IN THE SUPREME COURT OF FLORIDA

EDDIE JUNIOR BIGHAM,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. SC05-245
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court of the
Nineteenth Judicial Circuit

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County. The parties will be referred to as they appear before this Court.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE WAS COMPLETELY CIRCUMSTANTIAL AND FAILED TO PROVE IDENTITY.

Appellee hypothesizes Appellant abducted Lulu, dragged her into the woods, then forcibly had sexual intercourse with her (both vaginally and anally) and strangled her. Appellee's brief at 15-16. Appellee's hypothesis of guilt is not supported by the evidence.1

"Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain

[1] Appellant's claim of innocence was simple. He had sex with Lulu but did not kill her. Someone else killed her. It was not appellant's burden to specifically prove who killed Lulu. Appellant did point to other possibilities -- the husband or three men in a Jeep (see point XIII). The bottom line is appellant did not kill lulu and improper stacking of inferences is not sufficient to prove that he did.

conviction." Davis v. State, 90 So. 2d 629, 631 (Fla. 1976); Ballard v. State, 923 So.2d 475, 482 (FLA 2006).

As to the abduction hypothesis, the trial court granted the judgment of acquittal as to felony murder based on insufficient evidence of the underlying felonies of kidnapping and sexual battery. Appellee's abduction speculation is based on broken branches and disturbed pine needles. The body was found in an area known as a "dope hole" because of prostitution and narcotics T787. The area was well-traveled with paths T801. The disturbances could be the result of people going back and forth between the road and the dope hole. Also, there was no evidence that Lulu had been dragged. There was no evidence of a road rash, or any rash, on the feet one would expect if she had been dragged T1250. There was no trauma to the body that would indicate a struggle T1250. There was a small superficial abrasion to her face with a small amount of blood. However, the prosecution experts testified that this was so insignificant that it was not evidence of any violence[2] T1227.

As to the forced sexual intercourse, again the trial court granted the motion for judgment of acquittal T1264-65. Dr. Diggs specifically testified that he looked for evidence of

[2] Dr. Diggs testified the abrasion could have been caused by merely walking through a wooded area T1248.

forced sexual activity but there was none T1249.3 Dr. Diggs also specifically testified that there was no trauma to the body that would indicate a struggle T1250. In summary, there simply was insufficient evidence Appellant abducted and forcibly forced Lulu to have sex.4

Appellee claims that there was direct evidence that Appellant killed Lulu. However, Appellee fails to cite to any direct evidence. In Davis v. State, 90 So.2d 629 (Fla. 1956), this Court defined direct evidence as that to which the witness testifies to his own knowledge as to the facts in issue.

> Direct evidence is that to which the witness testifies of his own knowledge as to the facts at issue. Circumstantial evidence is proof of certain facts and circumstances from which the trier of fact may infer that the ultimate facts in dispute existed or did not exist. The conclusion as to the ultimate facts must be one which in the common experience of men may reasonably be made on the basis of the known facts and circumstances.

90 So. 2d at 631. The only direct evidence presented at trial was Appellant's statement denying that he killed Lulu. Appellant's statement came months after the night in question.

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3 Also, there was no indication of trauma to the rectal or vaginal areas T1249.

4 Appellee's hypothesis borders on the bizarre. The condom wrapper was, far from the road T871. Appellee's hypothesis would encompass Appellant unwrapping and putting on a condom with one hand while abducting, undressing, and assaulting what is described as a physically fit 150 lb. woman with the other hand. There would also be no sign of struggle or resistance. The hypothesis is speculative.

Naturally, when appellant was first asked about the night he did not go into the details. The more appellant thought about the night—the more details he was able to remember. The core of appellant's statement was that he had consensual sex with Lulu, but did not kill her. There were no material inconsistencies in appellant's statement. See Castillo v. State 705 So.2d 1037, 1038 (Fla, 3rd DCA 1998) (conviction reversed where Castillo gave varying accounts of the event "although inconsistent with one another, were tales of sex, drugs, jealousy and rage"); Andrews v. State, 577 So. 2d 650,653(Fla. 1st DCA 1991)(inconsistencies relied on by state were immaterial). Thus, no direct evidence of guilt was presented.

On pages 12-13 of its answer brief Appellee raises a number of inferences to claim that Appellant killed Lulu. However, stacking inferences to speculate that a defendant is guilty is not permissible. See Miller v. State, 770 So. 2d 1144, 1149 (Fla. 2000) ("the circumstantial evidence test guards against basing a conclusion on impermissibly stacked inferences"); Gustine v. State, 86 Fla. 24, 28, 97 So. 207, 208 (Fla. 1923) (conviction reversed because {"only by pyramiding assumption upon assumption and intent upon intent can the conclusion necessarily for conviction be reached"); Brown v. State, 672 So. 2d 648, 650 (Fla. 4th DCA 1996) ("circumstantial evidence is

insufficient when it requires pyramiding of assumptions or inferences in order to arrive at the conclusion of guilt"); Collins v. State, 438 So. 2d 1036 (Fla. 2d DCA 1983) (pyramiding of inferences lacks the conclusive nature to support conviction).

In this case it is undisputed that Appellant had sex with Lulu. The key is whether the state's evidence proves Appellant killed Lulu during sex to the exclusion of Appellant having sex with her earlier and someone else killing Lulu afterwards. In Ballard v. State, 23 So.2d 475 (Fla. 2006), this Court reversed a conviction where print evidence incriminating Ballard but there existed an inference that the print was placed at the scene earlier and someone else committed the murder:

> We find that the present case is similar to Cox in that the State's evidence, while perhaps sufficient to create some suspicion, is simply not strong enough to support a conviction. See also Jaramillo v. State, 417 So.2d 257 (Fla.1982) (finding insufficient evidence to support a murder conviction when the defendant's fingerprints were found at the murder scene but the State could not prove that the prints were left at the time of the murder and was unable to refute the defendant's hypothesis that he had left the prints earlier when helping the victim's nephew straighten the garage).
>
> * * *
>
> Ballard's hypothesis of innocence at trial was that he was not guilty, and that another individual, including perhaps a member of the gang that had shot into Jones and Patin's apartment a week prior to the murders, or some other unknown assailant, committed the murders. He further contends that any evidence of his presence in the apartment, such as a hair or fingerprint, is equally as susceptible to an inference that it was

> left there during one of his numerous innocent visits to the premises as it would be to an inference that it was placed there while he was committing the charged crimes.

923 So. 2d at 483 (emphasis added).

In this case while the inferences may create suspicion, the stacking of inferences cannot be used to compel a conviction.

The primary inference Appellee seeks to make is that Lulu id not rise from the spot where her body was found after having sex, therefore inferring Appellant killed Lulu. This involves stacking one inference upon another inference. One inference is that Lulu was killed at the spot her body was found.[5] Then one also must infer Appellant was the person who killed her as opposed to someone else.

The inference that Lulu was killed where her body was found is not supported by the evidence. The evidence was that she was killed somewhere else and then dropped off after she was dead. This would explain lack of evidence of rash on her feet from dragging her and the lack of signs of a struggle. This would also explain why the usual signs of strangulation (breaking of thyroid cartilage and hyoid) by a large man (Appellant) were not present T1223-24.

[5] When Lulu's body was turned over pine needles were found on her back T827. There was no dirt on her back T827. However, dirt was found on her shorts that she was not wearing T846. Thus, it seems that Lulu was killed in an area with dirt while wearing her shorts and later transported to the scene where her body was discovered.

In order to infer that Lulu did not rise after sex with Appellant, Appellee relies on numerous other inferences. This is an impermissible stacking of inferences. In addition, the inferences do not infer Appellant killed Lulu. Appellee's inferences are as follows:

1. Fecal matter on the T-shirt was consistent with a man wiping his penis on it.

This evidence requires the stacking of numerous other inferences to infer guilt.

There was no testimony that the fecal matter on the T-shirt was not consistent with causes other than an erect penis of a man. One must infer this cause to the exclusion of other causes which were not eliminated.

Even if one infers the wipe came from an erect penis it was not shown that the wipe came from Appellant's penis. Semen was also present with the fecal matter. Two parts of the alleged wipe had semen exclusively belonging to husband Oscar. One part was a mixture of Oscar and Appellant. Thus, the inference is that the wipe belonged to Oscar and not Appellant.

In fact, Mr. Ritzline's testimony indicated that Oscar (and not Appellant) wiped his penis with the semen and fecal stains onto the dead woman's T'shirt:

> Q: But we don't know what member was wiped on the T-shirt, do we:

> A:(Ritzline): That's true, except for the fact to indicate the semen that's on the tip area, which is, number one stain, because I said it looked like it's a mixture of Oscar and defendant. And then you've got the two other areas that don't have defendant at all, it's got all Oscar, stains two and three.

T1174 (emnphasis added).

Furthermore, Appellee claims that the killer took off Lulu's T-shirt and in the process turned it inside out. The semen found on the inside part of the T-shirt belonged exclusively to Oscar.

In addition, the inference that the fecal wipe cam from the erect penis of Appellant faces another obstacle. Appellant used a condom. Although Appellant withdrew from the condom as he withdrew from Lulu, thus the alleged wipe was more likely to come from someone other than Appellant.

Finally, even if one infers the fecal matter is from a wipe (rather than inferring another cause) and inferring the wipe belongs to Appellant (rather than inferring someone else who did not use a condom) one must still infer that it was the killer who left the wipe. However, there was no showing that the wipe was left by the killer. The stacking of inferences to conclude Appellant was the killer is without merit.

2. The shorts did not have fecal matter on them from anal sex but did have semen on them.

This is true. However, it does not prove Appellant killed Lulu. There is no reason to believe that fecal matter would be

on Lulu's shorts. None of the witnesses testified they would expect fecal matter to be on the shorts. Further, the state's experts could not eliminate the condom being located up the anal cavity of Lulu when she was alive T1171, 1250. Thus, fecal matter would have been prevented from being on the shorts.

Also, the evidence showed that Appellant's semen was found on the inside of the Lulu's shorts and on the inner pocked lining of Lulu's shorts. The state expert testified that the stain on the shorts was a transfer stain from the pocket area T1138, lines 2-9. This is consistent with Lulu putting on the shorts after having sex with Appellant and pulling the shorts on with the pocket flipping over and touching the inside of the shorts. There would be no semen on the shorts, nor transfer stain, if the state's hypothesis that Lulu never moved after sex with Appellant were true. Rather, the short evidence is consistent with Lulu dressing after sex with Appellant.

3. The panties did not have Appellant's semen on them.

Appellee infers from this Appellant had to have killed Lulu. The gist of Appellee's inference is that if Lulu had put on her panties after having sex with Appellant, his semen would be in her panties, but since semen was not found in Lulu's panties he must have killed her. There is no testimony supporting such speculation. The evidence shows that Lulu's panties were soaked with urine. There is no evidence as to when this occurred.

Lulu had been drinking heavily and taking drugs. Lulu could have lost control and urinated before she had met Appellant. Lulu may have decided not to wear the urine soaked panties. Even if it is assumed that Lulu decided to wear the panties, there is no evidence showing that Appellant's semen would necessarily travel to the panties. See Nickels v. State, 106 so. 479,488(Fla. 1925)(expert testifies that depending on degree of penetration "constructive vaginal muscle" tends to hold semen inside vagina). Also, Appellant used a condom. Further, a lot of other inferences would have to be made to infer that Appellant's semen should be in the panties.6 Thus, the fact appellant's semen was not found in the panties does not prove he killed her.

4. A condom with Appellant's semen was found partially inside Lulu's anal cavity. This does not show Appellant killed Lulu. As appellant indicated in his statement, the condom was left inside Lulu as he withdrew from her. The medical examiner could not tell where the condom was prior to Lulu's death. Lulu had been drinking heavily and a large amount of drugs were found in Lulu's blood T1706, 1714, 1715, 1716; SR371, 203. The point is that Lulu's senses and judgment were so diminished that

6 Dr. Diggs testified that the condom could have been inside the anal cavity and later forced out by gasses or other natural functions T1251, 1253. Dr. Diggs testified that it is mere speculation as to how the condom got to the opening T1254.

either she did not care about the condom or was not aware of the condom. The condom does not prove Appellant killed Lulu. Under the circumstances of this case, the condom probably creates more questions than it answers.7

5. The minute amount of Appellant's blood on Lulu's shirt. Appellee speculates that such minute blood must be the result of violence between appellant and Lulu. However, the State's expert testified because there was "such a small quantity" of blood it would not constitute evidence of a struggle or violence T1168. The expert testified the blood was of no significance T1227. Appellee also claims the fact that the blood was not smeared, infers Lulu did not wear the shirt after sex with appellant, and further infers appellant's guilt. First, there was no evidence whether Lulu wore the shirt after sex with Appellant. Second, the two miniscule droplets of blood could have dried in 10 minutes and Lulu could have then put on the shirt without the droplets smearing. Finally, the fact there was no smearing is inconsistent with the prosecution's theory that Appellant's bleed on the T-shirt while he and Lulu were in a violent struggle – in such a situation one would expect smearing. The stacking of these inferences doesn't even help

7 Ritzline testified a DNA semen sample could only exist in the anal cavity for 1-2 hours. The DNA sample from the tip of the condom in the anal cavity was taken at approximately 9:30 a.m. Thus, the placement of the condom in the anal cavity would be at 7:30 a.m. – about the time the body was discovered.

the state’s case.

6. Appellee claims one can infer Appellant killed Lulu because he admitted having sex with her in the woods just before she was killed. This claim is based on inaccurate facts and, even if true, does not show Appellant killed Lulu. Appellant’s statement explained that when leaving Lulu he observed her in the process of dressing. This was an area of prostitution and drug use – it was not an isolated area. It would not be improbable that someone else, probably someone unsavory, could encounter Lulu at the area known as a dope hole. Thus, under the circumstances of this case this inference is weak even when stacked with the other inferences. Moreover, this inference is built on other inferences. Some of which are not supported by evidence. Appellant did not state he had sex where Lulu's body was found. The condom wrapper was found at the roadside and not at the dope hole where the body was found. Also, appellant never gave a timeline as to the night/morning in question. After all, Appellant was referring to a night months before. One would not expect an exact time under the circumstances. Finally, the medical examiner didn't even nail down the time of death. Dr. Diggs gave the ballpark figure of the time of death. This was based on the drop in body temperature to T1234. However other things could impact the drop in body temperature. There was also testimony that the mixture of DNA found on the tip of the

condom inside the anal cavity which could only survive for a period of 1 or 2 hours. Since the condom was removed and proximally 9:30 a.m.,anal sex would have to occur between 7:30 and 8 a.m. Thus, one would have to conclude that anal sex occurred some six hours after the death, or there were problems with ascertaining the time of death.

7. Appellant admitted he was scratched by Lulu. This does not prove violence. Appellant's statement indicated that he had been accidentally scratched T1014-15. The so-called scratch was casual. There was no evidence of forced sexual activity. T1249. The scraping under Lulu's nail was not significant. Expert Ritzline testified if there was a real scratch there would be an accordion effect as the cells were scraped. Ritzline did not see that from the nail scraping T1163, lines 18-20. Violence cannot be inferred from the accidental and insignificant casual scratch.

8. Appellee infers that a single hair from Appellant infers appellant killed Lulu. Appellee neglects to mention that four other hairs not matching appellant were also found on Lulu. The hair does not prove appellant killed lulu. Appellant’s hair could have come from Lulu's clothes when they had consensual sex. T1158. The hair could have been there any amount of time. T1150. It does not prove Appellant was the killer. The bottomline is the evidence is not in dispute that appellant was

with Lulu and had sex with her. Appellant's statement to the police corroborates this fact. However, to speculate that appellant sexually abused and murdered Lulu amounts to an improper pyramiding and stacking of inferences.

POINT II

THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ESSENTIAL ELEMENT OF PREMEDITATION.

Appellee does not dispute that there was no motive, or any of the other aspects of premeditation, that support a finding of premeditation. Instead, Appellee claims that strangulation as a matter of law proves premeditation. Appellee does not dispute that strangulation is impulsive act. Nor does appellee dispute this court's recognition that the mere act of strangulation is not sufficient to prove premeditation. See Hoefert v.State, 617 So.2d 1046(Fla.1993)(premeditation is not sufficient by evidence of strangled female found partially nude); Green v. State, 715 So.2d 940 (Fla. 1998)(evidence that victim manually strangled and stabbed three times insufficient to prove premeditation).

In Carpenter v. State, 785 So.2d 1182,(Fla. 2001) this court also recognized that neck compression lasting for 2 or 3 minutes was insufficient for premeditation rejecting the State's argument on premeditation:

> **As for premeditation, however, we determine that the State failed to present sufficient evidence to warrant the trial court's submission of Carpenter's case to the jury on that theory.** … During the guilt phase, the State presented evidence that Carpenter had arranged for the "party" at

> which Powell was killed, and the State also presented evidence that Powell died as a result of blunt trauma and neck compression, **with the neck compression requiring total occlusion of the blood vessels in Powell's neck for two to three minutes to cause her death**… In *Hoefert [v. State*, 617 So.2d 1046, 1048 (Fla.1993)], we were unable to find evidence sufficient to support premeditation in a situation in which Hoefert had established a pattern of strangling women while raping or assaulting them. Evidence was presented in that case indicating that the homicide victim, found dead in Hoefert's dwelling, **was likewise asphyxiated**. Despite the pattern of strangulation, the discovery of the victim in Hoefert's dwelling, and efforts by Hoefert to conceal the crime, this Court found that **premeditation was not established**. *Hoefert,* 617 So.2d at 1049. In this case, there is no evidence that Kirkland had established a pattern of extreme violence as had Hoefert. A comparison of the facts in *Hoefert* and the instant case requires us to find, if the law of circumstantial evidence is to be consistently and equally applied, that the record in this case is insufficient to support a finding of premeditation. *Id.* at 735; *see also Green v. State,* 715 So.2d 940, 944 (Fla.1998) (rejecting State's argument that the nature of victim's wounds, which included strangulation, supported a finding of premeditation, relying on this Court's decisions in *Kirkland* and *Hoefert*)…. **While Carpenter's version of the events may not be true, the evidence does not exclude the reasonable hypothesis that Powell was killed, without premeditation, after she rebuffed sexual advances** made by Carpenter and Pailing. Accordingly, we determine that the trial court should have granted Carpenter's JOA motion with regard to only the premeditation theory of first-degree murder.

785 So. 2d at 1196-1197 (emphasis added).This court rejected the State's argument on premeditation noting that in the other cases there was evidence of strangulation and other evidence showing premeditation:

> The State's reliance on our decisions in *Holton* and *Hitchcock* is misplaced here because even though both of those cases involved a strangulation death, **there were other factors present in those cases that supported a finding of premeditation.** *See Holton,* 573 So.2d at 289-90

(involving defendant who had fresh scratch marks on his chest the day after the murder and victim with long fingernails, suggesting that a struggle occurred which belied the defendant's assertion that the killing was accidental); *Hitchcock*, 413 So.2d at 745 (finding that defendant's statement to jail mate that he choked the victim, took her outside, then choked her again-all to quiet her-supported a finding of premeditation).

785 So. 2d at 1197 (emphasis added). In the present case it is undisputed that other factors were not present. The evidence was insufficient to prove premeditation.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS JUROR NEESE.

Appellee's primary argument is that Appellant's cause challenge was unpreserved and without merit. Appellee has created a strawman argument. The issue below involved Appellant's moving to dismiss juror Reese and explaining he may have used a peremptory challenge if he had known that juror Reese knew witness Hall T991. Appellee does not dispute that this issue was preserved.

Appellee claims that the nondisclosure of juror Neese knowing witness Hall was not material. Appellee offers no basis for such a claim. Obviously, a juror knowing a state's witness is a relevant and material matter relating to jury service. The nondisclosed information would be relevant to defense counsel's decision-making during jury selection. Thus, the nondisclosed information was material.

Appellee also claims that there was no concealment because

the nondisclosure was not intentional. However, as fully explained in pages 28 and 30 of the Initial Brief the question is not whether the disclosure is intentional. The focus is not on the moral culpability of the juror-the focus is on whether the non-disclosure prevents counsel from making an informed judgement as to jury selection. The bottom line is that juror Neese did not disclose that he knew witness Hall.

Appellee also claims that defense counsel was not diligent because he did not ask Neese whether Hall was a relative or close relation to Neese. The prosecutor made no such claim below. However, Neese was not a relative or close relation to Hall. Thus, such a question would not have resulted in the disclosure. Nor should counsel be required to request that all witnesses be paraded into the courtroom for viewing by the jurors. In this case defense counsel sought to dismiss the juror as soon as the information was disclosed and the state never claimed that Appellant should have known about the nondisclosure at an earlier time.

Finally, Appellee claims that the scope of review is abuse of discretion for a cause challenge. As noted earlier, this issue does not involve a cause challenge. There is no dispute that the standard of review is *de novo* for the instant issue because the trial court has no discretion when the three-part test is met. Appellant relies on his Initial Brief for further

argument on this point.

POINT IV

THE TRIAL COURT ERRED IN ALLOWING STATE WITNESSES TO TESTIFY ABOUT STAIN PATTERN INTERPRETATION.

Appellee does not dispute that this evidence would not be harmless. However, Appellee does have a different opinion as to preservation, the standard of review, and the merits. Each of these will be discussed below.

PRESERVATION

Appellee claims that this issue was not preserved due to lack of objection. This is not correct. Appellee lodged his objection stating "that's speculation, judge, they can't say that's the same wipe" T1119-1120.

It would exalt from over substance to require magic words to preserve an issue for appeal. The purpose of an objection is to put the trial court on notice of the complaint so that it has the opportunity to correct the error. In the present case from the context of the examination and objection the trial court was aware of the objection. Such objections have been recognized to preserve the instant issue for appeal. *See* *Fassi v. State*, 591 So. 2d 977, 978 (Fla. 5th DCA 1991) (handwriting experts's testimony comparing wall graffiti to handwriting sample was inadmissible because if "is too speculative"); *Ruth v. State*, 610 SO. 2d 9 (Fla. 2d DCA 1992)(opinion of expert was "pure speculation and, as such, was inadmissible"). Without some

basis-such as personal knowledge or expertise-Ritzman's opinion that the multiple stains on the T-shirt came from a single wipe was pure speculation. Appellant made the proper objection.

STANDARD OF REVIEW

Under any standard of review, the speculation of Ritzline should not have been admitted. Appellee claims that this court should give deference to the witnesses determination of the scope of his testimony. Appellee's Brief at. However, Appellee also advocates that this issue is controlled by the rule of law. See Appellee's brief at 26-27.

The question is whether the Appellate Court should defer to the law (de novo review) or defer to the judgment of the trial court discretion). "Discretion" is defined as the power of a trial court to determine questions to which no rule of law is applicable and are controlled by the personal judgment of the court. BOUVIER'S LAW DICTIONARY, 804 (8TH ed. 1914).

The standard of review to be utilized by the trial court depends on the nature of the issue presented. If the issue is based on the superior vantage point of the trial court, the appellate court will give defense to the personal judgment (discretion) of the trial court. If the issue involves the application of a rule of law, the rule of law and not the trial court's personal judgment- is deferred to. The rule of law, as opposed to personal judgments, gives parties predictability as

to what their facing.

In the present case there was no dispute as to material facts involving the admission of the testimony. The trial court had no special vantage point to justify the exercise of his personal judgment. As Appellee concedes in its brief, the instant issue involves deference to a rule of law (and not the discretion of the trial court):

> "Florida Statutes section 90.702
>
> governs expert testimony"
>
> **********
>
> "The annotated code specifically says..."
>
> **********
>
> "A general rule of law concerning...."

Appellee's Brief at 26-27.

Thus, although mimicking that the standard of review is abuse of discretion, Appellee admits that the issue involves applications of rules of law. Thus, the issue controlled by law and discretion.In any event, the witness does not "decide for himself" the scope of his testimony.[1]

THE MERITS

Appellee tactfully avoids providing a basis for the opinion

[1] Appellee's Brief at 27. Appellee claims that the rule of law is that the witness: decides for himself" the scope of his testimony. However, Appellee cites not authority for such a proposition. Nor is there any authority to support that an appellate court should defer to the discretion of a witness.

that the multiple stains on the T-shirt came from a single wipe. Appellee only states that Ritzline was an expert in "DNA analysis and forensic science." Appellee cites to no portion of the record to support its claim. The record shows that Ritzline only area of expertise was laid out in the field of DNA testing and analysis T1065-1089. In fact, the prosecutor below emphasized that Ritzline's sole job was to match DNA and nothing else. T1376. Thus, it was inadmissable speculation that multiple stains came from a single wipe.[2]

PREJUDICE

Appellee does not dispute that the error was not harmless. The prosecutor utilized the improper evidence in closing argument to explain its case T1360.

POINT V

THE TRIAL COURT ERRED IN ALLOWING A STATE WITNESS TO SPECULLATE, BASED ON HIS EARLIER SPECULATION THAT MULTIPLE STAINS ON THE T-SHIRT OF LULU WERE THE RESULT OF A SINGLE WIPE, THAT THE MULTIPLE STAINS WERE THE RESULT OF A HYPOTHESIS CALLED THE "PLUNGER OR PISTON EFFECT."

Appellee never discusses Ritzline's testimony about the plunger/piston effect. Ritzline's testimony about the plunger/piston effect deals with the placing of an item in the vaginal cavity and the resulting

[2] There was no evidence presented that showed a knowledge or training in stain or blood pattern interpretation.

effects T1121.

Appellee does not dispute that Ritzline's only expertise was laid out in the field of DNA testing and analysis T1065–86. It was inadmissible speculation that the multiple stains were a product of the so-called plunger piston effect. See Fassi v. State, 591 So. 2d 977,978(Fla. 5th DCA 1991) (handwriting experts testimony comparing wall graffiti to handwriting sample was inadmissible because it "is too speculative"); Ruth v. State ,610 So.2d 9 (Fla. 2d DCA1992)(opinion of expert pure speculation and as such was inadmissible).

Appellee does not dispute that the error was harmful to the defense. The prosecution utilized the improper evidence in closing argument in a way to help the prosecution's case T1359.

Appellee claims the inadmissible speculation was not preserved. This is not true. Defense counsel complained, "Objection. Lacking foundation and speculation, Judge". T1121. The trial court overruled the objection T1121. Appellant's objection preserved this issue. See Fassi v. State, 591 So.2d 977, 978(Fla. 5th DCA 1991)(handwriting expert's testimony comparing wall graffiti to handwriting sample was

inadmissible because it “is too speculative”); Ruth v. State,610 So.2d 9,11-12(Fla. 2d DCA 1992)(opinion of expert was pure “speculation and, as such, was inadmissible”)

POINT VI

THE TRIAL COURT ERRED IN OVERRULING APPELLANT’S MOTION TO STRIKE THE PROSECUTOR’S ARGUMENT THAT APPELLANT SEXUALLY ASSAULTED LOURDES CAVAZOS A.K.A. LULU.

Appellee essentially argues the trial court has unbridled discretion in deciding the scope of closing argument. However, the trial court's discretion does not extend to permit improper argument. See Gore V. State, 719 So.2d 1197, 1200 (Fla. 1998).

Appellee claims that it was legitimate and proper for the prosecutor to argue that “Lulu was dragged from the street, assaulted, and murdered” because there was an inference of sexual assault in kidnapping. Appellee's Brief at 30. Appellee misses the point. It is not legitimate to argue sexual assault after the trial court had taken both the felony and felony murder off the table by granting the judgment of acquittal. See cases cited on pages 34 through 35 of the initial brief. At that point, the allegation of a sexual assault was not relevant.

As appellee concedes in its answer brief at page 32:

> “Here, the court granted Bigham's JOA motion for the counts of sexual battery in kidnapping. Those charges, and the issue of proving them beyond a reasonable doubt, was no longer germane or before the jury. The court's ruling was eminently reasonable...”

Appellee claims the prosecutor merely wanted to show appellant had sex with Lulu after she was dead. This is not a legitimate argument. The prosecutor can not argue to the jury that appellant committed the uncharged crime of having sex with a dead body.

The prosecutor's purpose was to unfairly prejudice appellant in front of the jury and not to discern the truth. In its opening statement, the prosecutor argued appellant had taken Lulu into the woods to commit a sexual battery--the very charges that were JOA'd T770. There was no surprise evidence at trial. It is only after the JOA the prosecutor changed its hypothesis in order to continue telling the jury Appellant had sexually assaulted Lulu. The prosecutor's argument of uncharged crimes to end run the JOA was not legitimate.

Appellee does not dispute appellant's harmless error analysis on pages 36 through 37 of the initial brief. Arguing crimes which have been JOA'd, or which have not been charged, is prejudicial. Compare Cole v.State, 356 So.2d 1307 (Fla.2nd DCA 1978) (reversible error for State to refer to offense for which JOA is granted); Price V. State, 816 So.2d 738 (Fla.3rd DCA 2002),(comments by prosecutor violated spirit of order in limine regarding prior robbery).

POINT VII

THE TRIAL COURT ERRED IN PROHIBITING APPELLANT FROM ARGUING TO THE JURY THAT THE STATE DID NOT PROVE THE

CHARGES OF SEXUAL BATTERY AND KIDNAPPING.

Appellee claims the trial court has unbridled discretion to limit proper closing argument. Appellant submits the trial court's discretion is limited to misleading argument. No claim has ever been made that appellant's arguments were misleading.

It is well settled that once party makes a claim in its opening statement, the opposing party may, comment on the failure to prove its contentions. See Austin v. State 700 So.2d 1233 (Fla. 4th DCA 1997)(comment in closing argument in prosecution for throwing deadly missile into a building that there was no testimony from the stand that defendant did not throw rock did not constitute an impermissible comment on defendant's failure to testify or mislead jury as to burden of proof; rather, comment was response to defense assertion during opening statement that defendant did not throw rock); Mitchell v. State, 711 So.2d 596, 597 (Fla. 3d DCA 2000).

In fact, appellee does not claim appellant's argument would be improper. Instead, appellee argues the restriction of closing our note was not harmful because appellant was not restricted from challenging the facts. However, appellee does not dispute appellant's explanation of the harm on page 38 of the initial brief. Also, the prosecutor told the jury appellant had kidnapped and raped Lulu prior to killing her. The defense

should been permitted to argue these charges were not proven. Appellant relies on the initial brief or for the further argument on this point.

POINT VIII

THE TRIAL COURT ERRED IN OVRRULING APPELLANT'S OBJECTIONS TO THE PROSECUTOR INFORMING THE JURY THAT THE STATE DOES NOT SEEK DEATH IN OTHER MURDER CASES.

Appellee claims the only explicit exclamations by the prosecutor of the personal believe that the defendant is guilty is prohibited. Such is not true. It is improper to implicitly give a personal believe that the defendant is guilty. In Brooks v. State, 762 So.2d 879 (Fla. 2000)this court found the statement "I would submit now that the State does not seek the death penalty in all first degree murders because it is not always proper" was improper. Appellee claims such an improper comment during closing argument, magically converts into a proper comment--if made to the jury in jury selection. Jury selection is not carte blanche to poison the jury with improper comments. Improper comments are still improper comments--regardless when they are made to the jury.

Appellee claims the error was harmless, because juror Dubberly never served as a juror. However, the improper comment was made in front of the entire panel and not just Dubberly. Also, appellee claims that the prosecutor was merely expressing or explaining the distinction between the guilt and penalty

phase. However, the comment, like in Brooks, informs the jury that this case is unlike other cases were the State does not seek death. It cloaks the states case with legitimacy as a bona fide death penalty prosecution. Informing the jury that the State selected this case as deserving the death penalty while not selecting other murder cases was improper and prejudicial.

POINT IX

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECITON AND ALLOWING THE STATE TO ARGUE FACTS NOT IN EVIDENCE.

Appellee addresses this issue on page 31 of its answer brief. Appellee does not dispute the prosecutor argued facts not in evidence, but claims the jury "might" have reached the same conclusion with other evidence. A harmless error test is not whether the jury might have considered other evidence. The interjection of facts not in evidence could only mislead and distract the jury from considering the true evidence. Appellant indicated he had consensual sex with Lulu. Obviously, the improper comments that the Dr. Diggs had testified differently was extremely detrimental to the defense. The error denied appellant due process and a fair trial.

POINT X

THE TRIAL COURT ERRED IN CONDUCTING PRETRIAL CONFERENCES IN APPELLANT'S ABSENCE.

Appellee concedes that there were five absences from pretrial hearings were appellant did not personally waive his

presence. Appellee labels these as docket calls. However, the pretrial hearings were not mere docket calls. One hearing involved whether the state would be allowed to invade appellant's person and take as blood. ST6. Another hearing involved the waiver of appellant's right to speedy trial. ST2. Appellee's labeling these hearings as uncontested illustrates the problem and the prejudice. Appellant was not present to contest the withdrawal of blood or waiver of speedy trial. These are his rights--not the attorney's rights.

In addition, Appellee claims that defense counsel may waive his clients present. In other words, there can be an implicit waiver. However, to be a valid waiver it must be affirmed personally by the defendant. See initial brief at pages 42 through 43.

POINT XI

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO OLIVIA CAVAZO'S TESTIMONY THAT SHE WOULD HAVE HEARD JOSE GUILLERMO A.K.A. OSCAR IF HE HAD LEFT THE HOUSE.

Appellee does not dispute the merits of the issue as raised on appeal, but claims that a different issue should be analyzed. Appellee claims that the issue involves Cavazos's opinion regarding her physical surroundings and what she perceived was not preserved. This is not the issue on appeal. The issue on appeal is whether a witness may speculate as to what action she would or would not have taken if something did

or did not occur. As explained in the initial brief at pages 44 through 45 this issue was preserved. Again, Appellee has not disputed that a witness may not speculate in such a manner.

Finally, Appellee claims the error is harmless. However, as explained on pages 45 through 46 of the initial brief the prosecutor used the improper testimony against appellant. Instead, it Appellee claims the evidence was overwhelming. Such a claim is without merit. As explained in detail in pages 1 through 12 of this reply brief, the evidence was far from overwhelming. For example, throughout the answer brief, Appellee claims "there was overwhelming evidence showing that Lulu was dragged from the street to the seclusion of the wooded lot where Bigham killed her as he finished having sex with her" Appellee's brief at 45, 42 -- 43. However, the trial court granted the judgment of acquittal as to kidnapping and sexual battery which Appellee claims provides the overwhelming evidence of guilt. Also, the harmless error test is not a "sufficient" or "overwhelming" evidence test. Rather, the test is whether the beneficiary of the error can prove that the error did not contribute to the verdict. State v. Lee, 531 So.2d 133,136 – 137 (Fla. 1988). As noted in the initial brief, this evidence was used by the prosecutor in its closing argument, The error was not harmless.

POINT XII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION AND ADMITTING HEARSAY STATEMENTS THAT JOSE GUILLERMO AND OLIVIA CAVAZOS HAD IDENTIFIED FLIP FLOPS THAT WERE FOUND NEAR THE SCENE WHERE THE BODY WAS FOUND.

Appellee claims a trial court has unbridled discretion in admitting hearsay. However, this is not true. See Burkey v. State,922 So.2d 1033 (Fla.4th DCA 2006) question of whether evidence falls within the statutory definition of hearsay is a matter of law subject to de novo review); Johnston v. State, 863 So.2d 271, 278 (Fla. 2003) (abuse of discretion to make ruling contrary to evidence code).

Appellee concedes that the out-of-court statements were hearsay, but claims a hearsay exception "in the interests of judicial economy". Appellee's Br. at 44. However, there is no such exception to the hearsay rule. The fact is that none of the witnesses with personal knowledge testified that the flip-flops belonged to Lulu. There was only the hearsay testimony of Detective Hall. In fact, the flip-flops probably did not belong to Lulu. This was an area known as a drug hole frequented by transients. The flip-flops could have belonged to anyone. It was error to allow the state to prove the flip law belonged to Lulu through the hearsay evidence. AS explained in the previous point the errors cannot be deemed harmless on an allegation of overwhelming evidence, Appellee does not dispute the prosecutor utilized the hearsay evidence to argue that Lulu struggled as

she was taken near the road. T1337. Thus, the error was not proven by Appellee to be harmless.

Contrary to Appellee's representation, there was no evidence of a struggle. Dr. Diggs testified there was nothing to indicate a struggle 1250. There was no road rash on Lulu's feet. One would expect to find this if Lulu had been dragged against her will as hypothesized by the prosecution T1250. Lulu only had a superficial abrasion which could have been caused by walking through a wooded area T1248.

POINT XIV

THE TRIAL COURT ERRED IN GRANTING THE STATE'S CAUSE CHALLENGE TO POTENTIAL JUROR MORRISON OVER APPELLANT'S OBJECTION.

Appellee claims this issue was waived because appellant did not renew his objection before the jury was sworn in. Appellee's Br. at 47. Such a claim is without merit. Renewing the objection would have been a futile act. Morrison had been released as a juror. She was unavailable if the trial court had changed its mind. It is not like a cause challenge had been denied where the renewed objection could later be granted and a remedy could be granted by removing the juror. There was no remedy once the juror was excused.

Appellee claims the trial court properly struck Morrison for cause because she could not be a fair and impartial juror. Appellee's Br. at 49. However, Morrison was excused merely

because she did not like decision judgment of others. This is not sufficient to disqualify someone for cause --especially where Morrison never indicated a problem with following the law and testified she could recommend the death penalty. T450. Morrison indicated that she would fall in the middle of a scale from zero to 10 of those against and for the death penalty T450.

POINT XV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS.

Appellee simply does not address the issue presented. Specifically, the argument on pages 53 to 54 of the initial brief. Appellee relies on his initial brief for further argument.

PENALTY ISSUES

POINT XVIII

APPELLANT WAS DENIED HIS RIGHT TO A RELIABLE CAPITAL SENTENCING AND DUE PROCESS BY THE FAILURE TO INSTRUCT THAT THE FACTFINDER MUST DETERMINE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES.

Appellee combines issues 18 and 19, but does not address issue 18. Specifically, Appellee does not address the principles expressed in State V. Wood, 648 P.2d 71 (Utah 1981), and State V. Rizzo, 833 A.2d 363 (Conn. 2003), at appellants' initial brief at 63 -- 64. Appellant relies on his initial brief for further argument on this point.

POINT XX

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INQUIRE INTO APPELLANT'S PRIOR CRIMINAL RECORD OVER APPELLANT'S OBJECTION.

Appellee claims the trial court has discretion to let the prosecution inform the jury as to the defendant's number of prior convictions. However, there is no case, rule, or statute that allows this.

Appellee claims the number of prior convictions- 12 -was admissible to rebut the mitigation that appellant could adjust while in prison. However, the number 12 does not have such a magical quality. It shows appellant cannot adjust while outside a prison, but that is not in issue. The only true relevance was as a nonstatutory aggravating circumstance.

Appellee finally claims the error was harmless because the jury was aware appellant had multiple convictions. 12 and multiple are not identical. Multiple can be viewed as 2. Certainly, driving a car after 12 beers is not viewed as the same as driving after 2 beers. Likewise, to a jury having 12 convictions is different than 2 convictions. The error was prejudicial.

POINT XXI

THE TRIAL COURT ERRED IN PERMITTING A STATE WITNESS TO TESTIFY WHETHER CERTAIN FACTS WERE MITIGATING.

Appellee argues that the trial court has discretion to allow witnesses to testify whether certain facts are mitigating

because an opinion on an ultimate issue helps assist the trier of fact in rendering a decision. However opinions as to guilt or penalty simply is not information which legitimately assists the jury. Instead, it is impermissible opinion evidence. See Martinez, v State, 761 So.2d 1074, 1079. (witnesses opinion as to guilt or innocence is not admissible such opinion, could unduly influenced jury). Likewise, an expert opinion as to whether certain facts were mitigating is not admissible.

POINT XXII

WHETHER THE COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

Appellee claims that Lulu was conscious and in fear at the time of her death. In support of such claim appellee stacks inference upon inference. Some of the inferences run contrary to the evidence.

Appellee infers that Lulu was conscious when she died. However, if Lulu was conscious at the time of death one would expect some evidence of resistance. The thyroid cartilage and the hyoid bone were not broken in this case as they usually are in strangulations T1223. In other words, this was not evidence of a struggle. In fact, the medical examiner testified there were no signs of a struggle T1250. Appellee claims a “finding that the struggle/ attack commenced near the street was a reasonable inference” Appellee's Br. at 76. However, the trial court rejected such a claim by granting the judgment of

acquittal as to kidnapping and sexual battery. Appellee also claims that Lulu's urination proves she was in fear at the time of her death. However, Lulu had digested a large amount of alcohol and drugs. Her control was in question. The State's expert testified there was no evidence as to when the urination occurred T1252. That was only speculation T1252. Appellee is correct that appellant admitted that Lulu scratched him and there was a very minute amount of blood as a result of a scratch. However, appellant stated there was no struggle and this casual scratch occurred after he was getting up after consensual sex. The State's expert testified that this was so small and so insignificant that it would not constitute evidence of a struggle or violence T1186. The hypothesis of EHAC is built on a stacking of speculations and is not sufficient for EHAC.

POINT XXIV

THE SENTENCE OF DEATH MUST BE VACATED AND THE SENTENCE REDUCED TO LIFE WHERE THE TRIAL COURT FAILED TO MAKE THE FINDINGS REQUIRED FOR THE DEATH PENALTY.

Appellee claims are no cases to support appellant's argument. In Layman v State, 652 So.2d 373 (Fla. 1995) the sentence was reduced to life for failure to meet the statutory required findings. More importantly, section 921.141(3) requires such a finding. Section 921.141(3) requires imposition of life sentence if this finding is not done within 30 days of

sentencing. The Legislature's directive is much better than any on point case. The Legislature's directive should not be overridden by the courts as Appellee impliedly advocates.

POINT XXV

THE TRIAL COURT ABUSED ITS DISCRETION IN ARBITRARILY AND CAPRICIOUSLY FINDING BECAUSE APPELLANT HAS NOT ADJUSTED WELL TO FREEDOM THE MITIGATING CIRCUMSTANCE OF GOOD PRISON ADJUSTMENT DESERVES LESS WEIGHT.

Appellee does not address this issue other than to claim the trial court has unbridled discretion. As explained in the initial brief this is not true. The trial court gave its rationale for its decision. Appellee does not dispute the trial court's reason was incorrect. Instead, Appellee claims its own reason. Appellant will not address Appellees' discretion--it is the trial court's discretion which is under review.

POINT XXVI

THE TRIAL COURT ABUSED ITS DISCRETION IN ARBITRARILY UTILIZING AN IMPROPER CONSIDERATION IN EVALUATING THE MITIGATING CIRCUMSTANCE OF APPELLANT'S CHILDHOOD PROBLEMS.

Appellee does not address this issue other than to claim the trial court has unbridled discretion. As explained in the initial brief this is not true. The trial court gave its rationale for its decision. Appellee does not dispute the trial court's reason was incorrect. Instead, Appellee claims its own reason. Appellant will not address Appellees' discretion --it is the trial court's discretion which is under review.

POINT XXVII

THE TRIAL COURT ERRED IN UTILIZING THE VICTIM'S CHARACTERISTICS AS A NON-STATUTORY AGGRAVATING CIRCUMSTANCE.

Appellee claims the trial court was merely analyzing proposed mitigating circumstance number 48. This is not true. Contrary to Appellee's representation, the trial court gave some weight to mitigator number 48. It was later, after discussing all the circumstances, that the trial court improperly used the victim's character as a nonstatutory aggravating circumstance. Appellant relies on his initial brief or further argument on this point.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should reverse appellant's conviction and sentence and remand with appropriate instructions, or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Reply Brief has been furnished to Lisa Marie Lerner, Assistant Attorney General, Ninth Floor, 1550 North Flagler Drive, West Palm Beach, Florida, 33401-2299 by courier, this _____ day of December, 2006.

_____
Attorney for Eddie Junior Bigham

CERTIFICATE OF FONT SIZE

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

_____
Attorney for Eddie Junior Bigham