IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC09-2234

ANDREW MICHAEL GOSCIMINSKI

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

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ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR ST. LUCIE COUNTY, FLORIDA, (CRIMINAL DIVISION)

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# ANSWER BRIEF OF APPELLEE


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## PRELIMINARY STATEMENT

Appellant, Andrew Michael Gosciminski, Defendant below, will be referred to as "Gosciminski" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate record will be by "R" and supplemental materials will be designated by the symbol "S" preceding the record referenced, Gosciminski's initial brief will be notated as "IB" followed by the appropriate volume and page number(s).

## STATEMENT OF THE CASE AND FACTS

On October 22, 2002, the grand jury returned an indictment of Gosciminski and on January 23, 2003, it was amended to charge him with the September 24, 2002 first-degree murder of Joan Loughman ("Loughman"), robbery with a knife, and burglary of a dwelling while armed. (R.1 1-3). The re-trial commenced with opening statements made on September 25, 2009. On October 7, 2009, the jury returned a verdict of guilty on both premeditated and felony murder theories of first degree murder as well on the robbery and burglary counts. (R.6 944-46).

Following the penalty phase, on October 9, 2009, the jury recommended death by a vote of nine to three (R.7 982). The trial court, after holding a Spencer hearing, the trial court independently found the aggravators: (1) heinous atrocious or cruel ("HAC"), (2) cold, calculated and premeditated ("CCP"),

and felony murder merged with pecuniary gain. Each was given great weight. (R.8 1253-60) In mitigation the court found one statutory mitigator of no significant criminal activity (some weight)[1] and thirteen non-statutory mitigators of which he gave four moderate weight, five some weight, and four little weight. (R.8 1261-76).

The facts of the case reveal that near 9:00 p.m. on September 24, 2002, Loughman was found dead in the back bedroom of her father's home. Four of her teeth were knocked out, she had a defensive wounds to her hand, and her jugular vein and throat had been cut after she had suffered other bludgeoning and stab wounds. Loughman's body temperature, when found, was consistent with being killed shortly after 8:47 a.m. on September 24th. (R.24 1894, 1896-1900; R.26 2091-95, 2125-29, 2138-39; R.35 3402-24, 3427, 3430-32, 3434, 3439-41, 3443) Although she was known to wear all of her jewelry all the time, Loughman was found without her jewelry, in particular a two carat diamond ring and diamond and emerald tennis bracelet. Her fanny pack was also missing. (R.26 2096-98, 2103-06). Crime scene forensics established that the attacked started in the

[1] The trial court noted that in 1998, Gosciminski was convicted of two felonies involving taking something from someone else in a nonviolent manner, but now he was convicted a murder along with robbery for pecuniary gain, this, "[t]he murder demonstrates the pattern of taking has changed from nonviolent to violent." (R. 1261).

front foyer where blood and Loughman's glasses were found nearby. The blood evidence showed that Loughman was dragged to a back bedroom, away from the front window, the only window that was not covered with a hurricane shutter. In the back bedroom, Loughman was bludgeoned with a large ashtray stand, which was broken during the attack. From the broken ashtray, it appeared she suffered a defensive wound to her hand and stab wounds to her back. (R.241901, 1914-, 1928-39, 1942-46, 1950-54; R.25 1968-78, 1988-95, 2006-06, 2012-14, 2066-68) While still alive, Loughman was turned over onto her stomach and her throat was slashed cutting her jugular causing her to bleed to death. R.35 3402-24, 3427, 3430-32, 3434, 3439-41, 3443). Loughman was found by her brother and sister-in-law while her twin sister remained outside the residence. (R.25 2008-17; R.26 2138-39)

While no forensic evidence was discovered linking Gosciminski to the homicide scene (R.24 1904-06; R.25 2017-19, 2021, 2025, 2033-36, 2041-43, 2047), he had possession of Loughman's two carat diamond ring after the murder and gave it to his girl friend Debra Thomas ("D-Thomas") as an engagement ring. The record establishes that Gosciminski[2] had an on-again-

[2] During this re-trial, Gosciminski's police statement and his testimony from the first trial were played during the State's case in chief. (R.27 2285-2321; R.33 3104-3236).

off-again relationship[3] with his D-Thomas and in the weeks before the murder he convinced her to return to him with promises of a new diamond ring and beach residence in Vero Beach. (R.31 2757-66, 2772-73, 2779-81).

Gosciminski was the marketing director of Lyford Cove, and assisted living facility, and about a week before the murder, he met Loughman when she was deciding to place her ailing father, Frank Vala, at Lyford. During their meeting, Gosciminski noticed Loughman's jewelry of which there was testimony she wore a two carat diamond ring and an emerald and diamond tennis bracelet among multiple other rings and other pieces of jewelry valued near $40,000.00. Gosciminski testified "you couldn't miss Joan's jewelry." On or about September 17, 2002, Gosciminski visited the Vala residence on Hutchinson Island, also referred to as South Beach, to pick up some furniture for Frank Vala's Lyford Cove room. Gosciminski knew Loughman was living alone in the house. (R.26 2163, 2168-77, 2190-91; R.27 2205-06, 2286, 2288-2300, 2305-09; R.29 2555; R.31 2757-61,

[3] D-Thomas and Gosciminski got engaged in 2001, but shortly thereafter, she moved out for a period of four months. Sometime in the spring of 2002, D-Thomas met Ben Thomas, no relation, while he was still married to Deborah Pelletier. Later, D-Thomas returned to Gosciminski, however, after Gosciminski found out about B Thomas, he competed with him. (R.31 2757-66, 2772-73, 2779). Gosciminski confirmed that they had a rocky relationship. He characterized D-Thomas as a "jewelry hound" who was out of work living on his salary. Also, Gosciminski claimed D-Thomas was addicted to pain killers and abused alcohol. (R.33 3108-09, 3114-19, 3126-36).

2764-65; R.33 3141-45, 3147-48, 3180-81, 3205-07) Janet Vala-Terry and Barbara Vala, explained that Loughman, had neck and back problems making it impossible for her to lift furniture, such as an ottoman, chair, or television. (R.26 2106, 2141-42; R.35 3353-, 3355-56). Loughman was living there alone at the time and had all but the front hurricane shutters closed. Shortly before September 24th, Gosciminski took D-Thomas to see the hurricane-shuttered Vala home stating it would be coming onto the market soon because the owner was not doing well (R.24 1910; R.25 2041-42; R.27 2205; R.31 2775-77; R.33 3205-07).

Within a day of Vala's admittance to Lyford, he fell and had to be returned to the hospital, and a week later to Hospice. (R.28 2408-10, 2420-21; R.33 3149-50) Approximately a week later, on September 23, 2002, the evening before the murder, Gosciminski was informed Loughman would be seeking the discharge of her father from Lyford Cove and asked that Gosciminski put her father's suitcase in the car, and the suitcase was found till there after her death. (R.25 1998-2000) She also told Gosciminski that her family was coming into town and she would be leaving. (R.26 2163, 2168-77, 2190-91, 2193; R.27 2286, 2288-2300, 2305-09; R.31 3149-50). Loughman was scheduled to meet with Karen Ricci at Hospice on September 24th regarding her father's admittance, however, when he was transferred from the hospital at 12:45 p.m., Loughman was not there to sign the

paperwork and she never called Hospice to explain; Ricci only got Loughman's voice-mail when she called her on September 24th. (R.28 2420-23)

The next morning, September 24, 2002 based on cell phone records, near 8:00 a.m., Gosciminski made a cell phone call near his Wakefield Circle, Port St. Lucie home. At 8:47 a.m., Loughman, while on the telephone with her sister announced that someone was at her front door and had to end their conversation. (R.26 2089-91, 2106-12). Loughman was not heard from or seen alive again; she never returned her husband's 10:30 a.m. call. At 9:12 a.m., Gosciminski cell phone was called, but he did not answer and the call went to voice. The cell records showed that the call went through the Faber Cove sector 1 tower which placed him within the cell coverage area for the Vala home where Loughman was staying. At 9:25 a.m. and 9:28 a.m. and while still activating the Faber Cove sector 1 tower, Gosciminski checked his voice mail and then returned the call. (R.32 3021-22; R.33 3153-71; R.35 3361).

Next, based on cell phone and bank records, Gosciminski made a cash deposit at Palm City branch of Harbor Federal at 10:08 a.m., about a half-hour drive from the Vala residence (R.31 2917-19, 2931-32).[4] At 10:36 a.m., Gosciminski made a cell

[4] The deposit was made with Darcy DelRosario. She testified that 90% of the time, she covered the drive-thru window for the

phone call using the Stuart Tower which covers the area near the I-95 Martin Highway/Route 714 intersection; the intersection where Loughman's fanny pack containing personal, checkbooks, and credit cards was recovered. (R.29 2627-39; R.30 2637-34, 2638-39; R.32 3023; R.35 3376). Subsequently, Gosciminski returned north to the Darwin Square branch of Harbor Federal in Port St. Lucie, and made a separate check deposit at a different branch at 11:04 a.m. (R.31 2917-19, 2942-44; R.33 3153-71).[5]

Near 11:30 a.m., Gosciminski made a cell phone call and at 11:39 a.m. he received a call on his cell phone. Both calls were routed through the cell phone tower covering the area around his Wakefield Circle home. (R.32 3023-24; R.33 3153-71). D-Thomas placed Gosciminski in his master bathroom hear 11:30 a.m. that morning, washing blood from his body and discarding clothes with blood visible on them. Gosciminski told her there was blood on his clothes and he had to get rid of them (R.31 2790-93, 2796-98)

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branch, although there was nothing to indicate whether or not she took the deposit through the drive-thru. Harbor Federal did not have video surveillance of its drive-thru windows and the videotapes of the inside of the branches, both Palm City and Darwin branches were not available due to damage or failure to make a tape that day. (R.31 2909, 2931-32)

[5] The deposit was taken by Eugene Christopher Manvill, who testified that he was a supervisor at the branch, and would cover the lunches of other tellers. Like Ms. DelRosario, Mr. Manvill worked mostly through the Drive-thru teller window. (R.31 2943-44).

Near noon, 12:07 p.m. and again at 12:16 p.m., Gosciminski's telephone makes contact with cell phone towers southwest of his Lyford Cove office. Debra Flynn ("Flynn") has Gosciminski arriving at Lyford Cove at 1:30 p.m. that afternoon. The cell phone records show that it was not until 12:56 p.m. that he receives a call through the Fort Pierce Center Tower which services the area near Lyford Cove. (R.29 2488, R.32 3024-26; R.33 3153-71)

According to Lois Bosworth, Gosciminski did not arrive to Lyford Cove until sometime between noon and 12:30 p.m. wearing casual attire of Dockers and a golf shirt. Although she had a morning meeting with him, he called to say he would not be in until later in the day. However, as noted above, Flynn, Gosciminski's immediate supervisor, who was watching for him to arrive for a scheduled meeting, testified that she saw his car drive into the parking lot at 1:30 p.m. Nicole Rizzolo ("Rizzolo"), Flynn's assistant, recalled Gosciminski arriving at Lyford on September 24, 2002 sometime in the afternoon, after she had eaten lunch. Both Flynn and Rizzolo reported that Gosciminski looked freshly showered - "scrubbed pink" with his hair wet and slicked back. His demeanor was very unusual for him; he was very subdued. (R.27 2317-29, 2331-32, 2338; R.29 2488-90, 2493-94, 2529-31, 2535).

Flynn and Rizzolo also reported that during a break in his

meeting with Bosworth, Gosciminski showed them a large round cut diamond ring, approximately two carats in weight, with a "square-ish"/rectangular baguette on each side, set in platinum or white gold. Neither looked at the ring closely, but reported that it appeared old and dirty. Flynn described the ring as having black coloring around the grooves and prongs. Gosciminski had it wrapped in a napkin or tissue. (R.29 2494-2503; 2531-34). He also told them that he had purchased an entire collection of estate jewelry and he planned to give a diamond and emerald tennis bracelet for D-Thomas as well as other rings. (R.29 2503-07, 2533-34).

D-Thomas testified that on September 24, 2002, near 11:30 a.m., around lunchtime, she found Gosciminski in the master bathroom of their Wakefield Circle home. He had not entered through the front door where she was working. The other entrance to the house was through the back door into the master bathroom. When D-Thomas saw Gosciminski, he was standing in his boxer shorts washing blood from his arm and side; he had previously washed his face and hair. In the corner were Gosciminski's Blue Dockers, his favorite shirt, and deck shoes. There was blood on these items as well, although there was a substantial amount of blood, they were not saturated. Noting D-Thomas' presence, Gosciminski volunteered that he had to rough up someone for his friend, Dominic, during the collection of a

debt. He also admitted that he had to get rid of the clothes because they had blood on them. D-Thomas did not see these clothes again. D-Thomas exited the bathroom and did not see Gosciminski leave the house; he left through the door he had used to enter. (R.31 2790-93, 2796-2801, 2808).

When Gosciminski returned later that night, he gave her a two carat diamond ring which D-Thomas identified as matching the replica of Loughman's ring. (R.31 2808-10, 2813, 2857). The next day, D-Thomas showed the ring to her friend, Maureen Reape, who also was able to identify it as matching Loughman's replica ring. (R.27 2215; R.31 2897-2905). Steve Jurina testified that on September 26, 2002, D-Thomas and Gosciminski visited him at which time D-Thomas showed off a diamond ring. Uninterested in jewelry, Jurina did not look at it, but Gosciminski described the ring as a round, almost two carat perfect diamond worth about $15,000.00. (R.29 2545-47). The record reflects that Gosciminski claimed to have acquired the jewelry at a time he has a negative balance in his check book. (R.31 2919-28)

On October 2, 2002, while Gosciminski was being questioned by the police, Detectives Bender and Hall interviewed D-Thomas at the Vero Beach residence she and Gosciminski recently leased. During the interview, both detectives noted the two carat ring she was wearing, and D-Thomas said she had received it from Gosciminski a year previously. (R.27 2208, 2210; R.29 2561-67;

2580-85; R.31 2821-23). The detectives did not collect the ring at that time because the police had not received pictures or the replica made by the same jeweler who had made the original ring. However, once a replica was created, Bender and Hall identified the ring D-Thomas showed them as matching the replica make of Loughman's ring. (R.27 2215)

After the police left, D-Thomas removed the ring, and made plans to leave the residence. Subsequently, Gosciminski called to say that Frankie said the ring was hot and that he needed to get rid of it. When Gosciminski returned from his police interview, he put on swim trunks, took the ring, and headed to the beach. Upon his return 20 to 30 minutes later, without the ring, D-Thomas left the residence eventually going to the police station. (R.31 2823-29, 2831-32). Subsequently, Gosciminski was arrested.

In the late summer and fall 2002, Deborah Pelletier ("Pelletier") and Ben Thomas ("B-Thomas")[6] were going through a divorce and she had sole possession of the marital home. On the heavily wooded property, Pelletier had a shed, the door of which

[6] In 2002, Debra Thomas and Ben Thomas were not related. Subsequently, they have married. During the trial, the State called B-Thomas in part to show his whereabouts on the day of the homicide and to refute the defense claim that he should have been the suspect. The State presented B-Thomas' testimony along with receipts and other records in an attempt to show that while he was in Fort Pierce on the morning of the homicide he could not have committed the crimes with which Gosciminski was charged. (R.30 2651-2751).

could not be seen from the home. The water pumps were in the shed. In August 2002, while Gosciminski and D-Thomas were separated for a time, he visited Pelletier and helped her fix a problem with the water system. Two or three times a week, Gosciminski would visit and talk to Pelletier about the relationship B-Thomas and D-Thomas were having, however, Gosciminski confided in Pelletier that he was going to get D-Thomas a two carat diamond ring. He spoke of this to D-Thomas as well as Flynn, D-Thomas confided in Reape that Gosciminski was talking of getting her a two carat diamond ring. (R.31 2780-83; R.33 3232; R.343282, 3285-87)

While Gosciminski was in custody, in November, 2002, Pelletier was visited by her mother and father. One afternoon, her father was fixing a problem with the water pump and discovered a bag of jewelry hidden in the rafters. The jewelry was in a Geoffrey Beane Gray Flannel cologne bag. D-Thomas identified the bag as one she had seen in Gosciminski's bedroom. The jewelry was identified as that belonging to Loughman's which she wore all the time, but was missing when she was found deceased on September 24th. (R.31 2851-55; R.34 3289-94; R.35 3334-42, 3367-71, 3374-75, 3396-97). When Pelletier told Gosciminski that her father had found the jewelry, Gosciminski told her he "it's over for me, I'm done. (R.34 3304).

After the denial of a motion for judgment of acquittal,

Gosciminski presented a rebuttal case attempting to show that B-Thomas was the likely suspect. Gosciminski also offered an engineer to support his trial testimony regarding his route of travel and stops given the cell phone records. The jury rejected his evidence, and convicted his on both the felony murder and premeditated murder theories as well as for the burglary and robbery.

Following the penalty phase, the jury recommended death by a nine to three vote, and the judge followed the jury's recommendation. After independently weighting the evidence, the trial judge found the HAC, CCP, and the merged felony murder/pecuniary gain aggravators. Each was given great weight. (R.8 1253-60). In mitigation, the court found one statutory mitigator (no significant criminal activity (some weight)[7] and thirteen non-statutory mitigators. (R.8 1261-76). This appeal followed.

[7] The trial court noted that in 1998, Gosciminski was convicted of two felonies involving taking something from someone else in a nonviolent manner, but now he was convicted a murder along with robbery for pecuniary gain, this, "[t]he murder demonstrates the pattern of taking has changed from nonviolent to violent." (R. 1261).

## SUMMARY OF THE ARGUMENT

**Issue I** - The trial court did not err in admitting the testimony that D-Thomas returned to Gosciminski based on threats he made to her, her family, and B-Thomas. The information was relevant to explain Gosciminski motivation and actions. It is inextricably intertwined in the events leading up to and motivation for the crime. Even if the testimony was not admitted properly, it was harmless beyond a reasonable doubt.

**Issue II** - Testimony regarding D-Thomas' alleged drug use was excluded properly under Trease and Edwards.

**Issue III** - There was no error in permitting D-Thomas to testify Gosciminski intercepted her mail while she was in Arizona as the testimony was not evidence of other crimes or bad character and was within the witness' knowledge. It was relevant to the on-going relationship between D-Thomas and Gosciminski.

**Issue IV** - The court denied the defense request for grand jury testimony properly after an *in camera* inspection.

**Issue V** - The court did not abuse it discretion in denying the defense request for a circumstantial evidence instruction and after notifying the defense it could not refer to the instruction as the law, the court properly allowed the State to assert the defense argument was not the law.

**Issue VI** - Limitations were not placed on Gosciminski's examination of Reape and the issue is unpreserved and meritless.

**Issue VII** – The court properly found the testimony that Gosciminski noticed Cox's diamond ring was relevant and did not constitute a violation of the Williams' rule

**Issue VIII** - A judgment of acquittal was denied properly. The State presented evidence supporting each element of the crimes and rebutted Gosciminski's hypothesis of innocence.

**Issue IX** – Gosciminski's polygraph was excluded correctly based on the Frye hearing showing polygraphs are not generally accepted by the scientific community.

**Issues X and XI** - Testimony regarding the reach of the cell phone towers as well as the diagrams showing the location of those towers was admitted properly.

**Issue XII** – The test drive results were admitted properly. They were relevant to material facts and were not misleading.

**Issue XIII** - The Walgreens receipt was admitted properly It had distinctive characteristics and was identified.

**Issue XIV** - Photograph of Loughman with family was admitted properly as it was relevant to material issues.

**Issue XV and XVI** - The CCP aggravator is supported by substantial competent evidence and found properly.

**Issue XVII** - The HAC aggravator is supported by substantial competent evidence and found properly.

**Issue XVIII** - The death sentence is proportional.

## ARGUMENT

### ISSUE I

**ADMISSION OF TESTIMONY THAT DEBRA THOMAS RETURNED TO GOSCIMINSKI DUE TO THREATS WAS PROPER (restated)**

Gosciminski asserts the court erred in overruling his objection to testimony of D-Thomas that she returned to him after he threatened her, as well as her family and B-Thomas. (IB at 38-39). Gosciminski argues that the testimony was irrelevant and constituted collateral bad acts which required prior notice under section 90.404 Fla. Stat. The trial court determined that the information was relevant to and inextricable intertwined with the charged crimes as it showed the sequence of events leading up to the crime as well as Gosciminski's motivation for the crimes. This ruling was not an abuse of the court's discretion and should be affirmed.

"A trial court has wide discretion concerning the admissibility of evidence" and whether that evidence is relevant Jent v. State, 408 So.2d 1024, 1029 (Fla. 1981). Sexton v. State, 697 So. 2d 833, 837 (Fla. 1997); Heath v. State, 648 So. 2d 660, 664 (Fla. 1994). In McGirth v. State, 48 So.3d 777, 786-87 (Fla. 2010), this Court explained:

> An appellate court will not disturb a trial court's determination that evidence is relevant and admissible absent an abuse of discretion. *See Victorino v. State*, 23 So.3d 87, 98 (Fla. 2009). Relevant evidence is generally admissible unless precluded by a specific rule of exclusion. *Id.* (citing § 90.402, Fla. Stat.

> (2004)). There are two categories under which evidence of uncharged crimes or bad acts will be admissible-similar fact evidence, otherwise known as Williams rule evidence, and dissimilar fact evidence. Id. (citing *Zack v. State*, 753 So.2d 9, 16 (Fla. 2000)). The requirements and limitations of section 90.404 govern similar fact evidence while the general rule of relevancy set forth in section 90.402 governs dissimilar fact evidence. *Id*. at 98-99. We have explained the test for dissimilar fact evidence as follows:
>
> > [E]vidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule evidence. It is admissible under section 90.402 because "it is a relevant and inseparable part of the act which is in issue.... [I]t is necessary to admit the evidence to adequately describe the deed."
>
> *Griffin v. State*, 639 So.2d 966, 968 (Fla.1994) (quoting Charles W. Ehrhardt, Florida Evidence, § 404.17 (1993 ed.)).

In Lynch v. State, 2 So.3d 47, 80 (Fla. 2008), this Court reiterated that a court abuses its discretion where "'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.' Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990) (quoting Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980))".

As held in Tripoli v. State, 50 So.3d 776, 779-80 (Fla. 4th DCA 2010), Williams v. State, 110 So.2d 654 (Fla. 1959) Rule:

> Notice is not required if the State seeks to introduce evidence of collateral acts which are inextricably intertwined with the crime charged under the general

> rule of relevance. *See* § 90.402, Fla. Stat. (2008); ... Examples of such evidence is evidence which is necessary to (1) "adequately describe the deed[;]" (2) "provide an intelligent account of the crime(s) charged[;]" (3) "establish the entire context out of which the charged crime(s) arose[;]" or (4) "adequately describe the events leading up to the charged crime(s)[.]" ...
>
> Conversely, evidence of the collateral acts of a defendant is not admissible if its only role is to show the defendant's bad character or his propensity to commit the crime for which he is charged. *Williams v. State*, 621 So.2d 413, 414 (Fla. 1993) (holding that evidence of other crimes, wrongs or acts is admissible only "if it casts light on a material fact in issue other than the defendant's bad character or propensity.").

Here, the State was attempting to prove Gosciminski murdered Loughman and stole her jewelry. To put the crimes in context, the State presented evidence showing why Gosciminski would be motivated to kill Loughman and the sequence of events leading up to that decision. The evidence established that Gosciminski was obsessed with D-Thomas and would do anything to have her stay with him. In the months and weeks before the murder, Gosciminski and D-Thomas were having relationship problems and he was trying to convince her to return and stay with him by sending gifts, promising a two carat diamond engagement ring, a new car, and a beach house, and ultimately threatening her, her, family, and B-Thomas. It was the threat that brought D-Thomas back, and it was the gifts that would be used to convince her to stay. The State established that

Gosciminski was not doing well financially, yet he purchased a new car for D-Thomas, moved to a beach property, and on the afternoon of Loughman's death, had a two carat diamond ring wrapped in a tissue and told co-workers he would be giving it to D-Thomas along with a diamond and emerald tennis bracelet.

The testimony of the threat was necessary to establish the progression of events leading to D-Thomas' return and how desperate Gosciminski was in this endeavor. Gosciminski's sending of small gifts such as flowers, promises of more expensive gifts, followed by threats when she did not return immediately explained Gosciminski's motivation for and timing of his killing of Loughman for her jewelry. The threat also supports the testimony Gosciminski was in competition with B-Thomas for D-Thomas' affections which in turn showed Gosciminski's intent to provide D-Thomas with things his rival could not. It was further support of the motivation for the robbery. The fact that he threatened D-Thomas establishes his obsession with her and the steps he would take to win and keep her culminating in Loughman's murder and robbery of her jewelry. The evidence of threat was relevant to and could not be separated from the crimes of murder and robbery as it was the event which caused D-Thomas to return to Gosciminski and prompted him to kill Loughman for presents for D-Thomas.

The testimony is not Williams Rule evidence, but is

evidence that is inextricable intertwined and shows the general context precipitating and explaining the robbery-homicide. Hall v. State, 403 So.2d 1321, 1324 (Fla. 1981). The threat testimony puts Gosciminski's motivations in context; it is relevant, inextricably intertwined evidence, thus, removing it from the dictates of Williams rule. McGirth, 48 So.3d at 786-87.

In McGirth, this Court concluded:

> Dissimilar fact evidence of a defendant's prior bad acts is admissible to "establish[ ] the relevant context in which the [charged] criminal acts occurred." ... The State may present evidence that "paints an accurate picture of the events surrounding the crimes charged." ... The evidence here helped establish how McGirth came to know Sheila, why he arrived at the Miller home the afternoon of the crimes, and why McGirth was greeted by Sheila with an embrace. Additionally, because Sheila testified that "everyone," including McGirth, knew that her parents had retired and that they provided her with a good life, the relationship between Sheila and McGirth helped explain McGirth's perception that Sheila's parents were wealthy. Indeed, when McGirth insisted to Diana during the course of the robbery that she had money because she lived in The Villages, Diana turned to Sheila and asked her what she had told the men. These factors were necessary to adequately describe the events leading up to Diana's murder. ... Consequently, evidence as to the defendant's drug-based relationship with the victims' daughter was relevant and inextricably intertwined with the crimes charged.

McGirth, 48 So.3d at 787 (citations omitted). As in McGirth, Gosciminski's threat to D-Thomas put in context why a nearly 50 year old man would choose to kill a woman who was a client of his employer where he had no prior violent criminal convictions.

His obsession with D-Thomas, his need to have and keep her even if by threats, was inextricably intertwined with his decision to kill Loughman for her jewelry.

For these reasons too, Floyd v. State, 18 So.3d 432, 448 (Fla. 2009), supports the admission of the threat testimony here. As Floyd was shown to be controlling of and threatening to the victim's daughter, Gosciminski's need to control and satisfy D-Thomas' desire explained his motivation to kill Loughman for her jewelry. While Gosciminski may not have met Loughman at the time he threatened D-Thomas as is argued on appeal (IB at 40), such does not render the threat inadmissible. As explained above, Gosciminski was haunted by his desire to have D-Thomas for himself going so far as to threaten her should she not return. Once D-Thomas returned, the obsession continued and progressed into the form of keeping her plied with gifts and other expensive items including a two caret second engagement ring. Unfortunately, Loughman possessed the jewelry Gosciminski "needed" and was seeking; he saw his opportunity to obtain something he perceived would perpetuate D-Thomas' affection. The murder could not be explained adequately without explaining the steps Gosciminski would take to get D-Thomas.

However, even if this testimony was admitted improperly, any error is harmless beyond a reasonable doubt under State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). See State v. Lee,

531 So.2d 133, 136 (Fla.1988) (stating "erroneous admission of collateral crime evidence is subject to harmless error analysis as set forth in DiGuilio.") The statement was stated clearly and without the interposed objection once and was referred to briefly in closing argument. See Floyd v. State, 913 So.2d 564, 573-74 (Fla. 2005) (holding erroneous admission of dissimilar fact evidence was harmless as it was strictly limited by the trial court and was only briefly referenced by the State).

Excluding the testimony of a threat leaves the following testimony intact: (1) cell phone records placing Gosciminski in the area of Loughman's home at the time of the murder; (2) the fact he is seen with a ring matching the description of the Loughman's ring within hours of the murder; (3) the ring given to D-Thomas after the homicide is identified by several lay and police witnesses as matching Loughman's ring; (4) when questioned by the police regarding the incident, Gosciminski discards the two carat diamond ring and ultimately gives conflicting accounts of his whereabouts that morning; (5) Loughman's jewelry is found in a shed where Gosciminski has visited two or three time a week and in a bag matching one Gosciminski had in his drawer before the murder, but not after; (6) Loughman's fanny pack is found in the woods near where Gosciminski made a cell phone call on the day of the murder; (7) cell phone records refute Gosciminski's testimony regarding what

he did that morning and/or how long it took him to complete the route he claimed to have taken; (8) Gosciminski told the police he was at home until 9:30 or 10:00 a.m., arriving at work at 11:00 a.m., then changing that account for his trial testimony (9) testimony that Gosciminski would not have been permitted to place a display board at a area boutique both because the owner did not allow such displays and did not open her doors until 10:00 a.m. contradicted his claim to have been at that boutique that morning. (R.26 2089-91, 2106-12; R.27 2331; R29 2492-2507, 2530-34, 2535, 2561-67, 2580-85 2627-39; R31 2790-93, 2796-2801, 2808-10, 2813, 2823-29, 2831-32, 2851-55, 2857, 2897-2905, 2909, 2917-19, 2931-32, 2942-44; R.32 3021-26; R.33 3243-47) Taken together, it is clear that the one answer referring to a threat and the reference to that threat in closing argument was harmless beyond a reasonable doubt.

## ISSUE II

### THE COURT PROPERLY FOUND THE AREA OF INQUIRY REGARDING DEBRA THOMAS' ALLEGED DRUG USE IRRELEVANT (restated)

Gosciminski maintains it was error for the court to find questions regarding D-Thomas' alleged drug use irrelevant under "Edwards and Green" and in assuming the issue was resolved in the first trial. (IB 42; R.31 2879-80). The State submits the testimony was excluded properly.

"A trial judge has wide discretion to impose reasonable

limits on cross-examination." Smith v. State, 7 So.3d 473, 500 (Fla. 2009); McDuffie v. State, 970 So.2d 312 (Fla. 2007); Boyd v. State, 910 So.2d 167, 185 (Fla. 2005). See Delaware v. van Arsdall, 475 U.S. 673, 679 (1986). The scope of and limitation on cross-examination in a criminal trial lies within the sound discretion of the trial court and is not subject to review except for a clear abuse of discretion. See Moore v. State, 701 So. 2d 545 (Fla. 1997); Tompkins v. State, 502 So. 2d 415, 419 (Fla. 1986); Diaz v. State, 747 So. 2d 1021, 1023 (Fla. 3d DCA 1999). But see Sanders v. State, 707 So.2d 664, 667 (Fla. 1998) (stating determination to allow/disallow questioning on cross-examination is not subject to review unless determination is clearly erroneous).

Evidence of drug use for impeachment should be excluded unless:

> (a) it can be shown that the witness had been using drugs at or about the time of the incident which is the subject of the witness's testimony; (b) it can be shown that the witness is using drugs at or about the time of the testimony itself; or (c) it is expressly shown by other relevant evidence that the prior drug use affects the witness's ability to observe, remember, and recount.

Trease v. State, 768 So.2d 1050, 1054 (Fla. 2000) (quoting Edwards v. State, 548 So.2d 656, 658 (Fla. 1989)).

Although Gosciminski alleges the State misled the trial court when it offered that the issue was decided previously, the

record shows both the defense and State acted under the premise the issue had been decided even to the extent that defense counsel thought he needed to raise the issue before asking the witness questions regarding the subject and agreed to stipulate to the proffer offered in the first trial. Apparently, the proffer the defense and prosecution were referring to was that of Debra Flynn from the first trial. In her proffer, she stated she was not D-Thomas' supervisor when they were employed at Crystal Palms, but by the time Flynn became director, D-Thomas had left and she did not know the basis for that resignation. (SR.1 135-36). Also, in the first trial, and when his taped trial testimony was played for the jury in here, Gosciminski stated that D-Thomas had a drug problem and such was the basis for their break-ups in April 2002, June 2002, and that he saw her using drugs in mid-August 2002 (R.33 3127-31)

In this trial, Gosciminski sought to impeach D-Thomas with allegations of drug problems during the time they had a relationship and that he kicked her out of the home they shared only to take her back in mid-August 2002. However, in neither the 2005 nor 2009 trial did the defense attempt to show that D-Thomas was under the influence of drug at the time of the incident (September 24, 2002), during the 2009 trial, or that she had taken such a quantity of drugs over a period of time that her ability to perceive/recall events was impaired. As

such the area of inquiry was excluded properly.

In Trease, this Court reasoned:

> During cross-examination, the defense did not attempt to establish via a proffer that there was testimony regarding cocaine use that it wanted to elicit and that the testimony satisfied *Edwards*. Having failed to demonstrate the relevancy of the sought-after testimony by way of proffer, Trease cannot now claim error. *See Finney v. State*, 660 So.2d 674, 684 (Fla. 1995) ("Without a proffer it is impossible for the appellate court to determine whether the trial court's ruling was erroneous and if erroneous what effect the error may have had on the result."); *Lucas v. State*, 568 So.2d 18, 22 (Fla. 1990) (holding that a party's failure to proffer what a witness would have said on cross-examination renders an alleged trial court error in the exclusion thereof unpreserved). We find no error.

Trease, 768 So.2d at 1054 (footnotes omitted). See Williams v. State, 617 So.2d 398, 400 (Fla. 3d DCA 1993) (recognizing "evidence of a witness' drug use, other than at the time of trial or at the time of the incident, is not admissible to impeach the witness unless there is an express showing, by other relevant evidence, that the prior drug use affected his ability to observe, remember, or recount"). This Court should affirm.

Moreover, Gosciminski's reliance upon Coxwell v. State, 361 So.2d 148 (Fla. 1978) is misplaced. Cross-examination of D-Thomas was not precluded on a subject raised on direct examination as was the case in Coxwell. Likewise, the State did not leave the jury with a mistaken impression of the situations between D-Thomas and Gosciminski as was found to be error in

Coco v. State, 62 So.2d 892 (Fla. 1953), nor was the defense precluded from challenging D-Thomas on information directly addressed to her observations regarding the criminal events as was done in McDuffie. The State had not broached the subject of D-Thomas' alleged drug use, as such was irrelevant and inadmissible unless certain criteria were met under Edwards.

Further, given the playing of Gosciminski's prior testimony by the State the jury was allowed to explore the on-again-off-again relationship he had with D-Thomas and the steps he took to win her and keep her with him. Whether he asked her to leave because he thought she was abusing drugs does not under cut the fact that she returned to him after a threat and promises of a two carat ring and beach home, especially where he followed through on both promises. As such, should this Court conclude there was an abuse of discretion in not permitting the defense to delve into D-Thomas' alleged drug use, such was harmless beyond a reasonable doubt and affirm. See Lukehart v. State, 776 So.2d 906, 920 (Fla. 2000) (finding restriction on cross-examination harmless beyond any reasonable doubt in light of the entire record); Kramer v. State, 619 So.2d 274, 276 (Fla. 1993) (finding cross-examination limitation harmless under DiGuilio).

## ISSUE III

### THE COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING D-THOMAS'S TESTIMONY ABOUT HER LICENSE AND ANY ERROR WAS HARMLESS (restated)

Next, Gosciminski argues the court improperly allowed D-Thomas to testify that he intercepted her mail, thus, causing her not to get her nursing license in Arizona. He asserts that the testimony was speculative and evidence of bad character because it involved a potential crime. Gosciminski contends he was prejudiced since it allowed D-Thomas to cast aspersions on his character while he was forbidden to elicit facts about her substance abuse history. The court found, Gosciminski failed to raise a timely, contemporaneous objection to the comment that D-Thomas' mail was intercepted, however, the court overruled the objection regarding who was living in the house at the time, and entertained the motion for mistrial. The trial court did not abuse its discretion in finding the objection to the "interception" comment untimely,[8] overruling the objection as to

[8] The challenge to the "interception" of mail comment was untimely, and thus, the direct objection to the comment was not preserved for appeal. See Murray v. State, 3 So.3d 1108, 1117 (Fla. 2009); Harrell v. State, 894 So.2d 935, 940 (Fla. 2005); Steinhorst v. State, 412 So.2d 332 (Fla. 1982). In Norton v. State, 709 So.2d 87, 94 (Fla. 1997), this Court reasoned:

> . . . defense counsel's failure to raise a contemporaneous objection to the comment at the time it was made waived his right to argue this issue on appeal. . . . The purpose of the contemporaneous objection rule is to place the trial judge on notice that an error may have occurred and provide him or her with the opportunity to correct the error at an early stage of the proceedings. *Castor*, 365 So.2d at 703. "[A] timely objection must be made in order to allow curative instructions or admonishment to counsel."

who was living in the house, and determining that neither comment rose to the level for a mistrial. However, even if the objection is found to have preserved the matter for appeal, admission of the testimony was not error as the testimony was not evidence of other crimes or bad character and was within the witness' knowledge. Furthermore, the two comments were innocuous, pertaining only to the on-going domesticate interactions of the two individuals, not some criminal charge. Relief should be denied.

The standard of review for the admission of evidence is abuse of discretion. Admission of evidence is within the court's discretion, and its ruling will be affirmed unless there has been an abuse of discretion. Williams v. State, 967 So.2d 735, 748 (Fla. 2007); Ray v. State, 755 So.2d 604 (Fla. 2000); Zack v. State, 753 So.2d 9 (Fla. 2000); Cole v. State, 701 So.2d 845 (Fla. 1997). Discretion is abused when the action is arbitrary, fanciful, or unreasonable. Trease, 768 So.2d at 1053, n.2.

The testimony at issue came during D-Thomas' explanation of her relationship with Gosciminski. She had testified that she had a relationship and lived with Gosciminski for about 14

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*Nixon v. State*, 572 So.2d 1336, 1341 (Fla. 1990). Thus, despite appellant's motion for mistrial at the close of the witness's testimony, his failure to raise an appropriate objection at the time of the impermissible comment failed to adequately preserve the issue for appellate review.

months, with her moving out for short periods during that time. When she first moved in, Gosciminski and his mother were the only other individuals living in the house. However, his mother left to go to a nursing home about five months after D-Thomas arrived. (R.31 2758-59) D-Thomas testified that when they began having relationship problems, she moved out briefly, and Gosciminski wooed her back by sending her gifts and tokens of his commitment to her. During their relationship, Gosciminski exaggerated his wealth in an attempt to make himself more desirable to her. (R.31 2760-66) While separated from him she met another man, B-Thomas, with whom Gosciminski attempted to compete for her affections, and she made arrangements to move to Arizona. Although she moved back in with Gosciminski, she went to Arizona to arrange for work and housing for her planned relocation. Her only permanent residence at that time though was at Gosciminski's Port St. Lucie house where she was living with him alone, save when she took a brief trip out of state. Consequently, she gave officials in Arizona only the Port St. Lucie address to reach her. (R.31 2766-67) It was immediately after these facts had come into evidence that D-Thomas made the statements to which Gosciminski objected. Abundantly clearly is the fact Gosciminski did not want to lose her and tried to keep her in Florida with him.

Defense counsel objected to the statements as speculative

and evidence of bad character. The court denied the objection on the grounds of speculation as D-Thomas knew who lived there because she herself was living there when she took this short trip to Arizona. Further, D-Thomas said it was Gosciminski's address that she gave to the Arizona nursing board. The court properly denied the objection and did not abuse its discretion.

While the court stated the defense had not made a contemporaneous objection to the comment about the mail being intercepted, it did allow counsel to argue the bad character objection and made a ruling on that basis as well. The State argued D-Thomas only meant that Gosciminski did not hand her any mail, not that he had committed a criminal act. The court noted Gosciminski lived at the home and could properly accept any mail that arrived. Further, as pointed out above, a more logical inference to this statement was that Gosciminski may not have handed/forwarded D-Thomas her letters as he wanted her to return and to stay with him in Florida. This is evident from the fact that Gosciminski even sent D-Thomas a lease agreement for a Vero Beach condo on the beach while she was in Arizona. (R.31 2771-72) It is imminently more reasonable to see this as a possible action of a man trying to hang onto a love rather than a criminal action. Finally, the State proposed additional questions in this area to bring out these ideas, but the defense wished to close the subject and declined the offer. There was no

evidence of bad character or of other crimes in this statement and the court did not abuse its discretion.

Finally, even if it were error for the trial court to allow this testimony, there was no prejudice to Gosciminski arising from it because any error was harmless beyond a reasonable doubt. DiGuilio, 491 So.2d at 1135. These particular facts did not go to the issue of guilt on the charges before the court and jury and were not brought up at all later in the case nor were they argued. Whether or not Gosciminski received a letter for D-Thomas and failed to tell her about it does not go to her credibility as a witness in this case, nor is it evidence of bad character on his part given the nature and state of their relationship at that time. While Gosciminski asserts that the State's case was "almost non-existent" ample evidence of his guilt was presented to the jury. The State also incorporates its harmless error analysis presented in Issue I here. Briefly, cell phone records placed Gosciminski near the crime and at the site where her fanny pack was located, he had Loughman's ring after the murder, Loughman's other jewelry was found in a bag he had before the murder and was in a shed on the property he frequented, and he numerous false statements regarding his actions that morning. Any error in allowing D-Thomas to comment that Gosciminski intercepted her mail is harmless beyond a reasonable doubt. This Court should affirm.

## ISSUE IV

**THERE WAS NO ABUSE OF DISCRETION IN DENYING GOSCIMINSKI'S REQUEST FOR RELEASE OF DEBRA THOMAS' GRAND JURY TESTIMONY (restated)**

Pointing to Section 905.27(1)(c), Fla. Stat., Gosciminski maintains he is entitled to D-Thomas' grand jury testimony in the interest of justice as she has given inconsistent statements regarding the time she saw him return home on the afternoon of September 24, 2002. The court reviewed D-Thomas' grand jury testimony *in camera* ad found no perjury or material inconsistencies necessitating disclosure. The appropriate procedures were followed and the disclosure of the grand jury testimony was denied properly. This Court should affirm.

Keen v. State, 639 So.2d 597 (Fla. 1994) provides:

> We have previously held that there is no pretrial right to inspect grand jury testimony as an aid in preparing a defense. *Jent v. State*, 408 So.2d 1024, 1027 (Fla. 1981), *cert. denied*, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). To obtain grand jury testimony, a party must show a particularized need sufficient to justify the revelation of the generally secret grand jury proceedings. *See Dennis v. United States*, 384 U.S. 855, 870, 86 S.Ct. 1840, 1849, 16 L.Ed.2d 973 (1966). Once a grand jury investigation ends, disclosure is proper when justice requires it. *Id*. at 870, 86 S.Ct. at 1849.
>
> To determine whether a defendant has shown the particularized need that Dennis requires, the trial court has the discretion to conduct an in-camera inspection of the grand jury testimony. *Miller v. Wainwright*, 798 F.2d 426 (11th Cir.1986), *vacated and remanded*, 480 U.S. 901, 107 S.Ct. 1341, 94 L.Ed.2d 513, *reinstated*, 820 F.2d 1135 (11th Cir. 1987).

Keen, 639 So.2d at 600.[9] See In re Request for Access to Grand Jury Materials, 833 F.2d 1438, 1441-42 (11th Cir. 1987) (noting "[p]ersons who testified before the grand jury did so with the expectation that their testimony would remain secret.... [Hence,] disclosure [of grand jury records] is appropriate only in those cases in which the need for disclosure outweighs the interest in secrecy.... However ... [t]he [party requesting disclosure] must assert a particularized need for the grand jury records."); Jent, 408 So.2d at 1027 (holding that in order "[t]o obtain access to grand jury testimony, a proper predicate must be laid. Mere surmise or speculation ... is not a proper predicate.") (citing Minton v. State, 113 So.2d 361 (Fla. 1959)). As noted in Murray v. State, 3 So.3d 1108, 1119 (Fla. 2009), Section 905.27, Fla. Stat. provides for the limited discourse of grand jury evidence for purposes of (1) determining the consistency of testimony; (2) determining whether perjury

[9] See State v. Reese, 670 So.2d 174 (Fla. 4th DCA 1996)(noting disclosure not warranted where court's order departed from essential requirement of law - no demonstration of a particularized need); State v. Pleas, 659 So.2d 700 (Fla. 1st DCA 1995) (holding reasons were mere speculation that the prosecutor would not make proper disclosure under Brady and motion failed to make strong showing of particularized need); Meeks v. State, 610 So.2d 647, 648 (Fla. 3d DCA 1992) (finding motion lacking based on failure to offer facts supporting allegation State had withheld critical facts from the grand jury and was based on "mere surmise or speculation"); Fratello v. State, 496 So.2d 903 (Fla. 4th DCA 1986) (denying request for in-camera review of grand jury minutes to determine whether prejudicial matter had been put before grand jury).

occurred; or (3) in furtherance of justice.

Here, the court was provided with the various statements and testimony D-Thomas gave as well as the time-line of the events of September 24, 2002. The State argued against disclosure as the defense was able to impeach D-Thomas with her previous statements on the matter. (R.12 368-70, 428-37; V.13 444-45). In the order on the motion, the court stated it had looked for "inconsistencies generally and specifically with regard to the arrival time of the defendant" as testified to by D-Thomas. The court also considered the pertinent portions of D-Thomas' deposition and trial testimonies. It found neither perjured testimony not "material inconsistencies" in her testimony. Instead, the court concluded "[i]t is clear that the witness, quite simply, does not know the exact time of the defendant's arrival or departure, but can only reference it to somewhere around lunch time." (Order on Defendant's Motion for Transcripts of Grand Jury Proceedings pg 3 Supplemental Record).

Disclosure was denied properly. See Brookings v. State, 495 So.2d 135 (Fla. 1986) (finding allegations of inconsistencies in various statements of state witnesses were insufficient to require disclosure of witnesses' grand jury testimony; defense through cross-examination was able to bring out purported inconsistencies). As in Brookings, defense counsel here was able to cross examine D-Thomas with her police statements,

deposition, and prior trial testimony showing alleged inconsistencies or uncertainty as to when Gosciminski returned home in the middle of the day on September 24, 2002. (R.31 2881-86). This Court should find no error in the procedure followed and the ruling made by the trial court.

## ISSUE V

### THE COURT DID NOT ABUSE ITS DESCRETION IN DENYING THE DEFENSE THE CIRCUMSTANTIAL EVIDENCE INSTRUCTION AND IN OVERRULING THE OBJECTION TO THE STATE'S ARGUMENT THAT THE INSTRUCTION ARGUED WAS NOT THE LAW (restated)

Gosciminski's argument is two-fold; it was an abuse of discretion to deny the defense request for an instruction on circumstantial evidence and then to allow the State to argue to the jury that the defense statement on circumstantial evidence was not the law. (IB at 55). The State disagrees.

Review of a court's decision to give the now abandoned circumstantial evidence instruction is for abuse of discretion. Huggins v. State, 889 So.2d 743, 767 (Fla. 2004); Parker v. State, 873 So.2d 270, 294 (Fla. 2004). Here, the proper instruction on reasonable doubt and the burden of proof were given the jury. (R.38 3877-80). This Court held in Floyd v. State, 850 So.2d 383, 400 (Fla. 2002) "that when proper instructions on reasonable doubt and burden of proof are given, an instruction on circumstantial evidence is 'unnecessary.'" The proper instructions were given here, therefore the

circumstantial evidence instruction, abandoned in 1981, In re Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981) was not required and there was no abuse of discretion in declining to give such an instruction.

Gosciminski offers that under Wadman v. State, 750 So.2d 655 (Fla. 4th DCA 1999), the instruction should have been given because this case was a circumstantial evidence case, the State argued for a verdict of guilty as charged based on circumstantial evidence, and that the trial court instructed that circumstantial evidence may be used to prove intent. (IB at 55). However, Wadman, does not further Gosciminski's position because there the instruction on the firearms charge was found to be misleading, whereas here, none of the instructions on first-degree murder, robbery, and burglary have not been found to be misleading, nor does Gosciminski make that claim here.

Instead, he asserts it was error not to give the instruction because the State relied upon such evidence in seeking a guilty verdict and because the State argued that the circumstantial evidence argument presented by the defense was not the law. Contrary to Gosciminski's position, defense counsel did refer to the circumstantial evidence as the law, which was erroneous, as the court warned. (R.36 3618R.37 3829).

During the charge conference, Gosciminski asked for the circumstantial evidence instruction. The court stated he was

exercising his discretion and declining to give the instruction. (R.36 3614-18). While the court noted argument could be made based on the facts of the case, he wanted the parties to know:

> that the law comes from me and from the court, and if isn't in the instructions I'm giving them, no one's going to be standing in front of them saying this is the law in the State of Florida.
>
> Now, if you want to use as an argument as a kind of persuasion, this is what I think you ought to consider, but it's not the instruction on the law.
>
> Even Mr. Taylor (prosecutor) can say that's not -- listen to the law the Judge gives you. **That's not the law. But you can't represent that as the law**.

(R.36 3618) (e.s.). Defense counsel showed the court its poster with the circumstantial evidence instruction on it. The court told counsel he could argue that certain evidence was circumstantial "it is a well connected chain, and it's conclusive, it's positive, but it depends on its nature and tendency, and -- but **you can't say that this is the law**." (R.36 3619) (emphasis supplied)

In closing argument, after discussing the reasonable doubt instruction, the defense noted it would be "talking about circumstantial evidence" and appears to have referred to his poster in discussing such evidence; his argument tracked the language of the old instruction.[10] (R.37 3748-50; R.38 3853).

[10] The old circumstantial evidence instruction read:

> Circumstantial evidence is legal evidence and a crime (any fact to be proved) may be proved by such evidence. A well-connected chain of circumstances is

Later in the defense closing, counsel stated:

> But we went the extra mile and we're showing you various options under this. If the circumstances are susceptible of two reasonable constructions, two interpretations, one for guilt, another for innocence, you must -- not maybe, yeah, if you want to --you must accept the construction indicating innocence. I suggest to you we've provided many constructions showing innocence.
>
> . . .
>
> Ben Thomas, there was no search of his vehicle whatsoever, when all indications were that he is just as likely a suspect as Mr. Gosciminski. And, remember, if you have two, one could be innocent, one could be guilty, you must go with innocent. They never searched his vehicle.

(R.37 3807-09). Finally, the defense argued:

> Ladies and gentlemen, the only conclusion that you can reach by looking at the facts and listening to the testimony and **following the law** is that you've been

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> as conclusive, in proving a crime (fact), as is positive evidence. Its value is dependent upon its conclusive nature and tendency.
>
> Circumstantial evidence is governed by the following rules:
>
> 1. The circumstances themselves must be proved beyond a reasonable doubt.
>
> 2. The circumstances must be consistent with guilt and inconsistent with innocence.
>
> 3. The circumstances must be of such a conclusive nature and tendency that you are convinced beyond a reasonable doubt of defendant's guilt (the fact to be proved).
>
> If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence.
>
> Circumstances which, standing alone, are insufficient to prove or disprove any fact may be considered by you in weighing direct and positive testimony.

Wadman v. State, 750 So.2d 655, 657 (Fla. 4th DCA 1999)

> provided, even though we were not obligated to do so, we have provided several hypotheses of innocence. And if there's one of innocence and one of guilt, you must accept the construction indicating innocence.

(R.37 3829).

In rebuttal, the prosecutor stated: "Now, Mr. Harllee had a poster over here about circumstantial evidence, and he referred to it at least once as the law. It is not the law. The Judge is going to give--" before the defense interposed an objection. (R.38 3853). Previously, the judge cited Holland v. United States, 384 U.S. 121 (1954) and noted that this Court had quoted that case in In re Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 595 (Fla. 1981) while recognizing that the circumstantial evidence instruction was found by the Supreme Court "confusing and incorrect" where the jury has been instructed properly on the "standards for reasonable doubt" (quoting Holland, 348 U.S. at 139-40). The court found that defense counsel had referred to the instruction as the law, that the State's rebuttal argument was an "invited response" and that the State could "explain that that's an argument that you can fairly make, but it's not the law, and I'm not going to instruct them on that." (R.38 3853-54)

In light of this Court quoting Holland with approval In re Standard Jury Instructions in Criminal Cases, 431 So.2d at 595, and the trial court's prior warning to the defense not to refer

to the circumstantial evidence instruction as the law, it was not error for the court to permit the State to inform the jury that the circumstantial evidence instruction was not the law and that they would not receive such an instruction from the court.

To the extent Gosciminski argues that the State's continued argument did not tell the jury the defense argument was fair to make (IB 60), that claim is not preserved for appeal as defense counsel did not object to the State continued argument. Steinhorst, 412 So.2d at 338 (opining "for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). To preserve a claim of prosecutorial misconduct "the defense must make a specific contemporaneous objection at trial." San Martin v. State, 717 So.2d 462, 467 (Fla. 1998); Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982) (finding prosecutorial misconduct issue not preserved where only general objection made followed by motion for mistrial).

A review of the record reveals that the State's argument can be seen as embracing the trial court's suggestion in that the prosecutor argued the jury was to follow the law given it by the judge and focused on the inferences to be drawn from the circumstantial evidence. (R.38 3854-61) However, should this Court determine that the State should have gone further to explain its position the failure to do so was not fundamental

error. The prosecutor's comments neither deprived Gosciminski of a fair trial, "materially contributed" to his conviction, nor were so "inflammatory" that it "might have influenced the jury to reach a more severe verdict than that it would have otherwise." See Anderson v. State, 863 So.2d 169, 187 (Fla. 2003). The jury was instructed properly on the standard of proof, the definition of reasonable doubt, and that the judge's instructions were the "law" it was to follow. It is presumed the jury follows the court's instruction. Crain v. State, 894 So.2d 59, 70 (Fla. 2004).

## ISSUE VI

### GOSCIMINSKI'S CROSS EXAMINATION OF REAPE WAS NOT LIMITED AND THIS ISSUE IS MERITLESS AND UNPRESERVED (restated)

In his next issue, Gosciminski claims the court improperly curtailed his cross examination of Maureen Reape ("Reape") regarding her state of incarceration at the time of this trial in violation of his Constitutional rights. He asserts this prejudiced him without detailing how. This issue is meritless and unpreserved. Gosciminski initially sought to impeach Reape with her incarceration in order to bring out any bias for the State, but did not seek a ruling and never brought the issue up when the witness was on the stand. This claim should be denied.

Gosciminski brought this issue up in a motion in limine while the jury was on break during the trial. He announced his

desire to bring out Reape's incarceration including how long her sentence was and that she was on probation, thus, possessing a bias toward the State or a motive to fabricate. He likened his proposed questions to impeachment with a prior felony or a crime involving dishonesty. (R.31 2841-42) Counsel knew Reape had been sentenced and was past the 60 day period specified in 3.800(c) Fla.R.Crim.P. for sentence reductions or modifications. (R.31 2843) The trial court noted that the sentence was unassailable after 60 days but a probationary sentence might be challengeable beyond that period. The defense then stated: "Then we would ask to bring it in as to her period of probation" and said that he would have to proffer it. (R.31 2843) The court pointed out that if her original testimony was before any misdemeanor convictions and if her new testimony was consistent with the original, then the convictions would not be evidence of bias or interest, to which defense counsel agreed. (R.31 2844-45). Defense counsel proposed: "So why don't we get through the direct. Maybe if I think that there are inconsistencies, ask the jury to leave ...." It was at that point the court speculated, **not ruled**, that the impeachment evidence would be more prejudicial than probative under §93.04 Fla. Stat. if the two testimonies were consistent. The issue was left at that, with no objection or ruling yet made.

After D-Thomas testified, the State called Reape. The court

immediately called a sidebar conference during which the jury was excused. Reape was in shackles[11] so was seated during that break. It was at that time the defense conducted a proffer of Reape where it inquired about any felony convictions and her probationary status. She stated that she was not on probation and had no convictions of felonies or crimes of dishonesty. Counsel asked nothing further and made no motions. (R.31 2890-93) On cross-examination defense counsel did not broach the subject of her incarceration so, consequently, no objections were made and the court rendered no rulings on this issue or any concerning the scope of cross-examination. (R.31 2905-06) Gosciminski never sought to bring this issue before the jury, or even the court, while Reape was on the stand in order for the State to be heard (as it had not to this point) or for the court to make a ruling on admissibility. The issue is unpreserved. Steinhorst , 412 So.2d t 338. See Armstrong v. State, 642 So. 2d 730, 740 (Fla. 1994)(finding claim procedurally barred where judge heard motion, but never ruled); State v. Kelley, 588 So. 2d 595, 600 (Fla. 1st DCA 1991) (noting failure to obtain ruling effectively waives motion)

Previously, the court merely had directed counsel to the pertinent law regarding sentence modification and impeachment which might apply to this area of examination. The court

[11]It is unclear whether or not she was in jail garb as well.

correctly cited the law and did not abuse its discretion in so advising counsel. Smith, 7 So.3d at 500; McDuffie, 970 So.2d 312; Boyd, 910 So.2d at 185. While the State maintains the court did not limit Gosciminski's right to cross examine Reape, any perceived limitation in the court citing the law or evidence was well within its discretion in running an orderly trial. Moore, 701 So.2d 545; Tompkins, 502 So.2d at 419.

Finally, any error in the manner the court handled the motion in limine and any alleged abridgement of cross-examination did not affect the verdict and was harmless beyond a reasonable doubt under DiGuilio, 491 So.2d at 1135. Both parties agreed, Reape's testimony in this trial was essentially a reiteration of her 2005 trial testimony, which occurred before she had been convicted and sentenced for this or any other misdemeanor drunk driving offense. This Court should affirm.

**ISSUE VII**

**THE TRIAL COURT PROPERLY ALLOWED THE TESTIMONY OF GOSCIMINSKI NOTICING COX'S RING (restated)**

Gosciminski next argues that the trial court improperly allowed Joan Cox ("Cox") to testify that he noticed her rings when he lunched with her in 2001 while she was deciding whether to admit her mother to Lyford Cove. Gosciminski contends the testimony was irrelevant and in violation of Williams' rule. The State disagrees.

The standard of review of a trial court's admission of evidence is abuse of discretion. Smith, 7 So.3d at 500; McDuffie, 970 So.2d 312; Boyd, 910 So.2d at 185. Here, the court heard argument by the parties after the witness proffered her testimony. It addressed both the relevancy of the evidence as well as whether or not it constituted a violation of the Williams' rule.

The court correctly stated the relevant law under §90.404(2) Fla. Stat., which encoded the Williams' rule, and its intent in finding this not Williams' Rule evidence.

> This is not character evidence, this is just a person looking at something and making a comment about an – on its face an innocuous object... None of that rises to the level of another crime wrong or act and it's significant that Williams' Rule is sometimes referred to short ham (sic for hand) as collateral crimes evidence. The – the point of this rule is to prevent improper character testimony or evidence, such that the acts that are being adduced would constitute a crime or some bad misconduct, whether mala mince or malum prohibitum, but there's something bad about it that would reflect badly on the character of the Defendant or the witness.
>
> So I don't find this to be Williams' Rule evidence requiring notice.

(R.28 2379) The purpose behind this rule is to prevent the introduction of other criminal or bad acts by the defendant just to disparage his character or show his propensity for criminal conduct. The fact Gosciminski noticed and knew jewelry did not fall into that category in any way. The court did not call the remark innocuous, only that Gosciminski commented on an

innocuous, everyday object, a ring. Such a statement is part of everyday conversation and shows no propensity for bad conduct, criminal behavior, or targeting of particular individuals. The statement would cast no dispersions on anyone. Further, no evidence at all came in that Gosciminski ever targeted anyone other than Loughman and this comment did not either. The court did not abuse its discretion in admitting it.

The court addressed the relevancy of the evidence stating:

> It shows the knowledge of rings, an awareness of rings. It does tend [to] relate back to a statement to law enforcement where he's asked did you notice the jewelry, no I don't notice stuff like that, it's irrelevant. I don't pay attention to things like that, it's irrelevant to what I do totally.
>
> So there is some nexus to what the Defendant told law enforcement and what actually happened out in the real world.

(R.28 2382) As noted by the court, Gosciminski's comment was a direct contradiction of his police statement, made when he suspected they were investigating him, that he never noticed the jewelry of his clients or their families. (R.27 2299, 2305) The statement to Cox was in keeping with the evidence that Gosciminski was interested in, familiar with, and knowledgeable about jewelry, even having sold it for a while. (R.33 3117-19, 3144, 3180, 3182, 3190, 3206) The fact that he would lie to the police when he knew he was a suspect showed that he was trying to hide something and deflect their suspicions away from him. Gosciminski's lying about an object stolen during a murder was

relevant. The court did not abuse its discretion and this Court should affirm.

However, even if this testimony was admitted improperly, any error is harmless beyond a reasonable doubt under DiGuilio, 491 So.2d at 1135. Excluding Cox's testimony about her ring leaves Pelletier's testimony that Gosciminski noticed her ring as well. There also was substantial evidence of his guilt as detailed in Issues I and III and incorporated here. Cell phone records placed him in the areas of the murder and where Loughman's fanny pack was found and he was seen with a similar ring within an hour of the crime. He gave Loughman's ring to D-Thomas and Loughman's jewelry was in a shed to which Gosciminski had access and was in a bag matching one in his drawer before the murder (R.26 2089-91, 2106-12; R.27 2331; R29 2492-2507, 2530-34, 2535, 2561-67, 2580-85 2627-39; R31 2790-93, 2796-2801, 2808-10, 2813, 2823-29, 2831-32, 2851-55, 2857, 2897-2905, 2909, 2917-19, 2931-32, 2942-44; R.32 3021-26; R.33 3243-47) Taken together, it is clear that the testimony that Gosciminski noticed a woman's diamond ring a year before the crime and the reference to that in closing argument was harmless beyond a reasonable doubt. This Court should affirm.

**ISSUE VIII**

**THE MOTION FOR JUDGMENT OF ACQUITTAL WAS DENIED PROPERLY**

Gosciminski claims the evidence is insufficient to support

the verdicts and that the State stacked inference upon inference to establish guilt. In moving for his judgment of acquittal ("JOA") after the close of the State's case, Gosciminski focused on the fact that identity was not proven and that there was only circumstantial evidence presented. His theory of innocence was that he was at health care facilities/local businesses that morning taking care of personal and employment related tasks. He suggested that B-Thomas was the possible killer. The State refuted this by showing Gosciminski made cellular calls just before/after the murder using the tower closet to the Vala home. Likewise, the State established that B-Thomas was not at Loughman's that day, and had not purchased Geoffrey Bean cologne, only work shorts. The court considered the evidence, noted the opinion overturning Gosciminski's original convictions, and explained it was "the cumulative effect of the seamless web of circumstantial evidence" and the State's rebutting of reasonable hypothesis of innocence which supported the denial of the JOA. The court applied the correct standard and this Court, under its review,[12] should affirm.

[12] A *de novo* standard of review applies to motions for judgment of acquittal. Pagan v. State, 830 So.2d 792, 803 (Fla. 2002). This Court has stated:

> In reviewing a motion for judgment of acquittal, a de novo standard of review applies. ... Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. ... If,

In moving for a JOA, a defendant "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So.2d 44, 45 (Fla.1974). This Court in State v. Law, 559 So.2d 187, 188-89 (Fla. 1989) stated:

> 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. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse.
>
> ....
>
> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is

---

> after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. ... However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence.

(citations omitted). "Proof based entirely on circumstantial evidence can be sufficient to sustain a conviction in Florida." Orme v. State, 677 So.2d 258, 261 (Fla.1996).

> inconsistent with the defendant's theory of events. Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

(citations and footnote omitted)

In denying the judgment of acquittal, the court reasoned:

> Now, certainly, all the elements of first degree murder, robbery, and burglary of a dwelling have been established, venue has been established; the only issue in the case, obviously, in ID. Now I don't think anyone in this room is disputing that a crime was committed; . . . the issue that the jury has to resolve is whether the Defendant is the person that committed the crime.
>
> I did review Lindsey. It is similar but It's not on point exactly and, of course, I think Gosciminski [994 So.2d 1018 (Fla. 2008)] is the controlling authority, where four of the Supreme Court Justices declined to Join Judge Quince's dissent.
>
> . . .
>
> It's no (sic) one thing. It's the cumulative effect of the seamless web of circumstantial evidence having been presented by the State and, again, it's not that the State has to exclude every hypothesis of innocence but only a reasonable hypothesis of innocence . . . .
>
> . . . I think the Defendant's testimony[13] was kind of striking that he was asked about the phone call that happened at 10:36 a.m., which just so happens encompasses Martin Highway out near I-95, and he's asked, so the fanny pack is just found tight there at Martin Highway and 95, and the Defendant says, quite a coincidence.
>
> It is quite a coincidence but, of course, that thing alone, the fanny pack and I-95 would not be sufficient in and of itself. The -- the jewelry bag in the shed in and of itself would not be sufficient. But as I've said, it's -- you know, when things are

[13] This Court will recall Gosciminski's police statement (R.27 2285-2321) and his 2005 trial testimony (R.33) were played for the jury before the State rested and the defense moved for a judgment of acquittal.

statistically independent, the probability of all these events happening at one time, you multiply that together, and the more of them you add up, the more unlikely all of these things converging at one time become.

. . .

And, really, they are lottery type odds that this is not a woman who ran a pawn shop and would be in constant contact with people in and out of her business, day in and day out, that lived in the area, but a woman who came down from Danbury, Connecticut, to put her father in an assisted living facility . . . the small group of people that would have contact with her in Florida is fairly small to begin with.

The people that would have an opportunity to se and observe her, and observe her jewelry and maybe comment about how nice her jewelry was, is even smaller.

The person who was last seen with her or last saw her alive; there's only one of those who wanted to get back with his fiance', who wanted a particular type of ring, and that he was seeking to get a ring for her, and that he had actually been to the residence on September 17th and knew the layout of the house, and had driven by the house, who didn't show up to work Tuesday morning when he's expected to show up to work Tuesday morning with the pretext that he was doing a presentation, but then he tells law enforcement he was home packing boxes which is evidence of consciousness of guilt because he's less than honest about where he was that morning, and he acknowledges that in his own testimony.

And then, again, this is all it's believed, but there's Debra Thomas saying that the morning that this woman died a brutal and bloody death, that he shows up at their house covered with blood and that he's scrubbing his arms and disposing of clothing. There can't be a whole lot of people that meet that qualification.

Then he shows up at his work and his arms look pink and freshly scrubbed, which is what Debra Flynn and the other witness from Lyford Cove said which again confirms and corroborates what Debra Thomas says.

And then the fanny pack being found at I-95 when his cell phone's being used at that time, which he himself describes as quite a coincidence. (sic)

> The jewelry being found in the shed that he had access to and had been to before. (sic)
>
> His financial distress, and the fact that he comes up with this fifteen thousand dollar ring for his fiance', the cell site information putting him on -- and I understand that it's theoretically possible that he would have been down in the dress shop putting brochures in the shop where the woman who never let people come in and put up brochures, that he was using his phone there, but the closer you are to the Sector 1 of that cell tower on Hutchinson Island, that the three calls made from that location in a very tight period of time, place him at or near the scene of the crime.
>
> And then down in Palm City, the bank records, depositing $430 in cash not too far from where - - where her fanny pack is found.
>
> Like I said, it's any one thing standing alone is fairly insignificant, but the cumulative effect of this circumstantial evidence is more than sufficient to sustain a conviction, and I will deny the motion for Judgment of Acquittal.

(R.35 3475-82)

The State has not piled inference upon inference. The above facts were established from the evidence including Gosciminski's admissions, bank records, cell phone records, and actions before and subsequent to the murder. From his admittance of Loughman's father and picking of furniture from the house, Gosciminski knew the jewelry Loughman wore, where she was staying alone, and the layout of the virtually shuttered house. (R.24 1890-1900; R.33 3144-48, 3180-81, 3205-06) From his meeting with Loughman the night before the murder, 9/23/02, Gosciminski learned her family was coming to town and she was leaving the following day (R.27 2299; R.33 3149-50, 3206).

The taped conversation between Loughman and her sister, Janet Vala-Terry, revealed that at 8:47 a.m. someone was at Loughman's door and she was going to answer it. Loughman was not heard from again. (R.26 2089-91, 2113, 2447-51) At 9:12 a.m. Gosciminski's phone receives a call via the tower nearest the victim's home, but he does not answer. It is not until 9:27 a.m. that he checks he voice mail and returns the call at 9:28 a.m. (R.32 3021-22) Gosciminski had an approximate 40 minute window from the time Loughman ended her phone call with her sister, and Gosciminski activate his voice mail to commit the burglary, robbery, and homicide. Between 9:30 a.m. and the time he arrives at Lyford Cove freshly washed some time after the lunch hour, between 12:30 and 1:30 p.m. (R.27 2331, 2338; R.29 2486-88, 2492-94, 2529-31), Gosciminski makes/receives calls in Martin and St. Lucie Counties (R.32 3014-27) near where Loughman's fanny pack and the balance of her jewelry are later found (R.30 2629-35, 2639; R.31 2908-09), is washing blood from himself, admitting that fact, and discarding bloody clothes (R.31 2790-2807), showing a two carat ring to co-workers, stating he has also obtained a diamond and emerald tennis bracelet and other jewelry for D-Thomas (R.29 2494-99, 2503-07, 2531-34), and later gives D-Thomas Loughman's two carat diamond ring, but after talking to the police, discards it because it was "hot." D-Thomas, Maureen Reape and Detectives Bender and

Hall all identify the diamond ring presented by Gosciminski as matching Loughman's ring. (R.29 2561-67, 2582-85; R.31 2808-17, 2819-29, 2898-2904) Other than the diamond ring, Loughman's jewelry is found in a shed on Pelletier's property, a property Gosciminski visited two or three times a week and once helped fix a water problem in the shed. (R.33 3138-39; R.34 3282-86, 3289-3300, 3304)

Also, Gosciminski was untruthful in describing his whereabouts to the police and in his 2005 trial testimony. Days after the murder, he told the police he was home until 9:30 or 10:00 a.m. on September 24th then to Lyford Cove by 11:00 a.m. In his 2005 trial testimony, played for this jury, he explained that he had a meeting at Life Care, made numerous stops to deliver brochures and displays and made two trips to banks well away from his work when other branches were closer. (R.33 3153-54, 3189, 3207-15) Also, Maria Creel, owner of Alcieri, the boutique Gosciminski claims to have delivered a Lyford display, stated she does not allow such solicitor or displays in her store and her store did not open until 10:00 a.m. (R. 33 3243-47). Such shows Gosciminski developed a plan, motivated by pecuniary gain, to kill Loughman for her jewelry and to establish an alibi using the ruse of delivering employment related materials to area businesses and taking care of personal errands related to his impending move to a new residence.

Inferences were not stacked one upon the other, but circumstances were identified which unwaveringly pointed to Gosciminski as the perpetrator and their cumulative effect established his guilt.

Equally important is the fact that the State also rebutted Gosciminski's suggestion that B-Thomas was the perpetrator. The State presented B-Thomas, who testified about his activities on September 24th all supported by records. While he was in Fort Pierce that morning, numerous receipts established he purchased fuel in Vero Beach before driving to Captain's Galley in Fort Pierce and paying for his breakfast at 8:46 a.m.; meeting with Krista from Drive Odyssey for a short time then making a cash deposit at a Fort Pierce Bank of America at 9:05 a.m. and purchasing envelopes at Walgreens at 9:19 a.m.. B-Thomas testified after the Walgreen's purchase, he went to the post office where he purchased stamps and mailed some items by certified mail at 10:25 a.m. Following this, he drove to Pompano Beach/Fort Lauderdale for lunch which he paid for at 12:23 p.m. before dropping of his car at the Miami hotel where he would be staying upon his return from Atlanta. At 2:03 p.m., B-Thomas had some food at the Chili's in the Miami Airport before he boarded his 4:55 p.m. flight to Atlanta. He did not return to Miami until 21:32 p.m. (9:32 p.m.) on September 25, 2002 as shown by his hotel receipt. (R.30 2665-99). Not only

did the State establish each element of the crimes[14] and that Gosciminski was the perpetrator, but it refuted Gosciminski's defense that B-Thomas did the crimes. This Court should affirm.

## ISSUE IX

### THE TRIAL COURT PROPERLY EXCLUDED GOSCIMINSKI'S POLYGRAPH RESULTS (restated)

Gosciminski contends he should have been permitted to present polygraph results showing he was truthful when claiming his innocence. The court held a hearing under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) and based on the reasoning in Ramirez v. State, 651 So.2d 1164 (Fla. 1995) determined that Gosciminski had not carried his burden. Gosciminski has not shown that polygraph results are generally accepted by the relevant scientific community as there remains great disagreement. This Court should affirm.

The standard of review for a Frye issue is *de novo*, Ramirez v. State, 810 So.2d 826, 844-45 (Fla. 2005) (citing Ramirez v. State, 651 So.2d at 1168 (Ramirez II)); Brim v. State, 695 So.2d 268, 275 (Fla. 1997); Hadden v. State, 690 So.2d 573, 579 (Fla. 1997) (noting "the appropriate standard of review of a Frye

[14] Similarly, felony murder has been shown. Not only did Gosciminski commit a burglary by obtaining entrance into Loughman's home with the intent to commit a felony therein, namely a robbery, but once inside, he bludgeoned and cut Loughman, and took all her jewelry during the course of that attack. The State proved a felony murder occurred and presented substantial, competent evidence refuting the offer of innocence.

issue is de novo"). The reviewing court must consider the level of acceptance at the time of appellate review. Ramirez, 810 So.2d at 844-45; Hadden. An appellate court may examine expert testimony, scientific and legal writings, and judicial opinions in making its determination. Hadden, 690 So. 2d at 579.

As noted in Ramirez II, 651 So.2d at 1166-67, "admission into evidence of expert opinion testimony concerning a new or novel scientific principle is a four-step process" involving the trial court first determining "whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue;" second, deciding "whether the expert's testimony is based on a scientific principle or discovery that is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" quoting Frye; third determining "whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue" and fourth, allowing the expert to render an opinion which, based on the jury's credibility assessment, it either may accept or reject that opinion. As in Ramirez II, the focus is on the second step, the Frye test which this Court, citing Professor Ehrhardt provided:

As Professor Ehrhardt has explained:

> When a novel type of opinion is offered, the proffering party must demonstrate the requirements of scientific acceptance and

> reliability. The most widely adopted test has been that of *Frye v. United States* which involved the admissibility of an early polygraph. The court held the evidence inadmissible because the underlying scientific principle was not "sufficiently established to have gained general acceptance in the particular field in which it belongs."
>
> *Ehrhardt, supra*, § 702.2 (footnotes omitted). The principal inquiry under the *Frye* test is whether the scientific theory or discovery from which an expert derives an opinion is reliable. We have not hesitated to utilize the *Frye* test to reject expert testimony concerning subjects that have not been proven to be sufficiently reliable. *. . . Walsh v. State*, 418 So.2d 1000, 1002 (Fla. 1982) ("[P]olygraph evidence is inadmissible in an adversary proceeding in this state."). . . .
>
> . . .
>
> In utilizing the Frye test, the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand. The trial judge has the sole responsibility to determine this question. The general acceptance under the Frye test must be established by a preponderance of the evidence.

Ramirez, 651 So.2d 1164, 1167-68.

Pre-trial, Gosciminski presented Dr. Joseph Palmatier, a proponent and on who administers polygraphs. He offered that polygraph tests are generally accepted in the scientific community knowledgeable in polygraph testing and there are accuracy rates near 90 percent, however, this excluded certain results from the final statistics (R.10 154-62, 266). As of

2009, 27 states and the District of Columbia bar polygraphs for all purposes and the United States District Court bar polygraph evidence regularly and two United States Circuit Courts ban polygraphs. (R.10 257). Dr. Palmatier recognized there were multiple studies questioning the validity of polygraphs reported by members of the scientific community and he recognized there were counter measures which could be employed to beat a polygraph. (R.10 267-73). He recognized that courts have noted the existence of a sharp divide in the scientific community regarding the reliability and accuracy of polygraphs. (R.274).

Conversely, Dr. Steven Feinberg, who has a background in statistics and was on the 2003 National Research Council ("NRC") committee studying polygraphs and whose livelihood did not depend on the outcome of the study, testified that the scientific community was the scientific community at large that read/understood the literature on the subject and is in the psychology and psychophysiology community. (R.10 187-92, 219-21). Dr. Feinberg took issue with the statistics and accuracy rates offered by proponents of polygraph testing given the testing methods and handling of false positive and inconclusive results. (R.10 197, 201-04). Because of inaccuracies in polygraph testing, the NRC recommended against the use of polygraphs in security screening concluding that polygraphs should not be used to determine either truthfulness or

deception. (R.10 207). He explained that polygraphs are subject to error from a variety of sources. (R.10 207-13). The NRC's 2008 report concluded that polygraphs were not ready for detecting terrorists and there was nothing to change the conclusions drawn in the 2003 report. (R.10 214-17). It was Dr. Feinberg's opinion that there was considerable consensus within the scientific community that polygraphs are not sufficiently accurate to rely upon for any purpose. (R.10 219-20, 231).

The court recognized that polygraphs generally have been held to be inadmissible, but that the science may have changed, thus, a Frye hearing was the correct course to take. (R.11 303-05). Based on the testimony presented, the court reasoned:

> . . . I think we know fairly conclusively now because of the National Institute and National Academy of Sciences studies in 2002 and 2008, we know the answer now; that -- that it's not accepted and that the per se rule excluding polygraphs from the trial is not only a sound legal decision, long standing sound legal decision, but is not a sound scientific holding, as well.
>
> I did note that in this case, the Thompkins[15] case, that the proponent of the polygraph didn't establish scientific reliability of Frye, and they noted that the testimony came from someone who had a vested interest in or personal stake in the theory, or is prone to institutional bias, and that that in and of itself was insufficient to carry the day in terms of a Frye Hearing.
>
> I also note curiously that the way the defense seems to define the relevant scientific community in based upon the exact people whose testimony in and of itself is legally insufficient to support the Fry

[15] Thompkins v State, 891 So.2d 1151 (Fla. 4th DCA 2005).

(sic) Hearing; in other words, those people that are -- have a personal stake in the theory or are prone to institutional bias.

In other words, the scientific community was defined as those people who accept and acknowledge and perform polygraphs, and that those that reject it were simply dismissed as -- and this was the expert's words -- ignorant.

So you are in the scientific community if you believe in it. If you don't believe in it you're ignorant and you are not in the community, -- expelled from the community, you're no longer in good standing.

And that is not the way it's defined in the case law, and common sense says the way it's defined is it's neurologists, psychologists, physiologists.

And the Defendant's own expert was asked, is a polygraph examination generally accepted in the scientific community? And again on the stand today he said . . . if you're in with us and you believe it, you accept it, you're in the scientific community, but if you don't believe it, you don't accept it, you're not in the scientific community, which is essentially saying it hasn't -- it isn't widely and generally accepted within the scientific community.

What it's saying is the scientific community is polarized between those that accept it and those that don't, which is the very antithesis of something that satisfies the Frye Hearing.

. . . Again on direct today he was asked if, let's assume the scientific community is neurologists, psychologists (sic), physiologists, is it generally accepted; and . . . the Defense's own expert very candidly said no. And in listening to what your earlier witness said, I would have to say no, that there is not a consistent consensus in the scientific community. So the Defense, by its own expert has failed to meet the burden of proof in the Frye Test.

. . .

So her we've had not only evidence from Professor Feinberg, as well as the National Institute publications and all the other scholarly publications and scholarly journals and articles, but we have the Defense's own expert conceding it's not generally or widely accepted.

(R.11 303-07). The court then reviewed the exhibits and case

law (R.11 307-26), before concluding: "[s]o the findings of the Court are that the polygraph examinations are not accepted within the realm of the scientific community. That the Defense has failed to meet its burden of proof for the admission of the polygraph generally. (R.11 326).

Under the analysis provided in Ramirez and Frye the trial court correctly determined Gosciminski did not establish that polygraph testing is generally accepted in the relevant scientific community.[16] This Court should continue to bar polygraph results absent a stipulation from the parties. See Duest v. State, 12 So.3d 734, 746 (Fla. 2009) (recognizing polygraph evidence is generally inadmissible); Davis v. State, 520 So.2d 572, 573-74 (Fla. 1988) (stating "factors contributing to the results of a polygraph test [operator skill, emotional state of person tested, fallibility of machine] and the lack of a specific quantitive relationship between physiological and

[16] Gosciminski's suggestion that the challenge to polygraphs studies for excluding inconclusive results would lead to the exclusion of fingerprint testing is not reasonable and in not a fair comparison. The fact that no prints are found or that the prints found are of such poor quality or did not contain enough definition to allow for a comparison with known prints does not equate to a polygraph tester unable to reach a conclusion being permitted to remove that result for the totals used to determine the statistical efficacy of the polygraph study. The focus of the polygraph study in how accurate the testing methods are i.e., are the tests able to discern truth. The fingerprint analysis is not tested on how many clean and well defined prints are left at a scene for him to test, but whether those prints are sufficient to test.

emotional states-are such that the polygraph cannot be recognized as a sufficiently reliable or valid instrument to warrant its use in judicial proceedings"); Delap v. State, 440 So.2d 1242, 1247 (Fla. 1983) (noting "polygraph evidence is too unreliable or too capable of misinterpretation to be admitted at trial"); State v. Thompkins, 891 So.2d 1151, 1152-53 (Fla. 4th DCA 2005) (finding proponent of admission of polygraph results did not carry burden under Frye test); State v. Hardware, 868 So.2d 574 (Fla. 3d DCA 2004) (recognizing polygraph results inadmissible), rev. denied, Hardware v. State, 885 So.2d 387 (Fla. 2004). See also Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (holding early version of polygraph machine lacked sufficient scientific acceptance and reliability to support the admission of expert testimony interpreting results).

**ISSUES X AND XI**

**TESTIMONY and DAIGRAM REGARDING THE REACH OF CELL TOWERS TO LOCAL AREAS ON SEPTEMBER 24, 2002 WERE ADMITTED PROPERLY (restated)**

Gosciminski contends that Juan Portillo ("Portillo"), the Nextel engineer, should not have been permitted to testify about the reach of area cell phone towers (Issue X) or their location (Issue XI) as he did not sufficient data regarding the towers at the time of the crime to render an opinion.[17] Contrary to his

[17] In support of his claim that the evidence is not harmless, Gosciminski points to his expert's testimony that calls

suggestion, Portillo was properly qualified and any challenges to his testimony/exhibit went to weight not admissibility. This Court should affirm.

"The admissibility of evidence is within the sound discretion of the trial court, and the trial court's determination will not be disturbed on appellate review absent a clear abuse of that discretion." Brooks v. State, 918 So.2d 181, 188 (Fla. 2005) See Jent, 408 So.2d at 1029.

As this Court will recall, the admission of cell phone records and cell tower information as a way to track Gosciminski's whereabouts on the day of the crime was an issue in his original trial and on direct appeal, although this Court did not render an opinion on the issue. Gosciminski v. State,

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originated from downtown Fort Pierce could activate the Faber Cove tower near Loughman's home. (IB 79). As this Court will recall, on September 24th, Gosciminski's cell phone activated the Faber Cove tower sector 1 three time that morning around the time Loughman was telling her sister someone was at the front door. The defense expert, David Snavely admitted that the stronger signal in 2002 was from sector 2 not sector 1 and that if a call were made from the boutique where Gosciminski claims to have visited that morning, it would have hit sector 2. (R.36 3605-7). Portillo testified that for the cell call from Fort Pierce to hit the Faber Cove tower sector 1, the person would have to making the call from U.S 1 and Ohio Avenue, the Farmer's Market tower, Fort Pierce Center tower, and the Faber Cove tower sector 2 would all have to be down before it would be "possible" for the call to activate Faber Cove sector 1 and that would be only if the person were standing outside with a clear view of sector 1 of the tower. (R.32 3090). The testimony does not supports Gosciminski's suggestion that it would be possible for him to be in Fort Pierce while his phone is activating a cell tower which covers the area for Loughman's home.

994 So.2d 1018 (Fla. 2008). Given that backdrop, the State called Portillo to testify about the same subject matter, but updated, including maps of the cell towers, coverage areas, propagation information, and specific cell phone calls made by Gosciminski. After Portillo had testified extensively as to his training, experience, expertise, and the physics of cell phone technology (R.32 2854-2989), Portillo discussed Gosciminski cell phone records for September 24, 2002 (State Exhibit #192) which was admitted without objection (R.32 2989-92). Next, Portillo testified as to how he developed State Exhibits #185 and #191 which are diagrams he created showing the cell phone tower locations with sector coverage including the propagation associated for each sector, and indications where Gosciminski's calls originated based on the sector which picked up the signal first. (R.30 2994-99). When the State sought to admit the diagrams into evidence, Gosciminski objected on the ground, pertinent here, that the diagrams were misleading unless Portillo could say that he has personal knowledge as to where each tower was located. (R.30 3001-04)

The trial court overruled the objection stating:

> ... I'll just note regarding cell phone records, cell sites information, coverage, all these issues that we're dealing with here today, that Juan Portillo has been called as a witness. He was placed under oath. He gave his background and qualifications as being a radio frequency or RF engineer for Sprint Nextel for -- with two decades of experience.

We listened to one hour of testimony regarding cell phone towers, radio frequency transmission, transmission coverage, not a single objection. Exhibit 192 was admitted without objection. Then there was opinion testimony adduced regarding call areas and the color zone and is it possible that calls would be outside and the dotted line and no contemporaneous objection to any of the oral testimony of the witness. This just memorializes or demonstrates the testimony that he just gave again that was not objected to. He testified that these were the cell phone towers that were existent at the time of September 2002 that were kept and maintained by Sprint Nextel network system.

I'll note that cell phone records and cell site tower information has been routinely admitted in the State of Florida for 15 years or as long as that, that technology has been in existence, as far as back (sic). . . .

Cell tower records are admitted in . . . Stanick Cousins vs. State, 912 So.2d 43, Fourth DCA, 2005. Deparvein vs. State, 995 So.2d, 351, Florida, 2008.

Again, this is just describing cell tower information and the evidence and them (sic) was was adduced. It's not even an issue on appeal because no one raised it as an issue on appeal because no one could point to any case law saying a positive prohibition that such evidence was to be excluded or not relevant or admissible.

The only two cases I could find that addressed this issue or (sic) Gordon vs. State found at 863 So.2d 1215, Florida, 2003 where the testimony of -- it was simply a records custodian for the cell phone company that came in and said these are the phone records. And then it was the detective who got on the stand and testified as to the location of the cell phone towers based upon the phone records and there was an objection made that was hearsay and the detective is not the one to put the phone towers in place. And the Court said, no, it's okay. There's no problem at all with that.

And most recently in Perez vs State, found at 98 So.2d 1126, Third DCA, 2008, they cited Gordon v. State with approval and it was a records custodian who testifies as to calls, duration and location of towers. And the Court there held, you don't even need an expert. I mean, we've gone way above and beyond

> with an expert in radio frequency engineering. They said that the average common juror who has a cell phone and had their cell phone records understands that calls are made, their duration of the call and generally there's a coverage area associated with a cell site. And that jurors can draw conclusions even in the absence of expert testimony now since the location may be more of an issue here that we do have a radio frequency engineer who has testified as to the maximum coverage area and the . . .again without objection, he testify (sic) as to these things.
>
> I'll also note in Mackerly vs State found at 900 So.2d 662, Fourth DCA 2005, it reminds us, sometimes we lose sight of this that although the State must prove it's (sic) case beyond a reasonable doubt, that standard does not apply to each piece of evidence. . . . This really goes to the weight, not admissibility. He can be cross examined regarding what's possible, what's probable, what's likely.
>
> In Delap vs. State, the cause of death by the medical examiner wasn't even stated to a reasonable degree of medical certainty, and the Court said, that's fine, he can testify. And that goes to the weight that he jurors might choose to propose in that evidence and testimony or choose not to propose in that evidence or testimony.
>
> So I don't find that it's misleading. I don't find that it's hearsay. I find that it is admissible and I will allow the admission of Exhibits 185 and 191.

(R.32 3004-08).

When Gosciminski objected to testimony regarding the strength of the tower sector because Portillo had done his measurements "recently," not in 2002 near the time of the incident, the court confirmed that Portillo would be rendering an opinion regarding coverage and power as it was in September 2002 given the measurements he took recently. (R.32 3035-36). The court overruled the objection finding "it goes to weight,

not admissibility." (R.32 3036). These rulings were not an abuse of discretion and should be affirmed.

Gordon v. State, 863 So.2d 1215 (Fla. 2003) supports the admission of the cell phone diagrams and testimony in this case. While addressed under a claim of ineffective assistance of counsel, this court rejected the assertion that explanations of cellular phone bills and relating locations of cellular calls to the site map was scientific. This Court reasoned:

> Next, Gordon argues that...counsel was ineffective for failing to object to or strike the expert opinion testimony of witnesses Mary Anderson and Detective Michael Celona.FN4 However, we find no error in the trial court's conclusion that the **testimonies of Mary Anderson and Detective Celona did not constitute expert testimony**. . . . The record demonstrates that Mary Anderson simply factually explained the contents of phone records that linked Gordon to Davidson's murder, and Detective Celona factually compared the locations on the phone records to **locations on the cell site maps**. Further . . . while it is possible that Mary Anderson's lengthy experience with Cellular One informed her testimony and was useful in assisting the jury to understand the phone records, counsel also could not be deemed ineffective because if challenged, her record qualifications demonstrate that she would have been qualified as an expert on the matters she addressed.
>
> FN4. **Gordon challenges the testimony of Mary Anderson, a Cellular One employee, and part of the testimony of Detective Michael Celona, who testified at trial regarding cellular phone records, roaming areas, location of cell sites regarding cellular phones, and the location of individuals placing certain cellular phone calls**.

Gordon, 863 So.2d at 1219 (emphasis supplied). See Deparvine v. State, 995 So.2d 351, 377 (Fla. 2008) (relying on cell phone

records in support of conviction). Cf. Medina v. State, 920 So.2d 136, 138 (Fla. 3d DCA 2006) (noting "we agree with the trial court that GPS tracking technology is not new or novel and has long been accepted within the scientific community as reliable); Still v. State, 917 So.2d 250, 251 (Fla. 3d DCA 2005) (recognizing GPS technology is "technology which has been generally accepted and used for years"); Stanek-Cousins v. State, 912 So.2d 43, 45 (Fla. 4th DCA 2005) (noting use of cell phone call and tower records). Other jurisdictions have accepted cellular technology as a reliable basis to establish the location of the defendant in a criminal case. See United States v. Weathers, 169 F.3d 336 (6th Cir. 1999); United States v. Sepulveda, 115 F.3d 882 (11th Cir. 1997); United States v. Pervaz, 118 F.3d 1 (1st Cir. 1997); United States v. Brady, 13 F.3d 334 (10th Cir. 1993).

In Pullin v. State, 534 S.E.2d 69 (Ga. 2000):

> . . . the State produced six expert witnesses who testified to the accuracy and reliability of records establishing the location of a tower which services a particular cellular call. In essence, the evidence established that a radio signal from a digital cellular telephone such as the one Pullin used is transmitted to the cellular tower which is geographically closest to the handset; if the handset moves out of the geographical area covered by the originating site during the call, the call is relayed or "handed off" to the next nearest site; the two cells which are the "originating" and "terminating" point of the call are automatically recorded; this "historical data" is relied upon for billing purposes, and has been an integral part of fraud investigation

> and prevention. The experts consistently testified that the historical data is accurate and has never been found to be incorrect. One expert opined with "100 percent certainty" that based on the information in this case, the calls at issue could not have originated in Stockbridge....
>
> ... the court reached the conclusion that the geographic location of the cell calls in question is based on sound scientific theory and that analysis of the data can produce reliable results.
>
> ... State's expert explained that the basic properties of cellular technology are well understood, and "not a source of argument." And while we acknowledge that there is no authority precisely on point, the basic principles of cellular technology have been widely accepted....
>
> We conclude . . . that **the technology in question has reached a scientific stage of verifiable certainty to be admissible in the trial of this case**.

Pullin, 534 S.E.2d at 71 (emphasis supplied, citations omitted).

From the above, where the objection to cell phone records and tower locations is that the witness lacks information about actual testing conditions, the issue becomes one of weight, not admissibility. See Rodgers v. State, 948 So.2d 655, 666 (Fla. 2006) (finding no abuse of discretion in admission of IQ test scores as objection challenging testing and expert's knowledge of conditions under which test given went to weight not admissibility). The State also incorporates its analysis of admission of testing discussed in Issue XII below. The court did not abuse its discretion in overruling Gosciminski's challenges to Portillo's testimony and diagrams. The evidence was admissible and it was left to the parties to argue to the jury the weight it should be given based on the testimony.

## ISSUE XII

## THE TEST DRIVE RESULTS WERE ADMITTED PROPERLY (restated)

Gosciminski asserts it was error to permit Det. Hickox ("Hickox"), Sgt. Hall ("Hall"), and State Attorney Investigator Ahrens to recount the time it took for them to drive to and from certain locations including the crime scene, the banks where deposits were made, the area where Loughman's fanny pack was found, and other sites, because they did not know the traffic, weather, and road conditions on September 24, 2002 and they may not have followed the route Gosciminski took. The court overruled the objections pointing to Pierre v. State, 990 So.2d 565 (Fla. 3d DCA 2008) and finding that such factors went to weight not admissibility. This Court should affirm.[18]

The test for admissibility of experimental evidence is whether it is relevant. "Relevant evidence is evidence tending to prove or disprove a material fact." §90.401, Fla. Stat. (2001), and "is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." §90.403, Fla. Stat. (2001). Experiments are admissible where the proponent shows

[18] "The admissibility of evidence is within the sound discretion of the trial court, and the trial court's determination will not be disturbed on appellate review absent a clear abuse of that discretion." Brooks, 918 So.2d at 188.

sufficient important factors have been duplicated in the experiment so as to show the probative value is not outweighed by the danger the evidence is misleading or confusing. Johnson v. State, 442 So.2d 193, 196 (Fla. 1983).

Here, the officers explained the routes they took, the speed they traveled, and the conditions they encountered. (R.27 2219-25; R.29 2585-87; R.34 3259-65). The defense cross examined them on their knowledge of the road conditions and other factors that existed on September 24th. There was nothing misleading or unfairly prejudicial. The important factors, such as the route Gosciminski testified that he took was duplicated on one trial, and reasonable routes were offered, based on cell phone records, where the alleged actual route was unknown. The test drives were not so dissimilar as to create confusion and unfair prejudice.

If such should have been excluded, the admission was harmless under DiGuilio, 491 So.2d at 1135. The cell records put Gosciminski near the murder scene at a time when Loughman was ending her telephone call with her sister to answer someone at her front door and he did not make another call for 30 minutes. Gosciminski was also at the scene where Loughman's fanny pack was found based on his cell phone records for September 24th. Shortly after the murder, he had cash, her jewelry, and blood on his body/clothes. The balance of

Loughman's jewelry was found in a Geoffrey Beane cologne bag, a bag Gosciminski possessed before the murder, but not afterwards. (R.26 2089-91, 2106-12; R.27 2331; R.29 2492-2507, 2530-34, 2535, 2561-67, 2580-85 2627-39; R31 2790-93, 2796-2801, 2808-10, 2813, 2823-29, 2831-32, 2851-55, 2857, 2897-2905, 2909, 2917-19, 2931-32, 2942-44; R.32 3021-26; R.33 3243-47). The State incorporates its harmless error analysis in Issues I and III. Under Pierre, any error in admitting the evidence is harmless. This Court should affirm.

## ISSUE XIII

### ADMISSION OF THE WALGREENS RECEIPT FOR A PURCHASE MADE BY B-THOMAS WAS ADMITTED PROPERLY (restated)

It is Gosciminski's position the original Walgreen's cash receipt produced by B-Thomas for a purchase made on September 24th at 9:19 a.m. should not have been admitted as the records custodian for the store had not authenticated it. (IB 84-85). B-Thomas testified to the fact he received the Walgreens receipt on the day and at the time stated on the receipt, thus, it was authenticated by B-Thomas. Moreover, the receipt contained distinctive characteristics further establishing authenticity and its proper admission into evidence. However, even if the document was admitted in error, such was harmless beyond a reasonable doubt as B-Thomas testified to the same information printed on the receipt.

"The admissibility of evidence is within the sound discretion of the trial court, and the trial court's determination will not be disturbed on appellate review absent a clear abuse of that discretion." Brooks, 918 So.2d at 188. Further, this Court has provide that:

> While section 90.901 requires the authentication or identification of a document prior to its admission into evidence, the requirements of this section are satisfied by evidence sufficient to support a finding that the document in question is what its proponent claims. *See* § 90.901, Fla. Stat. (1997). Authentication or identification of evidence may include examination of its appearance, contents, substance, internal patterns, or other distinctive characteristics in conjunction with the circumstances. *See State v. Love*, 691 So.2d 620 (Fla. 5th DCA 1997).

Coday v. State, 946 So.2d 988, 1000 (Fla. 2006). See State v. Love, 691 So.2d 620, 622 (Fla. 5th DCA 1997) (noting "trial court has great latitude in determining whether a proponent of evidence has met the burden of establishing a prima facie case of authenticity"). As stated in C. Ehrhardt, Florida Evidence §901.1, at 1030 (2010 ed.):

> Evidence is authenticated when prima facie evidence is introduced to prove that the proffered evidence is authentic. The finding of authenticity does not mean that the trial judge makes a finding that the proffered evidence is genuine. The judge only determines whether prima facie evidence of its genuineness exists. Once the matter has been admitted the opposing party may challenge its genuineness. The jury then determines as a matter of fact whether the proffered evidence is genuine.

See Garcia v. State, 564 So.2d 124, 126 (Fla. 1990).

In assessing whether sufficient evidence was produced to support a finding that the document in question is what the proponent claims it to be, this Court reasoned: "the trial judge must evaluate each instance on its own merits, there being no specific list of requirements for such a determination. Unless clearly erroneous, the trial court's determination will be sustained." Justus v. State , 438 So.2d 358, 365 (Fla. 1983). The trail court here fulfilled these requirements.

At trial, it was proffered that B-Thomas received a receipt from Walgreens for his purchase of envelopes on September 24th at 9:19 a.m. (R.30 2676). This purchase was made just after a bank transaction and before going to the post office to mail his credit card bill with a cashier's check withdrawn from Bank of America account in one of those envelopes. (R.30 2667-68, 2676). B-Thomas explained that he kept the original receipt with his personal tax returns in part to document his business expenses for the year, as he did not submit it to his employer as a company expense. (R.30 2678-79). The defense argued the receipt could not be authenticated by a Walgreens representative.[19]

[19] Neither the State nor Gosciminski called the Walgreens records custodian to substantiate the counter claims that the custodian would not authenticate the receipt because the receipt was missing the register number, cashier number, and transaction number from the top of the receipt, but that it was possible this information was torn off when the register tape was replaced, and that the logo and paper were the same as Walgreens used in 2002. (R.30 2673-74). Nonetheless, there were other

However, the trial court found:

> Then he (B-Thomas) testified direct here under oath, subject to cross examination that he went to Walgreens to purchase envelopes at 9:19 a.m. There was no objection to that testimony. It is not hearsay.
>
> The receipt that he has merely memorializes, confirms and corroborates his direct testimony which is subject to cross examination.
>
> . . .
>
> Also, he did testify that this was a record that he kept in the regular and ordinary course of his business, that he kept meticulous logs and records for expenses. Some of those expenses were mailed off with the original receipts to Head U.S.A. for reimbursement; other expenses were kept for tax purposes where he would deduct non reimbursements from his taxes, so I don't find it to be hearsay.
>
> Regarding authenticity, professor Ehrhardt notes under 901.5, distinctive characteristics may have bee--of the evidence itself, the evidence may provide authentication.
>
> In this case they'd be more concerned about a photocopy, but this is actually -- this doesn't quite rise to the level of U.S. currency, but it is very distinctive paper that the average person would not have access to, that almost has a watermark on that it's Walgreens, it's got the return policy of Walgreens on the back, it's got machine imprinted blue ink. The Court has carefully examined it. There's no evidence that any of the entries on the face of the document in blue ink have been altered.
>
> This -- the opponent of the evidence has failed to show probable cause of tampering or any problems with eth document, other than the fact that the top in torn off but that did not alter or change the information on the face of the document.
>
> In dealing with business records, certainly it there's -- if the trustworthiness is suspect, it should be closely scrutinized, and the opponent has the burden of showing sufficient lack of trustworthiness; again, that's Professor Ehrhardt in Section 803.6.

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distinctive characteristics the established that it was an original Walgreens receipt as explained more full below.

> And again I find the Defense has failed to meet its burden of either showing the document is untrustworthy or not authentic, so I will allow its admission.

(R.30 2681-83) The court's ruling was many fold. The receipt was admissible because it was merely memorializing what B-Thomas testified to subject to cross examination, it was an original receipt with distinctive characteristics, almost self-authenticating, there was no showing of tampering, and it was something B-Thomas received/retained as part of his records.

Gosciminski points to Armstrong v. State, 42 So.3d 315 (Fla. 2d DCA 2010) to support his claim that the document was inadmissible as a business record. Such case is distinguishable. Not only did the court admit the document for reasons other than it being a business record, but in Armstrong the document was merely copied from a web-site. Here, there are other indications of authenticity. The receipt was an original, on Walgreens paper with identifying watermark and return policy; it was obtained by B-Thomas directly from a Walgreen clerk while he was in the store transacting a purchase and was received as part of that sales transaction. B-Thomas testified in court to those events. Also, it was not the sole piece of evidence establishing Gosciminski's guilt. Instead, it was corroborative evidence which refuted the defense suggestion of innocence by pointing to B-Thomas as the suspected perpetrator.

However, should this Court find that the receipt should not have been admitted, the admission was harmless beyond a reasonable doubt. DiGuilio. Not only did B-Thomas testify to the information contained on the receipt, but there was all of the evidence placing Gosciminski near the crime scene, where the victim's property was found, and the fact that he gave D-Thomas Loughman's two-carat ring on the day of the murder as more fully outlined in the State's harmless error argument in Issue I and III and reincorporated here. This Court should affirm.

**ISSUE XIV**

**THERE WAS NO ABUSE OF DECRETION IN ADMITTING A PHOTOGRAPH OF THE VICTIM WITH HER GRANDCHILDREN AS IT WAS RELEVANT TO SHOW THE JEWELRY SHE WORE (restated)**

Gosciminski submits there was unrefuted testimony Loughman owned the jewelry taken in the robbery-homicide, thus, it was error to admit a photograph of Loughman which depicted her wearing that jewelry and sitting with family members as it had no probative value and was presented merely to evoke sympathy and emotions. In his brief, Gosciminski adds that the photograph (State's Exhibit #110) was taken in 2000, making it irrelevant as the crime was committed in 2002. The argument with respect to date relevancy is not preserved.[20] However, the photos were admitted properly and this Court should affirm.

[20]Steinhorst, 412 So.2d at 338 ("for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.")

The test for admissibility of photographic evidence is relevancy. Dennis v. State, 817 So.2d 741 (Fla. 2002); Pope v. State, 679 So.2d 710, 713 (Fla. 1996); Nixon v. State, 572 So.2d 1336, 1342 (Fla. 1990). "[A]dmission of photographs will also be upheld if they are 'corroborative of other evidence.' Czubak v. State, 570 So.2d 925, 928 (Fla.1990)." Smith v. State, 28 So.3d 838, 861 (Fla. 2009). "To be relevant, a photo of a deceased victim must be probative of an issue that is in dispute." Almeida v. State, 748 So.2d 922, 929 (Fla. 1999).

The record establishes, as the trial court found: "you do get actually a better view of the jewelry in 110 showing the pieces that she wears, and it is an issue in the case what the Defendant allegedly could have seen or would have seen when he met her, how she displayed or wore her jewelry, and I will allow the admission of 109 without objection and 110 subject to the Defense objection." (R.35 3373; SR9 1561-63). The victim's husband, Thomas Loughman, corroborated that the photographs depicted Loughman wearing her jewelry and how certain pieces were more visible in one photograph over the other. (R.35 3374-75). There was no error in admitting both photographs as this Court found in Allen v. State, 662 So.2d 323, 327 (Fla. 1995):

> Allen raises only one issue regarding the guilt phase of the proceedings. He contends that the court erred in admitting a photograph of Cribbs in which one of her grandchildren is seated on her lap. The photograph in question was admitted to depict the distinctive

> diamond ring that Cribbs wore. That ring was the basis for the grand theft charge against Allen. The test for the admissibility of a photograph is whether the photograph is relevant to a material issue either independently or by corroborating other evidence. *Straight v. State*, 397 So.2d 903, 906 (Fla.), *cert. denied*, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). In the instant case, the photograph was relevant to corroborate the witnesses' testimony regarding the existence and value of the missing ring. The jury's attention was called solely to the ring; the child's presence was not mentioned when the photograph was published to the jury, nor was it made a feature of the trial. The court sustained the defense's objection to the introduction of a similar second photo, finding that the first photo was better suited for the purpose of identifying the ring. We find no error regarding the admission of the photograph.

Allen, 662 So.2d at 327.

However, if it were error, such was harmless under DiGuilio, 491 So.2d at 1135 as there was other testimony establishing the jewelry Loughman wore daily, but was taken from her by Gosciminski at the time of her death only to be given to D-Thomas and hidden in Pelletier's shed. The State incorporates here its harmless error analysis presented in Issues I and III

**ISSUES XV AND XVI**

**THE FINDING OF CCP WAS PROPER (restated)**

Gosciminski challenges the finding of the CCP aggravator.[21]

[21] Whether an aggravator exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So.2d 148, 160 (Fla. 1998), reiterated the review standard, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating

In Issue XV he asserts that the court impermissibly stacked inferences to conclude CCP was proven and in Issue XVI, he maintains that CCP should not have been found because his intent to kill was not shown to have been formed before the murder. The state disagrees. This Court should affirm.

With respect to CCP, this Court has stated:

> In order to establish the CCP aggravator, the evidence must show that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.
>
> ... While "heightened premeditation" may be inferred from the circumstances of the killing, it also requires proof beyond a reasonable doubt of "premeditation over and above what is required for unaggravated first-degree murder." ... The "plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony." ... However, CCP can be indicated by the circumstances if they point to such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.

Philmore v. State, 820 So.2d 919, 933 (Fla. 2002) (quoting Farina v. State, 801 So.2d 44, 53-54 (Fla. 2001).

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circumstance beyond a reasonable doubt—that is the court's job. Rather, our task on appeal is to review the record to determine whether the court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," quoting Willacy v. State, 696 So.2d 693, 695(Fla. 1997). See Williams v. State, 967 So.2d 735, 764 (Fla. 2007). Boyd v. State, 910 So.2d 167, 191 (Fla. 2005); Gore v. State, 784 So.2d 418, 432 (Fla. 2001).

In assessing the CCP aggravator, the court cited Jackson v. State, 648 So.2d (Fla. 1994) for the proper standard and found:

> The evidence in this case proves that Michael Gosciminski wanted to obtain an engagement ring for his girlfriend. After meeting Joan Loughman, he noticed all of the expensive jewelry she usually wore, especially her two carat diamond ring, and commented to her that he wanted to get his girlfriend a two carat diamond ring. . . .
>
> Approximately two weeks before the murder, Gosciminski had been at the residence of Ms. Loughman's father, Frank Vala. Ms. Loughman was staying at the Vala residence while she was overseeing his placement into Lyford Cove, the assisted living facility where Gosciminski worked. Gosciminski handled the admission. Prior to the admission, Gosciminski went to the Vala residence while Ms. Loughman was there so that he could move some of Vala's belongings and furniture to Lyford Cove. That trip gave Gosciminski the location of the residence and the opportunity to see at least part of the lay-out of the residence. It also provided him with an opportunity to see that the storm shutters covered all of the windows except the front window.
>
> On September 14, 2002, Ms. Loughman's father was admitted by Gosciminski to Lyford Cove. After being at the facility for only one day, Mr. Vala fell and had to be transferred to a hospital. On September 23, the day before she was killed, Ls. Loughman arranged to meet Gosciminski at Lyford Cove that evening to pick up some of her father's belongings. Her father was being transferred from the hospital to a hospice facility. . . . Ms. Loughman asked Gosciminski to carry her father's suitcase to her car. Gosciminski put the suitcase in the trunk of her car. Ms. Loughman could not carry the suitcase because she had problems with strength due to a previous car accident causing permanent neck and back injuries. It is reasonable to infer that Gosciminski knew Ms. Loughman was physically impaired after his interactions with her in moving her father's belongings from his house and putting her father's suitcase in her car. Having learned Mr. Vala was being transferred to a hospice facility, Gosciminski was aware that the opportunity to see Ms. Loughman in the future was rapidly coming

to an end.

On the morning of the murder, Ms Loughman spoke to her sister using the telephone at her father's house. The telephone conversation lasted five minutes and ended at 8:47 a.m. Ms Loughman said she had to hang up because someone was at the front door. That same morning, Gosciminski was supposed to attend a staff meeting at Lyford Cove which was regularly scheduled at 8:00 a.m. In an effort to create an alibi for himself, at 8:15 a.m. Gosciminski called Lois Bosworth, one of the directors of the facility. Ms Bosworth was traveling from Clearwater, Florida, to visit the facility that day. Gosciminski told Ms. Bosworth he would not be attending the staff meeting that morning because he was going to Life Care Center in Fort Pierce to make a presentation that morning.[1] Gosciminski got to Lyford Cove shortly after lunch on the day of the murder. Upon arriving, he met with Debra Flynn, the manager of the facility, and Nicole Rizzolo, the facility receptionist, and showed them the two carat diamond ring he took from Joan [Loughman]during the course of the murder and robbery. Gosciminski appeared freshly scrubbed and showered. His demeanor was quiet and subdued while at the facility that day, even though he was normally very loud and talkative.

The evidence shows that at 10:08 a.m. on the morning of Ms Loughman's murder, Gosciminski made a cash deposit of $420.00 at a Harbor Federal branch bank in Palm City, Martin County, Florida. His bank account records show that the account was overdrawn and had a negative balance prior to, and even after, the deposit was made. Not only was almost all of Ms. Loughman's jewelry taken off her body, but her fanny pack containing her wallet, cash, checkbook and credit cards was also taken. The court finds from the sequence of these events that the murder occurred no earlier than 8:47 a.m. and no later than 10:08 a.m.[2]

The records for Gosciminski's cell phone show that on the morning of the murder, he made or received six phone calls between 8:03 a.m. and 8:37 a.m. There was no activity on his cell phone between 8:09 a.m. and 9:12 a.m. At 9:12 a.m. he received an incoming call, which lasted 16 seconds, from the cell phone tower which is the closest to the Vala residence. The next call was received n his voicemail at 9:27 a.m. from the cell phone tower the closest to the Vala

residence. Less than a minute later, he placed an outgoing call, again from the cell phone tower closest to the Vala residence, which lasted 86 seconds. The next cell phone call was placed by him from a tower near the Harbor Federal branch bank in Martin County at 10:23 a.m. He responded to or made various calls that morning in an attempt to maintain an alibi. The fact that he made or responded to cell phone calls during the time period of the murder is evidence that Gosciminski was calm, collected, and calculating, and he was pursuing a premeditated plan.

. . . Dr. O'Neill testified that the victim suffered multiple and diffuse injuries, including blunt force trauma, cutting and stabbing. The injury which killed Ms. Loughman was her throat being cut by a knife or a knife-like object. She also suffered multiple stab wounds. The court finds that Michael Gosciminski armed himself with a knife or a knife-like object in order to commit the murder either before he went to the residence or after he arrived at the residence. It is clear the Ms. Loughman suffered three different type s of injuries: Bludgeoning, stabbing, and cutting. Dr. O'Neal agreed with D. Diggs's finding the that (sic) Ms. Loughman was initially attacked in the hallway, where blood was found, and then she was dragged from the hallway into the nearest bedroom and out of the view from the front window. Gosciminski intentionally dragged Ms Loughman into the bedroom so that he could finish the attack unobserved.

While in the bedroom, she was severely bludgeoned. . . .

Dr. O'Neal testified that there was a defensive wound on the victim's left had (sic) that matched a broken portion of the ashtray stand. This indicates that she had already been struck, at least once, because it had to be broken by the force of the blow, prior to the time the defensive wound was made. The victim's face was beaten and cut by the ashtray stand. She was struck with such force that 4 of her teeth were knocked out by the root. Teeth were found on the floor next to her, and lodged in the back of her throat.

Additionally, there were stab wounds to her back and a piece of glass was removed from the larger of the wounds. The left lung was punctured by the stabbing wound. Finally, the victim was turned over

> onto her stomach and her throat was cut, severing the jugular vein. Dr. O'Neal testified that her heart was still beating at the time her throat was cut as evidenced by the amount of blood.
>
> The investigation by law enforcement reveals there was no evidence of forced entry into the residence, no evidence at the crime scene to suggest the murder was prompted by emotional frenzy, panic, or fit of rage, and no evidence that Gosciminski spent any time at the Vala residence to clean up after the murder.
>
> All of the above factual circumstances in combination prove to the court beyond a reasonable doubt that Ms. Loughman's murder was the product of cool and calm reflection rather than an act prompted by emotional frenzy, panic, or fit of rage; Michael Gosciminski had a careful plan or pre-arranged design to murder Joan prior to the fatal incident; and Gosciminski exhibited heightened premeditation in committing the murder.
>
> [FN1]Gosciminski prior testimony was the only evidence offered concerning the presentation at Life Care Center that morning. The court does not find his testimony credible.
>
> [FN2]The time frame is actually narrower, when one considers that Gosciminski would have traveled from South Hutchinson Island area of Fort Pierce, where Joan Loughman was murdered, to a branch bank in Palm City, in an adjoining county to the south of Port St. Lucie County.
>
> [FN3]The last activity on Gosciminski's cell phone before 8:47 a.m. was an inbound call beginning at 8:25:20 a.m. lasting 12 minutes, 11 seconds.

(R.5 1254-58)

CCP is established from the fact Gosciminski had come to know Loughman from his contact with her at Lyford Cove and from picking up her father's property at the shuttered residence. He knew Loughman possessed jewelry he wanted, especially a two carat diamond ring. Loughman knew her attacker and was struck

immediately upon Gosciminski's entry into the home as evidence by the blood near the entryway. Gosciminski then moved his victim to a bedroom where the storm shutters were down so that he could complete his plan of killing Loughman for her jewelry. Following this, he continued to create an alibi by making cell phone calls, visiting banks, discarding/hiding the incriminating evidence of fanny pack and other jewelry and returning home, entering through the back door, to clean up before going to work. While driving to the banks he made cell phone calls in a calm manner and at the bank he was controlled and drew no attention to himself. The entire episode was conducted in a cold and calculating fashion, with heightened premeditation. This Court has affirmed CCP findings where there had been a planned, motivated attack as was Gosciminski's murder of Loughman. See Philmore, 820 So.2d at 933 (upholding CCP finding where defendant went in search of a female victim to carjack); Mason v. State, 438 So.2d 374, 379 (Fla. 1983) (finding CCP where defendant broke into victim's home, armed himself with her kitchen knife, and attacked/killed sleeping victim).

Gosciminski cites Hamilton v. State, 547 So.2d 630 (Fla. 1989) and McKinney v. State, 579 So.2d 80 (Fla. 1991) to support his argument that CCP was based on speculation of what happened. Contrary to this claim, the State proved he was seeking jewelry, but did not have the money for it, and had it after the murder.

It proved the house was shuttered except for the front window and Gosciminski had not only been to the house, but been inside to pick up furniture Loughman could not move. The medical examiner, based upon the blood and other forensic evidence, concluded the initial attack took place in the hall, that Loughman was moved to a shuttered bedroom where the attack continued, and she received defensive wound to her hand, and ended with her being turned over so her throat could be slashed after a first failed attempt. The State showed a bloodied Gosciminski cleaned up at home and discarded his soiled clothes. All was proven beyond a reasonable doubt.

Gosciminski points to Power v. State, 605 So.2d 856 (Fla. 1992), Wyatt v. State, 641 So.2d 1336 (Fla. 1994), and Wyatt v. State, 641 So.2d 355 (Fla. 1994) as support for his claim CCP was unfounded as there was no prearranged plan to kill. The victims in Power, and both Wyatt cases did not know their attackers. Here, Loughman knew Gosciminski and she would have been able to identify him for any crime he committed against her and that she wore the jewelry all the time. The State incorporates its answer to Issue VIII and the denial of JOA and add there has been no stacking of inferences to find CCP.

Gosciminski also points to Thompson v. State, 619 So.2d 261 (Fla. 1993). While the victim in Thompson knew her attacker and was staying with him and two others, the killing was sparked

because she could not come up with more money for Thomson and his friend. The victim died of internal injuries sustained during the beating to entice her to call her family for money. Here, Gosciminski made a trip to Loughman's home at a time when he had no more formal business with her given that her father was no longer a resident of Lyford Cove.

Similarly, Green v. State, 583 So.2d 647 (Fla. 1991) does not help Gosciminski as in Green the killing was found to be prompted by the victims refusing to return rent money so Green, already having taken cocaine that night, could buy more cocaine. The murders in Green were found to be prompted by the denial of a return of funds, not from a pre-planned desire to kill. In the instant case, the evidence establishes, Gosciminski was intent upon getting Loughman's jewelry, jewelry she never removed, and in order to accomplish that, he cornered her in the house she was occupying alone and killed her to remove the jewelry. Contrary to his suggestion, Gosciminski's police statement confirmed that he knew Loughman would be moving her father to Hospice and that her family was arriving and she would be going home the next day. (R.27 2295-96, 2299). He also knew and commented upon the jewelry she wore including the two carat diamond ring and knew Loughman was alone in the house. (R.33 3180-81, 3190, 3205-07, 3232).

The facts of this case do not show that the killing was a

spur of the moment act as in Barwick v. State, 660 So.2d 685, 696 (Fla. 1995), receded from on other grounds, Topps v. State, 865 So.2d 1253 (Fla. 2004). In Barwick the killing was prompted after the mask he wore to hide his identity, during the robbery-burglary-sexual battery, was removed during the struggle. This prompted the killing. Likewise in Hamblen v. State, 527 So.2d 800 (Fla. 1998), victim and defendant did not know each other and the attempted robbery was one of convenience as Hamblen drove around looking for a location to rob and found the victim alone in the store. When the silent alarm was tripped, Hamblen became angered and killed his victim. There is no speculation in Gosciminski's case; he went to Loughman's house to kill a woman he knew for her jewelry. It was planned, including making an excuse to miss the scheduled morning meeting, to making deposits at two different bank branches, and making cell phone calls while he discarded Loughman's fanny pack, hid her jewelry, and washed the blood from his body, and disposed of the clothes. Also, he moved Loughman from an area of the house visible from the street to a secluded back room where he bludgeoned, stabbed, and turned her over to cut her jugular.

The evidence establishes Gosciminski's purpose in attacking and killing Loughman was to get her jewelry. This was not a spur of the moment decision as Gosciminski, in a poor financial position, had been telling friends for weeks he was looking for

a two carat diamond for his girlfriend. To accomplish that and to escape detection, he planned the killing by attacking Loughman in her home before her family arrived. This is different from events outlined in Vining v. State, 637 So.2d 921 (Fla. 1994) where it was not established what transpired that prompted the killing; what the court concluded there was that "only explanation of this murder is as a cold and calculated act, far beyond mere premeditation." Id. at 928.

Conversely here, Gosciminski went to Loughman's home after having set up his alibi for not being at work. He went there with the intent of attacking his victim for her jewelry as evidence by his immediate attack in the foyer and then stripping Loughman of all her jewelry. The initial confrontation is evidenced by blood in the foyer and Loughman's glasses nearby in the living room. Gosciminski then dragged Loughman on her back and by her feet her to a shuttered bedroom to complete his killing by bludgeoning, stabbing, then turning her over to cut her jugular. The cell phone alibi shows prior planning for the killing and robbery and to ensure he was not discovered. Without the phone calls before and after the murder, he would have been expected at work. These gave him time to accomplish the killing. The development of the alibi, skipping the meeting to visit area establishments allegedly on Lyford business and telling his employer he would not be in until the afternoon,

followed by the attack at Loughman's shuttered home in the foyer and moving her to a back bedroom to complete the killing and hide her body from view shows heightened planning and premeditation to support CCP.

However, even absent the CCP aggravator, the sentence should be affirmed. See Boyd, 910 So.2d at 193 (stabbing death with felony murder, HAC, one statutory and five non-statutory mitigators); Pope v. State, 679 So.2d 710, 716 (Fla. 1996) (holding death penalty proportional where murder committed for pecuniary gain and prior violent felony, outweighed two statutory mitigating circumstances, commission while under influence of extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct, and several nonstatutory mitigating circumstances).

## ISSUE XVII

### HAC AGGRAVATOR IS SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE (restated)

Turning to the HAC finding, Gosciminski relies on Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975) and Elam v. State, 636 So.2d 1312 (Fla. 1994) to assert the State did not prove Loughman was conscious long enough for the murder to be considered HAC. Neither case furthers Gosciminski's position. In Halliwell, the opinion is silent as to length of time for the killing, consciousness of the victim, and defensive wounds.

Similarly, while Elam involves bludgeoning as here, Gosciminski overlooks the fact that Loughman was attacked in the hall, where, according to the medical examiner, the most reasonable scenario was that she was stabbed and lacerated in and about the head, dragged into the bedroom and bludgeoned during which she received a defensive wound indicating consciousness during these phases of the attack. See Boyd, 910 So.2d at 191 (recognizing HAC aggravator found consistently where victim stabbed repeatedly and was conscious during portion of attack); Pooler v. State, 704 So.2d 1375 (1997) (finding HAC based on fact victim knew of impending death, not time it took her to die).

The record shows she was conscious during her initial stabbing and received a defensive wound during the bludgeoning which occurred at a later time after she had been dragged to a different location. From the facts outlined above for CCP, in addition to the fact Loughman endured a stabbing and bludgeoning while conscious evinced by her defensive wound inflicted in the bedroom during the second phase of the attack she knew of her impending death and HAC was established. This Court should find substantial, competent evidence supporting HAC and affirm.

In finding HAC, the court recognized that HAC applies in "'only torturous murders – those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or

enjoyment of the suffering of others.' Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990)." (R. 1258). Also, the court, citing to Pooler, 704 So.2d at 1378, noted the focus of HAC was "on the mental anguish of the victim and the pain suffered by the victim" and "[t]he victim's mental state may be evaluated in accordance with a common sense inference from the circumstances." (R. 1258). The trial court found:

> The evidence shows that the defendant attacked Ms. Loughman shortly after she let him into the Vala residence at 8:47 a.m. He initiated the attack causing her eyeglasses to fly across the living room. And given her physical limitations, there was little she could do to resist the attack. Dr. O'Neal testified that Loan Loughman suffered three different types of injuries: bludgeoning to the head, stabbing in the neck and back, and cutting to her neck and face. There were three lacerations to her head: a large laceration to the bone above her left eye, a laceration to the bone on her right cheek, and a laceration to her upper lip. Those lacerations to her head were the result of blunt trauma. There were two lacerations to her face and neck: one along the left jaw line, and the fatal one cutting her wind pipe and a jugular vein. There were three stab wounds: over the upper back of the neck at the base of the skull (which was stopped by her vertebrae);over the mid-back, between the shoulder blades, to the right of her spine, which perforated her right lung; and three inches left of her lid-chest, which perforated a rib, but did not enter the lung cavity. There was also a large laceration on the back of her left hand, which was a defense wound. As noted above, this defensive wound was caused by a broken part of the ashtray stand. There was a bruise on the back of her scalp, which occurred while she was still alive. Two of her teeth were knocked out of her mouth and onto the floor of the bedroom while she was being bludgeoned, and tow of her teeth ended up lodged in the back of her throat. The injury to the back of her left hand, the defense wound, showed the same pattern of abrasion as

> the injury on her right upper chest, indicating those wounds were made by the same object. A piece of the broken metal ashtray stand was consistent with the pattern of those wounds.[22]
>
> The fact that Joan Loughman was stabbed multiple times, bludgeoned savagely with the ashtray stand, and ultimately had her throat cut with a knife or knife-like object, convinces the court beyond a reasonable doubt that her murder was *both* conscienceless or pitiless *and* unnecessarily torturous, and that Michael Gosciminski either intended to inflict a high degree of pain or her was utterly indifferent to her suffering. Based on the defensive wound and the evidence indicating there was a struggle, the court in convinces beyond a reasonable doubt that Joan knew she was going to die, and she experienced extreme terror.

(R. 1259) (emphasis in original)

Gosciminski claims the defensive wound to Loughman's hand may have occurred just before she lost consciousness thereby undercutting proof of HAC. (IB 98) However, the blood evidence indicates Loughman had been attacked in the front hallway and again in the bedroom before she sustained the defensive wound to her hand as the ashtray had to have been broken before it was used to inflict the defensive wound and the ashtray pieces were found in the bedroom. Also, the injuries to her front and back indicate she was moving while being attacked showing there was a struggle ensuing. (R.35 3427-28, 3442-43). This evidence likewise undercuts the defense assertion that Loughman was unconscious shortly after the attack started. The record shows there was a struggle in two parts of the house, and in the

[22] The factual findings regarding the wounds is supported by Dr. O'Neal's testimony (R.35 3395-3435, 3439-48)

second area, Loughman sustained a defensive wound. Such distinguishes the instant case from Cherry v. State, 781 so.2d 1040 (Fla. 2000) and Jackson v. State, 451 So.2d 458 (Fla. 1984)

HAC findings have been upheld consistently where the victim was stabbed repeatedly and was conscious during a portion of the attack. See Reynolds v. State, 934 So.2d 1128, 1154-55 (Fla. 2006) (agreeing HAC proven based in part on multiple stab wounds, bludgeoning, and defensive wounds); Boyd, 910 So.2d at 191 (recognizing HAC aggravator found consistently where victim stabbed repeatedly and was conscious during portion of attack); Owen v. State, 862 So.2d 687, 698 (Fla. 2003); Duest v. State, 855 So.2d 33, 47 (Fla. 2003); Cox v. State, 819 So.2d 705, 720 (Fla. 2002); Jimenez v. State, 703 So.2d 437, 441 (Fla. 1997); Derrick v State, 641 So.2d 378, 381 (Fla. 1994); Floyd v State, 569 So.2d 1225, 1232 (Fla. 1990); Haliburton v. State, 561 So.2d 248, 252 (Fla. 1990); Hansborough v. State, 509 So.2d 1081, 1086 (Fla. 1987). The aggravator should be affirmed.

**ISSUE XVIII**

**FLORIDA CAPITAL SENTENCING STATUTE IS CONSITUTITONAL (restated)**

Gosciminski claims Florida's capital sentencing statute is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002) in that it does not require a jury to determine the facts required for death qualification, and that the jury sentencing recommendation does not have to be unanimous in finding that

sufficient aggravating circumstances support a death sentence. (R.2 174-84; IB 99). He acknowledges this Court has rejected such claims, but without offering more, seeks to have this Court find the statute unconstitutional. (IB 99) This Court should decline to recede from its settled law.

Repeatedly this Court has rejected Gosciminski's arguments (IB 99). While questions of law, are reviewed *de novo*, Elder v. Holloway, 510 U.S. 510, 516 (1994), Gosciminski has offered nothing new to call into question the well settled principles that death is the statutory maximum sentence, death eligibility occurs at time of conviction, and that the constitutionally required narrowing occurs during the penalty phase where the sentencing selection factors are applied to determine the appropriate sentence and that the statute is constitutional. See This Court should likewise reject this claim. See Perez v. State, 919 So.2d 347, 377 (Fla. 2005); Parker v. State, 904 So.2d 370, 383 (Fla. 2005); Jones v. State, 845 So.2d 55, 74 (Fla. 2003); Porter v. Crosby, 840 So.2d 981 (Fla. 2003); King v. Moore, 831 So.2d 143 (Fla. 2002); Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001). See also Proffitt v. Florida, 428 U.S. 242, 245-46, 251 (1976); Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984).

Moreover, Gosciminski has the contemporaneous felony convictions for robbery and burglary. This Court has rejected

challenges under Ring where the defendant has contemporaneous felony convictions. See Johnson v. State, 969 So.2d 938, 961 (Fla. 2007); Hudson v. State, 992 So.2d 96, 117-18 (Fla. 2008). Relief should be denied.

**ISSUE XIX**

**THE DEATH SENTENCE IS PROPORTIONAL**

Although Gosciminski did not challenge his sentence on proportionality grounds, this Court independently reviews death sentences for proportionality.[23] See England v. State, 940 So.2d 389 (Fla. 2006); Floyd, 913 So.2d at 578; Gore v. State, 784 So.2d 418 (Fla. 2001). The instant capital sentence is proportional and should be affirmed.

Gosciminski was convicted of the stabbing/bludgeoning murder of Loughman under both the premeditated and felony murder theories of prosecution in addition to being convicted of robbery and burglary. Following the jury's nine to three death recommendation, the court independently found HAC, CCP, and felony murder merged with pecuniary gain and gave each great

[23] Proportionality review is to consider the totality of the circumstances in a case compared with other capital cases. Urbin v. State, 714 So.2d 411 (Fla. 1998). It is not a comparison between the number of aggravators and mitigators, but is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). The function is not to reweigh the factors, but to accept the jury's recommendation and the judge's weighing. Bates v. State, 750 So.2d 6, 14 (Fla. 1999).

weight. (R.8 1253-60) In mitigation the court found one statutory mitigator of no significant criminal activity (some weight)[24] and thirteen non-statutory mitigators[25] (R. 1261-76).

This Court has affirmed capital sentences under similar circumstances. See Duest, 855 So.2d 33 (affirming for stabbing with HAC, pecuniary gain and prior violent felony and 12 non-statutory mitigators); Cox, 819 So.2d at 705 (finding proportionality based on HAC and CCP against 32 nonstatutory mitigators); Beasley v. State, 774 So.2d 649 (Fla. 2000) (bludgeoning death with HAC, pecuniary gain, felony murder out weighing substantial statutory and nonstatutory mitigation);

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[24] The court noted that in 1998, Gosciminski was convicted of two felonies involving taking something from someone in a nonviolent manner, but now he was convicted a murder and robbery for pecuniary gain which "demonstrates the pattern of taking has changed from nonviolent to violent." (R. 1261).

[25] (1) served in Air Force and was honorably discharged (moderate weight); (2) demonstrated positive correctional adjustment (moderate weight); (3) history does not indicate future dangerousness (moderate weight); (4) acted as Good Samaritan in pulling drive from truck after accident (moderate weight); (5) relatively normal upbringing and did not engage in disruptive, disturbed, or delinquent behavior as child or young adult (some weight); (6) good work history (some weight); (7) presents with "mixture of disordered personality characteristics (histrionic, somatic, narcissistic, self-defeating, anti-social, and aggressive) (some weight); (8) execution will have effect on elderly aunt (some weight); (9) cumulative effect of all mitigation (some weight); (10) life sentence means he will not get out of prison (little weight); (11) orthopedic injury following motorcycle accident (little weight); (12) had difficulty coping with death of father in 1982 from massive heart attack (little weight); and (13) good behavior during trial (little weight). (R. 1261-76).

Robinson v. State, 761 So.2d 269 (Fla. 1999) (bludgeoning death based on CCP, pecuniary gain, and avoid arrest along with two statutory mental mitigators and 18 nonstatutory mitigators); Nelson v. State, 748 So.2d 237 (Fla. 1999) (proportional with HAC, CCP, felony murder, one statutory and fifteen nonstatutory mitigators); Foster v. State, 654 So.2d 112 (Fla. 1995) (beating/stabbing based on felony murder, HAC, CCP and 14 nonstatutory mitigators). See also, Brant v. State, 21 So.3d 1276, 1284-88 (Fla. 2009) (proportionality found for stabbing death committed during felony with HAC and felony murder and mental health mitigation); Hoskins v. State, 965 So.2d 1 (Fla. 2007) (finding sentence proportional for victim bludgeoned, strangled and raped and HAC along with two other aggravators). Gosciminski's death sentence is proportional.

## CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm Andrew Michael Gosciminski's conviction and death sentence.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Gary Lee Caldwell, Esq., Office of the Public Defender, 421 Third Street, West Palm Beach, FL 33401 this 2nd day of May, 2011.

## CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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