IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-1126

ANDREW MICHAEL GOSCIMINSKI

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE AND FACTS

On October 22, 2002, the grand jury returned an indictment of Gosciminski and on January 23, 2003, it was amended to charge him with the September 24, 2002 first-degree murder of Joan Loughman, robbery with a knife, and burglary of a dwelling while armed. (R.1 1-3). Jury selection began April 11, 2005 and on April 18, 2005, the trial commenced. (R.12 184; R.21 1521). On April 28, 2005, the jury returned a verdict of guilty on all charges and specifically found Gosciminski guilty of first-degree murder under both the premeditation and felony murder theories. (R.6 952-54). The following day, the penalty phase was held resulting in a nine to three jury recommendation of death. (R.6 1018). Both the State and defense filed sentencing memoranda (R.6 1020-48; R.7 1238-44) and a Pre-sentence Investigation Report was prepared. (R.8 1261-71). A hearing pursuant to Spencer v. State, 615 So.2d 688 (Fla. 1993) was held, and on June 7, 2005, the court entered its order

sentencing Gosciminski to death and to consecutive life sentences for the robbery and burglary counts (R.8 1296).

In September, 2002, the victim, Joan Loughman ("Loughman"), flew in from Connecticut to make health care arrangements for her father, Frank Vala ("Vala"). As was her custom, she wore all of her jewelry daily which included a two carat diamond ring and many other rings, bracelets and earrings with diamonds and emeralds.[1] While in town, she met Gosciminski, the Marketing Director at Lyford Cove ("Lyford"), an assisted living facility, and contracted with Lyford to care for her father. Gosciminski, who had been in the jewelry business, later told co-worker, Michael Studinski, about Loughman's jewelry, the family's wealth, and their upscale neighborhood. He also told Debra Flynn that Vala had a home near the beach and was one of Lyford's wealthiest resident. Gosciminsji's salary was about $33,000 per year (R.21 1551-54, 1563-70, 1586-87; R.22 1624-25; R.23 1806; R.25 2054-57, 2078-80, 2088; R.30 2682-83; R.32 2890-91; 2937-38)

After Lyford had been chosen, Gosciminski met Loughman at Vala's home where she was staying and had opened only the front storm shutter, leaving the other windows covered. When he was

[1] Due to a prior burglary of a family member's home, Loughman wore all of her jewelry daily which included a two carat diamond engagement ring, multiple diamond and emerald bracelets, rings, and necklaces.

at the house, Gosciminski picked up the suitcase and furniture Loughman chose to go to her father's room and brought them to Lyford. Loughman could not lift anything due to a prior injury. Unfortunately, within a day of his admittance, Vala fell and had to be re-hospitalized. (R.21 1586-87; R.23 1807-13; R32 2886-92)

A week before the murder, Gosciminki took his fiancé, Debbie Thomas ("Debbie") to Vala's home, telling her it would be on the market soon because a Lyford resident was not doing well. In order to get Debbie to remain with him, just a few days before the murder, Gosciminski promised Debbie he would get her a two carat diamond engagement ring. Sometime before September 24th, he told Debra Flynn, Maureen Reape, and Debra Pelletier he was getting Debbie an engagement ring. Yet, during this time, his checking account was overdrawn; the insufficient funds charges caused a negative balance. (R.26 2116; R.28 2342 2344-47, 2355; R.31 2757, 2768; R32 2821-44)

On the evening of September 23th, as planned, Gosciminski and Loughman met at Lyford. Vala's health was deteriorating, and he was being transferred to hospice, thus, Loughman was picking up his belongings. At her request, Gosciminski carried the suitcase to the car and placed it in the trunk. (R.21 1604; R.23 1817-19; R.30 2682-83)

The next morning at 8:15 a.m, using his cell phone, Gosciminski called Lois Bostworth to say he would be missing the

scheduled meeting because he was going to do a presentation at a Life Care facility. Other than, Gosciminski's testimony, there was no evidence he visited that facility.[2] At 8:47 a.m., Loughman ended her telephone conversation with her sister because there was someone at the front door. Based on the wounds and blood evidence, the medical examiner opined that most likely the attack started in the hallway, which was visible through the front window. There, Loughman was stabbed and lacerated about the head, then dragged from the hall to the bedroom, leaving spurts of blood on the wall. In the bedroom, she was bludgeoned, and received a defensive wound from a large ashtray found in the home; broken pieces of it were found around Loughman's head in the bedroom. (R.21 1580; R.26 2119-23; R.26 2217-18; R.33 3010-16; 3021-37, 3039-55)

According to Dr. Diggs, Loughman was wearing her jewelry during the attack and was still conscious after being bludgeoned as evidence by her defensive wound. Several of her teeth were knocked out in the attack. She was stabbed three times – once in the chest and twice from behind. On of the back stab wounds penetrated her right lung and would have been fatal had her jugular not been cut. The final wounding occurred as Loughman was face down in the bedroom, indicating she had been turned over at some point, and following an attempt to slash her

[2] The court found this testimony not credible. (R.8 1274)

throat, a final cutting was made which severed her jugular vein causing her to exsanguinate. (R.33 3010-16, 3021-55). When found, all her jewelry was gone along with a fanny pack in which she kept cash, credit cards, identification papers and personal items. (R.22 1798-99; R.33 3010-16; 3021-37, 3039-55)

Gosciminski had no phone activity between 8:25 a.m. and 9:12 a.m. (R.29 2601-05). The 9:12, and following two calls, were placed from the cell tower closest the Vala home. Based on the 10:23 a.m. call and bank records, Gosciminski made a cash deposit at the Harbor Federal in Martin County which still did not bring his overdrawn account current. (R.29 2561-62, 2571-72, 2589-90, 2601-06; R.31 2821-30, 2835-44)

Near noon on September 24rd, Gosciminski returned home. He entered through the rear of the house, and was seen by Debbie Thomas. She reported that he was washing up, and had blood on his arm and his clothes were soaked in blood. This was Gosciminski's favorite clothing, and those items were never seen again. After lunchtime that day, he arrived at Lyford looking freshly showered, and his hair may have been wet, but his demeanor was unusually subdued.[3] There, he showed Nicolle Rizzolo and Debra Flynn the two carat diamond engagement ring, which had a dark substance on it and was carried in a tissue.

[3] Sometime thereafter, Gosciminski changed his appearance; he cut his hair and beard very short and dyed them a darker color. (R.26 2144-45)

He also told them he had gotten Debbie a tennis bracelet. That night, he gave Debbie the ring. The next day, Debbie met Maureen Reape for lunch and showed her the ring. The following day she showed the ring to Steve Jurina. Reape, Debbie, and Detectives Hall and Bender picked out the replica of Loughman's ring from the ring line-up as the one Debbie was wearing. Following October 2nd the police interviews of Debbie and Gosciminski, he took the ring from Debbie and it has not been seen since. (R.24 1858; R.26 2125-35, 2143; 2178-79, 2193, 2196-2200, 2207; 2219-20, 2230-32; R.28 2356, 2360-65, 2372-74, 2387-91; 2395-2401, 2430-31; R.29 2607-08; R.30 2688-90; 2701-02; 2709-12; E.31 2749-56, 2760)

Debbie reported having seen a grey bag from Geoffrey Bean cologne in Gosciminski's draw. The rest of Loughman's jewelry was found in such a bag in the rafters of a shed located on a property belonging to Debra Pelletier. When Pelletier told Gosciminski the jewelry had been found, he seemed shaken. Gosciminsk had been to that shed when he contacted Pelletier during the summer time Debbie and Ben Thomas were having an affair.[4] At that time, Gosciminski noted Pelletier's diamond

[4] In the summer/fall of 2002, Gosciminski had an on again/off again relationship with Debbie Thomas. During this time Ben Thomas left his wife, Debra Pelletier, and began dating Debbie. During one of their estrangements, Gosciminski visited Pelletier and assisted her with turning on her water system which was located at the shed where the jewelry was found.

ring and told her he was getting a two carat ring for Debbie. (R.28 2426-29; R.29 2606-07; R.30 2725-30; R.31 2768 2770-76, 2780, 2797-2807)

In February, 2003, Loughman's fanny pack was found at Interstate 95 and Martin Highway. Her identification and other personal items were there, but not the cash. Gosciminski's cellular records for September 24th show he made a call from that area. (R.29 2605-08; R.32 2944-47, 2949-53).

At trial, Gosciminski testified and denied being at the Vala residence on September 24th or killing Loughman. He offered testimony as to places he visited to put Lyford brochures in their lobbies, but often reported not having been seen by anyone, or just by the receptionist. (R.35) He also noted that he was looking for boxes because he was moving at the end of the month, but when initially contacted by the police, he said he had been home all morning packing. (2SR.3 37-39, 58; 2SR.4 61, 64-65). Upon this evidence, the jury convicted Goscimininski of first-degree murder under both premeditated and felony murder theories, robbery with a deadly weapon, and burglary of a dwelling with an assault or battery. (R.6 952-54).

The penalty phase was conducted on April 29, 2005 wherein Thomas Loughman gave a victim impact statement and the defense called Dr. Riordan, and friends and family to report on Gosciminski's history. This, in conjunction with the guilt

phase, resulted in a nine to three death recommendation. The court found: (1) cold, calculated and premeditated ("CCP"); heinous, atrocious, or cruel ("HAC"); (3) felony murder (robbery and burglary); and (4) pecuniary gain. The last two aggravators were merged, and all were given great weight. For mitigation, the court found one statutory mitigator, no significant history of criminal activity (some weight), and 14 non-statutory mitigators:[5] (1) relatively normal upbringing, and did not engage in disruptive, disturbed or delinquent behavior as a child or young adult (some); (2) served honorably in Air Force (moderate); (3) good work history (some); (4) positive correctional adjustment (moderate); (5) no future dangerousness (moderate); (6) will never get out of prison (little); (7) orthopedic injuries from motorcycle accident (little); (8) had significant difficulty in dealing with father's death (little); (9) no criminal history until 44-years old (some); (10) was Good Samaritan once (moderate); (11) presents with mixture of disordered personality characteristics (some); (12) good trial behavior (little); (13) effect of execution on elderly mother (some); (14) cumulative mitigation (some). (R.8 1280-94). Upon the court's weighing, in addition to the information presented at the Spencer hearing, Gosciminski was sentenced to death.

[5] Gosciminski offered 55 non-statutory factors which the court combined into categories. Each category was analyzed.

SUMMARY OF THE ARGUMENT

Issue I – While the defense challenge for cause was not preserved for appeal, it was denied properly.

Issue II – There was no abuse of discretion in permitting the police to testify about their time trials.

Issue III – The cellular technology related to determining where a call is generated in not new or novel scientific information and was admitted properly.

Issue IV – The court properly rejected Gosciminski's claim of a Richardson violation stemming from the failure to turn over Ben Thomas' credit card statement.

Issue V – There is substantial, competent evidence supporting the verdicts.

Issue VI – The question concerning newspaper advertisements was properly precluded as it called for hearsay, lacked foundation, and discussed facts not in evidence.

Issue VII – Having taken the stand to testify, Gosciminski subjects himself to all the credibility issues other witnesses face. The State's examination was proper.

Issue VIII – The State's impeachment of Gosciminski was proper and a mistrial was not required.

Issue IX – Both the question and closing arguments related to the source of the black substance on the ring were proper and within the prosecutor's forensic talents to argue.

Issue X – The denial a mistrial regarding whether Gosciminski was authorized to deposit his mother's was proper.

Issues XI and XII – Gosciominski's videotaped statement and testimony relating that he commented to Loughman about her ring and jewelry were admitted properly as impeachment or exceptions to the hearsay rule.

Issue XIII – It was correct to exclude Hickox's comment regarding betting on Gosciminski's indictment as an offercer's opinion of the strength of the case is irrelevant.

Issue XIV – Gosciminski was not entitled to a circumstantial evidence instruction, however, the one given was accurate and not substantively different from the one initially approved in the charge conference.

Issue XV – The court denied Gosciminski's request for grand jury testimony correctly.

Issue XVI – It was proper to permit the officer to report that a person of interest was no longer a suspect.

Issues XVII and XIX – Both the CCP and HAC aggravators are supported by the evidence and were found properly.

Issue XVIII – The court conducted the required analysis and made the finding required to impose the death penalty.

Issue XX – The death sentence is proportional.

ARGUMENT

ISSUE I

THE COURT PROPERLY DENIED THE DEFENSE FOR CAUSE CHALLENGE TO JUROR SCHMIDT. (RESTATED)

Gosciminski takes issue with the denial of his challenge for cause to Juror Schmidt ("Schmidt"). It is Gosciminski's position that Schmidt's strong conviction for the death penalty precluded him from following the law when weighing aggravators and mitigators. (IB 22-25) Not only is this issue unpreserved, but the challenge was denied properly. Schmidt's answers as the voir dire progressed show he was learning about capital sentencing and was willing to follow the law. There was no abuse of discretion and the matter should be affirmed.

The standard of review of a denial of a cause challenge is abuse of discretion. Ault v. State, 866 So.2d 674, 683-84 (Fla. 2003); Castro v. State, 644 So.2d 987, 989-990 (Fla. 1994). Discretion is abused when the judicial action is arbitrary, fanciful, or unreasonable. Green v. State, 907 So.2d 489, 496 (Fla. 2005); Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990).

This issue is unpreserved because the objection was not re-raised before the jury is sworn. Ault, 866 So.2d at 683 (finding issue preserved as counsel renewed objection to removal of juror prior to jury being sworn); Joiner v. State, 618 So.2d 174, 175-

76 (Fla. 1993) (requiring party making challenge renew objection prior to swearing in of jury to preserve issue as acceptance of jury without objection leads to assumption counsel abandoned earlier objection and is satisfied with jury). Defense counsel failed to object prior to the swearing of the jury (R.20 1477-1481),[6] and Gosciminski has made no allegations in support of preservation. The jury was then duly sworn[7]. (R.20 1481). As noted in Joiner, 618 So. 2d at 175-76, and in light of Gosciminski's decision not to add anything to the record, there is a reasonable assumption Gosciminski no longer objected to Schmidt's presence on the jury, and was satisfied with the venire. This court should find the matter unpreserved. However, should the merits be reached, the record establishes that the denial of the cause challenge was proper.

Under Castro v. State, 644 So. 2d 987 (Fla. 1994) and Wainwright v. Witt, 469 U.S. 412, (1985), the standard for determining when a juror may be excluded for cause due to his view on capital punishment is whether the juror's view would "prevent or substantially impair the performance of his duties

[6] Gosciminski mentions various requests counsel made that were denied by the court (IB 23-24), however, he does allege any action taken by counsel to comply with Joiner.

[7] Gosciminski notes counsel requested the court take action with regard to Schmidt prior to and at the conclusion of the evidence presentation. (IB 24). This does not approach the procedural requirements to preserve the matter set out in Ault and Joiner. The requests were made after the jury was sworn, and neither referenced objections to the jury as composed.

as a juror in accordance with instructions and his oath." Id. at 422. A "court has latitude in ruling upon a challenge for cause because the court has a better vantage point from which to evaluate prospective jurors' answers than does this Court in our review of the cold record." Mendoza v. State, 700 So.2d 670, 675 (Fla. 1997). See Morrison v. State, 818 So.2d 432 (Fla. 2002).

At the onset of the voir dire, Schmidt indicated he found the death penalty to be "[a]bsolutely appropriate in every case where someone is murdered". (R.4 533).[8] Yet, prior to being instructed, Schmidt was wholly uninformed of the law relative to capital punishment, thus, the focus must be on Schmidt's entire voir dire, including his post-instruction averments.

> Mr. Taylor: Okay. So, you really wouldn't want to -– or I couldn't -– you really couldn't follow the law and go through this weighing process? You would already be convinced the death penalty is appropriate and somebody would have to convince you differently?
>
> Mr. Schmidt: No, I'd have to go through the weighing process.
>
> Mr. Taylor: Are you sure?
>
> Mr. Schmidt: Yeah. I mean, I'd -- have to hear -- I'd have to hear all evidence and -–
>
> Mr. Taylor: Okay.
>
> Mr. Schmidt: -– you know?
>
> Mr. Taylor: Well, remember, it's not a test.

[8] Schmidt's questionnaire simply inquired into his initial, uninformed beliefs as to capital sentencing. (R.4 533).

> Mr. Schmidt: No, I know.
>
> Mr. Taylor: That's just your first time answer?
>
> Mr. Schmidt: But this is the first time I have ever done this. I'm a little nervous, that's all.

(R.19 1298-99). Despite his initial misunderstanding of the law, Schmidt was unequivocal in his belief he could follow the law as provided by the court. His prior belief was based upon ignorance. (R.19 1299-1300).

Schmidt's competency was tested by the defense when the jurors were asked to rate themselves on a "scale of death", where "zero" indicated death never would be recommended and "ten" indicated an unvarying vote for death. (R.20 1397-1398)

> Mr. Harllee: How about you, Mr. Schmidt, where do you fall in the scale?
>
> William Schmidt: I'd say around five, too.
>
> Mr. Harllee: A five. Now that's quite a bit of different (sic) from some of your earlier responses.
>
> William Schmidt: Yeah, without hearing about the facts of the case and the evidence and all.
>
> Mr. Harllee: Okay. You put it would be absolutely appropriate in every case where someone was murdered.
>
> William Schmidt: We haven't been through the case yet.
>
> Mr. Harllee: Okay. All right. Do you feel like if you reach a verdict of first degree murder, guilty, that you'll still go through the weighing process, or do you think at that point you'd already be leaning towards the death penalty?
>
> William Schmidt: No, I'd still go through the weighing process.

(R.20 1404).

Although the court initially withheld ruling, the court denied the defense challenge to Schmidt prior to alternate juror selection. The Court reasoned Schmidt's bias was based on a misunderstanding of law which was corrected during voir dire (R.20 1475). Overton v. State, 801 So.2d 877 (Fla. 2001), which relied upon Castro, 644 So.2d at 990, supports a finding of no error in the refusal to strike the juror, who like Schmidt, entered voir dire with a bias towards the death penalty, only to later announce his willingness to follow the law once informed. The ruling was based upon the totality of the voir dire which tended to show that once jurors were advised of the process, they unilaterally indicated their ability to follow the law. Id.

> [T]he average juror summoned for prospective service in a case where the State is seeking the death penalty enters the courtroom without any true insight whatsoever into the elements or factors involved in capital sentencing proceedings. They are overwhelmingly unaware of the existence of the bifurcated process by which defendants may be tried and ultimately sentenced to the death penalty. They similarly do not possess the requisite familiarity with the necessary balancing scheme whereby aggravating and mitigating factors are weighed against each other in an effort to produce a proportionate sentence.

Overton, 801 So.2d at 893-894. See Johnson v. State, 660 So.2d 637 (Fla. 1995); Reaves v. State, 639 So.2d 1 (Fla. 1994). As

in Overton, the court expressed no reservation regarding Schmidt's ability to be fair and open-minded.[9]

Gosciminski supports his claim by comparing Schmidt's situation to that of Juror Russell in Overton. Russell firmly believed that if a defendant were innocent, he would want to testify to clear his name. Id. 801 So.2d at 890. The defense relied on this "presumption of innocence" basis in making its cause challenge, which was denied improperly. However, in undertaking the Overton analysis, this Court distinguished the challenge to Russell from the death qualification issue present with Heuslein. This undermines Gosciminski's contentions.

While he agrees Overton is relevant; Gosciminski claims Schmidt was unfairly biased, thus, distinguishable. His claim is meritless. As this Court opined, it was not surprising "prospective jurors had no grounding in the intricacies of capital sentencing. Some of these jurors came to court with the reasonable misunderstanding that the presumed sentence for first-degree murder was death." Castro, 644 So.2d at 990. This rationale has been reaffirmed, and serves as a basis for juror competency, in spite of initial, uninformed comments favoring death. Overton, 801 So.2d at 893; Bryant v. State, 656 So.2d 426 (Fla. 1995); Johnson, 660 So.2d at 637; Reaves, 639 So.2d at 1.

[9] The court agreed Schmidt was willing to enter the death penalty deliberations with clean slate. (R.20 1475).

In Witt, the Court stated "judge has the duty to decide if a challenge for cause is proper, and this Court must give deference to the judge's determination of a prospective juror's qualifications." Witt, 469 U.S. at 426. In light of Mendoza and related cases, this Court should affirm.

Should this Court find otherwise, the conviction should be affirmed and the remand should be for to a new penalty phase as provided in Ault, 866 So.2d at 684. Gosciminski contends a limited remand is no longer proper under Ring v. Arizona, 536 U.S. 584 (2002); and Bottoson v. Moore, 833 So.2d 693 (2002), but such is not supported by law. See Porter v. Crsoby, 840 So.2d 693 (Fla. 2003) (finding death is statutory maximum and repeating rejection of Ring arguments). Ring and Bottoson address Sixth Amendment rights while the penalty phase addresses sentencing selection under the Eighth Amendment. Both pre-dated Ault and its recognition that an erroneously granted cause challenge based on capital issues would require only a new penalty phase. Schmidt's ability to follow the law as it applies to sentencing, limits the issue. Should this court find error, remand would be similarly limited to sentencing.

ISSUE II

TESTIMONY REGARDING THE TIME TRIALS WAS ADMITTED PROPERLY (restated)

Gosciminski asserts it was error to permit Det. Hickox

("Hickox") and Sgt. Hall ("Hall") to recount the time it took for them to drive to and from certain locations including the crime scene, the banks where deposits were made, the area where Loughman's fanny pack was found, and other sites without a proper foundation being laid. He complains that the probative value was outweighed by the prejudicial effect given there was no evidence of the route taken, road conditions, congestion, and speed driven on the day of the murder, thus, the conditions were not "substantially similar" and the evidence was inadmissible. The State disagrees.[10] The time experiment was relevant to show Gosciminski was capable of completing the crimes within the known time-frame. Variances in conditions go to the weight, not the admissibility of the evidence. Even if the evidence should not have come in, it was harmless beyond a reasonable doubt.

The test for admissibility of experimental evidence is whether it is relevant. "Relevant evidence is evidence tending to prove or disprove a material fact." §90.401, Fla. Stat. (2001), and "is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice,

[10] The admissibility of experiment evidence is within the court's discretion, and its ruling will not be reversed unless there has been a clear abuse of discretion. Johnson v. State, 442 So.2d 193, 196 (Fla. 1983). See Dessaure v. State, 891 So.2d 455, 466 (Fla. 2004); Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So.2d 9, 25 (Fla. 2000). Discretion is abused when the judicial action is arbitrary, fanciful, or unreasonable. Trease, 768 So.2d at 1053, n.2.

confusion of issues, misleading the jury, or needless presentation of cumulative evidence." §90.403, Fla. Stat. (2001). The "substantially similar" test between the actual conditions at the time of the event and those during the experiment, offered by Gosciminski, is no longer the law as recognized in Johnson, 442 So.2d at 196.

> The rule of "essential similarity" between test conditions and actual conditions first enunciated in *Hisler v. State*, 52 Fla. 30, 42 So. 692 (1906), has been eroded as to other types of experimental evidence since that time. *Janke v. Corinthian Gardens, Inc.*, 405 So.2d 740 (Fla. 4th DCA 1981), *cert. denied*, 413 So.2d 876 (Fla. 1982); *Vitt v. Ryder Truck Rentals*, 340 So.2d 962 (Fla. 3d DCA 1976). **We are convinced that the issue is one of the weight to be given the evidence rather than its relevance or materiality**.

(emphasis supplied). Experiments are admissible where the proponent shows sufficient important factors have been duplicated in the experiment so as to show the probative value is not outweighed by the danger the evidence is misleading or confusing. Johnson, 442 So.2d at 196.

The defense position was that the time trials were not relevant and a proper foundation was not made. Defense counsel objected that data was missing such as speed and traffic conditions. The State agreed to have the officer testify to those matters and explained that the drive from Gosciminski's home to the victim's and then to the location where a bag of Loughman's jewelry was found was relevant to prove he could have

made the drive within the time and mileage noted. The State argued the information was relevant, and the weight assigned should be for the jury. The defense took issue with the time-frame report, and the fact the driving conditions could not be duplicated. The court deferred ruling until hearing from the cellular engineer (R.24 1877-85). Following a finding the engineer was permitted to testify about Gosciminski's locations based upon cellular records (R.26 2101-03), the court found the time trials relevant and rejected the more prejudicial than probative argument[11] given the common experiences of jurors using cell phones. (R.27 2257-63, 2266-67).

Here, the State was attempting to prove Gosciminski could accomplish the crimes within the known time-frame. Such was circumscribed by his admissions of his whereabouts (R.25 2048-49; 2SR.3 58; 2SR.4 61, 64-65), as well as the location of his bank deposits and cell phone calls (R.29 2560-66, 2570-74, 2587-2608; R.31 2815-16, 2821-25, 2827-28, 2835-44; R.32 2858-61, 2864-67), the time Loughman last spoke to her sister telling her someone was at the door (R.21 1594-50, 1555-59), where

[11] The defense argued that given the cellular towers merely recorded where a call initiated, not where it ended, there was no proof of Gosciminski's direction of travel, thus, the experiment was suspect and confusing. The State asserted that the manner in which the court had the cellular engineer draw the location probabilities for the cell tower map, i.e., that the entire coverage area was drawn and the area where calls could not reach a particular tower was shown, Gosciminski received the benefit of the doubt. (R.27 2257-63, 2263-67).

Loughman's jewelry and fanny pack were found (R.31 2762-64, 2667-68, 2770-76, 2796-2807; R.32 2874-75, 2875-79, 2944-47), the eye-witness testimony of Debra Thomas, who saw Gosciminski at home with blood on his body/clothes, and the time he arrived at work. (R.26 2123-35, 2196-2200, 2217-18, 2219-20; R.28 2361-73). The police outlined their route and road conditions; they did not give opinions. (R.27 2284-86; R.30 2713-14). The jury was told the police did not know the exact route. (R.27 2284-86; R.30 2713-14). Jurors could not be confused by the testimony as the routes, conditions, and times were explained. Any differences the tests and actual events went to weight, not admissibility. Discretion was not abused.

If such should have been excluded, the admission was harmless beyond a reasonable doubt. The cell records put Gosciminski near the murder scene and where Loughman's fanny pack was found. Shortly after the murder, he had cash, her jewelry, and blood on his body/clothes. (R.25 2048-49; 2SR.3 58; 2SR.4 61, 64-65; R.26 2123-35, 2196-2200, 2217-18, 2219-20; R.28 2361-70, 2372-73)). The State incorporates its harmless error analysis in **Issues V, VI, and XVI**. This Court should affirm.

ISSUE III

THE CELLULAR TELEPHONE COVERAGE AREA TESTIMONY WAS ADMITTED PROPERLY (restated)

Gosciminski maintains the admission of testimony regarding

his whereabouts on the morning of September 24th based on the cellular telephone records was inadmissible as it did not pass the Frye[12] test. Following a Frey hearing, the court determined the technology was not new or novel, thus, Frye was not implicated, that such evidence was admissible because it was relevant, not confusing/misleading, and the prejudicial effect did not outweigh the probative value. This ruling was proper.

Courts only use the Frye test[13] in cases of new or novel scientific evidence. See Brim v. State, 695 So.2d 268, 271-72 (Fla. 1997). If it is determined Frye does not apply, the admissibility of expert testimony lies within the discretion of the court which will not be reversed absent a showing of abuse. See Ramirez v. State, 651 So.2d 1164 (Fla. 1995); See Cooper v. State, 336 So.2d 1133 (Fla. 1976).

Under Florida law, Frye is not applicable to "pure opinion testimony" which is based on an "expert's personal experience and training." Flanagan v. State, 625 So.2d 827, 828 (Fla. 1993). In particular, there is a distinction between an expert's "pure opinion testimony based upon clinical experience" and

[12] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
[13] "A trial court's ruling on a Frye issue is subject to *de novo* review, and the reviewing court must consider the level of acceptance at the time of review, not the time of trial. A Frye error is subject to harmless error analysis." Ramirez v. State, 810 So.2d 836, 844-45 (Fla. 2001) (citing Hadden v. State, 690 So.2d 573, 579 (Fla. 1997)) (footnotes omitted). In criminal cases, a Frye determination is made by a preponderance of the evidence standard. See Brim, 695 So.2d at 272.

testimony which "rel[ies] on conclusions based upon studies and tests." Hadden v. State, 690 So.2d 573, 580 (Fla. 1997). The Frey test is directed at expert testimony which "relies on some scientific principle or test because such testimony implies infallibility not found in pure opinion testimony." Flanagan, 625 So.2d at 828. In Hadden, this Court defined pure opinion testimony as being "based solely on the expert's training and experience" and as "testimony personally developed through clinical experience." 690 So.2d at 579-80.

Here, the court, following a Frye hearing determined that based on Kyle Lee's ("Lee") proffered testimony the cellular technology was not new or novel. Lee, a radio frequency engineer and manager for Nextel, was responsible for the upkeep and performance of the cell phone towers in the area. It is his responsibility to make sure the Nextel customers can place and receive cellular calls. He explained the technology behind cellular communications to involve towers which are divided into three sectors to optimize the network, permit for higher service capacity and monitor performance in smaller areas. When a call is placed, the signal goes from the phone, to the closest tower, to the mobile switching center. Nextel's records are always accurate as to which tower and sector is used (R.25 1969-72) He explained that the technology has been found to be accurate and it is not new/novel. Lee produced a chart to show the general

location a person would have to be to make or receive a call from each tower. (R.25 1968-76, 2005-06).

As part of his normal course of business, Lee makes propagation estimates - range from which customers will receive service from each tower. At a particular point, based on distance and angle from the tower, it becomes impossible to receive service from the tower. The towers are designed not to receive calls from the "back lobe." Lee reiterated that the system was 100% accurate that a particular tower was activated.[14] He denied being able to pin-point Gosciminski's location at a point in time, but he could give a broad determination of where the phone could have been when a call was placed/received. Although designed for the signal to hit the closest tower, it is possible go to another tower. (R.25 1977-79 1989-90, 2026-27).

The court found Lee was an expert, and out of concern that

[14] There is no listing of the percentage of accuracy to apply to the cellular technology to determine that a call is being made within a particular tower sector. The accuracy percentage comes from knowledge of the area, design of sites, and factors including terrain, area buildings, and trees. There is no way to check the accuracy, thus, prediction tools are used; in this case, a propagation tool produced by Agillant Technologies. That program is used by about half the industry and is generally accepted in the cellular community. Given the propagation, and the data collected of signal quality and strength measurements, Lee can offer with 85% accuracy that it will be within a certain sector. However, once a call is received by a tower, there is 100% accuracy that a particular tower sector was utilized. The propagation/distance estimates were developed from the Agillant information and supplemented with the drive test data, the quality of phone, and the experience and education of the engineer. (R.25 1984-87, 2005-10, 2015-16, 2022-24).

the testimony not be misleading/confusing, the court requested Lee show the outer limit boundary for a call to go to a particular tower. Lee agreed to draw the "lines of impossibility" (areas beyond which signals cannot reach) for each tower based upon terrain and interference estimates. These were done by taking into account height, location, and overall coverage area of each sector. Given the new coverage lines, Lee could say with 100% certainty a call had to originate within one of the tower circles. (R.25 2034-43; R.26 2093-99).

Lee's testimony was not confusing or deceptive. The calculations for the cell phone service area was not new/novel technology. The court acknowledged that cellular phone usage has expanded greatly in the past ten years with many people using the phones and many companies offering service. It was the court's conclusion that the technology respecting determining service areas in not new. Further, the testimony is scientific in nature and would be helpful to the jury. The issues of weight do not make the testimony unreliable so as to preclude admissibility. The court noted that with the 100% area map overlay, the evidence was admissible. (R.26 2101-03).

The court's ruling is proper and supported by Gordon v. State, 863 So.2d 1215 (Fla. 2003). While addressed under a claim of ineffective assistance of counsel, this court rejected the assertion that explanations of cellular phone bills and

relating locations of cellular calls to the site map was scientific. This Court reasoned:

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

Gordon, 863 So.2d at 1219 (emphasis supplied). Cf. Medina v. State, 920 So.2d 136, 138 (Fla. 3d DCA 2006) (noting "we agree with the trial court that GPS tracking technology is not new or novel and has long been accepted within the scientific community as reliable); Still v. State, 917 So.2d 250, 251 (Fla. 3d DCA 2005) (recognizing GPS technology is "technology which has been generally accepted and used for years"). Other jurisdictions have recognized and accepted cellular technology as a reliable

basis to establish the location of the defendant in a criminal case. See United States v. Weathers, 169 F.3d 336 (6th Cir. 1999); United States v. Sepulveda, 115 F.3d 882 (11th Cir. 1997); United States v. Pervaz, 118 F.3d 1 (1st Cir. 1997); United States v. Brady, 13 F.3d 334 (10th Cir. 1993).

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

> . . . the State produced six expert witnesses who testified to the accuracy and reliability of records establishing the location of a tower which services a particular cellular call. In essence, the evidence established that a radio signal from a digital cellular telephone such as the one Pullin used is transmitted to the cellular tower which is geographically closest to the handset; if the handset moves out of the geographical area covered by the originating site during the call, the call is relayed or "handed off" to the next nearest site; the two cells which are the "originating" and "terminating" point of the call are automatically recorded; this "historical data" is relied upon for billing purposes, and has been an integral part of fraud investigation and prevention. The experts consistently testified that the historical data is accurate and has never been found to be incorrect. One expert opined with "100 percent certainty" that based on the information in this case, the calls at issue could not have originated in Stockbridge....
>
> ... the court reached the conclusion that the geographic location of the cell calls in question is based on sound scientific theory and that analysis of the data can produce reliable results.
>
> ... State's expert explained that the basic properties of cellular technology are well understood, and "not a source of argument." And while we acknowledge that there is no authority precisely on point, the basic principles of cellular technology have been widely accepted....
>
> We conclude . . . that **the technology in question**

has reached a scientific stage of verifiable certainty to be admissible in the trial of this case.

Pullin, 534 S.E.2d at 71 (emphasis supplied, citations omitted). See United States v. Hodges, 2006 U.S. Dist. LEXIS 68401 (D. Ill. 2006)(using cellular technology to show defendant's location); People v. Davis, 2006 Cal.App.Unpub. LEXIS 9285, 22-30 (Cal Unpublished Opinions 2006) (attached); People v. Martin, 98 Cal.App.4th 408, 412 (Cal. 2002).

Gosciminski complains about a myriad of factors which he asserts were not addressed and could have affected the phone's ability to communicate with a tower. (IB at 37) The fallacy of his argument lies with the fact that if a phone is unable to communicate with the tower, there would be no call placed, or at least if it lacked power, it would not communicate with a tower farther away. However, the State introduced evidence of telephone connections made as well as those areas outside of which no connection could be made to a tower. Hence, the challenges to the system have nothing to do with the novelty of the technology, but with the weight assignment. Such does not bar admission and this Court should affirm.

Even if the information should not have been admitted, the conviction should stand. Gosciminski, strapped financially and pursuing Debbie Thomas ("Debbie") to be his wife and to whom he wanted to give a two carat diamond ring, met Loughman, who he

noted was wealthy, lived in an upscale community, and wore jewelry. He had been to Frank Vala's residence where Loughman was staying, and was acquainted with Loughman's inability to move heavy objects. Also, he had taken Debbie to the Vala home and told her it would be on the market soon because a Lyford Cove resident was not doing well. On the night before the murder, Gosciminski helped Loughman remove her father's suitcase from his room, because he was being moved to Hospice. On the morning of the murder, Gosciminski missed a scheduled meeting, giving the excuse that he would be making a presentation at a local health care facility, however, there was no evidence presented, other than Gosciminski's self-serving account that he was at that facility. Around noon he was seen with blood on his body and clothes and he had Loughman's two carat diamond ring. The clothes were never seen again, nor was the ring after the police showed interest in it. When he showed up for work, he looked freshly showered. Shortly after the murder, Gosciminski, previously overdrawn in his checking account, was able to deposit cash. Subsequently, in a shed on a properly to which Gosciminski had access, Loughman's jewelry was found in a Geoffrey Beene cologne bag; Debbie had seen a Geoffrey Beene bag in Gosciminski's drawer. When he heard about the jewelry being found in the shed, Gosciminski commented "it was over." These facts, along with the analysis in **Issues II, V, VI, and XVI**,

show that admission of the cell records was harmless beyong a reasonable doubt. This Court should affirm.

ISSUE IV

THE COURT PROPERLY REJECTED THE CLAIM OF A RICHARDSON VIOLATION (restated)

Referencing Fla. R. Crim. P. 3.220(b)(1)(K), Gosciminski contends the State committed a discovery violation by withholding a credit card statement showing Ben Thomas ("Thomas") made a purchase at Geoffrey Beene allegedly material to whether he may have had a cologne bag like the one in which the jewelry was found (IB 44). He complains a mistrial should have been granted. The State disagrees; the court properly applied Richardson in rejecting the allegation and request for a mistrial as the defense could have obtained the actual statement, but at a minimum, had all of the information contained therein. Any failure to turn over the statement did not hamper the defense preparation.[15]

The discovery issue arose during Thomas' testimony, who the defense suggested was the killer. On cross-examination, counsel inquired into a $64 purchase made at Geoffrey Beene (R.29 2540).

[15] The standard of review for discovery violation claim following a Richardson v. State, 246 So.2d 771 (Fla. 1971) hearing is whether the court abused its discretion in determining if a violation occurred and if so, whether it was inadvertent, and not prejudicial to the defense preparation. Pender v. State, 700 So.2d 664 (Fla. 1997) (opining "where a trial court rules that no discovery violation occurred, the reviewing court must first determine whether the trial court abused its discretion").

The State objected, requesting that Thomas see the receipt if counsel were going to impeach him. The court overruled the objection, contingent on the defense staying true to his explanation that it was merely to refresh recollection. Despite the ruling, counsel made added inquiries into what was purchased. Although originally unsure of what counsel was asking, Thomas acknowledged he had purchased two pairs of khaki shorts (R.29 2540-42). At the conclusion of cross-examination, the State requested the receipt be produced.[16] The defense objected saying it was under no obligation to produce anything. The State responded by arguing the impropriety of trying to impeach with material not possessed. (R.29 2546-2547).

As support for his basis for the questions, defense counsel explained he had Debra Pelletier's e-mail to her father which referenced her review of **Thomas' credit card statements**, and noting a purchase from Geoffrey Beene (R.29 2548-49).[17] The Court found it reasonable to assume the purchase involved a receipt; hence, both the defense and State questions were

[16] Following argument on the alleged discovery violation, the court gave the jury the curative, that it was improper of for the State to comment on evidence prior to it being admitted and remind them that the State had the burden of proof. The court denied the motion for mistrial. (R.30 2666-67).

[17] "Also yesterday I found a **credit card charge** for about $64 dollars at Geoffrey Beene, the name on that, pop. **I had the credit card statements out for the police. I was looking them over again when it jumped out at me**. Ben bought something at Geoffrey Beene on June 29th while he was in Vero."

proper. However, the State was required to check with the evidence custodian for a receipt (R.29 2552-55). Subsequently, the State located the **credit card statement**, but no receipt, and gave a copy to the defense. The statement merely referenced a Geoffrey Beene charge, not the product(s) purchased (R.30 2633).

Subsequently, the defense re-raised is discovery claim, noting it was unable to investigate the Geoffrey Beene cologne matter, discuss it in opening statement, or properly prepare for cross-examination of Thomas as it only had Pelletire's e-mail referencing the credit statement. Gosciminski asked for a mistrial. (R.30 2641-44). The State noted, it thought the defense had the credit statement because counsel referenced it. When the issue arose, the State did not have the statement, but obtained a copy on April 22, 2005. The State admitted Hickox had a copy from Pelletier's attorney. The police report mentioned this and the defense had Pelletier's e-mails which were used to impeach Thomas. From this, the defense was on notice (R.30 2644-51). The court confirmed the defense had Hickox's report which referenced the statement and inquired into why the defense believed there was a discovery violation.

In response, the defense offered that there was non-compliance because the State had a continuing duty to disclose and to give a copy of the actual statement. Counsel referenced Fla. R. Crim. P. 3.220(a) and (b)(1)(a) requiring the State to

give the names of persons with relevant information, and agreed he had the names of Hickox and Pelletier, but offered he did not have the statement so he could not investigate through Capital One and Geoffrey Beene. (R.30 2651-53).

The court concluded that the State had complied with its discovery responsibility by listing the names of those who had relevant knowledge, and that there was no violation for not giving the Capital One and Geoffrey Beene company names. There was compliance where the police evidence books were made available to the defense to copy, and the statement was contained therein (R.30 2653-56). The court found the defense had Discovery page 477 and Pelletier's e-mails which discussed the credit statement. Such would have led the defense to conclude it should look for the statement. (R.29 2658-59).

The court questioned if the credit statement were exculpatory as the purchase could have been for shorts as Thomas testified. It was reasoned that only a receipt for cologne may make a difference, yet, Hickox's report noted a cologne purchase which must have been revealed by Pelletier because the statement was silent on the matter. Given this, and the material the defense possessed, counsel knew the cologne was an issue and how he wanted to use it against Thomas. The defense could have asked Pelletier how she could verify that there was a cologne purchase. The defense's failure to investigate fully does not

turn the situation into a discovery violation (R.30 2659-62). The **motion was denied without prejudice** and the court noted that should a receipt for cologne be produced the matter could be revisited. Based on this, the court found neither a discovery nor a Brady v. Maryland, 373 U.S. 83 (1963) violation.[18] No exculpatory evidence was suppressed. (R.30 2662-63).

To the extent Gosciminski complains about the **receipt**, the matter is unpreserved as the denials of the discovery violation and mistrial were without prejudice. He does not allege that a cologne receipt has been located. Steinhorst. Similarly, his claim that the credit statement came into evidence over defense objection, such is erroneous. Both parties stipulated to its

[18] To the extent Gosciminski argues a Brady violation, the record refutes the allegation. Under Strickler v. Greene, 527 U.S. 263 (1999), the elements of Brady violation are "(1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." However, ther is a due diligence requirement as noted in Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000)(reasoning "[a]lthough the 'due diligence" requirement is absent from the Supreme Court's most recent formulation of the Brady test, it continues to follow that a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant."); High v. Head, 209 F.3d 1257 (11th Cir. 2000) (finding Strickler did not abandoned due diligence requirement of Brady). As will be shown below, the defense knew of the credit card statement, the information it contained, and could have obtained it with due diligence. The statement was not suppressed, and was not exculpatory as it did not tend to lessen Gosciminksi's charged crimes; there was no Brady violation shown.

admission, with the defense noting "We don't have an objection to that one page coming in, judge." (R.30 2664). Any complaint with respect to this item is unpreserved. Steinhorst. However, the following is offered for this Court's convenience.

The court conducted an adequate hearing in accordance with Richardson by considering whether there was a discovery violation which was inadvertent or willful, whether it was trivial or substantial, and whether it affected Gosciminski's ability to prepare his case. Richardson, 246 So.2d at 775. A court has broad discretion in determining whether a defendant was prejudiced and in determining what measure would best remedy the situation. See State v. Tascarella, 586 So.2d 154, 157 (Fla. 1991); Lowery v. State, 610 So.2d 657, 659 (Fla. 1st DCA 1993); Poe v. State, 431 So.2d 266, 268 (Fla. 5th DCA 1989). The court has discretion to determine if a violation would result in harm or prejudice to the defendant. See Barrett v. State, 649 So.2d 219, 222 (Fla. 1994). The court did not abuse its discretion.

The court conducted an extensive Richardson hearing and found Gosciminski had access to the credit statement when he viewed the police as it was contained in the evidence book which counsel knew to ask to see. Further, it found the defense had the police report and Pelletier's e-mail referencing the statement, thus, if the defense did not seen the statement, it could have asked for it from the police or Pelletier.

There was no abuse of discretion here. While the defense did not have the actual statement, it had all of the information contained therein. It is clear any alleged oversight in not providing a copy had no impact in the defense trial preparation. It cannot be argued seriously that Gosciminski's preparations would have been materially different had he been given the actual credit statement. He has not shown where his preparation was hindered in the least.[19] Not only did the statement fail to show what was actually purchased from Geoffrey Beene, but Gosciminski had the information via Pelletier's e-mail and Hickox's report. Moreover, both those items went further, and surmised that the purchase was for cologne which was of interest to the defense to cast doubt on Thomas – show him to be the killer as the jewelry was found in a Geoffrey Beene cologne bag.

Gosciminski asserts the court erred in placing the onus on him to prove the receipt was for cologne. (IB 47). Yet, he misreads the court's reasoning. The court noted the statement revealed nothing counsel did not already know and possess, namely, the Geoffrey Beene purchase. Only if a receipt for a cologne purchase were found to have been in the State's

[19] Given Gosciminski's failure here, his reliance upon Lynch v. State, 925 So.2d 444, 446 (Fla. 5th DCA 2006); Blatch v. State, 495 So.2d 1203 (Fla. 4th DCA 1986) is misplaced, because there, it was the defendant's oral inculpatory/derogatory statements which were not disclosed, while here, it was a credit statement for a collateral witness and the statement contained nothing more than that which was disclosed in other documents.

possession and not disclosed might counsel have a possible basis for a discovery violation. The defense was not required to show prejudice. Merely, because the court might envision an instance where prejudice might be shown, does not equate to placing the burden on the defense. The court conducted a proper Richardson hearing finding no discovery violation, thus, this Court merely reviews for abuse of discretion, not the standard of "presumed prejudice" noted in Cox v. State, 819 So.2d 705, 712 (Fla. 2002) and State v. Schopp, 653 1016, 1020 (Fla. 1995) where there was a violation and no Richardson hearing conducted.

However, if this Court finds error, such is harmless under State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). The credit statement does not undercut the evidence Gosciminski had a Geoffrey Beene cologne bag in his possession or that he had blood on his person/clothes and had a two carat diamond ring shortly after the murder. Likewise, it did not refute the fact that after the police showed interest in him and the ring, he discarded the ring. Any claimed error is harmless beyond a reasonable doubt. See discussion of facts and harmless error in **Issues II, V, VI, and XVI** incorporated by reference.

ISSUE V

THE EVIDENCE SUPPORTS THE CONVICTIONS (RESTATED)

Gosciminski's claims the evidence is insufficient to support the verdicts. In moving for his judgment of acquittal

on the murder and robbery charges after the close of the State's case, Gosciminski merely claimed that a reasonable hypothesis still existed. With respect to the burglary charge, he offered that there had been no forced entry. (R.33 3086-87). The motion was denied properly and should be affirmed.[20]

With respect to the murder and robbery charges, the matter is unpreserved. While Gosciminski offered that the State did not rebut all reasonable hypothesis of innocence he did not identify where the State had failed based on his hypothesis of innocence. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) (opining "for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

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

> In reviewing a motion for judgment of acquittal, a de novo standard of review applies. ... Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. ... If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. ... However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence.

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

Assuming it is preserved, Gosciminski's apparent claim of innocence was that he was not the killer, but maybe Ben Thomas was. While there was no forensic evidence linking Gosciminski to the scene, the State proved he met Loughman a few weeks before her murder. She had flown in from Connecticut to place her father, Vala, in an assisted living facility. As was her custom, she wore all of her jewelry all the time which included a two carat diamond ring and rings, bracelets, and earrings made of diamonds and emeralds. Having been in the jewelry business, Gosciminski had knowledge of the jewelry's value. Gosciminski told Debra Pelletier he was looking for a two carat diamond engagement ring for his girlfriend. Two to three days before the murder Gosciminski promised Debbie the ring. A few days before that, he told her the Vala home would be on the market soon. Yet, during this time, Gosciminski's checking account was overdrawn; he was bouncing checks, and accruing check charges.

Loughman chose Lyford, and Gosciminski met her at Vala's house, which was shuttered except for the front window, to pick up items she could not move to Lyford due to a prior injury. At Lyford, Gosciminski told Michael Studinski of Loughman's wealth, jewelry, and upscale neighborhood; he instructed that Studinski should take "very good care" of them. On the evening before the killing, Gosciminski and Loughman met as planned. Vala was ailing and was being moved to hospice, thus, she was there to

pick up his belongings before returning to Connecticut. At her request, he carried the suitcase and placed it in the car.

The next morning, Gosciminski called Lois Bostworth at 8:15 a.m. to say he would be missing the meeting for a presentation to Life Care. Other than, Gosciminski's testimony, there was no evidence he visited that facility. At 8:47 a.m., Loughman ended her telephone conversation with her sister because there was someone at the front door. After that call, and as the medical examiner found to be the most likely scenario given the wounds and blood evidence, Loughman was attacked in her hallway, which was visible through the front window. There, she was stabbed and lacerated about the head, then dragged to the shuttered bedroom, leaving spurts of blood on the wall. Next, she was bludgeoned, and received a defensive wound from a large standing ashtray found in the home. Loughman was conscious after being bludgeoned as her defensive wound came from the ashtray. Several of her teeth were knocked. She was stabbed three times, two were non-lethal, but one to the back penetrated the right lung and would have been fatal had her throat not been slashed. The final wounds would have occurred as Loughman was face down in the bedroom, and following an attempt to slash her throat, a final cutting was made which severed her jugular vein causing her to exsanguinate. (R.33 3010-16, 3021-55).

Gosciminski had no phone activity between 8:25 a.m. and

9:12 a.m. (R.29 2601-05) The 9:12, and following two calls were placed from the cell tower closest the Vala residence. Based on the 10:23 a.m. cell phone call and his bank records, Gosciminski, who had been overdrawn before September 24th, made a cash deposit to his Harbor Federal account. Near noon on that day, he returned home, where Debbie saw him with blood on his arm and clothes; that clothing was never seen again. Near 12:30 p.m. he arrived at Lyford looking freshly showered, and his hair may have been wet. There, he showed Debra Flynn and Nicole Rizzolo a two carat diamond engagement ring, which looked soiled with a dark substance. He said he got Debbie a diamond/emerald tennis bracelet. Shortly thereafter, Gosciminski changed his appearance; he cut his hair and beard. The day after the murder, Debbie showed Maureen Reape the ring. Reape and Debbie picked out a replica of Loughman's ring as the one Gosciminski had. Also, Dets. Hall and Bender identified the ring they saw Debbie wearing on October 2nd as Loughman's replicated ring. Following his police contact, Gosciminski took the ring from Debbie and it has not been seen since. (R.26 2127-31, 2133-35, 2144-45, 2196-2200; R.28 2351-53, 2356, 2361-70, 2372-74, 2395-2401, 2430-31; R.30 2686-90, 2709-12, 2749-57)

Debbie reported Gosciminski had had a grey bag from Geoffrey Beene cologne in his draw. (R.28 2426-28) The rest of Loughman's jewelry was found in such a bag in the rafters of a

shed located on Pelletier's property. Gosciminsk had been to that shed when he contacted Pelletier during the time Debbie and Ben Thomas were having an affair. In February, 2003, Loughman's fanny pack was found at Interstate 95 and Martin Highway. Gosciminski's cellular records for September 24th show he made a call from that area. (R.29 2606-08; R.31 2770-76, 2797-02).

Murder - A verdict, like all other findings of fact, is subject to the competent, substantial evidence test. See White v. State, 446 So.2d 1031 (Fla.1984).

> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. [c.o.] The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. [c.o] Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

State v. Law, 559 So.2d 187 (Fla. 1989) (footnote and citations omitted). Although not offered in his brief, Gosciminski's hypothesis of innocence was that he was at health care facilities that morning, and that Ben Thomas was the possible killer. The State refuted this by showing Gosciminski made cellular calls just before/after the murder using the tower closet to the Vala home. Likewise, the State established that

Ben Thomas was not at Loughman's that day, and had not purchased Geoffrey Bean cologne. (R.29 2526, 2533-37, 2540-43, 2676-78)

"Premeditation is defined as 'more than a mere intent to kill; it is a fully formed conscious purpose to kill'" which must exist for enough time "to permit reflection as to the nature of the act to be committed and the probable result." Green v. State, 715 So.2d 940, 943-4 (Fla.1998)(quoting Coolen v. State, 696 So.2d 738, 741 (Fla.1997)) However, premeditation may also "be formed in a moment and need only exist 'for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.' " DeAngelo v. State, 616 So.2d 440 (Fla. 1993) (quoting Asay v. State, 580 So.2d 610 (Fla. 1991)). Circumstantial evidence, including the manner of killing and the nature of the wounds, can be sufficient evidence to show premeditation. Spencer v. State, 645 So.2d 377 (Fla. 1994); See Woods v. State, 733 So.2d 980 (Fla.1999); Gore v. State, 784 So.2d 418 (Fla. 2001); Conahan v. State, 844 So.2d 629 (Fla. 2003).

Here, the State established that on September 24th near 8:00 a.m., Ben Thomas filled his car with gasoline, and paid for breakfast at 8:45 that morning. Following this, he met with the owner of a local dive shop, made a deposit and withdrawal as an area bank, then drove to the post office for stamps and other business for which he got a receipt.

With respect to Gosciminski, the State established Loughman owned a two carat ring and that Gosciminski was interested in a two carat diamond ring for his fiance, but that his checking account had a negative balance. Further, records show he was near the Vala home which he knew from a prior visit, and knew would be on the market soon. It was also proven that by lunchtime on that day, he had blood on his arm/clothes, and that he got rid of these clothes. He also showed a recently acquired two carat diamond ring, subsequently identified as Loughman's, which had a dark substance on it and was carried in paper. Further, it was shown that he had possessed a Geoffrey Beene pouch, and that the jewelry was found in such a pouch. Moreover, it was shown that on the morning of the murder, he was in the area where Loughman's fanny pack was discovered months later looking well weathered. In addition to this, when approached by the police, he took back the two carat ring and discarded it. From this, Gosciminski had the motive, opportunity, and means to kill Loughman.

From the medical and forensic testimony, it is clear the killing was both premeditated and a felony murder. Not only was a sharp object used to stab Loughman in the chest and back, penetrating a major organ, her lung, but her throat was slashed, severing her jugular vein and causing her to bleed out. This was accomplished in two areas of the home using two weapons.

The initial attack was made in the hallway where Loughman was stabbed/slashed about the head, after which, her body was dragged to the bedroom, out of sight of those who may be passing the open front window, and bludgeoned about the head and chest with a large ash trey. When she did not die from these wounds, she was turned on her stomach and her throat was slashed. An initial, unsuccessful attempt was made, before the knife was repositioned to cut through the muscle and jugular.

This Court has found premeditation where there has been a stabbing to vital organs.

> Premeditation may "be formed in a moment and need only exist 'for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.'"... Premeditation can be inferred from circumstantial evidence such as "the nature of the weapon used ... the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." ... Moreover, "[t]he deliberate use of a knife to stab a victim multiple times in vital organs is evidence that can support a finding of premeditation."

Boyd v. State, 910 So.2d 167, 182 (Fla. 2005). See Jimenez v. State, 703 So.2d 437 (Fla. 1997), receded from on other grounds Delgado v. State, 776 So.2d 233 (Fla. 2000); Sochor v. State, 619 So.2d 285, 288 (Fla. 1993); Preston v. State, 444 So.2d 939, 944 (Fla. 1984) (finding evidence supports premeditation where defendant brutally stabbed victim multiple times, severing carotid arteries and jugular vein). Goscimiski's acts show his premeditated design to kill.

The State has not piled inference upon inference. The above facts were established from the evidence including his admissions, bank records, and actions before and subsequent to the murder. From his meeting with Loughman the night before the murder, he learned she was leaving shortly and her father was failing. Within hours of the murder, Gosciminski is washing blood from himself, discarding bloody clothes, and showing the Loughman's two carat ring to co-workers. It is that same ring he takes back from his fiancé after the police inquiry, and discards. Such shows a planned, motivated attack, where inferences are not stacked upon each other, but circumstances were identified which unwaveringly pointed to Gosciminski's guilt. This Court should affirm.

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

Burglary – Below, Gosciminski's challenge to the burglary charge was that there were no signs of forced entry. The State showed that Gosciminski knew where Loughman lived, wanted a ring

she possessed, and killed her in the process. Under section 810.02(b), for offense done after July 1, 2001, burglary is:

> 1. Entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter; or
>
> 2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance:
>
> . . .
>
> c. To commit or attempt to commit a forcible felony, as defined in s. 776.08.

The statute does not require that there be signs of forced entry. "Neither forced entry nor entry without consent are requisite elements of the burglary statute." Jimenez, 703 So.2d at 441;[21] Robertson v. State, 699 So.2d 1343 (Fla. 1997). Yet, from the entirety of the circumstances, it is clear Gosciminski intended to commit a robbery and murder once he entered the Vala residence. How he gained entry, by forcing his way in after Loughman opened the door, or by just going there with the intent to commit a crime once he was offered admission was a question for the jury. Both circumstances are supported by the evidence and reasonable inferences therefrom. This Court must affirm.

Robbery – In Mahn v. State, 714 So.2d 391 (Fla. 1998), this Court reiterated:

[21] Delgado v. State, 776 So.2d 233 (Fla. 2000) reinterpreted section 810.02 and "remaining in", however, the legislature amended the definition of burglary for crimes committed after July 1, 2001, and eliminated "remaining in" requirement.

> Recently, in *Jones v. State*, 652 So.2d 346 (Fla. 1995), we again explained the requirement that the threat or force element of robbery be part of a continuous series of events with the taking of the property. We reaffirmed that:
>
> > Robbery is "the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear." § 812.13(1), Fla. Stat. (1989) (emphasis added). An act is considered " 'in the course of the taking' if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events." § 812.13(3)(b), Fla. Stat. (1989). . . .
>
> 652 So.2d at 349. Further, while the taking of property after the use of force can sometimes establish a robbery, *id.,* we have held that taking of property after a murder, where the motive for the murder was not the taking of property, is not robbery.

Mahn, 714 So.2d at 396-97.

Contrary to Gosciminski's position, the State presented evidence which rebutted his claim that he was not at the crime scene and did not commit the murder. The cell phone records, the testimony he had blood on his clothes/person, discarded bloody clothes, possessed Loughman's two carat diamond, but discarded it after the police contact, was near where her fanny pack was found, possessed a Geoffrey Beene bag, and had access to the shed where Loughman's other jewelry was found in the Beene bag. These facts along with his prior announcement that he wished to get Debbie a two carat diamond, knowledge that

Loughman had such a diamond, but would be leaving soon, and Dr. Diggs' note that Loughman had her jewelry on during the attack, but none was found on her body established the robbery during the course of the violent murder. The Court should affirm.

ISSUE VI

THE OBJECTION REGARDING ADVERTISEMENTS FOR RINGS WAS SUSTAINED PROPERLY (restated)

Relying upon California and Ohio cases, Gosciminski asserts it was error to sustain the State's objection to the question whether two carat diamond rings with baguettes on either side were advertised for sale weekly. (IB 49-50). Not only was the hearsay objection sustained properly, but there were other reasons the question was improper; counsel was discussing facts not in evidence, and there was no foundation laid for the witness' expertise in this area.[22] This Court should affirm.

Here, he was attempting to prove that similarly designed rings were for sale. As such, he asked Loughman's sister if there were weekly advertisements for such rings. If true, the repeating of such information would be equivalent to an out of

[22] The admissibility of evidence is within the court's sound discretion, and its ruling will not be reversed unless there has been a clear abuse of discretion. Dessaure, 891 So.2d at 466; Trease, 768 So.2d at 1053, n.2. Moreover, a court's ruling with be upheld if there is an alternate basis for the ruling. Muhammad v. State, 782 So.2d 343, 359 (Fla. 2001) (opining "court's ruling on an evidentiary matter will be affirmed even if the trial court ruled for the wrong reasons, as long as the evidence or an alternative theory supports the ruling.")

court statement (advertisement) repeated in court to prove the fact asserted (rings similarly designed were sold weekly). Such fits the definition of inadmissible hearsay, and Gosciminski has offered no recognized exception to the rule.

His reliance on In re Marriage of LaBass & Munsee, 66 Cal.Rptr.2d 393 (Cal. App. 2005) and State v. Reese, 844 N.E.2d 873 (Ohio App. 2005) is misplaced. The job advertisement in LaBass was not hearsay as it was not intended to prove the witness would obtain a position, only that positions were available. Likewise Reese does not assist Gosciminski as it confirms that advertisements are hearsay and their use to prove the information contained in them is improper. Further, Burkey v. State, 922 So.2d 1033 (Fla. 4th DCA 2006) does not aid Gosciminski. In Burkey, the offered evidence was a verbal act, and thus, not hearsay. Here, Gosciminski was trying to show that many rings were designed similarly to Loughman's ring. To do this, he referred to weekly advertisements. He was trying to prove the truth improperly via an out of court statement.

Moreover, even if this Court finds that the advertisement is not hearsay, the question was objectionable for two other reasons. Defense counsel was discussing facts not in evidence and he had not laid a foundation to show the witness was qualified to answer that question. See §90.604, Fla. Stat. The witness had just testified that she did not know how popular

Loughman's ring style was. Similarly, he did not show that Joan Loughman, a Connecticut resident, would know what jewelry advertisements were in the paper weekly. Such are valid reasons to affirm the court's ruling.

Also, even if the evidence should have been admitted, such did not impact the conviction. The evidence outlined in **Issues II, V vi, and XVI** was overwhelming that Gosciminski desired Loughman's ring, killed her for it, and gave the ring to his girlfriend. Just hours after the murder, he had blood on his person/clothes and gave Debbie a two carat ring. He discarded the ring within a week once the police showed interest in him as a suspect. The general popularity of the ring design would have no effect on such evidence. The conviction should be affirmed.

ISSUE VII

THE STATE'S CROSS-EXAMINATION OF APPELLANT WAS PROPER

Gosciminski argues the state committed reversible error during his examination. The "offending" exchange was elicited to demonstrate that he, like no other witness, had the opportunity to listen to all the evidence before presenting his own testimony. (ROA 3230-3231). He objected on the ground the questioning was "argumentative." (R 3231). Here, he claims the questioning was the equivalent of argument and that it was an improper comment on the right to remain silent. Relief should be denied for the following reasons.

First, Gosciminski's claim that the questioning was an improper comment on the right to remain silent was not raised below, and thus, it is unpreserved. See Occhicone v. State 570 So.2d. 902, 906 (Fla. 1990) (explaining, "[i]n order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court." Bertolotti v. Dugger, 514 So. 2d 1095, 1096 (Fla. 1987). This claim, therefore, has not been preserved).

Second, irrespective of the procedural defect, relief is not warranted. The questioning was neither argumentative nor an improper comment on the right to remain silent. The United States Supreme Court has rejected this very argument, in a case with very similar facts. The comments in that case were made in closing and were as follows:

> Finally, over defense objection, the prosecutor remarked:
>
> "You know, ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.
>
> . . .
>
> "That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?

Portuondo v.Agard, 529 U.S. 61, 64 (2000). In rejecting the claim the Court noted:

> In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate -- and indeed, given the inability to sequester the defendant, sometimes essential -- to the central function of the trial, which is to discover the truth.

Id. at 73. See Chandler v. State, 848 So.2d 1031, 1044, (Fla. 2003) (rejecting claim defendant enjoys extra constitutional protection as witness, "if a defendant voluntarily takes the stand and testifies as a witness in his own behalf, then he becomes subject to cross-examination as any other witness, and the prosecuting officer has the right to comment on his testimony his manner and demeanor on the stand, the reasonableness or unreasonableness of his statements, and on the discrepancies which may appear in his testimony to the same extent as would be proper with reference to testimony of any other witness," *quoting,* Dabney v, State 161 So. 380 (Fla. 1935). The state's questions on cross-examination were proper. This claim must be denied.

ISSUE VIII

GOSCIMINSKI'S OBJECTION TO STATE'S COMMENT ON HIS

INCONSISTENT STATEMENTS WAS DENIED PROPERLY (restated)

Relying on Smith v. State, 573 So.2d 306 (Fla. 1990) and Robbins v. State, 891 So.2d 1102 (Fla. 5th DCA 2004), Gosciminski contends the state was impermissibly allowed to comment on his right to remain silent during closing argument. The "offending" comment was: "[f]or the first time we hear the defendant take the stand…" (IB 55; R.35 3420-21). Focusing on a very limited portion of the argument, Gosciminski claims, "from the jury's standpoint," the remark encompassed the entire period of time leading up to his trial testimony, and thus, was a comment on his right to remain silent. (IB 59) The State disagrees. A review of the entire closing argument in conjunction with Gosciminski's direct and cross-examination testimony, clearly demonstrate he was being questioned about his prior inconsistent police statement. Such impeachment is proper and is not in anyway an inference on the right to remain silent.

One main defense theory was that Debbie and Ben Thomas could have committed the robbery and murder of Joan Loughman. (R.35 3423-3424). In support of that theory, Gosciminski testified at trial that Debra was aware the victim owned jewelry as she saw it and commented on same when she and Gosciminski had a chance meeting with Loughman at Lyford. (R.34 3191). However, Gosciminski's trial testimony was in direct contradiction to his earlier videotaped police statement on the

same subject. (SR.3 #2 46, 50-51). In an attempt to explain the prior inconsistency, defense counsel asked the following:

> QUESTION: Did you forget about that conversation when you were talking with the police or why didn't you say something to them about it?
>
> ANSWER: At the time they asked me that question, during the interview, I was quite frankly, extremely nervous, as I am now. This is a very serious matter that these people are talking about.

(ROA 3191). During cross, the state focused on inconsistencies between the trial testimony and previous videotaped statement regarding whether Gosciminski and/or Debra Thomas ever noticed the victim's jewelry. (R.35 3233-41, 3292-94).

Also, those issues were focused upon during closing argument. The State pointed out, on three separate occasions without objection, that Gosciminski testified at trial that he and Debra did notice and did comment on the victim's jewelry. He explains, "[a]nd in his video testimony he never noticed the jewelry, didn't comment on the jewelry." (R.36 3424). Further, "[d]efendant didn't say that in his video but now he says it." (R.36 3424) and "[w]e have a prior statement from him, a prior statement where he says I didn't notice the jewelry, don't get that close to people, didn't comment on it." (R.36 3425).

Gosciminski's claim that the jury could have been confused regarding what reference the prosecutor was making is belied by the record. The jury heard both of Gosciminski's statements,

and they were asked to consider the inconsistencies therein. This is not a situation where they were asked to compare a statement with his prior "silence", consequently, reliance on Smith and Robbins is misplaced. Relief was denied properly. Cf. Chandler v. State, 848 So.2d 1031, 1044, (Fla. 2003) (finding it proper to point out discrepancies between defendant's testimony and prior statements).

ISSUE IX

THE QUESTION TO GOSCIMINSKI AND ARGUMRNT REGARDING WHETHER BLOOD WAS ON THE RING WAS PROPER (restated)

Gosciminski maintains it was error for the court to overrule his objection to the question whether the ring was dirty with blood. He asserts that the State's closing was improper as it inferred the substance was blood.[23] (IB 61). In part this issue is not preserved; however, when placed in context, the questioning and argument were proper.[24]

[23] The challenge to the State's closing argument related to the black substance is not preserved because no contemporaneous objection was raised. (R.36 3407, 3442). To preserve a claim of prosecutorial misconduct "the defense must make a specific contemporaneous objection at trial." San Martin v. State, 717 So.2d 462, 467 (Fla. 1998); Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982) (finding defendant failed to preserve for review prosecutorial misconduct where only general objection made, followed by motion for mistrial). Where an objection to a comment is sustained, and the defense does not seek a curative instruction or mistrial, the matter is not preserved. Riechmann v. State, 581 So.2d 133, 138-39 n.12 (Fla. 1991).

[24] Admission of testimony is within the court's sound discretion. Dessaure, 891 So.2d at 466. Control of prosecutorial argument lies within the court's discretion, and will not be disturbed

With respect to the cross-examination of Gosciminski, the State had presented proof Loughman was wearing her jewelry at the time of the attack, that the attack was bloody, and that the jewelry was taken afterwards. (R.33 3034-36). The crime scene photographs show pools of a dark substance, i.e., blood. (R.33 3037, 3039-45). It is a reasonable question to the perpetrator whether the dark substance noted on the ring was blood. There was a valid basis for the question as found by the court. Whether or not other witnesses could have been asked the question is not the issue, and does not undermine the question posed to Gosciminski.

Duncan v. State, 776 So.2d 287 (Fla. 2d DCA 2000); Tobey v. State, 486 So.2d 54 (Fla. 2d DCA 1986); and Carpenter v. State, 664 So.2d 1167 (Fla. 4th DCA 1995) do not assist Gosciminski. Witnesses had testified previously as to the dark substance or dirty appearance of the ring. Moreover, the jury had been shown crime scene photographs showing the amount of blood around and on Loughman's body. As such, the State's question did not run afoul of the cases cited by Gosciminski.

Likewise, his argument that the State's closing was improper is meritless. When read in context, the State did not aver that the substance was blood, but asked the jury to

---

absent an abuse of discretion. Esty v. State, 642 So.2d 1074, 1079 (Fla. 1994), cert. denied, 514 U.S. 1027 (1995).

consider what it looked like and whether it could be blood. "Wide latitude is permitted in arguing to a jury. [c.o.] Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982). In arguing to a jury "[l]ogical inferences from the evidence are permissible. Public prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws." Spencer v. State, 133 So.2d 729, 731 (Fla. 1961), cert. denied, 372 U.S. 904 (1963).

The State commented: "This ring that is dirty and that's got black around it, black **like** the dried blood of the victim, dirty because he took it off her dead fingers." Later, the State asked: "Just so happens Bender and Hall, Reape and Debra Thomas pick that ring. Just so happens Debra Flynn went to pick Number 3 but it's dirtier and black. **Is that from the blood?**" (R.36 3407, 3442) (emphasis supplied). Both the comment and question are based on the evidence, i.e., witnesses' accounts and crime scene photographs. All fall within the limits of the prosecutor's forensic talents to enforce the criminal laws. Spencer. This Court should affirm.

Even if the question/argument is deemed improper, relief must be denied. There was overwhelming evidence of Gosciminski guilt, thus, any error is harmless. (see the evidence and

harmless error arguments asserted in **Issues II, V, VI, and XVI**.)

ISSUE X

THE DENIAL OF A MISTRIAL WAS PROPER (restated)

Here, Gosciminski argues his motion for mistrial following the State's inquiry as to whether he had authority to deposit his mother's check should have been granted even though the jury was given a curative instruction. (IB 66; R.35 3267-70). The State disagrees.[25]

In Spencer v. State, 645 So.2d 377, 383 (Fla. 1994), this Court outlined under what conditions a mistrial should be granted for prosecutorial misconduct. A new trial is required when the prosecutor's comments: "either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." See Anderson v. State, 863 So.2d 169, 187 (Fla. 2003); Hamilton v. State, 703 So.2d 1038 (Fla. 1997). The curative instruction given obviated the need for a mistrial.

The State disagrees that its question implied a collateral

[25] A ruling on a motion for mistrial is subject to an abuse of discretion standard. Smith v. State, 866 So.2d 51, 58-59 (Fla. 2004); Anderson v. State, 841 So.2d 390 (Fla. 2002); Smithers v. State, 826 So. 2d 916, 930 (Fla. 2002); Gore v. State, 784 So.2d 418, 427 (Fla. 2001). A motion for mistrial should be granted only when necessary to ensure the defendant receives a fair trial. See Goodwin v. State, 751 So.2d 537, 546 (Fla. 1999).

crime as it would be within the jury's common knowledge that the check would have had to be made out to cash or to the account holder in order to be deposited. Hence, the question would have little impact on the case. It would not be apparent to the jury that such may be a crime. The reference made here was not like those cases where the jury was informed the defendant had a record, was an escaped felon, or had other criminal cases pending. Czubak v. State, 570 So.2d 925 (Fla. 1990). However, should the court find it was improper, the curative given was sufficient. See Walker v. State, 707 So.2d 300, 313 (Fla. 1997) (holding admission of testimony referencing other charges harmless in light of curative instruction).

The jury was told the question was improper and to disregard it. It is presumed the jury follows the court's instruction. Crain v. State, 894 So.2d 59, 70 (Fla. 2004). Moreover, this issue was not discussed further. In contrast, irrespective of Gosciminski's finances with his mother and the depositing of a $57.00 check,[26] the evidence showed he was financially strapped based on his own records, that he wanted the two carat ring, that he was near Loughman's home that day,

[26] The suggestion that the check deposit was used to generate ill will is not well taken as the State was attempting to prove Gosciminski was having financial and relationship difficulties and such was part of his motive to take Loughman's jewelry. Further, it showed that it was not until he deposited the check that his account had a positive balance. Hence there was a relevant basis for asking the question.

had blood on himself/clothes, and hortly after the morning murder, had possession of Loughman's ring following the murder, and discarded the ring once the police became interested in it. This evidence, the facts and harmless error analysis of **Issues II, V, VI, and XVI** show the reference to the check pales in comparison with the evidence of guilt. This Court should find the question did not lead to the verdict; it did not vitiate the entire trial. The conviction should be affirmed.

ISSUES XI AND XII

THE VIDEOTAPED STATEMENT AND TESTIMONY RELATING DEFENDANT'S COMMENTS TO THE VICTIM ABOUT HER RING AND JEWELRY WERE ADMITTED PROPERLY (restated)

Gosciminski takes issue with the admission of a portion of his videotaped interview (Issue XI) and the testimony of Loughman's husband and sister (Issue XII) involving statements he made to Loughman noting her jewelry and wanting to get a two carat ring for his girlfriend. (IB 67, 71). Not only were these matters not preserved, but they were admissible affirm.[27]

In spite of having challenged other portions of his videotaped interview and having approved the transcript for use as a demonstrative aid, Gosciminski failed to object to the question Hickox posed and his answer until the video was being played to the jury. (R.24 1900-02). The defense objected and

[27] Admission of testimony is within the court's sound discretion. Dessaure, 891 So.2d at 466. Discretion is abused where the judicial act is arbitrary, fanciful, or unreasonable Trease.

moved for a mistrial.

To the extent Gosciminski is claiming a mistrial should have been granted and the evidence excluded, the matter is waived with respect to the statement. When the court denied the mistrial, it was **without prejudice** for the defense to raise it should the State not get its related testimony of the husband and sister into evidence.[28] When the defense challenged the admission of the testimony from the husband and sister, the court was not reminded of its prior ruling denying the mistrial. Hence, in spite of the fact the testimony was found admissible, the court was not given the opportunity to revisit the prior decision after it had taken the testimony by proffer (R.32 2904-17; SR.3 55-56) thus, it is unpreserved. Steinhorst.

With respect to the merits, the following puts in context

[28] Gosciminski admits the objection was late, but not so late that it could not be corrected. (IB 70) He cites Jackson v. State, 451 So.2d 458 (Fla. 1984); Evans v. State, 880 So.2d 182 (Fla. 2001); and Taylor v. State, 855 So.2d 1 (Fla. 2003). However, he overlooks the fact that the waiver was a secondary ruling and the court in fact considered the objection and found no error, but gave the defense the opportunity to renew the motion for mistrial at a later time. Given the defense failure to renew the motion for mistrial, it is now waived for purposes of appeal. This case is in a different posture form the cases cited by Gosciminski based upon the **denial of the mistrial was without prejudice**. Similarly, Gosciminski's attempt to equate the introduction of the defendant's statement to the police which had been litigated previously and the transcript pre-approved by the defense to a question on cross-examination that the defendant committed an un-charged battery it meritless. As explained below, the statement, as played was admissible; it put the answers in context and was impeachment evidence.

the questioning, the defense objection, and the statement which was played for the jury.

> [HICKOX]: ... Um, when Joan's sister was down here we were talking about the jewelry that Joan wore. And apparently she wore some really expensive jewelry. Did you happen to notice?
>
> [GOSCIMINSKI]: No. I don't notice stuff like that. I deal with people, family members all day long that – it's irrelevant for what dad and mom may be able to take care of to us, which is why we do a confidentiality statement on what mom and dad can afford.
>
> [HICKOX]: **According to her sister, Joan called her and told her about a conversation that you had with Joan about the jewelry that she was wearing, specifically about, she had** –
>
> (Video was turned off)
>
> MR. HARLLEE: Judge, can we stop the tape for a minute, Your Honor, approach for a second?
>
> ...
>
> MR. HARELEE:[29] **And in a conversation it's explained to me that you made a comment that, that you were going to buy your girlfriend a very large diamond ring and that perhaps Joan would like to look at (sic) because she obviously** –
>
> [GOSCIMINSKI]: I don't recall that conversation at all.
>
> [HICKOX]: -- **because she knew jewelry. So you don't remember anything about** (inaudible) –
>
> [GOSCIMINSKI]: No. I don't get that friendly with people. Hut-uh. I don't get that friendly with these people at all. I mean, she knew about us moving and things like that, you know, just in the course of,

[29] This is an error; from the context, Det. Hickox should have been identified as the speaker.

you know, a conversation.

> [HICKOX]: She had numerous diamond and emerald bracelets that she wore all the time, and I'm just trying to see if you noticed anything like that?
>
> [GOSCIMINSKI]: I don't (inaudible). Like I said, I mean, she could have, I could have commented. But I see, like I said, sometimes I can see 50 people a week between family members, residents, staff members that I deal with. And I don't pay a lot of attention to things like that. It's irrelevant to what I do. (inaudible).

(SR.3 50, 56-57). The highlighted portions are the ones objectionable to Gosciminski.

The State noted that the statement was admissible as an admission by party opponent and impeachment of Gosciminski for his denial that he did not notice Loughman's jewelry. The police statement was not coming in for the truth of what the officer said. (SR.3 51-55). The court made a dual ruling; it allowed the statement in subject to the State being able to present other witnesses to impeach Gosciminski and that there had been a defense waiver for having waiting until the tape was being played to object. (SR.3 55-56). Not only did the State later present Loughman's sister and husband to report these conversations, but Debbie Thomas and Michael Studinski testified. Debbie reported that Gosciminski said he would be getting her a two carat diamond ring and Studinski stated that Gosciminski told him about Loughman's jewelry and that she lived in an upscale community (R.32 2937-38).

This exchange with the police is admissible because police questions are not hearsay and were not offered for the truth asserted.[30] See Worden v. State, 603 So.2d 581, 583 (Fla. 1992) (finding questions propounded by police, where not offered for their truth, are not hearsay, but merely put the defendant's answers in context).[31] Also, the answer Gosciminski gave was an admission as to what he noticed. While exculpatory, such is admissible under §90.803(18)(a).

> Admissions by a party-opponent have historically been admissible as substantive evidence. These out-of-court statements and actions are admissible, not because they were against the interests of the party when they were made, but because they are statements made by an adversary and because the adverse party cannot complain about not cross-examining himself or herself. There is no requirement under section 90.803(18), or in the reported decisions that the admissions be against a party's interest. The common name of the exception, e.g., admission, may be misleading since there is no requirement that the adversary admit anything in the statement. A more precise term for the

[30] See Muhammad v. State, 782 So.2d 343, 359 (Fla. 2001) (noting "court's ruling on an evidentiary matter will be affirmed even if the trial court ruled for the wrong reasons, as long as the evidence or an alternative theory supports the ruling.")

[31] As was asserted by the State below, Hickox's question, although factually correct, was not being offered for its truth, but to put the entire statement in context. As such, Wright v. State, 586 So.2d 1024 (Fla. 1991) does not preclude the admission of the video tape in this case. In Wright, the victim's mother was testifying about what her deceased daughter had told her the day before the murder. Such was not part of a police interview nor was it used as impeachment. The statement had no value except for proving the truth of the matter asserted. That is not the case here as the State used the police questions to put Gosciminski's answers in context and for later impeachment. Those are valid reasons, and render the videotaped statement admissible.

> exception is "statement by a party-opponent." An exculpatory statement of a party is admissible against the party making the statement under section 90.803(18).

Charles W. Ehrhardt, Florida Evidence § 803.18, at 940-42 (2006 ed.) (footnotes omitted). See Delacruz v. State, 734 So.2d 1116, 1122 (Fla. 1st DCA 1999) (finding defendant's prior statements, whether exculpatory or not, admissible against him as admissions under § 90.803(18)).

Based on this, the entire videotaped statement was admitted properly, and the motion for mistrial denied properly. However, should the court find otherwise, the admission of the statement was not fundamental error. Even if the matter is found preserved, the admission was harmless beyond a reasonable doubt. Not only did the jury hear that Loughman had a two carat diamond and that Gosciminski promised a two carat diamond to his girlfriend, but they heard that he did notice and comment upon Loughman's jewelry based upon the testimonies of Debbie Thomas and Michael Studinski. As such, except for Gosciminski's request Loughman help him select a ring, everything Loughman's husband and sister offered, was before the jury without objection. Given the balance of the evidence and as discussed in **Issues II, III, V, VI, and XVI**, and error was harmless.

In **Issue XII**, Gosciminski relies upon Wright v. State, 586 So.2d 1024 (Fla. 1991); Bailey v. State, 419 So.2d 721 (Fla. 1st

DCA 1982);[32] Stoll v. State, 762 So.2d 870 (Fla. 2000); and Peterka v. State, 890 So.2d 219 (Fla. 2004)[33] to support his hearsay objection. The State disagrees and notes this matter was not preserved.

In ruling, the court reasoned that there was two aspects to the testimony offered by Loughman's husband and sister. The first was Gosciminski's statement to Loughman and the second was Loughman's report of this to her husband and sister. As such, §90.805, Fla. Stat. applied. The court rightly found Gosciminski's statement was an admission. See §90.803(18). The court also found Loughman's report to her husband and sister impeached Gosciminki's police statement that he did not notice her jewelry (R.2914-17). Finally, the court reasoned:

> However, when I weigh it all out in my mind, it does appear to me that this would be **admissible** under the Evidence Code **with the instruction to the jury** that this evidence to **only be considered by them as an alleged inconsistent statement** when compared to the statement Mr. Gosciminski allegedly made to law enforcement about Ms. Loughman's jewelry and any interest he might have in the jewelry. **So I am going**

[32] Bailey is distinguishable from the instant case. The challenged testimony, unlike that in Bailey, was admitted to put Gosciminski's police interview answers/admission in context and as impeachment, as were Loughman's conversations with her sister and husband. These contained Gosciminski's admissions and impeached his police account that he did not notice Loughman's jewelry. Such showed motive, but was not strictly to prove the truth of the matter. Bailey does not aid Gosciminski..

[33] Stoll and Peterka are distinguishable as they are addressing the victim's state of mind to rebut the defendant's statements rather that using the defendant's statements, as here, for impeachment of the defendant's prior accounts.

to allow it in with that limiting instruction.

(R.32 2917) (emphasis supplied).

The ruling was proper **with the limiting instruction**. Had the court not followed the defense request, and given the instruction, it would have been clear to the jury, and as argued by the State, that the information was not coming in for the truth of the matter asserted, but for impeachment. Hence, it was not hearsay under §90.801(1)(c), Fla. Stat. Impeachment evidence is not hearsay. See Fitzpatrick v. State, 900 So.2d 495, 515 (Fla. 2005) (recognizing statements offered as impeachment are not hearsay); Ellis v. State, 622 So.2d 991, 996 n. 3 (Fla. 1993) (opining impeachment is offered to attack witness' credibility, thus, "evidence so introduced is not being admitted 'to prove the truth of the matter asserted' but rather to show why the witness is not trustworthy.").

However, the defense, after initially agreeing to the limiting instruction, asked that it not be given. (R.32 2921-23). This request, along with Gosciminski's failure to object to the State's reference to this evidence in closing rendered the matter unpreserved and waived.[34] The testimony was admissible with the limiting instruction offered by the court, thus, it was incumbent upon the defense to object when the State

[34] "A party may not invite error and then be heard to complain of that error on appeal." Pope v. State, 441 So.2d 1073, 1076 (Fla.1983). See Cox v. State, 819 So.2d 705, 715 (Fla. 2002).

used this evidence in closing argument (R. 36 3430-31, 3437), or when the court discussed it in its sentencing order as substantive evidence (R.8 1273). Failure to do so at the appropriate time, renders the matter unpreserved. Steinhorst.

Nonetheless it is harmless. Not only did the jury hear from Debbie Thomas and Debra Pelletier that Gosciminski was interested in getting Debbie Thomas a two carat ring (E.28 2355-56; R.31 2768), but that Gosciminski had commented to Michael Studinski about Loughman's jewelry (R.32 2937-38) Even had the testimony from Loughman's husband and sister on this matter been excluded, the jury had the same information already. Also, the evidence, although circumstantial, was overwhelming as analyzed in **Issues II, III, V, VI, and XVI** and reincorporated here. This Court should reject Gosciminski's claim and affirm.

ISSUE XIII

DET. HICKOX'S COMMENT ABOUT WAGERING ON AN INDICTMENT WAS OMITTED PROPERLY (restated)

Gosciminski argues the court erred in excluding a portion of a discovery interview between Hickox and Ben Thomas wherein Hickox indicated "if he were to gamble he would not bet his house on an indictment" (IB 76) He further contends, notwithstanding whether this statement would actually have affected the jury's view of Thomas' credibility, he has a constitutional right to present evidence of a state witness'

possible motive or bias.[35] The State disagrees.

Upon requesting the court to consider its proffer of a portion of the discovery interview between Hickox and Ben Thomas the following colloquy took place:

> THE COURT: Okay. Anything else that we need to discuss before the jury comes in?
>
> MR. HARLLEE: Well, we'd ask the Court to ruled on our proffer of the testimony between Hickox and Ben Thomas regarding, we need the smoking gun, we have a lousy case without it, speaking about the jewelry. Now that the Court is aware of this whole thing with the shed and everything because[36]

(R. 2504-05). The record shows the defense requested a ruling on its proffer of the discovery interview and further, that the court initially overruled the State's objection to the defense motion (R.29 2507). Upon issuance of the ruling, the State

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[35] The admissibility of evidence is within the court's sound discretion, and will not be overturned unless there has been a clear abuse of that discretion. Ray, 755 So.2d at 610. Whether the probative value of the evidence is substantially outweighed by its prejudicial impact is reviewed for abuse of discretion. Rodriguez v. State, 753 So.2d 29, 42 (Fla. 2000).

[36] The state agreed to admitting a portion of the proffer, i.e., "We don't have the jewelry, especially we don't have the ring that he gave Deb. If we had that this case would be a breeze and that's why we want to call Deb back in." The state indicated their belief, correctly so, that a reading of this portion would essentially be giving the defense what it wanted from the testimony. It is noteworthy that the defense did not interpose an objection to this idea and, further, that the court eventually allowed more of the defense proffer in, including the "no smoking gun" characterization. While it is correct the defense indicated they intended to read the portion which stated "If I were to gamble, I don't think I'd put my house on it, let me put it that way" (R.29 2510), this statement came after his initial statement about the "smoking gun" and after the court had initially ruled in favor of the defense motion as to their entire proffer (R.29 2507).

tried to buttress its objection further, but, relenting, agreed that the Rule of Completeness had to yield in this matter as the entire paragraph put Gosciminski character in question (R.29 2515). Immediately reconsidering its decision, the court requested the parties highlight the portions they wanted. Once accomplished (R.29 2519), the court rendered its ruling in light of the highlighted sections offered by the parties:[37]

> It starts at line 6 with Detective Hickox saying: And, of course, if they don't indict, he's a free man and that's what we're trying to prevent.
>
> Line 8, the witness saying: How does it look?
>
> Then goes down to Line 12 with Mr. Hickox responding:
>
> We have a lot of circumstantial evidence but, as you know, we don't have a smoking gun, we don't have the jewelry and especially we don't have the ring that he gave Deb. If we had that, this case would be a breeze and that's why we want to call Deb back in.
>
> So I'm excluding the portion that talks about his opinion and strength of the case.

(R.29 2520). Upon issuance of the ruling, the defense stated "Okay" and the court marked the portions to be read into evidence Court's Exhibit 3 (R.29 2521) The court asked: "Anything else either side wants to put on the record?". In response, defense counsel stated: "No, sir."[38] (R.29 2521). Given

[37] The defense did highlight the portion regarding Hickcox being a "gambling man", *et al*.

[38] In view of this record, the State contends any clai of error in deleting the "gambling" comment was waived. In offering the "new" marked document as Court's Exhibit 3 (after discussions

these events, the issue, specifically raised by Gosciminski on appeal, is unpreserved. Steinhorst, 412 So.2d at 338. However, the State will address the issue for this Court's convenience.

The ruling, even with the deleted portion, gave the defense exactly what it sought at the outset, namely, "that there was no smoking-gun and without the jewelry it was a lousy case." Any fair-minded reading of the admitted proffer indicates such. Citing facts at hand, an investigating officer involved in the case believed he did not have a "smoking gun" and that more evidence was needed, specifically, the ring to get an indictment, otherwise making Gosciminski a "free man". This flies in the face of the appellate argument that, without the "gambling" reference, the deleted remark would not leave one with the impression the "case was not a sure thing without more evidence" and, conversely, confirms Gosciminski's initial request to the court as to his reasons for wanting the substantive part of the conversation between Hickox and Thomas.

Further, Gosciminski claims the court erred because, irrespective of credibility, he had a constitutional right to present evidence of a state witness' possible bias. Again, the record evinces Gosciminski received exactly what he sought to gain from the ruling. There is nothing in Hickox's comments

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with counsel), the defense raised no objection and agreed at the moment when it was re-addressed that it was no longer an issue.

exhibiting personal bias or untoward motive here.

Cases cited by Gosciminski are not dispositive and are irrelevant. All concern, whether a witness can be cross-examined by counsel for bias.[39] Such is not the case here. Instead, Gosciminski effectively presented his defense from the portions of the paragraph presented. None concern the threshold issue: whether the subjective opinion of an officer about the strengths/weaknesses of a case is admissible.

This Court has held that a witness's opinion as to the guilt or innocence of the accused is not admissible. See Glendening v. State, 536 So.2d 212, 221 (Fla. 1988) (citing Lambrix v. State, 494 So. 2d 1143 (Fla. 1986)). This was explained in Martinez v. State, 761 So.2d 1074 (2000):

> Further, there is an increased danger of prejudice when the investigating officer is allowed to express his or her opinion about the defendant's guilt. In this situation, an opinion about the ultimate issue of guilt could convey the impression that evidence not presented to the jury, but known to the investigating officer, supports the charges against the defendant.

Martinez, 761 So.2d at 1080 (citation omitted). See Rodriguez v. State, 609 So.2d 493, 500 (Fla. 1992) (holding officer

[39] Purcell v. State, 735 So.2d 579 (Fla. 4th DCA 1999), is wholly distinguishable. The Fourth District reversed because the judge improperly found the witness was no longer a victim in the case because the charges had been dropped against the defendant. However, the charge stayed in the case right up until the moment of opening statements. Hence, the District Court held, it was proper for defendant to attempt to show that before the charge was dropped and while it was still pending the witness had offered "to make the case go away" for a fee. Id., at 581.

corroborating story told by testifying witness by discussing witness' inadmissible prior consistent statements, cautioned "[w]hen a police officer, who is generally regarded by the jury as disinterested and objective and therefore highly credible, is the corroborating witness, the danger of improperly influencing the jury becomes particularly grave.").

Florida R. Crim. Pro. 3.220(g) is dispositive.[40] Clearly, a police officer could be considered part of the prosecution team. See Williamson v. Dugger, 651 So.2d 84 (Fla. 1994) (holding trial strategy and personal interpretation notations by the prosecutor...is not subject to disclosure); State v. Rabin, 495 So.2d 257 (Fla. 3d DCA 1986) (holding "opinion" work product is nearly absolutely privileged, and thus, not subject to disclosure); State v. Williams, 678 So.2d 1356 (Fla. 3d Dist. 1996) (finding court order requiring State disclose list of documents it intends to use is contrary to work-product doctrine as it would serve to highlight thought processes and legal analysis of attorneys involved)(citing Smith v. Florida Power & Light Co., 632 So.2d 696 (Fla. 3d DCA 1994).

Even if the court's deletion of the gambling reference is deemed improper, relief must be denied. There is overwhelming

[40](g) Matters Not Subject to Disclosure. (1) Work Product Disclosure shall not be required of. . .records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of their legal staffs.

evidence of Gosciminski guilt and, beyond a reasonable doubt, the inclusion of this comment would have had no impact on the conviction. The State reincorporates its discussion of the evidence and harmless error arguments asserted in **Issues II, III, V, VI, and XVI**.

ISSUE XIV

THE CIRCUMSTANTIAL EVIDENCE INSTRUCTION WAS AMENDED PROPERLY DURING THE DEFENSE CLOSING (restated)

Gosciminski argues it was improper for the court to have amended the circumstantial evidence instruction in the middle of his closing argument. The State disagrees. First, the defense was not entitled to such instruction and second, given the manner in which the defense was misinterpreting the instruction, the amendment was required to avoid confusion by the jury.

Review of a court's decision to give the now abandoned circumstantial evidence instruction is for abuse of discretion. See Huggins v. State, 889 So.2d 743, 767 (Fla. 2004); Parker v. State, 873 So.2d 270, 294 (Fla. 2004); Floyd v. State, 850 So.2d 383, 400 (Fla. 2002); Branch v. State, 685 So.2d 1250, 1253 (Fla. 1996) (noting decision to give additional instructions, even circumstantial evidence instruction, rest within court's discretion); Larzelere v. State, 676 So.2d 394, 401 (Fla.1996) (recognizing that deletion of circumstantial evidence instruction from standard instructions does not bar judge from

giving the instruction in his discretion under case facts).

Gosciminski was not entitled to the instruction, Parker; Floyd, and the instruction given was not confusing. It was required to explain the law correctly given the manner in which the defense was attempting to parse the words of the instruction in its closing. This Court should find no error and affirm.

The instruction initially agreed upon was explained as:

> THE COURT ... and that is to give the first paragraph of the draft by the defense, which would say circumstantial evidence is legal evidence in a crime or any fact to be proved may be proved by such evidence. **A well-connected chain of circumstances is as conclusive in proving a crime or fact as is positive evidence**. Its value is dependent upon it's conclusive nature and tendency. Then shift to the State's instruction draft, which says, circumstantial evidence is sufficient to convict the defendant of any crime charged if the circumstantial evidence proves each element of each crime beyond a reasonable doubt, and the circumstantial evidence rebuts every reasonable hypothesis of innocence. **If the circumstances are susceptible to two reasonable construction, (sic) one indicating guilt and the other innocence, you must accept the construction indicating innocence**.

(R.35 3342) (emphasis supplied). Gosciminski agreed that his instruction noting a "chain of circumstances" was the same as the State's "circumstances." (R.35 3340).[41] This is clear from the court's comments and foreshadowed its need to amend the

[41] The State argued that no instruction should be given as the reasonable doubt instruction was sufficient, as noted in Wadman v. State, 750 So.2d 655 (Fla. 4th DCA 1999), but if one were to be given it should be limited to the definition announced in Boyd v. State, 910 So.2d 167 (Fla. 2005). (R.35 3329-30, 3336)

instruction during the defense closing when counsel tried to argue that each individual circumstance should be looked at and if it could point toward innocence, then the state did not carry its burden (R.36 3452-57, 3459, 3460-61).

> THE COURT: ... I'm still concerned about the defense saying, and saying in argument when discussing that instruction and the evidence, making the argument that because there is this difference between the eighty-five percent zone and the hundred percent zone, that means that the first rule of circumstantial evidene has not been met, and that's not what the Rule says. It is true the jury has to decide that if they believe Mr. Lee's testimony, that this is the outside range of a hundred percent, but just because beyond that he's also able to say I also feel that there's an eighty-five percent likelihood he would have been within this smaller area. Now, they do have to be – they have to be convinced that the hundred percent line is accurate.
>
> ...
>
> THE COURT: Well, except it does say, and the circumstantial evidence rebuts every reasonable hypothesis of innocence. That allows to (sic) you to argue, here's a hypothesis of innocence, that's reasonable, so therefore the circumstantial evidence doesn't rebut that.
>
> MR. HARLLEE: Well, if your going to permit us to actually use the language in our proposed and just give this as the instruction, this being the State's, we don't have a problem with that. Because if they both mean the same thing but you're hung up on the language a little bit, it seems like you're hung up on Paragraph 1 of the defense proposal and not the bottom paragraphs.

(R.35 3338-40).

It was the intent that the "chain of circumstances" for each element meant the "circumstances" as a whole in proving the

element. The instruction was not intended to fracture each circumstance into its tendency to prove or disprove guilt. The jury was to look at the circumstances as a whole to determine if they disproved the defense's reasonable hypothesis of innocence beyond a reasonable doubt.

Given the defense concession that "chain of circumstances" equated to "circumstances" at the time the instruction was approved initially, the amendment, necessitated by Gosciminski's improper argument, was required. While the court amended and clarified that the "chain of circumstances" in the first sentence would be read as a "chain of circumstances" for the last portion of the instruction, it was amending, but not changing the meaning of the instruction, i.e., the words were changed, but the meaning remained the same. The "chain of circumstances" was just another manner of referring to all of the circumstances shown to prove an element of the crime. There was no abuse of discretion in granting the instruction as originally agreed, or in amending during closing argument. For the same reasons, Gosciminski's complaint that such changed the meaning in the middle of his argument is without merit.

However, even if the instruction as initially offered could have been read, this Court should still affirm based upon the discussion of the facts and harmless error arguments offered in **Issues II, V, VI, and XVI** reincorporated here.

ISSUE XV

THE REQUEST FOR GRAND JURY TRANSCRIPTS WAS DENIED PROPERLY (restated)

Gosciminski claims it was error to deny his motion for grand jury testimony. He submits that, at a minimum, the judge should have reviewed the testimony *in camera*, particularly when he alleged there were changes and discrepancies in witnesses' accounts. The State disagrees, because Gosciminski, as the court found, never set forth a particularized need for the material under Keen v. State, 639 So.2d 597 (Fla. 1994). (R.2 251-56, 415). This Court should affirm.[42]

This Court opined in Keen:

> We have previously held that there is no pretrial right to inspect grand jury testimony as an aid in preparing a defense. [c.o.] To obtain grand jury testimony, a party must show a particularized need sufficient to justify the revelation of the generally secret grand jury proceedings. [c.o.] Once a grand jury investigation ends, disclosure is proper when justice requires it.

Keen, 639 So.2d at 600. Gosciminski's motion was based on mere speculation, which is not a predicate reason for either a release or in camera review of grand jury transcripts. See Jent

[42] A ruling on a motion for grand jury transcripts is subject to an abuse of discretion standard. There is no pretrial right to inspect grand jury testimony as an aid in preparing a defense and holding an *in camera* inspection of such within the court's discretion. Minton v. State, 113 So.2d 361 (Fla. 1959).

v. State, 408 So.2d 1024, 1027-28 (Fla. 1981).[43]

Gosciminski claims state witnesses changed their accounts (IB 85), but as to Debra Thomas, Nicole Rizzolo, and Maureen Reape, he claims their accounts changed at trial from their depositions. In light of this admission, Gosciminski was aware these witnesses had either changed their testimony or presented discrepancies in the interim between the grand jury and trial, accordingly, there were no inconsistencies hidden from the defense which could not be elucidated on cross examination. See Maharaj v. State, 778 So.2d 944 (Fla. 2000) (holding no entitlement to grand jury transcripts where no inconsistencies hidden from defense prior to trial and court reviewed transcripts *in camera* finding only minor inconsistencies); Brookings v. State, 495 So.2d 135, 137 (Fla. 1986) (same); Jent, 408 So.2d at 1027-28 (finding no abuse of discretion for denying grand jury transcripts - defense did not lay sufficient

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

predicate and counsel drew attention to inconsistencies from depositions, negating need for transcripts).

Gosciminski suggests two other reasons for entitlement to the grand jury testimony: (1) witnesses' mentioned things at trial not previously disclosed and (2) pressure was put on Debra and Ben Thomas by Hickox which may have affected their grand jury testimony. As to his first contention, he does not offer facts as to how the release of the testimony, or even an *in camera* review, would be relevant/material to the trial. He does not allege perjury or testimony inconsistent with previous depositions/accounts. Respecting his second contention, his suggestions are based on speculation, and again, he does not elucidate how "pressure" on the witnesses affected their grand jury testimony. Both contentions fail to allege any particular facts for the grand jury testimony, in light of the trial, which would have led the court to exercise the extraordinary measure of providing or reviewing the grand jury transcripts. Again, Gosciminski does not cite one instance during his trial where he raised a particularized need for review of grand jury testimony.

While he cites to Keen and Miller v. Dugger, 639 So.2d 597 (applying Pennsylvania v. Ritchie, 480 U.S. 39 (1987) to grand jury testimony) for support, each are distinguishable and his reliance is misplaced. A court has discretion to review grand jury proceedings *in camera*, but that discretion does not vitiate

the defendant's duty to show a "particularized need". Keen. In Keen, this Court reviewed the factors the Supreme Court outlined in Dennis v. United States, 384 U.S. 855 (1966)[44] sufficient to justify the release of grand jury proceedings and concluded a showing had been made for an *in-camera* inspection as it involved the state's key eye-witness to the murder, and that she had given conflicting accounts during the years between the trial and retrial. Keen, 639 So.2d at 600. In Miller, conflicting testimony was given under oath by key eyewitnesses to the crime. Such is not the case here, and Gosciminski's allegations do not rise to the level of particularized need noted in Keen; Miller.

Even if the court' denial of the request for grand jury transcripts is deemed error, relief should be denied. There was overwhelming evidence of Gosciminski guilt as noted in the State's factual and harmless error analysis in **Issues II, V, VI, and XVI**, reincorporated here.

ISSUE XVI

TESTIMONY THAT PERSON OF INTEREST WAS INTERVIEWED AND

[44] Dennis provided: "A **conspiracy case** carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. **Under these circumstances**, it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations." Dennis, 384 U.S. at 873-74. (citations omitted)(emphasis added). Such is not the case here.

ELIMINATED AS SUSPECT WAS PROPER (restated)

Gosciminski contends it was error to permit Det. Hickox to testify that after conducting interviews and an investigation, a person of interest was eliminated as a suspect. (IB 89). At trial, hearsay and relevancy objections were raised. The court found the matter relevant based on the defense contention the investigation was not proper. Cognizant of hearsay, the court limited the question to whether the person was interviewed and eliminated as a suspect (R.23 1796-97). Such eliminated the potential hearsay problem. The resulting answer did not contain hearsay and was admitted properly.[45]

Hearsay is an out of court statement presented in court for the truth of the matter asserted. See § 90.801(1)(c), Fla. Stat. (2003). Such is inadmissible unless it falls within an exception noted in § 90.803, Fla. Stat. Here, Det. Hickox was not repeating anything which was said out of court, nor was he implying Gosciminski's guilt. Instead, he was reporting the results of his investigation to show it was thorough in rebuttal to the defense inference otherwise. (R.23 1796-97).

Gosciminski's position is not furthered by Keen v. State, 775 So.2d 263 (Fla. 2000) (finding it impermissible for officer

[45] Admission of evidence is within the court's sound discretion, and will not be reversed unless there has been a abuse of discretion. See Dessaure, 891 So.2d at 466; Ray, 755 So.2d at 610. Discretion is abused when the ruling is arbitrary, fanciful, or unreasonable. Trease, 768 So.2d at 1053, n.2.

to report he talked to two insurance companies which reported each had received information that missing person case was murder); Schaffer v. State, 769 So.2d 496 (Fla. 4th DCA 2000) (noting officer testified that after speaking with confidential informant, officer went to site and awaited defendant was direct implication of defendant's guilt); Stokes v. State, 914 514 (Fla. 4th DCA 2005); or Trotman v. State, 652 So2d 506 (Fla. 3d DCA 1995). Each deals with an officer either repeating an out of court conversation he had with a witness indicating the defendant's guilt or by the officer's subsequent actions there was a clear indication the out of court conversation implicated the defendant. Such was not the case here. The officer was reporting an initial person of interest was no longer a suspect. Nothing implies Gosciminski is the guilt party, only that the police looked elsewhere.

From these cases, Gosciminski asserts that given the State is not to imply the defendant's guilt, it may not imply others are innocent. He cites no cases to support this. The bar to hearsay is based on the defendant's right to confront his accusers. As noted above, the testimony in this case is not hearsay. Further, it does not infer guilt, thus, the confrontation clause is not implicated. The relevance of the testimony was to rebut the allegation of a poor police

investigation.[46] The testimony did not directly challenge Gosciminski's offered alibi defense that he was at other locations that morning or that Ben Thomas may have been the perpetrator. As such, Gosciminski has not shown reversible error. The conviction should be affirmed.

ISSUES XVII and XIX

BOTH THE CCP AND HAC FINDINGS ARE PROPER AND SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE (restated)

In **Issue XVII** Gosciminski complains that the court stacked inference upon inference to support a CCP finding. Similarly, in **Issue XIX**, he asserts the State failed to prove the amount of time Loughman was conscious, this, HAC should not apply. The State disagrees on both points. The CCP and HAC findings are supported by substantial, competent evidence.

Whether an aggravator exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So.2d 148, 160 (Fla. 1998), reiterated the standard of

[46] Gosciminski points to the trial court's "short-hand" comment that the testimony was rebutting the defense claim "they didn't get the right guy" to somehow show there was an implication of guilt. Such argument must fail as the jury did not hear this comment and the overwhelming evidence was that Gosciminski had the motive, opportunity, and ability to commit this crime. The evidence showed he wanted the ring, was near Loughman''s home that morning, had blood on his body and clothes after the murder, gave his girlfriend the two carat ring, and then took it back and discarded it once the police started questioning him. (see Issue V). The comment the police eliminated another suspect has not impact on this evidence of Gosciminski's guilt.

review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt—that is the court's job. Rather, our task on appeal is to review the record to determine whether the court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," quoting Willacy v. State, 696 So.2d 693, 695(Fla.), cert. denied, 522 U.S. 970 (1997). See Boyd v. State, 910 So.2d 167, 191 (Fla. 2005); Gore v. State, 784 So.2d 418, 432 (Fla. 2001).

With respect to CCP, this Court has stated:

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

Philmore v. State, 820 So.2d 919, 933 (Fla. 2002) (quoting

Farina v. State, 801 So.2d 44, 53-54 (Fla. 2001).

In finding CCP, the court made reasoned finding that Gosciminski wanted to get a two carat ring for his girlfriend after they recently got back together. At this same time, Gosciminski met Loughman, who wore a two carat diamond ring, and was seeking to place her father, Frank Vala, in Lyford. Gosciminski went to the Vala homee where Loughman was staying to pick up furniture and Vala's belongings which Loughman could not move herself due to an injury. At the time, all of the storm shutters, except for the front window, were down. Just the day after Vala moved to Lyford Cove, he fell and had to be sent to the hospital, and from there, to Hospice. On the evening before her murder, Loughman met with Gosciminski and procured his assistance in bringing Vala's suitcase to the car.[47] (R1273-74).

The following morning, Loughman ended her phone call with her sister at 8:47 a.m. because there was someone at the door. That same morning, at 8:15 a.m., Gosciminski called the Regional Manager, Lois Bosworth, to inform her he would be missing the

[47] Although not mentioned in the sentencing order, Debbie Thomas, Gosciminski's girlfriend at the time, testified that he started talking about a two carat diamond engagement ring two to three days before Loughman's September 24th murder. Debbie told Maureen Reape about Gosciminski's promise; Gosciminski would promise Debbie each day he would get the ring. Also, about a week before September 24th, Gosciminski took Debbie to the Vala residence, explaining it would be on the market soon and that he knew this from a relationship he had with a Lyford Cove resident who was not doing well. (R.28 2344-45, 2355-56).

regularly scheduled 8:00 a.m. staff meeting, but would be making a presentation at Life Care Center. The only evidence of this came from Gosciminski, and the court found that not credible. When Gosciminski finally arrived at work sometime near 12:30 p.m. looking freshly bathed, he showed co-workers, Debra Flynn and Nicole Rizzolo, a two carat diamond engagement ring with black material on it. His demeanor day was quiet and subdued, which was out of character. (R1273-74).

Also, that morning, the bank and cellular phone records showed Gosciminski had made a 10:08 a.m. cash deposit at the Harbor Federal Palm City branch which had been overdrawn before that morning. The phone records showed that he neither made nor received calls between 8:09 a.m. and 9:12 a.m.; the calls 9:12 a.m. (incoming), 9:27 a.m. (voicemail), and 9:28 (outgoing) were all processed through the cell tower closest to the Vala residence. He also made a call from near the Harbor Federal branch where he made a cash deposit and the place where Loughman's fanny pack was found. (R.8 1275)

The court credited Dr. Diggs' testimony establishing the multiple weapons used, the fact Loughman was dragged from the hallway, visible through the front window, to the bedroom, where he finally could complete the murder unobserved. In the bedroom, Loughman was bludgeoned, turned on her stomach, and her throat was cut, severing her jugular vein. Great significance

was afforded to the fact that Gosciminski had made an initial, unsuccessful cut to Loughman's throat, before moving his knife down her neck and cutting through her jugular vein. Further, the court noted that there was no sign of emotional frenzy, panic, or rage. (R.8 1275-76)

This Court has affirmed CCP findings where there had been a planned, motivated attack as was Gosciminski's murder of Loughman. See Philmore, 820 So.2d at 933 (upholding CCP finding where defendant went in search of a female victim to carjack); Mason v. State, 438 So.2d 374, 379 (Fla. 1983) (finding CCP where defendant broke into the victim's home, armed himself with her kitchen knife, and attacked/killed sleeping victim).

Gosciminski cites Hamilton v. State, 547 So.2d 630 (Fla. 1989) and McKinney v. State, 579 So.2d 80 (Fla. 1991) to support his argument that the court's finding of CCP was based on speculation of what happened. Contrary to this claim, the State proved he was seeking jewelry, but did not have the money for it. It proved the house was shuttered except for the front window and Gosciminski had not only been to the house, but been inside to pick up furniture Loughman could not move. The medical examiner, based upon the blood and other forensic evidence, was most comfortable reporting that the initial stabbing took place in the hall, that Loughman was moved to a shuttered bedroom where the attack continued, ending with her

throat being slashed after a first failed attempt. The State showed a bloodied Gosciminski cleaned up at home and discarded his soiled clothes. All was proven beyond a reasonable doubt.

With respect to the creation of an alibi using cellular phone calls – there was flurry of calls before and after the murder, by the phone was silent from a little before to a little after 9:00 a.m. which coincided with Loughman's report that someone was at her front door. He called Lois Bosworth to give a basis for his absence from a scheduled meeting, he drove to various locations to discard evidence, deposit cash stolen from Loughman, and claimed he was at area facilities where he just put brochures in the offices, without actually meeting with staff. This shows a conscious creation of an alibi. Such is not speculative, but it a carefully planned attack.

Neither Hamilton v. State, 547 So.2d 630 (Fla. 1989) nor McKinney v. State, 579 So.2d 80 (Fla. 1991) assist Gosciminski. In Hamilton and McKinney, the records were devoid of any planning leading up to the murders. While here, the State proved Gosciminski and promised his fiancé a two carat diamond ring and that he was motivated to get Loughman's jewelry, which she had on her person at all times, that he knew his victim, where she lived, and the layout of the home. While it is unclear whether Gosciminski went to the home armed or whether he armed himself there, the weapons were available, a knife like

object and a heavy ashtray. Further, the medical examiner opined about the more likely scenario of attack which showed a prolonged attack, including moving the body from one area of the house to avoid detection and making a first attempt befor methodically slashing Loughma's judgulat. Further, based upon his cell phone calls, Gosciminski developed an alibi by making an excuse for not being at his scheduled meeting and for being in the area of the Vala residence. The totality of the evidence shows a coldly planned, highly premeditated murder. Such began a week before the killing when Gosciminski told Debbie the Vala house would be on the market soon and promised her a two carat diamond ring, and ended with Loughman's robbery and murder.

Similarly Barwick v. State, 660 So.2d 685, 696 (Fla. 1995), receded from on other grounds, Topps v. State, 865 So.2d 1253 (Fla. 2004) (rejecting CCP because killing committed because mask was removed in struggle); Vining v. State, 637 So.2d 921 (Fla. 1994) (rejecting CCP as evidence did not show prearranged design to kill – identity hidden no evidence of motivation to kill); Power v. State, 605 So.2d 856 (Fla. 1992) (finding reliance upon prior rapes where the victims were not killed, and defendant's calmness after the murder were insufficient to show heightened premeditation/prearranged plan to kill); Wyatt v. State, 641 So.2d 1336 (Fla. 1994) (reversing CCP finding as there was no proof of a careful plan); and Street v. State, 636

So.2d 1297 (Fla. 1994) (rejecting CCP for shooting of second officer on scene after killing of first officer) do not help Gosciminski. In each, there was some triggering factor during the attack which prompted the killing, such as the assailant identity being revealed, or the killing of the first victim. Here, however, Gosciminski (1) was motivated to obtain a two carat ring for his girlfriend; (2) knew Loughman was physically impaired, living alone in a virtually shuttered home, was wealthy, and had a two carat ring;, (3) learned Loughman would be leaving soon as Vale was going to hospice; (4) mafe excuses to Lyford for his absence that morning; and (5) attacked Loughman in the hallway, but dragged her body to a shuttered bedroom where he bludgeoned her before he methodically re-positioned to make it easier to slash her throat and sever her jugular vein and removed all her jewelry. Such evinced a planned, prolonged attack by a person intent upon killing a person known to him to have jewelry he wanted and to hide his acts by claiming he was visiting clients.

Even absent the CCP aggravator, the sentence should be affirmed. See Boyd, 910 So.2d at 193 (stabbing death with felony murder, HAC, one statutory and five non-statutory mitigators); Pope v. State, 679 So.2d 710, 716 (Fla.1996) (holding death penalty proportional where two aggravating factors, murder committed for pecuniary gain and prior violent felony,

outweighed two statutory mitigating circumstances, commission while under influence of extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct, and several nonstatutory mitigating circumstances).

Turning to the HAC finding, Gosciminski relies on Elam v. State, 636 So.2d 1312 (Fla. 1994)[48] to claim the aggravator was not proven because it was unclear how long Loughman was conscious during the attack. Such does not further his position as the record shows she was conscious during her initial stabbing and received a defensive wound during the bludgeoning which occurred at a later time after she had been dragged to a different location. From the facts outlined above for CCP, in addition to the fact Loughman endured a stabbing and bludgeoning while conscious evinced by her defensive wound inflicted in the bedroom during the second phase of the attack she knew of her impending death and HAC was established. This Court should find substantial, competent evidence supporting HAC and affirm.

[48] Elam v. State, 636 So.2d 1312 (Fla. 1994) does not further his position. While Elam involves bludgeoning as here, Gosciminski overlooks the fact that Loughman was attacked in the hall, where, according to Dr. Diggs, the most reasonable scenario was that she was stabbed and lacerated in and about the head, dragged into the bedroom and bludgeoned during which she received a defensive wound indicating consciousness during these phases of the attack. See Boyd, 910 So.2d at 191 (recognizing HAC aggravator found consistently where victim stabbed repeatedly and was conscious during portion of attack); Pooler v. State, 704 So.2d 1375 (1997) (finding HAC based on fact victim knew of impending death, not time it took her to die)

The court found in part:

> The fact that Joan Loughman was stabbed multiple times, bludgeoned savagely with the ashtray stand, and ultimately had her throat cit with a knife or knife-like object, convinces the court beyond a reasonable doubt that her murder was *both* conscienceless or pitiless and unnecessarily torturous, *and* that Michael Gosciminski either intended to inflict a high degree of pain or he was utterly indifferent to her suffering. Based on the defensive wound and the evidence indicating there was a struggle, the court is convinced beyond a reasonable doubt that Joan knew she was going to die, and she experienced extreme terror.

(R.8 1278)(emphasis in original).[49] HAC findings have been upheld consistently where the victim was stabbed repeatedly and was conscious during a portion of the attack. See Boyd, 910 So.2d at 191 (recognizing HAC aggravator found consistently where victim stabbed repeatedly and was conscious during portion of attack); Owen v. State, 862 So.2d 687, 698 (Fla. 2003); Duest v. State, 855 So.2d 33, 47 (Fla. 2003); Cox v. State, 819 So.2d 705, 720 (Fla. 2002); Jimenez, 703 So.2d at 441; Derrick v State, 641 So.2d 378, 381 (Fla. 1994); Floyd v State, 569 So.2d 1225, 1232 (Fla. 1990); Haliburton v. State, 561 So.2d 248, 252 (Fla. 1990); Hansborough v. State, 509 So.2d 1081, 1086 (Fla. 1987). The aggravator should be affirmed.

[49] The evidence shows Loughman was stabbed three times, twice to the back and once in the chest. One stab wound penetrated her lung. She was lacerated about the head/face, two cutting to the bone. Her lip was lacerated. This occurred in the hallway before she was bludgeoned in the bedroom. The defensive wound came from the ashtray and shows Loughman was conscious in the bedroom following her stabbing. (R.33 3010-15, 3021-55).

However, even if the HAC aggravator is rejected, CCP and the merged aggravators of felony murder/pecuniary gain remain. This Court has affirmed such sentences. Pope, 679 So.2d at 716 (sentencing proportional with two aggravators, two statutory mental health mitigators and several nonstatutory mitigators).

ISSUE XVIII

THE REQUISITE FINDINGS TO SUPPORT THE DEATH SENTENCE WERE MADE (restated)

Gosciminski claims the court failed to find sufficient aggravating circumstances exist to justify death. The State disagrees, and submits the requisite findings were made for the sentencing factors and the judge completed the appropriate analysis. The death sentence should be affirmed.

Under §921.141(3), Fla. Stat, notwithstanding the jury's recommendation, the court must weigh the aggravation and mitigation, and if it finds death the appropriate sentence, put in writing its finding as to the facts "(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Gosciminski has not cited a case where this Court has overturned a death sentence because the sentencing court failed to include the phrase "sufficient aggravating circumstances exist" to justify the death sentence. Rather, he offers Rembert v. State, 445 So.2d

337 (Fla. 1989) and Terry v. State, 668 So.2d 954 (Fla. 1996). Neither supports his claim as both are proportionality decisions, not decisions on the sufficiency of order.

Review of orders imposing death sentences have not been for talismanic incantations, but for the content outlining the factual findings as to aggravation and mitigation, the weight assigned each, and the reasoned weighing of those factors in determining the sentence. This Court explained that to comply with §921.141(3), the judge "must (1) determine whether aggravating and mitigating circumstances are present, (2) weigh these circumstances, and (3) issue written findings." Layman v. State, 652 So.2d 373, 375 (Fla. 1995). As provided in Bouie v. State, 559 So.2d 1113, 1115-16 (Fla. 1990) the written order provides for meaningful review, and must contain factual findings and show the sentencing court independently weighed the aggravators and mitigators to determine the appropriate sentence of life or death. This Court requires each statutory and non-statutory mitigator be identified, evaluated to determine if it is mitigating and established by the evidence, and deserved wright. Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995). See Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000) (holding court may assign mitigator no weight). The sentencing order in Ferrell was found lacking because the court had not set forth its factual findings/rationale in other than conclusory terms.

Ferrell, 653 So.2d at 371. Such is not the case here. The order meets the dictates of Campbell v. State, 571 So.2d 415 (Fla. 1990); Bouie and §921.141 as each aggravator and mitigator was discussed, weighed, and factual findings setout (R.8 1272-97). Only then did the court balance the factors before imposing the sentence (R.5 1294-96). The proper analysis was completed.

Furthermore, it is presumed the court follows the instructions given the jury. See Groover v. State, 640 So.2d 1077, 1078 (Fla. 1994); Johnson v. Dugger, 520 So.2d 565, 566 (Fla. 1988). Here, the court instructed the jury properly regarding its sentencing duty including: "If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole." Also, "Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the aggravating circumstances outweigh the mitigating circumstances found to exist" (R.39 3868-69). The judge is presumed to have found sufficient aggravator existed to justify death. This Court should reject Gosciminski's claim for a talismanic phrase of "sufficient aggravating circumstances."

ISSUE XX

THE SENTENCE IS PROPORTIONAL (added claim)

Although Gosciminski did not address proportionality, this

Court had the independent duty to do so.[50] See England v. State, 940 So.2d 389 (Fla. 2006); Gore v. State, 784 So.2d 418 (Fla. 2001); Jennings v. State, 718 So.2d 144 (Fla. 1998). The instant capital sentence is proportional and should be affirmed.

Gosciminski was convicted of the stabbing/bludgeoning murder along with robbery and burglary. The court found HAC, CCP, and felony murder merged with pecuniary gain and gave each great weight. (R.8 1273-79) In mitigation the court found one statutory mitigator, no significant history of criminal activity (some wt)[51] and 14 non-statutory mitigators.[52] (R.8 1280-94).

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[50] This Court stated: "[t]o determine whether death is a proportionate penalty, we consider the totality of the circumstances of the case and compare the case with other capital cases where a death sentence was imposed. Pearce v. State, 880 So.2d 561, 577 (Fla. 2004)." Boyd v. State, 910 So.2d 167, 193 (Fla. 2005). See Fitzpatrick v. State, 900 So.2d 495, 526 (Fla. 2005); Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). This Court's function is not to re-weigh the factors, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So.2d 6 (Fla. 1999).

[51] Court noted Gosciminski's pattern had changed from two non-violent pecuniary gain motivation to violent acts. Nonetheless, it found the mitigator and gave it some weight. (R.8 1280).

[52] The court grouped the 55 non-statutory mitigators into categories, rejecting some, and finding: (1) relatively normal upbringing (some); (2) served honorably in Air Force (moderate); (3) good work history (some); (4) positive correctional adjustment (moderate wt); (5) no indication future dangerousness (moderate); (6) will never get out of prison (little); (7) had orthopedic injuries from motorcycle accident (little); (8) significant difficulty in dealing with father's death (little wt); (9) no criminal history until age 44 (some); (10) was Good Samaritan once (moderate); (11) presents with mixture of disordered personality characteristics (some wt); (12) good trial behavior (little); (13) effect of execution on mother (some); (14) mitigation cumulative effect (some). (R.8 1280-94).

This Court has affirmed capital sentences under similar circumstances. See Duest v. State, 855 So.2d 33 (Fla. 2003) (affirming for stabbing with HAC, pecuniary gain and prior violent felony and 12 non-statutory mitigators); Cox, 819 So.2d at 705 (finding sentence proportional - HAC and CCP, measured against 32 nonstatutory mitigators); Robinson v. State, 761 So.2d 269 (Fla. 1999) (affirming sentence for bludgeoning death based on CCP, pecuniary gain, and avoid arrest along with two statutory mental mitigators and 18 nonstatutory mitigators); Nelson v. State, 748 So.2d 237 (Fla. 1999) (affirming based on HAC, CCP, and felony murder, one statutory and fifteen nonstatutory mitigators); Foster v. State, 654 So.2d 112 (Fla. 1995) (upholding sentence for beating/stabbing based on felony murder, HAC and CCP and 14 nonstatutory mitigators). The sentence is proportional.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm Gociminski's convictions and death sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Gary Lee Caldwell, Esq., Office of the Public Defender, 421 Third Street, West Palm Beach, FL 33401 this 18th day of December, 2006.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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