IN THE SUPREME COURT OF FLORIDA

GERALD D. MURRAY,

Appellant,

CASE NO. 95,470

v.

STATE OF FLORIDA,

Appellee.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Appellant, GERALD D. MURRAY, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The facts surrounding this murder are essentially set forth in Taylor v. State, 630 So.2d 1038 (Fla. 1993), a case involving the direct appeal of Murray's co-defendant.

On September 15, 1990, between 11:00 and 11:30 p.m., the victim, fifty-nine year old Alice Vest, returned to her home after going shopping and eating pizza with a friend. (V. 28 468-469). Around midnight, Murray and Taylor, the co-perpetrator, were dropped off near the victim's home. (V. 30 735).

Juanita White testified that she lived "about two miles" from the victim's mobile home. (Vol. 30 744-745). She had known appellant for about ten years and she also knew Taylor. (V. 30 747). On September 15, the night of the murder, at about 12:40 a.m., her dog started barking (V. 30 746, 747-748, 749). Her dog is half German Shepard and half Timber Wolf. She told the dog to "go get them". (V. 30 748). The dog went after two people in the barn. She identified the two as Steven Taylor and appellant. (V. 30 748). They came out of the barn "right across in front of the flood lights", so she had no problem seeing who they were. (V. 30 749).

The next day, neighbors, went to check on Ms. Vest. (V. 28 480). Seeing that the home had been burglarized they called the police and went into the home and discovered the victim's body. (V. 484). Various pieces of jewelry, including a British sovereign, were missing. (V 30 820). The point of entry was the kitchen window. (V 30 820).(V. 39 2055). The phone line had been cut.

The deputy chief medical examiner testified that the cause of death was ligature strangulation. (V. 29 615). The victim had also

been stabbed approximately twenty four times. (V. 29 660). Most of the stab wounds were made with a knife while the remaining stab wounds on her back were probably made with a pair of scissors. (V. 29 651). Four of these stabs wounds would have been fatal. (V. 29 660). She was sexually assaulted both vaginally and anally. (V. 29 651). Her lower jaw had multiple fractures and she received several blows to her head. (V. 29 639). The examiner testified that the fractures of the victim's jaw could have resulted from being struck with a broken bottle because he recovered pieces of glass from the victim's body and that contusions to the victim's head were consistent with being struck by a metal bar and candlestick also found at the scene. (V. 29 647-648). The victim's breasts were bruised. (V. 29 614,641). The victim became unconscious or semi-conscious quickly but she was alive when stabbed and strangled.(V. 29 661,655). The victim was stabbed first and then strangled. She was strangled first with a belt. (V. 29 650). And two cords were still around her neck. (V. 29 614) In the medical examiner opinion the number, different types of injuries as well as the number of instruments used, was consistent with there being more than one perpetrator. (V. 29 663)

In January 1991, Taylor's former roommate discovered a small plastic bag buried behind his duplex. The bag contained the pieces of jewelry taken from the victim. (V 30 820). A month later, in February, Taylor and Murray along with his brother and another friend visited the duplex. (V. 30 757). The friend testified that Taylor went into the backyard and returned a few minutes later with dirty hands. (V. 30 815)

Murray escaped from jail with Anthony Smith. (V 35 1602-1603). After reaching Lake City, Murray told Smith with that he participated in the murder. (V. 36 1643-1645). Murray told him that he held the knife while Taylor sexually battered the victim. (V. 36 1645). Murray said he made the victim perform oral sex on him. (V. 36 1646). Taylor stabbed the victim but she was not dead so they got a cord and they both strangled her. (1647).

Murray was indicted by a grand jury for first-degree murder, burglary of a dwelling with an assault and sexual battery. (V. 1 1-3). At trial, the evidence showed that Murray's hair microscopically matched the hair recovered from the victim's nude body. (V. 32 1048). Furthermore, DNA test were conducted on hair found on a nightie in the victim's bathroom sink. Three types of PCR DNA tests were performed on the hairs. Using the Cellmark database, the odds of the hair not being Murray's was one out of 400,000 (V. 35 1465). These haisr could not have been Taylor's hair. (V. 35 1446). The jury convicted Murray of first degree murder, burglary of a dwelling with an assault, and sexual battery as charged in the indictment. (V. 7 1231-1233).

The penalty phase begun on February 26, 1999 (V. 44). The prosecutor presented the testimony of Sergeant Amy to establish one of the prior violent felonies. (V. 44 2499). Murray had grabbed a woman by her hair and forced her into a vehicle. Murray then put a bottle to her throat and threatened to kill her if she moved. (V. 44 2501). He then began undoing his pants. (V. 44 2503). She noticed a police officer and managed to exit the moving car and run for help. She recognized the perpetrator as Murray. (V. 44 2501). The officer apprehended Murray. The State then introduced a

judgment of conviction for false imprisonment based on this incident. (2504). A second officer testified about another prior violent felony. Officer Manwarning, testified about an incident where Murray entered the apartment of Brett Millhouse. Murray battered Millhouse with his fists. At one point, Murray picked up a glass and struck Millhouse in the side of the face with it. (V. 44 2506-2507). The State then introduced a judgment of conviction for aggravated battery. (V. 44 2508). Detective Steely testified as to the third prior violent felony. (2509). Murray was shooting a gun in the parking lot of a pool hall. (2510-2512). The State introduced a judgement of conviction for aggravated assault. (2513). The State presented the victim impact statement of two witnesses: Ms. Nystrom, who was a friend of the victim for thirty years, and her daughter. (V. 44 2513-2526). Murray defendant did not testify and agreed, on the record, to counsel not presenting any evidence. (V. 44 2527-2528). The jury unanimously recommended death. 12 to 0 (V. 7 1250). Both parties submitted written memoranda. (Vol. 7 1298)

The trial court's sentencing order lists four aggravating factors:

> (1) three prior violent felonies which the trial court gave "great weight" because two of prior violent felonies were similar to this murder including a conviction for false imprisonment in which Murray had abducted a woman with another person and held a bottle to her throat.
>
> (2) the murder was committed during the course of a burglary and/or sexual battery which the trial court gave "immense weight"

(3) the murder was committed for financial gain which the trial court gave "considerable weight"; and

(4) the murder was committed in an especially heinous, atrocious, or cruel manner which the trial court gave "great weight"

The trial court discussed but did not find two statutory mitigating factors:

(1) an accomplice whose participation was minor which the trial court found not to have been proven which the trial court gave "no weight" because Murray's participation was not minor;

(2) Murray's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired which the trial court found not to have been proven and gave no weight.

The trial court found five nonstatutory mitigators:

(1) untimely death of Murray's wife shortly prior to the murder which the trial court gave "very little weight";

(2) statements of his girlfriend that Murray was good with her children which the trial court gave "very slight" weight

(3) mother's statements regarding trouble as a juvenile which the trial court gave "little weight"

(4) no contact between the defendant and his father which the trial court gave "slight weight"

(5) defendant's mental health including a fake suicide attempt which the trial court gave "no weight" and an evaluation performed at approximately the time of the murder finding defendant competent which the trial court gave no

weight as a mitigator and an evaluation one year later while Murray was medicated which the trial court gave "little weight".

The trial court then determined that the aggravating factors far outweighed the mitigating factors and that each of the aggravators outweighed the "paucity" of the mitigating factors. The trial court noted that the murder was "appalling" and involved deliberate and intentional torture. (Vol. 7 1305-1316). The trial court sentenced Murray to death. (V. 7 1289-1296)

SUMMARY OF ARGUMENT

ISSUE I

Appellant asserts that the testimony that Murray's hair microscopically matched the hairs recovered from the victim's body should have been excluded because of "tampering". Appellant claims that while the evidence technician testified that he recovered two hairs, the FBI hair expert's notes refers to "several" hairs. First, the FBI hair expert testified that they do not count the hairs individually. He also testified that several means two to ten but he did not know the exact number. This is not tampering; rather, it is a dispute over the meaning of the word "several".. Furthermore, this is not a proper tampering assertion. A true tampering claim involves a change or alteration in the evidence, not that there is additional or missing evidence. Thus, the trial court properly denied the motion.

ISSUE II

Appellant argues that while the white nightie with the critical hair used for DNA testing was put into a paper bag with a bottle of lotion, when the FDLE expert removed the nightie from the bag to recover the hairs, the bottle was not in the paper bag. Appellant asserts that this is evidence of tampering. However, this is a break in the chain of custody, not tampering. A minor break in the chain of custody is not sufficient to suppress the evidence. Thus, the trial court properly admitted this evidence.

ISSUE III

Appellant argues that the trial court abused its discretion in excluding impeachment testimony. The trial court did not abuse its discretion in excluding the content of a phone conversation between the State DNA expert and the defense DNA expert in which the State's witness warned the defense witness about defense counsel. First, there was no witness tampering because the expert did not attempt to change the other expert's testimony. Rather, he just "warned" him about defense counsel. The phone call had no affect whatever on the content of the defense witness' testimony. Furthermore, the testimony was irrelevant, hearsay and had no significant impeachment value. The jury knew that the two experts disagreed on the DNA tests which was the only issue that mattered. Thus, the trial court properly excluded this testimony.

ISSUE IV

Appellant argues that the DNA test results should not have been admitted because the correct protocols were not followed as required by this Court's decision in Ramirez v. State, 651 So.2d 1164 (Fla. 1995). The State disagrees. First, Frye does not apply in this situation. Whether the correct procedures and protocols were followed are foundational considerations governed by ordinary evidentiary standards. This type of argument goes to the weight of the evidence not its admissibility. It is only when the testing procedures are so fundamentally flawed that the test results are rendered unreliable that Frye applies. Furthermore, there was substantial compliance with the protocols. The errors that were made were, in the trial court's words, scrivener's errors that did

not effect the reliability of the tests. Thus, the trial court properly admitted the DNA evidence.

ISSUE V

Murray argues that the evidence related to his escape from jail after the murder was improper propensity evidence. The State respectfully disagrees. Evidence related to the escape established consciousness of guilt. This Court has repeatedly rejected the claim that, when there are other pending charges, the State cannot introduce evidence of flight because the defendant could have been fleeing from the other charges. Moreover, this testimony was necessary to establish the context in which Murray confessed. Murray admitted his forcing the victim to perform oral sex on him and his involvement with the murder to his co-escapee. Thus, the trial court properly admitted the evidence of escape.

ISSUE VI

Murray claims that when the evidence is consumed in testing, the introduction of test results violates due process. The State disagrees. This Court has held that there is no prosecutorial duty to preserve a sample for additional testing by the defense. Thus, the trial court properly denied the motion to exclude the DNA evidence because the hairs were consumed in testing.

ISSUE VII

Appellant asserts that the evidence was insufficient because the State failed to prove his identity as one of the perpetrators. While the State agrees that identity is an implied element of every

criminal offense, DNA established that appellant was one of the perpetrators. Also, appellant's hair microscopically match the hair recovered from the victim's body. Murray confessed his involvement in burglary, sexual battery and murder of the victim to his co-escapee Smith. Therefore, this is not a circumstantial evidence case. This is a direct evidence case. Moreover, the eyewitness testimony of a neighbor who knew appellant put appellant in the neighborhood at the approximately the time of the murder and in the company of the known perpetrator. Thus, the trial court properly denied the motion for judgment of acquittal.

ISSUE VIII

Appellant asserts that the trial court abused its discretion by denying his discovery requests to obtain the names of the attorney representing the other persons whose DNA tests were performed at the same time as appellant's DNA test. Appellant raises the possibility of mistakes in the DNA test results in those other cases. However, the expert testimony established that the errors in those other cases did not effect the reliability of his DNA results. The other tests results were simply not relevant. Moreover, disclosing this DNA information would be a violation right of privacy of the other persons involved in the other cases. Additionally, it is doubtful whether a Florida trial court has the authority to order a lab outside its jurisdiction to release the medical records of non-parties. Thus, the trial court properly denied the discovery request.

ISSUE IX

Appellant argues that the trial court improperly admitted appellant's statement made after the officer informed appellant that his hair matched the hair from the murder scene. Appellant further argues not only that the officer's statement that the hair matched is inadmissible but also that the statement made in response is also inadmissible. The State respectfully disagrees. First, the officer did not lie. Appellant's hair, in fact, was a DNA match of the hair found at the murder scene. Furthermore, even if the officer had lied, the officer's statement and the suspect's response would both still be admissible. Appellant misunderstands the reason that a officer may lie to induce a confession. It has nothing to do with any possible cross examination. Confession are admissible depending on their voluntariness. An officer lying to a suspect does not render the suspect's confession involuntary. Thus, the trial court properly admitted appellant's statement.

ARGUMENT

ISSUE I

DID THE TRIAL COURT PROPERLY ADMIT THE HAIR EVIDENCE RELATED TO SLIDE Q42? (Restated)

Appellant asserts that the testimony that Murray's hair microscopically matched the hairs recovered from the victim's body should have been excluded because of "tampering". Appellant claims that while the evidence technician testified that he recovered two hairs, the FBI hair expert's notes refers to "several" hairs. First, the FBI hair expert testified that they do not count the hairs individually. He also testified that several means two to ten but he did not know the exact number. This is not tampering; rather, it is a dispute over the meaning of the word "several". Furthermore, this is not a proper tampering assertion. A true tampering claim involves a change or alteration in the evidence, not that there is additional or missing evidence. Thus, the trial court properly denied the motion.

The trial court's ruling

An evidence technician, Officer Chase, testified that he collected two hairs from the victim's body: one from the victim's left leg and the other from her chest. (V 30 718). However, he was not positive that it was exactly two. (V 30 718). These hairs along with other evidence were put into one box, sealed and sent to the FBI lab. (V. 32 1041-1042). The box contained a number of bags and sealed envelopes including 46 unknown items and six known hairs from the victim, Taylor the co-perpetrator and Murray. (V. 32 1043,1044,1046).

The FBI hair expert, Dizinno, testified that the hair microscopically matched appellant's hair. Specifically, he matched slide K-6, the known hairs of Murray with slide Q-42, the hairs recovered from the body of the victim. (V. 32 1048). However, he stated that there were several hairs. (Vol. 32 1068). He also testified that in two places his notes say "several" but that in one place the notes say one hair. (V. 32 1070). Dizinno testified that he does not count the hairs individually. (V. 32 1070). He also testified that "several" means two to ten but he did not know the exact number. (1070). Although at one point he indicted that several could mean as few as five and as many as twenty-one, he then repeated that "several" means two to ten to him. (V. 32 1070). In addition to complete hairs with roots, he received hair fragment and the "several" refers to both the complete hairs and the fragments. (V. 32 1070-1071).

Appellant filed a motion to exclude the testimony of the FBI expert Dizinno and a motion to suppress the hair evidence due to probable tampering. (V. 2 276-277,286-288). The motion asserted that while the technician collected only two hairs, the FBI expert testified that he received more than two hairs. The motion stated that the State failed to explain the discrepancy and asserted that this was evidence of probable tampering. Just prior to Dr. Dizinno's testimony, the trial court heard the motions. (V. 32 1001). The trial court denied the motion to exclude the testimony of FBI expert and the motion to suppress the hair. (V. 2 285,290; V. 32 1031).

Preservation

This issue is preserved. Appellant filed a motion to exclude the testimony of the FBI expert and a motion to suppress the hair. Furthermore, prior to the DNA expert's testimony, counsel renewed his tampering objection (V. 33 1156).

Presumption of correctness & the burden of persuasion

A trial court's ruling is presumed correct. Applegate v. Barnett Bank, 377 So.2d 1150 (Fla. 1979)(holding that, in appellate proceedings, trial court's decision is presumed correct and appellant has burden to bring forward record adequate to demonstrate reversible error). The trial court's decision, not its reasoning, is reviewed on appeal. Caso v. State, 524 So.2d 422, 424 (Fla. 1988)(holding that a trial court's decision will be affirmed even when based on erroneous reasoning). A trial court may be "right for the wrong reason". Grant v. State, 474 So.2d 259, 260 (Fla. 1st DCA 1985); Dade County School Board v. Radio Station Wqba, City of Miami, Susquehanna Pfaltzgraff and Three Kings Parade, Inc., 731 So. 2d 638, 645 (Fla. 1999)(referring to this principle as the "tipsy coachman" rule). An appellee, in arguing for the affirmance of a judgment, is not limited to legal arguments asserted below; rather, the appellee can present any argument supported by the record even if not expressly asserted in the lower court. Dade County School Board v. Radio Station Wqba, City of Miami, Susquehanna Pfaltzgraff and Three Kings Parade, Inc., 731 So. 2d 638, 645 (Fla. 1999)(noting that an appellee need not raise and preserve alternative grounds to assert them on appeal). However, this is not true of the appellant. The

appellant must raise and preserve the exact grounds in the trial court that he asserts as error on appeal. On appeal, the appellant bears the burden of persuading this Court that the trial court's ruling is incorrect. Savage v. State, 156 So.2d 566 (Fla. 1st DCA 1963).

The standard of review

A standard of review is deference that an appellate court pays to the trial court's ruling. Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 468 (1988). There are three main standards of review: *de novo*, abuse of discretion and competent substantial evidence test. PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE § 9.1 (2d ed. 1997). Legal questions are reviewed *de novo*. Under the *de novo* standard of review, the appellate court pays no deference to the trial court's ruling; rather, the appellate court makes its own determination of the legal issue. Under the de novo standard of review, an appellate court freely considers the matter anew as if no decision had been rendered below. Questions of fact in Florida are reviewed by the competent, substantial evidence test. Under the competent, substantial evidence standard of review, the appellate court pays overwhelming deference to the trial court's ruling, reversing only when the trial court's ruling is not supported by competent and substantial evidence. If there is any evidence to support those findings, the findings will be affirmed. The equivalent federal fact standard of review is known as the clearly erroneous standard. Other issues are reviewed for an abuse of discretion. Under the abuse of discretion standard of review, the appellate court pays substantial

deference to the trial court's ruling, reversing only when the trial court ruling's was "arbitrary, fanciful or unreasonable." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

The admission of evidence is within the trial court's discretion and will not be reversed unless defendant demonstrates an abuse of discretion. Thomas v. State, 748 So.2d 970, 982 (Fla. 1999); General Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997)(stating that all evidentiary rulings are reviewed for "abuse of discretion"). Under this standard, a determination of that the statement are admissible will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). The abuse of discretion standard of review is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So.2d 191, 195 (Fla. 4th DCA 1997).

Merits

Relevant physical evidence is admissible unless there is an indication of probable tampering. Peek v. State, 395 So.2d 492, 495 (Fla.1980)(finding no abuse of discretion in permitting the introduction of the hair comparison analysis). The purpose for requiring a chain of custody is to establish a reasonable probability that there has been no tampering with the evidence. Charles W. Ehrhardt, Florida Evidence, § 901.3 (2000 ed.). A bare allegation of tampering by the defendant is not sufficient to break the chain. Charles W. Ehrhardt, Florida Evidence § 901.3 (2000 ed.)

There is a presumption that public officials would not tamper with the evidence, so the burden of establishing tampering is on the defendant. United States v. Garcia, 718 F.2d 1528, 1533 (11th Cir. 1983).

First, this is not tampering; rather, it is a dispute over the meaning of the word "several". The FBI hair expert's notes refers to "several" hairs. The FBI hair expert testified that they do not count the hairs individually. He also testified that "several" means two to ten but he did not know the exact number. Indeed, his lowest figure two exactly matches the two hairs at issue here.

In State v. Nieves, 438 A.2d 1183 (Conn. 1982), the Connecticut Supreme Court held the admission into evidence of the state laboratory results was not an abuse of discretion despite the fact that was a discrepancy in the numbers of syringes. The police searched Nieves' apartment and seized several items including six syringes. Two days after the search, a detective Costardo removed the evidence from this locker and transported it to the state laboratory. Before turning over the evidence, he completed an inventory form. When the toxicological chemist, subsequently opened the envelope, she counted only five syringes and noted this discrepancy on the laboratory report. While six syringes were seized, only five syringes were delivered to the state laboratory. The Court explained that this discrepancy is not conclusive proof of tampering. The Court noted that explanations other than tampering, such as a simple counting error, are plausible. The Court also noted that an unbroken chain of custody was established.

In Haley v. State, 737 So.2d 371(Miss. App. 1998), a Mississippi appellate court held the State established a sufficient chain of

custody to permit admission of evidence. Haley was convicted of armed robbery and aggravated assault. The victim was robbed of various personal items, including a wallet and $22, a leather jacket, and a ring. Haley alleged that the trial court erred by allowing in certain items of evidence for which a chain of custody was not properly established and where the evidence inventory logs contained discrepancies as to what was actually recovered. The evidence logs indicated that there were only two $1.00 bills instead of three, and one instead of ten quarters seized from defendant's pockets; detective testified that items remained in his constant care, custody and control, and that he committed two typographical errors in preparing evidence logs chain of custody issues. The Haley Court noted the "strong presumption of validity" accompanying the actions of law enforcement officials with regard to preservation of evidence. The test for the continuous possession of evidence to be whether or not there is any indication or reasonable inference of probable tampering with or substitution of the evidence. At the suppression hearing, a detective testified that he seized several items from the person of Haley including one $5 bill, three $1 bills, ten quarters, twelve dimes, thirteen nickels, ten pennies. After inventorying the items, they remained in the detective's constant custody and control and had not been tampered with or otherwise altered. The detective testified that he committed two typographical errors in preparing the evidence logs: one indicated that there were only two $1 bills instead of three $1 bills and the other, there was a "1" instead of a "10" listed as the number of quarters seized. Haley contended that these errors are more than simple typographical errors and are

sufficient to suggest tampering with the evidence. The Haley Court rejected this claim reasoning that the detective who inventoried the evidence testified as to what he seized and to the fact of the recording errors he made in preserving the evidence.

Here, as in Nieves and Haley, the inconsistencies do not establish tampering. Basically, the inconsistencies were explained by the fact that the FBI does not count hairs so they do not know the exact numbers of hairs they received. Unlike here, Nieves involved missing evidence that was conclusively proven missing. Here, the claim is that there may be additional evidence. But there are no additional hairs, just some confusion about the exact number involved when the word "several" is used. The hair expert could have used a more precise word, but the term "several" is not inconsistent with exactly two hairs.

Furthermore, this is not a true tampering case. True tampering claims assert that the original item has either been exchanged with another or been contaminated or altered. Murray is not arguing that his hair was contaminated, altered, replaced or exchanged with other hair; rather, he claims only that there is additional hair. If there are additional hairs, this does not undermine the conclusion that at least some of those hair's are appellant's. Furthermore, the nature of the evidence here, hair, makes it unlikely that there can be any alteration. United States v. Olson, 846 F.2d 1103, 1116 (7th Cir. 1988)(noting that the nature of the evidence - bullets and bullet fragments - makes alteration unlikely).

Contrary to appellant's assertion, there is indeed an explanation for how the number of hairs could have expanded. The

evidence technician could have recovered exactly two complete hairs, which during transportation and handling, broke into fragments. The FBI expert testified that in addition to complete hairs with roots, he received hair fragment and the "several" refers to both the complete hairs and the fragments. (V. 32 1070-1071). Thus, appellant has not established tampering and the trial court properly admitted this evidence and testimony.

Harmless Error

Any error in the admission of testimony that the hairs microscopically matched appellant's was harmless. First, errors in record-keeping or note taking harm the prosecution, not the defense. Moreover, the State also had evidence that a second set of Murray's hairs located on a nightie in the bathroom sink were a DNA match. Thus, the State had stronger scientific evidence of guilt, i.e. DNA, than this testimony. Moreover, Ms. White testified that at 12:40a.m on the night of the murder within two miles of the victim's home, she saw appellant and Taylor. Thus, the State presented eyewitness testimony as to appellant's presence in the neighborhood at the time of the murder and his being accompanied by his long term friend, Taylor, at that time. Taylor was proven via DNA to be one of the assailants. Thus, the State established that appellant was accompanied late that night by a person known to be a perpetrator. Additionally, Murray confessed his involvement in the crime to his co-escapee Smith. Thus, any error in the admission of the testimony that Murray's hair microscopically matched the hair found on the victim's nude body was harmless.

ISSUE II

DID THE TRIAL COURT PROPERLY ADMIT THE HAIR EVIDENCE RELATED TO SLIDE Q20? (Restated)

Appellant argues that while the white nightie with the critical hair used for DNA testing was put into a paper bag with a bottle of lotion, when the FDLE expert removed the nightie from the bag to recover the hairs, the bottle was not in the paper bag. Appellant asserts that this is evidence of tampering. However, this is a break in the chain of custody, not tampering. A minor break in the chain of custody is not sufficient to suppress the evidence. Thus, the trial court properly admitted this evidence.

The trial court's ruling

Officer Laforte, an evidence technician, testified that he collected a bottle of lotion and a "nightie" from the bathroom sink of the victim's home. (V. 29 559). Because he found the items in the same location, for "continuity" he placed both items in a paper bag. (V. 29 560). He clarified that he placed the lotion into a smaller bag and put the smaller bag into the larger paper bag that contained the nightie. (582). They were "sealed up as one item". He wrote several things on the paper bag including the date and his initials (V. 29 560). The nightie was placed in paper rather than plastic. (V. 29 584). The FDLE microanalyst testified that she received six items, including the nightie from the sink, from FDLE serologist Hanson to look for trace evidence including hair. (V. 31 902, 904-905). She received the paper bag folded, stapled, and sealed with evidence tape. (V. 31 906). On cross, defense counsel asked her if there was a larger bag that contained the nightie and

then another bag inside that included the lotion. (918). She responded that she didn't think so. She stated that the lotion was not in the sealed package the contained the nightie. (V. 31 919). She did not receive the lotion bottle (919-920). Counsel then stated that the bag must have been open by Hanson. The lotion was in bag No. 55 but not routed to her. She testified that she received the item sealed and that the seal appeared to be intact. (V. 31 921). Defense counsel made a motion to exclude the evidence from the nightie because a proper chain of custody was not established (V. 31 925-930). Defense counsel argued that someone must have taken the lotion out of the bag and then resealed the paper bag. The prosecutor explained that the testimony established that the lotion was sent to the fingerprint section.

Preservation

Counsel made a motion however, the trial court reserved ruling until all the FDLE experts who handled the box containing all the evidence testified. Appellant did not renew the motion. Thus, this issue is not preserved.

The standard of review

The admission of evidence is within the trial court's discretion and will not be reversed unless defendant demonstrates an abuse of discretion. Thomas v. State, 748 So.2d 970, 982 (Fla. 1999); General Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997)(stating that all evidentiary rulings are reviewed for "abuse of discretion"). Under this standard, a determination of that the statement are admissible will be upheld

by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). The abuse of discretion standard of review is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So.2d 191, 195 (Fla. 4th DCA 1997).

Merits

A bare allegation of tampering by the defendant is not sufficient to break the chain. Charles W. Ehrhardt, Florida Evidence § 901.3 (2000 ed.). Furthermore, there is a presumption that public officials would not tamper with the evidence, so the burden of establishing tampering is on the defendant. United States v. Garcia, 718 F.2d 1528, 1533 (11th Cir. 1983). This is a break in the chain of custody claim. A mere break in the chain of custody does not automatically give raise to an assumption of tampering.

In State v. Taplis, 684 So.2d 214 (Fla. 5th DCA 1996), the Fifth District held that the burden is one the one attempting to bar otherwise relevant evidence based on a gap in the chain of custody and that they must show a probability of tampering. Taplis was charged with burning his wife's car to defraud an insurer. Samples of fire debris were taken from inside the passenger compartment of the car and sent to a private lab for analysis. The car was left unattended at the scene of the fire for three days. It was then towed to a lot and later towed to another lot where the public had access to the car during business hours. Taplis moved to suppress

on the basis that the vehicle had not been properly preserved and therefore the test results "may well be" the product of contamination or tampering. Taplis also claimed that by failing to properly preserve the vehicle, exculpatory evidence important to the defense may have been lost. The trial court granted the motion but the Fifth District reversed. The Taplis Court explained that a mere possibility of contamination or tampering was not sufficient; rather, the opponent of the evidence must show that there probably was tampering.

A mere break in the chain is not sufficient to raise any real possibility of tampering. Especially, when, as here, the break occurs in a laboratory where there is little possibility of contamination and no motive to tamper. Moreover, appellant fails to explain how a lab tech removing the lotion bottle affected the hairs on the nightie. The nightie was damp and the hairs clung to it. Removing the lotion bottle would have no affect on the nightie or on the hairs that clung to it. Appellant might have the basis for a claim if the evidence concerned the lotion bottle. But here while the State may or may not be able to establish a chain of custody for the lotion bottle, the State established a proper chain of custody for the nightie. It was the lotion that was "missing" not the nightie.

Harmless Error

Any error was harmless. Appellant confessed to his co-escapee Smith. Ms. White testified that at 12:40a.m on the night of the murder within two miles of the victim's home, she saw appellant and Taylor. Thus, the State had stronger scientific evidence of guilt,

i.e. DNA and an eyewitness to appellant's presence in the neighborhood at the time of the murder and his being accompanied by his long term friend, Taylor, at that time. Taylor was proven via DNA to be one of the assailants. Thus, the State establish that appellant was at the time and place of the murder and accompanied by a person known to be a perpetrator.

ISSUE III

DID THE TRIAL COURT PROPERLY EXCLUDE EVIDENCE OF A PHONE CALL DURING THE TRIAL BETWEEN THE STATE EXPERT AND THE DEFENSE ? (Restated)

Appellant argues that the trial court abused its discretion in excluding impeachment testimony. The trial court did not abuse its discretion in excluding the content of a phone conversation between the State DNA expert and the defense DNA expert in which the State's witness warned the defense witness about defense counsel. First, there was no witness tampering because the expert did not attempt to change the other expert's testimony. Rather, he just "warned" him about defense counsel. The phone call had no affect what ever on the content of the defense witness' testimony. Furthermore, the testimony was irrelevant; hearsay and had no significant impeachment value. The jury knew that the two experts disagreed on the DNA tests which was the only issue that mattered. Thus, the trial court properly excluded this testimony.

The trial court's ruling

The State's main DNA expert, Mr. Deguglielmo and the defense DNA expert Mr. Warren worked together at Microdiagnostics (V. 39 2085). Mr. Deguglielmo called Mr. Warren prior to the trial. At the Frye hearing, defense counsel asked Mr. Warren if he had spoken to Mr. Deguglielmo recently. (V. 22 4077). Defense counsel explained that she was trying to show that Mr. Deguglielmo was trying to influence Mr. Warren's testimony. (V 22 4079). The trial court noted that they were not dealing with feelings but rather with science. Defense counsel proffered from Mr. Warren that, two days before the Frye hearing, Mr. Deguglielmo called Mr. Warren and asked if he

kept a phone log and Mr. Warren responded no. (V. 22 4080). Mr. Deguglielmo invited Mr. Warren to lunch but Mr. Warren explained that he would not be in Jacksonville on that day. (4081). Mr. Deguglielmo then told Mr. Warren that defense counsel was not his friend and that she would try to get Mr. Warren to impeach Mr. Deguglielmo's testimony. (V. 22 4081). Mr. Warren responded that she was defending her client and trying to give him the best defense possible. (V. 22 4082). The witness testified that the conversation made him feel that he should be circumspect in his dealing with defense counsel.

At trial, prior to Warren's testimony, the prosecutor moved to exclude this testimony arguing that it was hearsay and irrelevant. (V. 39 2079-2080). Defense counsel argued that it was relevant to establish whether the expert's testimony was influenced by the other DNA expert. The trial court noted that "it wasn't successful" and that there was no showing that this was done at the behest of the State. (V. 39 2080-2081). Defense argued that it went to the credibility of Dr. Deguglielmos' testimony and they sought to impeach him with it. The trial court ruled the testimony was not admissible. (V. 39 2082).

Preservation

This issue is preserved. Appellant properly proffered the testimony at the Frye hearing and the trial court recalled the proffer at trial at trial. (V. 39 2082). Thus, the issue is preserved. *Cf.* Lucas v. State, 568 So.2d 18, 22 (Fla.1990)(noting that to preserve an issue for appellate review, the defendant must proffer the testimony he sought to elicit).

The standard of review

The exclusion of impeachment evidence is reviewed for a clear abuse of discretion because trial court have wide discretion in this area. Larzelere v. State, 676 So.2d 394 (Fla. 1996)(holding that trial court did not abuse its discretion when it limited defendant's impeachment of prosecution witness); United States v. Campbell, 49 F.3d 1079, 1085 (5th Cir. 1995).

Merits

In Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993), the Third Circuit held that the district court did not abuse its discretion in denying a mistrial when counsel attempted to improperly influence witnesses. Witco argued that Lightning Lube's trial counsel attempted to tamper with several witnesses. During trial, Lightning Lube's trial counsel contacted several witnesses who expected to testify adversely to Lightning Lube. Counsel called one witness' husband during trial and threatened to sue if his wife testified adversely to him. Counsel approached another witness in the bathroom of the courthouse, prior to the witness' testimony, advising him that his client intended to pay his promissory note to the witness if Lightning Lube won. Counsel also telephoned a third witness saying he wanted to discuss a settlement of franchise fees which that witness owed to Lightning Lube. When the district court became aware of these tactics, it conducted a voir dire of these witnesses outside the presence of the jury. All of the witnesses denied that counsel's overtures had intimidated them and claimed that they would not change their expected

testimony. And all three testified adversely to Lightning Lube at the trial. The district court found that counsel's approach to the witnesses was done to improperly influence their testimony adversely to Witco but the district court found and the Third Circuit agreed that there was no indication that their testimony was chilled or altered by counsel's conduct. Witco moved for permission to call counsel to the stand in front of the jury to examine him about his contacts with the witnesses. The district court denied the request. However, it permitted the three witnesses to testify about the conversations although not about what they perceived to be his intentions. The Third Circuit reasoned that it was clear that no prejudice had resulted to Witco from the attempted witness tampering, inasmuch as the witnesses themselves claimed under oath not to have felt intimidated; they testified adversely to Lightning Lube; and the district court made an express finding based on their demeanor that their testimony did not seem to have been altered. Lightning Lube, Inc., 4 F.3d at 1178.

Here, as in Lightning Lube, Inc., the State expert witness' call to the defense DNA expert had no affect on Mr. Warren's testimony. Mr. Warren's testimony was adverse to the State. Mr. Warren testified exactly as expected, that the test are inconclusive. If the purpose of the phone call was to influence Warren's testimony, or more correctly to influence his attitude toward defense counsel, it was not successful. Furthermore, the expert did not actually directly attempt to influence the content of Mr. Warren's testimony; rather, he merely "warned" Warren about defense counsel. The defense expert responded that defense counsel was just trying

to do her best for her client. It is clear from this response that Mr. Warren did not view defense counsel's action in the same light as Mr. Deguglielmo did. This is a difference of opinion, not attempted witness tampering.

Harmless Error

The error, if any, was harmless. According to the protocols, the experts were suppose to confer about any difference between them regarding the test results. Actually, their lack of agreement was part of defense counsel's claim of error regarding the DNA tests. Additionally, the content of is conversation is too innocuous to be prejudicial or to have any significant impeachment value. Most importantly, the jury knew that the two experts disagreed about the DNA test results, i.e. that the State DNA expert believed they were a match and the defense expert that the results were inconclusive, which was the only critical issue related to their respective testimony. Thus, the exclusion of this testimony had no affect on the jury's verdict.

ISSUE IV

DID THE TRIAL COURT PROPERLY CONCLUDE THAT THE DNA EVIDENCE MEET THE FRYE STANDARD? (Restated)

Appellant argues that the DNA test results should not have been admitted because the correct protocols were not followed as required by this Court's decision in Ramirez v. State, 651 So.2d 1164 (Fla. 1995). The State disagrees. First, Frye does not apply in this situation. Whether the correct procedures and protocols were followed are foundational considerations governed by ordinary evidentiary standards. This type of argument goes to the weight of the evidence not its admissibility. It is only when the testing procedures are so fundamentally flawed that the test results are rendered unreliable that Frye applies. Furthermore, there was substantial compliance with the protocols. For example, appellant complains about missing photographs. The photographs are not missing. Rather, normal photographs were never taken; digital images of the results were taken instead. Taking a picture with digital camera instead of a Polaroid is substantial compliance with the protocols. The errors that were made were, in the trial court's words, scrivener's errors that did not effect the reliability of the tests. Thus, the trial court properly admitted the DNA evidence.

The trial court's ruling

The DNA testing in this case involved three separate PCR tests DQ-alpha; polymarkers, and short tandem repeats (STR). (V. 33 1197,1199,1204, 1243). Murray filed a motion in limine to exclude the DNA based on the population statistics. (V. 2 338). Murray

filed a motion for a Frye hearing. (V 4 595). Murray filed a second Frye motion asserting that the proper procedures were not followed. (V. 4 638-642). The trial court held an extensive Frye hearing. Murray filed a motion for rehearing requesting that the trial court reconsider his ruling on the admissibility of the DNA evidence because the recommended protocols were not followed. (V 3 576). Murray asserted the errors included: the gel loaded worksheet for 97-262 was not supplied; that no photograph of this gel was ever taken; the photos were taken at an improper distance; that the kits were not present; and the temperature of the bath water was not recorded. The trial court entered a detailed written order finding the DNA admissible.

Preservation

This issue is preserved. Appellant filed a motion in limine to exclude the DNA evidence. The trial court held an extensive Frye hearing. The trial court ruled the DNA admissible. Prior to the testimony of Dr. Deguglielmo and Dr. Tracey, counsel requested a standing objection to the admissibility of the DNA evidence which the trial court granted. (V. 33 1142, 1156). Thus, this issue is preserved.

The standard of review

The standard of review of a Frye issue is *de novo*. Hadden v. State, 690 So.2d 573, 579 (Fla. 1997); *But see* General Electric Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 515, 139 L.Ed.2d 508 (1997)(holding that the abuse of discretion standard of review applies to scientific testimony under Daubert as well as other

evidence and rejecting the notion that the admissibility of scientific testimony requires a different standard of review). Appellate courts should consider the issue of general acceptance at the time of appeal rather than the time of trial. Hadden, 690 So.2d at 579.

Merits

The statute governing expert testimony, § 90.702, Florida Statutes (1999), provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

In Frye, the court first espoused the requirement that scientific evidence be "generally accepted within the relevant scientific community:"

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye, 293 F. at 1014. The federal courts no longer follow Frye. They have adopted a different standard of admissibility of scientific evidence as announced in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). However, many state courts, including Florida, continue to follow Frye. Flanagan v. State, 625 So.2d 827 (Fla. 1993)(noting the United States Supreme Court's decision in Daubert but "reaffirmed

the applicability of Frye."). A court examines three sources to determine if the evidence is admissible under Frye including: (1) expert testimony, (2) scientific and legal writings, and (3) judicial opinions. Hadden, 690 So.2d at 579.

In Ramirez v. State, 651 So.2d 1164 (Fla. 1995), this Court held that the proponent of the evidence must prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle. The Ramirez court adopted a procedure for determining the admissibility of expert testimony after a Frye objection is raised: First, the trial judge must decide whether the testimony will assist the jury in understanding the evidence or in determining a fact in issue. Second, the judge must decide whether the expert's testimony meets the Frye standard. Third, the judge must determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. Once the trial court follows these steps, the weight and credibility of the testimony is a question for the jury.

PCR technology generally, and the DQ-alpha methodology specifically, are generally accepted within the relevant scientific community. State v. Tankersley, 956 P.2d 486, 490, 492 (Ariz. 1998)(holding that DQ-alpha methodology was generally accepted within the relevant scientific community); State v. Stills, 957 P.2d 51 (N.M. 1998)(holding that polymerase chain reaction (PCR) method of DNA analysis is admissible); People v. Oliver, 713 N.E.2d 727, 734 (Ill. App. 1999)(holding that PCR testing is generally accepted in the relevant scientific community and thus is admissible under Frye); State v. Hoff, 904 S.W.2d 56, 59 (Mo. App.

1995)(noting that numerous cases in various jurisdictions have found the PCR method of testing to be generally accepted in the scientific community and the test results admissible); State v. Hill, 895 P.2d 1238 (Kan. 1995); Seritt v. State, 647 So.2d 1 (Ala. 1994);State v. Russell, 882 P.2d 747 (Wash. 1994); State v. Williams, 599 A.2d 960 (N.J. App. 1991). Indeed, some court have found PCR to be so widely accepted that it no longer needs to be Frye tested. People v. Pope, 672 N.E.2d 1321, 1327 (Ill. App. 1996)(holding that PCR-based methods of DQ-Alpha typing and polymarker typing for DNA identification are now generally accepted in the relevant scientific communities and trial courts need not conduct future Frye hearings); *But cf.* Murray v. State, 692 So.2d 157, 160 n.5 (Fla. 1997)(noting that the National Research Council 1992 report, DNA Technology in Forensic Science, expressly withheld endorsement of PCR methodology because while the PCR method has "enormous promise," "it has not yet achieved full acceptance in the forensic setting.")[1]. All three of the test performed are generally accepted. (V 35 1438-1439).

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[1] The National Research Council issued an updated report in 1996 after the holding in Murray. National Research Council, The Evaluation of Forensic DNA Evidence: An Update (National Academy Press 1996). The update concluded that: "[t]he state of the profiling technology and the methods for estimating frequencies and related statistics have progressed to the point where the admissibility of properly collected and analyzed DNA data should not be in doubt." National Research Council noted that the PCR method and statistical analysis had improved. George Bundy Smith & Janet A. Gordon, *The Admission of DNA Evidence in State and Federal Court*, 65 FORDHAM L.REV. 2465, 2470-2477 (1997)(observing that "PCR technique has been substantially improved" and noting that: "PCR analysis has received overwhelming acceptance in the scientific community and the courts."). Thus, this statement in Murray is probably no longer valid.

First, there was substantial compliance with the various protocols. By analogy, numerous Florida cases hold that BAC results are admissible if there was substantial compliance with the administrative rules.[2] The TWGDAM guidelines themselves refer to the fact that they are guidelines, "this document should not be construed as a mandate". (V. 33 1215-1216). Thus, if there is substantial compliance with the protocols, the DNA tests are admissible.

Additionally, deviations from test protocols and lab errors are not a violation of Frye unless they are so significant as to render the test results completely unreliable. In State v. Tankersley, 956 P.2d 486, 490, 492 (Ariz. 1998), the Arizona Supreme Court held the trial court did not abuse its discretion in admitting DNA results despite allegations that there was contamination and improper procedure were used. Tankersley, while agreeing that PCR was a reliable method in the lab, argued that PCR was inherently unreliable as applied to crime scene due to the possibility of contamination. Id. at 492. Moreover, Tankersley pointed to an array of allegedly improper procedures: a lack of written protocols and proficiency testing as recommended by TWGDAM,[3] an excessive number of cycles run on the thermal cycler above the number recommended by the kits manufacturer, temperature regulation

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[2] Ridgeway v. State, 514 So.2d 418 (Fla. 1st DCA 1987)(holding that failure to timely inspect breathalyzer machine did not constitute substantial deviation from rules which would warrant invalidation of test results); Jones v. State, 698 So.2d 1280 (Fla. 5th DCA 1997)(finding substantial compliance with HRS rules governing collection and testing of blood).

[3] Technical Working Group on DNA Analysis and Methods

problems, the failure to quantify the sample before amplification and the reporting of results despite evidence of contamination Id. at 493. However, the Arizona Supreme Court concluded that because such questions relate to the correctness of procedures followed and hence the reliability of particular results, they are foundational considerations governed by ordinary evidentiary standards. The Court rejected a requirement of strict compliance with TWGDAM guidelines as a prerequisite for admissibility because these guidelines are not mandatory; rather, the appropriate inquiry is whether a lab's techniques have deviated so far from generally accepted practices that the test results cannot be accepted as reliable. Id. at 493. During amplification, the lab used numerous controls to test for contamination. One of the controls showed some evidence of contamination and based on this, Tankersley argued that the results should not have been admitted because lab protocols state that the test should be considered inconclusive if a control appears positive. However, the State expert witness explained the positive control as "a barely detectable trace material" and that was not significant because all of the other controls were negative. At the conclusion of the Frye hearing, the trial court found that there was no contamination and that Tankersley's argument was really one of "dirty test tubes", not the reliability of the methodology and that while the defendant was free to explain the problem to the jury, the evidence was admissible and meet the Frye standard. Id. at 491. The Arizona Supreme Court agreed stating that the trial court's findings were amply supported by the record and that the evidence was admissible. Id. at 494.

In State v. Brown, 949 S.W.2d 639 (Mo. App. 1997), a Missouri appellate court held that the trial court did not abuse its discretion by not conducting a Frye hearing or in admitting the DNA test results. Brown asserted that the expert's findings did not address lab error rates and therefore the probabilities testified to by the expert were overestimated, misleading and unreliable. The Brown Court rejected the argument reasoning that "this type of argument goes more to witness credibility and weight of the evidence rather than admissibility of the evidence."

Here as in Tankersley and Brown, the evidence was admissible. The errors not not affect the basic reliability of the DNA tests. Appellant was free to and did point out to the jury all the deviations from the protocols. Thus, the trial court properly admitted the DNA tests.

Appellant argues that there was not an independent review of the DNA tests. However, Mr. Deguglielmo independently reviewed the tests Mr. Warren performed. While Mr. Deguglielmo testified that he did 50% of the actual work in the case, he then clarified this statement that he did the administrative work but the "actual wet lab work" was done by Mr. Warren. (V. 34 1408). Mr. Warren took notes during testing and Mr. Deguglielmo wrote the final report. Counsel asserts that the results should have been inconclusive because Mr. Warren and Mr. Deguglielmo disagree. Mr. Warren reported A. Mr. Deguglielmo reported A fainter B. However, when Mr. Warren was shown the results he agreed that the fainter B was there, so they did agree. (V 23 4088). Appellant also asserts that a portion of the hair that does not contain any DNA should be used as a control. However, other techniques were employed to control

contamination. Moreover, contrary to appellant's claim regarding "missing" photographs, picture of the results were taken with a digital camera. As the expert testified, there is no need to take photographs if you take digital images instead. (V. 18 3378). No picture of gel no. 97-262 was taken because it was broken during processing and the material was transferred to another gel plate that a picture was taken of. Thus, the scivenener's errors and other deviations from the protocols did not affect the underlying reliability of the tests.

Harmless error

Because three different types of PCR DNA testing were performed DQ-alpha; polymarkers, and short tandem repeats (STR), any error in one test is rendered harmless by the results in the other DNA tests. There would have to be fatal flaws in all three tests for the DNA test results to be inaccurate in this case.

ISSUE V

DID THE TRIAL COURT PROPERLY ADMIT COLLATERAL CRIME EVIDENCE? (Restated)

Murray argues that the evidence related to his escape from jail after the murder was improper propensity evidence. The State respectfully disagrees. Evidence related to the escape established consciousness of guilt. This Court has repeatedly rejected the claim that, when there are other pending charges, the State cannot introduce evidence of flight because the defendant could have been fleeing from the other charges. Moreover, this testimony was necessary to establish the context in which Murray confessed. Murray admitted his forcing the victim to perform oral sex on him and his involvement with the murder to his co-escapee. Thus, the trial court properly admitted the evidence of escape.

The trial court's ruling

Counsel filed a motion in limine to exclude this evidence arguing that the evidence of escape and the evidence of the false identification cards was propensity evidence. (V. 3 401-402). Prior to the testimony of Ms. Freeland, defense counsel moved to exclude her testimony regarding Murray's escape as not relevant because it occurred two years after the murder and because no Williams rule notice was given as required. (V. 35 1572-1573). The trial court noted that in fact a Williams rule notice was filed and probably was not even required. (V. 35 1574). The prosecutor explained that the evidence of escape was being introduced as consciousness of guilt and to establish the facts surrounding Murray's confession to his co-escapee. (1574-1575). The trial

court ruled that it was evidence of flight (1578). Defense counsel then argued that the State could not prove what charge he was in flight from because Murray had a violation of probation also. (1579-1580). The trial court explained counsel could make that argument to the jury and defense counsel stated that he couldn't do that. (1582). While the escape was two years after the murder, it was only six months from his indictment until his escape. (1588) The trial court ruled the testimony was admissible. (Vol 35 1588) The State presented the testimony of FBI Special Agent Kearns, who was involved in the recapture of Murray in Las Vegas. (V. 36 1727-1731). He testified that when he arrested Murray, Murray had a check cashing card and a social security card in the name of Doyle White on him. Counsel objected but he did not state the basis of his objection. (V. 36 1729). The FBI agent testified that he had both a federal and a state warrant. (V. 36 1728).

Preservation

This issue regarding the testimony of an escape is preserved. Counsel properly objected and obtained a standing objection to the testimony from the trial court. (V. 35 1576,1589). Counsel renewed his objected to this evidence when it was introduced. (V. 36 1729). Thus, this issue is preserved.

The standard of review

The admission of evidence, including evidence of flight, is within the trial court's discretion and will not be reversed unless there is an abuse of discretion. Thomas v. State, 748 So.2d 970, 982 (Fla. 1999).

Merits

When a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible because it is relevant to establish consciousness of guilt. Thomas v. State,748 So.2d 970 (Fla. 1999); Cf. Illinois v. Wardlow, - U.S. -, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000)(holding flight in a high crime area was enough to justify a Terry stop). Appellant argues that the evidence is not admissible because an escape two years after the murder or six months after being jailed proves appellant's state of mind after the murder which is not at issue. However, in Taylor v. State, 630 So.2d 1038 (Fla. 1993), the co-perpetrator's case, this Court held that evidence Taylor planned to escape was admissible. This Court explained that evidence that a suspected person endeavors to evade prosecution "by any ex post facto" indication to evade prosecution is admissible. Such evidence is relevant to establish a consciousness of guilt. Thus, this Court has held that escape plans are admissible even though the escape occurs after the crime. Moreover, here, while the escape was two years after the murders, it was merely six months after the indictment.

This Court has repeatedly rejected the claim that when the there are other pending charges, the State cannot introduce evidence of flight because the defendant could have been fleeing from the other charges. Bundy v. State, 471 So.2d 9, 20 (Fla.1985)(rejecting the argument that the state must prove that the flight was due to the guilty knowledge of the defendant of the crime for which he is on trial to the exclusion of any other explanation for the flight and

unless the state can show that there is no other reason to flee);Duest v. Dugger, 555 So.2d 849, 852 (Fla.1990)(classifying a reasonable inference that Duest escaped as a result of consciousness of guilt of the murder rather than the pending Massachusetts misdemeanor charges); Shellito v. State, 701 So.2d 837, 701 (Fla. 1997)(stating that the "law is well settled that evidence of flight is admissible as being relevant to infer consciousness of guilt"); But see Merritt v. State, 523 So.2d 573 (Fla. 1988)(finding that evidence of flight was erroneously introduced because the flight occurred three years after the crime but the flight occurred after the commission of unrelated crimes in other states following the commission of the Florida crime). It is reasonable to assume that Murray escaped to avoid both the murder prosecution and the violation of probation. Randall v. State, 760 So.2d 892, 900 (Fla. 2000)(finding no error in the trial court's admission of the evidence of Randall's flight, which was relevant to infer consciousness of guilt and explaining that it is reasonable to infer that Randall fled to avoid prosecution for both murders as well as the Massachusetts probation violation); Shellito v. State, 701 So.2d 837, 840 (Fla. 1997)(explaining that the fact that a defendant has committed more than one crime within a short period of time does not preclude introduction of the evidence of flight and rejecting the argument that the State failed to prove that he fled to avoid prosecution for the murder rather than for the robberies and concluding that the fact that Shellito committed several robberies during the brief period of time between the murder and the raid does not prevent a jury from hearing evidence regarding his flight); Freeman v. State, 547 So.2d 125, 128 (Fla.

1989)(finding evidence of an escape attempt, including providing a false name upon apprehension, admissible because he attempted to elude prosecution for both). Murray's claim that he found out that his hair matched earlier during Taylor's trial and would have fled then if he had a guilty conscious is a jury argument, not a legal reason to exclude relevant evidence.

Appellant's reliance on Czubak v. State, 570 So.2d 925 (Fla. 1990), is misplaced. During the cross-examination of a "key state witness", the witness referred to the fact that Czubak was an escaped convict. Because this evidence was not relevant to any material fact in issue, the evidence was inadmissible and this Court remanded for a new trial. However, the Czubak Court specifically stated that "[e]vidence of collateral crimes, wrongs, or acts committed by the defendant is admissible if it is relevant to a material fact in issue; such evidence is not admissible where its sole relevance is to prove the character or propensity of the accused." Here, by contrast, the testimony relating to the escape was admissible to establish both consciousness of guilt and the context of Murray's confession to his co-escapee. Thus, Czubak is inapposite.

Harmless Error

Moreover, any error in the admission of this testimony is harmless. The Czubak Court held that the erroneous admission was not harmless because the case against Czubak was largely circumstantial. While DNA is also circumstantial evidence, it is strong, scientific evidence of guilt. The general rule is that the erroneous admission of collateral crime evidence is presumptively

harmful. Czubak v. State, 570 So.2d 925, 928 (Fla.1990)(admission of the fact that defendant was an escaped convicted but not what crime he was convicted of committing). However, the rule that collateral crime evidence is presumptively harmful is only true depending on the seriousness of the collateral crime. If a jury improperly hears evidence of a nonviolent misdemeanor, they will not convict a defendant for a serious violent felony based on the minor collateral crime. Here, the jury heard evidence of an escape, an nonviolent felony. They would not have convicted a defendant of the brutal first degree murder and sentenced Murray to death based on his propensity to escape. In other words, at worst, the only propensity this evidence established was a propensity to escape, it does not establish a propensity to commit murder or any other violent felony. This is also true of the possession of fake identification cards. It at most, establishes a propensity to engage in white collar type, administrative crimes, not burglary, rape and murder. Thus, the error, if any, was harmless.

ISSUE VI

DID THE TRIAL COURT PROPERLY DENY THE MOTION TO EXCLUDE THE DNA EVIDENCE WHERE THE HAIR WAS CONSUMED BY THE TEST? (Restated)

Murray claims that when the evidence is consumed in testing, the introduction of test results violates due process. The State disagrees. This Court has held that there is no prosecutorial duty to preserve a sample for additional testing by the defense. Moreover, while the record is not clear, there does seem to be additional hair available for defense testing. Thus, the trial court properly denied the motion to exclude the DNA evidence.[4]

The trial court's ruling

Murray filed a motion to preserve the hair samples prior to trial. (V. 4 620). Murray also filed a motion to exclude the DNA test results because the hair was consumed by the tests. (V. 4 759). The motion referred to any earlier order by a previous judge which instructed the State to "use as little of it as reasonably possible and try to preserve whatever surplus may remain". The trial court denied the motion. (R. V. 4 761). During the Frye hearing, the State's DNA expert testified that prior to performing any tests, he spoke with the prosecutor on August 26th, 1997 (V. 18 3386-3387). The DNA expert informed the prosecutor that there was a "very limited sample". (V. 18 3386). The prosecutor told him to

[4] Murray also seems to be arguing an independent claim that this is error merely because the trial court's order may have been violated. However, the trial court did not hold the prosecutor in contempt and did not seem to view the prosecutor's actions as a violation of its order. Murray has no standing to contest the trial court's declining to hold the prosecutor in contempt. Thus, the only real issue is the due process claim.

use as much as needed to obtain as much information and as reliable results as possible. He then performed the preliminary test, doing two amplifications, using half the sample. (V. 18 3386). He then called the prosecutor and informed him that the preliminary tests matched the previous DNA tests and asked the prosecutor to obtain blood sample to compare the remaining DNA with the DNA of the victim, Taylor and appellant. The expert testified that "it is not possible for me to have the DNA to turn over to the defense." (V. 18 3388). Prior to the DNA expert's testimony, while counsel renewed his Frye objection and his tampering objection, he did not move to exclude the DNA based on the fact the State had consumed the evidence in testing. (V. 33 1156). While the record is not clear, there does seem to be additional hair available for defense testing. (V. 32 1098, 1109-1111). Indeed, the prosecutor at one point referred to a box with other hairs. (V. 32 1005-1006, 1019).

Preservation

This issue is not preserved. Even when a motion in limine has been filed and denied by the trial court, a defendant waives his challenge to admission of evidence where defendant fails to renew objection at trial. Correll v. State, 523 So.2d 562, 566 (Fla.1988) Thus, the issue is not preserved.

The standard of review

The standard of review is *de novo*. United States v. Cooper, 983 F.2d 928, 931 (9th Cir. 1993)(noting appellate court reviews *de novo* district court's determination that government's failure to

preserve potentially exculpatory evidence violated due process rights).

Merits

This Court has rejected a due process claim based on the inability to independently test a blood sample because the State did not preserve the sample. Houser v. State, 474 So.2d 1193 (Fla. 1985)(holding that due process is not violated and the evidence derived from scientific analysis of blood is admissible even though state does not preserve a blood sample for further analysis). The Houser Court noted that there is no prosecutorial duty to preserve the sample for additional testing by the defense. The Houser Court explained that an accused's due process right to attack the credibility of the results of the tests is preserved by cross-examination and the extreme sanction of suppression is unnecessary. The Houser Court relied on the rationale of California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

In Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), the United States Supreme Court held that the policy of not preserving breath samples so that a defendant could challenge the results of a breathalyzer test did not violate due process. Later, in Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), the United States Supreme Court held that due process was not violated when semen samples were not tested using the newest method and clothing was destroyed due to the lack of refrigeration. Trombetta applies if the exculpatory value of the evidence is apparent before the evidence was destroyed. Youngblood applies if the exculpatory value of the evidence is not apparent.

If the exculpatory value is indeterminate or only "potentially useful", then under Youngblood, a defendant must show that the government acted in bad faith in destroying the evidence to establish a due process violation. Obviously, consuming the entire sample because it was necessary to perform the DNA tests cannot, by definition, be bad faith destruction of evidence. Moreover, the evidence was not "destroyed" or not preserved; rather, it was necessarily consumed by the DNA testing. Thus, neither Trombetta nor Youngblood actually apply to this situation. The State had to use the entire sample to properly perform the DNA tests. It could not save any for additionally testing. Due process does not require the State to do the impossible. Appellant is really claiming that if it is necessary to use the entire sample for testing, then the State should not be allowed to introduce the test results at trial.

The four District Courts that have addressed the issue have held that the State's unavoidable consumption of the entire sample in testing is not a due process violation.[5] The Eighth Circuit has

[5] State v. Erwin, 686 So.2d 688 (Fla. 5th DCA 1996)(holding that there is no due process violation if the state's analysis necessarily consumes the entire contents of the vial); State v. Hills, 467 So.2d 845 (Fla. 4th DCA 1985)(holding that due process was not violated when the victim's bloodstains was consumed during State's testing and therefore, unavailable for later testing by his own serologist because the blood samples were not lost or negligently destroyed by the state, but rather were unavoidably consumed); State v. T.L.W.,457 So.2d 566, (Fla. 2d DCA 1984)(holding that consumption of all of the drugs during testing did not violate due process); State v. Herrera, 365 So.2d 399 (Fla. 3d DCA 1978)(reversing a trial court order excluding the testimony of the state's chemist and dismissing the information where the heroin was "unavoidably consumed" by analyzed and observing that the weight of authority in the country is that the destruction of suspect contraband drugs unavoidably consumed during chemical

also held, in a habeas case, that consuming the entire sample in testing is not a due process violation. Trevino v. Dahm, 2 F.3d 829, 832 (8th Cir. 1993)(holding due process is not implicated by a state's good faith failure to preserve a sample for independent testing where the serologist consumed the entire specimen during her testing, thereby depriving him of the opportunity to conduct an independent analysis because the defendant has an adequate opportunity to impeach the reliability of a scientific test and the qualifications of the expert). Thus, no due process violation occurred when the State consumed the hairs to perform the DNA tests. Due process is simply not implicated in this case.

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testing does not constitute a due process violation citing Partain v. State, 232 S.E.2d 46 (Ga. 1977); Poole v. State, 291 So.2d 723 (Miss.1974); Lee v. State, 511 P.2d 1076 (Ala. 1973) and State v. Lightle, 502 P.2d 834 (Kan. 1972)).

ISSUE VII

DID THE TRIAL COURT PROPERLY DENY THE MOTION FOR JUDGMENT OF ACQUITTAL BASED ON FAILURE TO PROVE A PRIMA FACIE CASE OF FIRST DEGREE MURDER, BURGLARY WITH AN ASSAULT AND SEXUAL BATTERY? (Restated)

Appellant asserts that the evidence was insufficient because the State failed to prove his identity as one of the perpetrators. While the State agrees that identity is an implied element of every criminal offense, DNA established that appellant was one of the perpetrators. Also, appellant's hair microscopically match the hair recovered from the victim's body. Murray confessed his involvement in burglary, sexual battery and murder of the victim to his co-escapee Smith. Therefore, this is not a circumstantial evidence case. This is a direct evidence case. Moreover, the eyewitness testimony of a neighbor who knew appellant put appellant in the neighborhood at the approximately the time of the murder and in the company of the known perpetrator. Thus, the trial court properly denied the motion for judgment of acquittal.

The trial court's ruling

At the end of the State's case, defense counsel moved for a judgment of acquittal arguing that the evidence was circumstantial and that even a fingerprint is not sufficient evidence.(V. 37 1750-1753). Counsel further asserted that the State did not rebut Murray's reasonable hypothesis of innocence that his hair was on a bag of marijuana that he gave Taylor. (V. 37 1752). The prosecutor responded that Smith's testimony established that a sex act occurred and that Murray was guilty of sexual battery under a principal theory even if he didn't personally rape her. The trial

court denied the motion. (V. 37 1757). The defense presented its case. Defense counsel renewed the motion for judgment of acquittal. (V 39 2201). Defense counsel argued that because the indictment did not charge Murray with being a principal, a judgment of acquittal as to the sexual battery count should be granted. Counsel also argued that Florida caselaw holds that hair alone or even fingerprints alone are not sufficient to convict; rather, the State needs "something further to corroborate" such evidence. Counsel asserted that the State had nothing further other than the "snitch" which was not enough to survive the judgment of acquittal. The prosecutor responded that the state was not required to allege alternative theories or the existence of co-perpetrators in the charging document. The trial court noted that this was not a circumstantial evidence case because Murray had confessed to his co-escapee Smith. (V. 39 2208). The trial court distinguished Long v. State, 689 So.2d 1055 (Fla.1997), by noting that it was a hair comparison case, not a hair DNA case. Moreover, the hairs in Long were recovered from a vehicle not from the crime scene as here. (2209). Counsel made the observation that fingerprints "are better than DNA". The trial court denied the judgment of acquittal. (V. 39 2212). Counsel then requested a circumstantial evidence instruction based on testimony of Detective O'Steen that appellant's reasonable hypothesis of innocence was that his hair was found on the victim because he had give Taylor a bag of marijuana earlier. (V. 39 2215-2216). The trial court explained that this was a direct case not a circumstantial evidence case because of Murray's statement to Smith and declined to give the instruction. (V. 39 2208, 2220).

Preservation

This issue is preserved. Murray makes the same arguments on appeal as he did in his judgment of acquittal motion and relies on the same cases in appeal as he did in the trial court.

The standard of review

An appellate courts reviews a trial court's denial of a motion for judgment of acquittal is *de novo* because the issue is purely a matter of law.[6]

Merits

The legal test for determining a judgment of acquittal should have been granted is "whether after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment." Tibbs v. State, 397 So.2d

[6] *See* United States v. Guerrero, 114 F.3d 332, 339 (1st Cir. 1997); United States v. Iafelice, 978 F.2d 92 (3d Cir. 1992); United States v. Wilson, 118 F.3d 228, 234 (4th Cir. 1997)(reviewing the district court's grant of a motion for a judgment of acquittal *de novo*);United States v. Mulderig, 120 F.3d 534, 546 (5th Cir. 1997)(reviewing *de novo* a denial of a judgment of acquittal); United States v. Hartsel, 199 F.3d 812 (6th Cir. 1999)(explaining that decisions denying a motion for judgment of acquittal are reviewed de novo to determine sufficiency of the evidence); United States v. Blassingame, 197 F.3d 271 (7th Cir. 1999); United States v. Hernandez, 105 F.3d 1330, 1332 (9th Cir. 1997)(reviewing the district court's denial of the motion for a judgment of acquittal *de novo*); United States v. Jackson, 213 F.3d 1269, 1283 (10th Cir. 2000)(noting that sufficiency of the evidence to support a jury's verdict is a legal issue that is reviewed *de novo*); United States v. Grigsby, 111 F.3d 806, 833 (11th Cir. 1997)(reviewing *de novo* the denial of a defendant's motion for acquittal); United States v. Harrington, 108 F.3d 1460, 1464 (D.C. Cir. 1997)(reviewing *de novo* a trial court's denial of a motion for judgment of acquittal).

1120, 1123 (Fla. 1981); Woods v. State, 733 So.2d 980, 985 (Fla. 1999). A judgment of acquittal should not be granted unless the evidence does not establish the prima facie case. *See* State v. Williams, 742 So.2d 509, 511 (Fla. 1st DCA 1999). If the State has presented competent evidence to establish every element of the crime, then a judgment of acquittal is properly denied. *See* State v. Williams, 742 So.2d 509 511 (Fla. 1st DCA 1999). The appellate court must view the conflicting evidence in a light most favorable to the state. Peterka v. State, 640 So.2d 59, 68 (Fla. 1994). Courts do not weigh the evidence or assess the credibility of witness; those are questions solely for the jury. Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998). The only evidence considered when reviewing a denial of a judgment of acquittal is the evidence presented in the State's case-in-chief, not the defense's case. Williams v. State, 711 So.2d 41 (Fla. 1st DCA 1998), *citing*, Walker v. State, 604 So.2d 475, 476-77 (Fla. 1992). However, even erroneously admitted evidence is considered. Barton v. State, 704 So.2d 569, 573 (Fla. 1st DCA 1997)(expressly relying on evidence found to be improperly admitted in rejecting a insufficiency of the evidence claim); United States v. Miller, 146 F.3d 274 280 (5th Cir. 1998)(explaining that in conducting a sufficiency review, the appellate courts consider all of the evidence that was before the jury including evidence that was erroneously admitted); Lockhart v. Nelson, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988). Here even if the DNA was erroneously admitted, it is properly considered in reviewing the sufficiency of the evidence of identity and guilt.

A special test of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. Miller v. State, 25 Fla. L. Weekly S649 (Fla. August 11, 2000)

However, this is not a circumstantial evidence case. This is a direct evidence case. Kidwell v. State, 730 So.2d 670, 671 (Fla. 1998)(explaining that eyewitness observations and confessions are direct evidence); Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988)(explaining that because confessions are direct evidence, the circumstantial evidence test does not apply in the instant case). Murray confessed his involvement to his co-escapee Smith. Because this is a direct evidence case, the State is not required to rebut appellant's hypothesis of innocence, *i.e.* that his hairs were on a bag of marijuana he gave to Taylor.

In Washington v. State, 653 So.2d 362 (Fla. 1994), this Court held that the evidence, including DNA and hair comparison, while circumstantial, was sufficient to convict. This Court noted that the evidence against Washington included DNA test results that matched his semen with those found at the murder scene; microscopic tests that matched his hair characteristics with hairs found at the murder scene; his possessing and selling the victim's watch and his proximity to the victim's home. This Court held that based on this evidence, the jury had sufficient basis to exclude all reasonable hypotheses of Washington's innocence. Washington, 653 So.2d at 366. Here, like Washington, the DNA established that

Murray's hair was found on a nightie in the bathroom sink; Murray's hair microscopically matched hair found on the victim's nude body; property taken during the burglary was located in the former residence of Taylor by the current residents and testimony establish that Murray was in the company of a known perpetrator whose involvement was also established by DNA in proximity to the victim's home. Moreover, here, unlike Washington, the State presented direct evidence as well as circumstantial evidence.

Appellant's reliance on Horstman v. State, 530 So.2d 368 (Fla. 2d DCA 1988) and Long v. State, 689 So.2d 1055 (Fla. 1997), is misplaced. In Long, this Court held that the evidence was insufficient to support conviction of first-degree murder. Two hairs were found in Long's car that were consistent with the victim's hair. Additionally, a carpet fiber found at the crime scene matched the carpet of Long's automobile. No statements were introduced in which Long stated that he killed the victim in this case. Long, 689 So.2d at 1058. The Court noted that this was a circumstantial evidence case. The Long Court explained that hair comparisons cannot constitute a basis for positive personal identification because hairs from two different people may have precisely the same characteristics and that hair analysis and comparison is not an absolutely certain and reliable method of identification. Moreover, even where evidence does produce a positive identification, such as fingerprints, the State must still introduce some other evidence to link a defendant to a crime. See Jaramillo v. State, 417 So.2d 257 (Fla. 1982)(finding the evidence insufficient where only evidence connecting defendant to crime was his fingerprints). Here, unlike Long, the State presented

testimony in which Murray admitted his involvement in the burglary, sexual battery and murder of the victim.

In Horstman, this Court held that the evidence was not sufficent to support the jury's verdict. The victim's nude body was found lying next to a dumpster an expert in hair and fiber analysis, testified that there were strands of head hair in victims's mouth, on her jeans, her shirt, her knee, and in her blouse, bra and panties that had been forcibly removed. The hairs were indistinguishable from Horstman's hair. A pubic hair indistinguishable from Horstman was found on victim's sock. Horstman and the victim were seen together earlier that day at three different locations. The Horstman Court explained that while admissible, hair comparison does not establish certain identification as do fingerprints. The Court then explained that even if the hair evidence were as positive as a fingerprint, the state failed to show that the hair could only have been placed on the victim during the commission of the crime. In Horstman, the victim and Horstman were together prior to the murder at which time his hairs could have come to be on the victim. Here, unlike Horstman, the victim and Murray were not together other than when appellant burglarized her home, sexually battered and murdered her.

Furthermore, both Long and Horstman are hair comparison cases, not hair DNA cases. Unlike hair comparison, DNA is a highly reliable means of identification. Here, the even the DNA evidence alone is sufficient to convict. The State presented testimony that Murray's hair was found in two location in the victim's home. The State rebutted Murray's hypothesis of innocence his hairs were on a bag of marijuana he gave to Taylor and that Taylor brought the

hair into the victim's home when he committed the crime alone. First, the sheer number of Murray's hairs rebut this claim. Moreover, Murray's hairs were found in two separate locations. Some were found on a nightie in the bathroom sink and some were found on the nude body of the victim. The only reasonable conclusion based on numbers and location is that Murray was in the victim's house and near the victim when she was nude. Thus, the evidence is sufficient and the trial court properly denied the judgment of acquittal.

ISSUE VIII

DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING APPELLANT'S DISCOVERY REQUEST? (Restated)

Appellant asserts that the trial court abused its discretion by denying his discovery requests to obtain the names of the attorney representing the other persons whose DNA tests were performed at the same time as appellant's DNA test. Appellant raises the possibility of mistakes in the DNA test results in those other cases. However, the expert testimony established that the errors in those other cases did not effect the reliability of his DNA results. The other tests results were simply not relevant. Moreover, disclosing this DNA information would be a violation right of privacy of the other persons involved in the other cases. Additionally, it is doubtful whether a Florida trial court has the authority to order a lab outside its jurisdiction to release the medical records of non-parties. Thus, the trial court properly denied the discovery request.

The trial court's ruling

Murray filed a motion to compel disclosure of the names of persons whose DNA tests were conducted at the same time as his. (V. 4 715). During the Frye hearing, defense counsel asked the expert for the names of the attorneys involved in the four other DNA tests which were recorded on the same gel loading worksheet. (V. 18 3396, 3402). The expert explained that the actual tests were not run simultaneously, rather, they were separate and that the other DNA tests "have absolutely no bearing whatsoever" on the test results in this case and that they were "completely irrelevant". (3406,

3407). There is considerable space between the sample from the other cases. The DNA expert also explained that this is a standard scientific practice. (3406). The expert also expressed concern about confidentiality of the other persons involved in the other tests and the potential of the lab being sued for a breach of confidentiality. (3407). The expert explained there is no possibility of contamination during the gel loading process; rather, any contamination occurs during the amplification process. At that critical time, they handled the cases one by one to avoid any contamination. (3409). The expert offered to produce the digital image of all the gels run at the same time, not just the section that involved appellant's test result. (3411). Counsel did not want this, he wanted the attorney's names and access to their files to see if his "reads were on their sheet". (3411) On cross-examination of the State DNA expert, Mr. Deguglielmo, defense counsel asked him whether he ever informed the people involved in the other DNA tests performed at the same time that there was a mistake in the paperwork because lane 35 was actually empty and was functioning a negative control rather than as a positive control as reflected in the paperwork and the expert responded no. (V. 33 1337). But the expert disagreed with counsel assessment that there was a mistake in the loading of the gel.

The standard of review

A trial court has broad discretion to order or limit discovery in criminal cases. State v. Lewis, 656 so. 2d 1248, 1249 (Fla. 1994)(stating that on review of an order denying or limiting

discovery it will be the [moving party's] burden to show that the discretion has been abused).

Merits

There is no constitutional right to discovery in a criminal case. State v. Pinder, 678 So.2d 410, 414 (Fla. 4th DCA 1996), *citing*, Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 845-46, 51 L.Ed.2d 30, 42 (1977). However, Florida has enacted discovery rules in criminal cases. The rule of criminal procedure governing the prosecutors discovery obligation, Rule 3.220(b)(1)(j), provides:

> (1) Within 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit which shall disclose to the defendant and permit the defendant to inspect, copy, test, and photograph the following information and material within the state's possession or control:
>
> (J) reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;

This rule also permits the trial court to limit discovery. Rule 3.220(3)(e) and Rule 3.220(1), provide:

> Restricting Disclosure. The court on its own initiative or on motion of counsel shall deny or partially restrict disclosures authorized by this rule if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from the disclosure, that outweighs any usefulness of the disclosure to either party.
>
> Motion to Restrict Disclosure of Matters. On a showing of good cause, the court shall at any time order that specified disclosures be restricted, deferred, or exempted from discovery, that certain matters not be inquired into, that the scope of the deposition be limited to certain matters, that a deposition be sealed and after being sealed be opened only by order of the court, or make such other order as is appropriate to protect a witness from harassment, unnecessary

> inconvenience, or invasion of privacy, including prohibiting the taking of a deposition. All material and information to which a party is entitled, however, must be disclosed in time to permit the party to make beneficial use of it.

The language of the rule limits discovery of scientific tests to the particular case. Moreover, evidence must be relevant or reasonably calculated to lead to discovery of admissible evidence to be subject to discovery. Ivester v. State, 398 So.2d 926 (Fla. 1st DCA 1981). Fishing expeditions are not permitted. Brown v. State, 493 So.2d 80(Fla. 1st DCA 1986)(holding trial court properly denied discovery request of defendant for inmate record which he alleged that the records might contain evidence which might be useful for impeachment of the inmates for their reputation for truth and veracity and might contain other evidence concerning bias because the request was too indefinite and was a "fishing expedition"). Here, appellant sought to obtain discovery not authorized by the rules of discovery and to obtain evidence that was not demonstratively relevant to his case.

Moreover, a trial court can refuse to order even relevant evidence be disclosed based on privacy concerns. Bartlett v. Hamwi, 626 So.2d 1040 (Fla 4th DCA 1993)(holding that a State witness could not be compelled to give hair samples which defendant sought through discovery, absent evidence that denial of access to samples would deprive defendant of due process or result in manifest injustice because the witness was protected by state and federal guarantees against unreasonable searches and seizures and the constitutional right of privacy and explaining that while the discovery rule permitted court to allow discovery "as justice may require"; the rule also allowed court to restrict disclosure of

information if it resulted in unnecessary annoyance or embarrassment and relying on Smith v. State, 260 So.2d 489 (Fla. 1972)(holding that the trial court was without authority to order eyewitnesses to be examined for visual acuity). Furthermore, it is doubtful whether a Florida trial court has the authority to order a Kentucky lab to release test results that probably involve persons from other states. Cf. Thomas Jefferson University v. Romer, 710 So.2d 67 (Fla. 4th DCA 1998)(holding court had personal jurisdiction over Pennsylvania clinical laboratory on claim of negligent performance where blood sample was drawn in Florida and resulting laboratory written report and analysis were used within Florida).

Harmless Error

Appellant fails to identify any possible harm to him from the trial court's denial of discovery request. Appellant asserts that he wanted the names to determine if the missing photographs and documents were part of the other files. But there really are no "missing" photographs. Rather, digital imaging photographs rather than normal polaroid photographs were taken. The testimony was clear and unrefuted that other tests, conducted at the time same appellant's DNA tests were conducted, did not affect the results in his case. Thus, there is no prejudice to appellant in the trial court's ruling.

ISSUE IX

DID THE TRIAL COURT PROPERLY ADMIT APPELLANT'S CONFESSION REGARDING HOW HIS HAIR CAME TO BE FOUND IN THE VICTIM'S HOUSE? (Restated)

Appellant argues that the trial court improperly admitted appellant's statement made after the officer informed appellant that his hair matched the hair from the murder scene. Appellant further argues not only that the officer's statement that the hair matched is inadmissible but also that the statement made in response is also inadmissible. The State respectfully disagrees. First, the officer did not lie. Appellant's hair, in fact, was a DNA match of the hair found at the murder scene. Furthermore, even if the officer had lied, the officer's statement and the suspect's response would both still be admissible. Appellant misunderstands the reason that a officer may lie to induce a confession. It has nothing to do with any possible cross examination. Confession are admissible depending on their voluntariness. An officer lying to a suspect does not render the suspect's confession involuntary. Thus, the trial court properly admitted appellant's statement.

The trial court's ruling

The officer, Detective O'Steen, testified. (V. 35 1490). Out of the jury's presence, defense counsel discussed his earlier motion to suppress and argued that not only should the officer's statement regarding a match should be suppressed but also appellant's confession should be suppressed "under the doctrine of entirety".[7]

[7] Appellant argues "under the doctrine of entirety" that, when the evidence that induces a confession is ruled inadmissible, the confession must also be suppressed. There is no doctrine of

(V. 35 1491-1492). Defense counsel argued that because the initial DNA evidence had been ruled inadmissible in the prior appeal, the detective should not be allowed to refer to the hairs as a "DNA match". The prosecutor explained that he had informed the detective not to mention DNA and only to refer to the hairs as a match. (V. 35 1492). Defense counsel argued that appellant's confession should not be admitted because it flowed as a response to evidence that was held to be inadmissible. (V. 35 1494). The trial court noted that the admissibility of the confession depends in its voluntariness, *i.e.* whether he was threatened or forced or promised anything. (V. 35 1495,1497). Defense counsel then explained that the jury would hear about a test performed in '91 or '92 but the jury would know that test results introduced were performed in '97 or '98 and they would then wonder about these earlier tests. (V. 35 1496). The trial court responded don't bring

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entirety. Appellant seems to mean the rule of completeness or some sort of "seed of the poisonous tree" version of the typical "fruit of the poisonous tree" doctrine. However, the rule of completeness does not apply and the seed of the poisonous tree doctrine does not exist. According to the rule of completeness, when the State introduces part of a confession or admission, the defendant is ordinarily entitled to bring out the remainder of the statement. Ramirez v. State, 739 So.2d 568, 580 (Fla. 1999). It requires that the entire conversation be placed before the jury. The rule of completeness is a rule of inclusion, not exclusion. The fruit of the poisonous tree doctrine, while a rule of exclusion, requires that the confession be a product of an illegal arrest or some other constitutional violation. Wong Sun v. United States, 371 U.S. 471, 487, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)(excluding evidence that is "fruit of the poisonous tree"). Appellant does not claim that there was an illegal arrest or any other constitutional violation; rather, the DNA evidence was determined to have not met the Fyre standard in this first appeal. Neither the rule nor the doctrine apply here. The test that applies to the admission of confessions is voluntariness. Appellant does attempt to claim that the statement was not voluntary. Therefore, the statement is admissible.

up the DNA, so that won't be an issue and overruled the objection. (V. 35 1496-1497). Defense counsel then argued that the trial court was allowing the prosecutor "to make up a question" that the witness never actually said to appellant that they match; rather, the officer said that the hairs were a DNA match. (V. 35 1497). The trial court then asked defense counsel if he would prefer the actual statement or the redacted one. (V. 35 1497). Defense counsel responded that he did not want the actual statement. He then requested a standing objection to the testimony to which the trial court agreed. (V. 35 1498,1513). The officer during the proffer of voluntariness testified that he did not threaten appellant or make any promises and that he Mirandized appellant. (V 35 1499-1501). The trial court ruled the confession voluntary and therefore, admissible. (V. 35 1513). In the jury's presence, the detective testified that he Mirandized appellant and he did not threaten or make him any promises. (V. 35 1514,1516-1518) The detective then testified that he informed appellant that the hairs found at the scene "matched" his hair and that they should have gotten the results back last year. (V. 35 1520). Appellant also told the detective that he learned that his hair matched the hair from the crime scene from watching the Taylor's trial on TV. (V. 35 1521-1522). The detective testified that he asked appellant how his hair got at the scene and that appellant responded: "maybe when I pulled a bag of reefer out of my crotch and gave it to Taylor", the hair must have stuck to the bag but he did not remember where he was when he gave Taylor the bag of reefer. (V. 35 1522). On cross-examination, defense counsel referred to the statement that

you should have gotten the results back a year ago. (V. 35 1541).

Preservation

This issue regarding appellant's statement in response to the officer's statement is properly preserved. Appellant contemporaneously objected in the trial court to the admission of this testimony on the same grounds he asserts as error on appeal. Thus, the issue is preserved. However, any objection to the officer's statement as a match is not preserved. Defense counsel agreed that he did not want the officer's actual words regarding a DNA match used. Thus, appellant waived any objection to the officer's statement.

The standard of review

A trial court has wide discretion over whether to admit evidence and a ruling relating to the admission of evidence will not be disturbed absent an abuse of discretion. *See* Ray v. State, 25 Fla. L. Weekly S96, (Fla. 2000)(stating that the admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion); General Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997)(stating that all evidentiary rulings are reviewed for "abuse of discretion"). Under this standard, a determination of that the statement are admissible will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d

1197, 1203 (Fla. 1980). The abuse of discretion standard of review is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So.2d 191, 195 (Fla. 4th DCA 1997).

Merits

The test that applies to the admission of confessions is voluntariness. An officer's misrepresentations of the evidence against a defendant does not render any subsequent confession involuntary.[8] Such misrepresentations, of course, may cause a suspect to confess, but causation does not constitute coercion. Here, the officer's statement was not even a misrepresentation. Appellant's hairs were, in fact, a DNA match of the hair found on the victim.

Moreover, while the prosecutor agreed to refer to the hairs merely as a match, in fact, the statement that the hairs were a DNA match was perfectly proper. Both the officer's statements that the

[8] Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969)(holding that an interrogator's misrepresentation to the suspect that his counsin had already confessed did not render the confession coerced); Ledbetter v. Edwards, 35 F.3d 1062, 1070 (6th Cir.1994)(holding officer's false statements that defendant's fingerprints matched fingerprints found in victim's van and that two witnesses had identified defendant did not render defendant's confession involuntary because a defendant's will is not overborne simply because he is led to believe that the government's evidence of his guilt is greater than it actually is"); Holland v. McGinnis, 963 F.2d 1044, 1051 (7th Cir.1992) (observing that of the numerous varieties of police trickery ... a lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary and does not effect the voluntariness of a confession); United States v. Velasquez, 885 F.2d 1076, 1088, n. 11 (3d Cir.1989)(observing that manipulation and lies may play a part in the suspect's decision to confess, but so long as that decision is a product of the suspect's own will, the confession is voluntary); Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 6.2(c), at 446-48 (1984).

hairs were a DNA match and appellant's subsequent response were admissible. The jury must make a determination regarding the voluntariness of the confession and needs all the evidence surrounding the confession to make that determination. That a suspect would make partial admissions when confronted with scientific evidence is reasonable and understandable to a jury and therefore, this evidence was admissible to establish voluntariness.

This Court did not hold that the DNA evidence was per se inadmissible in the first appeal of this case; rather, this Court held the Frye hearing was inadequate and remanded for a new Frye hearing and new trial due to the "the compound errors" of an inadequate Frye hearing and an improperly qualified expert witness. However, at the new trial the DNA evidence, if properly Frye tested with a properly qualified expert, could be admitted. Here, a proper Frye hearing was held; therefore, the fact that the hairs were a DNA match was proper. Whether a court later rules that the evidence used to induce the confession is inadmissible does not effect the earlier voluntariness of the confession. Thus, the confession is admissible regardless of the admissibility of the officer's statement. One is simply independent of the other. Thus, the officer's statement was improperly redacted and appellant basically received a windfall at trial of having the officer's statement partially redacted.

Appellant reasons that a confession induced by a lie is admissible because defense counsel can cross examine the officer regarding the fact he lied and mislead the suspect into confessing. But that here he is prevented from exploring this area on cross-examination because it is tactically inadvisable. First, the

reason that confessions are admissible had nothing to do with cross-examination; rather, confessions induced by a lie are admissible because they are voluntary. Moreover, contrary to appellant's claim, he was perfectly free to cross-examine the detective regarding any circumstances surrounding the confession. He asserts that an cross-examination would open the door to the admission of the prior DNA tests. However, this is a tactical decision not legal error. Hard choices are hard choices, not legal error. State v. Raydo, 713 So.2d 996 (Fla. 1998)(noting that although trial court's erroneous ruling allowing improper impeachment made the choice not to testify more difficult, the erroneous ruling did not violate the right to testify). Additionally, if appellant wished the officer to testify as to the actual statement he made, he should have agreed to use the actual statement including the reference to a "DNA match" and then requested a limiting instruction informing the jury that they were to consider the officer's statement only for the purpose of determining the voluntariness of the confession. However, appellant did not request this. Appellant was perfectly free to cross-examine the officer regarding the actual statement he made to appellant but declined to do so.

Harmless Error

The error, if any, was harmless. Appellant opines the harm is that the jury will be jump to the conclusion that there were additional earlier DNA test performed and wonder what the results showed. However, a jury would not speculate on earlier test results never introduced at trial when they were presented with

actual test results. Thus, the error, if any, did not affect the jury verdict. Goodwin v. State, 751 So.2d 537 (Fla. 1999)(holding the DiGuilio harmless error test, under which state must prove that there is no reasonable possibility that error contributed to conviction, applies to both constitutional and non-constitutional errors). Moreover, appellant used this testimony as his reasonable hypothesis of innocence.

PROPORTIONALITY

This Court reviews the propriety of all death sentences. Foster v. State, 25 Fla. L. Weekly S667 (Fla. September 7, 2000). To ensure uniformity, this Court compares the instant case to all other capital cases. However, this Court does not reweigh the mitigating factors against the aggravating factors in a proportionality review, that is the function of the trial court. For purposes of proportionality review, this Court accepts the jury's recommendation and the trial court's weighing of the aggravating and mitigating evidence. Bates v. State, 750 So.2d 6, 12 (Fla. 1999). Here, the trial court found four aggravators and five nonstatutory mitigators. The trial court found prior violent felonies; the murder was committed during the course of a burglary and/or sexual battery; the murder was committed for financial gain and HAC as aggravators and the death of his wife; his girlfriend's statements that appellant was good with her children; his mother's statements regarding trouble as a juvenile; no contact between the defendant and his father and his mental health as mitigators.

The trial court did not abuse its discretion in finding the existence of all the aggravators including HAC. This Court affirmed the heinous, atrocious or cruel (HAC) aggravator in the co-perpetrator's case.[9] Thus, this Court has already held that the

[9] Taylor v. State, 630 So.2d 1038, 1043 (Fla. 1993)(finding that the heinous, atrocious, or cruel aggravating factor was clearly supported by the evidence despite the fact that Taylor contended there was no evidence the victim was conscious or that she endured great pain or mental anguish during the murder because the victim was stabbed at least twenty times with two different weapons and also suffered twenty-one other lacerations, bruises, and wounds, and received several blows to her head and face from blunt objects and the victim was alive while she was stabbed,

facts of this case support the HAC aggravator. Furthermore, the strangulation, rape and injuries individually support the finding of heinous, atrocious, or cruel.[10]

The death sentence in this case is proportionate. This Court affirmed the death sentence in the co-perpetrator's case.[11] Additionally, this Court has found the death penalty proportionate in other similar cases.[12]

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beaten, and finally strangled).

[10] Orme v. State, 677 So.2d 258,(Fla. 1996)(explaining that strangulation creates a prima facie case for aggravating factor of heinous, atrocious, or cruel); Banks v. State, 700 So.2d 363 366(Fla. 1997)(noting that even where the victim's death may have been almost instantaneous, the HAC aggravator is proper where the defendant committed a sexual battery preceding the killing because of the fear and emotional strain in the victim from the rape); Gudinas v. State, 693 So.2d 953, 966 (Fla. 1997)(finding the trial court did not abuse its discretion in finding heinous, atrocious, or cruel aggravating circumstance (HAC) based on numerous injuries to victim's face, neck, hand, mouth, genital area, rectal area and head and rejecting a claim that the victim was unconscious, perhaps even brain dead, at the outset of the attack because a trier of fact could reasonably infer that the victim was conscious during the sexual batteries and when the other injuries that were inflicted); Perry v. State, 522 So.2d 817, 821 (Fla. 1988)(finding HAC where the victim was beaten in the head and face, choked, and repeatedly stabbed while she was in her own home); Randolph v. State, 562 So.2d 331, 338 (Fla. 1990)(finding HAC where victim was repeatedly hit, kicked, strangled and knifed).

[11] Taylor v. State, 630 So.2d 1038, 1043 (Fla. 1993)(affirming the death penalty where the trial court found the following aggravating factors: (1) the murder was committed during the course of a burglary and/or sexual battery; (2) the murder was committed for financial gain; and (3) the murder was committed in an especially heinous, atrocious, or cruel manner and as the sole nonstatutory mitigating factor, the trial court found that Taylor was mildly retarded).

[12] Kimbrough v. State, 700 So.2d 634 (Fla. 1997)(holding death sentence was proportionate where there were three aggravators present: prior violent felony, committed during the course of a felony, and HAC and there was no statutory mitigation and weak nonstatutory mitigation and evidence supported finding of heinous,

atrocious or cruel (HAC) aggravator where victim had fractured jaw, fractured temple, vaginal injury and bruises inflicted during a rape); Gudinas v. State, 693 So.2d 953, 966 (Fla. 1997)(affirming the trial court's rejection as a statutory mitigator a claim that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement was substantially impaired and finding that the death sentence was proportionate where the trial court found the three statutory aggravators: (1) the defendant had been convicted of a prior violent felony; (2) the murder was committed during the commission of a sexual battery; and (3) the murder was especially heinous, atrocious, or cruel and one statutory mitigator: (1) the defendant committed the murder while under the influence of an extreme mental or emotional disturbance and twelve nonstatutory mitigating factors); Branch v. State, 685 So.2d 1250 (Fla. 1996)(finding the death sentence was proportionate in a case where the trial court found three aggravators: (1) murder committed in the course of a sexual battery; (2) prior violent felony conviction; and (3) HAC and four nonstatutory mitigators: (1) the defendant's remorse; (2) unstable childhood; (3) positive personality traits; and (4) acceptable conduct at trial); Johnson v. State, 660 So.2d 648 (Fla. 1995)(finding death sentence proportionate with three aggravators: (1) prior violent felony; (2) murder committed for pecuniary gain and (3) the murder was heinous, atrocious, or cruel and fifteen nonstatutory mitigating factors where the victim was repeatedly stabbed); Johnson v. State, 660 So.2d 637 (Fla. 1995)(finding death sentence proportionate with three aggravators: (1) prior violent felony; (2) murder committed for pecuniary gain and (3) the murder was heinous, atrocious, or cruel and fifteen nonstatutory mitigating factors where the victim had twenty-four stab wounds, one incised wound, and blunt trauma to the back of the head and wounds and abrasions near the vagina and anus).

CONCLUSION

The State respectfully requests that this Honorable Court affirm appellant conviction and death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to RICHARD R. KURITZ, Esq., 503 East Monroe Street, Jacksonville, FL 32202 this 25th day of September, 2000.

_____
Charmaine M. Millsaps
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