IN THE SUPREME COURT OF FLORIDA

KATHLEEN WEIAND, :

Petitioner, :

vs. : Case No. 91,925

STATE OF FLORIDA, :

Respondent. :

_____:

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE

On February 9, 1994, an indictment was filed in the Thirteenth Judicial Circuit in Hillsborough County charging the Appellant, Kathleen Weiand, with premeditated murder with a firearm of Todd Weiand, occurring on January 23, 1994 (v1:R17-18).

On December 20, 1994, Judge Holloway ruled the parties had a continuing discovery obligation, set pretrial discovery deadlines, and compelled all discovery to be completed before the pretrial conference (v19:T2121-2130; v1:R67). A defense motion to treat witness Christi Brockman as hostile was granted (v1:R71-72).

Jury selection was held on Jan. 9-10, 1995, before the Judge Padgett (v1:R81; v2:T1-214). After jury selection on January 10, at hearing before Judge Holloway, an exception to the discovery order was requested for Tracy Bowman who had not been found until this day (v20:T2156-2159, 2161-2163). The State was immediately informed and offered an opportunity to depose Ms. Bowman who was the sole corroborating witness to incidents of Mr. Weiand's abuse of his wife and whom Ms. Weiand told of his threats to kill her if she left (v20:T2155, 2159-2161, 2164). The court granted the motion to strike, and allowed a proffer of Ms. Bowman's testimony[1] (v1:R81; v20:T2156-2157, 2162-2164, 2167-2174; Appendix A).

A jury trial was held between January 10 and 24, 1995, before Judge Padgett (v1:R81-86; v4-18:T229-2039). At the close of the State's case, ruling was reserved on a motion for a directed

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[1] The State suggested the judge need not remain during the proffer, but her presence is shown by a remark (v20:T2166-2167).

verdict of second degree murder and a motion for a directed verdict of manslaughter was denied (v1:R82; v8:T754-756).

The State requested that Ms. Weiand "voluntarily" leave the court room during the testimony of Christi Brockman and Dr. Maher[2] (v8:T760-761). Defense counsel did not object to Ms. Weiand's absence, but no waiver of her presence was sought (v8:T759-761).

The State sought exclusion of defense testimony concerning matters the State asserted Ms. Weiand could not remember (v12:-T1233-1234, 1237, v13:T1438-1440, 1442-1443). The defense asserted Ms. Weiand testified about the presence of Ms. Dumond and Mr. Charles during incidents of physical abuse, they could testify to the violence they observed, and Ms. Weiand had memory problems because of abuse (v:12:T1234-1236, 1238; v13:T1433-1438, 1441, 1444-1445). The defense argued this critical testimony was relevant to Ms. Weiand's perception of the situation during the incident, to the issue of retreat, and to Mr. Weiand's physical abilities (v13:T1435). The State stipulated to the defense account of the proposed testimony (v13:T1433-1441, 1560-1563; Appendix B). The court excluded the testimony and denied the defense motion for mistrial (v12:T1238; v13:T1445; v14:T1561-1562).

The defense moved for judgment of acquittal and argued, "At best the State has proved manslaughter." (v:17:T1893). The court reserved ruling, then denied the motion (v1:R84; v17:T1894, 1913).

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[2] When the defense called Ms. Brockman as its first witness, the State objected despite previously agreeing Ms. Brockman could testify out of order because of personal problems (v8:T758-760). The State had previously stipulated Dr. Maher could testify before Ms. Weiand because of a personal emergency (v7:T628-638).

In closing, the prosecutor asserted that Ms. Weiand was guilty, denigrated the theory of defense and defense witnesses, and asserted the defense manufactured evidence. She stated there was no corroboration to Ms. Weiand's testimony concerning injuries inflicted by her husband. She argued self-defense did not apply because every means of escape had not been exhausted. She asserted Ms. Weiand placed an assault rifle on a daybed in the small bedroom before the shooting (v18:T1927-1941, 1983-2015; Appendix C).

The jury instructions did not include the castle doctrine instruction (v1:R91-114; v18:T2015-2034), despite the defense request (v17:T1898-1899). The defense motions for a mistrial based on the failure to give requested jury instructions were denied (v17:T1913; v18:2035). The jury found Ms. Weiand guilty of second degree murder with a firearm (v1:R85, 115; v18:T2036-2037).

The defense moved for new trial, asserting: the verdict was contrary to the law and to the weight of the evidence; defense witnesses were improperly excluded; and the State violated Brady v. Maryland, 373 U.S. 83 (1963), by not disclosing information concerning a criminal investigation of a key State witness for extortion and false imprisonment (v1:R118-119). A sworn affidavit of that witness, Deputy Terry, and a memorandum supporting the motion were filed (v1:R120-129; Appendix D). The court denied the motion for new trial, holding there was much testimony about prior violence, testimony was excluded because it was unsupported by Ms. Weiand's testimony, and the investigation would not have been admissible or affected the outcome of the case (v19:T2062-2064).

On February 27, 1995, Ms. Weiand was adjudicated guilty and was sentenced to 18 years imprisonment with a 3 year minimum mandatory (v1:R136, 139-140, 142-144; v19:T2110). A timely notice of appeal was filed on March 13, 1995 (v1:R152-153).

The Second District Court of Appeal affirmed Ms. Weiand's conviction, holding the exclusion of three witnesses was harmless error and prosecutorial misconduct was not fundamental error. Weiand v. State, 22 Fla. L. Weekly D1707 (Fla. 2d DCA July 11, 1997). On October 22, 1997, the Second District Court of Appeal denied Appellant's motion for rehearing, but certified a question:

> SHOULD THE RULE OF STATE V. BOBBITT, 415 SO. 2D 724 (FLA. 1982), 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?

STATEMENT OF THE FACTS

On Sunday, January 23, after a week of begging, Todd Weiand agreed to watch their seven-week-old baby while his wife Kathleen Weiand went to a pool league banquet (v8:T858-859; v10:T1041-1042, 1161; v13:T1416-1419; v16:T1662, 1720-1721). Todd demanded she return by 4:00 P.M. (v8:T859; v10:T1041; v16:T1720). Kathy's participation in a women's pool league was important to her, but her husband opposed it (v10:T1074; v17:T1869, 1881). Kathy's team received a trophy and she had two beers at the banquet (v10:T1043-1044, 1419). Kathy drank beer and shot pool at three pool halls before returning home at 8:30 or 9:00 P. M. (v8:T859; v10:T1044-

1047; v13:T1419-1421; v16:T1662). Her infant Jackie was in her swing in the living room (v10:T1049; v11:T1164-1165).

Todd was furious (v8:T859; v10:T1049; v11:T1161; v16:T1662). He shook her by her arms and screamed at her (v8:T859; v10:T1049; v11:T1161). Kathy screamed back and fought back (v11:T1162, 1168). Although Kathy was nearly the same size as her husband, she was no match for him physically (v11:T1159). Although Todd, a mechanic, lost a leg while in high school and wore a prosthesis, he was very strong and not physically limited except perhaps in kneeling (v8:T823; v9:T939; v10:T1028, 1066; v13:1348-1349; v17:T1848-1850). Kathy was recovering from a recent emergency Caesarian operation (v8:T846-855; v9:T991-998, 1001-1004; v10:T1022-1025; v11:T1138-1139; v14:T1535-1538; v15:T1636-1638, v17:T1805-1815).

Kathy called her mother in Sheboygan for fifteen minutes at 10:34 P.M. (v8:T860; v10:T1047-1050; v11:T1162; v14:T1539, 1555; v16:T1662). She said she could not continue the way she was living and her mother agreed to send money for her to return to Wisconsin (v8:T1050; v11:T1163; v14:T1539, 1555; v16:T1662).

Kathy told Todd she was leaving with the baby and he could have everything (v8:T860-861; v10:T1051-1052; v11:T1165; v16:T1662-1663). In the past Todd beat her severely when she threatened to leave, and he threatened to destroy her possessions if she left, he would find her, he would disable her car, and she better never live in the same state as him (v10:T1051-1052; v11:T1160, 1166).

Todd attacked her, choked her, and told her she wasn't leaving with the baby (v8:T859, 861; v10:T1052; v11:T1166-1168, 1198;

v16:T1663). She passed out, then awoke on the kitchen floor (v8:T860; v10:T1052; v11:T1167-1168; v16:T1663). Kathy chased Todd into the bathroom with a knife from the kitchen (v8:T861, 893; v10:T1053; v11:T1169; v16:T1663). She hacked a hole through the bathroom door to scare Todd to prevent further abuse and to see what he was doing (v8:T861, 897; v10:T1053, 1055; v11:T1168-1169, 1171; v16:T1663). She heard a metallic sound within the bathroom, but did not know if Todd had a weapon (v10:T1053). A metal towel rack was on the back of the door (v10:T1054; v11:T1169). She did not try to enter the bathroom (v10:T1055). She did not try to leave with the baby because she would not have had time to get the baby's things (v11:T1172).

They agreed to a truce -- Todd would stay in the bathroom while Kathy would go to the kitchen (v8:T861; v10:T1055; v11:T1170; v11:T1172-1173, 1199-1200). Todd entered the kitchen and attacked her (v8:T862; v10:T1055-1056; v11:1173, 1200). She grabbed another knife, chased him back to the bathroom, and again hacked at the door (v8:T862, 897; v10:T1056; v11:1173; v16:T1664). This scenario repeated after another promise from Todd (v8:T862; v10:T1056, v11:T1172-1173, 1200). She never tried to cut him (v10:T1060, 1066; v11:T1173; v16:T1663).

Todd tried to hit Kathy's face with a piece of the metal towel rack as she looked at him and tried to talk to him through the hole (v10:T1054, 1056; v11:T1168, 1174, 1200; v16:T1664-1665). When she stepped back, he swung the metal rod and hit her (v10:T1056, 1066; v11:T1168, 1174-1177, 1201; v16:T1664-1665). When she tried to

block his blows with her right arm, he struck her right wrist and she put down the knife which no longer frightened him (v10:T1057, 1066; v11:T1174-1175; v16:T1665). Todd ignored her pleas to stop hitting her and backed her into their bedroom (v10:T1057-1058, 1060, 1066; v11:T1174-1177, 1201; v16:T1665).

Todd kept a 9 mm handgun in the bedroom dresser, which he had taught Kathy to shoot (v9:T986; v10:T1039; v11:T1181-1182). Kathy took the handgun from the dresser while Todd was within striking range with the metal rod (v10:T1058, 1060, 1066; v11:T1177; v16:T1665). Todd ran into the baby's room and closed the door (v10:T1059; v11:T1177; v16:T1728). Todd kept an assault rifle and another rifle in a closet in that room (v9:T985-987; v10:T1037-1038). She fired two shots, testifying she fired one shot at the wall and she did not intend to fire the second shot (v8:T863; v10:1058-1059; v11:1177-1178; v16:T1665, 1728). She did not intend to shoot Todd and did not try to hurt him (v10:T1060, 1066; v16:T1665). Kathy did not know why she did not leave when he ran to the nursery, but believed he wouldn't let her leave (v11:T1182).

She listened to hear whether Todd was getting a gun, but she heard nothing (v8:T863; v10:T1061; v11:T1178). When she opened the door and looked in the room she saw Todd slumped on a corner of the day bed (v8:T863; v10:1062; v11:T1178-1180). The door was unlocked and unobstructed (v11:T1178-1180). Kathy called 911 at 11:22 P.M., and, when no one came, again at 11:29, stating she shot her husband and pleading for help for him until the police arrived at 11:32 P.M. (v8:T863; v10:T1062; v11:T1204; supp:T2184-2190).

Paramedics and Deputies Terry and Santos arrived at the scene (v4:T268-270, 279, 306-307, 311-312, 344; v5:T394-395; v12:T1298-1301; v13:T1319-1320, 1327-1331, 1338). This was Terry's first homicide (v4:T325). The deputies saw no disarray upon entering the home and saw the infant asleep in the living room (v4:T271-272, 275-276, 281, 307, 312, 325-326; v5:T406, 452-453; v13:T1331). Within seconds, Kathy came from a hallway (v4:T273). There was blood on Kathy, including on her face and hands (v4:T273, 276-278). She was handcuffed and taken to a patrol car (v4:T292, 326; v5:T381-384, 393-394; v12:T1301-1303; v13:T1331, 1345). Paramedics were called in the home although normally a scene is secured before paramedics enter (v12:T1299-1301; v13:T1320, 1324, 1331-1332).

Paramedics followed Terry as he searched the home and found Todd laying in the doorway of a bedroom with a towel on his head (v4:T279-280, 285-288, 292, 295, 326-327, 346; v12:T1303-1304, 1310; v13:T1320-1324, 1332-1334, 1339-1343). Todd had a gunshot wound to his forehead, bled badly, was combative, had seizures, was unable to talk or understand, and breathed with difficulty (v4:T301, 334; v12:T1310-1311; v13:T1322, 1326). Although Terry was trained not to disturb evidence, he picked up the handgun which lay near Todd's head and handed it to a paramedic who placed it on the kitchen stove (v4:T280-283, 286-289, 292, 315-319, 326-327, 340-342, 360; v5:T453, 461, 1303, 1332-1333, 1339).

The door to the bathroom was ajar and had a large hole in it (v4:T280-281, 284-287, 290; v5:445-446; v13:T1326). There were wood chips and pieces of knives on the floor (v4:T281, 313-314,

321; v5:T446, 453, 461; v13:T1326). In the larger bedroom, there was a knife bearing a drop of blood on a dresser which had an open drawer (v4:T321-324, 339, 348-350, 357-360; v5:T446, 453, 461; v6:T513-514). There were bullet holes through a hall closet wall and the door to the small bedroom, and there was a large amount of blood on the day bed and the small bedroom floor (v4:T293, 310-311, 335, 350-352; v5:T446-447, 463).

A paramedic suggested the police take photographs before the scene was disturbed (v13:T1322). Four or five paramedics treated Todd (v4:T290-292, 331-332; v13:T1321, 1334-1336, 1344). They repeatedly moved Todd, seeking sufficient room to work, leaving blood on the hallway and living room floors (v4:T276, 281, 283, 300; v5:T444; v13:T1336-1337, 1343). They were concerned with Todd, not with preserving the scene (v4:T333).

Paramedics testified that while they examined the victim, Terry picked up an unencased assault rifle which may have been loaded with a clip (v12:T1305-1307, 1310; v13:T1321, 1324). Terry testified he opened a case which was on the bed and removed an assault rifle (v4:T292-299, 324, 327-331; v5:T462). He examined the weapon, but did not recall whether it contained a magazine and did not check the pockets on the case for a magazine (v4:T296, 298). He flipped the case over on the bloody bed (v4:T293-295, 327-331). Terry did not mention the assault rifle in his field notes, his computer, or his eight page report (v4:T370-371).

Many officers arrived in the residence after the paramedics departed (v4:T301, 331-333; v5:T396-398, 436, 444, 456-457, 469,

481-483; v6:T508-509, 577-578, 604). That night, police collected as evidence: two knife handles and a knife blade from the hallway and bathroom floors; the knife found on the dresser; the spent casings; a bullet from the hole in the wall of the small bedroom; and a loaded 9 mm handgun (v6:T516-524, 533-534, 579, 602). The handgun was operable with a normal trigger pull, it automatically ejected spent shells which could bounce off of objects, ejected shells could be moved by someone's foot, the expended shells may have been fired from the gun, and the bullet found in the bedroom wall was fired from the gun (v7:T662-681, 714-719).

The police failed to collect as evidence: the bathroom and bedroom doors; the assault rifle, and a knife blade found in the small bedroom (v6:T519, 528-532, 579-581, 585, 596-597, 600-603, 608-610). A detective testified knife pieces near the bathroom door may have been moved during rescue efforts (v5:T453). The police also failed to collect a broken metal towel rack which was in the bathroom or to look for or notice a metal rod in the small bedroom, asserting they did not know Kathy said she had been hit with a metal rod (v6:T535-537, 547-548, 594-596).

The manager began cleanup of the apartment after receiving permission from police (v12:T1252-1253; v14:T1483-1486). She found the assault rifle in a case on the day bed and cleaned the bloody case (v14:T1468-1488, 1492). Loaded and empty magazines were in pockets of the case (v6:T609-610). Two days after the incident, police collected the assault rifle and a knife blade which had been near the day bed in response to a call from the manager (v6:T583-

584, 602, 605; v14:T1488, 1494). Blood on the case and blood on the knife blade found near a puddle of untested blood on the small bedroom floor could been Todd's, but not Kathy's (v6:T566-568, 655-657). Blood on the other blade could have been Kathy's, but not Todd's (v6:T564-565, 570-571; v7:T654-655).

A week after the incident, police impounded the bathroom door which had been removed by the manager (v6:T538, 586, 605-606; v14:T1494-1495). Blood on the bathroom door could have been Kathy's, but not Todd's (v6:T570-571). The hollow door had a thin flimsy particle material skin and most of the damage to the door occurred outside the bathroom (v7:T683-685, 720-722).

The manager threw away pieces of the towel rack which were in the bathroom because a piece was missing (v12:T1253-1260; v14:-T1488-1489). The manager later unsuccessfully attempted to recover the towel rack pieces when she found another piece of the towel rack under the day bed in the small bedroom (v12:T1254-1260; v14:T1490). This piece was bent and blood splattered (v14:T1490). She left it in the bedroom and it was later secured by the defense investigator (v12:T1247-1250, 1258-1259; v14:T1490-1491). The minute amount of blood remaining on the metal rod could have been Todd's, but not Kathy's (v6:T570-574; v7:T656).

A bullet had passed through the hallway wall and lodged in a breaker box in the closet; another bullet passed through the door to the small bedroom and lodged in a wall of the small bedroom (v5:T446-450, 510-515). The bullet lodged in the breaker box and was later recovered by the defense (v12:T1246-1247, 1458).

While police investigated, Deputy Hoover kept Kathy in the back seat of a patrol car. He saw no injury other than saw redness on her wrist which he opined could have been caused by the handcuffs and he believed the blood on her clothing was consistent with the dispatch report that she held her husband in her lap (v5:T382, 405-406; v5:T411). Hoover testified Kathy alternately cried, then calmed and talked, for half an hour (v5:T388, 396, 402-405). When Hoover responded to this home on a previous occasion, he gave Kathy pamphlets for "the Spring" (v5:T403-404).

Numerous other officers separately entered the car to obtain consent to search the residence (v5:T396-399, 436-443, 453-455, 458-459, 469-470, 479, 484-486, 489). They testified Kathy was hysterical and temporarily insane, had alcohol on her breath, and complained of an injured wrist (v5:T438-439, 458, 470, 479, 493).

During conversations with officers, Kathy said: she loved her husband, but he was mean; she told a doctor that she "was losing it," but the doctor said this was normal after having a baby; she sought help from "the Spring" (a battered women's shelter), but her calls were not returned; she called her mother that day to say she hated her husband and wanted to leave him, but he said she could never leave or take the baby; her husband choked her and she lost it; her husband hit her three times on the wrist with a metal pole; she wanted to scare her husband with the gun, did not aim at him, and did not intend to shoot him; and she was concerned about her husband and baby (v5:T385-388, 401-408, 412-413, 439, 460, 487, 490-493, 498-500). Hoover testified Kathy never mentioned the term

"self defense," including when she spoke about being struck with a metal pole (v5:T407).

Terry and Hoover believed that paramedics examined Kathy for injuries, but the paramedics denied examining her (v4:T342, 388, 393, 408-409; v12:T1307-1308; v13:T1323, 1327, 1337-1339, 1345). At 1:00 A.M., Kathy was taken to a substation to relieve her bladder (v5:T388-389, 399-400, 422). An officer escorting her did not look for and did not see injuries (v5:T389, 399-400, 415, 423). Kathy remained in bloody clothing and was not given shoes or a jacket (v5:T401, 407). She was returned to the scene and Terry took custody of her 15 minutes later (v4:T352; v5:T389-390, 407).

Terry drove Kathy to the Sheriff's Office (v4:T352-354). He testified Kathy repeatedly made statements similar to those made to the other officers, but allegedly also said, "He hit my wrists with like a steel pipe trying to defend himself." (v4:T312, 326, 342, 353-354, 363-368, 370). She alternated between being upset, depressed, and angry (v4:T354-356, 363-364). Terry testified Kathy was the most talkative woman he had ever met (v4:T368). Terry later wrote these statements from memory (v4:T364-365, 368-370).

At 2:45 A.M., Deputy Egan watched Kathy wash her hands and change clothing (v4:T362; v5:T416-417, 423-424, 426, 429-431). Egan photographed Kathy, including shots of her throat and side because she complained of injury, but did not photograph her wrist because she had not complained of injury, and saw a small scrape on her back, but no other injuries or abdominal scar (v5:T416-417, 424-426, 428-432, 470-475, 477-478, 488-489; v6:T543-547). Depu-

ties Keys and Figueredo observed no injury when Kathy complained about her wrist, but Figueredo conceded a photograph showed a bruise and a cut to her fingers (v5:T427, 433, 473-477).

Todd died from a gunshot wound through his forehead which exited behind his right ear and there were no other injuries (v7:T727-734, 740-741; v14:T1470). He was 5"11" tall, may have weighed 140 pounds, and had not consumed alcohol (v7:T735-736). The fatal bullet travelled on a level trajectory of 53" off the floor through the door until it struck him (v7:T685-698, 703). The bullet may have been fired from the large bedroom, the doorway to that bedroom, or from the hallway (v7:T689-690, 695, 701-702, 712-713; v14:T1466-1467). The distance the gun was fired from the door could not be determined because the door had not been preserved for testing (v7:T702; v14:T1491, 1495). Todd could have been anywhere along the trajectory of the bullet from the door to the wall, including across a corner of the day bed (v7:T699, 703-706, 709).

Todd could not have suffered the injury if he was erect, but the trajectory was consistent with Mr. Weiand sitting on something 18" high, kneeling or crouching, or bending over (v7:T698-700, 709-711, 737-738; v14:T1461-1466, 1473-1475). The day bed was 18" high (v14:T1458). Dr. Feegel believed the victim's position on the day bed was most likely, and was consistent with the pool of blood on the day bed (v14:T1461-1466, 1473-1475). The bedroom door was hinged to swing inward and, therefore Todd would have blocked the door if he was shot while at the door if he dropped where he was shot (v7:T711-714). An FDLE expert believed if he had been leaning

forward when shot he would have fallen straight down, but the medical examiner believed he could have moved to his right after he was shot in a reflexive reaction (v7:T713-714, 738-739).

Kathy was in jail from January to February (v13:T1385). She was depressed and hysterical all day on January 24 (v13:T1381-1382, 1386-1387, 1411). She complained about her thumb and hand, which was swollen, but not discolored (v13:T1391-1392). A County Animal Services investigator visited Kathy to arrange adoption of her dog and saw bruises on her neck (v5:T390; v13:T1411-1422).

Kathy's employer hired a defense attorney after the incident (v11:T1158-1159, 1198). A defense investigator photographed her at the jail on January 26, 1994 (v12:T1239-1241). Kathy had a long bruise on her back, a bruise on her knee, a possible bruise on her leg, and obvious strangulation bruises on her throat (v12:T1242-1246). Deep tissue bruising may not appear for 12 to 72 hours after infliction of injury, but the throat bruises could have a cause other than choking (v8:T864-867, 907-908).

On January 28, a jail nurse saw bruises on Kathy's right arm and hip which she said were caused by blows from a metal rod, but did not examine or notice bruises on her throat (v13:T1395-1400). A jail nurse practitioner ordered X-rays of the swollen right wrist on January 29 (v13:T1407-1408). Another jail nurse treated the wrist on January 31, 1994 (v13:T1402-1403). A psychiatric nurse saw no injury other than a swollen wrist, but did not look for injuries (v13:T1392-1393). Kathy was diagnosed by jail staff as suffering depression and she was given anti-depressant drugs

(v8:T869-870; v16:T1731-1732). Her hand injury may have been defensive (v14:T1468-1469, 1471).

Kathy never read battered-spouse syndrome materials on advice of counsel and never discussed the syndrome, until her defense team confirmed prior incidents and discussed its applicability to her defense (v11:T1183-1184, 1203). Dr. Maher, a physician and psychiatrist, and Dr. Walker, a clinical and forensic psychologist, were hired for evaluation and treatment, and to testify about their findings (v8:T790, 871, 874, 915; v15:T1569-1574, 1612-1613; v16:T1668-1669, 1681-1682, 1741-1742, 1745-1746). Dr. Maher found her competent to stand trial and both doctors considered her legally sane at the time of the incident (v8:T792-793, 872-874; v16:T1166-1667).

Kathy began to date Todd Weiand in 1991 (v8:T822-824; v9:T938-939, v15:T1614; v16:T1756). When they began dating, Todd treated Kathy respectfully and Kathy was disappointed that her best friend, Leslie, disliked Todd (v8:T824; v9:T939-940; v17:1756-1757).

In November 1991, Todd and Kathy rented a country cottage, fifteen minutes from Sheboygan and twenty minutes from her mother's home (v8:T825; v9:T940-941; v13:T1348, 1357). They began to argue because Todd was jealous and demanding, he stayed out with his buddies, and he did not contribute toward the bills (v8:T825-826; v9:T941-942; v10:T1076-1077; v15:T1614). During arguments, Todd shoved her, shook her by her arms, screamed at her, choked her, or slammed her into walls or other things (v9:T946; v10:T1076-1077; v15:T1614-1615). He once threatened her life while holding a gun

to her head (v9:T946; v10:T1082; v15:T1626, 1637). Dr. Walker testified most battering relationships start with pushing and shoving, then escalate (v15:T1615, 1618).

Todd's father, a licensed gun dealer, raised Todd with guns (v17:T1855-1856). Todd had a .22 rifle, a 9 mm Ruger, and an AR-15; he practiced shooting; and he taught Kathy to shoot (v9:T946-947; v10:T1037, 1082; v13:T1351; v17:T1848).

Leslie once visited and asked about bruises on Kathy's cheek and legs (v9:T952; v10:T1091-1092; v16:T1757-1758). Kathy once called an ex-boyfriend in California when Todd abused her (v11:-T1196; v14:T1507-1508). The ex-boyfriend sent his brother to take her to his Sheboygan apartment where she stayed overnight, believing it was unwise to return home or go to her mother's house (v11:T1196; v14:T1506-1508; v16:T1769-1770, 1772-1773).

In early April, Todd became angry after a car became stuck in the snow in front of the house (v8:T827-828; v9:T943-944; v11:-T1160; v13:T1349; v15:T1615-1616). Todd had fixed the car and planned to sell it (T946, 1349-1350, 1616). Kathy became frightened by Todd's subsequent destruction of the car by chopping it with an ax, then driving it into a tree (v8:T827-828; v9:T945-946; v11:T1160; v13:T1349; v15:T1616-1617; v17:T1847).

Later in April, an incident occurred which resulted in the police being called to their home (v8:T830; v9:T943, 946-947; v10:T1076; v15:T1615, 1617). Todd and Kathy had shot darts, played pool, and drank beer all afternoon (v8:T829-830, 884; v9:T947-948; v10:T1078; v12:T1263, 1269, 1272). Dr. Walker testified that they

both abused alcohol, but not drugs, and alcohol consumption is common in battering relationships (v15:T1590-1591, 1638, 1642).

On the way home they argued about Todd's reckless driving, then Kathy kicked at his seat, the shifter, and probably at Todd (v8:T830, 885-889; v9:T947-949; v10:T1078-1079; v12:T1263-1264). Todd slowed, then stepped on the gas as she was getting out of the car, her clothing hooked on the door, she came loose and tumbled on the pavement (v8:T830, 858, 886; v9:T949; v10:T1080-1082; v12:-T1264, 1281-1282; v15:T1617, 1722-1724). She walked home, believing the incident was over (v8:T830, 887-888; v9:T949-950; v10:T1080-1081; v12:T1264, 1281-1282; v15:T1617; v16:T1723-1724).

When she arrived home, she wanted to use the phone or get her car keys, but Todd hid them (v9:T950; v10:T1082-1083; v12:T1265; v15:T1617). Todd choked her, pulled her hair, and slammed her against a wall (v8:T830-831; v9:T950; v10:T1076, 1082-1084; v12:T1266-1267; v15:T1617). She pushed and punched him to defend herself (v10:T1083). When she attempted to leave, Todd threw the contents of her purse around, shoved her in the bedroom, and ordered her to stay (v8:T831; v9:T950; v12:T1266-1267).

Dr. Maher and Dr. Walker testified Kathy's fighting back was not inconsistent with being a battered spouse (v8:T838; v16:T1716-1722). Battered spouses are not completely passive, they respond to hostility and violence in various ways, including ways that make situations worse (v8:T844; v16:T1718-1719). Battered women will confront their abuser when they believe abuse is either unlikely or unavoidable regardless of what they do (v16:T1716-1717).

Kathy broke a window and went to a neighbor's home (v8:T831; v9:T950; v10:T1083-1085; v12:T1266; v13:T1350, 1352, 1359; v15:T1617). She said Todd threw her from a car and beat her, and she was afraid he would come after her (v13:T1350, 1359). Her legs were skinned (v8:T886; v13:T1352, 1359). The neighbor, who was concerned because he knew Todd had guns, called the police (v9:T950; v12:T1267; v13:T1350-1351, 1359; v15:T1617: v16:T1698).

Many officers responded and treated the incident as a crisis because of the reported presence of weapons (v8:T831; v9:T950-951; v12:T1261-1265, 1274-1278, 1282-1286, 1289-1295; v13:T1360; v15:T1617). Kathy feared police would shoot Todd, so she said he must be passed out and he had not threaten her with weapons (v9:T951;v10:T1086-1087; v12:T1278, 1285, 1288-1289; v15:T1617). Police arrested Todd and found an assault rifle under the bed, and a rifle and a semi-automatic pistol in a bedroom closet (v8:T831; v9:T951-952; v12:T1269, 1279, 1286-1287, 1293).

Todd told police that they fought when they drank, admitted pushing Kathy against a wall, but denied striking her (v12:T1270-1271). Todd said he packed the phone because they were planning to move, but although there were several boxes in the residence, most of their belongings were unpacked (v12:T1269-1270, 1287).

Kathy had a bloody scrape on her knee, a large lump on her head, and complained of a headache, but refused medical help (v8:T858; v10:T1087; v12:T1267-1268, 1271). Kathy obtained a re-straining order to keep Todd away from the house (v9:T953). Kathy's mother testified the sole injury she saw to Kathy while

they lived in Wisconsin was her scraped knees, but stated that they argued a lot (v14:T1540-1541).

Todd apologized, said he would never hurt her again, his leg was sore, and he needed to come home (v8:T831; v9:T953; v10:T1089; v15:T1617). She believed him, let him return against police advice, they made up, and they decided to marry and move to Tampa for a new start (v9:T953-954; v10:T1089-1090). Friends warned Kathy that Todd was abusive to women and she should not marry him (v9:T1009; v12:T1212-1214). The doctors found a pattern of escalating tension and violence followed by periods of making up in which is typical of battering relationships (v8:T829-847; v15:-T1584, 1589, 1592-1595, 1615, 1618, 1628, 1631-1632, 1635-1636, 1640; v16:T1715-1716). Dr. Walker testified Kathy's feelings of guilt about reporting abuse and her belief in Todd's promises to change are typical of battered women (v15:T1617-1618, 1621).

Dr. Walker testified Todd's violence could have carried over from a previous battering relationship (v15:T1615). Christi Brockman lived with Todd from 1987 to 1990 and they had a daughter (v8:T763-764, 785-786). Christi testified she did not consider herself battered (v8:T782). She testified Todd once, when they both had been drinking, used violence against her (v8:T764-765). They had not been getting along and Todd stayed out a lot, saying he was working late (v8:T765-768, 781). When she refused to let him sleep in the bed, they argued, she pushed him off of the bed, and ordered him to leave (v8:T765-766, 783). He tore off her nightgown (v8:T766, 782; v11:T1211). She dressed, threw his

clothes out of a window, then went to a bar (v8:T766, 768, 782-783). Upon her return, Todd grabbed her arms and yelled (v8:T768-769; v11:T1211). She showed injuries to police who came in response to a neighbor's call (v8:T769, 774). She told the police about prior incidents where Todd shook, slapped, and pushed her (v8:T769-770, 773-774). Both were charged, they got restraining orders, and agreed to separate (v8:T767, 774-776, 781-782; v11:T1211). On another occasion, police were called when Todd slapped her for trying to prevent him from driving while drunk with their daughter (v8:T770). He once kicked her leg for returning late from shopping (v8:T770-771). He did not want her to work, began returning home from work late into the time at which she was to be at work, and once disabled her car (v8:T771-773; v11:T1220).

Christi's sister-in-law witnessed Todd kicking Christi and testified Christi told her Todd threatened to take their daughter to punish Christi (v11:T1210, 1212). The sister-in-law once took Christi and her child away from Todd after a fight (v11:T1212).

On the night before their wedding, an argument escalated to pushing and shoving (v8:T834; v9:T955). Kathy went to her mother's home to avoid further violence, but Todd was at her mother's home when she arrived (v8:T834; v9:T955-956; v14:T1527, 1541). Kathy threatened to cancel the wedding, but did not because she loved Todd (v8:T834; v9:T956-957; v10:T1091; v14:T1527-1528, 1541-1542).

Kathy and Todd did not talk much at the wedding and Kathy met Todd's parents for the first time (v8:T834-836; v9:T957; v17:T1842-1843, 1853, 1859, 1877-1878). They then moved to Tampa (v8:T836;

v9:T958; v10:T1089; v14:T1528-1529, 1543; v16:T1758-1759, 1764-1765; v17:T1843, 1860). Kathy found an apartment at Timber Falls in Tampa (v8:T837; v9:T958-959). Todd found a job as a mechanic; Kathy had not yet found a job (v9:T959; v10:T1090-1092). They agreed things would be different, better in Florida, but Todd emphasized that she would need to rely on him because they would be isolated from family and friends (v8:T836-837).

They argued after they moved to Florida, perhaps every other week (v8:T837; v9:T960; v10:T1093, 1096). Kathy testified that during their arguments, Todd shoved her, shook her by her arms, screamed at her, choked her, or slammed her into something and Kathy would fight back (v10:T1093-1094; v15:T1618-1619). He often destroyed or disabled the telephone (v10:T1094). Todd once kicked in a heavy exterior door to their apartment (v9:T967).

Todd worked regularly from 7:00 A.M. until 5:00 or 6:00 P.M. (v10:T1097; v17:T1825, 1833-1834). A co-worker/friend testified that he and Todd did moonlight mechanical work together, sometimes two or three nights per week, sometimes working until 9:00 P.M. (v17:T1824-1825, 1831-1832). Kathy initially believed Todd moonlighted after work, but learned he was drinking daily after work at O'Hara's, a pub across the street from his job (v10:T1074-1075, 1097-1098; v11:T1135). Kathy also drank a lot, for enjoyment and to hide from her problems (v10:T1075; v11:T1194). Kathy admitted she can get angry when she drinks (v10:T1099).

Todd's supervisor testified Todd never missed work, became a supervisor at work, and never appeared hungover (v17:T1832-1833).

He and Todd drank O'Hara's on Fridays (v17:T1834). A coworker testified he and Todd went O'Hara's once or twice a week (v17:-T1827). These men testified they never saw the Weiands argue verbally or physically (v17:T1826-1827, 1835, 1837-1841, 1838).

One month after they moved to Tampa, while they were drinking heavily, Kathy told Todd she was going to leave and told him about hidden money (v9:T960-961; v10:T1101; v13:T1362-1363, 1365; v15:T1620; v16:T1702). Todd searched for, found, and kept $500 which Kathy's mother sent to her (v9:T961; v10:T1100; v11:T1193). When she tried to pack a suitcase, he threw dresser drawers at her (v8:T890; v9:T960; v15:T1620, 1702). He shoved her, choked her, and she fought back (v9:T961-962; v15:T1620). Todd ordered her to remain in a bedroom (v9:T962). She left through a window and went to a neighbor who called police (v8:T837; v9:T962; v11:T1193).

Police found the apartment in disarray and broken dresser drawers were on the bedroom floor (v8:T837; v13:T1363, 1366, 1369). Todd was arrested for spouse battery and aggravated assault (v8:T837; v9:T963; v13:T1364, 1367-1369; v16:T1702-1703). Todd was not wearing his prosthesis (v13:T1365-1366). He told police Kathy kicked him, she admitted doing so in self defense, and she was arrested for a misdemeanor (v8:T837-838; v9:T963; v10:T1100-1101; v13:T1364, 1367-1369; v15:T1620; v17:T1702-1703). They spent the night in jail (v8:T838; v9:T964). Kathy's case was dismissed with an admonishment from the judge that he did not want to see her again (v9:T964-965; v10:T1101-1102; v15:T1620). Todd was released because Kathy lied to the court at Todd's request, to save his job,

save their home, and to prevent a beating (v8:T838-839, 841; v9:T965-966; v10:T1102; v15:T1620; v17:T1702). She hoped things would improve and a period of calm ensued (v8:T838-839; v9:T966).

After two months in Tampa, Kathy was hired by Skids Billiards as a waitress/bartender (v9:T969, 971). She wanted to help with expenses and to have money of her own (v10:T1095). She usually worked the 11:00 A.M. to 7:00 P.M. shift (v9:T971-972; v13:T1415). She made better tips at night, but she had trouble at home when on the night shift (v9:T972-973; v11:T1127-1128). Kathy wore long pants and long-sleeved shirts when necessary to cover bruises (v8:T841; v9:T977; v11:T1152; v13:T1416-1417, 1423-1424). She did not tell friends at work about her problems (v9:T977). The doctors testified that wearing clothes to conceal bruises is consistent with abused women who conceal abuse (v8:T840-841; v16:T1711-1712).

Kathy did not drink while working and was never drunk at work (v11:T1194; v13:T1424-1425). She shot pool occasionally after work and Todd sometimes joined her there (v13:T1415, 1423, 1425). Kathy once argued with Todd's supervisor at O'Hara's when he criticized her for talking about her seriously ill puppy (v9:T968-971; v10:T1099; v17:T1836-1837). She yelled, cried, and squealed her car tires upon leaving (v9:T970-971; v10:T1100; v17:T1836-1840).

Todd terrorized Kathy's cat and dog (v9:T984; v15:T1641; v16:T1762). When a puppy, the dog chewed a fitting to Todd's prosthesis, so he beat the puppy for a week with the remains of the fitting (v9:T984-985). Todd threatened to shoot the dog, but relented when she begged for the it's life (v9:T984; v15:T1641).

Del Charles, a cook at O'Hara's, and his girlfriend, Amy Dumond, became friends of Todd and Kathy (v9:T975-976). Todd struck Kathy and argued with her in their presence, but Kathy did not recall specifically when this occurred (v9:T976; v11:T1125). Dr. Walker testified Kathy had memory difficulties which may relate to the post traumatic stress disorder or Kathy's head injury of 1991 (v15:T1597-1599, 1615, 1622-1625, 1628). Battered women deal with prior incidents of battering even though they may lack conscious recall of the prior incidents or specifics about only some details of prior incidents (v15:T1622-1625, 1628). Kathy confided with a neighbor named Tracy about her problems with Todd, but she later lost track of Tracy (v11:T1029).

Kathy did not tell her mother about the abuse during their regular telephone conversations and could not recall telling others about abuse (v10:T1092-1093, 1096; v11:T1128; v16:T1713-1714, 1766). Her mother testified Kathy cried a lot and said they were not getting along, Todd did not help at home and came home late (v14:T1530, 1543).

On December 12, 1992, Kathy was treated at a hospital for hip and back injuries after Todd had choked her and slammed her to the floor (v8:T839-840; v9:T973-974; v10:T1103; v15:T1619, 1626). She lied to the emergency room doctor, saying she had fallen (v8:T840-841; v9:T974; v10:T1103; v15:T1619-1620; v16:T1702). Dr. Maher and Dr. Walker testified that lying to doctors when seeking treatment was consistent with abused woman who conceal abuse (v8:T839-841; v15:T1619-1620; v16:T1704). Kathy's mother visited for a week

before Christmas, but observed no difficulties and Kathy did not tell her about abuse (v12:T1129-1130; v14:T1529-1530, 1543-1546).

Kathy learned she was pregnant (v9:T978). Todd's mother visited and helped them move to a new apartment (v9:T979-980; v11:T1129; v13:T1477; v17:T1860-1863). Todd's mother did not see them argue and she saw no injuries to Kathy who wore shorts (v17:T1863). Kathy painted the apartment, bought new furniture, and prepared a nursery (v9:T981; v11:T1137; v14:T1533).

Prior to the pregnancy, they discussed separating, but they decided to work things out for the baby's sake (v8:T841-842; v9:T978-979; v11:T1130-1131; v15:T1546-1547). Todd agreed to seek counselling and showed her a counsellor's card (v8:T842-843; v9:T979). Kathy quit drinking daily during her pregnancy, but drank an occasional beer (v10:T1075, 1099; v16:T1763). Todd continued to drink daily (v10:T1098-1099; v16:T1763-1764).

Kathy attended birthing classes for six weeks, but Todd attended only the initial class (v9:T986-987). He verbally abused her and called her a fat pig (v9:T987; v16:T1661). He no longer slept with her during her pregnancy, claiming she made the bed rise on his side (v9:T987; v15:T1628-1629). He began ignoring her and she became lonely, but he was still demanding (v15:T1628-1629; v16:T1660-1661, 1712-1714). They argued (v16:T1661). He gave her only $60 per week for shopping and she made up the difference for shopping and other bills from her savings (v9:T988-989; v11:1137).

Abuse continued during the pregnancy including shaking her, hitting her head against walls, and choking her, but there was less

violence and he did not strike her stomach (v8:T845; v11:T1131, 1134, 1137-1138; v15:T1629; v16:T1704-1705). Although she tried to avoid provoking him, they argued about his drinking after work and coming home late (v11:T1134-1135). They once argued while playing pool, Todd slapped her face a couple of times, then she hit him with a cue stick, breaking it (v8:T843; v9:T980; v11:T1126). Todd left, then Kathy found a slashed tire on her car (T980, 1126). Kathy did not recall calling 911 about abuse during her pregnancy or what led to a 911 call in August 1993 (v11:T1135-1136, 1192). The landlady once asked Kathy about bruises on her arm, but Kathy left without explaining (v14:T1478, 1496).

Kathy was frightened and feared for her baby because of difficulties during her high-risk pregnancy, including depression, back pain, anemia, and low amniotic fluid (v8:T845-847; v9:T990; v16:T1660). She had monthly prenatal visits in which doctors checked her belly, checked her internally, and performed sonograms (v11:T1131-1132; v14:T1513-1515). During Kathy's four sonograms, only her belly was exposed and the nurse saw no physical injuries (v14:T1515-1516; v17:T1808, 1816, 1818-1821). During sonograms, she told a nurse her husband was verbally abusive and she feared him (v14:T1516). The doctors, who had a busy practice, did not recall any injuries, but could not have seen bruises on her arms, throat, or legs if she was wearing a long-sleeved, high-collared shirt and long pants (v17:T1805-1808, 1810, 1816, 1818-1819, 1821). She did not tell doctors about abuse (v11:T1132-1132).

Kathy stayed busy cleaning the apartment, working in her garden, and tending bar during her pregnancy, until two months before her delivery (v8:T846-847; v9:981, 990; v10:T1103; v11:-T1133-1134; v16:T1660-1661). Todd lost interest in the pregnancy upon learning the baby was a girl (v14:T1154).

Kathy flew alone to Sheboygan for a week for a baby shower in the fall (v9:T982-983; v11:T1130, 1136; v14:T1531, 1548-1549; v 16:T1759; v17:T1865). Kathy's and Todd's mothers saw no injuries to Kathy (v14:T1548-1549; v17:T1865). Leslie testified Kathy complained to Todd's mother about his drinking, failure to help her, and his verbal and physical abuse (v16:T1759-1760). Kathy returned to Todd because she still loved him (v9:T983). Leslie came to Tampa with Kathy and stayed for one week with the Weiands who argued (v11:T1136-1137; v14:T1549; v16:1760, 1765).

Todd's father and mother visited Todd and Kathy for a few days in November, but did not stay at their home (v17:T1843-1846, 1854). Todd's father did not see them argue, except about the safety of their vehicles, he saw no injuries to Kathy who he claimed wore tank tops and shorts (while 9 months pregnant), and he saw Todd play with and care for the dog (v17:T1844-1847, 1854-1855).

The baby was overdue and Todd had a cell phone so she could call him, but he did not come straight home from work (v9:T991-992; v11:T1194-1195). When she called him after work, she could tell by the background noise that he was at O'Hara's (v11:T1195). Todd drove her to the hospital for the delivery (v8:T847; v9:T993; v11:T1138). She was admitted at 1:30 P.M. (v9:T992).

Kathy was repeatedly given medication to induce labor (v9:T992-994). Todd spent the night at the hospital (v9:T993; v11:T1138). There was concern about the baby's heart rate dropping with the contractions (v8:T848; v9:T994). The next day, doctors decided an emergency cesarean section was necessary after thirty hours of labor (v8:T848; v9:T993-994; v17:T1808-1809, 1811). Kathy was scared because there were problems with the anesthetic, she never met the doctor who performed the operation, and the doctor said the cord was around the baby's neck (v8:T848; v9:T994-995). Todd was present for the delivery (v9:T994-995; v11:T1138-1139; v17:T1866-1867, 1878). The baby, Jackie, was born on November 30, 1993, nine days overdue (v9:T991-992).

Kathy's physician, Dr. Johnson, does not treat depression which is common after delivery (v17:T1808, 1811, 1815). Despite Kathy's thick chart containing many minor complaints, and despite the doctor's awareness of her fear about the cesarean operation, he made no notations concerning her depression and fear on her chart (v8:T846, 848; v9:T996-997; v17:T1809, 1812-1813, 1815). Kathy was hospitalized for one week (v8:T849; v9:T996). She called the manager of their residence and told her how scared she had been during the delivery, but stopped visiting with the manager after the baby was born (v14:T1477, 1481-1483). After delivery, she complained of back pain (v8:T846). Dr. Walker testified that after the traumatic delivery, Kathy was hypervigilant, afraid of and complaining about everything, which is consistent with post-traumatic stress (v8:T849-850).

Todd's mother stayed with the Weiands for ten days and helped with the baby (v9:T996-998, 1004, 1139; v14:T1531; v16:T1661-1662, 1705; v17:T1866-1867, 1881, 1868, 1880-1881, 1884). Todd and Kathy slept in their bedroom, Todd's mother in the nursery with the baby (v9:T1000; v11:T1139-1140; v17:T1867). Kathy called her doctor on December 6 to see if it was alright to ride in a car (v9:T998). Todd's mother testified Kathy's nature was unchanged after the delivery, but she admitted she may have told an officer that Kathy was uptight after the birth and she stated Kathy was disorganized with her housework (v17:T1880-1881, 1885). Todd's mother testified Todd worked during the visit, did not come home drunk, and played with the dog (v17:T1868-1869).

On December 7, Kathy told her doctor that her medication was making her ill and her prescription was changed (v8:T848-849; v9:T998-999). Kathy spent a night with the baby who was not sleeping at night so Todd's mother could sleep (v11:T1140).

Todd and Kathy celebrated parenthood at a bar one night (v9:T999-1000; v11:T1140; v17:T1871). She consented that night to try to have sex even though she still had stitches, but Todd refused to stop when she asked and continued until he was done (v8:T850-851, 893; v9:T1000-1001; v15:T1636). Todd's mother left the next day (v9:T1001). Kathy called her doctor that next day and said she was in pain and asked for an appointment (v8:T851-852; v9:T1001-1002). Todd's mother testified Kathy said she was glad she had a cesarean because they could have sex before six weeks, but Kathy did not recall this statement (v10:T1141; v17:T1869).

Kathy and Todd argued, but Todd's mother saw no physical encounters (v11:T1140-1142; v15:T1637; v16:T1717-1718, v17:T1870, 1879-1880).

Kathy saw Dr. Cardenas on December 14 (v9:T1002). She told him she had engaged in consensual sex, but did not tell him more details because she was ashamed (v8:T851-852; v9:1003). They discussed birth control and the doctor gave her a depo provera injection (v8:T852-853; v9:T1003-1004; v15:T1636). She later read the pamphlets about depo provera and regretted getting the injection because of side effects that can not be reversed until the injection wears off which may take months (v8:T853; v9:T1004). Dr. Walker testified that depo provera was inappropriate for depressed persons (v15:T1636, 1638).

Kathy had difficulties with the baby after Todd's mother departed (v9:T1004; v11:T1142, 1146). The baby did not sleep (v9:-T1004). Kathy felt terrible, tired, and overwhelmed (v9:T1005; v11:T1146; v15:T1637). Todd did not come home from work until 9:00 or 10:00 P.M. (v9:T1007). The manager saw a long raised bruise on Kathy's back a couple of weeks after the baby was born (v14:T1479-1480, 1496). After the baby was born, Todd did not increase the shopping allowance (v9:T989).

Kathy called Todd's former girlfriend, Christi Brockman, in Wisconsin on December 23, 1993 (v9:T1005-1006; v11:T1142, 1214-1216). Kathy apologized about once complaining about Todd having to pay child support and asked about gifts and a card she sent in Todd's name to his daughter, Jennifer (v8:T776-777, 783-785; v9:T1006-1007; v10:T1144). Kathy and Christi shared accounts of

Todd's habitual lying about working and staying out late drinking and accounts of abusive incidents which led to arrests (v8:T777-779, 783, 789; v9:T1007-1008; v10:T1143-1144). Kathy believed they also spoke about the shared experience of being choked by Todd (v9:T1008; v11:T1143-1144). Kathy then believed that her marital problems were not all her fault (v9:T1009).

She told Todd about this conversation and said that she was not at fault for their marital problems (v9:T1009; v10:T1144). Todd lunged at Kathy, knocked her off her feet, and her head struck the kitchen table resulting in a large lump (v9:T1009-1010; v10:T1144-1145). The next day, she confronted Todd who tearfully apologized, said it would never happen again, and Kathy believed him (v9:T1010-1011). When she complained about the $60 allowance, Todd took her shopping, spent $300, they had a nice evening, and he made Christmas dinner the next day (v9:T1011).

Kathy's mother, sister-in-law, and nieces visited on the day after Christmas and stayed until January 2 at a hotel attached to O'Hara's (v10:T1019, 1023; v11:T1142; v14:T1531-1532, 1551-1552; v15:T1637-1638, 1662). Kathy was very moody, wore crew neck T-shirts and her hair down, and did not tell her mother about the December 23 incident or show her any bumps or bruises (v11:T1145; v14:T1532-1537, 1552-1553).

Kathy planned a trip to Disney World for her relatives before she had the baby and drove them there on January 1 (v10:T1021-1023; v14:T1534-1535; v15:T1638). Todd agreed to baby sit for the day after a week of pleading (v10:T1022; v14:T1534-1535; v17:1872,

1884). Kathy did not feel well during the trip and she reacted very emotionally to a minor traffic accident (v10:T1022-1023; v14:T1535-1537). Before she left Tampa, Kathy's mother told her to consult with a doctor about her depression and unusual behavior (v10:T1023-1024; v11:T1146; v14:T1532-1533).

Kathy called her doctor the next day, January 3, and complained of pain and fear (v8:T854; v10:T1024). When Kathy was examined by Dr. Johnson on the following day she told him she was very depressed, but he said most women get depressed and she should call if it gets worse (v8:T854-855; v10:1024-1025; v14:T1537-1538).

The next day, Kathy called 911 to ask police to make Todd leave because he was drunk, they had argued, and she was concerned about her infant and impending violence (v8:T855; v10:T1026, 1094-1095; v11:T1147, 1192; v16:T1698-1700, 1718, 1738-1739; supp:T2181-2184). During the call she discussed a previous incident where Todd refused to leave because of his handicap, so police asked Kathy if she would stay elsewhere (v10:T1028; supp:T2182). She requested that the police ask him to leave because she could not leave with her infant (supp:T2182-2184).

Deputy Hoover and another officer responded to the call at 8:50 P.M. (v8:T855; v10:T1028; v11:T1219-1220). Kathy was frustrated and upset and wanted her husband removed from the home because he was drinking, coming home late, and not helping at home (v8:T855, 900-902; v11:T1220, 1224-1225; v16:T1701). They both said no violence had occurred that night (v11:T1192, 1221, 1225). Hoover gave her pamphlets for the Spring and Bay Area Legal

Services and suggested they seek family counselling (v8:T855; v10:T1029-1030, 1221; v16:T1701-1702). Kathy called the Spring and spoke to a counselor who suggested that she come to the shelter, but Kathy feared taking her baby to a shelter (v8:T855-856; v10:T1030; v11:T1158). Kathy called Legal Services, but did not get to talk to a lawyer and no one returned her call (v8:T856; v10:T1030-1031; v11:T1158).

Kathy returned to work the dayshift at Skids because she needed money for the baby, despite Todd's opposition to her working (v8:T856-857; v10:T1031, 1035-1036, 1073-1074; v11:T1148, 1158; v16:T1720). Kathy had back trouble at work and was overwhelmed by work, domestic duties, and caring for the baby (v10:T1032-1036, 1065-1066; v13:T1416, 1430-1433; v14:T1538-1539, 1550-1551, 1554-1555). On January 21, Kathy considered suicide (v10:T1039-1040; v11:T1159). A co-worker/friend of Todd's said Todd discussed moving in with the friend (v17:T1829-1831). The fatal incident occurred on Sunday, January 23, 1994.

The doctors who examined Kathy after the incident found she was suffering from battered spouse post-traumatic stress disorder and depression at the time of the incident (v8:T792-793, 868-869; v15:T1614, 1634, 1637, 1650-1651; v16:T1666-1667). Post-traumatic stress disorder is a brain function and behavior disorder which results in impulsiveness, anxiety, apprehension, fear, depression, and an inability to deal realistically with surroundings (v8:T796-797; v15:T1586-1590, 1596-1600). Her depression was a mental disease which caused a pervasive feeling of hopelessness and

interfered with sleep, concentration, and ability to function (v8:T793-795, 870; v16:T1658-1660, 1732).

The doctors relied on interviews, treatment, and psychological testing, depositions, medical records, Hillsborough County police and jail records, 911 tapes, Wisconsin police and court records, physical evidence, law review articles, and other documents in reaching their conclusions (v8:T799-800, 829, 875-876; v15:T1602-1612, 1643-1653; v16:T1683-1687, 1694-1701, 1706-1711, 1728-1738).

Dr. Maher and Dr. Walker found many traumas occurring in Kathy's life left her predisposed to becoming a battered spouse (v8:T802-803, 813-815, 816, 818-821; v15:T1581-1584, 1632-1635; v16:T1695-1696). Kathy's large family suffered much hardship, many loved ones suffered serious injuries and death, Kathy saw little of her father, and her stepfather was abusive (v8:T804-815, 818-822, 891-892; v9:T927-938; v10:T1068-1072; v14:T1517-1525, 1555-1557; v15:T1633-1634; v16:T1695-1696, 1750, 1752-1756). In the 1990s, Kathy hit her head in a car accident and continued to suffer from migraines (v8:T819; v9:T937; v15:T1615). Kathy was treated for a work-related back injury, from which she continued to suffer (v8:T820-821; v9:T938, v:14:T1528, 1627).

In Dr. Walker's professional opinion, Kathy did not leave during the incident because she was a battered spouse and she believed Todd would seriously hurt her when she fired the gun (v16:T1665-1666, 1724-1727). She did not leave because she loved and feared her husband, and she was trapped in the relationship (v8:T902-905).

SUMMARY OF THE ARGUMENT

This Court should recede from State v. Bobbitt, 415 So. 2d 724 (Fla. 1982), and rule that a castle doctrine instruction should be given where there is evidence that a defendant acted against an aggressor co-resident while they were in their home. The cause should be reversed for a new trial.

The improper exclusion of critical defense witnesses for failure to timely list one witness and because of a mistaken belief that the defense failed to establish a predicate for two other witnesses denied Appellant a fair trial. The District Court erroneously found these errors to be harmless. Appellant must receive a new trial.

The absence of the Appellant during the questioning of witnesses violated her State and federal constitutional rights to counsel, due process, and confrontation. A new trial is required.

The State failed to disclose impeachment information concerning a key State's witness. The undisclosed information may have been relevant to the witness's bias and/or motive to testify. Reversal for a new trial is required.

Improper arguments of the prosecutor in closing constituted fundamental error. The prosecutor denigrated the defendant, defense counsel, defense witnesses, and her defense. The cumulative effect of this closing argument and the errors addressed in the preceding issues requires reversal for a new trial.

There is insufficient evidence to support the Appellant's conviction for second degree murder.

ARGUMENT

ISSUE I

THE RULE OF STATE v. BOBBITT, 415 SO. 2D 724 (FLA. 1982), SHOULD BE CHANGED TO ALLOW THE CASTLE DOCTRINE INSTRUCTION IN CASES WHERE EVIDENCE WAS PRESENTED THAT THE DEFENDANT ACTED IN SELF DEFENSE WHILE IN HER RESIDENCE AGAINST AN AGGRESSOR WHO WAS A COHABITANT OF THE RESIDENCE.

"Why ... should one retreat from his own house, when assailed by a partner or cotenant, any more than when assailed by a stranger who is lawfully upon the premises? Whither shall he flee, and how far, and when may he be permitted to return?" State v. Bobbitt, 415 So. 2d 724, 728 (Fla. 1982) (dissenting opinion of Overton, J., quoting Jones v. State, 76 Ala. 8, 14 (1884)).

> More than 200 years ago it was said by Lord Chief Justice Hale (1 Hale's Pleas of the Crown, 486): In case a man "is assailed in his own house, he need not flee as far as he can, as in other cases of se defendendo, for he hath the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by flight." Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home.

Bobbitt, 415 So. 2d at 728 (dissenting opinion of Overton, J. quoting People v. Tomlins, 213 N.Y. 240, 107 N.E. 496, 497 (1914)).

Despite a defense request, the jury in this case was not instructed on defense of home (v1:R91-114; v17:T1896-1903; v18:T2015-2034). There was evidence presented that Todd Weiand was the initial aggressor in the incident which led to his death, and Kathleen Weiand feared it was not safe for her to leave the residence during the incident.

The requested instruction would have informed the jury that:

> An issue in this case is whether the defendant acted in self-defense. It is a defense to the offense with which Kathleen Weiand is charged if the death of Todd Weiand resulted from the justifiable use of force likely to cause death or great bodily harm.
>
> The use of force likely to cause death or great bodily harm is justifiable only if the defendant reasonably believes that the force is necessary to prevent imminent death or great bodily harm to herself while resisting any attempt to commit assault in any dwelling house occupied by her.

Fla. Std. Jur. Instr. 3.04(d)(4).

In State v. Bobbitt, 415 So. 2d 724 (Fla. 1982), this Court held the doctrine that a person is privileged not to retreat in her own home, but may stand her ground and use such force as appears to her to be necessary to save herself from great bodily harm is inapplicable to co-residents. The Court quashed the decision of the district court which held the privilege of nonretreat in the home applies even where legal co-residents are involved.

For a battered woman, leaving the shared residence is not the obvious way to safety, but may be the most dangerous thing a battered woman can do. "The majority opinion in Bobbitt ... clearly penalizes spouses, and particularly wives, in defending themselves from an aggressor spouse." State v. Rippie, 419 So. 2d 1087 (Fla. 1982) (dissenting opinion of Overton, J.).

Society and the courts have learned much about domestic violence since this Court promulgated the rule of Bobbitt. The Ohio Supreme Court recently held that a battered woman had no duty to retreat when attacked by her boyfriend, a cohabitant with an

equal right to be in the home, in order to claim self-defense. Ohio v. Thomas, 77 Ohio St.3d 323, 673 N.E.2d 1339 (1997).

> [I]n the case of domestic violence, as in the case sub judice, the attacks are often repeated over time, and escape from the home is rarely possible without the threat of great personal violence or death.
>
> There is no rational reason for a distinction between an intruder and a cohabitant when considering the policy for preserving human life where the setting is the domicile, and accordingly, we hold that there is no duty to retreat from one's home before resorting to lethal force against a cohabitant with an equal right to be in the home.

Thomas, 673 A.2d at 1343. The New Jersey Supreme Court recently held it could not change the statutorily imposed duty to retreat, but urged the legislature to reconsider the retreat doctrine in cases of spouses battered in their homes because the code was drafted when the public and drafters "were not fully aware of the epidemic of domestic violence." New Jersey v. Gartland, 694 A.2d 564, 571 (1997). "Currently, jurisdictions vary as to their willingness to extend the castle doctrine where both parties legally occupy the home, but the majority of these jurisdictions extend the privilege of non-retreat to apply in these type situations. Gartland, 694 A.2d at 569.

Denial of the castle doctrine to battered women who exercise self defense against aggressor cohabitants denies them a proper self defense instruction. "The defendant's inability to retreat and escape without harm may be closely linked to her inability to escape from the relationship." Elizabeth Bochnak, Women's Self-Defense Cases 47 (1981). Ms. Weiand testified she did not leave

during the incident because of concern about her infant and she believed her husband would not let her leave (v11:T1172, 1182). Some battered women kill their spouses in response to escalating abuse occurring when the spouse perceives her emotional withdrawal or preparation to leave. Lenore Walker, Battered Women Syndrome and Self-Defense, 6 Notre Dame Journal of Law, Ethics & Public Policy 321, 333 (1992). There was evidence presented that Ms. Weiand was preparing to leave her husband when the incident occurred (v8:T860-861; v10:T1047-1052; v11:T1162-1163, 1165; v14:T1539, 1555; v16:T1662-1663). Over 50% of battered women who flee are hounded, badgered, and forced to return. Angela Browne et. al., When Battered Women Kill; Evaluation and Expert Witness Techniques, in Domestic Violence at Trial, (Daniel J. Sonkin ed., 1987). There was evidence presented that in prior incidents Ms. Weiand was beat and threatened by her husband when she mentioned leaving or attempted to leave (v10:T1051-1052; v11:T1160, 1166).

The rule of Bobbitt elevates the contractual matter of sharing a residence to a superior position to the basic constitutional right to exercise self-defense.

> The right to fend off an unprovoked and deadly attack is nothing less than the right to life itself, which this portion of our Constitution expressly declares to be a basic right. Florida's Constitution states:
>
> > Basic rights.--All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty....
>
> Art. I, Sec. 2, Fla. Const.
>
> . . .
>
> Under article I, section 2, the state cannot deprive individuals of this right of

> self defense without demonstrating a compelling state interest achieved by the most narrowly tailored means. As we stated in the case of In re Estate of Greenberg, 390 So. 2d 40, 43 (Fla. 1980), appeal dismissed, 450 U.S. 961, 101 S. Ct. 1475, 67 L. Ed. 2d 610 (1981), a strict-scrutiny analysis applies whenever a statutory classification "impinges upon a fundamental right explicitly or implicitly protected by the constitution."

Perkins v. State, 576 So. 2d 1310, 1314 (Fla. 1991) (Kogan, J. Concurring specially).

The rule of Bobbitt disadvantages the victims of domestic violence. The rule of Bobbitt places a woman attacked by her husband "under a mandate to leave her home to avoid her aggressor spouse." State v. Rippie, 419 So. 2d 1087, 1088 (Fla. 1982).

> More difficult still to understand is the application of the majority's rule to the situation where a mother is attacked in her home by a nineteen-year-old son. If the son is living in the home, the mother has a duty to retreat before she can use deadly force, but, if the son is not residing in the home, the mother has no duty to retreat before such force is used.

Bobbitt, 415 So. 2d at 728 (Fla. 1982).

The castle doctrine instruction should be provided to any defendants presenting evidence of using self defense when attacked in their home, whether their attacker is a non-resident or co-resident spouse, significant other, parent, child, or roommate. The instruction given at Ms. Weiand's trial permitted the prosecutor to persuasively argue that to find she acted in self-defense, "she had to exhaust every reasonable means of escape prior to killing him," and because she did not leave her home she had not done so (v18:T1938-1940). A new trial is required.

ISSUE II

THE DISTRICT COURT ERRED IN FINDING THE EXCLUSION OF CRITICAL DEFENSE WITNESSES TO BE HARMLESS ERROR[3].

The district court held, "We have reviewed the entire trial transcript which includes the testimony of the defendant and thirty-two defense witnesses, two of whom were experts who presented exhaustive testimony explaining the battered spouse syndrome, and both of whom rendered opinions that the defendant suffered from battered-spouse syndrome at the time she shot her husband. After examining the proffered testimony of the three excluded witnesses, together with all the other evidence and testimony presented in this case, and applying the harmless error rule as we are required to do, we cannot conclude the exclusion of these witnesses requires reversal." Weiand v. State, 22 Fla. L. Weekly D1707, 1708 (Fla. 2d DCA July 11, 1997). The finding of harmless error in this case is erroneous.

The only eyewitnesses to Todd Weiand's abuse of Kathleen Weiand were excluded. A proffer of Ms. Bowman showed she witnessed arguments between the Weiands and Mr. Weiand's abuse of their dog, Ms. Weiand often told her about being hit by her husband and his threats to follow and kill her if she left him, she observed marks

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[3] This issue and the following issues were affirmed by the district court. However, this Court may consider these issue. Kennedy v. Kennedy, 303 So. 2d 629 (Fla. 1974) ("In acquiring jurisdiction of a case, our Court has appropriate authority to dispose of all contested issues."); Atlas Properties, Inc. v. Didich, 226 So. 2d 684, 685 (Fla. 1969) ("Florida Supreme Court has the power "to explore the entire record to see if the proper result has been reached in both the trial and District Courts.").

on Ms. Weiand's neck when she said he had choked her, she felt lumps on Ms. Weiand's head when she said her husband had beat her with a vacuum cleaner pole, and she once stayed overnight with Ms. Bowman to escape abuse (v20:T2169-2171; Appendix A3-5).

Ms. Dumond would have testified that while returning from a restaurant with the Weiands, they argued (v13:T1434, 1440; Appendix B2, 8). When they arrived home, Mr. Weiand kicked the car, Ms. Weiand yelled at him, then Mr. Weiand choked her (v13:T1434-1435, 1440; Appendix B2-3, 8). When Ms. Weiand threatened to call the police, Mr. Weiand vaulted a 6' high fence (v13:T1435, 1440-1441; Appendix B3, 8-9). Mr. Charles was present when Mr. Weiand was angry about the volume of a stereo. He kicked the stereo, struggled with his wife, and threw her into glass table, breaking it. (v13:T1444). Del Charles also saw "Todd smack her in the back of the head, shove her, and punch her." (v1:R121-123). The excluded testimony would have provided vital corroboration of Ms. Weiand's testimony about past abuse and threats.

The district court held that "Because the testimony of the witnesses was relevant to the factors used in diagnosing battered spouse syndrome, it was error to exclude it." Weiand 22 Fla. L. Weekly at D1708. However, this testimony was not only relevant to diagnosing battered-spouse syndrome, it was critically needed corroborative evidence of Ms. Weiand's self-defense claim, including the reasonableness of her fear of her husband, Mr. Weiand's physical ability, and the reasonableness of her fear that she could not safely retreat from their home.

The testimony of the expert witnesses was not a substitute for corroborative eyewitness testimony of abuse. The State chose not to present its own expert, but instead relied on a strategy of denigrating the defense and the defense witnesses[4] (v18:T1927-1941, 1983-2015, Appendix C1-48). The State was able to argue, in light of the excluded testimony, that there was no corroboration of Todd Weiand's abuse of Ms. Weiand. The State asserted: "and how do we know she's not one of them [battered women]. All we have to back her up is her own statements." (v18:T1984-1985; Appendix C17-18); "They [the doctors who testified for the defense] know what she [Ms. Weiand] was thinking based on what she says. Their testimony should be discredited by you." (v18:T1991; Appendix C24); and "Nobody sees any injuries to her." (v18:T1993; Appendix C26). The prosecutor also stressed Todd's disability to the jury (v18:T1992: Appendix C25), which may have been ineffective if the jury heard the excluded testimony about Todd's physical ability.

One witness was erroneously excluded as a discovery sanction. Until recently, Florida courts held that such errors were per se reversible error. See Smith v. State, 500 So. 2d 125 (Fla. 1986); Wilcox v. State, 367 So. 2d 1020 (Fla. 1977); Cumbie v. State, 345 So. 2d 1061, (Fla. 1977). In State v. Schopp, 653 So. 2d 1016 (Fla. 1995), this Court found that such errors are now subject to harmless error analysis. However, this Court stated that finding

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[4] The district court found, "It is not so much the central points in the closing argument that are offensive, but rather the manner in which the points are presented." (For a more complete review of the closing argument, please see Issue V and Appendix C).

such error harmless "is clearly the exception rather than the rule." Schopp, 653 So. 2d at 1021. This Court also stated, "We recognize that in the vast majority of cases it will be readily apparent that the record is insufficient to support a finding of harmless error." Schopp, 653 So. 2d at 1021.

> In his perceptive essay, The Riddle of Harmless Error, former Chief Justice Traynor addressed various common errors which, historically, appellate courts fall into when applying harmless error analysis. The worst is to abdicate judicial responsibility by falling into one of the extremes of all too easy affirmance or all too easy reversal. Neither course is acceptable. The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful. This rather truncated summary is not comprehensive but it does serve to warn of the more common errors which must be avoided.

State v. Diguilio, 491 So. 2d 1129, 1139 (Fla. 1986).

In this homicide case, where the defense of self-defense was raised and there was incomplete and conflicting evidence, the jury had a right to see all of the circumstances as they existed and to be fully apprised of the evidence relevant to Ms. Weiand's state of

mind in believing her actions were necessary to defend herself against her husband and the reasonableness of retreat. See Coker v. State, 212 So. 2d 648 (Fla. 1st DCA 1968) (reversal required by exclusion of testimony corroborating defendant's account of beating inflicted by victim on defendant on day prior to shooting); Parrish v. State, 113 So. 2d 860 (Fla. 2d DCA 1959) (exclusion of testimony concerning victim's prior threats of bodily harm against defendant requires reversal); Melvin v. State, 592 So. 2d 357 (Fla. 1st DCA 1992) (reversal required by exclusion of evidence that victim was a bully even in the absence of evidence defendant knew he was a bully because of factual dispute as to whether victim choked defendant before defendant shot him).

The excluded testimony was also relevant to Ms. Weiand's state of mind supporting only a conviction of manslaughter, as the defense requested in the motions for directed verdict (v1:R82, 84; v8:T754-756; v17:T1893-1894, 1913). See Douglas v. State, 652 So. 2d 887 (Fla. 4th DCA 1995) (because killing may be found to be manslaughter based on heat of passion, "evidence of the past relationship of the victim and the defendant, which would be relevant to why defendant went into a rage, is admissible even if it reflects badly on the character of the victim"); Billeau v. State, 578 So. 2d 343 (Fla. 1st DCA 1991) (murder defendant's evidence of wife's past extramarital affairs was relevant to crime of passion defense -- that shooting of wife's lover was committed after years of frustration resulting in "a blind unthinking, sustained rage", "greater than the jury could have expected").

The exclusion of critical testimony denied Ms. Weiand corroboration of the abuse she suffered and of Todd Weiand's physical ability. This testimony was crucial to the essential issues of Ms. Weiand's credibility, the reasonableness of her acts, the unreasonableness of attempting to retreat with her infant, and her state of mind. Ms. Weiand was denied her right to adequately defend herself in court. Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). Improper exclusion of this critical corroborative testimony requires reversal and remand for a new trial.

ISSUE III

APPELLANT'S ABSENCE DURING CRITICAL STAGES OF HER TRIAL REQUIRES REVERSAL.

A defendant has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by her absence. Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982); Snyder v. Massachusetts, 291 U.S. 97 (1934); U.S. Const. Amends. VI and XIV; Art. I §§ 9 and 16, Fla. Const. A defendant's presence is mandated "at all proceedings before the court when the jury is present." Fla. R. Crim. P. 3.180(a)(5).

Ms. Weiand was made absent from the courtroom during the testimony of hostile defense witness Sherri Brockman and during the testimony of defense witness Dr. Maher, at the request of the State (v8:T760-761). The discussion among the trial court, the prosecutor, and defense counsel proposing Ms. Weiand's removal from the

courtroom was conducted at side bar without Ms. Weiand and while the jury was present in the courtroom (v8:T758-760). Defense counsel did not object to Ms. Weiand's absence, and the jury was instructed that her absence was "voluntary," but there was no discussion of the matter with Ms. Weiand on the record and no waiver of presence was obtained from Ms. Weiand (v8:T759-762). The side bar conducted in the presence of the jury would not have been loud enough for the jurors or Ms. Weiand to hear. The first clue given to Ms. Weiand was the trial court's announcement that she was "voluntarily" leaving the courtroom (v8:T762). Ms. Weiand was not informed she had a right to object or that she had a right to be present during the examination of witnesses, and may well have believed this was a standard courtroom procedure.

A defendant's waiver of the right to be present at essential stages of trial must be knowing, intelligent and voluntary. Amazon v. State, 487 So. 2d 8 (Fla. 1986), cert. denied, 479 U.S. 914 (1986). To the extent a defendant can waive her right to be present in favor of the "exercise [of] constructive presence through counsel ..., the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary," Coney v. State, 653 So. 2d 1009 (Fla. 1995); Butler v. State, 21 Fla. L. Weekly D1498, 1499 (Fla. 1st DCA June 27, 1996) ("Although his attorney purported to waive the appellant's right to be present, the court did not obtain a personal waiver from appellant or confirm the appellant's acquiescence and ratification of his attorney's actions"). Waiver by counsel of a defendant's right to

be present at a crucial stage of a trial, without acquiescence or ratification by the defendant, is error. State v. Melendez, 244 So. 2d 137, 140 (Fla. 1971); Amazon, 487 So. 2d at 11. The record in the instant case contains no inquiry and does not establish, with the certainty and clarity necessary to support the waiver of constitutional rights, that Ms. Weiand's absence was voluntary.

Ms. Weiand was not only denied her right to confront witnesses, she was denied her right to effective counsel during a critical stage of her trial. An accused has a constitutional right to assistance of counsel in making his defense. Faretta v. California, 422 U.S. 806 (1975); Myles v. State, 602 So. 2d 1278, 1980 (Fla. 1992); U.S. Const. Amends. VI and XIV; Art. I § 16, Fla. Const.

> While there are many facets to the right to assistance of counsel, there can be no doubt that a core element is ready access to and communication with counsel during trial. As we recently recognized in Gore v. State, 599 So. 2d 978, 985 (Fla. 1992), "it is crucial for a defendant to be able to consult with his attorney at trial in order to aid ... in conducting the examination of a witness."
>
> Any delay in communication between defendant and defense counsel obviously will chill this constitutional right. Communication between defendant and defense counsel must be immediate during the often fast-paced setting of a criminal trial. For example, the defendant may realize that a witness has testified untruthfully. If so, it may be crucial that the defendant talk to counsel so that appropriate actions can be taken immediately to object or impeach or rebut, especially if the untruthful testimony occurs during defense counsel's questioning.

Myles, at 1280.

A defense motion to treat witness Christi Brockman as hostile had been granted (v1:R71-72). Ms. Brockman formerly lived with Todd Weiand and they had a child (v8:T763-764, 785-786). During a telephone conversation seven weeks before the shooting, Ms. Brockman and Ms. Weiand shared details of Todd's abuse of each of them (v8:T776-781; v10:1005-1009; v11:T1142-1144, 1214-1216). At trial, Ms. Brockman denied she had been battered by Todd and asserted they had only one physical altercation, but upon questioning admitted some further physical abuse (v7:T763-776, 781-786). Had Ms. Weiand been present, Ms. Brockman may not have been as reluctant to testify about the abuse she suffered and Ms. Weiand may have been able to assist counsel in questioning her.

In Savino v. State, 555 So. 2d 1237 (Fla. 4th DCA 1989), modified on other grounds 567 So. 2d 892 (Fla. 1990), the State was permitted to call a witness out of turn, after it had rested, and while Savino was not present in the courtroom. When Savino's counsel moved to strike the testimony, the State offered to repeat the questioning in Savino's presence, but his counsel waived his presence. The appellate court did not find counsel's waiver dispositive of the issue or his absence was harmless, holding:

> Notwithstanding counsel's waiver of appellant's presence, the record must demonstrate that appellant made a knowing, intelligent and voluntary waiver of his right to be present at essential stages of the trial. See Turner v. State, 530 So. 2d 45 (Fla. 1987), cert. denied, ___ U.S. ____, 109 S. Ct. 1175, 103 L. Ed. 2d 237 (1989). This record does not show that appellant's counsel advised him of his right to be present or that the court questioned appellant concerning his possible ratification of counsel's waiver. Although

> appellant remained silent when his counsel waived the state's offer to repeat the testimony of the witness, his silence cannot be construed as acquiescence or ratification of his counsel's action. See Francis v. State, 413 So. 2d 1175 (Fla. 1982), cert. denied, 474 U.S. 1094, 106 S. Ct. 870, 88 L. Ed. 2d 908 (1986). We find merit in appellant's argument that while the witness's testimony may not have been crucial to the outcome of the case, his absence during the testimony deprived him of his right to confront her and to confer with his counsel during cross examination. We cannot construe, as the state suggests, appellant's absence during the witness's testimony as harmless error.

Savino, 555 So. 2d at 1238.

Conducting critical stages of Ms. Weiand's trial in her absence violated her State and federal constitutional rights to counsel, due process, and confrontation. The trial court failed to certify through proper inquiries that Ms. Weiand waived her right to be present at these critical stages of her trial where fundamental fairness may have been thwarted by her absence. It is impossible to show that Ms. Weiand's absence was harmless. The errors are reversible and entitle her to a new trial.

ISSUE IV

A NEW TRIAL IS REQUIRED BY THE FAILURE OF THE STATE TO DISCLOSE EXCULPATORY EVIDENCE TO THE DEFENSE.

Due process proscribes governmental suppression of exculpatory evidence which might lead the jury to entertain a reasonable doubt about a defendant's guilt. Giles v. Maryland, 386 U.S. 66 (1967). To demonstrate a Brady violation, a defendant establish "(1) that the prosecution suppressed evidence (2) that was favorable to him or exculpatory and (3) that the evidence was material." Delap v.

Dugger, 890 F.2d 285, 298 (11th Cir. 1989), cert. denied, 110 L. Ed. 2d 648 (1990). "Impeachment evidence, ... as well as exculpatory evidence, falls within the Brady rule." United States v. Bagley, 473 U.S. 667, 676 (1985).

> A more particular attack on the witness' credibility is effected by means of cross examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." .... We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. [Citations omitted.]

Davis v. Alaska, 415 U.S. 308, 316 (1974).

At hearing on a defense motion for new trial (v19:T2042-2065), the defense argued that the State committed a discovery violation by failing to disclose the investigation of key prosecution witness, Deputy Terry, for extortion and false imprisonment at the time he testified (v19:T2049-2055; v1:R118-119). That information could have provided effective impeachment of this key State's witness (v19:T2049-2050, 2052; v1:R123-128). Terry allegedly threatened "to falsely charge a woman and her friends with a crime if she did not pose for nude photographs for him" and "held her against her will" (v1:R123; v19:T2051, 2060). In a sworn affidavit, Terry stated he was under investigation by Internal Affairs and by the State Attorney's Office when he testified in the instant case. (v1:R120; Appendix D1). The State stipulated there was an

investigation, the defense had not had access to the internal investigation file during Ms. Weiand's trial, Terry's testimony was important to the State's case, and knowledge of the investigation should be imputed despite the prosecutor's personal lack of knowledge[5] (v19:T2055-2062). The prosecutor asserted, and the court agreed, that the information was irrelevant, inadmissible, and would have had no effect on the outcome of the case (v19:T2055-2064). The motion for new trial was denied (v19:T2064).

Terry's testimony was critical to the State's case. Terry testified that as he took Ms. Weiand, whom he described as the most talkative woman he had ever met, to the Sheriff's Office she repeatedly said, "He hit my wrists with like a steel pipe trying to defend himself." (v4:T342, 352-354, 363-370). Terry was certain she used those words although her statement was not recorded and he later wrote the statement from memory (v4:T364-365, 368-370). Another officer testified Ms. Weiand said her husband beat her with a metal rod without using the term "self defense" (v5:T407).

In closing, the prosecutor argued that Todd was killed while locking the door in the small bedroom and that Kathy had earlier placed Todd's assault rifle on the day bed while Todd was in the bathroom, but had been unable to unzip the case and use that weapon (v18:T2005-2010; Appendix C38-43). This argument was supported solely in some respects by the testimony of Terry that the case had been zipped and unloaded, and blood was on both sides of the case

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[5] A State Attorney is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers. Gorham v. State, 597 So. 2d 782 (Fla. 1992).

because of Terry's handling of it (v4:T292-299, 324, 327-331, 370-371). Paramedics testified that the assault rifle had not been within the case and may have been loaded with a clip (v12:T1305-1307, 1310; v13:T1321, 1324). Terry's testimony made possible the prosecutor's argument which heightened the state of mind of Ms. Weiand and minimized the danger she faced from her husband.

"When charges are pending against a prosecution witness at the time he testifies, the defense is entitled to bring this fact to the jury's attention to show bias, motive or self-interest." Torres-Arboledo v. State, 524 So. 2d 403, 408 (Fla.), cert. denied, 488 U.S. 901, 109 S. Ct. 250, 102 L. Ed. 2d 239 (1988); Breedlove v. State, 580 So. 2d 605, 608 (Fla. 1991).

> A witness can be impeached by, among other things, showing that the witness is biased or by proving that the witness has been convicted of a crime. (Footnote deleted.) While defense witnesses may be impeached only by proof of convictions, the rule regarding prosecution witnesses has been expanded. Thus, this Court has stated: "'[I]t is clear that if a witness for the State were presently or recently under actual or threatened criminal charges or investigation leading to such criminal charges, a person against whom such witness testifies in a criminal case has an absolute right to bring those circumstances out on cross-examination[.]' " Fulton v. State, 335 So. 2d 280, 283, 284 (Fla. 1976) (quoting Morrell v. State, 297 So. 2d 579, 580 (Fla. 1st DCA 1974)). The Morrell court explained that such expansion is needed
>
> > so that the jury will be fully apprised as to the witness' possible motive or self-interest with respect to the testimony he gives. Testimony given in a criminal case by a witness who himself is under actual or threatened criminal investigation or charges may well be biased in favor of the State without the knowledge of such bias by the police or

> prosecutor because the witness may seek to curry their favor with respect to his own legal difficulties by furnishing biased testimony favorable to the State.
>
> The constitutional right to confront one's accuser is meaningless if a person charged with wrongdoing is not afforded the opportunity to make a record from which he could argue to the jury that the evidence against him comes from witnesses whose credibility is suspect because they themselves may be subjected to criminal charges if they fail to "cooperate" with the authorities.

297 So.2d at 580.

> This reasoning has been generally accepted when a state witness has been charged with a crime. [Citations deleted.]
>
> . . .
>
> If a state witness is merely under investigation, however, the ability to cross_examine on such investigation is not absolute. Instead, any criminal 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 607-608. In Breedlove, the Court found the fact that State's key witnesses, police officers, had been investigated was not material because the officers were not under investigation until after they testified and the officers' criminal activities were collateral to issues in appellant's trial.

In the instant case, Terry was being investigated while he testified and the matter for which he was being investigated relates to bias. The investigation of Terry for extortion and false imprisonment was based on allegedly forcing a young woman to pose for naked photographs. Such an allegation would have provided a basis for the defense to inquire about Terry's attitudes about and bias toward women. See Lee v. State, 422 So. 2d 928, 931 (Fla. 3d DCA 1982) (where a defendant is black, inquiry may be made of

the State's witnesses, not only as to their bias against the defendant as a black, but also to their bias against blacks in general); Smith v. State, 404 So. 2d 167 (Fla. 1st DCA 1981) (same); Jackson v. State, 585 So. 2d 420 (Fla. 1st DCA 1991) ("we find that the trial court abused its discretion in limiting defense cross examination of a pivotal state's witness regarding his generalized bias or lack thereof toward black citizens").

The knowledge of investigation of Terry would have provided a basis for the defense to inquire about abuse of position and dishonesty. Proper inquiry also could have established whether Terry sought to curry favor with his testimony. See Auchmuty v. State, 594 So. 2d 859 (Fla. 4th DCA 1995) (preventing impeachment of key State witness about potential bias because of a pending prosecution is not harmless error); Williams v. State, 600 So. 2d 509 (Fla. 3d DCA 1992) (evidence that state's witness to drug transaction had outstanding bench warrant for driving with suspended license was relevant and should have been admitted as impeachment evidence). See Marrow v. State, 483 So. 2d 17 (Fla. 2d DCA 1985) (failure to reveal exculpatory evidence that witness had a tentative offer of leniency for his testimony required new trial where witness and his wife were only witnesses to a conversation leading to conspiracy charge). It is impossible to know what could have been established by a defense examination based on the investigation of Terry. It is possible that the incident involved a threat to testify falsely against the young woman.

Failing to provide the defense with impeachment evidence concerning a key State witness denied Ms. Weiand a fair trial. The cause must be reversed and remanded for a new trial.

ISSUE V

THE IMPROPER REMARKS OF THE PROSECUTOR CONSTITUTED FUNDAMENTAL ERROR.

"The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985). Closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Bertolotti, 476 So. 2d at 134.; Jackson v. State, 522 So. 2d 802, 809 (Fla. 1988), cert. denied, 488 U.S. 871 (1988).

The prosecutor denigrated the defendant and all aspects of her defense. In closing, while discussing second degree murder, the she stated "What the heck does that mean? For a second there you would think Dr. Walker wrote that because it's hard to understand"[6] (v18:T1933; Appendix C6). While discussing self defense, the prosecutor stated, "it's been around for a real long time, it's been around longer than this battered woman's syndrome that Dr. Walker talked to us about," "[t]he law and justice is supposed to be blind, not dumb, but blind,"

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[6] During the defense examination of Dr. Walker, counsel asked the court to instruct the prosecutor to quit rolling her eyes (v15:T1648-1649). There is no ruling or instruction on the record.

> But listen very carefully to this self defense law because there is no way that if you follow the law you're going to believe that she acted in self defense, and that is exactly why we had to hear from those two high paid experts at a total of twelve grand to come in here and talk all that psycho stuff about battered women syndrome because her actions don't meet the criteria of self defense.

(v18:T1935-1936; Appendix C9-10).

A prosecutor may not ridicule a defendant or her theory of defense. Riley v. State, 560 So. 2d 279, 280 (Fla. 3d DCA 1990); Nowitzke v. State, 572 So. 2d 1346, 1355 (Fla. 1990). Expert testimony on battered spouse syndrome to support a claim of self defense is admissible evidence and essential to assist jurors to disregard their prior conclusions as being common myths. State v. Hickson, 630 So. 2d 172 (Fla. 1993). In light of the recognition of the admissibility of expert testimony on battered spouse syndrome to support a claim of self defense, it may be reversible error to ridicule such a defense. See Garron v. State, 528 So. 2d 353 (Fla. 1988) ("it is reversible error to place the issue of the validity of the insanity defense before the trier of fact.").

The prosecutor attacked the expert testimony concerning battered spouse syndrome, asserting:

> And Dr. Walker comes in here, Ms. I've got an agenda, I've got this battered women's syndrome that I have provided, I have created, and it's such a flexible syndrome it applies to everybody.
>
> Stop and think about what she was talking about. Is there anybody it doesn't apply to? The answer is no. That is why she has been cited as an expert by both sides in the OJ Simpson case, because her syndrome is so flexible and she says so many different things at so many different times she can make it

> fit. And how can she make it fit? Because she created it.

(v18:T1986-1987; Appendix C19-20). In addition to her comment about "those two high paid experts at a total of twelve grand to come in here and talk all that psycho stuff about battered women syndrome" (v18:T1987; Appendix C20), the prosecutor also asserted Dr. Walker did not care about the evidence in this case "Because she's getting paid to say she's a battered woman." (v18:T1987). See Pippin v. Latosynski, 622 So. 2d 566, 567-568 (Fla. 1st DCA 1993) (personal injury plaintiff's counsel arguments expressing personal outrage concerning the money spent on defense and defendant's use of a doctor who gives ludicrous testimony for pay was fundamental error). The prosecutor continued her attack on the defense, asserting that Dr. Maher, defense counsel, and Ms. Weiand had to "concoct" evidence that Ms. Weiand had been abused by her husband (v18:T1989-1901). See Venning v. Roe, 616 So. 2d 604 (Fla. 2d DCA 1993) (improper to argue opposing counsel "created and orchestrated a work of fiction" with the help of a "prostitute medical expert"); Sun Supermarkets, Inc. v. Fields, 568 So. 2d 480 (Fla. 3d DCA 1990), rev. denied, 581 So. 2d 164 (1991) ("Based upon the remarks of the plaintiff's counsel that counsel for the defendant lied to the jury and that he committed a fraud, we must reverse. ... derogatory comments about opposing counsel will not be condoned"); Landry v. State, 620 So. 2d 1099 (Fla. 4th DCA 1993) (a prosecutor's argument that implies that the defense was presenting false testimony is highly improper).

The prosecutor also improperly asserted that a defense witness planted evidence and the jury should not credit this witness's testimony concerning injuries to Ms. Weiand (v18:T2011-2012; Appendix C44-45). This evidence, a metal rod, had not been looked for or collected by the police, despite Ms. Weiand's statements on the scene that her husband beat her with a metal rod. The manager denied the prosecutor's insinuation in cross-examination that the manager had not truly found the metal rod in the small bedroom, but the State submitted nothing, excepting the prosecutor's speculation, to rebut the manager's testimony. (v5:T464-465; v6:536-537, 594-596; v12:T1247-1250, 1253-1260; v14:T1488-1491).

It is reversible error for a prosecutor to discredit a witness in the eyes of the jury by improper means. State v. Castillo, 486 So. 2d 565 (Fla. 1985) (reversible error where the prosecutor portrayed a defense witness as committing an illegal act where there was no evidence to support the suggestion); Silva v. Nightingale, 619 So. 2d 4, 5 (Fla. 5th DCA 1993) (attorney directly or inferentially stating opinion on credibility of a witness is improper). See Smith v. State, 414 So. 2d 7 (Fla. 3d DCA 1982) (a prosecutors insinuation of impeaching facts, the proof of which is nonexistent, is clearly impermissible).

The prosecutor argued that other than the residence manager, "Nobody sees any injuries to her." (v18:T1993; Appendix C26). This statement was not true. There were witnesses, however, the State succeeded in having these witnesses erroneously excluded (See Issue II). A prosecutor's closing argument assertion which is known to

be untrue is reversible error which is not saved by the fact that the contrary facts known to the government were unknown to the jury. Kojayan v. State, 8 F.3d 1315 (9th Cir. 1993). The prosecutor also exploited her improper impeachment, allowed over objection, of Ms. Weiand and Dr. Walker[7] (v18:T1984, 1988-1989; Appendix C17, 21-22). "No conviction is warranted except upon convincing evidence fully and fairly presented." Goddard v. State, 196 So. 596, 602 (Fla. 1940). "[W]hile the State is free to argue to the jury any theory of the crime that is reasonably supported by the evidence, it may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So. 2d 1325, 1331 (Fla. 1993).

The prosecutor asserted:

> And ask yourselves, does it make any sense that defense they were talking about? Did it make any sense to you? Did it? Really? When you think about it? And the answer should be no. Because she is guilty and she is guilty as charged, and there's no sympathy, no bias, or no prejudice that's supposed to take any form or place in your decision.

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[7] When Dr. Walker was questioned about statements from one of her books, the court rejected the defense request to allow Dr. Walker read the statement in context (v16:T1671). When Ms. Weiand was questioned about specific answers on a 600 question psychological test she had taken, the trial court rejected the defense request for Ms. Weiand to be given a copy of the test (v10:T1105).

> When a witness is examined concerning his prior written statement or concerning an oral statement that has been reduced to writing, the court, on motion of the adverse party, shall order the statement shown to the witness or its contents disclosed to him.

§ 90.614(1), Fla. Stat. (1993).

(v18:T1940; Appendix C14). Counsel may not offer dogmatic statements as to what is proven by the evidence. Carlile v. State, 129 Fla. 860, 176 So. 862 (Fla. 1937). "The expression by counsel in argument before the jury of personal opinion of guilt is not only bad form, but highly improper, as counsel is not under oath to speak the truth, nor called as a witness to give his opinion." Tyson v. State, 87 Fla. 392, 100 So. 254, 255 (Fla. 1924).

The prosecutor made statements which were not inferable from the evidence. She asserted Ms. Weiand should have called 911 since "she practically had it tattooed on her forehead and she called it "on every boyfriend she was ever with" (v18:T1940; Appendix C14). However, there was no evidence that Ms Weiand called 911 on former boyfriends, there was merely the prosecutors questions about such which were denied (v11:T1150-1152). She asserted Ms. Weiand conveniently avoided stating she shot her husband on the second 911 call on the night of the incident (v18:T2002; Appendix C35). However, Ms. Weiand clearly stated in the 911 calls that she had shot her husband and there is no record support for an inference that miscommunication was a matter of convenience to the defense (v20:T2184-2190). The prosecutor alleged Ms. Weiand caused the "SWAT" response by police at a Wisconsin incident by what she told police (v18:T1985; Appendix C16). However, Ms. Weiand told her neighbors she had been abused by Todd and feared he would follow her (v13:T1350, 1359). The neighbors who knew Todd and knew about his weapons called the police (v9:T950; v12:T1267; v13:T1350-1351, 1359; v15:T1617; v16:T1698). There not only was no evidence that

Ms. Weiand caused the SWAT-like response, but the testimony established she tried to calm the situation. In fear of what the police might do to Todd, Ms. Weiand told police he had not threatened her with a weapon that night and he was probably passed out drunk (v9:T951; v10:T1086-1087; v12:T1278, 1285, 1288-1289; v15:T1617). It is improper for a prosecutor to imply the existence of incriminating testimony which was not presented to the jury. Duque v. State, 640 So. 2d 416 (Fla. 2d DCA 1984).

The prosecutor also incorporated impermissible "Golden Rule" argument in her closing:

> Did [Dr. Walker] interview Todd Weiand?
> No.
> Did Todd Weiand get to come in here and take the stand?
> No.
> Did any of you get to meet him?
> No.
> Did anybody get to hear his side of the story?
> No.

(v18:T1988; Appendix C21). See Sims v. State, 602 So. 2d 1253, 1257 (Fla. 1992) (prosecutor improperly made "Golden Rule argument," by suggesting jurors consider what victim might have said had he been able to testify); Bertolotti, 476 So. 2d at 133 ("Golden Rule" arguments placing the jury in the position of the victim are clearly prohibited).

The effect of the prosecutor's statements should not be presumed to be harmless.

> A prosecutor's role in our system of justice, when correctly perceived by a jury, has at least the potential for particular significance being attached by the jury to any expressions of the prosecutor's personal be-

> liefs. That expression in this case involved critical issues in the trial, to wit, the defendant's credibility and intent. Thus, as we have indicated, the question on this regard boils down to whether the evidence of guilt was so overwhelming as to justify a conclusion that defendant was not improperly prejudiced and that the error was harmless.

Singletary v. State, 483 So. 2d 8, 10 (Fla. 2d DCA 1985). Careful scrutiny must be given to a prosecutor's characterizations of a defendant and the defendant's lawful defense. Rosso v. State, 505 So. 2d 611, 613 (Fla. 3d DCA 1987). The burden is on the State, as recipient of error, to show that the prosecutor's improper statements did not contribute to the guilty verdicts. Rosso, 505 So. 2d at 613.

The prejudice aroused by the prosecutor's improper argument denied Ms. Weiand a fair trial. This was a close case. Ms. Weiand was convicted on a lesser charge than the State sought. There was evidence to support an even lesser crime or outright acquittal on the basis of self defense. The verdict also hinged on the credibility of Ms. Weiand and the expert witnesses.

That the defense made no objection to the prosecutor's improper remarks should not foreclose review. In the interests of justice, an appellate court may consider fundamental error that is apparent in the record, despite the lack of objection where "the prejudice to the accused is so highly probable that we are not justified in assuming its nonexistence." Goddard v. State, 196 So. 597, 600 (Fla. 1940), quoting Berger v. State, 295 U.S. 78 (1935). An objection to a prosecutor's remarks that appealed to passion or prejudice is not essential in cases where feelings may easily be

aroused. Owens Corning Fiberglas Corp. v. Morse, 653 So. 2d 409, 411 (Fla. 3d DCA 1995), rev. denied, 662 So. 2d 932 (Fla.1995) (derogatory comments specifically attacking the integrity of opposing counsel such as accusing counsel of "trickery" and "hiding the ball," and arguing counsel "prodded" plaintiff's answers and plaintiff's responses "had to have been told by his attorneys" constitute fundamental error); Rosso, 505 So. 2d 611 (finding fundamental error based on improper comments regarding defendant's use of the insanity defense in both opening statement and closing argument despite objections only to opening remarks).

Individually, elements of the improper argument are fundamental error, and taken as a whole, the cumulative effect of nonobjected to errors clearly amounted to fundamental and reversible error. Pacifico v. State, 642 So. 2d 1178, 1185 (Fla. 1st DCA 1994) (cumulative effect of prosecutorial misconduct during closing argument amounted to fundamental and reversible error); Schubert v. Allstate Ins. Co., 603 So. 2d 554, 555 (Fla. 5th DCA 1992) (the cumulative effect of counsel's arguments which included assertions that plaintiff's doctor "as he usually does" found permanent injury and that plaintiffs' attorney would do "anything to advance the cause" constituted fundamental error); Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984) (prosecutorial misconduct is fundamental error where its sinister influence could not be overcome by rebuke or retraction).

In Fuller v. State, 540 So. 2d 182, 184-185 (Fla. 5th DCA 1989), the prosecutor asserted: the defendant lied; the defendant

was shrewd and cunning; the defendant must be held accountable for his wicked act; and that proper defense counsel strategy was sinister and improper. Although the comments were unobjected to, these inflammatory and impermissible arguments vitiated the fairness of the proceedings and required a new trial. Fuller, 540 So. 2d at 184.

The cumulative effect of the objected to errors raised in the prior issues as well as nonobjected to errors of the closing argument should be considered in determining if substantial rights of Ms. Weiand have been affected. In Pollard v. State, 444 So. 2d 561, 563 (Fla. 2d DCA 1984), the court found the judge prejudicially interjected himself into case, then held:

> The other issues raised by appellant concern matters not objected to at trial. These issues, being the improper use by the prosecutor of a prior recorded statement, improper argument by the prosecutor, and the trial court's remarks during appellant's closing argument, though waived, do have a cumulative effect and the combined weight of these errors should be considered with others to determine if substantial rights of the appellant have been affected.

The cause must be reversed and remanded for a new trial.

ISSUE VI

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION OF SECOND DEGREE MURDER.

Defense counsel moved for a directed verdict of manslaughter (v1:R82, 84; v8:T754-756; v17:1893). Defense counsel specifically asserted "At best the State has proved manslaughter." (v17:T1893). The motions were denied (v1:R82, 84; v8:T756; v17:1894, 1913). Ms.

Weiand was found guilty of second degree murder (v1:R85, 115, 136, 139; v18:T2036-2037; v19:2110). There is insufficient evidence in this case to support the conviction of second degree murder.

"In order to obtain a conviction for second degree murder, the state must prove the defendant killed the decedent with a depraved mind regardless of human life." Roberts v. State, 425 So. 2d 70, 71 (Fla. 2d DCA 1982). "The crime of manslaughter encompasses those situations in which the defendant uses excessive force to defend [her]self." Roberts, 425 So. 2d at 71.

In Andrews v. State, 577 So. 2d 650 (Fla. 1st DCA 1991), Ms. Andrews killed her abusive husband. There was evidence of past abuse and evidence of an earlier abusive episode before the killing. The only witness to the killing was Ms. Andrews. The court found Ms. Andrews' testimony that she stabbed her husband during a fight which he had initiated and while he was choking her not only did not support a conviction of second-degree murder, but despite the lack of footprints near the pickup truck where she stated a portion of the struggle took place, and despite an officer's testimony that he did not recall seeing any physical injuries to Ms. Andrews at the time of her arrest, the State failed to prove beyond a reasonable doubt that she did not act in self-defense.

The actions of Ms. Weiand, after she was attacked by her husband also show that she acted in the heat of passion. She was attacked and choked by her husband who was furious because she returned home late. Ms. Weiand chased him into the bathroom and

hacked a hole through the flimsy hollow core door with kitchen knives. When her husband came out of the bathroom and beat her with a metal rod, driving her into their bedroom. Ms. Weiand dropped a knife, which her husband was not in fear of, and picked up her husband's handgun. Her husband ran into another room where he kept an assault rifle. She fired the gun twice and a shot which went through a door killed him (v7:T683-685, 720-722; v8:T858-863, 893, 897; v9:T985-987; v10:T1037-1038, 1041-1060, 1066-1178; v11:T1198-1201; v13:T1416-1421; v15:T1539, 1555; v16:T1662-1665, 1720-1721, 1728). Expert testimony established he could have died while on a daybed next to his assault rifle or bent over at the door (v7:T685-706, 709-714, 737-739; v14:T1458, 1461-1467, 1473-1475, 1491, 1495). Ms. Weiand was also injured in the incident (v5:T416-417, 424-433, 470-478, 488-489; v6:T543-547; v8:T864-867, 907-908; v12:T1242-1246; v13:T1391-1403, 1407-1408, 1411-1412; v14:T1468-1469). The combination of past abuse, long term depression and post partum depression aggravated by improper medication, and the immediate abuse resulted in Ms. Weiand "losing it", acting by the sudden access of passion with an absence of malice (See the entire record).

In Pierce v. State, 376 So. 2d 417 (Fla. 3d DCA), cert. denied 386 So. 2d 640 (Fla. 1980), the court reduced a conviction of second degree murder to manslaughter where the evidence was undisputed that the death occurred at the culmination of a fight which was started by the deceased and in which the defendant was a reluctant participant. While Pierce was making a phone call from

a booth at a shopping center, he was taunted by the man who had been drinking. When Pierce left the booth, the man continued his taunting. When Pierce attempted to leave, the man hit him in the face with a beer can, which caused a significant injury. The man hit and kicked Pierce several times. Pierce then fought back, got the better of the struggle, and the man retreated behind a van in the center of the parking lot. As Pierce approached him, the man made a sudden movement which Pierce thought was an attempt to secure a weapon. Pierce drew a derringer from his pocket and shot twice, killing the man. The court found that these facts provided no basis for a finding that Pierce acted with a depraved mind.

In Collins v. State, 88 Fla. 578, 102 So. 880, 882 (Fla. 1925), this Court held:

> The law reduces the killing of a person in the heat of passion from murder to manslaughter out of a recognition of the frailty of human nature, of temporary suspension or overthrow of the reason or judgment of the defendant by the sudden access of passion and because in such cases there is an absence of malice. Such a killing is not supposed to proceed from a bad or corrupt heart, but rather from the infirmity of passion which even good men are subject. Passion is the state of mind when it is powerfully acted on and influenced by something external to itself. It is one of the emotions of the mind known as anger, rage sudden resentment, or terror.

Unrebutted facts in this case establish Ms. Weiand acted in the heat of passion and lacked malice. Although the State may have had an alternative theory as to what occurred, it presented no evidence inconsistent with the defense account of events. This Court has a duty to reduce a conviction to its proper degree where

the facts do not support the conviction. Ms. Weiand acted in the heat of passion. The State did not prove the depraved mind necessary for a conviction of second degree murder. The conviction should be reduced to manslaughter.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Appellant respectfully asks this Honorable Court to recede from State v. Bobbitt, 415 So. 2d 724 (Fla. 1982), and rule that a castle doctrine instruction should be given where there is evidence that a defendant acted against an aggressor co-resident while they were in their home. Appellant respectfully asks this Honorable Court to exercise its discretion to review the other issues of this case and to reverse for one or more of the individual errors, reverse for the cumulative effect of all of the errors, or discharge the conviction for second degree murder for insufficient evidence.