he fled into the nursery after the Petitioner pulled the handgun. (TR. 1094). Thus, the facts were hardly sufficient in the case *sub judice* to establish a real necessity for the taking of human life. State v. Bobbitt, 415 So.2d 724, 725 (Fla. 1982)("It cannot be denied that it is the duty of a party to avoid a difficulty which he has reason to believe is imminent, if he may do so without apparently exposing himself to death or great bodily harm.")(citations omitted).

B. Exclusion of Amy Dummond and Del Charles.

The trial court sustained the State's objection to Amy Dummond's and Del Charles' testimony because of concern that the Petitioner did not recall the specific acts of violence about which they would be called to testify. (TR. 1445). Nonetheless, the Second District held it was error to exclude this testimony. However, after reviewing the record, the Second District found that the error was harmless.

Petitioner's reliance upon Coker v. State, 212 So.2d 648 (Fla. 1st DCA 1968), is misplaced. The defendant in Coker testified that on the day prior to the

shooting he and the deceased were involved in an altercation wherein the deceased beat the defendant with a bottle then shot at him with a gun. Coker, 212 So.2d at 648. The trial court excluded evidence from a witness who observed the conduct of the deceased the day prior to the shooting. The court agreed with defendant's contention that "this testimony would have established that on the day of the fatal shooting the actions of the deceased constituted such a hostile demonstration which, in the light of deceased's previous actions, reasonably caused defendant to be in fear of bodily injury or death, and which justified him in taking the action he claims he did in self-defense." Id. at 649.

In Coker the defendant possessed specific recollection concerning the violent acts about which the proffered witness could provide corroborating testimony. In this case, unlike Coker, the defendant did not testify concerning the specific acts which were encompassed in defense counsel's oral proffer. Furthermore, the witnesses in this case would not have testified about an event which occurred the day prior to the shooting as in Coker, but about events which occurred before Petitioner was even pregnant. Consequently, such acts were undisputably remote in time from the date the victim was fatally shot by the Petitioner.

Petitioner was given broad leeway to testify concerning all violent actions which may have occurred during her relationship with the victim. Indeed,

testimony was allowed even for remote violent encounters which occurred in Wisconsin prior to the marriage. See e.g. TR. 827-30, 884, 885, 1617, 1083-84, 1261-65. Further, given Petitioner's failure to recall the specific instances of misconduct allegedly witnessed by Charles and Dummond, their testimony would have limited corroborative value in this case. More importantly, as noted above, Petitioner's own testimony concerning her conduct on the night she fired the fatal shot did not support her self-defense theory. Given Petitioner's extremely weak self-defense theory, and the broad latitude given the defense to develop any violent proclivities on the part of the victim, any error in excluding this testimony was clearly harmless. Petitioner has not established the Second District's resolution of this issue on the basis of harmless error was in any way improper.

III.

WHETHER PETITIONER'S VOLUNTARY ABSENCE FROM CERTAIN PORTIONS OF THE TRIAL REQUIRES REVERSAL OF HER CONVICTION? (RESTATED BY APPELLEE).

Petitioner claims the trial court committed fundamental error in allowing the appellant to voluntarily absent herself from the courtroom so that two defense witnesses could testify out of order. The State disagrees.

Petitioner's claim that her absence from the courtroom while Sherri Brockman and Dr. Maher testified below requires reversal of her conviction is barred by the invited error doctrine. Not only did counsel fail to object to her absence below, but counsel affirmatively requested that she be excused from the courtroom so that two defense witnesses could testify prior to Petitioner taking the stand.

Defense counsel was the first one to suggest Ms. Weiand leave the courtroom in order to assuage the prosecutor's concern that the defense had not laid the necessary predicate for admission of Dr. Maher's or Ms. Brockman's testimony. Defense counsel stated, "I have no problem if the Court even wants for Mrs. Weiand to be out of the courtroom while this witness testifies . . ." (TR. 759). This suggestion was followed by a discussion between the trial court, prosecutor, and defense counsel:

Ms. Morgan (defense counsel): She [Ms. Brockman] couldn't testify next week at all. That was our problem.

The Court: If we don't get her out of the way, she's going to be looking at a three day weekend and a trip back here.

Ms. Goudie (prosecutor): If the defendant voluntarily leaves the courtroom, and I'm going to have the same concern with Dr. Maher, which has always been my concern with that whole concept, that she's sitting in here before she testifies.

Ms. Morgan: I don't care.

Ms. Goudie: And they're not going to raise any issues as to that on appeal, it's a voluntary removal form the trial, I don't have a problem.

Ms. Morgan: Judge, I don't have a problem with Kathy leaving. I think the Court needs to give some explanation as to why she's going, perhaps these witnesses have personal problems that prevented them--

(TR. 759-60).

The trial court then went on to discuss a proposed instruction for the jury to explain Petitioner's voluntary absence from the courtroom. The trial court read the proposed instruction for the defense counsel and prosecutor:

"That the defendant would ordinarily testify before the next witness is going to testify so that she can't mold her testimony so as to conform to the testimony of the witness you're about to be hearing, but she's read the deposition, she probably knows the questions and answers." (TR. 761). In response to the proposed

instruction, defense counsel stated: "Defense has no objection." (TR. 761). Whereupon, Ms. Goudie stated, "Judge, I would like it to be clear that she's not being sent out." (TR. 761). The prosecutor also stated, without objection or clarification: "She's voluntarily leaving. She has a right to be present." (TR. 761). Petitioner was not absent from the courtroom during any of the dialogue between the trial court, prosecutor and defense counsel.

When the jury returned, the trial court again made it clear that the Petitioner was voluntarily leaving the courtroom, stating: "[S]o Ms. Brockman can testify now, get back to Wisconsin and take care of her family, the defendant is going to voluntarily leave the courtroom." (TR. 762). Consequently, it is quite clear that based upon the dialogue below, Petitioner not only failed to object to being outside of the courtroom for the testimony of two defense witnesses but that she sought through counsel to induce her exclusion in order to gain the premature admission of that testimony.

In Roberts v. State, 510 So.2d 885 (Fla. 1987), cert. denied, 485 U.S. 943, 108 S.Ct. 1123 (1988), the defendant argued that failure to include him and the trial court in a jury view of the crime scene was reversible error. While noting that the defendant had a right to be present at the scene and that the trial judge was required to accompany counsel to the scene, this Court found defense counsel

specifically waived the trial court's presence at the scene. Roberts, 510 So.2d at 889-90. This Court rejected the defendant's argument that notwithstanding counsel's waiver there is no record of a "knowing and intelligent waiver" from him and therefore reversal was required. Id. at 890. "To hold otherwise would allow Roberts to benefit from this clearly invited error." Id.

The Court also found the defendant's presence at the jury view was waived by counsel after consultation with his client. This Court noted that no evidence or testimony was presented at the view and that "a defendant's absence can in no way thwart the fairness of the proceeding." Roberts, 510 So.2d at 890. Thus, the Court found that "the waiver by defense counsel after consultation with the defendant serves as an adequate waiver of Roberts' right to be present at the jury view."[14] Id.

Here, the evidence of invited error and waiver is even more compelling than in Roberts. Defense counsel was the first to offer appellant's voluntary absence in order to present the testimony of Dr. Maher and Ms. Brockman before the defendant testified. In Roberts, the defense counsel merely affirmed after the jury

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[14]The court initially remanded the case for an evidentiary hearing to determine whether or not defense counsel discussed waiver of presence with the defendant.

view had been conducted that he had agreed to waive the defendant's presence at the scene. Here, defense counsel proposed the defendant absent herself from the proceedings prior to her physically leaving the courtroom instead of merely ratifying the waiver after the fact as in Roberts.

The prosecutor expressed some concern about the Petitioner leaving, stating: "And they're not going to raise any issues as to that on appeal, it's a voluntary removal form the trial, I don't have a problem." (TR. 759-60). Thus, if the defense counsel or Petitioner had any concern about her temporary absence from the proceedings they had ample opportunity to voice their concerns. Instead, the trial court and the State were led to acquiesce to the Petitioner's absence from the proceedings by the dialogue below, and the State now is confronted with an issue on appeal which was clearly invited by the Petitioner and her defense counsel below. See Pollock v. Bryson, 450 So.2d 1183, 1186 (Fla. 2d DCA 1984)(A defendant "should not be encouraged nor allowed to take advantage, on appeal or collateral attack, of an error he initiated or induced below."); Weber v. State, 602 So.2d 1316, 1319 (Fla. 5th DCA 1992)("Defense counsel should not be allowed to sandbag the trial judge by requesting and approving an instruction they know or should know will result in automatic reversal, if given.").

However, even if the trial court erred in not obtaining Petitioner's personal

imprimatur of approval on defense counsel's invitation to take the testimony of two defense witnesses in her absence, the error was harmless in this case. A defendant's absence from a portion of the trial is subject to a harmless error analysis. Roberts, 510 So.2d at 891.

While Petitioner claims in her brief that she could have assisted counsel in examining Ms. Brockman (Petitioner's Brief at 50), it is clear Petitioner was familiar with Ms. Brockman's anticipated testimony and had discussed her testimony with defense counsel. In proposing her voluntary absence, defense counsel stated: "It's not going to prejudice the State. The State can ask Kathleen Weiand if she has read Christi Brockman's deposition, she has, she'll admit she has." (TR. 759). Thus, it is quite clear neither Petitioner nor her defense counsel believed that her presence would be beneficial during Ms. Brockman's examination.

Petitioner has offered nothing on appeal which suggests she could have assisted in defense counsel's examination of Dr. Maher. Since Petitioner was represented by competent counsel during her absence and alleges no deficiency in counsel's examination of Dr. Maher or Ms. Brockman, it is clear Petitioner suffered no prejudice from her temporary absence.

IV.

WHETHER A NEW TRIAL IS REQUIRED BY DISCOVERY AFTER TRIAL THAT A STATE WITNESS WAS UNDER INVESTIGATION FOR AN UNRELATED INCIDENT AT THE TIME OF HIS TRIAL TESTIMONY? (RESTATED BY RESPONDENT).

Petitioner next claims that the failure of the State to disclose the investigation of Deputy Terry for abusing his position and photographing a woman naked at the time he testified requires reversal of her conviction. Although the prosecutor had no personal knowledge of this investigation, the defense counsel below argued that knowledge should be imputed to the State. However, even if knowledge is properly imputed to the prosecutor, non-disclosure of this information would not have revealed effective impeachment material. Therefore reversal of Petitioner's conviction is not required.

The problem with Petitioner's argument on appeal is that the pending investigation of Deputy Terry had nothing to do with the instant case. As noted by the prosecutor below: "Deputy Derek Terry is being investigated for is (sic) during an off duty job at a McDonald's he allegedly took some pictures of a woman who was riding naked in a car. After he had her removed from the car, he took her somewhere else and apparently took pictures of her. That's what the

allegations are, and I'm getting my information from the newspaper so everybody is clear." (TR. 2060). Obviously, his sexual misconduct in that situation has no bearing on his bias or credibility in this murder case. Since no charges were pending at trial, or even on the motion for new trial, there was nothing related to the instant case which was relevant to witness credibility.

Deputy Terry's trial testimony did not differ in any significant respect from his pretrial deposition and police report made after the shooting. Thus, there is no danger that Deputy Terry in any way changed his testimony in this case to curry favor with the prosecution. The prosecutor aptly made this argument below, stating:

> . . .Your Honor, Deputy Terry's testimony did not change in any way at all whatsoever since he gave his deposition in April of 1994 to the defense. The incident that he was being investigated for apparently occurred sometime in November of 1994, more than -- well, eleven months after he wrote police reports, which included her statement, the defendant's statement of he hit me with the metal pole in self-defense, which included his observations of what he saw and where he saw them and which included the statements that he makes in his deposition to Ms. Morgan prior to being under any investigations or any allegations against him.
>
> The only change in his testimony, in fact, and Ms. Morgan is correct, is that on the stand he stated, which he had stated to me earlier when he and I were talking, that when he was shown the photograph of the day bed where the assault weapon was, he said, no, it actually wasn't up that high, it was lower, that to tell you the truth and to confess here for the record was not something that was beneficial at all for the State, and I don't know how in any way or

> stretch of the imagination that Ms. Morgan can say that was critical to the State at all, that a deputy changes his testimony on the stand and says, no, the gun was actually lower on the bed. . . .

(TR. 2057-58).

The prosecutor noted that the evidence which led to the theory that Petitioner actually placed the assault weapon on the bed was the knife found in the nursery: "The critical piece of evidence that led us to that theory was the fact that there was a knife -- a broken knife blade right by the day bed and we knew that this victim never possessed a knife. So how in the world did that knife get there? And that's when the State came up with, oh, my God, she's the one that did it, okay?" (TR. 2057-58).

Based upon the facts of the alleged violation, Petitioner has not even shown a primae facie Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) violation. In establishing a Brady violation, a defendant must prove: (1) the prosecutor suppressed evidence; (2) the evidence was favorable to the defense; and, (3) the evidence was material. Sellers v. Estelle, 651 F.2d 1074 (5th Cir. 1981), cert. denied, 455 U.S. 927, 102 S.Ct. 1292, 71 L.Ed.2d 472 (1982). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97,

109-10, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976). "Suppressed evidence useful only for impeachment purposes is material if its disclosure probably would have resulted in acquittal." United States v. Darwin, 757 F.2d 1193, 1202 (11th Cir.), cert. denied, 106 S.Ct. 896, 88 L.Ed.2d 930 (1985); Porter v. State, 653 So.2d 374 (Fla. 1995)(citations omitted), cert. denied, 115 S.Ct 1816, 131 L.Ed.2d 739 (1996). As discussed above, the unrelated investigation of Deputy Terry was not material in this case.

After listening to the arguments of counsel, the trial court denied Petitioner's motion for a new trial, stating:

> . . . It's important, also, to point out that it was at the time merely an investigation as opposed to charged on public record, which he could have been asked about. And it certainly wasn't a conviction, which he certainly could have been asked about.
>
> So reading from two parts of Breedlove, which I think are applicable to our case, I'll just state for the record that the trial court concludes that there is no reasonable probability that the evidence of the detective's criminal activities would have changed the outcome of Ms. Weiand's trial because such evidence would not have been admissible and therefore is not material.
>
> And Deputy Terry's activities, if, in fact, criminal, we don't know because he's innocent until proven guilty, were collateral to any issues in Ms. Weiand's trial and any questions about his activities would not have promoted the ends of justice. Such questions would not have been permissible because of the Fifth Amendment right that Deputy Terry or Officer Terry has . . . .

(TR. 2063-64).

In Breedlove v. State, 580 So.2d 605 (Fla. 1991), the Florida Supreme Court addressed a similar situation. The defendant in Breedlove argued that "evidence of the testifying detectives' criminal activities could have been used to show their bias in testifying for the prosecution in order to gain more favorable treatment if and when the state proceeded against them." 580 So.2d at 607. Although the Breedlove court noted that a defendant has an absolute right to bring out pending felony charges, the right to bring out a pending investigation is limited. "If a state witness is merely under investigation, however, the ability to cross-examine on such investigation is not absolute." The investigation must "not be too remote in time *and must be related to the case at hand* to be relevant." Breedlove, 580 So.2d at 608. (emphasis added). And, evidence is not relevant "when the conduct and investigations are totally unrelated to the case at bar." Id. at 609.

As in Breedlove, the case sub judice is completely unrelated to the investigation of Deputy Terry for alleged sexual impropriety and apparent abuse of his position while off duty. The investigation simply does not implicate any interest or bias that Deputy Terry might have had in the instant case. And, since Terry's testimony was consistent with earlier police reports and depositions in the case prior to his investigation for the alleged misconduct, it is clear that this information would have no impact upon the verdict in this case. Consequently,

the trial court properly denied Petitioner's motion for a new trial in this case.

V.

WHETHER THE PROSECUTOR'S UNOBJECTED TO COMMENTS IN CLOSING VIOLATED PETITIONER'S RIGHT TO A FAIR TRIAL? (RESTATED BY APPELLEE).

Petitioner next complains that the prosecutor's comments in closing argument were so prejudicial that they constitute fundamental error. The Second District agreed that the tenor of the prosecutor's argument may have crossed the line, but concluded that the argument did not constitute fundamental error. Weiand, 22 Fla. L. Weekly at D1708. Petitioner has offered no compelling reasons for this Court to examine this issue. And, the State submits that Petitioner cannot carry her burden to establish fundamental error based upon this record.

In order to preserve a claim for prosecutorial misconduct: "[C]ounsel has the obligation to object and request a mistrial. If counsel fails to object or if, after having objected, fails to move for a mistrial, his silence will be considered an implied waiver." Nixon v. State, 572 So.2d 1336, 1340 (Fla. 1990), cert. denied, 112 S.Ct. 164, 116 L.Ed.2d (1991). Because Petitioner failed to either contemporaneously object or move for a mistrial based upon the prosecutor's comments during closing argument, the alleged errors have not been preserved for

appellate review. Nixon, 572 So.2d at 1340; Wilson v. State, 549 So.2d 702 (Fla. 1st DCA 1989), aff'd, 577 So.2d 1300 (Fla. 1991). It is also well settled that when a potential error is not presented to the trial court, an accused has waived the allegation of error on appeal. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) post conviction relief denied, 574 So.2d 1075 (Fla. 1991)("except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court.").

Petitioner has not established error in the prosecutor's closing argument, let alone the type of error required to be considered fundamental. Addressing the application of fundamental error, the Second District Court of Appeal has stated the following:

> The Florida cases are extremely wary in permitting the fundamental error rule to be the 'open sesame' for consideration of alleged trial errors not properly preserved. Instances where the rule has been permitted by the appellate Courts to apply seem to be categorized into three classes of cases: (1) where an involved statute is alleged to be unconstitutional, (2) where the issue reaches down into the very legality of the trial itself to the extent that the verdict could not have been obtained without the assistance of the error alleged, and (3) where a serious question exists as to jurisdiction of the trial court.

Watson v. State, 633 So.2d 525 (Fla. 2d DCA 1994), rev. denied, 641 So.2d

1347 (Fla. 1994). The alleged improprieties in the prosecutor's closing argument meet none of the above criteria.

Petitioner claims the prosecutor impermissibly attacked the defendant, her expert, and the theory of the defense. However, it is clear the prosecutor is not prohibited from making an argument based upon common sense and is allowed to point out rather obvious flaws in the defense theory of the case. Dr. Walker did indeed testify concerning a very flexible theory, battered woman's syndrome. The prosecutor was merely making a fair comment on Dr. Walker's testimony when she stated "her syndrome is so flexible and she says so many different things at different times she can make it fit. And how can she make it fit? Because she created it." (TR. 1986-87).

Petitioner also complains that it was error for the prosecutor to suggest that Dr. Maher, defense counsel, and Petitioner "concocted" evidence. Petitioner's Brief at 59. The "concoct" statement in Petitioner's brief is taken out of context. The prosecutor pointed out in closing:

> And stop and think about something else that was very curious that wasn't mentioned on the direct testimony of Dr. Maher. He goes through four interviews with her. Four interviews with that woman, four of them. She doesn't say a darn thing about prior violence between her and her husband, not one thing.
> She says, oh, we were immature; we had problems like everybody does and what happens? He testified to it. He testified to it. What

> happens? Ms. Morgan gives him a call. Hey, what's your opinion? What's your evaluation?
>
> I don't have one yet, he says, because she's not giving me specific incidences (sic) of violence that I can turn around and put -- give you an opinion on.
>
> Then all of a sudden eureka, fifth interview comes and he sits down with the defendant and what does he say to her? You've got to start giving me specific incidents of violence. That was his testimony on the stand.

(TR. 1989-90).

The prosecutor's argument was a fair comment upon the evidence adduced at trial. After his initial set of interviews with appellant, Dr. Maher told defense counsel that he was not getting the type of specific acts of violence he needed from the Petitioner to conclude that she suffered from battered woman's syndrome. (TR. 880). Only after communicating this to the defense counsel and then interviewing Petitioner again did Dr. Maher conclude that Petitioner fit the profile of a battered woman.

Petitioner's claim that the prosecutor made statements not inferable from the evidence is not well taken. If Petitioner or her defense counsel had an objection, they should have lodged it below. Further, the prosecutor's argument that Petitioner should have called 911 if she perceived danger because she called it "on every boyfriend she was ever with" was fairly inferred from the evidence. The following dialogue provides ample support for the prosecutor's argument:

Q: Todd isn't the first man that you've called 911 on; is he?

A: No.

Q: In fact, in just about every single relationship you've had, you have called the police on the person that you have either been dating or living with, haven't you?

A: I'm not sure every one.

(TR. 1150). Thus, Petitioner essentially admitted that she called the police on most of her boyfriends: "When I needed help." (TR. 1151).

Contrary to Petitioner's argument, the prosecutor did not make an impermissible golden rule argument. (Petitioner's Brief at 63). The prosecutor did not ask the jury to place themselves in the victim's shoes, but instead merely noted that the defense experts and the jury had not heard the victim's side of the story. This unobjected to comment did not constitute error, let alone fundamental error requiring reversal of appellant's conviction. See Shaara v. State, 581 So.2d 1339, 1341 (Fla. 1st DCA 1991)(A Golden rule argument is made when a prosecutor asks "the jurors to place themselves in the victim's position, [or] to think how they would feel if the crime happened to them.")(string citations omitted).

The prosecutor's suggestion that someone may have placed the metal rod in the

baby's room after the shooting has support in the record.[15] The so-called metal rod the victim allegedly used to beat the Petitioner was not located by the police after the offense. Even the defense investigator did not notice a metal rod in the nursery when she went through the residence on February 4th. Only when the defense investigator went back to the apartment on February 8th, did she locate a metal rod in the baby's room. (TR. 1252). And, at that time, a cleaning crew had already begun to clean the apartment and items had been moved or removed in preparation for renting the unit. (TR. 1253). When the defense investigator showed that bar or towel rack to Phyllis Wilkes [the apartment manager], she stated that was the rod she had earlier found behind the bathroom door. (TR. 1254). Thus, it can certainly be argued the metal rod the defense investigator allegedly found in the nursery more than two weeks after the shooting was only placed in that location after the offense had been committed.

In sum, none of the comments objected to on appeal, either alone or in combination, denied Petitioner the right to a fair trial. Petitioner's objections to

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[15]The prosecutor stated: "You heard from Phyllis Wilkes and the investigator Diane Fernandez who is sitting right over there. You heard from them. You heard that taped statement. We read the transcript of it back and forth where Phyllis Wilkes said, no, this rod is found behind the bathroom door. That's where this rod is found. (TR. 2011).

the prosecutor's closing argument were not preserved for review by proper objection below. And, the prosecutor's comments in this case addressed defense counsel's strategy, witness credibility, and the evidence adduced at trial. More importantly, this was not a close case. Consequently, Petitioner has not established fundamental error requiring reversal of her conviction. See Hopkins v. State, 632 So.2d 1372, 1374 (Fla. 1994)("[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process.").

VI.

WHETHER THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR A JUDGMENT OF ACQUITTAL BELOW? (RESTATED BY RESPONDENT).

Petitioner finally claims that the evidence only supported her conviction for manslaughter, not second degree murder. Petitioner's Brief at 66. The State disagrees.

Of Course, "[a]n appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact." Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), affirmed, 457 U.S. 31, 72 L.Ed.2d 652, 102 S.Ct. 2211 (1982). Accordingly, "the concern on appeal must be whether, after all conflicts

in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment." Id.

The trial court properly denied appellant's motion for a judgement of acquittal. "A court should not grant a motion for a judgement of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party." Taylor v. State, 583 So.2d 323, 328 (Fla. 1991). Further, "[t]he grade or degree of a homicide, and the intent with which a homicidal act was committed are questions of fact dependent upon the circumstances of the case, and are typically for resolution by a jury." Larsen v. State, 485 So.2d 1372 (Fla. 1st DCA 1986), aff'd, 492 So.2d 1333 (Fla. 1986).

"[M]urder in the second degree is the unlawful killing of a human being when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without the premeditated design to effect the death of any particular individual." Conyers v. State, 569 So.2d 1360, 1361 (Fla. 1st DCA 1990). "An act is considered imminently dangerous to another and evincing a depraved mind if it is an act that (1) a person of ordinary judgment would know is reasonably certain to kill or do serious injury to another, (2) is done from ill will, hatred, spite, or an evil intent, and (3) is of such a nature that

the act itself indicates an indifference to human life." Id. (citations omitted).

While Petitioner claims the victim initiated the physical confrontation, it is clear that Petitioner escalated the level of violence when she picked up a knife and chased the victim into a bathroom. Not content to leave the victim in the bathroom behind a locked door, Petitioner began hacking at the door with a knife. Petitioner even admitted she broke one knife hacking her way through the door and returned with another knife to continue cutting at the door. The physical evidence clearly indicates that Petitioner had become the aggressor at that point. Immediately after the police arrived, Petitioner admitted to Deputy Terry that the victim struck her with a metal pipe in self-defense.

Although Petitioner claims the victim was striking her with a metal rod when she pulled a loaded 9 mm handgun from a dresser drawer, she also admitted the victim fled the master bedroom upon seeing the handgun. Petitioner claimed to remember firing only one shot as the victim was fleeing her presence. However, she did admit to firing two shots on cross-examination. (TR. 1178). The second and fatal shot went through a closed door and struck the victim on the top of his head. The physical evidence supports a conclusion that the victim was in the process of locking the door when struck down by the fatal shot. (TR. 698, 738).

Petitioner's reliance upon Andrews v. State, 577 So.2d 650 (Fla. 1st DCA

1991) rev. denied, 587 So.2d 1329 (Fla. 1991), in support of her claim is misplaced. (Petitioner's Brief at 67). In Andrews, the defendant had suffered a long history of spousal abuse and had previously been placed in the hospital for injuries received at the hands of the decedent. On the night the decedent was killed, the decedent beat and choked the defendant. Indeed, when the fatal wound was administered, the decedent was choking the defendant. Andrews, 577 So.2d at 651-52. As the Andrews Court summed it up: "When Reginald caught up with her in the yard with a knife in his possession and began choking her, she was afraid he was going to kill her." 577 So.2d at 652. Consequently, the Andrews Court held the trial court should have granted the defendant's motion for a judgment of acquittal.

In this case, unlike Andrews, the victim was not in the process of choking Petitioner when she fired the fatal shot. Indeed, Petitioner's own testimony establishes the victim fled when she pulled the handgun. (TR. 1059).

In Hoffert v. State, 559 So.2d 1246 (Fla. 4th DCA), rev. denied, 570 So.2d 1306 (Fla. 1990), the court rejected the defendant's argument that the facts supported a claim of self-defense or manslaughter instead of second degree murder. The defendant in Hoffert was struck by the decedent in the stomach with a nightstick and several witnesses testified they observed the decedent and his

brother "beating appellant." Hoffert, 559 So.2d at 1247. Appellant then returned to his apartment and retrieved a hunting rifle. As the decedent ran "toward his apartment, appellant fired a single, fatal shot into his back from a distance of seventy-seven feet." Id.

The court rejected the defendant's argument that at best the facts established manslaughter in the heat of passion or manslaughter in the use of excessive force. In rejecting the defense claim, the court stated: "The record shows that after appellant broke away from the fray, he went to his apartment and returned with a rifle. When no further threats to his physical safety were imminent, he fired the fatal shot into the victim's back, from a distance of seventy-five feet." Hoffert, 559 So.2d at 1247. The court observed, "[a]lthough appellant testified that he feared the victim was returning to his apartment to obtain a firearm, the record contains sufficient evidence to support the jury's rejection of his self-defense claim." Id.

Similarly, the evidence in this case was sufficient to establish that Petitioner was under no immediate threat of harm when she fired the fatal shot. The victim had clearly retreated at that point and Petitioner was not entitled to use deadly force. Thus, as in Hoffert, the evidence was clearly sufficient to overcome Petitioner's self-defense claim and uphold her conviction for second degree

murder.

It is quite clear that even if we accept the victim initiated the physical confrontation, control of the violent encounter shifted to the appellant first, when she chased the victim into the bathroom, and again when the victim fled her presence when she pulled the handgun. Petitioner was known to readily express her rage and anger, especially when drinking. (TR. 843, 909, 911, 970-71, 1101, 1836). Obviously, the jury was able to infer that Petitioner chased the victim into the bathroom in a drunken rage and began hacking at the door. When one knife handle broke under the strain of her attack, she returned to the kitchen and retrieved another knife. Subsequently, firing two shots into an occupied room at chest level after the victim fled for his life is certainly an act a reasonable person would know is likely to cause serious harm or death. Given evidence of her continued rage, it is certainly reasonable for the jury to conclude that Petitioner fired the handgun out of ill will or spite.

In Walden v. State, 191 So.2d 68 (Fla. 1st DCA 1966), the court addressed a "typical 'juke joint' brawl in which the deceased and the defendant became involved in an altercation and, after they had separated, the defendant proceeded to leave the premises by the front door." When the defendant reached the door, he drew a handgun and fired it at the decedent. The deceased was some distance

from the defendant when he fired the handgun and was attempting to leave through a back door. Walden, 191 So.2d at 69. The court noted that the decedent "was not threatening the appellant and was, in fact, attempting to get away from him." In upholding the defendant's conviction, the court noted that there was no immediate provocation when the defendant fired the fatal shot. Consequently, the court found "conduct on the part of the defendant was sufficient for the jury to find that his conduct amounted to an act imminently dangerous to another, and evincing a depraved mind regardless of human life." Id.

As in Walden, the facts of the instant case reveal the absence of an immediate provocation. The victim was in clear retreat and had sought shelter in another room when the fatal shot was fired. Under the circumstances, the jury was certainly entitled to conclude that appellant acted with a "depraved mind regardless of human life." Consequently, as in Walden, the evidence was sufficient to sustain Petitioner's second degree murder conviction.

WHEREFORE, the Respondent, State of Florida, respectfully requests that this Court decline to review the certified question. In the alternative, the Respondent asks that this Court uphold its ruling in Bobbitt on the cohabitant's duty to attempt to retreat from a confrontation before resorting to deadly force if a safe retreat is available. The remaining issues decided adversely to the Petitioner

below do not warrant review by this Court.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to John C. Fisher, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow Florida 33831 and Peter Margulies, Amicus Counsel, St. Thomas Univ. School of Law, 16400 N.W. 32nd Avenue, Miami, Florida 33054 on this 22nd day of January 1998.

COUNSEL FOR RESPONDENT