IN THE

SUPREME COURT OF FLORIDA

RONNIE KEITH WILLIAMS	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC05-857
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE

AUTHORITIES CITED

CASES CITED PAGE

FLORIDA STATUTES

OTHER AUTHORITY

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ADMITTING LISA DYKE'S OUT-OF-COURT-STATEMENTS INTO EVIDENCE.

TRIAL COURT'S RULING

Appellee claims it met its burden of demonstrating that the non-hospital statements (911 statement and the statement to Officer Gillespie at the scene) were excited utterances and dying declarations. Appellee claims that the trial court found them to be both excited utterances and dying declarations. AB18. This is incorrect. The trial court found these statements admissible only as excited utterances:

> The Court finds the 911 statements of Lisa Dyke and her statements made shortly after the police and emergency medical personnel arrived at her apartment to police; and the call she made to Julius Lawrence, identifying Ronnie as the person who stabbed her, are admissible under the **excited utterance** exception to the hearsay rule
>
> * * *
>
> The Court finds that the statements of Lisa Dyke to the 911 operator, to Julius Lawrence, and to police officers and emergency medical personnel in her apartment, constituted "**excited utterances**" within 90.803(2) of the Florida Evidence Code.

R329-330 (emphasis added).[1]

[1] Despite the prosecutor vehemently arguing these were dying declarations, the trial court only found them to be excited utterances, thus implicitly rejecting the prosecutor's argument. Appellee seems to acknowledge this by claiming that the trial court was right for the wrong reason. AB18. The trial court would later find Dyke's statements at the hospital (a much different situation) to constitute a dying declaration:

DYKE'S PHONE CALL TO JULIUS LAWRENCE

Appellee claims this never occurred. However, there was ample evidence of the phone call to Julius Lawrence. In fact, the prosecutor toyed with the idea of introducing the phone conversation into evidence. Out of the hearing of the jury, Stephanie Lawrence testified that Dyke had called and asked for Julius Lawrence SR1417-1418. The remainder of the conversation was between Dyke and Julius Lawrence SR1418. The conversation appeared to have occurred prior to the 911 call.[2] Without hearing the contents of the conversation between Lisa Dyke and Julius Lawrence, the trial court warned that prosecutor that he was worried about admitting this communication SR1420. The prosecutor then changed her mind and decided not to introduce the call 2SR1420. There can be no doubt that the call occurred.[3]

The phone call from Dyke to Julius Lawrence is important for several reasons. It rebuts Appellee's hypothesis that Dyke was unconscious for the 30 minutes between the attack and the

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> As to the head nods wherein Lisa Dyke identified the Defendant's picture in a photo line-up as the person who stabbed and bit her, the court finds that they should come into evidence either as "excited utterances" or as "dying declarations." R330.

[2] The prosecutor proffered that the call occurred at approximately 8:30 a.m. which would be just prior to the 911 call SR1419. Also, Stephanie Lawrence went to school at approximately 8:30 right after Dyke's call SR1417.

[3] In fact, at the pretrial hearing on the motion to suppress the statements it was brought out that the police used the call as probable cause for their warrants SR112.

911 call and was unable to make phone calls earlier. It also shows a conscious decision by Dyke to make other calls before calling 911. It shows that Dyke had time for reflective thought. Dyke's statements should not have been admitted absent proof by the state that she did not engage in reflective thought. See Hutchinson v. State, 882 So. 2d 943 (Fla. 2004).

FABRICATION BY DYKE

Appellee claims that there was only evidence of lack of reflection and there was no evidence of fabrication by Dyke.[4] However, Dyke also misrepresented her condition during the 911 call. Dyke told the 911 dispatcher in unequivocal terms that she was unable to get up or move. Yet, she was able to quickly, and without effort or coaxing, get up and move through the apartment and unlock her door when police arrived T726-27. In addition to making phone calls, Dyke had been able to move about and take a shower.[5]

The phone call from Dyke to Julius Lawrence does not show lack of refelction. It is evidence of reflection and

[4] Appellee implies even if there is time for reflection the statements will be admissible unless it is shown that fabrication occurred. This is not true. If there is time for reflection, the state must prove that reflection did not occur. E.g. Hutchinson v. State, 882 So. 2d 943 (Fla. 2004).

[5] Officer Gillespie testified that when he observed Dyke she was wet as if she had showered T715. Dyke had showered or it was raining in her apartment. The prosecutor noted that after the attack but before police came, Dyke had showered T1429.

fabrication by Dyke. Dyke chose to call others before calling 911. This has several implications. Dyke lied to the 911 dispatcher. In its answer brief at page 21, Appellee acknowledges that "in response to the operator's question about the time delay" Dyke claimed she was unable to make a phone call. The 911 dispatcher questioned Dyke why it took 20 or 30 minutes to call 911. Dyke responded that she tried, but had not been able to make a call SR70.[6] This was not true. Dyke was able to make a call previously and she did – she called Julius Lawrence. It was not that Dyke could not call 911 earlier, Dyke chose to call Lawrence instead.

Dyke's demeanor during that call was apparently totally different than the demeanor she had displayed earlier to the Lawrences.[7] It is suspicious that Dyke hid the fact that she had called Julius Lawrence when talking to the 911 dispatcher.

THE STATE DID NOT MEET ITS BURDEN OF PROVING THAT DYKE'S STATEMENTS QUALIFIED AS EXICTED UTTERANCES.

The bottom line is that there was time for reflection and it was not shown that Dyke did not engage in reflection. In ruling that Dyke's statements to police at the scene were excited utterances, the trial court did not find that there was not time to reflect or that Dyke had not reflected. The state

[6] Dyke also portrayed the same sentiment during another portion of the call – "long time trying to get the phone" SR66.

[7] The Lawrences did not come to Dyke's aid or call 911.

had the burden of proving the excited utterances exception. It had to show what occurred between the attack and Dyke's statements to 911 and police. Despite having evidence regarding a phone call that occurred during this time,[8] the state failed to meet its burden of proving that Dyke did not reflect before her statement. Thus, it was error to admit the 911 statement as an excited utterance. See Hutchinson v. State, 882 So. 2d 943 (Fla. 2004) (30 minutes sufficient for reflective thought and due to the lack of information as to what occurred in that time it was error to admit statement as excited utterance).

None of the cases cited by Appellee for the admission of Dyke's statements involve the situation where between the time of the exciting event and the time of the statement the declarant made a phone call to someone else and the state failed to show that reflection did not occur during the call. There has never been a single case admitting the statement under such conditions. This Court should not encourage trial courts to admit hearsay evidence under such circumstances.

Also, none of the cases cited by Appellee is like the one at bar in which Dyke actually fabricated to 911 that she had been unable to make a phone call (when, in fact, she had called

[8] The witnesses to the phone call were Stephanie Lawrence (who testified for the state at each of the 3 trials) and Julius Lawrence (who testified for the state at the very first trial). However, the state has never had either witness testify as to Dyke's demeanor during the calls. All we know is that neither showed concern about Dyke by calling 911 or going to her residence.

Julius Lawrence). There has never been a single case admitting the statement under such conditions.

THE TRIAL COURT WAS NOT WRONG IN NOT FINDING THE DYING DECLARATION EXCEPTION TO DYKE'S NON-HOSPITAL STATEMENTS.

As noted on page 1 of this brief, the trial court did not find Dyke's out-of-court statements to be dying declarations.

As explained earlier, by not finding the dying declaration exception for the non-hospital statements, after it was argued by the state, the trial court was rejecting the dying declaration exception. Since the trial court did not find the non-hospital statements were dying declarations, Appellee's claims that Appellant has not shown an abuse of discretion is without merit. Instead, Appellee should be showing that the trial court abused its discretion in not finding the dying declaration exception.

The trial court validly treated Dyke's hospital and non-hospital statements differently. If Dyke had a fear of dying during her non-hospital statements, she knew that help was on the way from paramedics and that she would be taken to the hospital.[9] Thus, the trial court could find that Dyke did not

[9] The suppression hearing of the 911 tape and testimony of Officer Gillespie shows that Dyke was assured that help was on the way:

> There are paramedics on the line, Okay? R67,L18-19.
> Ma'am, help is on the way, but we want to try to catch him, Okay? R69;L4-5.
> You are going to be fine. You are going to be just fine. We're on our way. R70;L23-24.

believe that her death was imminent where help and treatment were on the way. Dyke could believe that paramedic and hospital doctors would save her from dying.[10] Appellee has not shown that the trial court abused its discretion in not finding Dyke's non-hospital statements to be dying declarations.

There are other reasons the statements were not proven to be dying declarations. As the party seeking the exception to the hearsay rule, the state had the burden of proving the statutory exception. The state failed to elicit the totality of the circumstances surrounding the non-hospital declarations -- specifically the phone call to Julius Lawrence. The dying declaration exception focuses on the declarant's state of mind. Dyke's phone call to Lawrence made very close in time to the statements in question, would be necessary to make an accurate evaluation of Dyke's state of mind. As noted earlier, Dyke lied or misled about being able to make such a phone call. The state needed to present the full details of this phone call to be able to prove Dyke's state of mind under a totality of the circumstances approach. None of the cases cited by Appellee involve the admission of statements as dying declarations where, as here, the declarant made a phone call prior to the statement,

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You are not going to die. SR82.

[10] On the other hand, the trial court could find that Dyke's fear of dying at the hospital, after surgery and treatment, showed that she believed death was imminent. Thus, there is a rationale for treating the hospital statements differently.

but the state did not bother to introduce the details and demeanor of the call.

As explained on pages 28 and 29 of Appellant's Initial Brief, being stabbed and afraid of dying is not by itself sufficient for the dying declaration. This is explained by the Supreme Court in Shepard v. United States, 54 S.Ct. 22 (1933) and this Court in McCrane v. State, 194 So. 2d 632 (Fla. 1940). These cases have never been overruled and still hold that there must be an absence of all hope of recovery and not merely the fear of dying. Appellee does not dispute the principle of these cases. Nor does it show that Dyke had given up all hope of recovery. Instead, Appellee claims that codification of the dying declaration exception overruled McCrane. This is not true. Appellee cites no cases for its claim. The codification of the dying declaration exception allowed the exception to be used in civil and non-homicide cases, but it did not reduce the reliability requirements of the exception that were present in McCrane. In fact, if one still maintains hope of recovery, death is not really imminent in his or her mind. This Court should not expand dying declarations beyond McCrane.

Appellee's reliance on Teffeteller v. State, 439 So. 2d 840 (Fla. 1983) is misplaced. In Teffeteller, the statement was made at the hospital where the declarant stated, "Oh God, I'm dying." Although he was consoled and told not to worry there was no indication that he was assured he would not die. In

fact, the doctors testified that the victim was aware of his impending death (final glidepath). In holding that the statements were dying declarations this Court relied on Lester v. State, 37 Fla. 382, 20 So. 232 (Fla. 1896) which holds, "The absence of all hope of recovery, and appreciation by the declarant of his speedy and imminent death, are a preliminary foundation that must always be laid...."

Finally, Appellee claims Appellant concedes that Dyke believed her death is imminent. This is not true. Dyke had been told she was not going to die – by 911 dispatcher – "You are going to be just fine" R70 and by Gillespie – "You are not going to die" SR82, and was told that help was here or on the way. Dyke would believe that death was not imminent because she would be saved by paramedics and doctors at the hospital. The state did not prove that Dyke believed her death was imminent. Dyke expressed concern, but not a belief that she was actually going to die. Most of the concern was for the life of her unborn baby. While there is evidence that Dyke was concerned about the health of her baby, this does not mean that she believed her death was imminent:

> A: I can't say that she did not have concern for imminent death, but her concern at that point is, as far as I can remember, was to at least speak to the police officers to let them know who she felt possibly did this to her….

R518.

> Q. Did she express concern for herself to you on that first day?
>
> A. At that time, I don't remember. I know she was concerned about the baby and she wanted to speak to the authorities.

R524.

If Dyke believed that her death was imminent, she might have asked for a priest or she would want to say goodbye to her parents. None of these circumstances were present. The state did not carry its burden and the trial court did not abuse its discretion in not finding the non-hospital statements were dying declarations.

ISSUE WAS PRESERVED

Appellee claims that Appellant did not preserve the issue as to the admission of the out-of-court statements. However, Appellant filed a motion to exclude the statements and objected to the statements on hearsay groundsR55-56,74-75;SR153,164-166. The trial court overruled the objections R320-322. Thus, the issue is preserved. Andrews v. State, 261 So. 2d 497 (Fla. 1972) (hearsay objection sufficient to preserve insufficient predicate); Neely v. State, 883 So. 2d 861 (Fla. 1st DCA 2004).[11]

[11] Appellee's claim on page 22 of its brief that Appellant did not object to or challenge the non-hospital statements admission as dying declarations is particularly frivolous. The trial court did not find these statements to be dying declarations.

THE ERROR CANNOT BE DEEMED HARMLESS

Appellee claims that based on "sufficient" or "overwhelming" evidence the error of admitting the statements was harmless. However, as this Court has pointed out the harmless error test is not a "sufficient" or "overwhelming" evidence test. Rather, the test is whether the beneficiary of the error can prove that the error did not contribute to the verdict of the jury. State v. Lee, 531 So. 2d 133, 136-137 (Fla. 1988).

In this case during deliberations, the jury requested the 911 tape be played and a transcript of the 911 tape R379,380. The prosecutor emphasized the 911 tape to the jury in closing argument:

> You can judge from the statement of Lisa on that tape. Please listen to that tape. You will have all this evidence going back to you, to listen to it again.
>
> If you have to listen to it three times, four times, whatever, listen to it again.

T1416 (emphasis added)

> … I submit to you, ladies and gentlemen, and Lisa testified that he raped her, and you will hear it on the tape. You heard that she said, he raped me, I was raped … and I submit to you, ladies and gentlemen, he raped her, and he raped her, before he decided to kill her.

T1428-29 (emphasis added). The error was not harmless.[12]

[12] Appellee claims the 911 tape never contained a rape allegation. Such a claim is without merit. While there could be different versions of the 911 tape, the 911 tape with the rape allegation was played to the jury twice – once during

The rape allegation is obviously harmful to the issue of felony murder. See T1429 (prosecutor says Dyke's "testimony" she was raped proved felony murder).

In addition, the statement regarding rape could contribute to a premeditation finding. The sexual battery provides a possible motive for the killing – covering up the sexual battery. In fact, the prosecutor specifically argued to the jury that Appellant had not intended to kill Dyke until after he had raped her:

> … I submit to you, ladies and gentlemen, and Lisa testified that he raped her, and you will hear it on the tape. You heard that she said, he raped me, I was raped … and I submit to you, ladies and gentlemen, **he raped her**, and **he raped her**, **before he decided to kill her**.

T1428-29 (emphasis added). Appellee claims that the "motive for the attack was plain," Appellee's Brief at 23, but then fails to explain what that motive was. Appellee implies that Appellant decided to kill Dyke because he was angry with Lawrence. This convoluted logic is not plain and does not make introduction of

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closing argument (T1479, line 15) and once during deliberations when the jury asked for a playback T1527, line 5. The prosecutor telling the jury to listen to the rape allegation on the tape confirms that it was on the tape T1428-29. Defense counsel also noted the rape allegation on the tape T1210, lines 6-9, 987, 664-665. The rape allegation may be more, or less, audible depending on the version of the tape played and the machine used to play the tape. However, one thing is certain – the tape as played to the jury during the state's closing argument (T1479,Line 15) and during jury deliberations (T1527,Line 5) did contain Dyke's rape allegation.

the non-hospital statements harmless. Appellee is also wrong in characterizing the evidence as overwhelming.[13]

DYKE'S HOSPITAL STATEMENTS ARE HEARSAY

Appellee claims that Dyke's statements to Detective James at the hospital by a system of head nodding and shaking were excited utterances. However, Appellee does not dispute that this communication was the product of reflection. Picking someone out of a photo array is not an excited utterance done without reflection. Appellee also claims that the 11 hours between the event and statements was insufficient time to reflect because Dyke was in surgery essentially all that time. However, there was no testimony as to how long Dyke was in surgery. There was no evidence presented as to Dyke's

[13] Appellee claims the DNA evidence, the bitemark evidence, and the fact that a print was found in Dyke's residence, makes any error was harmless. However, such evidence does not show premeditation or felony murder. Furthermore, Appellee wholly ignores that such evidence was challenged and may not have been wholly relied on by the jury. For example, it was conceded that the DNA lab involved in this case had recently made mistakes T1120. In addition, other than Dyke's blood at the scene, the amount of blood and DNA were minute T1102,1100. The measuring of the distortion of the bitemark was not done properly and could lead to inaccurate results T1188,1186. The print matching Appellant was not dated T1034. The print was in a substance. The substance was never tested. There was no testimony demonstrating conclusively that the print was placed on top of the substance or whether the substance was placed on top of the existing print thus highlighting the print (as is done with powder to highlight prints). Appellant had been at Dyke's apartment on a number of occasions. Thus, it was not earthshaking that his print was there. The evidence was challenged and far from overwhelming.

activities hours before James saw her. The state did not meet its burden.

On page 37, Appellee claims this Court uses a bright line rule – statements made after arriving at a hospital are dying declarations. This is without merit. Appellee does not even allege that Dyke believed death was imminent when giving these statements. Nor does Appellee dispute the analysis and testimony referred to on page 32 of the Initial Brief that it was not proven Dyke believed death was imminent when communicating with James at the hospital.

Appellee claims that the evidence of identification was overwhelming so that admission of the statements was harmless. As explained earlier, this is a misapplication of the harmless error test. Also, in performing a harmless error test the appellate court must look at "evidence in favour of the losing party" and not the beneficiary of the error in determining whether the error is harmless. Barnes v. State, 743 So. 2d 1105, 1114 (Fla. 4th DCA 1999). As explained at footnote 13 in this brief, the evidence was challenged and far from overwhelming as to identity.

CONFRONTATION

In Evans v. State, 838 So. 2d 1090, 1097, ftnt. 5 (Fla. 2002), this Court reviewed a confrontation clause issue on the basis of a hearsay objection because the two were intertwined. This is the law at the time of Appellant's objection. The trial

court was aware of the confrontation problems with Dyke's statements:

> THE COURT: … and taking out of court statement[s] of the victim, who has never been cross-examined, that complies with the confrontation clause of the United States Constitution.

T1387. The confrontation clause issue should be addressed.[14]

Appellee claims an excited utterance cannot violate the confrontation clause. This is not so. See Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004).

Appellee claims that dying declarations are exempt from the confrontation clause. Appellee recognizes that the dying declaration exception of today does not have the same requirements as the exception of common law – see also page 26 of the Initial Brief. The question of whether dying declarations are exempt from the confrontation clause has not been decided Crawford v. Washington, 124 S.Ct. 1354 (2004). However, Justice Scalia notes that opening is only due to the history of the exception. Under Justice Scalia's analysis this means at the time of common law. In other words, Appellee's modern day view of the dying declaration would not be exempt from the confrontation clause.

[14] The Fourth District decision in Mencos v. State, 909 So. 2d 349 (Fla. 4th DCA 2005) does not overrule this Court's decision in Evans. If this Court should agree with Mencos, Mencos should be applied to future cases. Evans was the law on preservation at the time of Appellant's trial.

Finally, Appellee claims that forfeiture by wrongdoing applies. Appellee notes Florida's evidence code does not contain such a provision. However, it does -- § 90.804(b)(6). However, the prosecution never argued forfeiture by wrongdoing in the trial court below. Thus, the issue is waived.[15] In addition, assuming arguendo that the doctrine had been raised below it should not apply in this case for several reasons. The doctrine should not apply when the alleged "wrongdoing" is for the same offense for which Appellant is on trial. In order to determine admissibility, the trial court would have to determine the defendant is guilty at the beginning of trial. It is terrible policy, not to mention a denial of due process and fair trial, to have a trial presided over by a trial judge who has already determined the defendant is guilty. Also, it must be shown that the intent to kill Dyke was done with the specific intent of preventing testimony about the murder. § 90.804 (b)(6); U.S. v. Houlihan, 96 F.3d 1271, 1280 (1st Cir. 1996). Obviously, the doctrine would not apply in this case.

[15] Such an argument would have to be raised in order for the trial court to conduct the proper hearing and rule on the admissibility of the statements.

POINT IV

THE TRIAL COURT ERRED IN ALLOWING IN EVIDENCE THAT LISA DYKE WAS PREGNANT WHERE SUCH EVIDENCE WAS IRRELEVANT AND ANY RELEVANCY WAS SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE.

Appellee argues that Dyke's pregnancy was relevant because of Appellant's request for a 3° murder instruction. However, Appellant sought to exclude evidence of the pregnancy prior to requesting an instruction on 3° murder. Appellant later would explain that he requested a 3° murder instruction only after the trial court had overruled his earlier objection SR203. In addition, Appellant never argued for 3° murder based on the pregnancy.

Appellee next argues the pregnancy was admissible to rebut the non-existent defense of consensual sex. The defense in this case was never consensual sex. In fact, there was no evidence of any sex. Appellee has not pointed to any portion of the trial where the defense even hinted at consensual sex. Appellee quotes from the transcript of the earlier mistrial where the trial court states the evidence of the pregnancy is relevant as a preemptive measure. This is an admission that the pregnancy was not relevant at that time but might become relevant if Appellant later raised a defense of consent. See e.g. Taylor v. State, 855 So. 2d 1, note 21 (Fla. 2003) (inadmissible evidence cannot be used to rebut evidence that has not been introduced by the defense). Also, there is no preemptive doctrine for

introducing irrelevant evidence.[16] Until the consent defense was used the irrelevant evidence should not have been admitted.[17] Second, the defense was that there was no evidence of sex and that Appellant was not the perpetrator. Thus, the pregnancy did not rebut any defense by Appellant. After the second trial, the prosecutor and trial judge knew Appellant was not using a defense of consensual sex.

Finally, there was no evidence that Lisa Dyke would not engage in sex due to her pregnancy. It is safe for the mother and baby to engage in sexual intercourse right up until birth and some women have an increased enjoyment of sex during pregnancy. The bottom line is that some women have sex during their pregnancy.[18] Thus, unless there is some evidence presented that Lisa Dyke was adverse to sex due to pregnancy, the evidence of pregnancy does not even rebut consensual sex.

Appellee also argues that it was permissible to introduce evidence of pregnancy during the guilt phase to prove the HAC aggravating circumstance. Based on this logic, the state could

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[16] If such a doctrine were endorsed, the prosecutor logically would next seek admission of a defendant's prior criminal record as a preemptive strike to a potential defense of entrapment.

[17] If the defense had introduced evidence of consent, and if the pregnancy rebutted it, the state could then introduce such evidence. That is the purpose of rebuttal evidence.

[18] See http://www.americanbaby.com/ab/story.jhtma;storyid =/templatedata /ab/story/data/2127.xml (last visited 3/31/2006).

introduce a defendant's prior violent criminal history in the guilt phase to prove prior violent felony. Appellee's argument is without merit.

Appellee next argues that the pregnancy is per se admissible because one must take the victim as they find them. However, by holding evidence of pregnancy to be inadmissible, courts have disagreed. See Initial Brief at 40-42.

Appellee next claims that, unlike the cases cited in Appellant's Initial Brief, the jury in this case was not exposed to any "inflammatory information, namely, this child's death." AB47. However, while never being told of what happened to the child, the jury did know of the attack, loss of blood, and thus would certainly expect that the child then died or was severely disabled. Appellee's claim that the attack on an 8 month pregnant woman would not inflame the emotions of the jurors is specious. An illustration of this is the fact that the potential juror Ms. Dougherty had read a news article T473. Dougherty characterized it as an article about Lisa Dyke's "child" T473. Dougherty had a reasonable doubt whether she could set aside what she had read and fairly weigh the evidence in this case T473.[19] The evidence of pregnancy was prejudicial.

Appellee claims that the evidence of pregnancy could not have been kept from the jury. However, the tape could have been

[19] Dougherty was excused for cause T474.

redacted. The transcript of the tape could have been redacted.

Assuming arguendo, the evidence of pregnancy had some relevancy, that relevancy was substantially outweighed by unfair prejudice. Appellee has not disputed this part of Appellant's objection.

Appellee also claims there was only a fleeting reference to the pregnancy. Even though acknowledging 6 references to the pregnancy, Appellee does not acknowledge that the jury had a transcript with emphasis on the pregnancy:

> L.: Mam, I'm pregnant. I need help.
> P: You're pregnant? How long in the pregnancy are you?
> L: Seven and three weeks.
> P: Three weeks?
> L: Seven months and three weeks!!

Supplemental record, and the prosecutor urged the jury to play the tape over and over again T1416. The pregnancy is something that was not fleeting. Also, hearing about it once indelibly etches it in one's mind.

Finally, Appellee claims the error was harmless because of the evidence identifying Appellant. However, first degree murder cases involve more than proving identity.[20] The state must prove either premeditation or felony murder. The state's case was far from overwhelming in this regard. The hypothesis of premeditation was mere speculation. Appellee hypothesizes that "Williams was motivated to attack Lisa because Ruth was not

[20] Even as to identity, Appellant disagrees with Appellee that the error was harmless. See footnote 13, supra.

home" AB at 60. In other words, Appellee claims that Ruth Lawrence was the intended victim and Lisa Dyke was a substitute victim of opportunity. Appellee characterizes this as a revenge killing planned before Appellant went to Dyke's residence. This is pure speculation. At trial, the prosecution argued to the jury that Appellant made the decision to kill Dyke after he raped her T1428-29. Thus, the State of Florida does not even consistently speculate as to what happened. Assuming arguendo, that the jury believed Appellant was the person who was at Dyke's residence, they could believe that the had done so with the intent to seek her help in reconciliating with his girlfriend (as she had done before). It was undisputed that Appellant did not bring a weapon and was let in Dyke's apartment as a guest. What happened then is in doubt. Was there a reaction based on anger and not premeditation? Was there an action triggered by a mind clouded by drugs and not premeditation? Appellant had the right to have a jury calmly analyze the evidence to determine whether the killing was premeditated, or felony murder,[21] rather than an emotionally inflamed jury that subconsciously would not give a calm, fair analysis of the evidence. This cause must be remanded for a new trial. Appellant relies on his Initial Brief for further argument on this point.

[21] The evidence supporting the hypothesis of sexual battery is also extremely questionable.

POINT V

IT WAS FUNDAMENTAL ERROR TO SUBMIT A FELONY MURDER CASE TO THE JURY WHERE THE UNDISPUTED EVIDENCE REFUTED THAT THE DEATH OCCURRED DURING THE COMMISSION OF A FELONY.

As explained in F.B. v. State, 852 So. 2d 226 (Fla. 2003), in a capital case this Court will review the sufficiency of the evidence even in the absence of any objection.

Appellee argues that there was infliction of stab wounds to Dyke "during the rape" thus the killing occurred during the sexual battery. AB at 50. The problem is that there is absolutely no evidence that the stabbing occurred during a sexual battery. In fact, the prosecutor below argued that the sexual battery occurred before any decision was ever made to kill Dyke:

> … I submit to you, ladies and gentlemen, and Lisa testified that he raped her, and you will hear it on the tape. You heard that she said, he raped me, I was raped … and I submit to you, ladies and gentlemen, he raped her, and he raped her, before he decided to kill her.

T1428-29 (emphasis added).

Thus, the killing did not occur during the commission of the sexual battery. The sexual battery was done and completed after union or penetration. § 794.011(h), Florida Statutes.

Appellee's reliance on Parker v. State, 641 So. 2d 369. (Fla. 1991), and the related cases, to claim that even though the felony is complete it is said to continue until there is some definitive break in the circumstances is misplaced. Parker

is a robbery case and the perpetration of a robbery, by legislative definition, continues until there is a break in the circumstances. See § 812.13(3)(a) and (b), Florida Statutes. However, The Florida Legislature did not define sexual battery to be an offense that is perpetrated until a break in circumstances. The statute indicates sexual battery occurs only during the union or penetration. § 794.011(h). Nor does the felony murder statute define the felony as continuing until a break in circumstances. See § 782.04. Since the statutes involved in this case do not provide that sexual battery continued beyond union or penetration, a continuation until a break in circumstances cannot be read into the statute. § 775.012(2), Florida Statutes (Legislature's purpose of criminal code is to "give fair warning to the people of the state in understandable language the nature of the conduct proscribed …").

POINT VI

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON FELONY MURDER WITH SEXUAL BATTERY AS THE UNDERLYING FELONY AND AGGRAVATING CIRCUMSTANCE THAT THE OFFENSE OCCURRED DURING A SEXUAL BATTERY BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE SEXUAL BATTERY.

Appellee never really addresses this issue in its Answer Brief. Instead, Appellee combines Points VI and VII of the Initial Brief and primarily addresses the sufficiency of the evidence relating to identity. However, Appellant is not

raising the issue whether there was legally sufficient evidence to put the question of identity to the jury.

As explained in the Initial Brief, Dyke's mere statement about being "raped" is not sufficient to prove sexual battery.[22] Appellee's position to be that the mere accusation of rape is sufficient in itself. This makes no sense. If someone testified at trial "defendant raped me" without any further testimony or clarification this Court would never uphold a sexual battery conviction because such evidence is not legally capable[23] of proving beyond a reasonable doubt the specific elements of sexual battery.[24] However, Appellee's position is that the same statement, made without the opportunity of cross-examination, should be given increased evidentiary credit so as to constitute sufficient evidence to convict for sexual battery. Again, this makes no sense.

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[22] Appellee takes issue with the 911 tape containing such an allegation. As explained on footnote 12 of this brief, there clearly was such an allegation.

[23] On page 60 of its Answer Brief, Appellee seems to claim that Appellant is utilizing the wrong legal standard in its argument. This is not correct. In order to give a jury instruction there must be sufficient evidence to support a charge. For sufficient evidence the evidence must be legally capable of supporting a guilty verdict.

[24] See State v. Miller, 1995 WL 9395 (Ohio App. 3 Dist.) ("he raped me" was not sufficient to prove charge of sexual battery). The same would also be true if the witness testified that they were "robbed," "burglarized," "kidnapped," etc.

In addition, the word rape has more than one definition. Rape is also defined as being forcibly seized.[25] This definition would not render Appellant guilty of sexual battery. Cross-examination would have clarified what rape exactly meant in this case – a forcible seizure (which has evidentiary support of physical injury including bruises) or forced sexual intercourse (which lacks corroborative evidence). This is why Beber v. State, 887 So. 2d 1248 (Fla. 2004) is important.

Appellee does not dispute Beber v. State, 887 So. 2d 1248, 1252 (Fla. 2004) stands for the proposition that a conviction cannot be based solely upon Dyke's unsworn out-of-court statement. However, Appellee then utilizes Dyke's out-of-court statement to distinguish cases cited in Appellant's Initial Brief and to claim there was sufficient evidence. AB at 59.

Appellee does point to the fact that Dyke was nude when answering the door and had bite marks on her. However, as explained at page 50 of the Initial Brief, these facts do not show a sexual battery. Dyke was nude because she had taken a shower.[26] The bite marks were not to Dyke's sexual organs so as

[25] rape –3. "the act of seizing and carrying by force". The Random House College Dictionary.

[26] Officer Gillespie testified that Dyke was wet and naked as if she had taken a shower R74;T714. The prosecutor noted that Dyke had showered to clean herself up T1429. Although Appellee claims Dyke never showered, it is not reasonable to conclude the alternative – that it rained inside Dyke's apartment.

to demonstrate a sexual battery.[27] Nor did the state produce scientific evidence showing that the bite marks were representative of a sexual attack.

Appellee also cited to cases involving an express intent to have sexual intercourse; semen stains; vaginal injuries to show sexual battery. These facts were not present in this case. There was no evidence of any semen in Dyke's clothing or residence or in Appellant's clothing. There simply was no evidence that a sexual battery occurred other than Dyke's unsworn out-of-court statement. Beber, supra.

POINT VII

THE TRIAL COURT ERRED IN ADMITTING THE CONCLUSION THAT LISA DYKE HAD BEEN RAPED.

Appellee claims the present issue was not preserved and that Appellant only objected to hearsay. However, Appellant objected specifically to the evidence of the out-of-court conclusion that Dyke had been "raped" T664,1388, lines 10-11. This issue is preserved.

Appellee claims the term "rape" is a non-legal term. However, Appellee does not cite to cases to support this. Appellee implies that if the conclusion comes from the alleged victim, rather than a doctor, the statement constitutes fact

[27] Appellee characterizes one as being to the groin area. However, it is actually to the thigh. See T1359, lines 8-16. Regardless, it is undisputed that there were no bite marks to Dyke's vagina.

rather than opinion. This is not true. State v. Larson, 389 N.W.2d 872, 876 (Minn. 1986) (victim's indication that defendant's conduct was a legal conclusion rather than factual and was inadmissible); Brooks v. City of Birmingham, 488 So. 2d 19 (Ala. Appeals 1986) (error to admit victim's testimony that phone calls were "harassing or obscene" where defendant was on trial for making such phone calls).

In Nichols v. State, 340 S.E.2d 654 (Ga. Appeals 1986), it was reversible error to allow the legal conclusion "this is rape", however, it would be permissible for the doctor to testify to the individual facts that caused the conclusion to be made. Likewise, regardless of the source, stating that something is "rape" is a legal conclusion and the witness should testify to the individual facts rather than the conclusion.

Also, Appellee constantly claims that Dyke's saying she was raped without more is sufficient in itself to convict. Thus, the state uses the term "rape" as a legal conclusion.

Appellee claims that Dyke's "rape" statement would be admissible under § 90.701(1) as a lay opinion. However, lay witnesses are not supposed to give opinions whether certain facts constitute a crime. Additionally, Appellee claims the predicate for admission under § 90.701(1) is that the opinion makes it easier for the witness to testify. However, § 90.701(1) is not based on convenience. Rather, it must be shown what the witness has perceived cannot accurately and adequately

be communicated without giving opinions. Witnesses testify to the facts which constitute a sexual battery, and other crimes, all the time without merely stating they were raped, robbed, burglarized, kidnapped, etc. Appellee has failed to cite a single case where a witness has been permitted to testify she was raped rather than facing examination as to the facts of what occurred. The predicate was never laid that Dyke could not have explained what happened. Dyke's out-of-court statement should not receive any evidentiary advantage of not having to meet the predicate merely because Appellant could not confront her.[28]

Finally, Appellee claims the error was harmless, and that the conviction be affirmed, because there was an alternative theory of guilt – premeditation. However, unlike the case upon which Appellee relies, San Martin v. State, 717 So. 2d 462 (Fla. 1998), the instant error impacted not only the felony murder theory it also impacted the theory of premeditation. The "rape" was alleged to have provided the motive, and the impetus, for the decision to kill. the prosecutor specifically argued to the jury that Appellant had not intended to kill Dyke until after he had raped her:

> ... I submit to you, ladies and gentlemen, and Lisa testified that he raped her, and you will hear it on the tape. You heard what she said, he raped me, I was raped ... and I submit to you, ladies and gentlemen,

[28] If Dyke had been a witness, she would have had to testify to the facts rather than merely stating she was raped. The state should not have the testimony be given an advantage merely because she cannot be confronted.

> he raped her, and he raped her, **before he decided to kill her**.

T1428-29 (emphasis added). Thus, the error cannot be said to be deemed harmless.

POINT VIII

> THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE FAILED TO PROVE THE ELEMENT OF PREMEDITATION.

Appellee claims a relaxed legal standard for this issue should be used due to direct evidence from Dyke's statement. While this statement may constitute direct evidence of identity, there is no direct evidence as to the intent of the attacker – i.e. premeditation.

Throughout its argument on this issue Appellee points to the bitemark, print, and DNA evidence. Again, this evidence goes to identity and not premeditation.

Appellee analyzes Appellant's testimony to claim that his reasonable hypothesis of innocence is unreasonable.[29] However, this issue involves Appellant's motion for judgment of acquittal which was made and denied before Appellant ever testified T1259,1262.[30] Thus, the motion has nothing to do with

[29] Specifically, Appellee claims because Appellant was able to "navigate" his way to and from the crime scene his testimony about not remembering what happened and drug ingestion was unreasonable. The crux of this analysis is that anyone who successfully leaves the scene of a killing is guilty of premeditated murder. Such analysis lacks merit.

[30] The motion was later renewed and denied T1406.

Appellant's testimony. In fact, this Court has made it clear that Appellant's testimony cannot be used in analyzing this motion for judgment of acquittal. State v. Pennington, 534 So. 2d 393 (Fla. 1988).

Appellee claims Appellant was "motivated to attack" Dyke because Ruth Lawrence was not at home AB at 66. Strangely, Appellee does not even allege Appellant was "motivated to kill" anyone.[31] A mere motive to attack, and not to kill, equates with a second degree murder rather than a premeditated intent to kill.

The real analysis by Appellee in this case involves the multiple stab wounds. Appellee cites to Perry v. State, 801 So. 2d 78 (Fla. 2001). In Perry, this Court noted that "multiple stab wounds alone do not prove premeditation." 461 So. 2d at 85. In Perry, premeditation was shown in that 4 individual stab wounds would each have been fatal.[32] Here, by contrast, it was

[31] Throughout the brief, Appellee alludes to a convoluted hypothesis that Appellant wanted to attack a third person (Ruth Lawrence) in order to exact revenge on his girlfriend for breaking up with him. The evidence showed that Ruth Lawrence revealed an argument that allegedly caused Stephanie Lawrence to break up with Appellant. Although Dyke listened to Ruth's revelation she was not part of the cause of the breakup. In fact, Dyke had helped Appellant in this past. It makes no sense that there was a planned revenge killing of Dyke. A more likely scenario is an unpremeditated killing as described at page 53 of Appellant's Initial Brief. The bottom line is the evidence does not show the motive for killing Lisa Dyke.

[32] Likewise the other cases cited by Appellee involve slicing the neck from ear to ear and a practical decapitation.

undisputed that none of the stab wounds was of the nature to be lethal or fatal. Instead, Dyke's death was caused by the healing process T1172. Obviously, one who is delivering multiple fatal stab wounds is probably intending a fatality. Here, the evidence is different. The multiple non-fatal stab wounds reflect an angry frenzied attack rather than a premeditated placement of wounds to cause death. Also, unlike in Perry, it is undisputed that Appellant left Dyke alive, conscious and ambulatory. Under the circumstances if there was an intent to kill Dyke she would have been killed. There was nothing to stop the killing from occurring other than the fact there was no intent to kill

While leaving Dyke alive and ambulatory by itself may not per se exclude premeditation, combined with the other circumstances of this case – not coming to the scene armed with a weapon, not inflicting fatal wounds, and no threats to kill – it shows that there was not sufficient evidence of premeditation.

POINT IX

IT WAS FUNDAMENTAL ERROR TO CONSTRUCTIVELY AMEND THE INDICTMENT CONTRARY TO THE GRAND JURY CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

It is a basic violation of due process and a fundamental error to convict on a theory not brought by the Grand Jury. See Stirone v. United States, 361 U.S. 212 (1960); Cole v. Arkansas, 333 U.S. 196 (1948). Important in this point is Long v. State,

92 So. 2d 259, 260 (Fla. 1957) ("where an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged in the indictment). Long has never been receded from by this Court. In combining its answer to Points IX and X, Appellee confuses the concept of Grand Jury and Notice. As discussed in the Initial Brief, there is no jurisdiction to try a defendant on a theory different than charged by the Grand Jury. There is no case law contradicting this rule of law.

POINT X

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PROCEED ON A THEORY OF FELONY MURDER WHEN THE INDICTMENT GAVE NO NOTICE OF THE THEORY.

This issue must be examined anew on the basis of Ring v. Arizona, 536 U.S. 584 (2002).

POINT XI

IT WAS REVERSIBLE ERROR TO FAIL TO GIVE AN INSTRUCTION ON THE PRESUMPTION OF INNOCENCE AS TO FELONY MURDER.

As explained in the Initial Brief this issue may be reviewed even absent objection. As explained in the Initial Brief only the allegations in the indictment were given the presumption of innocence. Contrary to Appellee's claim, felony-murder was not alleged in the indictment.

POINT XV

THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS COLD, CALCULATED AND PREMEDITATED.

In discussing the prior second degree murder case, Appellee continuously refers to facts for which Appellant was acquitted. Appellant's prior case was not a premeditated and planned killing as Appellee represents. One must go no further than to look at the fact that the prior crime was second degree murder. Thus, Appellant was acquitted of the allegations which Appellee says constitute premeditation.[33] The trial court cannot use facts (showing premeditation) for which Appellant has been acquitted to find an aggravating circumstance. Burr v. State, 550 So. 2d 444, 446 (Fla. 1989); Owen v. State, 441 So. 2d 1111, 1113 (Fla. 2d DCA 1983) (trial court "is not free to disregard the jury's finding" of acquittal of premeditation by convicting of second degree murder to enhance a sentence).

Appellee and the trial court both use a prior conviction as Williams rule evidence to show CCP. In Wuornos v. State, 676 So. 2d 966, 971 (Fla. 1995), this Court held it to be improper to use collateral crime evidence to establish CCP to establish a criminal pattern or propensity. The same is true here – but this is worse. Facts constituting the part of a collateral

[33] It should be noted that because Appellant did not have notice before the evidence in the penalty phase that the prior offense would be used by the trial judge to prove CCP (or that CCP was even being considered) in violation of Wuornos v. State, 676 So. 2d 966 (Fla. 1995) and because he had been found guilty of second degree murder he did not call the witnesses in the prior case who would negate the facts which Appellee now claims show premeditation.

crime for which Appellant was acquitted (premeditation) are being used to claim CCP.

Appellee's argument is that Appellant planned to kill prior to going to Dyke's apartment. However, there is no evidence of such a plan. Moreover, Appellee should be estopped from even making such an argument where the prosecution below took the position that the decision to kill occurred only after arriving at the apartment[34] and never sought to use CCP.

CONCLUSION

For the reasons in the Initial Brief and Reply Brief, Appellant's conviction and/or sentence must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Reply Brief of Appellant has been furnished to LESLIE CAMPBELL, Assistant

[34] The prosecutor specifically took the position that Appellant was at the scene and raped Dyke "before he decided to kill her" T1429.

Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401 by courier this _____ day of April, 2006.

_____
Of Counsel

CERTIFICATE OF FONT COMPLIANCE

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

_____
Of Counsel