IN THE SUPREME COURT OF FLORIDA

ANDREW MICHAEL GOSCIMINSKI,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC09-2234
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

REPLY BRIEF OF APPELLANT ANDREW MICHAEL GOSCIMINSKI

On Appeal from the Circuit Court of the
Nineteenth Judicial Circuit of Florida
(St. Lucie County)

CAROL STAFFORD HAUGHWOUT
Public Defender

GARY LEE CALDWELL
Assistant Public Defender
Fifteenth Judicial Circuit
Florida Bar No. 256919
Attorney for Appellant
421 Third Street
West Palm Beach, Florida 33401

(561)355-7600; (561) 624-6560

gcaldwel@pd15.state.fl.us

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I. THE COURT ERRED BY ALLOWING TESTIMONY THAT DEBRA THOMAS MOVED BACK IN WITH APPELLANT BECAUSE HE THREATENED HER, HER FAMILY AND BEN THOMAS.

A. Appellee offered no theory for this evidence at trial. It now adopts the trial court's sua sponte rationale – that threats to Thomas were inextricably intertwined with Loughman's murder. It says such evidence is admissible not under the *Williams* rule[1] but under section 90.402, Florida Statutes.

But under Appellee's theory, the evidence must be an "inseparable part of the act which is in issue" and "necessary … to adequately describe the deed":

> Thus, evidence 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) (cit. omitted). *See also Sliney v. State*, 944 So.2d 270, 286 (Fla. 2006).

Appellee has not shown the evidence was "necessary to adequately describe" the murder. Instead of showing necessity, it argues inferences: Appellant threatened Thomas to make her come live with him; when she came back, he decided to keep her by getting her a diamond ring; he later decided to steal Loughman's

[1] *Williams v. State*, 110 So.2d 654 (Fla. 1959); § 90.404(2)(c), Fla. Stat.

ring; to steal her ring, he decided to murder her. Threats to a different person at a different time were too remote to show motive. *See Machara v. State*, 272 So.2d 870 (Fla. 4th DCA 1973) (error to admit evidence of drug addiction on ground that it supplied the motive because it takes money to supply a drug habit: "This is simply too remote.").

Threats to Debra Thomas and her family did not tend to prove Appellant killed Loughman. If he controlled Thomas by threats, he had no motive to kill Loughman for her ring.

There was no evidence he threatened Loughman.

As to the "necessary" element of *Griffin*, Appellee can only say the evidence "was necessary to establish the progression of events leading to D-Thomas' return and how desperate Gosciminski was in this endeavor." AB 19. This is a long way from showing it was "necessary to adequately describe the deed."

Appellee relies mainly on *McGirth v. State*, 48 So.3d 777 (Fla. 2010). McGirth robbed a woman he knew, robbed and shot her parents, and then kidnapped the woman. The defense objected to evidence that he used drugs with, and threatened, **the robbery victim**. This evidence explained how he knew her, why she let him in her home, why he knew her parents had money. The evidence at bar is different: It did not involve threats to Loughman. It had nothing to do with how Appellant knew her or anything about whether he was at her house on the day of the murder.

Appellee also cites *Floyd v. State*, 18 So.3d 432 (Fla. 2009). Floyd was charged with murdering his wife's mother. He threatened his wife and murdered her mother after she intervened. At bar, the alleged threats were not made to anyone in Loughman's family and Loughman did not intervene in any dispute between Appellant and Thomas.

B. Appellee argues in essence (AB 21-23) that the error was harmless because the evidence was overwhelming. Overwhelming evidence is not the standard. *See State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986), *Williams v. State*, 863 So.2d 1189, 1189-90 (Fla. 2003), *Ventura v. State*, 29 So.3d 1086, 1089 (Fla. 2010), and *Cooper v. State*, 43 So.3d 42 (Fla. 2010).

Regardless, the evidence was not overwhelming.

Appellee recites a jumble of claims that add up only to circumstantial, disputed facts and pyramided hypotheses.

Appellee rested its case on Thomas. The threats painted her as a collateral victim, creating sympathy for her, the main witness, and attacking Appellant's character as someone who would threaten an entire family.

It is said that you cannot throw a skunk in the jury box and tell the jury not to smell it. Here, Appellee has thrown a skunk in the jury box and claims the jury did not smell it. This claim should be rejected.

II. THE COURT ERRED IN LIMITING THE DEFENSE CROSS-EXAMINATION OF DEBRA THOMAS.

A. Appellee says (AB 24) a witness may be impeached with evidence of drug and alcohol abuse only if it occurred at the time of trial or at the time of the incident.

This ignores the nature of Debra Thomas's direct examination. On direct, Appellee laid out at length the course of her relationship with Appellant from when they first met through the spring and summer leading up to September 24. R31 2757-88.

Appellee had her say she had her life in order and left Appellant, but was thwarted because she could not get her Arizona nursing license due to his interference with her mail. R31 2766-67. It had her say she was then compelled to move back with him due to his threats. R31 2773-75.

Appellee thus presented her version of this period in a light flattering to her and throwing Appellant in a dark light.

By law and logic and fairness and reason, under this Court's precedents, under Article I, sections 9 and 16 of the Florida Constitution and the Sixth and Fourteenth Amendments, Appellant had the right to go into these matters and cross-examine Debra Thomas to show things were not as she said.

The defense was entitled to go into whether, contrary to her testimony for the state, Appellant threw her out because of her abuse of alcohol and drugs, and she begged to return to him.

"To determine the proper scope of a defendant's cross-examination in a criminal case, a court must keep in mind 'the expansive perimeters of subject matter relevance which the constitutional guarantee of cross-examination must accommodate to retain vitality.'" *Stotler v. State*, 834 So.2d 940, 943 (Fla. 4th DCA 2003) (quoting *Coxwell v. State*, 361 So.2d 148, 151 (Fla. 1978)). The right of cross-examination is especially important in a capital case. *See Coxwell*, 361 So.2d at 152.

This rule is not negated by Appellee's cases. They involve alcohol's effect on the ability to remember or testify accurately under *Edwards v. State*, 548 So.2d 656 (Fla. 1989). They do not undo the right to cross-examine the state's main witness about matters testified to on direct examination.

B. Appellee briefly says (AB 27) Appellant testified about these matters so that the error was harmless. But the fact that a defendant testifies to a matter does not alter the invaluable effect of cross-examination of the state's main witness. *See Dukes v. State*, 442 So.2d 316 (Fla. 2d DCA 1983).

Here, as in *Coxwell*, the witness "purportedly gave the jury a complete picture," and it was prejudicial error not to let Appellant go into the matter on cross. *Coxwell*, 361 So.2d at 152.

Juries can and do disbelieve witnesses on the basis of their responses to cross-examination. Judge Learned Hand observed that demeanor on the stand

> may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir. 1952). *See also Calloway v. State*, 996 A.2d 869, 881 (Md. 2010) (issue of bias does not disappear because witness denies it; trier of fact is entitled to observe witness's responses to questioning).

Our jurors are instructed that they "**should** consider how the witnesses acted, as well as what they said," and some things they "**should** consider" include whether witnesses are "honest and straightforward in answering the attorneys' questions," and whether their testimony "agree[s] with the other testimony and other evidence in the case." Fla. Std. Jury Instr. (Crim.) 3.9. The jury was so instructed at bar. R38 3879. Appellant had the right to confront Debra Thomas on these matters before the jury so that they could gauge her credibility.

Appellee cites *Lukehart v. State*, 776 So.2d 906, 920 (Fla. 2000). This Court found error in not allowing an officer to answer this question: "Was one [attorney] provided by you?" But the error was harmless because Lukehart was only trying to show he was without counsel at that point, a fact that was completely undisputed. *Lukehart* is unlike the case at bar.

It also cites *Kramer v. State*, 619 So.2d 274 (Fla. 1993). Kramer sought to ask the medical examiner about needle tracks that may have been on the victim's body, speculating he was in withdrawal, which may have made him violent. There was no error as this speculation was without support in the record, and, even if error occurred, it was harmless "in light of the entire record." *Id*. at 276. Unlike in *Kramer*, the court at bar limited the cross-examination of the state's main witness on a matter on which she had testified at length on direct. Cross-examination is "especially necessary" when the witness "is the State's key witness, upon whom the credibility of the State's case depends." *Perez v. State*, 949 So.2d 363, 365 (Fla. 2d DCA 2007).

III. THE COURT ERRED IN ALLOWING DEBRA THOMAS'S TESTIMONY THAT SHE WAS UNABLE TO GET HER NURSING LICENSE IN ARIZONA BECAUSE HER MAIL WAS INTERCEPTED AND IT WAS SENT TO THE HOME WHERE APPELLANT WAS LIVING.

A. Appellee again adopts the trial court's sua sponte rationale, namely that Appellant waived the issue of the interception of the mail by objecting a few questions after the issue came up. Appellee ignores the cases cited in the initial brief including *Jackson v. State*, 451 So.2d 458 (Fla. 1984).

Appellee does not say why *Jackson* should be ignored.

Instead, it cites *Norton v. State*, 709 So.2d 87, 94 (Fla. 1997). Unlike at bar and in *Jackson*, Norton's attorney waited until the **close** of the witness's testimony before making any ob-

jection. Hence, he did not preserve his issue for appeal under *Jackson*, which this Court cited in *Norton*. *Id*. at 94. Appellee's other cases are yet further afield – they do not involve objections which were made, as at bar and as in *Jackson*, when the judge could act to correct the error.

B. Appellee makes a diffuse argument that seems to come down to the claim that "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." AB 31.

People do not look with favor on someone who steals mail. It is dishonest. Interfering with the mail is a bad act, especially if it severely alters one's career and life plans. This alleged "possible" act of love was far removed from the question of whether Appellant murdered Loughman five months later. It was improper character evidence and should not have been admitted.

C. Having argued the relevance of the evidence, Appellee says it was harmless because it "**did not go to the issue of guilt** on the charges before the court." AB 32 (e.s.).

That's the point. The evidence was collateral to what the jury had to decide and instead simply threw dirt on Appellant.

The state eases road to conviction by showing bad character. "The deep tendency of human nature to punish, not because our defendant is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tenden-

cy which cannot fail to operate with any jury, in or out of court." JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 1, 127 (1984).

Part of advocacy is to "make the jury **want** to find for your client".[2] In pursuit of this goal, the prosecution went over the line at bar.

Appellee says the evidence was not referred to again, but that does not make it harmless. We must assume that jurors considered **all** the evidence, regardless whether it is emphasized in final argument.

Thus, in *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986), this Court found prejudicial a witness's comment on silence that was not repeated during the trial. *See also Graham v. State*, 479 So.2d 824 (Fla. 2d DCA 1985) (mistrial required by officer's statement that two unknown persons identified Graham even though the judge sustained objection, admonished prosecutor, and gave curative instruction) (opinion of then-Judge Grimes for court).

Evidence is prejudicial even if it is not mentioned again and instead is left lingering as a stain on the defendant's cha-

[2] Robert E. Keeton, *Trial Tactics and Methods* 273 (2d ed. 1973) (emphasis in original). *See also* Richard A. Leo and Deborah Davis, *From False Confession to Wrongful Conviction: Seven Psychological Processes*, 37 Journal of Psychiatry and Law 332 (2009) ("In the case of a heinous violent crime, the prosecutor is likely to attempt to inflame the jury's passions with horrifying accounts and exhibits of the crime, and damning depictions of the motivations, character and actions of the defendant.").

racter. *See Fischman v. Suen*, 672 So.2d 644, 646 (Fla. 4th DCA 1996) (single unsupported statement that plaintiff committed Medicare fraud required mistrial despite curative instruction).

The able prosecutors did not go into this issue inadvertently. They chose to present this evidence over objection. They calculated it would help them win. Having made that choice and that calculation, Appellee now says the jury did not weigh this evidence in its deliberations. We presume the jury carefully weighed all the evidence and we must presume that counsel introduced the evidence in order to affect the jury's verdict.

To decide if the state has shown the error could not reasonably have affected the jurors, the issue must be considered from the vantage of the jury box. The jurors heard the evidence, they saw the defense object, they were left to mull the testimony over during a long bench conference. The state has not proved that they did not carry it into their deliberations and that it did not affect their verdict.

IV. GOSCIMINSKI IS ENTITLED TO DEBRA THOMAS'S GRAND JURY TESTIMONY.

At bar, the trial court found that Appellant showed a particularized need for in camera review of the testimony. Upon review, it found that the testimony showed Thomas's inability to recall when she saw Appellant.

The evidence concerned the most dramatic evidence in the case: Debra Thomas testified Appellant was washing blood off on the day of the murder. Her inability, **at the time of the grand jury**, to recall when this occurred would throw into doubt her credibility about this supposed incident. Once the judge found that the evidence showed her inability to recall, he should have disclosed it. Instead, the judge withheld the evidence.

Appellee says that this ruling was justified under *Brookings v. State*, 495 So.2d 135, 137-38 (Fla. 1986).

In that case, Brookings sought the grand jury testimony of two witnesses, but there was no need for disclosure because the witnesses were impeached with their depositions. At bar, Thomas excused her inconsistent deposition testimony by saying defense counsel badgered her. This excuse **could not** apply to her grand jury testimony. Hence, *Brookings* does not govern this case.

Brookings was decided before *Keen v. State*, 639 So.2d 597, 600 (Fla. 1994), which does govern this case.

Brookings relied mainly on *Jent v. State*, 408 So.2d 1024 (Fla. 1981). It is understandable that Appellee did not dwell on this source case, as *Jent* is the poster case for why grand jury testimony should be disclosed.

Jent involved the prosecution of Earnest Lee Miller and William Riley Jent for a horrible murder in central Florida. The state's case rested on three eyewitnesses. The defense sought

unsuccessfully to obtain the grand jury testimony of these witnesses in state court.

After Jent and Miller's convictions and sentences were affirmed in state court, the Supreme Court decided *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), which provided for disclosure of evidence privileged under state law. Under this authority, the federal court granted review of the grand jury testimony. *Miller v. Dugger*, 820 F.2d 1135 (11th Cir. 1987).

It came out that evidence had not been disclosed, the convictions were set aside, and Jent and Miller were freed. Although the state had the men plead to second degree murder in exchange for their freedom, they were later awarded substantial damages for the acts of the investigating authorities.

The unhappy history of the Jent-Miller prosecution is set out in DAVE VON DREHLE, AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH ROW 327-57 (1995). *See also* Michael L. Radelet, et al., *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907, 943 (1996); 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.2c, at 457-58 (3d ed. 1998).

Thus, after *Jent* and after *Brookings,* the importance of the disclosure of grand jury testimony has become clear even where it seems that the state has an overwhelming case of guilt.

V. THE COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUESTED INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE AND IN LETTING THE STATE TELL THE JURY THAT APPELLANT'S ARGUMENT AS TO CIRCUMSTANTIAL EVIDENCE WAS "NOT THE LAW."

Appellee confuses (AB 38) the judge's sua sponte rulings during the charge conference.

When defense counsel Harllee said he wanted to show a poster of the instruction to the jury, the judge said he could not argue that his poster was "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." R36 3618. The judge was pointing out that the prosecutor could tell the jury to listen to the judge's instructions. He did not clearly say the state could tell jurors the circumstantial evidence standard was not the law, he was stressing that defense counsel could not claim his poster was "the law."

Any doubt was cleared away in the subsequent discussion. When Harllee showed him the poster, the judge told him, "**you** can't say that this is the law." R 36 3619.

Thus, the judge did not authorize the state to say the circumstantial evidence standard is not the law. He was telling Harllee he could not tell the jury his poster was "the law."

All of this explains the significance of the prosecutor's statement to the jury, with which the judge agreed, that "Mr. Harllee … referred to it [the poster] at least once as the law."

R38 3853. The prosecutor's statement, which was erroneous, formed the basis for the judge's ruling allowing the prosecution's improper argument.

In this regard, Appellee takes out of context (AB 38-40) defense counsels' statements to the jury.

The record shows:

Harllee went over the poster with the jury at R37 3748-50. He did not refer to it as "the law."

Sixty pages later, a **different** defense attorney (Ledina), without mention of the poster, said "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." R37 3807. (She made a similar remark at page 3809.) Ledina correctly stated this basic principle.

Twenty pages later, without mentioning the poster, Ledina referred to "following the law" in general terms and then referred to the rule regarding hypotheses of innocence and guilt.

So the state was wrong when it said, "Mr. **Harllee** had up a poster over here about circumstantial evidence, and he referred to it at least once as the law." R38 3853. And the judge was wrong when he agreed and said to **Harllee**: "I think once **you** did refer to it as law, and it's in kind of the format of a jury instruction … ." R38 3853. Harllee did not refer to the poster as

being the law. The state and the judge were not referring to Ledina's much later remarks, and, in any event, Ledina did not say that the poster was "the law."

VI. THE COURT ERRED IN LIMITING APPELLANT'S CROSS-EXAMINATION OF MAUREEN REAPE.

Appellee interprets (AB 42-43) the record in a way that appellant cannot agree with.

Without hearing any meaningful argument from the state, the judge said the cross-examination was inadmissible unless Reape testified differently than at the first trial: "But if she made a - her prior statement long before she could have possibly had these DUIs, **there would be no bias or motive as long as she testifies truthfully in accordance with her 2002 testimony**. The fact that she subsequently picked up a misdemeanor would not be evidence of bias or interest because -" R31 2844-45 (e.s.).

After the judge said Reape could be impeached as to bias or motive only if her testimony changed, defense counsel suggested they see if her testimony did change. R31 2845.

The contemporaneous objection rule is no pointless formality. It serves two purposes: (1) "It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings." (2) It "prohibits counsel from attempting to gain a tactical advantage by allowing unknown errors to go undetected and then

seeking a second trial if the first decision is adverse to the client." *State v. T.G.*, 800 So.2d 204, 210 (Fla. 2001). Thus,

> [t]he primary thrust of the rule is to insure that the trial judge is made aware that an objection is being made and that the grounds therefor are enunciated. We do not believe that the rule was intended to approve or disapprove a special word formula; we will not exalt form over substance by requiring that counsel use the magic words, "I object," so long as it is clear that the trial judge was fully aware that an objection had been made, that the specific grounds for the objection were presented to the judge, and that the judge was given a clear opportunity to rule upon the objection.

State v. Heathcoat, 442 So.2d 955, 956-57 (Fla. 1983) (quoting prior authority).

Here, counsel gave the court a fair chance to rule on the issue and did not let an unknown error go undetected. The judge had a clear opportunity to rule, and he found the evidence inadmissible unless the witness departed from her prior testimony (which was favorable to the state).

It was in response to this ruling that counsel said, "Right. So why don't we get through the direct. Maybe if I think that there are inconsistencies, ask the jury to leave, and we'll have her –," He thus argued in the alternative that, even if the judge were right, the evidence would come in if Reape did change her testimony. There is no reason to think he was waiving his client's constitutional right to impeach the witness.

Appellee makes no real justification for the judge's ruling that Reape could be impeached only if she deviated from prior testimony favorable to the state. Her incarceration gave her a compelling motive for her **present** testimony for the state and for her not to deviate from her prior testimony that helped the state convict and condemn Appellant.

"Questions touching interest, motives, animus, or the status of witnesses to the suit, or parties to it are not collateral or immaterial. As to such matters inquiry may be had, and **it is not within the discretion of the court to exclude it**." *Purcell v. State*, 735 So.2d 579, 580-81 (Fla. 4th DCA 1999) (e.s.) (quoting *Alford v. State*, 36 So. 436, 438 (Fla. 1904)).

Finally, Appellee has not proved beyond a reasonable doubt that the error did not affect the verdict. It says only that Reape's testimony was the same as at the earlier trial. But this fact is irrelevant. She gave important testimony for the state. A properly informed jury could conclude that she had a motive for her present testimony. The jury could not assess her credibility without evidence of her compelling reason to testify favorably for the prosecution at this trial.

VII. THE COURT ERRED IN ALLOWING JOAN COX'S TESTIMONY THAT GOSCIMINSKI NOTICED HER DIAMOND RING IN 2001.

Appellee premises its argument on the idea that Cox's testimony "was a direct contradiction of [Appellant's] police

statement … that he never noticed the jewelry of his clients or their families. (R.27 2299, 2305)" AB 47. In fact, Appellant did not tell the police he "never noticed the jewelry of his clients or their families."

Even if Appellant had made that statement, there was no relevance to the remark to Cox more than a year before the murder. This isolated event was not competent to prove anything.

Appellee says (AB 46-47) the remark was innocent conduct. Yes, commenting on a ring is not a bad act, but the state spun out of it a claim that Appellant lied to the police to cover up the murder. *See Johnson v. State*, 991 So.2d 962, 967 (Fla. 4th DCA 2008) (fact that defendant was beneficiary of will was not a bad fact except that "the spin placed on it by the State" turned it into improper evidence of propensity: "It became a prejudicial sword wielded by the State to convict the defendant.").

From Cox's testimony Appellee infers that Appellant lied to the police, which, it infers, shows he was "trying to hide something." AB 47. This sort of claim – this stacking of inference upon inference – typifies this entire case. Cox did not prove any material fact.

Appellee says (AB 48) the evidence was harmless. But it has not proved that the jury did not carefully consider all the evidence, including this evidence, and that it did not pay close attention to the prosecution argument stressing it. It has not

proved that the error was harmless beyond a reasonable doubt.

Joan Cox was of a similar age as Loughman and also had had an infirm parent, and she was a friend of the prosecutor's mother. She was exactly the kind of person a prosecutor would want to put in front of the jury, especially since the prosecution was relying on so doubtful a character as Debra Thomas. Appellee has not proved beyond a reasonable doubt that her testimony did not affect the verdict.

VIII. THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

Appellee says (AB 53) it has not piled inference on inference. But then it does exactly that.

Appellee also makes claims unsupported by the record. For instance, it says (AB 53) Appellant learned the night before the murder that Loughman "was leaving the following day (R.27 2299; R.33 3149-50, 3206)." This claim is not borne out by the record.

At page 2299, Appellant said Loughman said she was going home, but he did not say it would be the next day. At pages 3149-50, there is no discussion of Loughman going home. At page 3206, Appellant expressly said "she **didn't** tell me when" she was leaving. As the testimony went on to the next page, he explained: "She didn't tell me it was that night or that day, **she just said she was going home**." R33 3206-07.

Appellee says Appellant said he "obtained a diamond and emerald tennis bracelet and other jewelry for D-Thomas (R.29 2494-99, 2503-07, 2531-34)."

But there is **nothing** about a bracelet at pages 2494-99. And the testimony about a bracelet at pages 2503-07 was:

First at page 2503, in response to leading questions, Flynn said Appellant "mention[ed]" a tennis bracelet and he "mention[ed] diamonds and emeralds in relation to the tennis bracelet." (It is noteworthy that in his carefully leading questions the prosecutor did not ask if Appellant said he actually got a tennis bracelet, much less still that it was "a diamond and tennis bracelet.") Second, at pages 2504-06, the prosecutor asked about Thomas's response to the bracelet, and never got a meaningful answer except that Appellant said she would be excited about the tennis bracelet. Again, this does not even say he had a tennis bracelet, much less one such as Appellee claims.

Finally, at page 2534, there was testimony that Appellant "mentioned that he had also got her a tennis bracelet." But again, Appellee can only infer that he got the tennis bracelet at the same time as the ring, and the testimony did not show it was a diamond and emerald tennis bracelet.

Appellee stacks (AB 55) supposed immaterial differences as to Appellant's whereabouts to say he "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."

First, Appellant's trial testimony was not inconsistent with his statement to the police. He told the police he was nowhere to be found on the morning of the murder. R27 2309. He also said he was getting ready to move. *Id*. The discussion was cut off when his lawyer called him. R33 3186. If Appellant had concocted an alibi, he would have related it to the police.

Second, the dress shop owner did not contradict him – he did not say he put brochures inside her shop.

There were no material inconsistencies sufficient to allow a jury to conclude beyond a reasonable doubt that Appellant committed the crime. *See Andrews v. State*, 577 So.2d 650, 653 (Fla. 1st DCA 1991) ("These and other inconsistencies relied on by the State are immaterial in that they do not substantially contradict appellant's claim of self-defense."). This Court long ago determined that where a statement to law enforcement "is ambiguous and susceptible of innocent explanation as well as being indicative of criminal knowledge," such ambiguity must be resolved in favor of the accused. *See Fiske v. State*, 366 So.2d 423, 424 (Fla. 1978).

In *Terranova v. State*, 764 So.2d 612 (Fla. 2d DCA 1999), Terranova was charged with killing his ex-wife and her lover,

who had been Terranova's friend. Terranova had an obvious motive and he threatened to kill them both. He got in a heated argument with the ex-wife the day before the murders. The murder weapon was a gun Terranova had once owned. A portion of his alibi was contradicted by other witnesses. The Second District found the evidence of guilt insufficient, writing: "Although this evidence suggests Terranova had a motive and possibly an opportunity to kill the victims, it falls far short of the kind of evidence needed to support first-degree murder." *Id*. at 615.

As in *Terranova*, Appellant contends he did not commit the murder. As in that case, Appellee did not present competent substantial evidence of guilt.

The bottom line is that there is no evidence, physical or testimonial, that Appellant killed Loughman. At most, Appellee stacks inferences to create a suspicion of guilt. A conviction may not be based on suspicion - no matter how strong it may be. *See e.g., Frank v. State*, 163 So. 223 (Fla. 1935). "It is not sufficient that the facts create a strong probability of, and be consistent with guilt. They **must be inconsistent with innocence**." *Francis v. State*, 58 So.2d 872, 872 (Fla. 1951) (e.s.); *Lindsey v. State*, 14 So.3d 211, 214-15 (Fla. 2009).

Even evidence raising "a very strong suspicion" of guilt is not proof beyond a reasonable doubt. *See Long v. State*, 689 So.2d 1055, 1059 (Fla. 1997). In *Ballard v. State*, 923 So.2d

475, 483 (Fla. 2006), the hypothesis was that Ballard

> was not guilty, and that another individual, including perhaps a member of the gang that had shot into [the victims'] apartment a week prior to the murders, or some other unknown assailant, committed the murders.

Forensic evidence put Ballard on the scene, but he had been there in the past. At bar, no forensic evidence put Appellant on the scene. His hypothesis was that he was not guilty, and some unknown person committed the murder. Appellee had the burden to show he was guilty and no one else committed the crimes.

Appellee's argument is a stack of inferences. It points to evidence of Appellant's statements, bank records, his meeting with Loughman the night before the murder, his knowing she was leaving, his washing blood from himself and discarding bloody clothes, and having a ring like Loughman's. Appellee infers that his money problems – which were not unusual - would drive him to murder. It infers he decided to kill Loughman when he knew she was leaving. It must pyramid these inferences on evidence that he was bloody to infer that the blood had to be Loughman's. It must infer from these inferences that the ring he had was taken from Loughman and taken from her in the murder.

Hypotheses cannot make up for a lack of proof. *Cf. Miller v. State*, 770 So.2d 1144, 1149 (Fla. 2000) ("the circumstantial evidence test guards against basing a conviction on impermissibly stacked inferences."). As in *Ballard*: "Suspicions alone can-

not satisfy the State's burden of proving guilt beyond a reasonable doubt, and the expansive inferences required to justify the verdict in this case are indeed improper." 923 So.2d at 482.

> IX. THE COURT ERRED IN REFUSING TO LET APPELLANT PRESENT EXCULPATORY EVIDENCE THAT APPELLANT'S POLYGRAPH RESULTS WERE CONSISTENT WITH INNOCENCE.

Appellant relies on his initial brief.

> X. THE COURT ERRED IN ALLOWING JUAN PORTILLO TO TESTIFY ABOUT THE REACH OF THE CELL TOWERS TO PARTICULAR AREAS ON SEPTEMBER 24, 2002 WHEN HE WAS UNAWARE OF THE RELEVANT CONDITIONS ON THAT DATE AND DID NOT PERFORM A DRIVE TEST UNTIL YEARS LATER.

Appellee again adopts the rationale advanced sua sponte by the trial court. AB 66-68.

Apellee relies mainly on *Gordon v. State*, 863 So.2d 1215, 1219 (Fla. 2003). Gordon contended on post-conviction that counsel was ineffective for not challenging **lay** testimony connecting phone records to a cell phone map. The registry attorney made no intelligible legal argument about cell towers, and the opinion does not address the present issue, namely that witness Portillo did not know the relevant conditions on September 24, 2002.

Appellee also cites *Medina v. State*, 920 So.2d 136 (Fla. 3d DCA 2006) and *Still v. State*, 917 So.2d 250 (Fla. 3d DCA 2005), which involved GPS tracking. The present case **does not**.

(Regardless, *Medina* and *Still* are doubtful authorities. In *Medina*, the court found it **unnecessary to decide the issue** below or on appeal, but stated agreement with the trial court without

citing any authority. In *Still*, the only Florida authority cited for admission of GPS testimony was *Hicks v. State*, 852 So.2d 954 (Fla. 5th DCA 2003), which decided no such issue. *Hicks* involved a suppression issue with only a passing reference to OnStar tracking. Hicks did not challenge the OnStar evidence, and it played no role in the analysis.)

Appellee also cites *Stanek-Cousins v. State*, 912 So.2d 43 (Fla. 4th DCA 2005), which involved **no** legal issue about cell phones, much less the legal issue now before the Court.

Appellee cites four federal cases in saying that "other jurisdictions accept cellular technology as a reliable basis to establish the location of the defendant in a criminal case." Federal law on scientific evidence differs from Florida law.

Appellee's cases do not help it. In *U.S. v. Sepulveda*, 115 F.3d 882 (11th Cir. 1997), there was an overlap of tower sites, as at bar, and one **could not** determine the location of calls, so that calls were "**improperly attributed to appellants**." *Id*. at 891. *Sepulveda* involved federal sentencing and not the rules of evidence governing trials. In *U.S. v. Weathers*, 169 F.3d 336 (6th Cir. 1999), the issue was only whether use of a cell phone involved interstate commerce. *U.S. v. Pervaz*, 118 F.3d 1 (1st Cir. 1997), involved a probable cause issue as to whether phone company employees acted as federal agents tracking cell phone calls. *U.S. v. Brady*, 13 F.3d 334 (10th Cir. 1993), upheld dis-

missal of an indictment, and involved no evidentiary issue.

Appellee relies heavily on *Pullin v. State*, 534 S.E.2d 69 (Ga. 2000). *Pullin* did not involve the issue raised here.

Prosecuted for a 6:30 a.m. murder in Lithonia, Georgia, Pullin claimed he had made a call from his home in a town "approximately **30 miles** from Lithonia," at 5:30 a.m. and stayed home until 7:30 a.m., but phone records showed calls in Lithonia at 5:31 and 7:09 a.m. *Id*. at 70. The evidence was that a phone "such as the one Pullin used is transmitted to" the tower "geographically closest to the handset". *Id*. at 749. The evidence was that Pullin could not have made the calls from his home.

The case at bar is unlike *Pullin*. The evidence at bar was that the closest tower would not necessarily be the one to take a call from appellant's phone.[3] Portillo did not know what towers were down. Appellant did not claim to make a phone call 30 miles from a cell tower.

Appellee cites *Rodgers v. State*, 948 So.2d 655, 666 (Fla. 2006) in passing. There, the argument was that IQ test results were inadmissible because the test conditions were not shown. But the issue here does not involve the conditions under which any tests were made - it involves the witness's ignorance of the

[3] This is a nationwide problem in trying to locate the sources of cellular 911 calls. *See* Christine Kenneally, *How to Fix 911*, TIME, Apr. 11, 2011 at 37 ("the tower [handling the 911 call] may not be the one physically nearest the caller").

conditions at the time the phone calls were made. Regardless, where the testing of **physical objects** is involved, "the results of an experiment are inadmissible if conducted under dissimilar circumstances." *Goodyear Tire & Rubber Co., Inc. v. Ross*, 660 So.2d 1109, 1111 (Fla. 4th DCA 1995). Appellee had to show similarity of conditions. It did not. Its witness did not know the conditions on September 24, 2002.

> XI. THE COURT ERRED IN ALLOWING INTO EVIDENCE DIAGRAMS MADE BY JUAN PORTILLO PURPORTING TO SHOW THE LOCATION AND REACH OF CELL TOWERS IN 2002.

Appellee has not explained why the principles of *Gosser v. Commonwealth*, 31 S.W.3d 897, 903 (Ky. 2000) should not apply.

> XII. SINCE THE MURDER WAS IN 2002, THE COURT ERRED IN ALLOWING TESTIMONY AS TO THE TIME IT TOOK FOR DET. HICKOX TO DRIVE FROM APPELLANT'S HOME TO THE MURDER SCENE IN 2005, FOR DET. HALL TO DRIVE FROM THE MURDER SCENE TO A BANK IN STUART IN 2003, AND FOR INV. ARENS TO DRIVE FROM DOWNTOWN FORT PIERCE TO A BANK IN PALM CITY IN 2009.

Appellee relies on the trial court's reference to *Pierre v. State*, 990 So.2d 565, 570 (Fla. 3d DCA 2008). But in *Pierre* the court merely ruled the issue was not preserved for appeal.

Appellee has made no effort to explain why this issue should not be governed by *Goodyear Tire & Rubber Co., Inc. v. Ross*, 660 So.2d 1109, 1111 (Fla. 4th DCA 1995) and *Dempsey v. Shell Oil Co.*, 589 So.2d 373, 380 (Fla. 4th DCA 1991).

> XIII. THE COURT ERRED IN ALLOWING IN EVIDENCE STATE'S EXHIBIT 186, THE UNAUTHENTICATED WALGREENS RECEIPT.

Appellee relies on the fact that the exhibit was authenti-

cated by Judge Belanger himself. This despite the contention that even a Walgreens' custodian **could not** authenticate it. Appellee does not justify the court's relieving the state of its duty to authenticate the exhibit. A court should not short-circuit our procedures and put itself so far into the litigation as to make itself a witness for one party. "It is not the role of the trial court to be prosecutor, defense counsel, and arbiter." *See Holley v. State*, 48 So.3d 916, 920 (Fla. 4th 2010) (same judge erred in unilateral treatment of discovery issue).

Appellee had the burden to authenticate the exhibit through a records custodian or similarly qualified person. *See Osagie v. State*, 58 So.3d 307, 308 (Fla. 3d DCA 2011).

Ben Thomas produced a receipt for a minor purchase years after the fact. Appellee says his testimony proved the authenticity of the receipt, which it used to support his testimony. This circular argument cannot relieve the proponent's burden to properly authenticate the exhibit. The judge erred by relieving Appellee of its burden based on his own view of the authenticity of a document that could easily be forged on a computer printer.

Appellee relies on *Justus v. State*, 438 So.2d 358 (Fla. 1983), but there the state authenticated a tape recording with testimony as to how the tape recorder was operated and how the recording was preserved to prevent tampering. At bar, the court relieved the state of its burden to produce such testimony.

XIV. THE COURT ERRED IN ALLOWING IN EVIDENCE STATE'S EXHIBIT 110, A PHOTOGRAPH SHOWING JOAN LOUGHMAN WITH HER GRANDCHILD AND FAMILY MEMBERS.

Appellee suggests (AB 79) that Appellant did not preserve any relevancy issue for appeal.

In fact, Appellant argued among other things that the exhibit had "no probative value." R35 3372. "Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. If something has no probative value, it does not tend to prove a material fact and is irrelevant. The judge and prosecution were perfectly aware of Appellant's objection.

Appellee said exhibit 110 showed what Appellant saw when he met Ms. Loughman. R35 3372-73 ("This is what the Defendant would have seen **when he met with her on several occasions**, and **we need** to have both of these photographs in **for that purpose** because some show some of the pieces, some show others."). In fact, it did not show what he saw when he met her. It did not show her diamond and emerald pendant. R35 3374-75. It did not show the two carat diamond ring. R35 3389. The picture was taken in 2000, long before the murder. R35 3389.

"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). Here, exhibit 110 was not probative of an issue that was in dispute. Hence, it was inadmissible.

Appellee cites *Allen v. State*, 662 So.2d 323, 327 (Fla.

1995). But there, the judge allowed only one photograph and that one photograph "was admitted to depict the distinctive diamond ring that Cribbs wore" and was the basis of the grand theft charge. The court excluded another photograph that did not show the ring as clearly. Here, exhibit 110 **did not** show the distinctive diamond ring that was the focus of the trial - the ring was shown by exhibit 109, which was in evidence. Unlike in *Allen*, Appellee had only a generalized theory of robbery of money or jewelry. R38 T30 3869. That would not authorize a picture of Loughman giving money to a child or to a charity two years fore the murder to show she had money. It does not appear that the photograph in *Allen* was taken two years before the murder. The state claimed Loughman wore the jewelry "**all the time**," R35 3372, but never showed why it did not present a more recent tograph showing the jewelry without her holding a child.

Allen did not rule on whether the prejudicial effect outweighed probative value. Here, the picture had no probative value as to "what the Defendant would have seen" two years later, and it had a substantial prejudicial effect.

Can we say beyond a reasonable doubt that the jurors were not affected in their deliberations and in their verdict by the picture of a smiling woman full of life holding a baby in her hands? Unless the answer is yes, the error was harmful.

XV. THE COURT ERRED IN STACKING INFERENCES AND RELYING ON SPECULATION TO FIND CCP. THE STATE DID NOT PROVE CCP UNDER CASES SUCH AS *POWER V. STATE*.

Appellee relies (AB 86-87) on the stacking of inferences.

Appellee had the burden to prove beyond a reasonable doubt that "the defendant had a careful plan or prearranged design to commit murder **before the fatal incident** (calculated)." *Williams v. State*, 37 So.3d 187, 195 (Fla. 2010) (striking CCP where state did not prove intent before the fatal incident); *Philmore v. State*, 820 So.2d 919, 933 (Fla. 2002) (affirming CCP where state showed that Philmore and co-defendant discussed committing murder before encountering victim).

Appellee conjectures an intent **before the fatal incident**, but its speculations are consistent with simply going to the house and, on whatever provocation, suddenly attacking Loughman.

Appellee theorizes (AB 90-91) that Appellant had an insane desire to get a diamond ring, this desire focused on Loughman's ring, and it drove him to steal it because he did not have money to buy one. But Appellee's inferences are not inconsistent with going to the house to try to borrow (Appellee claims he fixated on her wealth) or steal, and then flying into a rage when it did not work. They are also consistent with going there to commit a burglary and the crime going awry. Appellee did not prove an intent to kill before the fatal incident.

As to prejudice, Appellee overlooks how jurors will view

the absence of prior convictions for violence and the lack of mental illness: they will consider them powerful mitigation.

Jurors will view such mitigation as showing the incident was out of character, without danger of recidivism. Juror interviews show future dangerousness overshadows all other mitigation. John H. Blume, et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell L. Rev. 397, 404 (2001). *See also* Stephen P. Garvey & Paul Marcus, *Virginia's Capital rors*, 44 Wm. & Mary L. Rev. 2063, 2089-92 (2003).

It cannot be said beyond a reasonable doubt that, without an improper aggravator, the result would have been the same. The jury could find Appellant had a humanity within him worth saving, giving them a reason to choose life.

XVI. CCP DOES NOT APPLY BECAUSE THE STATE DID NOT PROVE AN INTENT TO KILL BEFORE THE FATAL INCIDENT.

Appellant relies on his argument in Point XV above.

XVII. HAC WAS IMPROPERLY APPLIED AT BAR UNDER *ELAM v. STATE*.

Appellee relies (AB 92-93) on a hypothesis that it did not prove. It says Loughman received the "defensive wound" after she was attacked and beaten and stabbed at the front of the house and after she was dragged down the hallway.

The testimony about the "defensive wound" was conjectural.

It was based on the mere fact that there was a laceration on the back of the left hand. R35 3406.

The medical examiner (who did not perform the autopsy) did not know what caused this injury. Asked if it was caused by the statue, she said: "I did not see anything else at the scene as far as any other instrument that was consistent with this wound so, yes, in my opinion this would have caused that injury." R35 3427. (The medical examiner was never at the scene.)

The medical examiner did not know if the injury happened while Loughman was conscious. At most, she said, "**Typically**, with defensive type wounds a person is conscious and they are using their extremities to defend themselves." R35 3408 (e.s.).

She said that **if** the wound was caused by the statue, it occurred before the statue was broken. R35 3427-28.

Thus, the testimony about the "defensive wound" was based on a stacking of inferences.

Even if Appellee had proved the wound occurred while Loughman was conscious, it did not prove consciousness longer than needed to suddenly lift her hands before being struck once or twice. The medical examiner thought Loughman was conscious when the first blow was struck based on the **assumption** that the wound to her hand was a defensive wound, but said that, even so, she may have been unconscious after that. R35 3454.

The medical examiner did not say the defensive wound occurred after Loughman was dragged down the hall.

Appellee has not explained why *Elam v. State*, 636 So.2d

1312 (Fla. 1994) does not govern this issue. In *Elam*, there was **more than one** defense wound, and the victim was unconscious at the **end** of the beating, which might have lasted over a minute.

Appellee relies (AB 93) on *Boyd v. State*, 910 So.2d 167, 191 (Fla. 2005) and *Pooler v. State*, 704 So.2d 1375 (Fla. 1997), but they are unlike the case at bar.

Boyd kidnapped a stranded motorist and raped her and then tortured her do death with various tools. She had **twelve** defensive wounds before he finally killed her by stabbing her in the brain with a screwdriver. *Boyd*, 910 So.2d at 182.

In *Pooler*, the victim knew for two days that Pooler meant to kill her. He then went to her house and, when she would not let him in, he shot her brother. She begged for her brother's life and her own life. She was so terrified she vomited in her hands. After breaking into the house, Pooler chased the victim down, smashed her with a gun, and dragged her screaming and begging for her life toward his car. He then dragged her screaming back toward her home and shot her several times, pausing to ask her if she wanted some more. *Pooler*, 704 So.2d at 1377.

The case at bar is unlike *Pooler* and *Boyd*. It is like *Elam*.

Appellee sets out (AB 96) a string cite of cases, but offers no explanation for how they are closer to this case than is *Elam*. For instance, in its main case the defendant murdered an entire family. The mother suffered "torment wounds" "normally

associated with the perpetrator taking a depraved, measured approach to the infliction of the injury and taking pleasure in his cruel activity," and she was anxious for her daughter's life. The little girl suffered intense horror and pain before her death. *Reynolds v. State*, 934 So.2d 1128, 1153 (Fla. 2006). *Elam* is much closer to the case at bar.

The circumstance must be read narrowly and applied with caution. This is not an appropriate case for its application.

XVIII. FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Appellant relies on his initial brief.

CONCLUSION

The convictions and sentences should be reversed, and the case remanded with appropriate directions.

Respectfully submitted,

CAROL STAFFORD HAUGHWOUT
Public Defender
Fifteenth Judicial Circuit

_____
GARY LEE CALDWELL
Assistant Public Defender
Florida Bar No. 256919
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by first class US Mail on Leslie T. Campbell, Esq., Assistant Attorney General, Counsel for Appellee, Ninth Floor, 1550 North Flagler Drive, West Palm Beach, Florida, 33401-2299, on 1 July 2011.

_____
Attorney for Appellant

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier, a font that is not spaced proportionately.

_____
Attorney for Appellant