IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,211

LABRANT D. DENNIS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI-DADE COUNTY

REPLY BRIEF OF APPELLANT

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

LOUIS CAMPBELL
Assistant Public Defender
Florida Bar No. 833320

CHRISTINA A. SPAULDING
Assistant Public Defender
Florida Bar No. 995320

Counsel for Appellant

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

CASES

FLORIDA STATUTES

ARTICLES & BOOKS

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

INTRODUCTION

In this reply brief, the clerk's record on appeal is cited as "R.", the supplemental record as "S.R.", the transcript of the proceedings as "T.", the appellant's initial brief as "Initial Br." and appellee's answer brief as "Answer Br." With respect to issues not separately addressed in this reply, Appellant relies on his initial brief and does not waive any claims raised therein.

ARGUMENT

II.

DEFENSE COUNSEL DID NOT OPEN THE DOOR TO INADMISSIBLE HEARSAY THAT IMPROPERLY BOLSTERED THE CREDIBILITY OF PROSECUTION WITNESSES OR TO A POLICE OFFICER'S OPINION AS TO APPELLANT'S GUILT

.

The state answers that the admission of a barrage of inferential hearsay that bolstered the credibility of the state's key witness was not error because the defense "opened the door." *See* Answer Br. at 50. The state's argument, however, rests on an erroneous and highly selective reading of the record as well as an overly broad interpretation of "opening the door."[1]

---

[1]For example, the state argued below:

> He challenged the competency of this investigation in opening. He challenged it in cross-examination when he said 'You didn't do this. You didn't do that. You didn't take Joseph Stewart's blood.' All these questions opened

This Court has emphasized that "[t]he concept of 'opening the door' is 'based on considerations of fairness and the truth-seeking function of a trial.'" *Ramirez v. State*, 739 So.2d 568, 580 (Fla. 1999) (quoting *Bozeman v. State*, 698 So.2d 629, 631 (Fla. 4th DCA 1997)). It "allows the admission of otherwise inadmissible testimony to 'qualify, explain, or limit' testimony or evidence previously admitted." *Id.* For example, in *McCrae v. State*, 395 So.2d 1145, 1151 (Fla.1980), defense counsel, through his questions on direct examination, "attempted to mislead the jury" about the gravity of the defendant's prior conviction. The prosecutor was entitled to elicit the nature of the conviction on cross examination in order to "negate the delusive innuendoes of [defense] counsel." *Ramirez*, 739 So.2d at 580 (quoting *McCrae,* 395 So. 2d at 1152).

The record in this case makes clear that "considerations of fairness" did not warrant allowing the state to bolster the testimony of its star witness with "inadmissible and unreliable" inferential hearsay. *See Ramirez,* 739 So. 2d at 580.

Detective Romagni

First, the state's answer omits to mention that Detective Romagni testified on ***direct*** examination that the investigation was "very massive," (T. 4009-10); that it

---

> the door as to why. And the answer is, "Because we know your client committed the crime, and now I am going to tell you the evidence that convinces me of that." The door has been opened, Judge.

(T. 4208)

only focused on Dennis "[b]ecause of the information that was . . . developed . . . after the initial homicide," (T. 4010); and, if additional evidence had appeared after Dennis' arrest, indicating that someone else had committed the crimes, Romagni would have notified both the State Attorney's Office and the defense attorney, as he is legally obligated to do, (T. 4010-11). Romagni also testified that he took statements from Joseph Stewart, Zemoria Wilson, and Bernadette Hardy. (T. 4055).

Consistent with "[t]he proper purposes of cross-examination," defense counsel sought to "to weaken [and] test" Romagni's testimony, *Steinhorst v. State,* 412 So.2d 332, 337 (Fla. 1982), by asking about gaps in the state's evidence and investigative steps – particularly concerning Joseph Stewart – that had not been pursued. Contrary to the state's repeated assertion, defense counsel never asked Romagni "why" he chose to believe Joseph Stewart. Answer Br. at 49, 50, 51.[2] What defense counsel asked, in context, is as follows:

> Q: Approximately how long after these homicides occurred did you find him [Stewart]?
>
> A: Approximately two weeks.
>
> Q: Okay. So for two weeks, after he tells you he knew that these homicides had occurred and he felt that what he disposed of was involved in a homicide, he still didn't call you to say, "Hey, I've got something that may be important here"?
>
> A: He was afraid that he would have been charged.

[2]That misapprehension was corrected below, a few pages after the excerpt cited in the state's brief. (T. 4211)

Q: He was afraid he would be charged with this crime?

A: He was afraid he would be charged with this crime he had nothing to do with.

Q: *When you say he had nothing to do with it, sir, you choose to believe Joseph Stewart; correct*?

A: I chooses *(sic)* to believe that your client duped Joseph Stewart.

(T. 4118) As the record shows, Detective Romagni responded to defense counsel's questions by volunteering excuses for Stewart's behavior, thereby bolstering his credibility. Defense counsel's question, "you choose to believe Joseph Stewart," was merely an attempt to remind the jury that Romagni was taking Stewart's word for it.

There was nothing in defense counsel's questions that created "delusive innuendos" or otherwise misled the jury. *Ramirez, supra*. Detective Romagni's combative response ("I choose to believe your client duped Joseph Stewart") was, if anything, more helpful to the prosecution than to the defense.[3] The prosecution therefore should not have been permitted to *further* bolster Stewart's credibility with inadmissible and unreliable inferential hearsay. *See Thompson v. State,* 615 So. 2d

[3] Romagni's responses to other questions cited in the state's brief were similar. *See* Answer Br. at 49. To the question "it is only from what Mr. Stewart says that you gather it is only one assailant involved here?" Romagni replied "And all the evidence surrounding his statement and other witnesses statements, correct." (T. 4114) At another point, when defense counsel asked whether Stewart's conduct in disposing of the shotgun constituted obstruction of justice, Romagni again volunteered an explanation for Stewart's behavior: "He was not actually hiding the gun to cover his possession of it." Defense counsel again tried to emphasize that Romagni was taking Stewart's word for it: "That's because you want to believe Joseph Stewart; right?" And Romagni responded by vouching further for Stewart's testimony, asserting that Stewart "testified honestly and truthfully, sir." (T. 4115-16)

737, 742 (Fla. 1st DCA 1993) (question "from whom" police got information for arrest warrant did not open door to "what" information the warrant was based on where officer answered fully that he got information from "a lot of sources"); *see also Young v. State,* 25 Fla. L. Weekly D2788 (Fla. 4th DCA Dec. 6, 2000) (door not opened where defense counsel did not mislead jury); *Bozeman*, 698 So. 2d at 631 (defense counsel did not open door where question was not deceptive).

Detective Poitier[4]

The record also belies the state's claim that defense counsel opened the door for Detective Poitier to explain why he believed Dennis was guilty by soliciting Poitier's personal opinion regarding the motives for the murders. On direct examination, Detective Poitier testified that money and valuables were found in the apartment, in Barnes' pocket, and in Lumpkins' purse, thereby suggesting that robbery was not the motive. (T. 3364-66) When defense counsel asked Detective Poitier on cross examination whether he knew for a fact that nothing had been taken from the apartment, Poitier *volunteered* his personal beliefs, responding, "There was a lot of valuables laying around the apartment. There's no way I believe anyone came in there robbed the place." (T. 3374) Defense counsel then asked whether Detective Poitier knew "for a fact" that the assailants were not surprised by Earl Little's arrival at the apartment. (T. 3376) Detective Poitier again responded combatively, "Based on the

[4]Detective Poitier was mistakenly identified as Detective Hellman in appellant's initial brief, at 41, and in the state's answer brief, at 52.

facts in evidence I've experienced in this case, it points to Mr. Dennis there." (T. 3376)

This cross-examination similarly did not give rise to any misleading inferences that could reasonably be construed as opening the door. The trial judge therefore abused his discretion by allowing Detective Poitier to testify, over defense objection, that he believed "the defendant is the person that committed these murders," based on Romagni's conversation with Stewart and "[t]he domestic abuse history with the defendant and Ms. Lumpkins." (T. 3378-79) *See Martinez v. State,* 761 So. 2d 1074, 1079-80 (Fla. 2000) (investigating officer's improper testimony regarding his belief in defendant's guilt was harmful error in circumstantial case in which no physical evidence linked defendant to murders).[5]

The Improper Bolstering of the State's Key Witness, Whose Testimony was Critical to the Case, Was Not Harmless

Relying on *Baird v. State,* 572 So. 2d 904, 908 (Fla. 1990), the state insists that any error was harmless. In *Baird*, this Court held that improper testimony regarding an anonymous tip was harmless, where it was elicited in anticipation of a selective prosecution defense, was not admitted for the truth of the matter, and was brief and

[5]The state suggests this error was not preserved for review because the only objection at trial was on hearsay grounds. Answer Br. at 52. Both grounds are raised on appeal. *See* Initial Br., at 42. Since the Court may "consider both preserved and unpreserved errors in determining whether the preserved error was harmless beyond a reasonable doubt," it may presumably consider that the preserved error (hearsay) was rendered all the more egregious because it *also* constituted an improper expression of belief in the defendant's guilt. *See Martinez,* 761 So. 2d at 1082-83.

isolated. *Id.* at 38-39.

This Court has made clear, however, that the erroneous admission of inferential hearsay is not harmless, even when there is also legitimate evidence to support conviction, when that evidence "bolstered and supported" the state's key witness, whose credibility was the central issue at trial.[6] *See Keen v. State*, 775 So. 2d 263, 276 (Fla. 2000); *see also Pacheco v. State*, 698 So. 2d 593, 595-96 (Fla. 2d DCA 1997) (inferential hearsay that exceeded proper scope of opened door could not be found harmless where it corroborated key state witnesses who had credibility problems).

Not only was Detective Romagni permitted to summarize the state's case against Mr. Dennis through inferential hearsay, *see* Initial Br. at 40-41, he testified specifically that Bernadette Hardy and Zamoria Wilson "corroborated what Joseph Stewart said."[7] (T. 4217) This improperly bolstered Stewart's credibility and Hardy's as well, by implying that her prior statements to police were consistent with her trial testimony. This Court has warned specifically that permitting a law enforcement officer to bolster a witness' testimony by referring to the witness' prior consistent statements poses a "particularly grave" danger that the jury will be improperly influenced. *Rodriguez v. State*, 609 So.2d 493, 499 (Fla.1992); *see also Bradley v.*

---

[6]Even if, as the state asserts, the prosecutor's closing argument does not constitute fundamental error by itself, this Court should consider it in determining whether the preserved errors were harmless beyond a reasonable doubt. *Martinez,* 761 So. 2d at 1082-83.

[7]In light of this assertion, the state's claim that any harm was minimal, because "no details" of Wilson's statements were elicited, Answer Br. at 51, is disingenuous.

State, 26 Fla. L. Weekly S136, S139 (Fla. March 1, 2001)(error to allow one officer to testify to another's prior consistent statement); EHRHARDT, FLORIDA EVIDENCE § 801.8, at 657 (2000 ed.).

As the state apparently concedes, the reference to Zamoria Wilson was particularly improper since she never testified and thus was never subject to cross-examination.[8] *See* Answer Br. at 51. Wilson was clearly identified as Stewart's wife *and* as a friend of Dennis'. (T. 3619, 3625-26) In fact, in closing argument – to rebuff attacks on Stewart's testimony – the prosecutor emphasized that "Zemoria [Wilson] is like family to the defendant . . . and Joseph at that time is her boyfriend." (T. 4872) Wilson's purported corroboration of Stewart – which was never subject to cross-examination – was therefore especially prejudicial. *See Keen*, 775 So. 2d at 273-74 (improper, inferential hearsay that defendant's own brother had incriminated him in murder, thereby bolstering testimony of state's key witness, was especially prejudicial).

The prosecution's case turned almost entirely on Stewart's testimony. Dennis

---

[8]The state suggests that the defense waived this issue by failing to move to strike the reference to Wilson when she was not called to testify. Answer Br. at 50. The Judge's ruling that he would admit the evidence subject to its "being tied up by other witnesses," (T. 4209), erroneously treated the issue as one of conditional relevance. *See generally* EHRHARDT, *supra* § 105.2. The hearsay nature of the testimony could not be "cured," however, by subsequently calling the witnesses to testify. Moreover, defense counsel insisted at the time that this procedure was inadequate and a mistrial required because the prejudice could not be cured by an instruction after the fact. The issue was therefore properly preserved. *See Walker v. State,* 707 So. 2d 300, 314 n. 8 (Fla. 1998) (defense counsel need not request curative instruction where he believes prejudicial effect of evidentiary error is incurable).

had an alibi for the time of the murders, and there was no physical evidence that linked Dennis to the crime or the crime scene. Stewart's testimony that he loaned Dennis his inoperable shotgun, which was used as the murder weapon, was therefore essential to the state's case. There were good reasons for a jury to question Stewart's testimony, however: (1) Stewart owned the murder weapon and had disposed of it; (2) Stewart's story that Dennis, who had supposedly planned the murders carefully to avoid detection, returned a blood-stained gym bag containing the murder weapon and clothes to Stewart to dispose of makes little sense; (3) it took Stewart two months after his initial interview with police to remember that, after returning the gun, Dennis made incriminating statements to him, supposedly confiding, "I just had to do what I had to do and I didn't even go in my car and something like that" (T. 3659, 3675); (4) Stewart also failed to tell authorities about his own alibi witness, Dorothy Davis, until the second interview (T. 3673-74); (5) Davis told her friend, court reporter Vanester Collier, before trial, that she had been mistaken about the date on which she stayed overnight at Stewart's house[9] (T. 2111-12); and (6) while prosecutors introduced a computer printout of Stewart's hours at the Doral, showing that his card had been used to "clock in" at 6:32 on the morning of the murders, the state did not

[9]Collier spoke to Davis after being questioned by the trial judge and subsequently testified she was no longer sure what Davis had said. (T. 4727-28). Collier admitted she told Davis that she (Collier) would retract her testimony and say she knew nothing. (T. 4717)

call any witnesses who worked with Stewart that day to corroborate his testimony.[10]

III.

THE PROSECUTION'S STATEMENTS AND ACTIONS AT TRIAL ESTABLISH THAT IT IMPROPERLY CALLED WATISHA WALLACE FOR THE PRIMARY PURPOSE OF IMPEACHING HER WITH OTHERWISE INADMISSIBLE EVIDENCE THAT WAS EQUIVALENT TO AN ADMISSION OF GUILT BY APPELLANT.

The state has conceded that the fact that Ms. Wallace hired someone to burn her car, which was allegedly used in the crime, was inadmissible as substantive evidence of Dennis' guilt because there was no evidence Dennis was involved in the car burning.[11] (T. 2948, T. 4197-98). Yet, the prosecutors regarded the car burning as "the main crux of this case," and therefore devised a plan before trial to call Wallace, whom they knew to be a hostile witness, for the sole purpose of impeaching her with the car burning evidence, should she say anything conceivably favorable to the defense. (T. 2949, 2951-53, 2956-57)

The only testimony Wallace gave that was relevant to the state's case-in-chief – that she left her Nissan Sentra, which Dennis sometimes drove, parked at a friend's

---

[10]Stewart claimed Dennis called him at work the morning of the murders, and Dennis' cell phone records show a call to the Doral at 9:03 a.m. (S.R. 370) The call was simply to the Doral's main number, however, and Dennis also worked there.

[11]*See Duke v. State*, 106 Fla. 205, 142 So. 886 (1932) (evidence that defendant's father attempted to procure a witness not to testify was inadmissible unless connected to defendant); *accord Ponticelli v. State*, 593 So.2d 483, 489 (Fla. 1991) (threats made against a witness are inadmissible to prove guilt unless the threats are shown to be attributable to the defendant), *judgment vacated on other grounds,* 506 U.S. 802 (1992); *Koon v. State*, 513 So. 2d 1253, 1255 (Fla. 1987) (same).

house the weekend of the murders – was also provided by two other witnesses, and Wallace ultimately did not dispute that Dennis *could* have driven her car while she was out of town. Thus, calling Wallace was clearly a pretext for presenting, in the guise of impeachment, the otherwise inadmissible and highly prejudicial evidence of the car burning.

The State Called Ms. Wallace for the Primary Purpose of Impeaching Her

The state maintains that its impeachment of Wallace was permissible under *Morton v. State,* 689 So. 2d 259, 264 (Fla. 1997), *receded from on other grounds, Rodriguez v. State,* 753 So. 2d 29 (Fla. 2000), because Wallace gave both favorable and unfavorable testimony. Answer Br. at 59. As *Morton* makes clear, however, this is only part of the inquiry in determining whether the prosecution has abused the rule allowing impeachment of its own witnesses, by calling "a witness for the *primary* purpose of placing before the jury . . . impeaching evidence" that would not otherwise be admissible. 689 So. 2d at 263 (emphasis added); EHRHARDT, *supra* §608.2, at 435. The fact that the prosecution may be able to identify some "legitimate purposes" for calling the witness will not excuse an abuse of the rule where, as here, the favorable testimony is inconsequential or cumulative, and it is clear from the record that the prosecution's dominant motive for calling the witness was to impeach her. *See United States v. Hogan,* 763 F. 2d 697, 702-03 (5th Cir. 1985) (impeachment of government's witness was plain error where only "legitimate" evidence witness offered concerned undisputed issues and prosecutor had indicated before trial his

intention to call witness and impeach him), *opinion corrected in part*, 771 F.2d 82 (5th Cir.1985) (error found harmless as to one count), *and affirmed in relevant part*, 779 F.2d 296 (5th Cir.1986).

Cases applying *Morton* and the federal law on which it is based have considered a number of factors in determining whether a witness was called for the primary purpose of impeachment, including: (1) whether the witness' favorable testimony was simply cumulative of other prosecution witnesses;[12] (2) whether the prosecution was surprised by the witness' testimony;[13] (3) whether the witness' testimony was harmful to the state so that the disputed evidence had probative value as impeachment;[14] and (4) whether the prosecution's intentions are otherwise clear from the record.[15] This case has every earmark of improper impeachment.

(1) Every item of "favorable" testimony that the state cites as reason to call Wallace was also supplied by other witnesses:

- Wallace owned a 1992 Nissan Sentra, which Dennis helped pay for. Answer Br. at 58. *Katina Lynn testified Wallace owned the Nissan Sentra, which Dennis sometimes drove and that Dennis "helped . . pay for it" and had a key.*

---

[12]*Hogan*, 763 F.2d at 703; *James v. State*, 765 So.2d 763, 765 (Fla. 1st DCA 2000); *Bowles v. State,* 742 So. 2d 821, 823 (Fla. 4th DCA 1999).

[13]*United States v. Zackson,* 12 F.3d 1178, 1184 (2d Cir. 1993); *United States v. Gomez-Gallardo,* 915 F. 2d 553, 555 (9th Cir. 1990); *Hogan,* 763 F.2d at 702; *James,* 765 So. 2d at 766.

[14]*United States v. Ince,* 21 F. 3d 576, 580-81 (4th Cir. 1994); *James*, 765 So. 2d at 766; *Collins v. State,* 698 So. 2d 1337, 1339-40 (Fla. 1st DCA 1997).

[15]*Zackson,* 12 F.3d at 1184; *Hogan,* 763 F. 2d at 702; *Bowles,* 742 So. 2d at 823.

(T. 4340-41)

- Wallace identified her car in photographs. Answer Br. at 58. *Katina Lynn testified that the tag on Lynn's Nissan was in the back of the window, and the windows were tinted – a description that matched the photographs. (T. 4341)*

- Wallace left town with friends the weekend of April 12 and left her car parked at Sarah Finch's house . Answer Br. at 59. *Tracy Little testified that she met Wallace at Finch's house and that Wallace left her car parked there when the women left for Daytona Beach. (T. 3426, 3429)*

It was undisputed that Wallace left her car at Finch's house over the weekend that the homicides occurred and that Dennis knew the car was there; another state witness (Lynn) testified that Dennis had a key to Wallace's car. Wallace's testimony therefore added nothing to the state's case. *See Hogan*, 763 F.2d at 703 (only testimony favorable to prosecution was as to undisputed issues); *James,* 765 So. 2d at 765 (witness did not testify to any substantive matter in controversy that was not also testified to by other witnesses); *Bowles,* 742 So. 2d at 823 (witness' testimony was either unfavorable to state or cumulative of other witnesses).

(2) The prosecution was not surprised by Wallace's testimony. While surprise and damage to the calling party are no longer prerequisites to impeaching one's own witness, the absence of these factors is relevant to determining whether the witness has been called as pretext for impeachment. *Morton,* 689 So. 2d at 264.

In this case, the prosecution argued expressly before trial that Ms. Wallace "is his [Dennis'] girlfriend, and she's claiming he didn't use the car, and she wasn't in town, so how would she have known anyway? She's protecting him and lying for him." (T. 2949) The prosecutor explained that the car burning episode would be

admissible as impeachment, because "the fact that she paid someone to burn the car that is used in the killings, what could show more bias by a witness who comes in here to try and help the defendant than that?" (T. 2953)

Despite (or more accurately, because of) the expectation that Wallace would "try and help the defendant" by "lying for him" (T. 2949, 2953), she was called as a prosecution witness. After a few preliminary questions,[16] the prosecutor elicited the very testimony she had earlier characterized as a lie:

> Q. Could the defendant have driven your car while you were away that weekend?
>
> A. No.

(T. 3576) The prosecution immediately announced its intention to impeach Wallace with evidence of the car burning. (T. 3576-77)

Record evidence such as this, establishing that the prosecution fully expected the witness to give untruthful testimony, suggests strongly that the state's "primary purpose" in calling the witness was to impeach her. *See, e.g., Zackson,* 12 F.3d at 1184 (finding impeachment was "primary purpose" where prosecutor stated before trial he expected witness to lie); *Gomez-Gallardo,* 915 F. 2d at 555 (same); *Hogan,* 763 F.2d at 702 (same).

(3) Wallace's testimony was not damaging to the state. The testimony that

[16]Most of these were also devoted to establishing Wallace's bias in favor of Dennis. (T. 3567-68, 3574)

purportedly invited the impeachment was not even affirmatively harmful to the state, further demonstrating that calling Wallace was "a mere subterfuge to get before the jury . . . evidence which is otherwise inadmissible . . ." *See Ince,* 21 F. 3d at 580-81. Indeed, at side bar the trial judge asked, "What I don't understand, how did this particular question prompt this [the impeachment]?" (T. 3577) The prosecutors responded that Wallace's answer that Dennis could not have driven her car while she was gone was "was completely contrary to our case" and "incredible" and the state was therefore entitled to show her "bias." (T. 3577) The trial judge suggested that more questions should be asked before Wallace was impeached before the jury. (T. 3578)

In the subsequent voir dire conducted outside the presence of the jury, Wallace explained that she did not think Dennis could have driven her car because he did not have a key. (T. 3582) She conceded, however, that he could have made a copy on one of the occasions he borrowed the car. (T. 3583) Wallace then answered "no" to the question "As far as you know there were no other set of keys to your car?" (T. 3584) Despite these equivocal responses, the prosecution pounced, insisting that the car burning episode constituted "conclusive evidence . . . that there was at least one other key to the car; therefore, she now has been established to be lying under oath." (T. 3584)

The problem with this theory is that the car burning episode occurred in June 1996 (T. 3798) and did not necessarily have any bearing on how many keys there

were in April 1996, at the time of the murders or who had them. Moreover, by conceding that Dennis could have copied the keys, Wallace's testimony allowed the possibility that Dennis could have driven her car after all. It was undisputed that the car was parked at Sarah Finch's house over the weekend and that Dennis knew it was there. Consequently, Wallace's subjective belief that Dennis could not have used her car, was not even sufficiently damaging to the state to warrant impeachment.[17] *See Ince,* 21 F. 3d at 581 (evidence attacking witness' credibility had no probative value where her testimony did not damage government's case); *accord James*, 765 So. 2d at 766; *Collins,* 698 So. 2d at 1339-40 (prosecutor called defendant's wife "solely to procure an answer regarding an 'irrelevant piece of information'" in order to introduce as impeachment otherwise inadmissible and highly prejudicial evidence).

(4) **The prosecution acknowledged that its primary purpose in calling Wallace was to impeach her**. Finally, "[i]f any doubt remained concerning the government's motive," for calling Wallace, "it was dispelled by" the prosecutor's own "candid admission[s]" that she would call Wallace in order to impeach her. *See Zackson,* 12 F.3d at 1184. The prosecutors announced before trial that they intended to call Wallace as their witness and "bring . . . up" the car burning incident on direct examination if Wallace "says something that is helpful to the defendant." (T. 2951-

[17]The state's contention that the car burning episode would "have helped the jury evaluate [Wallace's] credibility as to her claim that Dennis could not have used her car while she was out of town," or "the credibility of her insistence that Dennis had no key to her car," Answer Br. at 59-60, is therefore specious.

53) As noted above, the prosecutors made clear at the same time that they fully expected Wallace would "try and help the defendant" by "lying for him." (T. 2949, 2953) The prosecutor characterized the car burning incident as "important and essential" to the state's case because "[t]he car is used in the murder" and "[h]is [Dennis'] ex-girlfriend or girlfriend who visits him in jail, who claims that she has a baby by him while he's in jail, who he is supposedly supporting her children, she goes out and burns the car and tells the guy that burns it, 'This car was used in the U.M. killings.' That doesn't go to show her bias when she is trying to protect him and lied for him? That is the main crux of this case." (T. 2956-57).

During the trial, as noted above, the prosecutor deliberately elicited Wallace's opinion that Dennis could not have used her car the weekend of the murders, then immediately sought to impeach Wallace. At the subsequent side bar, the prosecutors acknowledged that they had carefully choreographed their effort to introduce the impeachment evidence, assuring the trial court, "we waited very carefully until we were sure the door was open to the testimony." (T. 3577) And "[w]e waited to make sure she would give and [*sic*] obviously false answer to establish -- to open the door for us to show her bias, which is what this shows." (T. 3581)

Thus, the prosecutors' own comments before and during the trial establish that their primary purpose in calling Wallace was to impeach her. *See Hogan,* 763 F. 2d at 702 (government's "primary purpose" to impeach witness clear where prosecutors announced before trial they expected witness to be hostile and intended to impeach

him); *accord Bowles,* 742 So. 2d at 823.

***

There is simply "no evidentiary basis in the record to support any inference except that the prosecution called" Wallace "because it wished to put" the car burning episode "before the jury . . . 'in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence--or, if it didn't miss it, would ignore it.'" *James*, 765 So.2d at 766.

The Probative Value of the Car Burning Episode Was Vastly Outweighed by the Danger of Unfair Prejudice and Was Not Cured by the Court's Instruction

Despite the clarity of the prosecutors' intentions,[18] the state maintains that the trial court did not abuse its discretion in concluding that the probative value of the evidence outweighed the danger of unfair prejudice, which "could be dealt with by jury instruction." Answer Br. at 60. "[I]mpeachment evidence has no probative value," however, if the testimony it is offered to refute "does no damage" to the state's case. *See Ince,* 21 F. 3d at 581; *Bowles*, 742 So. 2d at 823-24. As discussed above, Wallace's testimony did not damage the state's case. The car burning episode therefore had no probative value whatsoever as true impeachment evidence.

Even setting aside the fact that there was nothing in Wallace's testimony that

[18]*Morton* suggests that the section 90.403 balancing test applies when the motives of the calling party are "not so clear." 689 So. 2d at 263. Consequently, this Court may not need to reach that issue in this case, given the unequivocal evidence that the prosecution's "primary purpose" in calling Wallace was to impeach her with the car burning episode.

warranted impeachment, the car burning episode still had little probative value. The state's theory is that Wallace's "willingness to destroy potential evidence" to protect Dennis is probative of her bias. Answer Br. at 60. At trial, the prosecutor elicited that Wallace had been present in the court room when the importance of the car was discussed and then arranged for it to be burned when it was returned to her. (T. 3592)

Incredibly, since the state's theory of relevance depended entirely on Wallace's purported understanding that the car was important to the state's case, the prosecution ***objected*** when defense counsel asked Wallace if she knew whether any evidence had been found in the car, claiming the question called for hearsay. (T. 3609) Of course the evidence was not hearsay since it would have come in only to show Wallace's state of mind — which the prosecution had made a material issue in the case by asserting Wallace was biased. *See* EHRHARDT, *supra* § 801.2, at 635 & n. 18. The trial court nevertheless sustained the state's objection. (T. 3609)

In fact, the prosecution had announced in open court, shortly after the car was returned to Wallace, that no evidence was found in it. (T. 108-9) Although the state is correct that witnesses testified during the trial that no evidence was found in Wallace's car, Answer Br. at 56, the jury never learned whether ***Wallace*** was aware of that fact. Because the impeachment evidence was materially misleading with respect to Wallace's state of mind, its probative value was even more dubious, and it potential for unfair prejudice even greater.

The record shows, moreover, another motive for Wallace's attempted insurance

fraud: On the same day that the attorneys discussed the importance of Wallace's car and the testing underway on it, they also announced that the county was pursuing a forfeiture action because the car was used in the commission of a felony. (T. 42) Wallace may therefore have been afraid that she was about to lose the entire value of her car because of its purported role in the crime.

Finally, the state suggests that, apart from bias, the car burning incident was relevant and admissible to impeach Wallace as "a conviction involving dishonesty" under section 90.610, Florida Statutes (1997). Answer Br. at 59. In that case, however, the state would have been entitled to establish, at most, the fact of Wallace's conviction for insurance fraud, not to elicit any of the details of the crime. *See* EHRHARDT, *supra* § 610.6.

Against the minimal probative value of the car burning episode, was a tremendous "danger of unfair prejudice, confusion of issues [and] misleading the jury." *See*§ 90.403, Fla. Stat. (1997). As noted in the initial brief, at 55-56, the state called two additional witnesses to testify about their investigation of the car burning, in addition to questioning Detective Romagni about it, introduced four photos of the burned out car, (S.R. 267, 269, 271, 273), and argued in closing that Wallace must have been trying to hide something by burning the car, thereby making the improperly-admitted evidence a feature of the case.

The trial court's cautionary instruction[19] was completely ineffectual because it failed to advise the jury that it could not consider the car burning as substantive evidence of Dennis' guilt with respect to the murders; it suggested that the only reason the evidence should not be considered was that Dennis had not been charged with the offense, not because — as the state conceded — there was no evidence whatsoever to connect him to the car burning; and, it failed to guard against the devastating implication that Dennis' girlfriend must have *known* that he used her car to commit the murders. *See* Initial Br. at 63-64.

Wallace's putative belief that Dennis used her car in the homicides was therefore likely to carry considerable weight with the jury in evaluating the state's otherwise problematic evidence as to whether Dennis used Wallace's car to lay in wait for Barnes and Lumpkins and then follow them home. The car burning evidence also tended to neutralize the exculpatory fact that not a shred of forensic evidence had been found in the car. The improper impeachment evidence was therefore particularly damning when "used prejudicially as substantive evidence" to establish that Dennis used Wallace's car to commit the crimes, that Wallace knew it, and that she burned the car in an effort to hide inculpatory evidence. *See Morton,* 689 So. 2d at 263.

---

[19]The instruction was as follows: "This witness . . . may eluded [*sic* - allude] to certain facts in his testimony relating to the burning and destruction of a certain automobile, which facts may constitute a crime. That crime, if any, however has not been charged in the crimes in this case. Therefore, you shall not infer from the testimony of this witness any guilt or responsibility whatsoever on the part of the defendant in this case, Mr. Labrant Dennis for that act." (T. 3588, 3796, 3839).

The prosecutor sought to raise precisely those inferences in closing argument:

> Watisha who says that the car was in the exact spot and Watisha who a few weeks after getting that car back from the police went out and burned it. The car used in this homicide she burned it and she plead guilty to burning it [Defense request for sidebar denied] By the way going back to Watisha. She said that she and the defendant were just friends and yet she told you that when he was arrested he was undressed, in his underwear, in her bed. ***What is she trying to hide here.***

(T. 4869) The clear implication of this is that Wallace must have *known* – presumably from Dennis' own lips, given their intimate relationship[20] – that he had committed the murders. Thus, used improperly as substantive evidence, the car burning was tantamount to an admission of guilt by Dennis.

Under these circumstances, defense counsel was correct that the danger of unfair prejudice was too great to be cured by instruction. (T. 2991) *See Ince*, 21 F.3d at 581 (prejudicial impact of improper impeachment "often substantially outweighs its probative value for impeachment purposes because the jury may ignore the judge's limiting instructions and consider the 'impeachment' testimony for substantive purposes" particularly where improper impeachment consists of an admission of guilt by the defendant); *see also James,* 765 So. 2d at 766 (finding cautionary instruction inadequate to cure prejudice of improper impeachment evidence); *Bowles*, 742 So. 2d at 824 (same).

Because Wallace's "so-called 'impeachment' testimony was both highly

---

[20]The prosecution also elicited from Wallace that Dennis was arrested in her bed, in his underwear, and that she continued to visit him in jail as often as she could (T. 3574, 3588-89).

prejudicial and devoid of probative value as impeachment evidence, the trial judge should have recognized the Government's tactic for what it was – an attempt to circumvent" the rules of evidence "and to infect the jury with otherwise inadmissible evidence . . ." *Ince*, 21 F.3d at 582. By ignoring well-established precedent prohibiting such tactics, the trial judge abused his discretion. *Id.*

The State Has Not Demonstrated that the Error was Harmless Beyond a Reasonable Doubt

The state asserts that this error was harmless and lists essentially every item of incriminating evidence introduced at trial. Answer Br. at 61-62. This Court has cautioned repeatedly, however, that the correct inquiry in assessing the harmfulness of a trial error is not whether there is sufficient or even overwhelming evidence of guilt, but rather how the error could have affected the trier-of-fact. *State v. DiGuilio*, 491 So.2d 1129, 1139 (Fla. 1986); *accord Goodwin v. State,* 751 So. 2d 537, 541 (Fla. 1999); *State v. Lee,* 531 So.2d 133,136-137 (Fla. 1988).

This was a contested case, in which the defendant presented an alibi, and there was no physical evidence whatsoever linking him to the crime. (T. 4630, 4641-44, 4646) The only evidence that did link Dennis directly to the crime came from Joseph Stewart, but – as discussed in the preceding section – there were good reasons to question Stewart's testimony.

Moreover, much about the state's theory of the case simply did not make sense. Dennis, who is 5'7" tall and 175 pounds, supposedly chose to confront Marlin Barnes, a six-foot, 228-pound linebacker for the University of Miami football team, at the

apartment he shared with two other football players, in the early morning hours.[21] (T. 3096, 3148, 4059, 4435) Dennis, allegedly, was armed only with a nonworking shotgun that was used as a club. Yet, Dennis did not have a single scratch or bruise on his body, which was photographed by police on the day of the homicides. (T. 4043, 4146) Despite the extremely bloody crime scene, not one drop of blood or other evidence was found in Wallace's car – which Dennis supposedly used to commit the crime. While Dennis purportedly planned the murders carefully to avoid detection, he also allegedly returned the blood-stained gym bag containing the battered shotgun and clothes to Joseph Stewart, with whom he was only casually acquainted, for Stewart to dispose of them.

This was a case, in short, in which the jury could have found reasonable doubt. Any such doubts would likely be dispelled, however, by the improper impeachment evidence of the car burning. The state's attempt on appeal to characterize the car burning evidence as insignificant is a stark reversal from the prosecutors' insistence at trial that evidence of the car burning was not only "important and essential" but the "main crux of this case." (T. 2956-57) The trial prosecutor's view of the evidence is the more accurate since, as discussed above, the car burning raised a powerful, improper inference that Dennis had admitted his guilt to Wallace. If Dennis' own girlfriend was convinced of his guilt – why else would she burn the car? – then why

[21]There was no evidence that Dennis knew or could have known that Barnes' roommates would not be there.

should the jury harbor any doubts?[22] Under these circumstances, the Court cannot say that there is no reasonable possibility that the error contributed to the verdict. *See Gore v. State,* 719 So. 2d 1197, 11202-03 (Fla. 1998) (repeated instances of prosecutorial misconduct, including improper impeachment with collateral crimes evidence was not harmless where there was no physical evidence directly linking defendant to murder, defendant did not confess, and state's case was circumstantial); *Green v. State,* 688 So. 2d 301, 307 (Fla. 1996) (erroneous impeachment of defense witness and improper introduction of defendant's clothing not harmless where no physical evidence linked defendant to crime and state's case hinged primarily on testimony of witness of dubious credibility);*Ellis v. State,* 622 So. 2d 991, 998 (Fla. 1993) (improper admission of witness' prior inconsistent statement as substantive evidence was not harmless where it contained alleged confession by defendant that could have dispelled reasonable doubts jury might otherwise have entertained).

Finally, even if the Court were to find that the improper impeachment evidence was not harmful by itself, it was harmful when considered along with the improper bolstering of Joseph Stewart's testimony, the improper expressions of belief in Dennis' guilt, and the suggestive identification of Wallace's car. *See Stoll v. State,* 762 So. 2d 870, 877-78 (Fla. 2000) (combined effect of improper rebuttal evidence

---

[22]The improper evidence also bolstered the state's otherwise weak evidence that Dennis' actually used Wallace's car, which was vital to the state's theory that the crimes were carefully planned to avoid detection, establishing premeditation and CCP. *See* IX, X and XII, *infra*.

and victim's hearsay statements not harmless); *Martinez,* 761 So. 2d at 1082-83 (cumulative effect of officer's improper expression of belief in defendant's guilt and improper closing argument were not harmless in largely circumstantial case where no physical evidence linked defendant to crime and case turned on interpretation of defendant's ambiguously inculpatory statements on surveillance tape); *Ruiz v. State,* 743 So. 2d 1, 7 (Fla. 1999) (cumulative effect of prosecutorial misconduct required reversal).

IV.

THIS COURT HAS ALREADY APPLIED THE DUE PROCESS PROHIBITION ON SUGGESTIVE IDENTIFICATION PROCEDURES TO THE POSITIVE IDENTIFICATION OF A SPECIFIC VEHICLE.

The state asserts that there is no authority for applying to automobiles and other physical things the due process right established by *Stovall v. Denno*, 388 U.S. 293, 301-2 (1967) and *Neil v. Biggers*, 409 U.S. 188, 196 (1972), to exclude identification testimony resulting from unnecessarily suggestive procedures. Answer Br. at 62-63). In fact, however, there is precedent from this Court for applying the requirements of *Biggers* to the identification of a vehicle. In *Pittman v. State*, 646 So.2 d 167 (Fla. 1994), which was cited in the initial brief but was apparently overlooked by the state, the defense sought to suppress the identification of a wrecker. One of the identification witnesses was taken by the police to see the defendant's wrecker itself, and another witness identified it from a photo-pack that included photos of the defendant's wrecker only. *Id.* at 171. This Court applied *Biggers* but held that, on the

facts of the case, the identifications were not unduly suggestive. *Id.* The applicability of the *Biggers* test was squarely before this Court in *Pittman* since the state raised it in its answer brief, and the issue was resolved against the state. *See* Answer Brief of Appellee, *Pittman v. State*, case no. 78,605, at 42.

Moreover, the positive eyewitness identification of a specific vehicle, to the exclusion of all others, ("It was the car I saw that night,"(T. 3467)), like the positive identification of a particular person, has greater probative value and greater impact on the jury than a mere description of physical characteristics that could be shared by many others. Applying *Biggers* in this context, as the Court has already done in *Pittman*, simply signals that, if the prosecution wishes to benefit from the greater impact of testimony positively identifying a particular vehicle, it must avoid improperly suggestive identification techniques.

The state also suggests that the identification was reliable, pointing out that Ms. El-Djeije was shown photos of Mr. Dennis's Mazda and stated that it was not the car she had seen. Answer Br. at 63-64. The photo of Mr. Dennis's car, however, shows a vehicle with the word "Mazda" plainly visible on the back. (S.R. 253) Ms. El-Djeije was sure she had seen a Nissan on the night in question, because she recognized the Nissan symbol. (T. 3463-64) Thus, as Ms. El-Djeije explained to the police, since the car in the photo was a Mazda, not a Nissan, it could not be the vehicle she had seen. (T. 3466-67, 3547). Ms. El-Djeiji's identification was unreliable precisely because she was never shown photos of any cars that actually matched her original

description, which differed significantly from Wallace's car. Initial Br. at 69-70.

Finally, the state suggests that even if Ms. El-Djeije could not reliably identify the car, allowing her identification testimony was harmless because there was other evidence which, together with Ms. El-Djeije's testimony that she saw a suspicious black man standing next to a gray Nissan, indicated that Mr. Dennis used Ms. Wallace's Nissan on the night in question. Answer Br at 64-65. This is inconsistent with the position taken by the state below. The prosecutor informed the court that the identification testimony was in fact "very significant" (T. 728), explaining that it confirmed Joseph Stewart's statement that the defendant told him he had not used his own car (T. 729-30). Without Ms. El-Djeije's testimony that the car in the photo was ***the*** car she saw that night, the fact that she had observed a gray Nissan, which, as she described it to police, did not match the Nissan belonging to Ms. Wallace, would have had so little probative value as to be irrelevant. The state's assertion to the contrary is based on the erroneous claim that Ms. El-Djeije reported seeing a ***1992*** Nissan – like Ms. Wallace's – when, in fact, she reported seeing a ***1986 or 1987*** Nissan. (T. 3469, 4095)

The state's theory that Dennis used Wallace's car to avoid detection, slashed the Explorer's tires, and lay in wait for Barnes and Lumpkins outside Club Salvation, depended on El-Djeije's identification of Wallace's car. This theory was, in turn, critical to find premeditation and, even more clearly, to find the CCP aggravator at the penalty phase.

VII.

EVIDENCE OF THE DEFENDANT'S JEALOUS CHARACTER WAS NOT ADMISSIBLE ON ANY THEORY.

The state's contention that Katina Lynn's testimony was not impermissible character trait evidence flies in the face of the trial judge's unambiguous explanation that "jealousy" is "one of the traits that has been brought out" and "I believe if he is a jealous person, it would be pertinent for this person to know. I'm going to allow it." (T. 4338-39) The violation of section 90.404(1), Florida Statutes, prohibiting introduction of "[e]vidence of a person's character or a trait of character . . . to prove action in conformity with it on a particular occasion," could not be clearer.

Contrary to the state's argument, Answer Br., at 72-73, the evidence was not offered and would not be admissible under section 90.404(2) as similar fact evidence. As the state essentially concedes, *see* Answer Br. at 73, Lynn did not even testify during the guilt/innocence phase to any specific acts, only to Dennis' purported jealousy of her "main boyfriend," Marlin McGhee. Finally, unlike in *Salamanca v. State,* 745 So. 2d 502, 504 (Fla. 3d DCA 1999), on which the state relies, the prosecution did not include this evidence in its pre-trial notice of intent to rely on evidence of other crimes, wrongs or acts. (R. 1296-99)

VIII.

THE GRUESOME AUTOPSY PHOTOS AT ISSUE ON APPEAL WERE NOT RELEVANT TO ANY DISPUTED ISSUE IN THE CASE.

The state contends that the trial judge did not abuse his discretion in admitting numerous, gruesome autopsy photos, because the photos were relevant to establish identity and premeditation where the defense "had raised an issue about the number of assailants and the absence of blood or injuries on [the defendant] or in his car." Answer Br. at 74. While the issues of identity and premeditation were in dispute, the objectionable photographs were not relevant to resolve these or any other disputed issue in the case. Indeed, with respect to the number of assailants and the likelihood of blood on the assailant, Dr. Gulino's testimony was *favorable* to the defense, and did not in any way involve the objectionable photos. (T. 4459-60) Similarly, Dr. Gulino candidly answered, without any reference to the disputed photos, that he could not tell how many assailants there were. (T. 4457-58)

Appellee further contends that the medical examiner used these photographs "to identify the murder weapon and to illustrate the circumstances of the victims' death, the extent of their injuries and the amount of the forced *(sic)*used." Answer Br. at 74. With respect to these matters, however, the 36 other, less gruesome, autopsy photographs were more than "adequate to support the State's contentions." *Pangburn v. State,* 661 So. 2d 1182, 1187-88 (Fla. 1995). For example, Dr. Gulino used Exhibits 177, 184, 190, 196, 206, and 210 to match patterns on the victims' injuries

to specific parts of the shotgun. (T. 4415, 4423, 4427-28, 4436, 4444-45). With respect to the disputed photographs, however, Dr. Gulino opined merely that the injuries depicted in Exhibit 189 were "consistent with" the victim having been beaten or struck with the shotgun.[23] (T. 4420) While Dr. Gulino testified that the injuries depicted in Exhibits 187 and 193 would require "[a] large amount of force," (T. 4418, 4421), it was undisputed that the amount of force used was great and the injuries severe.

The probative value of the seven disputed photographs was therefore minimal at best. At the same time, the content of the photos was "so inflammatory as to create an undue prejudice in the minds of the jury and [distract] them from a fair and unimpassioned consideration of the evidence." *Czubak v. State*, 570 So.2d 925, 928 (Fla. 1990) (quoting *Leach v. State*, 132 So.2d 329, 331-32 (Fla.1961)). Four of the photos showed Ms. Lumpkins' skull with the skin peeled back to expose the underlying tissue. (S.R. 439 (Ex. 188); S.R. 441 (Ex. 189); S.R. 447 (Ex. 192); S.R. 449 (Ex.193)). One photo showed the skin and tissue peeled away from Ms. Lumpkins' back. (S.R. 433 (Ex. 185)). Two additional photos showed the inside of the victims' heads, after the tops of their skulls had been sawed off and their brains removed. (S.R. 437 (Ex. 187); and S.R. 459 (Ex. 198)). The photos were projected,

[23]Defense counsel made clear that he was not disputing that the shotgun was, in fact, the murder weapon, but merely eliciting that another weapon, such as a tire iron, could have inflicted injuries of the same severity. (T. 4466) This was consistent with the defense contention that it would make little sense for Mr. Dennis to borrow a non-working shotgun to use as a club. (T. 4898-99, 4909-10)

in a power point presentation, onto a ten-foot screen in the court room. (T. 635, 4413)

In these circumstances, the trial judge abused his discretion in concluding that the marginal relevance of these photographs was not substantially outweighed by the danger of unfair prejudice. *See Hoffert v. State*, 559 So.2d 1246, 1249 (Fla. 4th DCA 1990) (danger of unfair prejudice"far outweighed the probative value" of photograph that "depicted the internal portion of the victim's head after an incision had been made from behind the ears to the top of the head, with the scalp rolled away revealing the flesh which underlies the hair and overlies the skull."), *review denied,* 570 So. 2d 1306 (Fla. 1990).

IX, X AND XII

THE IMPROPER EVIDENCE CONCERNING WALLACE'S CAR TAINTED THE CONSIDERATION OF AGGRAVATING AND MITIGATING CIRCUMSTANCES AT THE PENALTY PHASE AND REQUIRES A NEW SENTENCING PROCEEDING.

The trial court's finding of the CCP aggravating circumstance rested heavily on the state's evidence that Dennis borrowed Wallace's car as part of an elaborate scheme to avoid detection. (R. 3259-3260) That evidence, however, is irreparably tainted by both (1) the improper introduction of the car burning incident, which bolstered the state's otherwise weak evidence that Dennis had in fact used Wallace's car to commit the murders and (2) the improperly suggestive identification of Wallace's car by the parking lot attendant, Ms. El-Djeije. Those errors, either singly or together, even if not harmful at the guilt phase, were certainly harmful at the penalty phase. *See, e.g., Lawrence v. State,* 614 So. 2d 1092, 1096-97 (Fla. 1993)

(erroneous admission of collateral crimes evidence harmless as to guilt/innocence phase but not as to penalty phase).

The state's theory that Dennis stalked Lumpkins and Barnes, lay in wait for them outside Club Salvation, and slashed the Explorer's tires, all depend entirely on El-Djeije's identification of Wallace's car. Otherwise, there was no evidence placing Dennis near the club at that time. Even if El-Djeije's identification was admissible, the jury could have had doubts about it, given the differences between her original description and Wallace's car and the suggestive nature of the identification. The evidence of the car burning, however, would have dispelled any doubts regarding the identification. The evidence of planning – tainted by this improperly admitted evidence – was also the basis on which the prosecution urged the jury to reject the extreme emotional disturbance mitigating circumstance (T. 5379), and on which the trial court relied in rejecting that mitigator (R. 3262). These errors therefore require reversal for a new sentencing proceeding before a jury.

Appellant also notes that the state's answer embroiders significantly on the trial court's rationale for finding the CCP aggravator. First, the answer brief states incorrectly that Dennis drove Lumpkins to Club Salvation the night of the murder. Answer Br. at 77. While Katina Lynn claimed that Dennis told her this while he was supposedly "trying to square away his alibi," it is demonstrably false. (T. 4347, 4349) Dennis told police he brought Lumpkins to a prearranged spot where she was picked up by her friend Marissa Roberts. (T. 269, 4028-29) Detective Romagni testified in

a pre-trial proceeding that Roberts corroborated Dennis' statement. (T. 269-70)

Second, the answer constructs a hypothetical series of events based on a corrected chronology, asserting that Dennis slashed the tires of the Explorer, waited for the wrecker to arrive, then later accosted Barnes at his apartment. Answer Br. at 77. The trial court, however, found that Dennis cleverly slashed the Explorer's tires which "enabled the Defendant to arrive at the apartment ahead of the victims and wait for the victims' arrival." (R. 3260) This finding was contrary to the evidence, which established that the mysterious silver Nissan was still at the Amoco station near Club Salvation at 5 a.m., the same time the Explorer was being loaded onto the wrecker. (T. 3493-94, 3502-3, 4083) This erroneous premise, and the findings based on Dennis' purported use of Wallace's car, comprise three of the five grounds cited for the trial court's finding of CCP. (R. 3260)

CONCLUSION

For the foregoing reasons, appellant's convictions and sentences must be reversed and the case remanded for a new trial.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

By: _____
CHRISTINA A. SPAULDING
Assistant Public Defender
Florida Bar No. 995320

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Assistant Attorney General CURTIS M. FRENCH, Office of the Attorney General, PL-01 The Capitol, Tallahassee, Florida 32399-1050, this _____ day of March, 2001.

_____
CHRISTINA A. SPAULDING
Assistant Public Defender
Florida Bar No. 995320