IN THE SUPREME COURT OF FLORIDA

WILLIAM DEPARVINE,

Appellant/Cross-Appellee,

v. Case No. SC06-155

STATE OF FLORIDA,

Appellee/Cross-Appellant.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE
INITIAL BRIEF OF CROSS-APPELLANT

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STATEMENT OF THE CASE AND FACTS

On January 28, 2004, a Hillsborough County grand jury indicted Appellant, William Deparvine, for the first degree murders of Richard Van Dusen and Karla Van Dusen, as well as two counts of armed kidnapping,[1] and armed carjacking. (V1:71-74).[2] Pre-trial motions were heard by the Honorable Ronald Ficarrotta, and the jury trial was presided over by the Honorable J. Rogers Padgett. On August 3, 2005, the jury found Appellant guilty on both counts of first degree murder under both the premeditated and felony murder theories, and also found Appellant guilty on the single count of armed carjacking. (V40:3737). After hearing the evidence at the penalty phase proceedings, the jury returned an advisory recommendation of death by votes of 8-4 on both counts. (V41:3930-31).

In 1998, Richard Van Dusen purchased a classic 1971 Chevrolet Cheyenne pickup truck for $16,000. (V33:2514-16). Mr. Van Dusen proceeded over the next few years to put over $8,000 into repairs and customization of the truck.[3] (V33:2548-

[1] The trial court granted Appellant's motion for judgment of acquittal on the two counts of kidnapping during trial. (V37:3109-10).

[2] The direct appeal record consists of 42 volumes and 10 volumes containing exhibits. The State will cite to the record on appeal by referring to the volume number (V__), and then the page number.

[3] In September, 2000, the truck was appraised for insurance purposes at $21,500. (V33:2518-20).

51). Mr. Van Dusen showed the truck in auto shows once or twice a week, almost always winning awards for having the best truck in his class, and sometimes even Best in Show. (V29:1888-90; V31:2292-96). After Richard Van Dusen married Karla in 2000, his involvement in auto shows decreased. (V29:1890).

In February, 2003, Richard Van Dusen advertised his truck for sale for $18,900 (or partial trade). (V35:2793). At about the same time, Mr. Van Dusen entered into a consignment contract with Kruse International, a large auctioneer for automobiles. Mr. Van Dusen placed a reserve price of $17,000 on his truck, and at an auction in March, 2003, the truck did not sell because the highest bid of $15,000 did not reach the reserve price. (V33:2594-99). In the summer of 2003, Mr. Van Dusen advertised his truck for $14,500, and in November of 2003, he again advertised his truck for $13,700 (or partial trade). (V35:2795).

In late October or early November of 2003, Paul Lanier observed Richard Van Dusen pumping gas into his truck and, seeing a “for sale” sign in the truck’s window, began talking to him about the classic truck. (V34:2718-20). Approximately a week before Thanksgiving, Paul Lanier saw the Van Dusens’ truck drive by and followed it to the Van Dusens’ home to enquire

about the truck and their house which was also for sale.[4] (V34:2724-25). Mr. Lanier saw Richard Van Dusen exit the truck from the passenger side and Appellant exited from the driver's side. While Appellant stood by, Mr. Lanier inspected the truck, and eventually offered to buy it for the $13,000 asking price, but told Mr. Van Dusen that he would need about a week to get his finances together. (V34:2728-30). On November 25, 2003, around 5:45 p.m., Mr. Lanier and his girlfriend stopped by the Van Dusens' home and they briefly toured the home, including the pool patio area before leaving.[5] The next day, Mr. Lanier saw televised news reports about the Van Dusens' deaths and walked to their house to speak with detectives.

The State introduced evidence from cell phone records and cell towers indicating the Van Dusens' movement after they left their Tierra Verde home on November 25, 2003, at approximately

[4] The Van Dusens had purchased a house in South Carolina and were in the process of selling their house in Tierra Verde, Florida. (V29:1866; V32:2410-11). Tierra Verde is a small island (1.47 square miles) in Pinellas County, Florida, that had a population of 3,547 in 2000. See generally www.census.gov (information obtained from search of website).

[5] The State introduced other evidence establishing that Richard Van Dusen returned home from work on November 25, 2003, at approximately 4:45 p.m. while driving the couple's Jeep Cherokee (V29:1854-55; V31:2158-59). Approximately an hour later, after Paul Lanier had toured the Van Dusens' Tierra Verde home, Chris Coviello saw Richard and Karla Van Dusen leaving, with Richard driving the classic truck and Karla following in the Jeep Cherokee; there were no other passengers in either car. (V29:1855-56).

5:45 p.m. The evidence established that Richard Van Dusen received a call on one of his two cell phones at 5:45 p.m. near downtown St. Petersburg where Appellant resided. (V33:2558-73). He made two calls on one cell phone at 5:50 and 5:55 p.m. that utilized the downtown St. Petersburg cell tower, and then he had calls between 6:11 and 6:17 p.m. that were in the Clearwater area. (V33:2572-73; V36:3041-42). His final call at 6:37 p.m. utilized a cell phone tower in Oldsmar, Florida. (V36:3048-49).

Karla Van Dusen's cell phone indicated that she began a call at 5:33 p.m. within a mile of the cell tower on Tierra Verde, and her next two calls utilized cell towers in downtown St. Petersburg. (V36:3038-40). Karla's last phone call on November 25th also utilized a cell tower in Oldsmar. (V36:3040).[6] One of Karla's phone calls during this time was to her mother, Billie Ferris. Ms. Ferris testified that, while speaking with her daughter, she heard a car engine and asked Karla if she was in a car. Karla responded that she was "following Rick and the guy that bought the truck. He knows where to get the paperwork done." (V29:1869). Karla informed

[6] The State utilized posterboard exhibits which were not forwarded to this Court showing the cell phone activity and a map of the Tampa Bay area which detailed the victims' movement from their residence in Tierra Verde, through downtown St. Petersburg where Appellant resided, and ultimately ending in Oldsmar where their bodies were found on the morning of November 26, 2003. (State's Exhibits 130, 131, 132, 136, 137, 138, 139, 140).

her mother that the guy was going to buy the truck with cash. (V29:1869).

Approximately 8:30 in the morning on November 26, 2005, the bodies of Richard and Karla Van Dusen were found on a dirt road in a remote area of Oldsmar, Florida. Richard Van Dusen died from a single gunshot wound to the head, while Karla suffered two gunshot wounds to the head as well as two stab wounds in the chest. (V29:1957, 1970-71). Numerous items of value were found on the victims including their cell phone, money, and jewelry. (V29:1905-08; 1932). The Van Dusens' Jeep Cherokee was discovered 1.3 miles away at a local business, Artistic Doors, with a Florida Identification card for Henry Sullivan lying next to the driver's door.[7] The Jeep had significant amounts of blood inside the vehicle and the physical evidence supported the State's theory that the victims were shot while seated in the

[7] The State introduced evidence that Appellant lived at the same apartment complex as Henry Sullivan in May, 2003. Sometime during the summer, Henry Sullivan lost his identification card and had to obtain a replacement. (V32:2369-77; 2415-23). In order to establish that Appellant placed Henry Sullivan's identification card outside the Jeep as a red herring, the State introduced an abundance of evidence establishing that Henry Sullivan, or his brother who had occasionally utilized Henry's name, were not involved in the homicides. Because Appellant does not contest the sufficiency of the evidence to support his murder convictions, see Initial Brief of Appellant at 2, and because the Sullivan brothers were clearly not implicated in the Van Dusens' murders, Appellee will not detail the evidence introduced at trial regarding these individuals.

front seats of the Jeep.[8] In addition to the victims' blood found throughout the Jeep, Appellant's blood was found on numerous spots on the Jeep's steering wheel and DNA testing indicated that it matched Appellant's DNA profile.[9] (V35:2832-47; V36:2927-31, 2965-73).

After the victims' bodies and Jeep Cherokee were discovered in Oldsmar, law enforcement officers began looking for the Van Dusens' 1971 Chevrolet Cheyenne truck. The truck was located on November 27, 2003, parked outside Appellant's apartment complex. (V29:1915-19; V31:2186-89). A subsequent search of Appellant's apartment revealed a file of information relating to the 1971 truck. Officers located a sheet of paper with 14 questions written on it relating to the 1971 truck, including Rick Van Dusen's name and phone number and an asking price of $18,900.[10] (V32:2394-95; Exhibit V2:187). Additionally, Appellant had in

[8] A bullet casing was found in the Jeep and the front windshield was cracked with a bullet fragment found on the dashboard. (V29:2064-68; V35:2806-14). The passenger seat belt had been cut and the knife blade found near Karla Van Dusen could have been used to stab Karla and cut the seat belt. (V29:1981-85; 33:2555-57).

[9] One of the swabs on the steering wheel contained a mixture of both Appellant's and Richard Van Dusen's DNA. (V35:2843-44).

[10] As previously noted, Richard Van Dusen first advertised his truck for $18,900 in February, 2003.

his possession a signed bill of sale for the truck indicating a purchase price of $6,500.[11] (V32:2396).

At trial, Appellant testified in his defense that he purchased the truck from Richard Van Dusen on November 25, 2003. According to Appellant's version of events, he began inquiring about numerous trucks, including the Van Dusens' truck, while incarcerated in a work release center.[12] (V38:3278; V39:3439-40). Appellant testified that during his negotiations with Richard Van Dusen, he was also simultaneously considering buying a different truck from George Harrington. (V38:3280-94).

The State presented evidence from Mr. Harrington that Appellant began inquiring about the truck he was selling in August, 2003. (V32:2328-33). Appellant told Mr. Harrington that he had a mechanic friend in Oldsmar that would inspect the truck and Appellant would pay Mr. Harrington with cash that he

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[11] On November 25, 2003, Richard Van Dusen had a notary notarize his signature on the bill of sale. (V33:2496-99). As will be discussed in more detail in Cross Appeal Issue II, the State was prevented from introducing a statement by Richard Van Dusen to a coworker, Peter Wilson, indicating that he sold the truck for $13,000, but wrote $6,500 on the bill of sale so the buyer would not have to pay the full amount of sales tax on the vehicle.

[12] Appellant had sixteen prior felony convictions and, after being released from a work release center, Appellant obtained a job with a construction company in late April, 2003. (V32:2323-24; V38:3299). For the thirteen years prior to his release, Appellant had not earned any money. (V39:3430). From April 24, 2003 until his arrest in January, 2004, Appellant earned $14,750. (V32:2324-25). Appellant opened a savings account in June, 2003, and his bank statements reflected a maximum amount of $826 prior to the victims' murder. (V33:2613).

kept at his friend's house. (V32:2334-36). When Mr. Harrington informed Appellant that his father would have to follow him to the mechanic's shop so he would have a ride home after he sold the truck, Appellant stated that it was not necessary to involve his father because Appellant or his friend would give Mr. Harrington a ride back to his house. (V32:2334-35). When Appellant was at Mr. Harrington's house looking at the truck in November, he gave Mr. Harrington a blank bill of sale and told him to get it notarized and Appellant would return later and buy the truck. (V32:2338-39). Appellant never returned to purchase the truck.

Appellant testified that he was considering whether to buy Mr. Harrington's truck or Mr. Van Dusen's truck in November, 2003, and that he had obtained the money to purchase the truck by selling a Rolex watch he had obtained while in prison. According to Appellant, he befriended a terminally ill inmate at Everglades Correctional Institution in 2000 who gave him a Rolex watch before he died. Appellant managed to conceal the watch for three years and managed to smuggle the watch out of prison and the work release center by burying it underground.[13]

[13] As will be discussed in more detail in Cross Appeal Issue I, infra, the State was precluded from introducing any evidence surrounding how Appellant allegedly obtained and maintained the Rolex watch while in prison during its case in chief. After Appellant testified, the State presented rebuttal evidence from

(V38:3299-300; V39:3393-99). Appellant testified that he ran a one-day advertisement in the St. Petersburg Times[14] for the Rolex, and the first person to come by bought the watch for $7,000 cash. (V38:3300-01). Appellant did not put the money in his bank account, but instead opted to store it in his apartment. (V38:3301-02).

Appellant testified that he had contacted the Van Dusens a couple of times during the time period in which they advertised their truck (February, 2003 through November 20, 2003). (V38:3302-08). On November 20, 2003, the first day the Van Dusens' advertisement ran listing the truck's sales price as $13,700, Appellant contacted the Van Dusens. He arranged to go to the Van Dusens' Tierra Verde residence to inspect the truck on Sunday, November 23, 2003. (V38:3307-10). Appellant testified that he arrived at the Van Dusens' home early on Sunday morning and Richard Van Dusen was outside with the truck. They spoke for a few minutes and then went for a test drive in the truck, with Appellant driving. Appellant testified that

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corrections officers at the work release center concerning the plausibility of Appellant being able to bury a Rolex watch in the visitor's park area of the facility and the correctional facility's policy of searching inmates and their cells. (V39:3540-51).

[14] The defense presented evidence that the advertisement ran on Sunday, October 26, 2003. A one day advertisement cost almost twice as much as running the advertisement for 30 days. (V38:3259-69).

they went only three-fourths of a mile and they ran out of gas. (V38:3310-13). The two men walked back to the Van Dusens' home and Richard grabbed a can of gas from his garage and they drove back to the truck in the Jeep Cherokee. According to Appellant's version of events, while he was pouring gas on the carburetor, Richard Van Dusen cranked the truck to get it started and Appellant's hand jerked backed and he ripped off a scab from a previous cut on his hand. (V38:3313-18; V39:3403-04, 3421-22, 3427-28, 3464-68). After he cut his hand and wiped the blood off, Appellant stated that he got in the Van Dusens' Jeep Cherokee and followed Richard Van Dusen in the 1971 truck to the gas station and then back to the Van Dusens' residence, where he met Karla Van Dusen for the first time.[15] (V38:3319-20). After the ¾ mile test drive, Appellant agreed to buy the truck for $6500, and gave Richard $1500 as a deposit.[16] (V38:3325-26). According to Appellant, despite the fact that

[15] The State presented evidence that contradicted Appellant's testimony. Peter Wilson testified that he rode in the Van Dusens' Jeep Cherokee two days later and did not observe any blood stains in the immaculately clean car. (V32:2378-81). Paul Lanier testified that he observed Appellant and Richard Van Dusen return from test driving the 1971 truck, with Appellant driving and Richard Van Dusen in the passenger seat. (V34:2725-26). Additionally, Appellant initially told law enforcement officers that, after the truck ran out of gas, he and both Karla and Richard Van Dusen returned to the truck to put gas in it. (V39:3556).

[16] Paul Lanier testified that he offered the victim $13,000 for the truck while Appellant was standing near the truck. (V34:2728-29).

Paul Lanier had just offered to buy the truck for $13,000, Richard Van Dusen agreed to accept Appellant's half-price offer because Appellant had cash. (V39:3449).

Appellant testified that on November 25, 2003, the Van Dusens delivered the 1971 truck to his apartment at about 5:30 p.m. (V38:3329). Appellant got into the truck with Richard and drove to the back of the apartment complex and Karla followed in the Jeep Cherokee. After they parked the truck, Appellant entered into the back seat of the Jeep and gave the Van Dusens $5,000. (V38:3329-37). According to Appellant, another man, matching Appellant's physical description, driving a similar red vintage truck, followed the Van Dusens and gave Richard Van Dusen a ride after the transaction was complete. (V38:3331, 3337-39; V39:3440-43). Appellant testified that approximately 15 to 20 minutes after the Van Dusens left, Richard Van Dusen called Appellant from his cell phone and had a nine second conversation with him regarding oil filters.[17] (V38:3342-43).

The jury rejected Appellant's version of events and convicted him of both counts of first degree murder

[17] As previously noted, the State presented circumstantial evidence from witnesses and cell phone and toll plaza records rebutting Appellant's version of events. This evidence established that the 5:50 p.m. phone call from Richard Van Dusen to Appellant was actually when the victims initially arrived at Appellant's apartment complex, not twenty minutes after they allegedly dropped off the truck.

(premeditated and felony murder) and one count of armed carjacking. (V40:3737). At the penalty phase proceedings, the State presented victim impact evidence and testimony regarding Appellant's prior felony convictions. (V41:3796-837). Barbara White testified that Appellant was her landlord in 1989 and they had a dispute over the repair of some appliances in the home. (V41:3797-803). One night while Ms. White slept in the home with her three children, Appellant poured gas around the house and detached garage and set them on fire. Fortunately, Ms. White and her children were able to escape the blaze without injury. (V41:3797-805). The State also introduced evidence that at the time of the Van Dusens' murder, Appellant was on conditional release for possession of a firearm by a convicted felon and carrying a concealed weapon. (V41:3810-12).

Appellant presented evidence from a mitigation specialist regarding his childhood. (V41:3839-84). The evidence established that Appellant's parents very strict and wanted Appellant to grow up and become a doctor, engineer, or lawyer. Appellant married at a young age without his parents' approval and he eventually fathered four children and graduated from law school. (V41:3856-75). After hearing all of the evidence, the jury recommended death by a vote of 8-4 on each count. (V41:3930).

At the Spencer hearing, the defense presented testimony from Dr. Eric Rosen who testified that Appellant's personality tests results showed elevated scores for depression and psychopathic deviance. (V42:3978). Dr. Rosen opined that Appellant did not meet the threshold for a full personality disorder under the DSM, but showed personality traits for depressive personality, antisocial personality, and borderline personality traits. (V42:3978-79). On cross-examination, the doctor acknowledged his extremely limited experience in forensic psychology and admitted that Appellant's low level depression and personality traits would not have impaired Appellant's decision-making in any significant ways. (V42:3983-4005).

The State's expert witness, Dr. Randy Otto, testified that he could not make any diagnosis based on Dr. Rosen's testing. Dr. Otto had been given the same information as Dr. Rosen, but was unable to conduct a personal evaluation of Appellant because he refused to see Dr. Otto. (V42:4013-14). Although Dr. Otto opined that he could not give a diagnosis based on the information made available to him, he did acknowledge that Dr. Rosen's personality test results supported the suggestion that Appellant suffers from depression. (V42:4010-26).

In sentencing Appellant to death, the trial court found four aggravating circumstances: (1) each capital felony was

especially cold, calculated and premeditated without any pretense of legal or moral justification; (2) the capital felonies were committed for pecuniary gain; (3) the capital felonies were committed by a person previously convicted of a felony and under sentence of imprisonment, or placed on community control, or on felony probation; and (4) the defendant was previously convicted of another capital felony. (V15:2558-61). The trial court found that the four aggravating circumstances outweighed the slight nonstatutory mitigation. The trial judge succinctly summarized the evidence establishing Appellant's guilt when finding the CCP aggravator:

> The victims, the Van Dusens, husband and wife, were killed for the possession of their motor vehicle, a pickup truck. The defendant executed a well—thought—out and time-consuming plan to acquire the truck. Beginning while he was still in work release, after having been released from prison for a previous conviction, he focused on the Van Dusens' truck and the truck of a George Harrington, both of which were advertised for sale. Upon his release from work release, he contacted these sellers both by phone and in person. Knowing that he had no money and no credit with which to purchase either vehicle, and that an investigation would reveal this, the defendant devised the following scheme: He placed a one-day classified ad in a newspaper offering to sell a Rolex watch. The watch was non-existent.
>
> The defendant later claimed he had been given such a watch by a fellow inmate. The plan was to claim, if asked, that he used the proceeds from the sale of the watch to purchase the truck. The defendant also knew he would need to obtain a bill of sale from the truck owner prior to the completed sale because the truck owner was not going to survive a completed sale. The defendant planned to obtain the

> bill of sale on the pretext that he and the owner would then go immediately "to Oldsmar" where a friend of his would "complete the transaction" by doing some paperwork and/or an inspection and/or provide the funds the friend was holding for the defendant.
>
> The plan with Mr. Harrington came apart when he refused to go with the defendant to the city of Oldsmar. The Van Dusens were not so fortunate.
>
> After executing the bill of sale provided by the defendant, they and the defendant drove at night from St. Petersburg "to Oldsmar" in two vehicles, the truck and the Van Dusens' other auto. It was in that part of Hillsborough County nearest the city of Oldsmar that the victims were murdered. After parking the truck, the three drove in the Van Dusens' auto up a dark dirt driveway in the woods. It was there that the defendant, sitting in the back seat with a concealed pistol he had brought for the occasion, killed each of the victims by shooting them in the head. He dumped the bodies in the driveway, returned to where the truck had been left in Oldsmar, parked the auto and took the truck to his home in St. Petersburg. But before he left the auto, he placed on the pavement by the driver's door a Florida Identification Card which had been lost some weeks previously by a former neighbour of the defendant's. Unbeknownst to the defendant he also left behind some of his DNA in the form of his blood inside the Van Dusen auto.
>
> All of the above is established by the evidence beyond a reasonable doubt.
>
> The defendant had a careful plan and prearranged design to commit these murders. These murders were a product of cool and calm deliberation. It is hard to imagine a factual scenario more so.

(V15:2558-60). The court found in mitigation that Appellant suffered from emotional deprivation as a child because of familial dysfunction and that he "is less capable than emotionally healthy people of forming and maintaining close relationships with others." (V15:2561). The court gave little

weight to the mitigating circumstances and sentenced Appellant to death.

On January 10, 2006, Appellant filed a Notice of Appeal. (V15:2544-49). On January 20, 2006, the State filed a Notice of Cross Appeal. (V15:2557). This appeal follows.

SUMMARY OF ARGUMENT

Issue I: The trial court acted within its discretion in admitting the victim's spontaneous statements to her mother during a telephone conversation shortly before she was murdered. The victim's statements to her mother that she was following her husband and the guy who bought the truck to get the paperwork done that evening were spontaneous statements made describing an event that she was currently perceiving. Even if the trial court erred in admitting the victim's statements, the error was harmless beyond a reasonable doubt.

Issue II: The indictment charging Appellant with two counts of first degree murder was not fundamentally flawed. Appellant did not move to dismiss the indictment based on any alleged defect, and although Appellant moved for a statement of particulars regarding the theory of prosecution prior to trial, he effectively abandoned this argument by not pursuing the matter when the motion was heard by the trial judge. Appellant waited until the State rested its case-in-chief before sand-bagging the State by moving for a judgment of acquittal based on alleged defects in the indictment. Although the language in the indictment may not have tracked the first degree murder statute's language, the indictment cited the applicable statute and subsection and provided Appellant with adequate notice of

the charges pending against him. Additionally, Appellant cannot show that he was mislead or hindered in his defense based on the language in the indictment.

Issue III: Likewise, the trial court did not err in denying Appellant's motion for judgment of acquittal on the murder charges on the grounds that the indictment did not allege either premeditated or felony murder, or by denying Appellant's objection to the verdict form allowing the jury to find Appellant guilty of murder under both theories. The indictment charged Appellant with first degree murder in violation of Florida Statutes, section 782.04(1). This statutory section governs first degree murder and put Appellant on notice that the State was pursuing a first degree murder case utilizing both theories of prosecution. Even if the Court erred in allowing the jury to consider premeditation because it was not specifically alleged in the indictment, the State submits that the error was harmless because the evidence clearly supports the jury's verdict under a felony murder theory. Appellant's defense at trial was not affected in any manner based on the indictment's language, and based on the current trend in Florida caselaw, Appellant should not be allowed to obtain relief based on an alleged technicality in the indictment when he has not shown any prejudice.

Issue IV: The trial court properly denied Appellant's motion for judgment of acquittal on the charge of armed carjacking. The State introduced substantial, competent evidence to support Appellant's conviction. Furthermore, Appellant waived any issue regarding the charging language in the indictment or the jury instructions on this count based on his failure to raise a timely objection below on these grounds.

Issue V: The trial judge acted within its discretion in admitting the victim impact evidence in this case. Contrary to Appellant's assertions, the victim impact evidence was not excessive or unduly emotional. The State presented five victim impact witnesses to testify about the two victims that were murdered in this case. The victim impact evidence was strictly limited to the type of evidence specified in Florida Statutes, section 921.141(7).

Issue VI: The trial court did not err in allowing the State to strike a prospective juror for cause. The State questions whether Appellant preserved this issue, but even assuming that it was preserved, the trial judge properly struck the juror for cause because he unequivocally stated that he would hold the State to a higher burden of proof in this capital case. Given that the juror's answers created a reasonable doubt as to

whether he possessed an impartial state of mind, the trial court properly granted the State's cause challenge.

Issue VII: This Court has consistently rejected Appellant's challenge to Florida's capital sentencing scheme based on Ring v. Arizona, 536 U.S. 584 (2002).

Issue VIII: The trial court's sentencing order clearly indicates the slight mitigation found by the judge. The court's sentencing order properly identified the mitigating factors presented in this case, assigned the mitigators little weight, and then found that the aggravating factors clearly outweighed the mitigating circumstances.

Cross Appeal Issue I: The trial court erred in granting Appellant's motion in limine seeking to exclude Appellant's statements regarding how he obtained and maintained a Rolex watch while incarcerated. Appellant claimed to law enforcement officers that he lawfully purchased the victims' truck after he sold a Rolex watch he had obtained while in prison. The State sought to introduce Appellant's statements to show their falsity in order to imply the defendant's guilt. The probative value of the evidence regarding how Appellant obtained and maintained the Rolex watch was not substantially outweighed by it prejudicial effect upon the jury.

Cross Appeal Issue II: The trial court abused its discretion in granting Appellant's motion in limine seeking to exclude Richard Van Dusen's statement to a co-worker regarding his act of knowingly falsifying the sales price of his truck on a bill of sale. The victim's statement was an admissible statement against his penal interest pursuant to Florida Statutes, section 90.804(2)(c). A reasonable person would not have made such a statement exposing them to criminal liability unless it was true.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE KARLA VAN DUSEN'S OUT-OF-COURT STATEMENTS TO HER MOTHER DURING A TELEPHONE CONVERSATION AS THESE WERE SPONTANEOUS STATEMENTS WHICH ARE AN EXCEPTION TO FLORIDA'S HEARSAY RULE.

Prior to trial, Appellant moved in limine to preclude the State from introducing any evidence that, on November 25, 2003, Karla Van Dusen told her mother, Billie Ferris, over the telephone that she was driving in her vehicle and following Rick and the guy who bought Rick's truck in order to get paperwork done because the guy knew a person would could get the paperwork done for them tonight and that the guy was buying the truck with cash. (V1:112). The State argued below that the victim's statements to her mother were "spontaneous statements" that were admissible pursuant to Florida Statutes, section 90.803(1). (V1:138-52). Appellant, relying primarily on this Court's decision in Hutchinson v. State, 882 So. 2d 943 (Fla. 2004), argued that the statements were not spontaneous statements because Karla Van Dusen was not laboring under the influence of a startling event at the time she made the statement. After hearing argument from counsel, the trial court denied Appellant's motion in limine and found that the statements were admissible as spontaneous statements. (V2:255-57).

At trial, the State called Karla Van Dusen's mother, Billie Ferris, and she testified that she received a call from her daughter on November 25, 2003.[18] At some point during their conversation, Ms. Ferris heard a car motor running and asked Karla if she was in a car. (V29:1868). Over renewed objection, Ms. Ferris testified that Karla responded that she was in her car following Rick and the guy that bought the truck and that he knew where to get the paperwork done tonight. Karla told her mother that the buyer was paying with cash. (V29:1869).

Appellant argues on appeal that the trial court erred in denying his motion in limine and allowing the State to introduce Karla Van Dusen's statements to her mother.[19] Appellee submits that the trial court acted within its discretion in denying the

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[18] The State introduced cell phone records indicating that Karla called her mother at 5:55 p.m., and the phone call lasted 37 minutes. (V35:3022-23). Cell phone records indicated that Karla utilized her cell phone at 5:35 p.m. within a mile of the cell tower located on Tierra Verde island where she lived. (V35:3038-39). The call to her mother began twenty minutes later and utilized a cell phone tower in downtown St. Petersburg, near Appellant's residence. As previously noted, the cell phone records indicated that during this time period, the victims traveled from downtown St. Petersburg to Oldsmar. The last phone call either of the victims made was at 6:37 p.m. from Oldsmar, Florida. (V35:3021).

[19] Although argued below by Appellant's trial counsel, Appellant's appellate counsel properly acknowledges in his brief that the United States Supreme Court's opinion in Crawford v. Washington, 541 U.S. 36 (2004), does not control on the issue of the admissibility of the victim's non-testimonial statements. As the Crawford Court noted, non-testimonial hearsay statements are regulated under state evidentiary law. Id. at 61.

motion and properly found that the victim's statements were spontaneous statements. The law is well established that a ruling on the admissibility of evidence is within the discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. White v. State, 817 So. 2d 799 (Fla. 2002); Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000).

Florida Statutes, section 90.801(1)(c), defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. (2003). Although hearsay is generally inadmissible, see section 90.802, a "spontaneous statement" is admissible even though the declarant is available as a witness. Florida Statutes, section 90.803(1), defines a "spontaneous statement" as:

> A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.

§ 90.803(1), Fla. Stat. (2003).

As Professor Ehrhardt explains in his treatise, Florida Evidence, "[t]he spontaneity of the statement negatives the likelihood of conscious misrepresentation by the declarant and

provides the necessary circumstantial guarantees of trustworthiness to justify the introduction of the evidence." C. Ehrhardt, Florida Evidence § 803.1 at 855 (2006 Ed.) (footnote omitted). Unlike an excited utterance, "[t]here is not a requirement for an exciting or startling event or condition for statements to be admitted under section 90.803(1); neither the language of the exception or the policy supporting it require the startling event or condition." Id. at 856-57. In making this distinction, Professor Ehrhardt cites "McCormick, Evidence § 271 (5th Ed. 1999) (("[N]o exciting event or condition is required for . . . [spontaneous statements]."). But see Hutchinson v. State, 882 So. 2d 943, 951 (Fla. 2004) **(dicta)** ("Both the excited utterance and the spontaneous statement exceptions require the declarant to be laboring under the influence of a startling event at the time that the statement is made.")." Id. at 857 n.3.

Although this Court is obviously not bound by Professor Ehrhardt's opinion that the language in Hutchinson was dicta, Appellee submits that Professor Ehrhardt correctly read the decision in Hutchinson and determined that the quoted language, also relied on by Appellant, was in fact dicta. "Dicta" is defined in Black's Law Dictionary as:

> Opinions of a judge which do not embody the resolution or determination of the specific case before the

> court. Expressions in court's opinion which go beyond the facts before court and therefore are individual views of author of opinion and not binding in subsequent cases as legal precedent.

Black's Black's Law Dictionary 454 (6th ed. 1990).

In Hutchinson, this Court found that the trial court erred in admitting statements made by the victim to her friend during a telephone conversation as excited utterances. Hutchinson, 882 So. 2d at 950-52. The victim had called her friend after having been in a "big fight" with the defendant and she told her friend that he had taken some of his things and left. Although the trial court admitted the statements as excited utterances, the State argued on appeal that the statements were also admissible as a spontaneous statement. Id. at 950. This Court cited the definitions of both excited utterances and spontaneous statements and then stated that "[b]oth the excited utterance and the spontaneous statement exceptions require the declarant to be laboring under the influence of a startling event at the time that the statement is made." Id. at 951 (citing State v. Jano, 524 So. 2d 660, 662 (Fla. 1988) (explaining that the excited utterance exception and the spontaneous statement exception are primarily distinguishable by the time lapse between the event and the statement describing the event)).[20]

[20] This Court's opinion in Jano does not support the cited proposition that *both* the excited utterance and spontaneous

The language in this Court's Hutchinson opinion requiring a startling event as a prerequisite for the admission of a spontaneous statement does not "embody the resolution or determination of the specific case before the court" and goes "beyond the facts before court" and is accordingly dicta that is not binding in subsequent cases as legal precedent.

Additionally, a plain reading of statutory law, Florida Statutes, sections 90.803(1), spontaneous statements, and subsection (2), excited utterances, establishes that spontaneous statements do not require a startling event. As noted, subsection (1) defines spontaneous statements as a spontaneous statement describing or explaining **an event or condition** made while the declarant was perceiving the event or condition, or immediately thereafter . . . while subsection (2) defines an excited utterance as a statement "relating to a **startling event** or condition made while the **declarant was under the stress of excitement**" caused by the event or condition. Obviously, the plain language of the spontaneous statement statute deliberately omits language requiring a statement to relate to a startling

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statement exceptions require a startling event. In Jano, this Court briefly alluded to the spontaneous statement exception, but because the State had conceded that it did not apply because the child victim's statements were not made while she was perceiving the event or immediately thereafter, this Court did not discuss this exception in any detail. Jano, 524 So. 2d at 661.

event. It is well established that this Court will not look behind the statute's plain language for legislative intent or resort to statutory construction to ascertain intent when a statute is clear. State v. Burris, 875 So. 2d 408, 410 (Fla. 2004). Clearly, the Florida Legislature could have added language that required an exciting or startling event as a precondition for admissibility under section 90.803(1) since in the very next paragraph such a requirement was articulated in the excited utterance exception. See § 90.803(2), Fla. Stat. (2003).

In the instant case, Karla Van Dusen's statements to her mother while on the telephone clearly meet the definition for spontaneous statements contained in Florida Statutes, section 90.803(1). When asked by her mother if she were in a vehicle, Karla Van Dusen responded, that she was, **at that time**, following Richard Van Dusen and the guy who bought his truck because the guy knew a person who could get the paperwork done for them tonight. The trial court properly concluded that this was an admissible as a spontaneous statement. See State v. Adams, 683 So. 2d 517 (Fla. 2d DCA 1996) (finding that the fact that the defendant made the statement in response to a neighbor's questions does not diminish its spontaneity). The statement was made contemporaneous to the event that was being described.

Additionally, there was nothing sinister or self-serving about the statement. Its evidentiary value was not known at the time Karla Van Dusen made the statement. The usefulness of her statements only became apparent following the discovery of her body the following morning. Karla Van Dusen, not knowing that her death was imminent, could have had no improper motive at the time she made the statement. No circumstances exist which could support an argument that the statement was contrived or made for improper purpose. Accordingly, the State submits that the trial court acted within its discretion in admitting this evidence. See J.M. v. State, 665 So. 2d 1135, 1137 (Fla. 5th DCA 1996) ("[C]ontemporaneity is not the only requirement, but instead, the statement must also, of course, be spontaneous; that is, the statement must be made without the declarant first engaging in reflective thought."); McGauley v. State, 638 So. 2d 973, 974 (Fla. 4th DCA 1994) (When officer asked defendant's wife who had jumped through window, wife identified defendant. The statement was admissible under section 90.803(1) even though it was in response to a question).

Although the trial court found that the statements were admissible as spontaneous statements, Appellee submits that Karla's statements to her mother about following the guy that bought the truck to get the paperwork done were also admissible

under section 90.803(3), as a statement of the declarant's then existing state of mind, including a statement of intent or plan, which was offered to prove or explain acts of subsequent conduct. See Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002) (The "tipsy coachman" doctrine allows an appellate court to affirm a trial court that "reached the right result, but for the wrong reasons" so long as there is any basis which would support the judgment in the record); Muhammad v. State, 782 So. 2d 343, 359 (Fla. 2001) ("The trial 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.").

Appellant correctly notes the general rule that "a victim's state of mind is generally not a material issue in a murder case, except under very limited circumstances." Stoll v. State, 762 So. 2d 870, 875 (Fla. 2000); but see Taylor v. State, 855 So. 2d 1 (Fla. 2003) (noting that a victim's state of mind "may become an issue to rebut a defense raised by the defendant"). In the instant case, Karla Van Dusen's state of mind was relevant given Appellant's defense that he lawfully purchased the truck. Karla's statements to her mother establish that, contrary to Appellant's defense, lawful possession of the truck had not transferred to Appellant. As previously noted, at the

time Karla made the innocuous statements, there is no question that the statements displayed indicia of trustworthiness.

Furthermore, the victim's statements were also admissible under section 90.803(3) in order to prove or explain acts of subsequent conduct. Karla Van Dusen's statements explain her acts of driving from south St. Petersburg to Oldsmar, Hillsborough County. She informed her mother that she was following her husband and the guy that bought the truck and they were going to finish the paperwork and complete the sale. See Huggins v. State, 889 So. 2d 743, 757 (Fla. 2004) (victim's statement on the day of her murder that she would go to a Publix grocery store was admissible under section 90.803(3) to prove that the victim went to the supermarket; the statement explained the victim's subsequent conduct and was not made under circumstances that indicate its lack of trustworthiness). Accordingly, if this Court finds that the statements were not admissible as spontaneous statements under section 90.803(1), the State submits that the statements were still admissible under section 90.803(3).

Even if the trial court erred in admitting the victim's spontaneous statements, the error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); J.M., 665 So. 2d at 1137 (stating that errors admitting

hearsay statements are often harmless). The circumstantial evidence in this case established that the victims left their residence on Tierra Verde traveling in separate vehicles; Richard Van Dusen in the classic truck and Karla Van Dusen in couple's Jeep Cherokee. Cell phone records established that the victims traveled to downtown St. Petersburg where Appellant resided and then to Oldsmar where their bodies were discovered. The State introduced evidence that Appellant had told another person selling a truck, George Harrington, that he had a mechanic friend that lived in Oldsmar whom he would like to have inspect the truck before he bought it and Appellant also told Harrington that he kept his money at his friend's house. Of course, after the brutal murders occurred inside the Jeep Cherokee where the victims were seated in the front seat, law enforcement personnel discovered Appellant's blood on the steering wheel of the Jeep, including a mixture blood stain containing Appellant's and Richard Van Dusen's DNA.

The State's circumstantial evidence refuted Appellant's theory of events that he lawfully purchased the Van Dusens' truck with the proceeds he obtained from selling a Rolex watch. According to Appellant, the victims came to his apartment around 5:30 p.m. and dropped off the classic truck and he paid them the remainder of the purchase price in cash that he had obtained

from selling a Rolex watch he obtained years earlier while incarcerated in prison. Appellant then claimed that Richard Van Dusen got into another red truck that looked similar to the truck he allegedly sold to Appellant and the driver of this mysterious truck also happened to match Appellant's physical description. Appellant testified that he could have gotten blood in the victims' Jeep Cherokee days earlier when he was test driving the classic truck with Richard Van Dusen and they ran out of gas. Appellant claimed that, while priming the carburetor in the truck when putting a small amount of gas into it, he jerked his hand and ripped off a preexisting scab and bled some. According to Appellant's testimony, Richard Van Dusen drove the 1971 truck to the gas station to put more gas in it while Appellant drove the victims' Jeep Cherokee back to their residence.

The State's circumstantial evidence clearly refuted Appellant's version of events. Eyewitnesses and cell phone records established that the victims did not drop off the 1971 truck at Appellant's apartment at 5:30 p.m., as claimed by Appellant. Evidence further refuted Appellant's story about taking the truck for a test drive and running out of gas and re-injuring his hand days before his blood was discovered in Richard Van Dusen's immaculately clean Jeep. Contrary to

Appellant's story, Paul Lanier did not observe Appellant driving the Jeep Cherokee and following Richard Van Dusen in the 1971 truck after their test drive. Mr. Lanier observed Appellant and Richard Van Dusen return from their test drive and they were both in the 1971 truck with Appellant in the driver's seat.

Contrary to Appellant's assertions in his brief, the fact that Billie Ferris testified that Karla Van Dusen told her they were following the guy who bought the truck in order to get paperwork done was not "the critical piece of evidence in the State's case" and certainly was not the only piece of evidence that contradicted Appellant's version of events. Although the prosecutor argued this piece of evidence during opening and closing arguments, this does not equate to a finding of harmfulness if this Court finds that the evidence was improperly admitted.

An error is harmless beyond a reasonable doubt when, after considering all the permissible evidence, a court concludes that there is no reasonable possibility that the error contributed to the jury's verdict. DiGuilio, 491 So. 2d at 1135. In this case, a thorough review of the evidence establishes, beyond a reasonable doubt, that there is no reasonable possibility that Karla Van Dusen's spontaneous statements to her mother

contributed to the jury's verdict. Accordingly, this Court should affirm the trial court's ruling.

ISSUE II

THE INDICTMENT CHARGING APPELLANT WITH, AMONG OTHER OFFENSES, TWO COUNTS OF FIRST DEGREE MURDER, A CAPITAL FELONY, IN VIOLATION OF FLORIDA STATUTES, SECTION 782.04(1), WAS NOT FUNDAMENTALLY FLAWED.

On January 28, 2004, the Grand Jurors of Hillsborough County returned a five-count indictment against Appellant, including two charges of first degree murder. (V1:71-74). The two first degree murder counts alleged that Appellant unlawfully and feloniously killed Richard Van Dusen by shooting him with a deadly weapon and by shooting Karla Van Dusen with a deadly weapon and/or stabbing her with a deadly weapon (sharp object), contrary to the form of the statute in section 782.04(1). The State subsequently filed a Notice to Seek the Death Penalty for the murders of Richard and Karla Van Dusen. (V1:78). On January 29, 2004, Appellant pled not guilty. (V1:2).

On June 2, 2005, almost a year and a half after the indictment, Appellant filed a motion for statement of particulars as to the aggravating circumstances and as to the theory of prosecution. (V11:1913-21). At the hearing on Appellant's numerous death penalty motions, defense counsel indicated that this motion was a "standard" death penalty motion and counsel did not orally present any argument regarding the theory of prosecution. (V19:706-07). The trial court denied the motion and Appellant never raised any issue concerning the

indictment until after the State had presented its case in chief at trial and rested, at which time Appellant argued that the trial court should grant a motion for judgment of acquittal on the first degree murder counts because the indictment did not allege premeditation or felony murder.[21] (V36:3053-55; V37:3058-68). Appellant renewed his motion at the close of the evidence, during the discussion of jury instructions, and raised it in his motion for new trial. (V39:3539; V40:3584-85; V41:3782-83; V42:3938-48, 3960-64).

Appellant now argues on appeal, contrary to the argument presented below, that the indictment was fundamentally and jurisdictionally defective because it did not charge any crime. Appellant asserts that this claim cannot be waived and the only cure is to void the trial and resubmit the case to the grand jury for another prosecution on first degree murder with a properly worded indictment. The State submits that Appellant's argument is without merit and that the indictment in the instant case was not fundamentally flawed and Appellant's convictions for first degree murder should be affirmed.

Florida Rule of Criminal Procedure 3.190(c) provides that "[e]xcept for objections based on fundamental grounds, every

[21] Defense counsel asserted that the indictment charged manslaughter and therefore argued that the court should reduce the charges to manslaughter. (V37:3061-62, 3067-68).

ground for a motion to dismiss [an indictment] that is not presented by a motion to dismiss within the time hereinabove provided shall be considered waived." Fla. R. Crim. P. 3.160(c). Rule 3.610 states that a motion for arrest of judgment should only be granted when the indictment on which the defendant was tried is so defective that it will not support a judgment of conviction. Fla. R. Crim. P. 3.610. Additionally, the law is well settled that "the failure to include an essential element of a crime does not necessarily render an indictment so defective that it will not support a judgment of conviction when the indictment references a specific section of the criminal code which sufficiently details all the elements of the offense." DuBoise v. State, 520 So. 2d 260, 265 (Fla. 1988).

In the instant case, the indictment charged Appellant with the first degree murders of Richard and Karla Van Dusen by shooting them with a deadly weapon, and in the case of Karla Van Dusen, shooting and/or stabbing her to death, in violation of Florida Statutes, section 782.04(1). Appellant pled to these offenses and waited until the State had rested its case at trial before raising an issue as to the adequacy of the indictment. As this Court stated in Ford v. State, 802 So. 2d 1121, 1130 (Fla. 2001), "[a]ny inquiry concerning the technical propriety

of the indictment should have been raised prior to trial at which time any deficiency could have been cured." See also DuBoise, 520 So. 2d at 264-65 (stating that Rule 3.160 was established to discourage defendants from waiting until after trial before challenging deficiencies in the charging document).

Appellant has not alleged, much less established, that he was prejudiced in any manner by the wording of the indictment. By the time of his trial, Appellant had been on notice for over a year and a half that he was facing the death penalty for two counts of first degree murder for the murder of Richard and Karla Van Dusen between the dates of November 25-26, 2003. Appellant cannot claim that any deficiency in the indictment mislead him or subjected him to a new prosecution for the same offense. See Fla. R. Crim. P. 3.140(o) (No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses or for any cause whatsoever, unless the court shall be of the opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense.).

The indictment in this case referenced the controlling first degree murder statute, specifically citing subsection (1) of Florida Statutes, section 782.04. This subsection includes first degree premeditated murder, felony murder, and murder resulting from the unlawful distribution of a controlled substance.[22] In Ford v. State, 802 So. 2d 1121, 1130 (Fla. 2001), this Court found that, although the statute cited in the indictment embraced three separate child abuse-related offenses, this was not a valid basis for invalidating the defendant's conviction. This Court found that the indictment adequately placed the defendant on notice of the charges under the statute and also found that the evidence supported his conviction for third degree felony child abuse. Id. Likewise, in the instant case, the indictment placed Appellant on notice of the applicable murder charges and the evidence supported the jury's finding of both premeditated and felony murder.[23]

Here, Appellant waited over a year and a half before sand-bagging the State by moving for a judgment of acquittal or a new trial. This extreme sanction is an undue burden placed upon the State where a motion to dismiss the indictment would have

[22] Obviously, the language in the indictment did not implicate the possibility of a conviction based on murder resulting from the unlawful distribution of a controlled substance.

[23] The jury's verdict form indicated that the jury unanimously found both premeditated and felony murder beyond a reasonable doubt. (V13:2299-2300).

allowed the State the opportunity to cure any potential infirmity in the indictment. Because the indictment charged Appellant with first degree murder under section 782.04(1) and never mislead or embarrassed Appellant in the preparation of his defense, or exposed him to the possibility of a new prosecution based on the same offense, this Court should reject Appellant's claim that the indictment was fundamentally flawed and deny his request for a new trial. See generally State v. Anderson, 537 So. 2d 1373, 1375 (Fla. 1989) (noting that the modern trend is to excuse technical defects in the charging document which have no bearing on the substantial rights of the parties; the emphasis is on determining whether the defendant was prejudiced by the departure).

ISSUE III

THE TRIAL COURT DID NOT ERR BY ALLOWING THE JURY TO RETURN A VERDICT FORM FINDING BOTH PREMEDITATED AND FELONY MURDER.

Appellant argues that the trial judge committed fundamental error by constructively amending the indictment and allowing the jury to consider premeditated murder. During a discussion on the applicable jury instructions, defense counsel renewed his argument made for judgment of acquittal on the murder charges based on the charging language in the indictment, see Issue II, supra, and objected to the proposed verdict form allowing the jury to find: (1) both premeditated and felony murder; (2) premeditated murder only; or (3) felony murder only. (V40:3584-85). The trial court denied Appellant's objection to the verdict form and the jury ultimately returned a verdict finding Appellant guilty of both murders based on premeditation and felony murder.

The State submits that the trial court did not err by rejecting Appellant's objection to the verdict form. As discussed in Issue II, supra, the indictment in this case charged Appellant with first degree murder in violation of Florida Statutes, section 782.04(1). It is well established that "due process prohibits a defendant from being convicted of a crime not charged in the information or indictment." Crain v.

State, 894 So. 2d 59, 69 (Fla. 2004) (citing Aaron v. State, 284 So. 2d 673, 677 (Fla. 1973)). If the indictment charges premeditated murder, the State need not charge felony murder or the particular underlying felony to receive a felony murder instruction. Id. However, the converse is not true. In Ables v. State, 338 So. 2d 1095 (Fla. 1st DCA 1976), the First District Court of Appeals held that the trial court erred in charging the jury with premeditated murder when the indictment only charged felony murder.[24]

In the instant case, the indictment's charging language did not specifically allege that the unlawful killings were "perpetrated from a premeditated design to effect the death" of the victims, but rather alleged that Appellant unlawfully and feloniously killed the victims by shooting them (and/or stabbing in the case of Karla Van Dusen) "contrary to the form of the statute in such cases made and provided, to-wit: Florida Statute 782.04(1)." By citing section 782.04, subsection (1), Appellant was on notice that the State was pursuing two first degree murder counts based on both premeditation and felony murder. As noted in Issue II, supra, Appellant moved for a statement of particulars as to the aggravating circumstances and the State's

[24] The Ables court affirmed the defendant's first degree murder conviction despite the charging error because the error did not adversely affect the defendant's substantial rights.

theory of prosecution, but Appellant never pursued the theory of prosecution when arguing the motion. Obviously, Appellant was aware during the discovery process that the State was pursuing both premeditated and felony murder theories of prosecution. Appellant has never asserted any prejudice based on being mislead or confused over the murder charges. See Crain, 894 So. 2d 59, 69-70 (rejecting defendant's argument that the indictment was constitutionally insufficient when the record did not establish that the defendant was surprised or prejudiced by the charges, the jury did not request any clarification on the jury instructions, and the defendant's theory of defense was that he was in no way responsible for the offense, not that he lacked the requisite intent).

Similar to the situation in Crain, Appellant in this case was not surprised in the least that the State was pursuing both premeditated and felony murder theories of prosecution. Obviously, had defense counsel been prejudiced in any manner in preparing his defense, he would have raised the issue pre-trial and not chosen to sandbag the State by waiting until the prosecution rested its case-in-chief before raising this issue. Furthermore, like Crain, the record establishes that the jury was not confused by the instructions and found that the State had established both premeditation and felony murder on both

murders beyond a reasonable doubt. Appellant's defense, similar to Crain, was that he was not responsible for the murders, not that he lacked the requisite intent to establish first degree murder. Thus, the State submits that, based on this record, this Court should reject Appellant's argument that the trial judge impermissibly submitted the case to the jury on both theories of first degree murder.

Even if this Court finds that the jury should not have been instructed on premeditated murder based on the wording of the indictment, the State asserts that any error is harmless because the evidence overwhelmingly supports Appellant's conviction for first degree murder based on felony murder. As will be discussed in more detail in Issue IV, infra, the evidence was sufficient to support Appellant's conviction for felony murder during an armed carjacking. The jury's verdict form clearly indicates that the jury found Appellant guilty of first degree felony murder based on the carjacking. See Crain, 894 So. 2d at 70 (upholding defendant's kidnapping conviction when the indictment did not include alternate theory of prosecution when there was no evidence of unfair surprise, failure of notice, or denial of due process); Ables, 338 So. 2d at 1097 (affirming conviction despite charging error where defendant's substantial rights were not adversely affected and the erroneous charge

could not have misled the jury). As such, this Court should affirm Appellant's convictions.

ISSUE IV

THE EVIDENCE WAS SUFFICIENT TO SUPPORT APPELALNT'S CONVICTION FOR ARMED CARJACKING AND APPELLANT WAIVED ANY ERROR AS TO THE JURY INSTRUCTIONS ON THIS COUNT BY NOT RAISING AN OBJECTION BELOW.

Appellant argues that the trial court erred in denying his motion for judgment of acquittal as to the armed carjacking count because the evidence was legally insufficient to support his conviction. Appellant further asserts that, because the indictment did not specify the vehicle stolen from the victims, the trial court erred in giving a jury instruction on the carjacking charge which allowed the jury to find that Appellant may have stolen either the 1971 Chevrolet Cheyenne pickup truck or the vicitms' Jeep Cherokee sport utility vehicle (SUV). The State submits that the evidence was sufficient to support Appellant's conviction for armed carjacking, and Appellant waived any alleged error in the jury instructions based on his failure to raise an objection with the trial court below.

As this Court noted in Crain v. State, 894 So. 2d 59, 71 (Fla. 2004) (citations omitted):

> A judgment of conviction comes to this Court with a presumption of correctness and a defendant's claim of insufficiency of the evidence cannot prevail where there is substantial competent evidence to support the verdict and judgment. The fact that the evidence is contradictory does not warrant a judgment of acquittal since the weight of the evidence and the witnesses' credibility are questions solely for the jury. It is

> not this Court's function to retry a case or reweigh conflicting evidence submitted to the trier of fact.

This Court further stated in Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981):

> An appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

In State v. Law, 559 So. 2d 187, 188 (Fla. 1989), this Court noted that where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, this Court will not reverse. Heiney v. State, 447 So. 2d 210 (Fla. 1984). Appellee submits that there is substantial, competent circumstantial evidence to support the jury's verdict on the armed carjacking count.

The State charged Appellant with armed carjacking and alleged that Appellant "unlawfully, by force, violence, assault,

or putting in fear, rob, steal, and take away from the person or custody of Richard Van Dusen and/or Karla Van Dusen certain property, to wit: a motor vehicle, with intent to permanently or temporarily deprive Richard Van Dusen and/or Karla Van Dusen of said property, and in the course of said carjacking, William James Deparvine discharged a firearm," resulting in the Van Dusens' deaths. (V1:73). After the State rested its case in chief, Appellant moved for a judgment of acquittal and argued that the evidence was insufficient to support an armed carjacking conviction for either vehicle involved in the case; the 1971 truck or the victims' Jeep Cherokee SUV. (V37:3080-3110). After hearing argument from counsel, the trial court denied the motion. Appellant renewed his argument after the defense presented it case, and the court again denied the motion for judgment of acquittal.

During the argument on Appellant's judgment of acquittal, the prosecutor explained to the court that although the 1971 truck was the ultimate goal of the robbery[25] and murders, Appellant had to temporarily deprive the victims of the their Jeep SUV in order to commit the crime in the manner he had

[25] As this Court has previously held, carjacking is an enhanced version of the robbery statute. The two statutes mirror each other with one exception, carjacking pertains only to motor vehicles whereas robbery pertains to all property. Cruller v. State, 808 So. 2d 201, 203-04 (Fla. 2002).

planned. (V37:3089-92). After the victims picked Appellant up in downtown St. Petersburg, Karla Van Dusen, driving the Jeep Cherokee, followed Appellant and her husband in the classic truck to Oldsmar, where Appellant apparently had informed them he could complete the paperwork. Appellant managed to park the distinctive 1971 truck in an unknown location and then got into the back seat of the Jeep Cherokee, with the victims in the front seat, and they drove to an isolated dirt road not far from the main highway.[26] Once on the isolated road, Appellant shot Richard Van Dusen in the back of the head, and shot and stabbed Karla Van Dusen while they were both seated in the front seat of the Jeep SUV. Appellant cut the seat belt holding Karla, and dropped her into the road. He ruffled through her purse and checked Richard's pants pocket, presumably searching for the notarized bill of sale that he had Richard Van Dusen obtain prior to the anticipated transaction.[27] Appellant then drove the Jeep SUV a little over a mile and dumped it at Artistic Doors and placed Henry Sullivan's identification card outside the Jeep to implicate him in the murders. Appellant picked up the 1971

[26] As the State argued, Appellant could not risk having the classic 1971 truck seen in the isolated area where the murders took place because it would have obviously linked him to the murders.

[27] Despite the victims having cash, jewelry, endorsed checks, and other items of value on their person and in their vehicle, Appellant did not take any of these items.

truck and drove it back to his residence in St. Petersburg where it was discovered by law enforcement officers two days later.

The evidence in this case supports the State's theory that Appellant permanently or temporarily deprived the victims of their motor vehicle, and during the course of the carjacking, discharged a firearm and caused their deaths. As previously noted, Florida Statues, section 812.133 defines the enhanced crime of carjacking in essentially the same terms as robbery with the exception that the property must be a motor vehicle. See Cruller, 808 So. 2d at 203-04. Carjacking is the "taking of a motor vehicle which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the motor vehicle, when in the course of the taking there is the use of force, violence, assault, or putting in fear." § 812.133(1), Fla. Stat. An act will be deemed to have occurred "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." § 812.133(3)(b), Fla. Stat.; see also Jones v. State, 652 So. 2d 346 (Fla. 1995).

In this case, Appellant utilized his firearm to shoot and kill the victims while they were in their Jeep SUV. Although

the ultimate motive for this crime was the eventual possession of the 1971 truck, Appellant's theft of the Jeep SUV was not merely incidental to the truck's theft or an afterthought. To the contrary, Appellant meticulously planned the instant murders. As noted, Appellant left the distinctive 1971 truck at another location while luring the victims to an isolated area so that he could commit the murders. Appellant, seated in the backseat of the Jeep, shot the victims in the back of the head. The medical examiner testified that Karla Van Dusen had raised her hands near her head, obviously an instinctive action to defend herself. After the murder, but during the same continuous event, Appellant dumped the victims from the Jeep and drove to another location and abandoned the Jeep along with Henry Sullivan's identification card. After committing the murders, Appellant was able to acquire the 1971 truck that he coveted.

Based on the circumstantial evidence, the State submits that the trial court properly denied the motion for judgment of acquittal. See Gore v. State, 784 So. 2d 418, 430 (Fla. 2001) (upholding defendant's robbery conviction where evidence established that defendant murdered victim for her car because he did not own a car of his own). The jury heard Appellant's version of events that he had lawfully purchased the 1971 truck

and had nothing to do with the victims' murder. As this Court stated in Riechmann v. State, 581 So. 2d 133, 141 (Fla. 1991), where there are conflicts in testimony and theories of the case, the jury has the prerogative to resolve those conflicts in favor of the State. Here, the jury was able to weigh the evidence, observe the witnesses and Appellant, and evaluate their credibility. The jury found Appellant guilty of first degree murder and armed carjacking. A determination by the trier of fact when supported by substantial evidence, will not be reversed on appeal by this Court. State v. Law, 559 So. 2d 187 (Fla. 1989); see also Heiney v. State, 447 So. 2d 210 (Fla. 1984) (upholding murder conviction when the victim was with Heiney just before he was murdered, the victim's blood was found in the defendant's car, and the victim's valuables were found in the defendant's possession); Beasley v. State, 774 So. 2d 649 (Fla. 2000) (rejecting defendant's argument that robbery of car and money was an "afterthought," where no other motive appeared for the murder). Accordingly, this Court should affirm Appellant's carjacking conviction.

In addition to arguing the sufficiency of the evidence, Appellant also asserts that the jury should have been instructed that the carjacking count applied to a specific vehicle, rather than "a motor vehicle." This argument is not cognizable on

appeal as Appellant never requested such an instruction.[28] In Lawrence v. State, 831 So. 2d 121 (Fla. 2002), this Court noted that "'[i]ssues pertaining to jury instructions are not preserved for appellate review unless a specific objection has been voiced at trial,' and absent an objection at trial, can be raised on appeal only if fundamental error occurred. Fundamental error is defined as the type of error which 'reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" Id. at 137 (citations omitted).

Appellant attempts to avoid the waiver argument by asserting that it was fundamental error to allow the jury to consider the carjacking count because the jury might not have been unanimous in their verdict given the facts of this case. Appellant relies on two Florida cases for this proposition, Perley v. State, 947 So. 2d 672 (Fla. 4th DCA 2007), and

[28] Furthermore, Appellant never moved to dismiss the indictment or move for a statement of particulars based on this alleged deficiency in the indictment, thereby allowing the State to remedy the alleged defect. See Fla. R. Crim. P. 3.140(o) & 3.160(c), and discussion in Issue II, supra. Thus, the State submits that any claim regarding the sufficiency of the charging language in the indictment or the jury instructions has been waived. See Williams v. State, 547 So. 2d 710 (Fla. 2d DCA 1989) (holding that any defect in an information is waived where there was no timely objection and the information does not wholly fail to state a crime).

Robinson v. State, 881 So. 2d 29 (Fla. 1st DCA 2004). However, these cases are distinguishable from the instant facts.

In Perley, the defendant was a passenger in a vehicle stopped during a routine traffic stop. The officer became suspicious of the defendant, and when he exited the car, he pushed the officer and ran away. The officer eventually apprehended the defendant and he complained of chest pains. Perley was taken to the hospital and while there, attempted to escape but was caught. The State charged Perley with one count of escape, but the State introduced evidence of two entirely separate incidents and the prosecuting attorney argued to the jury that they could convict Perley of escape based on either instance of escape. Id. at 674. The Perley court reversed the defendant's escape conviction because the State presented evidence as to both escapes and informed the jury that it could convict for either one, thereby making it difficult, if not impossible, to determine which incident the jury convicted him for, or if the jury reached an unanimous decision.

In Robinson, the defendant was charged with sexual battery and lewd and lascivious conduct having occurred between February 17, 2001 and May 5, 2001. The evidence at trial established two distinct episodes and the court instructed the jury that they could not convict unless the State proved that the crimes were

committed on February 27, 2001 and/or May 5, 2001. 881 So. 2d at 30. Like the prosecutor in Perley, the prosecuting attorney in Robinson argued in closing arguments that the jury could convict the defendant whether they believed the offense happened on February 17th or May 5th: "Either one. And if some of you believe it happened on one day and the others believe on the May 5th date and some on the February 17th date, you can still have a unanimous verdict to convict." Id. at 30. The court reversed the conviction because the prosecutor was allowed, over the defendant's objection, to encourage the jurors to convict even if they did not reach a unanimous verdict.

Unlike the situation in Perley and Robinson, the prosecutor in the instant case did not argue to the jury that they could convict Appellant of armed carjacking for stealing either the Jeep SUV or the 1971 truck. The State's theory was that Appellant committed the instant murders in order to obtain the victims' 1971 truck and devised a plan to obtain the truck by luring the victims to a remote area and shooting them in the Jeep SUV while leaving the 1971 truck at a nearby location. All of these crimes took place during one continuous series of events. The State's evidence clearly established that the murders took place inside the Jeep SUV and Appellant had to deprive the victims of this vehicle in order to carry out his

plan. The evidence is sufficient to support a carjacking conviction as to either vehicle, and Appellant's conviction cannot constitute fundamental error where the evidence supports the jury's finding and the indictment alleged all of the elements of the offense.

As previously noted, in order to be legally sufficient, an information or indictment can neither be so vague or indefinite as to mislead or embarrass the accused or subject him to multiple prosecution. Fla. R. Crim. P. 3.140(o). Here, there is no danger that the defense was misled or surprised in its preparation. Moreover, there is no danger of a later prosecution involving these acts because "a double jeopardy violation will be presumed" should the State attempt a successive prosecution, to the extent that the prosecution involves the same defendant, and the same crimes against identical victims, and the periods of time overlapping or subsumed within those periods included in the prior charging instrument." Dell'Orfano v. State, 616 So. 2d 33, 36 (Fla. 1993). In the instant case, double jeopardy would be presumed if the State attempted a subsequent carjacking prosecution involving one of the vehicles involved in this case since both vehicles belonged to the same owners, and the same time frame

was alleged in the information. Therefore, Appellant cannot claim prejudice under double jeopardy.

Appellant has been unable to demonstrate harmful, reversible error in the instant case. The evidence presented at trial did not unduly prejudice Appellant or hinder his trial preparation. The remedy now sought by Appellant is an extreme measure that is unwarranted in light of the facts before this Court. Accordingly, this Court should affirm Appellant's conviction for armed carjacking.

ISSUE V

THE TRIAL COURT PROPERLY ALLOWED THE STATE TO PRESENT VICTIM IMPACT EVIDENCE FROM THE VICTIMS' FAMILY MEMBERS.

Appellant's argument that the trial judge erred in allowing the State to present "excessive and unduly emotional" victim impact evidence is without merit. Prior to trial and before the victim impact witnesses testified at the penalty phase proceeding, Appellant moved to exclude or limit the State's presentation of evidence from the victims' family members. (V12:1975-98, 2010-15, 2106-07, 2112, 2133; V13:2329-41; V19:710-20; V41:3748-60). After hearing arguments on Appellant's various motions, the trial court denied Appellant relief. At the penalty phase proceeding, in addition to relying on the guilt phase evidence,[29] the State presented victim impact testimony regarding Richard Van Dusen from his two daughters and his sister,[30] and victim impact evidence regarding Karla Van Dusen from her son and her mother. (V41:3816-37).

The State submits that the trial court properly allowed the State to present the victim impact evidence regarding Richard

[29] The State also presented evidence from two witnesses regarding Appellant's prior felony convictions and his status on conditional release. (V41:3797-3813).

[30] Richard Van Dusen's daughter, Rene Koppeny, had her statement read by an unrelated person, and his sister, Jacqueline Bonn, had her statement read by another sister, Morene Cancelino. (V41:3826-32).

and Karla Van Dusen. In Windom v. State, 656 So. 2d 432 (Fla. 1995), this Court noted that both the Florida Constitution in Article I, Section 16, and the Florida Legislature in section 921.141(7), instruct that victim impact evidence is to be heard in considering capital felony sentences. Id. at 438; see also Payne v. Tennessee, 501 U.S. 808 (1991) (holding that evidence and argument relating to the victim and the impact of the victim's death on the victim's family were admissible at a capital sentencing hearing). This Court stated that the procedure for addressing victim impact evidence, as set forth in section 921.141, does not impermissibly affect the weighing of the aggravators and mitigators or interfere with the constitutional rights of the defendant. Windom, 656 So. 2d at 438.

Contrary to Appellant's argument, the trial court did not abuse its discretion in allowing the State to present evidence from five witnesses regarding the loss of two victims, Richard and Karla Van Dusen. The law is well settled that a trial court's decision on the admissibility of evidence is subject to the abuse of discretion standard of review. Blanco v. State, 452 So. 2d 520, 523 (Fla. 1984). In the instant case, the trial court acted within its discretion in allowing the witnesses to briefly read statements to the jury regarding their family

member's uniqueness as a human being and the resultant loss their murder had on community members. See Huggins v. State, 889 So. 2d 743, 765 (Fla. 2004) (upholding the trial court's admission of victim impact evidence presented during the penalty phase from three witnesses -- the victim's husband, mother, and best friend -- regarding their relationship with the victim and the loss they suffered due to her murder). The evidence presented in this case was strictly limited to the type of evidence specified in section 921.141(7), Florida Statutes. Furthermore, both before and after the victim impact evidence was presented, the trial judge instructed the jury that victim impact evidence was not to be considered as an aggravating circumstance. (V41:3815, 3837).

Likewise, contrary to Appellant's argument, the trial judge did not abuse its discretion in allowing the witnesses to display photographs of the victims. As this Court stated in Branch v. State, 685 So. 2d 1250, 1253 (Fla. 1996), "[f]ew types of evidence can 'demonstrate the victim's uniqueness as an individual' more aptly than a photo of the victim taken in his or her life before the crime. While such evidence can have an emotional impact on jurors, the effect is minimized where the photo is a basic portrayal of the victim, presented to the jury in a routine manner. Such a photo can give real-world balance

to the esoteric displays and analyses of medical examiners and other forensic experts and may help jurors develop in their own minds a true picture of the crime." See also Alston v. State, 723 So. 2d 148, 160 (Fla. 1998); Mansfield v. State, 758 So. 2d 636, 649 (Fla. 2000).

Even if this Court were to find any error in the admission of the victim impact evidence, given the strong case in aggravation and the extremely weak case for mitigation, the error is harmless beyond a reasonable doubt. Alston v. State, 723 So. 2d 148, 160 (Fla. 1998); Hoskins v. State, 32 Fla. L. Weekly S159 (Fla. Apr. 19, 2007) (stating that even if there were error in admitting the minimal victim impact evidence, it would be harmless given the strong aggravation and relatively weak mitigation). The aggravating factors in this case included: (1) the murders were committed in a cold, calculated and premeditated manner; (2) the murders were committed for pecuniary gain; (3) Appellant committed the instant murders while under the sentence of imprisonment; and (4) Appellant has been previously convicted of another capital felony. The court did not find any statutory mitigation, but found nonstatutory mitigating factors concerning Appellant's emotional deprivation as a child due to his dysfunctional family upbringing and certain anti-social personality traits. (V15: 2558-62).

Accordingly, because Appellant has failed to show an abuse of the trial court's discretion in admitting the victim impact evidence, this Court should affirm the trial court's discretionary ruling.

ISSUE VI

THE TRIAL COURT ACTED WITHIN ITS SOUND DISCRETION IN EXCUSING PROSPECTIVE JUROR DARYL RUCKER FOR CAUSE BASED ON HIS ANSWERS DURING VOIR DIRE INDICATING THAT HE WOULD HOLD THE STATE TO A HIGHER BURDEN OF PROOF IN A DEATH PENALTY CASE.

During voir dire, the State questioned the venire regarding their views on the death penalty and the circumstantial evidence standard. When the State inquired of prospective juror Daryl Rucker regarding circumstantial evidence in a capital case, the following exchange occurred:

> MR. PRUNER: Mr. Rucker, what do you think about the idea of circumstantial evidence to prove an element of the offense, whether it be state of mind or identity?
>
> MR. RUCKER: **We're talking about death case, so circumstantial evidence has got to take me to – I've got to apply a higher standard to that.** So you've got to come – I don't want to – **I would be very hesitant to apply the death penalty to somebody based on circumstantial evidence.**
>
> If the logic took me there and I could connect all the dots freely, not parts – but when you're talking about an offense of this magnitude, circumstantial evidence is – I need facts.
>
> MR. PRUNER: Well, okay. Let me address a few things with you. And again, I'm not trying to parse your words or anything. Circumstantial evidence is evidence -- facts from which you can draw conclusions. It's evidence based on fact, but it requires you to infer and conclude something. It's not guess work, so it would be evidence for you to consider.
>
> Let me ask you then -- I referred to this or talked about this a little bit yesterday afternoon and I don't want to go into at this point your view on the death penalty. We'll talk about that in a bit.
>
> But it is the state's obligation in this case as in any criminal case to prove the case beyond a reasonable doubt, prove the defendant's guilt beyond a

> reasonable doubt. And that's the same burden of prove whether it's a shoplifting case, a drunken driving case or a death penalty case. It's the same standard.
>
> Obviously the evidence is going to be different. You're not going to have a dead body in a shoplifting case, but it's the same burden of proof. By your previous comments, sir, are you suggesting, sir, that because there's a potential down the road for death to be a sentence that you would require the state to prove its case to a higher standard of proof than beyond a reasonable doubt?
>
> MR. RUCKER: Well, not to -- **I would require the state to — yeah, I think that is what I'm saying. I would require a higher standard or an elimination of the -- the doubt factor.** I would not -- I would not readily convict someone and give them death. Now, a conviction is one thing. The death penalty is another.
>
> A conviction I can arrive at using the inference that you're speaking of, but the application of the final judgment would be -- would have to meet a higher standard.
>
> MR. PRUNER: Okay. All right. I think I understand what you're telling me, sir. Would you -- let me go back to the original question. Could you consider circumstantial evidence in the guilt phase of a death penalty case?
>
> MR. RUCKER: Yes, it could be considered.

(V24:1298-1300).[31] Based on Mr. Rucker's answers indicating that he would require the State to prove its case with a higher standard of proof than beyond a reasonable doubt, the State challenged him for cause. (V24:1387). Appellant objected to the cause challenge "for the record," and began to state his reasoning, but the court moved on to another prospective juror and defense counsel did not attempt to provide a basis for his

[31] During questioning by defense counsel, Mr. Rucker reiterated that he would require the State to satisfy a higher burden of proof in the penalty phase proceedings. (V24:1372).

objection. Prior to the jury being sworn, defense counsel renewed his prior motions and objections. (V27:1734, 1787).

Appellant asserts on appeal that the trial court abused its discretion in granting the cause challenge because the State allegedly failed to demonstrate that Mr. Rucker was unqualified to serve as a juror. The State first questions whether Appellant preserved the instant issue based on his failure to inform the trial court of the basis of his objection. See generally Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (stating that "in order 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."); Fernandez v. State, 730 So. 2d 277 (Fla. 1999) (holding that the improper granting of a challenge for cause must be preserved by a proper objection). Appellant claims that he was prevented from presenting his legal argument by the trial judge, but a review of the record does not support his position. Admittedly, the trial judge immediately asked defense counsel his position on the next person in the venire, but defense counsel was not *prevented* from voicing his objection and could have pursued the matter had counsel wished to at that time or shortly thereafter.

Even if preserved, the State submits that the trial court acted within its discretion in striking prospective juror Rucker

based on his clearly stated position of requiring the State to prove its case with a standard above the beyond a reasonable doubt standard. The law is well settled that the test for determining juror competency is "whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." Kearse v. State, 770 So. 2d 1119, 1128 (Fla. 2000) (citing Lusk v. State, 446 So. 2d 1038, 1041 (Fla. 1984)). Under this test, a trial court should excuse a juror for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. Id.; see also Hill v. State, 477 So. 2d 553, 555 (Fla. 1985). The trial court has the duty to decide if a challenge for cause is proper, and its ruling will be sustained on appeal absent an abuse of discretion. See Castro v. State, 644 So. 2d 987, 989-90 (Fla. 1994); Singleton v. State, 783 So. 2d 970, 973 (Fla. 2001).

In the instant case, the trial court acted within its discretion in granting the State's cause challenge as to Mr. Rucker. Mr. Rucker unequivocally stated that he would not allow the State to prove a capital case and sentence a defendant to death based on circumstantial evidence. He indicated that circumstantial evidence would be sufficient to support a conviction, but he could not base a death sentence on

circumstantial evidence. Here, the State utilized the guilt phase circumstantial evidence to establish the cold, calculated, and premeditated (CCP) and pecuniary gain aggravating circumstances. Thus, given Mr. Rucker's answers, there is no reasonable doubt as to his inability to serve as a juror in this capital case based on his view that the State had to meet a higher standard of proof than legally required. See Wainwright v. Witt, 469 U.S. 412, 423 (1985) (stating that voir dire involves "the quest . . . for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of, and we do not think, simply because a defendant is being tired for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor.") Accordingly, the State submits that the trial court acted within its discretion in granting the cause challenge. See also Kimbrough v. State, 700 So. 2d 634, 638-39 (Fla. 1997) (finding that even though prospective juror responded to questions from defense attorney that she could follow the oath administered to her and apply the law as instructed by the judge, her previous answers expressed uncertainty as to her abilities to act in accordance with the juror's instructions and oath, and thus, the trial court did not abuse its discretion in excusing juror for

cause); Michael v. State, 796 So. 2d 1292 (Fla. 3d DCA 2001) (holding that “[u]ncertainty as to a venireperson's impartiality must be resolved in favor of a party raising the challenge.").

ISSUE VII

APPELLANT'S CONSTITUTIONAL CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE IS WITHOUT MERIT.

Appellant asserts that Florida's capital sentencing statute is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). As this is a purely legal issue, appellate review is de novo. Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002).

Appellant's argument has been consistently rejected by this Court, and there is no error presented in the trial court's denial of his motion to declare Florida's capital sentencing statute unconstitutional. See Marshall v. Crosby, 911 So. 2d 1129 (Fla. 2005) (noting that this Court has rejected Ring claims in over fifty cases); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002).

Additionally, Appellant's Ring claim is without merit in the instant case given his prior felony convictions. Since the defect alleged to invalidate the statute - lack of jury findings as to an aggravating circumstance - is not even implicated in this case due to the existence of the prior felony convictions,

Appellant has no standing to challenge any potential error in the application of the statute. See Marshall v. Crosby, 911 So. 2d 1129 (Fla. 2005) (citing the numerous cases wherein this Court rejected Ring arguments when the defendant had a prior felony conviction); Winkles v. State, 894 So. 2d 842 (Fla. 2005) (rejecting Ring claim when defendant has prior felony conviction and rejecting argument that aggravating factors must be charged in the indictment). Accordingly, this Court should deny Appellant's Ring claim.

ISSUE VIII

THE TRIAL COURT'S SENTENCING ORDER CLEARLY INDICATED THE NONSTATUTORY MITIGATING CIRCUMSTANCES ESTABLISHED BY THE EVIDENCE.

Appellant asserts that the trial court's sentencing order fails to clearly indicate the mitigating factors found and is insufficient to provide this Court with the opportunity for meaningful review. Contrary to Appellant's assertions, the trial judge properly identified the scant mitigation presented in this case, assigned it little weight, and then found that the aggravating factors clearly outweighed the mitigating circumstances.

Appellant erroneously states that the trial court failed to address or evaluate the testimony of Dr. Rosen that Appellant suffers from several recognized mental disorders. The trial court's order specifically cites to Dr. Rosen's testimony that "the defendant is less capable than emotionally healthy people of forming and maintaining close relationships with others." The court also recognized, based on Dr. Rosen's test results and testimony, that Appellant is an "anti-social person with little or no regard for the feelings and rights of others or for authority." Dr. Rosen, however, did not opine that Appellant had any personality disorders. Rather, his testimony, based

primarily on Appellant's psychological test results,[32] was that Appellant had "personality features" which did not rise to the threshold for a diagnosis of a personality disorder according to the DSM. (V42:3979-81). Furthermore, Dr. Rosen's opinions were refuted by the State's expert witness who utilized the same information as Dr. Rosen. (V42:4010-26).

Appellant's reliance on Mann v. State, 420 So. 2d 578 (Fla. 1982), Bryant v. State, 656 So. 2d 426 (Fla. 1995), and Woodel v. State, 804 So. 2d 316 (Fla. 2001), is misplaced as these cases are clearly distinguishable from the instant facts. In Mann, the unrebutted testimony established that both statutory mental mitigators were established, yet the trial court did not discuss the mental mitigators in any fashion in the sentencing order. Mann, 420 So. 2d at 581. This Court reversed because it was unable to discern if the trial court found the mental mitigators. Contrary to Mann, the trial court in this case discussed Dr. Rosen's findings and found that the nonstatutory mitigators existed, but assigned them little weight. (V15:2561-62).

In Bryant and Woodel, the trial court failed to find any of the proffered mitigation and failed to assign the mitigating

[32] Appellant was not forthcoming with information to Dr. Rosen and only provided him with basic facts about his education. (V42:3977). Appellant refused to participate in the evaluation conducted by the State's expert. (V42:4014).

factors any weight as required by Campbell v. State, 571 So. 2d 415 (Fla. 1990), receded from, Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) ("We hereby recede from our opinion in Campbell to the extent it disallows trial courts from according no weight to a mitigating factor and recognize that there are circumstances where a mitigating circumstance may be found to be supported by the record, but given no weight."). Here, the trial court found all of the mitigators proposed by defense counsel, with the exception of the proposed mitigating factor that the totality of the circumstances did not demonstrate that death was the appropriate penalty. (V14:2492). The trial court's order expressly finding the proposed mitigators and assigning them little weight is supported by the evidence. Furthermore, the trial court's sentencing order provides this Court with the opportunity to conduct meaningful review and its proportionality analysis. See Bowles v. State, 804 So. 2d 1173 (Fla. 2001) (rejecting defendant's claim that trial court did not consider all of the proposed mitigating factors, and even if court did err with respect to the mitigators, the error was harmless).

Although not argued by Appellant, the State submits that Appellant's two death sentences are proportionate. This Court has previously stated that its proportionality review does not

involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). In conducting the proportionality review, this Court compares the case under review to others to determine if the crime falls within the category of *both* (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

A review of the aggravating and mitigating evidence established in the instant case demonstrates the proportionality of the death sentences imposed. As previously discussed, the four substantial aggravating factors in this case greatly outweigh the slight mitigation found by the trial court. A review of other death penalty cases establishes that Appellant's death sentences are proportionate. See Henyard v. State, 689 So. 2d 239, 255 (Fla. 1996) (upholding defendant's two death sentences when defendant stole victim's car and committed two murders; four aggravating factors outweighed three statutory mitigating factors and numerous nonstatutory mitigators); Brown v. State, 721 So. 2d 274 (Fla. 1998) (affirming death penalty where evidence established four aggravators including prior violent felony, murder committed during robbery and for pecuniary gain (merged), HAC, and CCP, balanced against two

nonstatutory mitigators of an abusive family background and drug and alcohol abuse); Foster v. State, 778 So. 2d 906 (Fla. 2000) (holding that death penalty is proportionate when there are two strong aggravators, avoid arrest and CCP, and there is no statutory mitigation and only minor nonstatutory mitigation). Here, the aggravating factors of CCP, pecuniary gain, prior felony and under sentence of imprisonment, and previously convicted of another capital felony far outweigh the slight mitigation that Appellant has some anti-social personality traits. As the trial court properly found:

> The defendant's life up until the time he first became a law violator does not seem to the court to be particularly remarkable. From the evidence it would be a reach for the court to speculate that the defendant was anything other than in control of his own destiny.

(V15:2561). Because Appellant's death sentences are proportionate, this Court should affirm Appellant's death sentences.

CROSS APPEAL ISSUE I

THE TRIAL COURT ERRED IN GRANTING APPELLANT'S MOTION IN LIMINE CONCERNING APPELLANT'S STATEMENTS TO LAW ENFORCMENT OFFICERS REGARDING A ROLEX WATCH THAT HE ALLEGEDLY OBTAINED WHILE IN PRISON.

On February 21, 2005, Appellant filed a motion in limine regarding his post-arrest, videotaped statement to detectives and moved to preclude the State from introducing, among other items, any evidence regarding Appellant's acquisition and maintenance of a Rolex watch while incarcerated. (V3:364-526). After hearing argument from counsel on the motion, the trial judge entered an order granting Appellant's motion "with respect to any and all discussion in the Defendant's acquisition and maintenance of a Rolex wrist watch prior to his release from incarceration (including the halfway house) by the Florida Department of Corrections." (V11:1869). On June 6, 2005, Appellant filed another motion in limine concerning Appellant's pre-arrest statements concerning the Rolex watch, and the trial court again granted his motion:

> The Defendant's Motion in Limine concerning certain pre-arrest statements concerning a Rolex watch, prior criminal history, or release from incarceration be, and hereby is, granted **and the State is hereby prohibited from mentioning in opening statement or otherwise eliciting testimony that the Defendant obtained a "Rolex watch" while he was in prison, or any other matters surrounding his acquisition and maintenance of such a watch while he was incarcerated either in its opening statement or cross-examination of any witness**.

(V12:2046-49; 2119-20). The State submits that the trial court erred in granting Appellant's motion because the evidence surrounding how Appellant obtained and maintained the Rolex watch while incarcerated was relevant and admissible.

The law is well established that a ruling on the admissibility of evidence is within the discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. White v. State, 817 So. 2d 799 (Fla. 2002); Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000).

Florida Statutes, section 90.401 defines relevant evidence as "evidence tending to prove a material fact in issue." § 90.401, Fla. Stat. (2003). Relevant evidence is only inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (2003). The trial court must utilize a balancing test to determine if the probative value of relevant evidence is outweighed by its prejudicial effect. White, 817 So. 2d at 806.

In this case, the trial judge abused its discretion in precluding the State from introducing evidence surrounding Appellant's statements to law enforcement officers regarding how

he obtained and maintained a Rolex watch while incarcerated in prison and at a work release center. As Professor Ehrhardt explains, out-of-court statements made by a party-opponent are admissible under section 803.18 of the Florida Evidence Code 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. C. Ehrhardt, Florida Evidence § 803.18 at 940-41 (2006 Ed.). In contrast to other hearsay exceptions, admissions are admissible in evidence not because the circumstances provide indicators of the statements reliability, but because the out-of-court statements of the party are inconsistent with his express or implied position in the litigation. Swafford v. State, 533 So. 2d 270, 274 (Fla. 1988). However, there is no requirement under section 90.803(18) that the admissions be against the interest of the party making the statement. Ehrhardt, supra, at 941. In discussing the introduction of a defendant's exculpatory statements by the prosecution, Professor Ehrhardt states:

> In a criminal case, the prosecution may offer statements made by the defendant which are exculpatory and then demonstrate the falsity of the statement in order to imply the defendant's guilt. These statements by the defendant are admissible during the prosecution's case-in-chief.

Ehrhardt, supra, at 944 (footnote omitted).

Although section 90.803(18) provides an avenue for overcoming a hearsay objection to the introduction of a defendant's statements, such evidence is still subject to the threshold relevancy requirement of section 90.403. Many of the statements made by Appellant during his interviews with law enforcement officers are prejudicial to his interests. However, that fact, standing alone, does not compel the exclusion of such evidence from the fact finder's consideration. As this Court has recognized, "almost all evidence to be introduced by the state in a criminal prosecution will be prejudicial to a defendant. Only where the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded." Amoros v. State, 531 So. 2d 1256, 1259 (Fla. 1988). The probative value of the evidence regarding the Rolex watch was not substantially outweighed by it prejudicial effect upon the jury.

In arriving at its verdict in this case, the jury had to determine whether Appellant unlawfully obtained possession of the Van Dusens' truck after murdering them, as alleged in the indictment, or if he acquired the truck via a legitimate purchase as he claimed to law enforcement. The jury's verdicts on the homicide counts were inextricably connected to the resolution of this issue. Appellant informed law enforcement

officers that he had obtained the truck from Richard Van Dusen in exchange for $6500 in cash, which was only half of the advertised asking price, even though Appellant informed Richard Van Dusen of his willingness to attempt to obtain financing for the remaining $6500 of the asking price. Bank records revealed that in the five (5) months leading up to the murders, Appellant never had more than $827 in his bank account. During that period of time, Appellant's sole source of income was from his job with a construction company.

During his interviews with law enforcement, Appellant informed the investigating detectives that he paid for the Van Dusens' truck with the cash proceeds from his sale of a Rolex watch that he had obtained in prison from a person for whom he had done some work. In his post-arrest custodial interview, detectives pressed Appellant for additional details of the prison acquisition of this watch in order to either refute or corroborate his account. Appellant repeatedly refused to identify the name of the person whom had given him the watch in prison and refused to describe the work that he had done to earn the watch. There is nothing inherently nefarious about any "work" that Appellant might have done in prison to earn a watch as he was a law school graduate who, according to deposition testimony, performed legal work for other inmates in prison.

Although Appellant claimed in his post-arrest interview that he had sold the Rolex watch and obtained the cash only "six weeks or so" before he bought the truck, he claimed to have kept the cash proceeds from the sale of this Rolex at his apartment rather than in his bank account, because "you can hide it there" and because "if you don't put it in the bank nobody can ever seize it." (V3:465-66). Appellant insisted in his post-arrest interview that he was able to bring the Rolex out of prison with him because "when you're in prison they don't get into your legal work." (V3:394). Appellant was last housed within the Department of Corrections system at the St. Petersburg Work Release Center. The State argued in the pretrial hearings that it would be able to prove that Appellant did not possess a Rolex in any of his belongings, including his legal work, when he entered that facility following a secure transportation from prison. Consequently, on this critical issue, the State would be able to disprove Appellant's story that he was able to fund a legitimate purchase of the victims' truck with the proceeds he had received from selling a non-existent watch.

Introduction of evidence that a defendant has been incarcerated in the past is not per se inadmissible in every case. Such evidence must be subjected to the balancing analysis required by section 90.403. The trial court must "weigh the

logical strength of the proffered evidence to prove a material fact or issue against the other facts in the record and balance it against the strength of the reason for exclusion." C. Ehrhardt, Florida Evidence § 403.1 at 183 (2006 Ed.). Evidence that Appellant claimed to have obtained the financial wherewithal to buy the victims' truck while in prison and the evidence disproving this claim was material to the jury's resolution of Appellant's guilt.

This Court has previously upheld that the admissibility of evidence of a defendant's prior imprisonment when the probative value of such evidence is not substantially outweighed by its prejudicial effect. In Coolen v. State, 696 So. 2d 738 (Fla. 1997), this Court rejected the defendant's argument that the trial court erred in admitting evidence that he had previously been in prison because the evidence was relevant to prove the defendant's state of mind at the time he stabbed the victim to death. Similar to the instant case, the fact of Coolen's prior imprisonment arose during an admission made by the defendant to investigating detectives in a recorded interview. In describing the homicide to detectives, Coolen stated that he had seen something silver in the victim's hand. Id. at 742. As Coolen explained to the detectives, he reacted quickly by stabbing the victim because "'eight years in maximum prisons up in

Massachusetts' had taught him not to take chances, to 'react very quickly,' and that it's better to 'be safe than sorry.'" Id. Coolen was on trial for a homicide committed outside of a residence, not one committed in a prison or jail setting. This Court upheld the trial court's denial of a motion in limine which sought to require the State to excise those references from the taped interview to be published at trial. This Court agreed with the trial court's conclusion that the statements were relevant to explain Cooley's actions and state of mind at the time of the stabbing. Appellee respectfully submits that the Coolen case provides a sound legal basis for the admissibility of Appellant's numerous admissions to having funded the purchase of the victims' truck through the sale of a Rolex watch that he had obtained in prison.

Additional support for the admissibility of this evidence can be found in Farrell v. State, 682 So. 2d 204 (Fla. 5th DCA 1996). Farrell was accused of having committed a lewd and lascivious assault upon a child under 16 years of age. The victim testified that the defendant had told him that he had gone to prison previously for molesting another child. Farrell's conviction was overturned because the appellate court determined that the jury should not have been advised that Farrell's imprisonment resulted from a conviction for a criminal

act which was identical to the one for which he stood trial. Nonetheless, the appellate court determined that the fact of Farrell's prior incarceration was relevant and admissible to explain the victim's state of mind and his reluctance to report the defendant's lewd act. "Instead of admitting the similar crime evidence, the court should have allowed [the victim] to testify only that Farrell stated he had been in prison — which would have explained [the victim's] fear of Farrell and reluctance to report him." Id. at 206 (footnote omitted). In the instant case, unlike in Farrell, the State was not seeking to introduce any evidence surrounding the crime for which Appellant was imprisoned when he claimed to have received the Rolex watch. Rather, the State simply wanted to introduce Appellant's statement so that they could show the falsity of his story to law enforcement officers.

Although the State was ultimately able to introduce this evidence concerning the Rolex watch during the cross-examination of Appellant, had he chosen not to testify, the State would have obviously been prejudiced in its ability to prove its case. In addition to cross-examining Appellant about how he had obtained and maintained the Rolex watch while incarcerated, the State was also able to present rebuttal evidence from the work release correctional officers which established the falsity of

Appellant’s story. The State submits that if this Court were to reverse Appellant’s convictions and remand for a new trial, the State should be entitled to present this evidence regarding the Rolex watch during its case-in-chief.

CROSS APPEAL ISSUE II

THE TRIAL COURT ERRED IN GRANTING APPELLANT'S MOTION IN LIMINE REGARDING HEARSAY STATEMENTS MADE BY RICHARD VAN DUSEN TO A CO-WORKER REGARDING SELLING HIS TRUCK FOR ITS ASKING PRICE, BUT INDICATING ON A BILL OF SALE THAT HE SOLD IT FOR MUCH LESS THAN ITS ASKING PRICE IN ORDER TO ALLOW THE BUYER TO AVOID PAYING THE FULL AMOUNT OF TAXES ON THE VEHICLE.

Appellant filed a motion in limine seeking to preclude the State from introducing any evidence of statements made by Richard Van Dusen on November 25, 2003, to his co-worker, Peter Wilson, regarding the fact that he "had listed his truck for $13,000 or $13,500 and that he had sold the truck to someone from out of state for his asking price," and that the truck was "valued between $21,000 and 21,500," and that "an invoice was written for either $6,000 or $6,500 to avoid paying the full amount of taxes on the vehicle." (V1:110-12). The State argued that Richard Van Dusen's statement to Peter Wilson was admissible pursuant to Florida Statutes, section 90.804(2)(c), as a statement against interest because it exposed him to criminal liability for tax fraud. (V1:140; V2:231-32). The trial court rejected the State's argument and granted Appellant's motion in limine.

As previously noted, a ruling on the admissibility of evidence is within the discretion of the trial judge, and the judge's ruling will not be reversed unless there has been a

clear abuse of that discretion. White v. State, 817 So. 2d 799 (Fla. 2002). In this case, Appellee submits that the trial judge abused its discretion in granting the motion in limine and precluding the State from introducing evidence that was admissible pursuant to Florida Statutes, section 90.804(2)(c). The statement by Richard Van Dusen regarding signing and notarizing a bill of sale indicating a false sales price was a statement that a reasonable person would know would subject him to criminal liability.

Florida Statutes, section 90.804(2)(c) provides that an unavailable witness' statement against interest is not excluded under Florida's hearsay rule:

> (c) Statement against interest. -- A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

§ 90.804(2)(c), Fla. Stat. (2003). Richard Van Dusen's unguarded, candid statement to his co-worker that he had sold his truck for $13,000, but was knowingly filling out a bill of sale for only $6,500 to save the buyer from paying full sales tax was contrary to his penal interest as it subjected him to

criminal liability as a principle to sales tax fraud. Florida Statutes, section 212.05 provides that it is a first degree misdemeanor for any party to knowingly report a sales price less than the actual sales price. See § 212.05(1), Fla. Stat. (2003) (stating that each sale of a vehicle is subject to a 6 percent tax rate and providing that "[a]ny party to such sale who reports a sales price less than the actual sales price is guilty of a misdemeanor of the first degree").

The trial court in the instant case granted the motion in limine based on his finding that Richard Van Dusen "was not aware of the risk of harm to his own pecuniary or penal interest at the time the statement is made. . . or that a reasonable person would believe he would be subject to tax fraud charges and penalties stemming from a conversation with a co-worker or friend about the sale of the vehicle." (V2:254-55). Appellee submits that the trial court misapprehended the applicable law in this case. The trial court based his ruling on the fact that Richard Van Dusen or a reasonable person would not have believed that he was subjecting himself to criminal liability by telling a co-worker of his criminal activity. Implicit in the court's ruling is the requirement that in order for the statement to have been admissible, the court would have required the co-worker to have actually reported the criminal activity to

authorities. This is not a requirement for admissibility under 90.804(2)(c).

In Maugeri v. State, 460 So. 2d 975 (Fla. 3d DCA 1984), the court found that the victim's statement to his girlfriend that he had stolen cocaine from the defendant was properly admitted as a statement against penal interests because it subjected him to criminal liability for drug trafficking. The court found that "a reasonable person in his position would not have made the statement, **even to his girlfriend**, unless he believed it to be true." Id. at 978. Obviously, the victim in Maugeri was not afraid that his girlfriend would alert authorities of his theft of drugs. Rather, the court found the statements admissible because a reasonable person would not make such a statement exposing themselves to criminal liability unless the statements were true.[33]

As the Maugeri court properly found, the crux of the issue is not whether the declarant fears that the person will alert authorities to the criminal activity, as required by the trial court in the instant case, but the rule encompasses the rationale that a person does not make statements exposing himself to criminal liability unless they are actually true. In

[33] Because the declarant must be unavailable, the rule provides for an objective standard of what a reasonable person would think when they made the statements.

this case, a reasonable person would know that providing a false bill of sale would subject them to criminal liability. In fact, by his own statement to his co-worker, Richard Van Dusen realized the implications of such an action. He specifically told Peter Wilson that he was doing it so that he could save the buyer from having to pay full sales tax on the purchase of his truck.

The evidence of Richard Van Dusen's statement to Peter Wilson was admissible as a statement against interest. The evidence was obviously relevant to the State's case and explained why the victim had notarized a bill of sale indicating a sales price of $6,500 when he was selling the truck at the time for $13,000. Because the trial judge erred in ruling that a reasonable person would not have known that he was exposing himself to criminal liability for knowingly stating a false sales price for a motor vehicle, Appellee submits that this Court should find that the trial court erred in excluding this evidence from trial.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm Appellant's judgments and convictions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33831, this 8th day of June, 2007.

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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