IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-1234

STEVEN DOUGLAS HAYWARD

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE AND FACTS

On March 22, 2005, Hayward was indicted for the February 1, 2005 first-degree murder of Daniel Destefano ("Destefano"), robbery with a deadly weapon, burglary of a conveyance while armed, and possession of a firearm or ammunition by a convicted felon. (R.1 3-4). Hayward's motion to suppress his statements and to dismiss the case were denied on February 9, 2007 (R.11 6-7, 91-96) and on March 5, 2007, jury selection began. (R.13 176). On March 8, 2007 the jury was sworn and testimony commenced the next day. (R.23 1409-16; R.24 1458). By general verdict for the first-degree murder charge and with special interrogatories for the other charges, on March 14, 2007, the jury convicted Hayward on all counts. (R.7 1146-47).

The penalty phase began on March 19, 2007 and the jury rendered an eight to four recommendation for death the next day. (R.8 1189; R.31 2357) Following the April 27, 2007 Spencer v. State, 615 So.2d 688 (Fla. 1993) hearing, on June 1, 2007,

Hayward was sentenced to death upon the finding of three aggravators, two of which were merged, no statutory mitigation, and eight nonstatutory mitigating factors. Also, Hayward was designated a Prison Releasee Reoffender who qualified for minimum mandatory terms under the 10-20-Life statute. For the robbery and burglary convictions, Hayward received life sentences and for the count of possession of a firearm by a convicted felon, he was given 15 years with the minimum mandatory term of three years under 10-20-Life. (R.8 1261-93).

Dorothy Smith ("Smith") Hayward's girlfriend lived in the rooming house on Avenue G in Fort Pierce and occupied one of the six rooms. Hayward would stay with her three to four nights a week. (R.27 1850-52). On January 31, 2005, Hayward had been paid and because the rent was due shortly, Smith asked him for money, but he refused. (R.27 1851-53) A little before 5:00 a.m. the next morning, while it was still dark outside, Smith was awakened by Hayward knocking on her window which was in the back of the rooming house. He was wearing boots, blue jeans, a Hilfiger shirt and a black zippered Orlando Magic jacket. (R.27 1855-56) When she let him in, Hayward told her that he had been robbed by two men in a black Chevrolet and they had shot him in the hand. Smith's attempts to have Hayward go to the hospital or call an ambulance were rejected; Hayward even unplugged the telephone and stopped Smith from leaving the rooming house. His

attempts to have someone in the rooming house sew up his hand were unfruitful. (R.27 1854-57, 1863) Several hours later, Smith heard news reports of a shooting at the 17th Street convenience store. When she confronted Hayward, he denied involvement and said he was robbed on 18th Street. Shortly thereafter Hayward gave Smith a ten dollar bill for the store; this bill had blood on it. (R. 1858-60). When Smith returned from the store she found Hayward's bags packed and he announced he was leaving, however, she convinced him to stay. (R.27 1861-62). The next day, February 2, 2005, Hayward sold a silver gun to Montavious Gatlin, a/k/a "Prophet" for one hundred dollars. (R.1863-64).

Renee Edwards ("Edwards") described her fiancé, Destefano, as an Italian with brown hair and a dark complexion. He was employed by Scripps Newspaper to stock the newspaper dispenser boxes found outside convenience stores. He would do this between 2:00 and 5:00 a.m., and return later in the daylight, to empty the coin boxes. During his morning rounds, Destefano would carry about $10 cash along with a silver revolver for protection. (R.24 1458-61).

Between 3:00 and 4:30 a.m. on the morning of February 1, 2005, Roosevelt McDowell ("McDowell"), who lived on the 1700-block of Avenue D in Fort Pierce, across the street from a convenience store, heard two small shots "pow, pow, pow", then

someone shouting “I don’t have no more, I don’t have no more” only to be followed by a “big shot.” (R.24 1516-19) McDowell stated that there was a 10 to 15 minute delay between the first two shots and the third louder shot. When questioned more closely, McDowell testified, “Well, I heard the first two shots and then I heard him, the guy say, ‘I don’t have no more.’” “Right thereafter he (sic) heard the big shot went off. Right after that the third the big shot went off is what I heard.” (R.24 1520). According to McDowell, he opened his apartment door between the first two shots and the last shot and he had a clear view of the parking area in front of the convenience store. (R.24 1521, 1523).[1]

When McDowell looked out his door, he saw Destefano, who he described as a Hispanic man, on one knee near a vehicle with its trunk and driver’s side door open. Standing upright behind Destefano, was a black male. McDowell watched as the black male searched the car and as DeSetfano arose, and holding his side, limped away crossing Avenue D. The black male wore his hair in dreadlocks (R.7 1074-75), he had nothing on his head. After going through the car, the man moved to a lighted area and examined his hand. McDowell could see him trying to bandage his

[1] McDowell admitted it does not take 10 to 15 minutes for him to open his door, but only two to three seconds. He then repeated it “[m]ight have been 10 or 15 minutes” between the first two shots and the third louder one. (R.24 1521)

hand which was "leaking" blood. The man then left the area walking behind McDowell's building. McDowell saw only two men that morning, Destefano and the black male. (R.24 1522-30)

Near 4:00 a.m. that morning, Calvin Williams ("Williams") saw an injured man in the middle of the road at 16th Street and Avenue D. Destefano was seeking help and said he had been shot. He did not look at all well, and was bent over with his hands on his knees. Williams had Destefano sit as he called for help. (R.24 1471-72).

A few minutes after calling 911, Officer Grecco ("Grecco") arrived (R.24 1478), followed two to three minutes later by the paramedics. (R.24 1487) Destefano was about 200 yards from where he had been shot. (R.24 1484). According to Grecco, Destefano was bleeding, out of breath, and terrified. His eyes were wide as though "scared, frightened, terrified." In response to Grecco's question as to what happened, Destefano reported that while delivering newspapers, a black man with a stocking cap over his face tried to rob him and shot him. Destefano got off a shot with his .357 Magnum, but did not think he hit his assailant, and he did not know what happened to his gun. Grecco's encounter with Destefano lasted 10 to 15 minutes, but by the end, due to his condition, Destefano could not respond; he was non-communicative. It was with urgency, that the paramedics took Destefano to the hospital, where he later

died. (R.24 1512-14; R.25 1575, 1647-48).

The autopsy was conducted by Dr. Diggs and revealed that Destefano was shot twice, once in the lower left thigh and once in the left chest. There would have been very little bleeding at the scene as Destefano was bleeding internally from the gunshot wound to his chest which perforated his left lung, diaphragm, liver, small intestines, and large colon. Dr. Diggs agreed that initially it would have been possible for Destefano to move about, "travel quite a distance." (R.25 1652-55).

> Q. (by prosecutor): Tell me what type of process the victim goes through as he continues bleed out (sic). What affect does it have on his mental state and how aware is the victim of the gravity of the situation?
>
> A. (by Dr. Diggs) What basically starts to happen is that the individual starts to become light-headed, starts to become dizzy. Then as the time goes by this particular individual tends to start to actually pass out.
>
> Q. And so would the individual be aware of the fact that death – is (sic) death isn't eminent, it certainly is impending?
>
> A. Oh, yes. The individual would have some notice that something is radically wrong here, yes.

(R.25 1655-56). Although Dr. Diggs could not say definitively, it appeared from the trajectory of the bullets that Destefano was shot in the leg first and while kneeling, was shot in the chest from above. The chest shot was the fatal wound. (R.25 1658-68).

Crime scene investigator, Thomas Garrison ("Garrison"),

with additional experience in blood work and spatter analysis, processed the shooting scene, Destefano's car, and received the victim's clothing[2] and empty holster. (R.25 1559-66, 1568-70, 1614-15). The evidence revealed Destefano had been shot at the scene, his car had been entered, and items were missing. A blood trail, not Destefano's,[3] was found around the car, heading toward a lighted area where there was a pooling of blood indicating the person had stood for a period, before moving off and going behind McDowell's building. (R.25 1569-70, 1576-77, 1580-90, 1592, 1617-27). According to Detective Coleman ("Coleman"), the blood trail was consistent with someone trying to return to the rooming house located at 2108 Avenue G in Fort Pierce. (R.25 1682). Blood samples from the blood trail and car were collected for DNA testing. (R.25 1587-88, 1607-09). Various items were dusted for prints, but none were found. (R.25 1604-06). No guns or casings were found at the scene which

[2] Destefano's clothing was collected at the hospital by Officer Holmes and, in a sealed container, returned to Garrison at the crime scene. Upon receipt, Garrison secured the clothing in his van which was parked outside the crime scene taped area. Garrison never removed the clothing at the crime scene, nor did he rub the pants in the blood found at the crimes scene. Instead, the sealed package of clothing was removed from the crime scene immediately, and secured in Garrison's locked van. Holmes did not walk around the crime scene with Destefano's clothing exposed. (R.25 1628-30, 1637-40)

[3] Destefano had walked in an easterly direction and was found east of the crime scene. A blood trail was found leading wast. Very little blood was found at the scene where the paramedics treated Destefano. (R.25 1569-70, 1576-77)

indicated revolvers were used. (R.25 1609-11). Garrison attended Destefano's autopsy where projectiles were recovered and placed in evidence for later testing. (R.25 1616-17).

Following an area canvass on the morning of the crime, Coleman developed Hayward and George Brooks as suspects. After eliminating Brooks as a suspect, the investigation focused on Hayward who was staying with Smith at the rooming house on Avenue G. On the morning of February 3, 2005, Coleman, Officer Mace ("Mace"), and others arrived at the rooming house. It had a common living room and bathroom, but separate rooms for each resident's living quarters. The common living room was located just inside the front door. When the officers arrived they were granted permission to enter and were told where Smith's room was located at the end of the hall across from the common bathroom. When they reached her door, they became aware there was someone in the bathroom. (R.25 1676-78, 1681, 1687-90).

Smith's door was open, and the officers engaged her in conversation. As they were talking to Smith, Hayward emerged from the bathroom, holding his bandaged left hand. When asked what happened to his hand, Hayward told the officers Smith had cut him during a fight. Hayward showed the officers his hand when they asked to see it. According to Mace, the wound did not look like a knife wound, which is usually clean and well defined; instead it was a hole which looked infected. The

police separated Smith and Hayward as Coleman wanted to talk to Smith alone; Hayward accompanied Mace outside. There Hayward, when asked, agreed to go to the police station to talk to the detectives. As he was getting in the car, Hayward *sua sponte* admitted "Sir, I'm not gonna lie to you, I got robbed last night and I think the guy shot me." (R.25 1690-94, 1696-97).

Later that day, Hayward was interviewed by Coleman and Sergeant Flaherty. After waiving his Miranda[4] rights, Hayward initially told the officers that he had been out in search of drugs, and a "dude"[5] pointed a gun at him, demanding money. When Hayward grabbed for the gun, he was shot in the hand. (R.26 1737-39, 1744-47). Under closer questioning, Hayward's story changed; it became that he witnessed two men, one African-American and the other Hispanic, attack Destefano, shoot him and run off. He claimed that after the incident, he picked up a gun left at the scene, but dropped it and was shot in the hand when it discharged. He also admitted to going through Destefano's car, but denied accosting him. As the interview progressed, Hayward settled on the account that he had witnessed one black male rob and shoot Destefano, after which he tried to pick up the gun, but dropped it, and shot himself in the hand. Hayward

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[4] Miranda v. Arizona, 384 U.S. 436 (1966).

[5] Earlier, Hayward had hold Smith and later Mace, that he had been robbed by two black males. (R.26 1743)

admitted going through Destefano's car. At all times he denied shooting the victim. (R.26 1739, 1743-1836).

Following the interview, Hayward was placed in a holding cell and was able to telephone Smith several times. The transcripts of those conversations revealed that Hayward was coaching Smith on what to tell the police and was asking her to get rid of an item he had in the apartment. He spoke in code as he initially said to get rid of the marijuana/reefer, but then admitted that there were no drugs in the room, however, Smith knew what he was saying and she should give the item to his brother. When Smith spoke of the gun, Hayward became incensed. In fact, throughout the conversations, he was exasperated by Smith's inability to understand what he was asking or unwillingness to stay on the topic of most concern to Hayward. (R.4 487-512; R.27 1873-97).

The DNA and ballistics evidence revealed that Hayward bled at the shooting scene. His blood was found on Destefano's jeans and in a pocket as well as on items from the victim's car. There was a blood trail at and in the car, around the vehicle and to a lighted area where Hayward stood for a period examining his bleeding hand. This trail then led off toward McDowell's building and around the back as though heading toward Smith's rooming house. Hayward's blood was found on a wall and fencing leading away from the scene, but toward the rooming house. The

washcloth found at the scene and his Orlando Magic jacket contained Hayward’s blood. (R.27 1914-19, 1926-40, 1943-53, 1957-58) Destefano’s blood was not found on the ground at the shooting scene, but was found two block away were the paramedics treated him. (R. 27 1959).

In July 2005, the rooming house was sold and during renovations, on August 16, 2005, a gun was found in the utility room behind a board covering a vent in the wall. (R.27 1962-68). This gun was tested and was determined to be the murder weapon and it had Hayward’s blood on and in it. (R.27 1981-92; R.28 2009-05, 2017-20) It did not fit Destefano’s holster and it was determined that the safety was in good working order and would not discharge accidently. (R.28 2016-17, 2019-22, 2026-31). Upon this evidence, Hayward was convicted on all counts.

During the penalty phase, the State presented evidence of Hayward’s prior 1988 convictions for second degree murder and two counts of armed robbery (the prosecutor informed the court that Hayward had been out of prison for approximately three months before the instant crimes). The victim impact testimony was offered by Destefano’s mother, sister and fiancé. In mitigation, Hayward presented Dr. Reardon, a psychologist, as well as four family members, Hayward’s brother, two sisters, and mother. The focus was on his family history, academics (91 IQ.), financial difficulties, and ability for rehabilitation.

(R.31 2434-83) Hearing this, the jury recommended death by a vote of eight to four and the court found: three aggravators (1) prior violent felony; (2) felony murder (robbery) merged with (3) pecuniary gain. There were no statutory mitigators offered or found and the court weighed non-statutory mitigation of: (1) Hayward could have gotten life sentence; (2) grew up without a father; (3) loved by family; (4) had academic problems; (5) obtained GED in prison; (6) will make good adjustment to prison; (7) had financial stress at time of crime; and (8) has capacity for rehabilitation. Each was given little weight except for the factor that Hayward could have gotten a life sentence, very little weight, and the factor he grew up without a father, some weight. (R.8 1261-93). This appeal followed.

SUMMARY OF THE ARGUMENT

Issue I – The court did not err in admitting Destefano's statements to the responding officer under the excited utterance exception or as a dying declaration. Crawford does not bar the admission of an excited utterance, as such statements are not testimonial. Further, dying declarations recognized exceptions at the time the Constitution was written, thus, they do not create a confrontation clause problem.

Issue II – The motion to suppress was denied properly as Hayward was not in custody when he made his statements at the rooming house, although the police had probable cause to arrest at that time. Other than the voluntary and spontaneous comments, all of Hayward's statements to the police came after his was given his Miranda warnings and knowingly and voluntarily waived those rights.

Issue III – Hayward's recorded conversation with Smith was relevant as it showed his consciousness of guilt, concern that the murder weapon may be found, and the coaching of Smith to assist him with the police. The vulgarity used in talking to Smith or in referring to the judge and counsel were the way Hayward expresses himself and showed his deep concern for his situation and frustration with Smith and her failure to listen and help him. Again, this showed consciousness of guilt and was relevant and not more prejudicial than probative of the issues

before the court.

Issue IV – There was substantial competent evidence of premeditation, hence, the motion for judgment of acquittal was denied properly. However, if it should have been granted, this Court should still affirm because a general verdict form was used, the jury was instructed on felony murder, and convicted Hayward of robbery.

Issue V – Although unpreserved for review, identity was proven based in large measure on McDowell's testimony reporting Hayward's movements and contact with Destefano. All was confirmed by DNA testing.

Issue VI – Following this Court's precedent, the objection to the standard premeditation instruction was overruled correctly.

Issue VII – Victim impact testimony is admissible evidence and the prosecutor's argument based on that evidence was proper and met constitutional dictates.

Issue VIII – This Court has repeatedly rejected claims that less than a unanimous sentencing recommendation is unconstitutional. Hayward's sentence should be affirmed.

Issue IX – Florida's death penalty statute is constitutional and neither Ring v. Arizona nor Caldwell v. Mississippi invalidate the statute.

Issue X – Hayward's sentence is proportional.

ARGUMENT

ISSUE I

THE COURT PROPERLY ADMITTED DESTEFANO'S STATEMENT TO THE RESPONDING OFFICER UNDER BOTH THE EXCITED UTTERANCE AND DYING DECLARATION EXCEPTIONS (restated)

Hayward asserts that Destefano's statement to Grecco identifying his attacker as a black male wearing a stocking cap should have been excluded as inadmissible hearsay because the State failed to lay the proper predicate for either an excited utterance or dying declaration. Further, Hayward maintains that the admission of the statement violated the Confrontation Clause as defined in Crawford v. Washington, 541 U.S. 36 (2004) and Davis v. Washington, 126 S.Ct. 2266 (2006). The record indicates that there was no abuse of discretion[6] in admitting this statement, not only was the proper predicate laid to establish that the statement was made while Destefano was still under the excitement of the event, but also while he was contemplating his imminent death. Moreover, under the circumstances of this case, Destefano's response to the officer was not testimonial, and thus, not a violation of the

[6] Admission of evidence is within the court's discretion, and its ruling will be affirmed unless there has been an abuse of discretion. Williams v. State, 967 So.2d 735, 748 (Fla. 2007); Ray v. State, 755 So.2d 604 (Fla. 2000); Zack v. State, 753 So.2d 9 (Fla. 2000); Cole v. State, 701 So.2d 845 (Fla. 1997). Discretion is abused when the action is arbitrary, fanciful, or unreasonable. Trease v. State, 768 So.2d 1050, 1053, n.2 (Fla. 2000); Huff v. State, 569 So.2d 1247 (Fla. 1990).

Confrontation Clause. However, even if the statement should not have been admitted, it was harmless beyond a reasonable doubt given the other record evidence. This Court should affirm.

Excited Utterance - In Williams v. State, 967 So.2d 735, 748 (Fla. 2007), this Court defined excited utterance stating:

> An excited utterance, which is 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," is admissible under section 90.803(2) of the Florida Statutes. § 90.803(2), Fla. Stat. (2006). Generally, to be admissible under the excited utterance hearsay exception, the out-of-court statement must be made while the declarant is under the stress of the startling event and without time for reflective thought. *See Hutchinson v. State*, 882 So.2d 943, 951 (Fla.2004). If sufficient time passed for reflective thought, the proponent for admission of the statement must show that reflective thought did not occur. *See id*.

Williams, 967 So.2d at 748. See also Henyard v. State, 689 So.2d 239, 251 (Fla. 1996); Rogers v. State, 660 So.2d 237 (Fla. 1995); State v. Jano, 524 So.2d 660 (Fla. 1988). "While the length of time between the event and the statement is a factor to be considered in determining whether the statement may be admitted under the excited utterance exception...the immediacy of the statement is not a statutory requirement." Henyard, 689 So.2d at 251.

Hayward offers that the state failed to show Destefano remained in an excited state as there was a one hour window between the shots being fired and his statement to Grecco. (IB

28). The victim's statements in Henyard, 689 So.2d at 243 were admitted properly as excited utterances. Regaining consciousness two hours after being raped and shot, the victim reached a nearby house for help. In finding her statements to the responding officer excited utterances, this Court stated:

> ... When the officer arrived, he found Ms. Lewis, who was hysterical but coherent. At trial, the officer was permitted to recount statements Ms. Lewis made to him on the front porch immediately after his arrival. The police officer testified that Ms. Lewis told him she had been raped and shot, identified her assailants as two young black males who fit the description of Henyard and Smalls, and said they had taken her children. Given these circumstances, we find that Ms. Lewis was still experiencing the trauma of the events she had just survived when she spoke to the officer and her statements were properly admitted under the excited utterance exception to the hearsay rule.

Id. at 251.

The test regarding the time elapsed is not a bright-line rule of hours or minutes; but where the time interval is long enough to permit reflective thought, the statement will be excluded in the absence of some proof the declarant did not engage in reflective thought. Rogers, 660 So.2d at 662. The additional evidence tending to prove there was no reflection, even though hours had passed between the event and the statement, "is that at the time of the statement, the declarants were either 'hysterical,' severely injured, or subject to some other extreme emotional state sufficient to prevent reflective thought indicating they were still suffering under the stress of

the event. Blandenburg v. State, 890 So.2d 267, 270 (Fla. 1st DCA 2004). See, Sliney v. State, 699 So.2d 662, 669 (Fla. 1997) (affirming admission of 911 call); Davis v. State, 698 So.2d 1182, 1190 (Fla. 1997) (same); Pope v. State, 679 So. 2d 710 (Fla. 1996) (admitting victim's statement to police); Turner v. State, 530 So.2d 45, 50 (Fla. 1987).

Hayward's focus on the time between the shots and his contact with the police is an oversimplification of the record and apparently is based on McDowell's, at times confusing, testimony. According to McDowell, he heard shots between 3:00 and 4:30 a.m. and that there was a 10 to 15 minute span between the firing of the first two shots and the louder third shot. (R.24 1516-20). While this was his testimony, he appeared confused by the differences between minutes and seconds as he also testified he heard "pow, pow, pow" then a man pleading that he did not have anything more, and then a third shot, followed shortly thereafter by the victim limping away. Clearly, the trier of fact could discount McDowell's estimate of the 10 to 15 minute delay between the discharging of the different guns, especially in light of his testimony that "Well, I heard the first two shots and then I heard him, the guy say, 'I don't have no more.'" "Right thereafter he (sic) heard the big shot went off. Right after that the third the big shot went off is what I heard." (R.24 1520). Further, and unchallenged

below,[7] was Destefano's statement the he got a shot off at his attacker. Clearly, if the shooting were done, and Hayward was already shot when McDowell saw him standing over Destefano, then Hayward was the attacker.

Likewise, the estimate of an hour and a half clearly would allow for the shots to have occurred much closer to the time Williams confronted the injured Destefano, bent over, not looking well at all, in the middle of Avenue D about a block from the crime scene. (R.24 1471-72) Destefano's grave condition was clearly visible to this lay witness and all Destefano said was that he was shot. Just a few minutes later, Grecco arrived and tried to ascertain the situation. Grecco observed that Destefano was pale and bleeding; his eyes were "very wide" from pain and he was panting/breathing was shallow. According to Grecco, Destefano was in fear, "pretty scared" and "very excited." He was trying to talk and reported he had been delivering newspapers when he was shot by a black male wearing a stocking cap. He fired at his attacker, but was unshure if he hit his mark. Shortly thereafter, Destefano became non-communicative due to his injuries. (R.24 1485-87, 1509).

This evidence, in conjunction with Dr. Digg's testimony that Destefano, even with perforations to his lung, liver,

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[7] Hayward merely objected to Destefano's statement the he was shot by a black male wearing a stocking cap. (R.24 1490-91).

diaphragm (the muscle which assists with breathing), and colon, would have been able to walk a distance before he would succumb to the massive internal bleeding he was experiencing, indicates that not much time would have passed between the shooting and the 911 call placed by Williams. (R.25 1652-56). Clearly, Destefano had not obtained help given the hour of the morning, and the testimony of McDowell and Williams that they did not see anyone else on the streets. It is reasonable to deduce that Destefano remained under the excitement of the shooting and the police were merely attempting to determine what had happened, not conduct an interrogation.

Hayward's reliance on Hutchinson v. State, 882 So.2d 943 (Fla. 2004); Merritt v. Crosby, 893 So.2d 598 (Fla. 1st DCA 2005); Blandenburg v. State 890 So.2d 267 (Fla. 1st DCA 2004); State v. Skolar, 692 So.2d 309, 310 (Fla. 5th DCA 1997)is misplaced. In Hutchinson, the statement was found not to be admissible because the 30 minute delay was sufficient time for the victim to reflect, but more important, there was no other evidence to elucidate what transpired during delay. Conversely here, the mortally wounded Destefano was able to make it about a block before reaching help, during this time he exhibited signs of fear, difficulty breathing, and the effects of his internal bleeding from the gunshot wound to his chest. The reasonable inference is that he knew he was badly wounded and was

succumbing to the effects of the internal bleeding. The physical effects of the wounds and fear visible to Williams and Grecco indicate Destefano was still under the stress and excitement of the attack and that he did not have time to reflect. Likewise unsupportive of Hayward's position is Blandenburg v. State 890 So.2d 267, 270 (Fla. 1st DCA 2004) (witness statement given after he was hospitalized and stated in "patently rational manner" he did not want his mother prosecuted while another witness clearly gave consideration first as to whether her mother would go to prison for a parole violation, showed reflection). In fact, the discourse on the law in that area contained in Blandenburg, 890 So.2d at 270, supports a finding of admissibility as Hayward's injuries were so severe he was becoming pale (from loss of blood) and losing consciousness.

Merrit is distinguishable from the instant case. There was a 20 minute delay between the initial 911 report and the arrival of the officer who took the victim's statement. Here, the officer arrived within two minutes of the 911 call and immediately spoke to the scared/mortally wounded Destefano. Further, in Merrit, the victim there was not severely injured,[8] and there was no evidence she was excited by the situation.

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[8] See National Union Fire Ins. Co. v. Blackmon, 754 So.2d 840, 843 (Fla. 1st DCA 2000) which lends support to the State's position that the severity of Destefano's untreated injuries is an indicator he remained under the excitement of the situation.

Again, those who observed Destefano noted the physical effects of his fear and excitement from the shooting, i.e., his eyes were wide, he seemed to be in fear, he was panting, and looked pale. The court's finding of excitement is supported by these facts and it cannot be said there was an abuse of discretion.

Williams, 967 So.2d at 748-49 supports the State's position. The time between the attack and the report to first responders is not a bright line. In Williams, some 20 minutes elapsed before the victim was able to call for help, yet, her concern for her health and fear in her voice indicated she remained under the excitement of the situation when she reported the crime. Even though a vocalized fear/hysteria may be indicators of the victim's continued excitement, such are merely indicators and should not be held to be dispositive of the question. Here, while Destefano did not voice his fear and excitement, his outward appearance and demeanor made it clear to those who saw him that he was under the stress of the attack and suffering the physical effects of being shot. As such, neither Rogers v. State, 660 So.2d 237, 240 (Fla. 1995) nor Rivera v. State, 718 So2d 856, 858 (Fla. 4th DCA 1998) should be an impediment to the admission of Destefano's statement.

The entirety of the evidence presented at trial supports the court's finding of an excited utterance and this Court should affirm. Power v. State, 605 So.2d 856, 862 (Fla. 1992)

(finding witness' statements to police an excited utterance); Pope, 679 So. 2d at 710 (finding statement given to neighbor before police arrived did not cause later account to police to fall outside excited utterance definition); Rogers, 660 So.2d at 240 (finding statement excited utterance in spite of fact victim sat on couch for 10 minutes and had a soda before giving police statement because at no time did she appear relaxed); Pedrosa v. State, 781 So.2d. 470, 473 (Fla. 3rd DCA 2001) (holding statement excited utterance made while bleeding profusely and in distressed state).

Dying declaration - "Before a hearsay statement is admissible as a dying declaration the court must be satisfied that the deceased declarant, at the time of its utterance, knew that his death was imminent and inevitable." Torres-Arboledo v. State, 524 So.2d 403, 407-08 (Fla. 1988); Teffeteller, 439 So.2d at 843; Lester v. State, 37 Fla. 382, 385, 20 So. 232, 233 (1896). "Whether a proper and sufficient predicate has been laid for the admission in evidence of a dying declaration is a mixed question of law and fact and will not be disturbed unless clearly erroneous." Teffeteller, 439 So.2d at 843-44. "A dying declaration is 'a statement made by a declarant while reasonably believing that his or her death was imminent, concerning the physical cause or instrumentalities of what the declarant believed to be impending death or circumstances

surrounding impending death.' § 90.804(2)(b), Fla. Stat. (2006). For a statement to be admissible under this hearsay exception, the declarant must believe death is imminent and inevitable with no hope of recovery. See Tillman v. State, 44 So.2d 644, 648 (Fla. 1950)." Williams, 967 So.2d at 749. In Pope v. State, 679 So. 2d 710 (Fla. 1996), this Court stated:

> Statements made concerning the cause or circumstances of what the declarant believes to be his or her impending death are admissible as hearsay exception. Section 90.804(2)(b), Fla. Stat. (19993). (sic) Although it is not required that the declarant make express utterances that she knew she was going to die, the court should satisfy itself "that the deceased knew and appreciated her condition as being that of an approach to certain and immediate death." *Henry v. State*, 613 So. 2d 429, 431 (Fla. 1992) The trial court's determination that the predicate for dying declaration was sufficient should not be disturbed unless clearly erroneous, and Pope has not demonstrated error. *See i.d.* We find that the court's admission of the statements as dying declarations was reasonably based on the totality of the circumstances.

Pope, 679 So. 2d 710 (Fla. 1996). It is not required that the declarant make "express utterances ... that he knew he was going to die, or could not live, or would never recover." Lester v. State, 37 Fla. 382, 385, 20 So. 232, 233 (1896). Rather, the court should satisfy itself, on the totality of the circumstances, "that the deceased knew and appreciated his condition as being that of an approach to certain and immediate death." Id., 20 So. at 233.

Destefano made his statement to Grecco after having been

shot in the chest and a he was experiencing the effects of the internal bleeding it caused. The bullet had perforated the lung and diaphragm on his right side making it difficult to breath; Destefano's breathing was shallow and he was panting. Also, he was very pale and frightened. He was losing blood not only from his lung, but from his liver and colon. According to Grecco, Destefano was "scared, frightened, terrified" and Dr. Diggs confirmed that someone in Destefano's condition, with internal bleeding and stating to lose consciousness, would know something was "radically wrong." According to Grecco, shortly after DeSetfano made his statement, he was no longer communicative. Given this, it is not unreasonable to find Destefano knew he was close to death and was making a dying declaration. Destefano was not required to voice his concern; however, his outward appearance and demeanor established he was aware of his grave condition and imminent death. See Henry v. State, 613 So.2d 429 (Fla. 1992) (finding statement of victim with burns over 90% of her body given after drive to hospital to be dying declaration); Labon v. State, 868 So.2d 1222, 1223 (Fla. 3d DCA 2004).

Confrontation Clause:[9] In Crawford v. Washington, 541 U.S.

[9] Hayward also asserts that forfeiture by wrongdoing would not permit admission of Destefano's statement as was suggested in Crawford. After he filed his brief, the Supreme Court decided Giles v. California, 128 S.Ct. 2678 (2008). There the Court held that forfeiture by wrongdoing is not an exception to the right of confrontation established at the time the founding of

36 (2004), the Supreme Court held that the Confrontation Clause prohibits the admission of testimonial hearsay against a criminal defendant without a showing that the witness who made the statement is unavailable, and that the defendant had a prior opportunity to cross-examine the witness. Crawford, 541 U.S. at 67-68. Analyzing the history of the confrontation clause, the Court stated "there is scant evidence that exceptions [to hearsay rule] were invoked to admit testimonial statements against the accused in a criminal case." Id., at 56. Under Crawford, the threshold inquiry is whether the statement is "testimonial." The Supreme Court chose not to comprehensively define testimonial hearsay finding only "it applies at a minimum to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Crawford, 541 U.S. at 67-68. The State contends Destefano's statement is not testimonial.

Later in Davis v. Washington, 126 S.Ct. 2266 (2006), the Court further clarified Crawford reasoning:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose

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the United States as required by Crawford, and thus, the defendant's killing of the victim alone would not suffice to permit admission of a pre-death statement.

> of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 126 S.Ct. at 2273-74. Similarly, in State v. Lopez, 974 So.2d 340 (Fla. 2008), this Court focused on the objective purpose of the police inquiry. Where it was clear that the emergency had passed, the responses were considered testimonial, such as in Lopez, because the police had arrived and the attacker had left the victim's presence, thus, dissipating any threat, t. Conversely, where there was an ongoing emergency and the questions were designed to meet the emergency, such as in Davis where the declarant was seeking help, they were considered nontestimonial. However, Davis did not alter the determination in Crawford:

> The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. ... Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. ... We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.

Id., at 56, n.6.

Under this standard, Destefano's statement was a dying declaration, and the inquiry should be over, because there is no confrontation problem with dying declarations. Under an excited utterance analysis, it is the State's position that Destefano's

statement was nontestimonial because the police were responding to an ongoing emergency. Grecco was assessing what happened to Destefano – the emergency was ongoing both from the standpoint that the victim was in critical condition and that there was a shooting where the weapons were unsecured. Destefano was breathless, panting, and losing consciousness, due to his internal bleeding. His fear and general deteriorating condition established that his response to Grecco was nontestimonial even though it was in answer to a question posed by the officer. See Williams v. State, 909 So.2d 599 (Fla. 5th DCA 2005) (holding statements to 911 operator and responding officers were excited utterances and non-testimonial under Crawford); Anderson v. State, 111 P.3rd 350 (Alaska Ct. App. 2005) (finding response to officer's inquiry to be excited utterance not interrogation, nor testimonial under Crawford); State v. Anderson, 2005 Tenn. Crim. App. LEXIS 62, 2005 WL 174441 (Tenn. Crim. App. 2005) (holding excited utterances to responding officer are not "testimonial").[10]

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[10] See also People v. Cage, 120 Cal. App. 4th 770 (Cal. App. 2004) (holding hearsay statement made at hospital to police that defendant had cut him was not testimonial because the interview was "unstructured" and "informal and unrecorded"); Leavitt v. Arave, 371 F.3d 663, 683 n.22 (9th Cir. 2004) (finding victim's call to police the night before her murder to complain defendant broke into her home was non-testimonial, excited utterance because victim initiated contact, was not interrogated, and her motivation was to get help) Demons v. State, 595 S.E.2d 76, 80-81 (Ga. 2004)(finding no constitutional error under Crawford for

However, even if this Court rejects the contention that the statement was a nontestimonial excited utterance and dying declaration, the admission was harmless beyond a reasonable doubt. Hamilton v. State, 547 So.2d 630 (Fla. 1989); State v. DeGuilio, 491 So.2d 1129 (Fla. 1986). Destefano merely indicated he was shot by a black male wearing facial covering. Similar information came from McDowell who reported that a black male was standing above Destefano just after the shots were fired and that the attacker moved off to a lighted area to

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admitting excited utterance); Fowler v. State, 809 N.E.2d 960, 961-66 (Ind. App. 2004) (holding statements to police in response to informal questioning at scene shortly after crime are not testimonial); State v. Barnes, 854 A.2d 208, 211-12 (Me. 2004) (in earlier incident, mother went to police station in tears stating defendant, who eventually killed her, had tried to kill her. Mother's statements non-testimonial because she had gone to the police on her own while under the stress of the alleged assault and police only asked questions to determine why she was upset); People v. Moscat, 777 N.Y.S.2d 875, 880 (N.Y. City Crim. Ct. 2004) (911 call made by domestic violence victim to obtain emergency help is non-testimonial because it was to get help not start prosecution); Hammon v. State, 809 N.E. 2d 945,951 (Ind. Ct. App. 2004)(holding statements given to police answering call for aid are not testimony when questions posed were made to assess situation police faced); United States v. Griggs, 2004 U.S. Dist. LEXIS 23695 (SDNY 2004), (declarant’s statement to police defendant “had a gun” and pointed to him was excited utterance and agreeing that declarant's statements are testimonial if they are "knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings); Rogers v. State, 814 N.E. 695 (Ind. Ct. App. 2004); Moscat, 777 N.Y.S. 2d 875; People v. Corella, 122 Cal. App. 4th 461 (Cal. App. 2d Dist. 2004)(preliminary questions by police at scene of crime not interrogation); Barnes, 854 A.2d 208, 211-12 (statements not given in structured police interrogation).

examine his bleeding hand. The DNA evidence confirmed McDowell was describing Hayward's actions as the blood trial mirrored MsDowell's report that Hayward stood over Destefano and then rifled though his pocket and car before walking to a lighted area to examine his bleeding hand. Further, the DNA testing confirmed Hayward had examined his bleeding had under a light post. Even absent Destefano's statement, the jury had the same information, that a black male had fired upon Destefano, burglarized his car, and was shot during the confrontation. DNA proved it was Hayward who committed these acts. This Court should find any error harmless beyond a reasonable doubt under DeGuilio, and affirm.

ISSUE II

HAYWARD'S STATEMENT WAS ADMITTED PROPERLY (restated)

Hayward contends the court erred in denying his motion to suppress the statements he made to the police at the rooming house because he was illegally detained and the officers lacked probable cause, contrary to the rights protected by the Fourth, Fifth, and Sixth Amendments. The State asserts that the denial was appropriate and this issue is without merit.

Recently this Court discussed the standard of review for a motion to suppress stating:

> [I]n reviewing a trial court's ruling on a motion to suppress, this Court accords a presumption of correctness to the trial court's findings of

> historical fact, reversing only if the findings are not supported by competent, substantial evidence, but reviews de novo "whether the application of the law to the historical facts establishes an adequate basis for the trial court's ruling." Connor v. State, 803 So.2d 598, 608 (Fla.2001), cert. denied, 535 U.S. 1103, 122 S.Ct. 2308, 152 L.Ed.2d 1063 (2002).

Parker v. State, 873 So.2d 270, 279 (Fla.2004); see Nelson v. State, 850 So.2d 514, 521 (Fla. 2003).

In this case, the court held an evidentiary hearing on the motion to suppress during which Detective Joseph Coleman ("Coleman") and Sergeant Dan Flaherty ("Flaherty") and Officer Darren Mace ("Mace"), of the Fort Pierce Police Department, testified. They reported that around 4:00 a.m., February 1, 2005, a call came in reporting the shooting of a male victim at 1702 Avenue D, in Fort Pierce. Prior to the arrival of the paramedics, the victim reported to the responding officers that he had been robbed by a black-male wearing a mask or ski cap and that he had been shot. Although the victim reported that he returned fire, he was unable to confirm whether or not he had hit his attacker. The victim's gun was a silver .357 revolver. (R.11 10-14) Officers noted that there appeared to be someone shot other than the victim at the crime scene. The victim fled and was later found at 16th Street and Avenue D. There was very little blood leading in his direction. On the other hand, there was much blood at the crime scene, and a blood trail leading from the scene. (R.11 15-16)

Responding to the call, Coleman spoke with McDowell, who reported hearing much commotion coming from the parking lot across from his building. Before he went to look outside, he reported hearing three distinct gunshots, but, the third shot was distinctly different than the first two. Coleman stated that McDowell reported seeing a white man on his hands and knees in the parking lot while a black man wearing dark clothing and a ski cap or mask was going through the vehicle. The black male had obvious amounts of blood dripping from his left hand as he left the scene, fleeing behind an apartment house. (R.11 19-23)

On February 3, 2005, Coleman was notified that the department had received a call from Linda Roberts reporting a man with a possible gunshot wound was at 2108 Avenue G, a location consistent with the path taken by the fleeing black male with a bleeding hand took. (R.11 23-25) Responding to the call, Mace and Flaherty testified that the building located at that address was a rooming house, a block house with several room attached for rent with a common living area. When law enforcement arrived, the door to this area was open. Although anyone was free to enter this common area, the officers received permission to enter the premises from men sitting in the living room. (R.11 26-27, 45-46)

Upon entering, the officers asked these men if there was someone inside the house who had some sort of injury to his

hand. Answering in the affirmative, the men directed the officers to the back room, where they saw Smith, the black female occupant of that room. Smith informed the officers there was no other person in the room with her. (R.11 27-29, 46-47) Although she claimed to be unaware of whether the adjacent bathroom was occupied, Hayward stepped out a short time later wearing a bandage on his left hand. He claimed to have been stabbed by Smith during a domestic incident, however, after Mace and Flaherty inspected the wound, it was apparent it was from a bullet. (R.11 30-32, 47-48)

As Flaherty wanted to question Smith alone, Mace requested that Hayward step outside with him, which he did without objection. At no point did Mace have his gun drawn, nor did he order Hayward outside; it was merely a request. Inside the room, a very nervous Smith confirmed to Flaherty that she had stabbed Hayward in the hand. (R.11 48) Meanwhile, as they went outside, Mace informed Hayward that they would like to take him back to the police station in order to discuss things further. Hayward was informed that Mace would be cuffing him, **not** because he was under arrest, but because of police policy; anytime someone is riding in the backseat of a patrol car, they must be cuffed, but Hayward's hands would **not** be cuffed behind his back. This occurred as he stood just outside of the patrol car and was for officer safety. (R.11 33-36 42). Hayward agreed and offered

no objection or any sort of complaints. When they arrived at the station, Hayward's cuffs were removed immediately, however, again due to police policy, those in the interrogation rooms must be secured by an ankle bracelet attached to the floor which was done in Hayward's case. (R.11 33-38) Also taken to the station was Montavious Gatlin ("Gatlin"), who was driven by Detective Gagliano ("Gagliano"). (R.11 62-63)

As Hayward was stepping into the patrol car outside of the rooming house, he spontaneously said to Mace that he was not going to lie, that he was robbed the other day and he may have been shot. Mace immediately informed Flaherty of the admission. (R.11 38-39) As Smith was present for this news, she changed her story as well and stated that on February 1, 2005, Hayward had knocked on her bedroom window trying to get in. Once inside, he informed Smith that he was shot while being robbed, but refused to go to the hospital when Smith offered to take him. At no time did she see a gun. Smith consented to a search, but the officers were unable to find anything in the room or the shed outside. (R.11 49-50)

Prior to interviewing Hayward at the station, Coleman was informed by Gagliano that Gatlin had said that it was a rumor on the street that the victim was shot by Smith's boyfriend, "Steve". Gatlin mentioned that on February 1, 2005, Hayward had

sold a chrome revolver with a black handle.[11] (R.11 64-65). Just prior to the interview, Coleman read Hayward his Miranda rights, which he waived via written form. At this point, he made a brief statement to Coleman, however, he did not confess to killing Destefano. (T.11 66-67).

After considering this testimony, along with argument by the parties, the court found Hayward's statements admissible at trial. In doing so, the court found that the officers had probable cause, and Hayward made no statements between the time he was cuffed and the time he was given Miranda.

> ...As I may have indicated in my questions with defense, the Court does determine that, firstly, that prior to the defendant being handcuffed, we'll phrase it that way, being handcuffed and taken down to the Fort Pierce Police Department, I do find that there was probable cause that would have justified the police to make an arrest at that time. Now, I know the police did not announce an arrest at that time, however, they certainly I believe could based upon the evidence.
>
> The defendant made no statements from the point that he was handcuffed, placed in the car and brought to the Fort Pierce Police Department where once he was brought into the interrogation room or questioning room…he was at that time read Miranda, which would have, I think, at that the point possibly could arguably have made, led a reasonable person to believe that he was under arrest at that time. In any event, at that point was advised of his rights and may or may not have made the statement.
>
> With regards to the consent. I do believe the

[11] The victim's fiancé, Ms. Edwards, reported Destefano owned a chrome revolver with a black handle. (R.11 64-65)

> evidence shows that given the circumstances of an injury to a hand to which Mr. Hayward said…that injury was saying my girlfriend and I got into a fight and I got stabbed in the hand with a knife, I believe is what he said, that the officer requesting that he come down to discuss that would have led any reasonable person to believe that that's exactly what they were going to do, to discuss what occurred with regard to that.
>
> My understanding was there was, and there's no testimony to it, that there was no indication that they were investigating the robbery that led -- or this murder investigation which could have been either robbery or a murder investigation up to that point. Mr. Hayward had no idea that that's why they were there other than perhaps in his own mind.
>
> So I do believe that he consented to go along with the officer and that the procedure of having somebody handcuffed when they're riding in the patrol car, certainly I believe is reasonable.
>
> ...Therefore, that the motion to suppress statements, which I assume to be any statement that Mr. Hayward made, I don't see any statements, the Court doesn't find there is any statements that need to be suppressed based upon the fact that any statements after Miranda were valid whether he was in custody or not at that point. That the statements made while the officers were present with him in the rooming house at…2108 Avene G address were made while he's -- where no reasonable person would have believed that they were in custody at that time or under arrest.

(R.11 91-93) The court discussed Hayward's statement made as he was entering the patrol car reasoning:

> With regard to the only close call or closer call, I will say, which is the statement, "Oh, I got to tell you the truth, I wasn't cut with a knife, I was shot through the hand during a robbery, that I believe the testimony, only testimony which is unrefuted was that that statement was made prior -- during the discussion at the car about going down to the police station, Officer Mace made it very clear,

> at least the testimony is that Mr. Hayward was not under arrest at the time, that the procedure was to have him handcuffed to be placed in the patrol car and that Mr. Hayward -- and that was done somewhere around the same time before he was placed in the car. It was before he was handcuffed.
>
> And that based upon that, that statement also will be suppressed as it was validly obtained.
>
> ...I mean, the bottom line was that Mr. Hayward was found -- Hayward was found within two days of the injuries, the gunshot wound, the robbery that took place and now the charged murder and that all that is consistent with law enforcement developing probably cause. So I will deny the motion to suppress at this time.

(R.11 94-96)

In support of his claim of unconstitutional detention, Hayward cites Brendlin v. California, 127 S. Ct. 2400 (2007), a case where the Supreme Court reiterated its reliance on the test set out in United States v. Mendenhall, 446 U.S. 544 (1980), for determining when a seizure occurs.

> When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), who wrote that a seizure occurs if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," id., at 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (principal opinion). Later on, the Court adopted Justice Stewart's touchstone, *see, e.g., Hodari D.*, supra, at 627, 111 S. Ct. 1547, 113 L. Ed. 2d 690; *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988); *INS v.*

> *Delgado*, 466 U.S. 210, 215, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984), but added that when a person "has no desire to leave" for reasons unrelated to the police presence, the "coercive effect of the encounter" can be measured better by asking whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter," ...

Brendlin, at 2405. While Brendlin was primarily concerned with scenarios arising out of a traffic stop, this Court has expanded on the dictates of Mendenhall in Taylor v. State, 855 So.2d 1 (Fla. 2003) by describing three levels of encounters a person can have with law enforcement.

> The first level is considered a consensual encounter and involves only minimal police contact. During a consensual encounter a citizen may either voluntarily comply with a police officer's requests or choose to ignore them. Because the citizen is free to leave during a consensual encounter, constitutional safeguards are not invoked. *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).
>
> The second level of police-citizen encounters involves an investigatory stop as enunciated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). At this level, a police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime. § 901.151 Fla. Stat. (1991). In order not to violate a citizen's Fourth Amendment rights, an investigatory stop requires a well-founded, articulable suspicion of criminal activity. Mere suspicion is not enough to support a stop.
>
> ...[T]he third level of police-citizen encounters involves an arrest which must be supported by probable cause that a crime has been or is being committed. *Henry v. United States*, 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959); § 901.15 Fla. Stat. (1991).

Taylor, 855 So.2d at 17. This Court also explained that a consensual encounter is:

> …one in which a reasonable person would feel free to disregard the police and go about the person's business." *Voorhees v. State*, 699 So.2d 602, 608 (Fla. 1997). The police are not required to have a reasonable suspicion of improper conduct to initiate a consensual encounter. Id. When determining whether a particular encounter is consensual, the Court must look to the "totality of the circumstances" surrounding the encounter to decide "if the police conduct would have communicated to a reasonable person that the person was free to leave or terminate the encounter." *Id.*

Id.

Just as this Court found that Taylor eventually passed through all three of the phases, Hayward did as well. Consistent with this Court's findings in Taylor, it is the initial encounter that cannot be seen as anything other than consensual. Hayward's first encounter with law enforcement took place as he was exiting the bathroom adjacent to Smith's bedroom. (R.11 46-47) The police did nothing to compel Hayward to exit the bathroom; there was no showing of authority which drew Hayward into the hallway. Likewise, the record shows the police were unaware of the identity of the person in the bathroom. Hayward exited of his own accord and chose to confront the officers. He appeared quite anxious to explain away his injuries. Inquiring as to what happened to Hayward's left hand, he volunteered that Smith had stabbed him following a

domestic dispute. When Hayward removed his bandage, it was in response to Mace asking if he could take a look at it. At no point did Mace, nor any other member of law enforcement have a weapon drawn or demand to see the wound.[12] (R.11 53-54).

As was the case in front of Smith's room, Hayward was not detained at the time that he was taken outside nor was he detained when he was transported to the police station, both of which he chose to do under his own free will. Hayward argues that because he was handcuffed, it is unreasonable to expect any body in similar circumstances to feel as if they are free and instead, argues that they are "on the receiving end of a classic show of authority". (IB 54). While handcuffs may, by definition, be restraining devices, this Court has previously allowed such restraint when the intention behind it is not arrest, but rather officer safety, as was the case here. As Hayward pointed out, this issue was addressed in Taylor.

> Next, Taylor argues that he was under de facto arrest when he was taken to the police station and, therefore, his subsequent confession to Detective Lester about the burglary was the fruit of an illegal arrest. 16 We disagree because the facts surrounding Taylor's trip to the station do not meet the custody requirement in order for him to be considered to be under arrest. HN6In order to conclude Taylor was in custody, "it must be evident that, under the totality

[12] Indeed, one responding officer did have a shotgun with him, but there is nothing that suggests in any way that the shotgun was being used for any purpose other than simply to ensure the officer's safety, which is department protocol. (R.11 54) In this sense, it cannot be said the officer's weapon was "drawn".

> of the circumstances, a reasonable person in the suspect's position would feel a restraint of his or her freedom of movement, fairly characterized, so that the suspect would not feel free to leave or to terminate the encounter with police." *Connor v. State*, 803 So. 2d 598, 605 (Fla. 2001).
>
> When he was asked to accompany Noble to the station, Taylor voluntarily agreed. 17 Moreover, although Taylor rode in the back of the police car, Noble testified at the suppression hearing that Taylor was not handcuffed during the ride. Upon arriving at the station, Noble handcuffed Taylor for safety reasons, but explained to him that he was not under arrest. Thus we conclude that Taylor's transportation to the station did not amount to an illegal detention or de facto arrest.

Id., at 27. Although in the case at bar Hayward was handcuffed while being transported to the station, just as was the case in Taylor, Mace was very deliberate when handcuffing Hayward, assuring him that not only was he not under arrest, but was only being handcuffed because of safety reasons as required by department protocol. (R.11 33-36). Furthermore, when they arrived at the station, Mace removed the handcuffs. During the evidentiary hearing, Mace was careful to point out that not only did Hayward acquiesce to these requests; he did so without any objection or protest. (R.11 36-38) Finally, as with Taylor, although Hayward was restrained with an ankle bracelet when he was placed in the interrogation room, this was further in line with department protocol. In any case, Hayward made no statements until after receiving Miranda warnings.

This line of reasoning is also bolstered by Simmons v.

State, 934 So. 2d 1100 (Fla. 2006), where, just as here, the defendant was cuffed while being transported to the station for no other reason than the officer's safety, and, in relying on Taylor, this Court once again reiterated the significance behind the defendant being told that he was not under arrest. Hayward is not able to demonstrate in any way how the circumstances here place his situation outside the purview of Taylor and Simmons.

However, even if this court were to find that Hayward had been *de facto* arrested, he still must demonstrate that law enforcement was without probable cause when he was detained. see Simmons, at 1114; Blanco v. State, 452 So. 2d 520, 523 (Fla. 1984) (holding court properly denied defendant's motion to suppress evidence when there was probable cause to support his *de facto* arrest). He is unable to do so.

Walker v. State, 707 So.2d 300, 312 (Fla. 1997), provides:

> Probable cause for arrest exists where an officer "has reasonable grounds to believe that the suspect has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction." *Blanco v. State*, 452 So.2d 520, 523 (Fla. 1984). The question of probable cause is viewed from the perspective of a police officer with specialized training and takes into account the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Schmitt v. State*, 563 So.2d 1095, 1098 (Fla. 4th DCA 1990).

See Chavez v. State, 832 So.2d 730, 747-48 (Fla. 2002) (finding probable cause to arrest based on tips from citizen informants);

McCarter v. State, 463 So.2d 546, 548-49 (Fla. 5th DCA 1985) (opining "[p]robable cause to arrest exists when facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has [been] or is being committed.").

In considering the totality of the circumstances and taking into account the testimony presented during the hearing, this Court will find that law enforcement had probable cause to arrest or detain Hayward. Detective Coleman testified to speaking with an eyewitness McDowell, who mentioned that a black male with a wounded left hand fled the scene, in the direct path of the rooming house. This was corroborated by the blood trail leading toward the rooming house, which was not left by the victim, as he was found a few blocks in the opposite direction. Coleman was notified two days later, on February 3, 2005, a call came in from Linda Roberts, who reported that a man with a possible gunshot wound Avenue G. (R.11 17-25) Inside the house, Hayward was unable to offer a reasonable explanation for the wound to his hand, which, due to it being infected, indicated that the wound was not fresh. (R.11 30-32) Finally, the officers had the statement from another occupant of the house, Gatlin, who reported that Hayward sold a chrome revolver with a black handle on February 1, 2005, the day of the murder.

Destefano's revolver was chrome with a black handle. (R.11 64-65) Taking everything into account, the court correctly found probable cause existed.

As Hayward was not illegally detained, and even if this Court were to find that he was *de facto* arrested, probable cause existed for a valid arrest, making this issue meritless. Moreover, even if Hayward's statements should have been suppressed, their admission was harmless beyond a reasonable doubt. Digulio. Destefano, carried only ten dollars with him during his morning deliveries, and had a gun which he reported firing at his attacker that morning. Not only did McDowell testify that he saw a black male standing over Destefano and going through his car, but that the man walked off, only to stop at a lighted corner to look at his bleeding hand. The DNA and blood trail confirmed that Hayward bled at the scene, left blood on Destefano's pants, trailed it around the car and to a lighted area where a blood pool was found. Further, the blood trail continued leading toward the rooming house where Hayward stayed with Smith. Hayward gave Smith a bloody ten dollar bill that morning. He also suffered a gunshot wound to his hand, sold Destefano's gun, and the murder weapon, with his blood on it, was found in the laundry room of the rooming house. This Court should affirm. (R.24 1458-61 1516-30, 1569-70, 1576-77; R.25 1580-92, 1604-11, 1616-30, 1637-40, 1682, 1690-94, 1696-97; R27

1854-60, 1863-64, 1914-19, 1926-40, 1943-53, 1957-58, 1962-68; R.28 2009-20).

ISSUE III

HAYWARD'S CONVERSATIONS WITH SMITH WERE ADMITTED PROPERLY (restated)

It is Hayward's position that the court erred in overruling his objection to the admission of taped conversation he had with Smith on the day of his arrest. Here, he asserts that the State failed to prove the relevancy of his discussions of having reefer[13] in her apartment, referring to the judge and his attorney in disparaging terms, and using vulgarity and dismissive language in responding to Smith. Hayward also claims that these statements were more prejudicial than probative, (IB 67-72), and that the error goes to both the guilt and penalty phases. (IB 75) In part, this claim is not preserved for review as the argument below was abandoned, and that which is preserved, is without merit. (R.25 1551-57, 1701-07; R.26 1714-33). Having considered the conversation in context, and given the court's broad discretion to resolve evidentiary issues,[14]

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[13] During his taped conversation Hayward refers to reefer, marijuana and weed interchangeably. For consistency, the State will refer to this drug as reefer.

[14] As provided in Williams v. State, 967 So.2d 735, 753 (Fla. 2007): "The Evidence Code provides that "[a]ll relevant evidence is admissible, except as provided by law." § 90.402, Fla. Stat. (2006). The Code places the following limitation on the admission of evidence: 'Relevant evidence is inadmissible if its

this Court should affirm.

At trial, Hayward complained that the vulgarity in his conversation with Smith was irrelevant and more prejudicial than probative and should be suppressed. (R.25 1551-57, 1701-07). Upon the court's review of the transcripts, the judge voiced concern about the discussions involving hidden marijuana/reefer ("reefer") which were made in such an incoherent manner that it seemed the parties were talking about different things. Additionally, the court focused on whether this could be seen as an uncharged crime that the possible prejudicial nature of Hayward's prediction he would not receive bond for the crime. (R.26 1714-16, 1726).

When asked to clarify his position and the portions of the tape at issue, Hayward claimed the entire tape was not relevant, but he had specific objections to the vulgarity expressed about the judge and a prior attorney (R.26 1720) and a confession to this crime (R.26 1726). Hayward had no objection to his reference to a possible denial of bond (R.26 1731). With respect to the relevance of the reefer, Hayward appears to have

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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. (2006). The standard of review for a trial court's ruling on the admissibility of evidence is abuse of discretion. See *Alston*, 723 So.2d at 156."

withdrawn the objection and concurred that when read in context, it was relevant. Defense counsel stated: "Only other one specifically as to relevance was the issue with the reefer and we've already dealt with that. And my understanding is he said in its context it is relevant." (R.26 1728-29). It would appear that Hayward agreed with the judge's assessment that his reaction when Smith spoke of the gun in response to his trying to get her to remove the "reefer" from the apartment, indicated that the State was correct that reefer was code for gun. (R.26 1718, 1722). As such, he agreed the statement was relevant on this point. (R.26 1728-29).

The court found that the vulgarity was not prejudicial as it put the conversation in context and he noted that at the point where Smith spoke of the gun, Hayward went ballistic. The court obtained an agreement from the State to clarify that there were no drug charges/uncharged crimes and that there had been no confession. Based upon this, he overruled the relevancy and prejudicial objections.

The State was seeking introduction of tapes of two telephone conversations Hayward had with Smith on the day of his arrest. The prosecutor noted the conversations had to be read in context and they showed Hayward was trying to coach Smith so she could assist him, that he was talking in code, and that he was frustrated and used vulgarity because Smith was not

listening to him. The conversations together show consciousness of guilt, and thus, were relevant. (R.26 1714-33)

Initially, the court addressed the relevancy of portions of Hayward's conversations with Smith and questioned the State regarding the matter. Specifically, the court was concerned about the reference to a quantity of drugs Hayward asked Smith to remove from the apartment, but the court also recognized that the parties may have been talking in code. (R.26 1714) In response to the court inquiry, the State offered that the conversations were relevant when taken together and in context. Track 2 of the conversation showed Hayward, from the holding cell, was trying to coach Smith and was advising her what he had told the police. Track 3 contained a similar conversation and included reference to a quantity of reefer, which Hayward acknowledged on the tape did not exist, but that it was code for the murder weapon. (R.26 1715-17) The State also offered that the vulgarity used by Hayward was just the way he spoke; he was not as articulate as others, however, in context it showed his frustration with Smith and coaching efforts to help him escape prosecution. (R.26 1717-18).

At the State's urging, the defense pointed to specific portions of the tapes and the court concluded periodically:

> For an uncharged crime, I was concerned about that. So as long as ... you all were looking at it in the sense that – that this pound ... of reefer was

> something the Defendant was, in the State's view, not making reference to, you know three pounds of reefer ... he was instead talking about the weapon in code. As long as it's made clear to the – clear that that is not – do you see, my concern is that, obviously, if we're talking about the guy, also in addition to possibly being involved quantities of marijuana, that's not even the intent of the State to put this evidence on, that he also had marijuana in his residence.

(R.26 1717). The court admitted it had heard Hayward on the tape go ballistic when Smith mentioned the gun. (R.26 1718). Continuing the court opined:

> Okay. Now let me ask you this. Is there any portion of these transcripts that you would conceive don't have to be played?
> ...
>
> All right. Where – and, as I said, I reviewed the whole thing ... But there was some place in here where she mentioned something about the gun. And that's when he went ballistic.[15]
>
> ...
>
> So it's right before that.
>
> ...
>
> Right before that. Got it. Okay. Yeah, I mean, it's unfortunate that he uses these kinds of words, but I don't think that in a death penalty case people are going to be enhanced in their decision in any way by the use of vulgarity. So, in the scheme of things, if there is relevance, I would find that under 90.403 that the relevance is not outweighed by any prejudicial affect. I think the jury selection process itself told us that these people all take their obligation ... very seriously. And I don't

[15] The State pointed to Page 22, Line 3 of the transcript of CD 1, Track 2. (R.26 1722).

> think anybody on this panel is going to make a decision without being sure of it. I rather doubt that in the scheme of things and the facts of had this that (sic) somebody is going to be in any way influenced by the use of vulgarity. And if it help (sic) you, I'll tell them that what they're going to hear is a conversation which contains vulgarity. Do no be offended by it. I am not personally offended by any of this. If you want me to, if not, I'll just let it go on the way it was presented.[16]
>
> ...
>
> I actually looked at this whole segment of the tape (discussion of confession) as being exculpatory. I mean, he's saying, why am I going to confess to something I didn't do, you dumb bitch, end quote. Excuse me. But, if you – I mean, what drink , what would you like for me to do about that? What is your proposal?[17]
>
> ...
>
> If we're going to tie it up together that this was not refer we're talking about, actually a code doe, you know, the weapon, whatever.
>
> ...
>
> Even if it is in summation, I just want to be clear to this Jury that this man is not committing other crimes that we are not charging him with here.

(R.26 1722-30).

Here, Hayward challenges the relevancy of his statements regarding the reefer and the State's argument that such was code for the murder weapon. As noted above, that argument was

[16] The court offered to give an instruction, but the defense rejected the offer. (R.26 1726)

[17] Counsel sought the prosecutor's assurance he would confirm for the jury that Hayward had not confessed. Further, the defense declined the offer of a jury instruction. (R.26 1726)

withdrawn by defense counsel (R.26 1728-29). As such, it is not preserved for appeal. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (holding for issue to be cognizable on appeal, it must be specific contention asserted below). Further, the thrust of Hayward's argument below was the prejudicial and irrelevant nature of the vulgarity. Hayward has not pointed to a record cite showing he argued that his negative reaction to Smith's pregnancy was prejudicial. (R.25 1551-57, 1701-07; R.26 1714-33). Hence, it too, is not preserved. Stenihorst. However, even if the merits of the issues are reached, this Court will find the rulings on admissibility proper.

In Steverson v. State, 695 So.2d 687, 688-89 (Fla. 1997), this Court stated:

> In *State v. McClain*, 525 So.2d 420, 422 (Fla.1988), we explained the balancing test a trial court must perform under section 90.403 in determining whether relevant evidence also is admissible against a defendant at trial. We stated:
>
>> This statute compels the trial court to weigh the danger of unfair prejudice against the probative value. In applying the balancing test, the trial court necessarily exercises its discretion. Indeed, the same item of evidence may be admissible in one case and not in another, depending upon the relation of that item to the other evidence. E. Cleary, McCormick on Evidence, § 185 (3d ed. 1984).
>
> Professor Ehrhardt explains the application of the statute as follows:
>
>> Although Section 90.403 is mandatory in its

> exclusion of this evidence, a large measure of discretion rests in the trial judge to determine whether the probative value of the evidence is substantially outweighed by any of the enumerated reasons. The court must weigh the proffered evidence against the other facts in the record and balance it against the strength of the reason for exclusion.
>
> In excluding certain relevant evidence, Section 90.403 recognizes Florida law. Certainly, most evidence that is admitted will be prejudicial to the party against whom it is offered. Section 90.403 does not bar this evidence; it is directed at evidence which inflames the *689 jury or appeals improperly to the jury's emotions. Only when that unfair prejudice substantially outweighs the probative value of the evidence is the evidence excluded.
>
> ....
>
> ... In weighing the probative value against the unfair prejudice, it is proper for the court to consider the need for the evidence; the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional basis; the chain of inference necessary to establish the material fact; and the effectiveness of a limiting instruction.

1 C. Ehrhardt, Florida Evidence § 403.1 at 100-03 (2d ed. 1984) (footnotes omitted).

Steverson v. State, 695 So.2d 687, 688-89 (Fla. 1997).

Professor Ehrhardt also stated:

> Evidence of conduct or speech of the accused which demonstrates a consciousness of guilt is relevant since it supplies the basis for an inference that the accused is guilty of the offense. Because of the difficulty in determining the strength of inference of a guilty conscience from the outward conduct,

> sometimes additional requirements have been imposed, apparently to protect the accused from an erroneous inference. For example, evidence of the flight of the accused is admitted when there is a nexus demonstrated that the accused fled to avoid prosecution for the offense.

1 C. Ehrhardt, Florida Evidence § 403.1 at 189-90 (2008 edition) (footnotes omitted).

At issue was the identity of Destefano's killer. In order to prove Hayward's guilt, the State relied in part on the discovery of the murder weapon with Hayward's blood on it in the utility room of his girl friend's apartment. Hayward countered, with his final version of events, that he had witnessed the attack on Destefano and had found the gun, and he shot himself when he dropped it while looking for the "other" attacker. Hayward's reaction and orders to Smith with respect to the gun, the search of her apartment, and what she told the police was highly relevant to his consciousness of guilt and rebutted his claimed version that he merely found the gun with which he shot himself. The court's offered limiting instruction was rejected by Hayward, but he agreed to have the prosecutor clarify the fact that there was no suggestion of a drug crime.

A review of Hayward's conversation with Smith is helpful. Initially, Hayward told Smith not to say anything and he became angry when she kept talking. (R.27 1873-76). Hayward wanted Smith to stop talking so he could tell her what he wanted her to

do, because he did not know when he would be able to call her again. (R.27 1877). Also, he wanted to stop crying so he could tell her what went on in his police interview. He claimed to have told the police the same story he told Smith and in response to her answer that she lied to the police when she said she knew nothing, Hayward said Smith did not lie as she did not know anything because he had lied to her so she would know nothing. (R.27 1879-81). Hayward communicated that if Smith told the police anything it would just be the lie he had told her. (R.27 1883). He instructed Smith not to say anything about what he told her. (R.27 1885).

Hayward also tried to explain why he lied to Smith and admitted he lied to the police when he said he watched the robbery and heard shots. He coached Smith to tell the police that he did not shoot anyone, but was shot himself when he dropped the gun he found at the scene. When Smith asks why Hayward had not told her this, he responds "[t]elling you what the same lie I told you." (R.27 1886-89). In response to Hayward's admonishment that she should say nothing and that she should not have told the police he would not let her call for an ambulance for his injured hand, Smith offered that the police still did not have the gun. (R.27 1995-89). This prompted Hayward's tirade that Smith was stupid, that he would call his brother to beat her given that he had told Smith not to say

anything. He could not believe he would have to fight the judge/charges with a dumb lawyer and girlfriend. He claimed she was dumb because of what she "just did." Hayward told Smith not to say anything, but just to bring the item he spoke about before to "Charles," but Smith did not want to comply. (R.27 1995-98).

When Smith and Hayward spoke again, he confirmed the he was shot with a .357, but she should be quiet. (R.4 491). Shortly thereafter, Smith asked Hayward where the item was and learned that it was in drawer near the refrigerator. (R.4 496). Hayward then instructed Smith that as soon as she got of the telephone, she should get all the "reefer" he told her to hide, to which Smith asks, "what are you talking about?" (R.4 497-98). Smith accused Hayward of setting her up, but he counters that she thought that only because she did not understand what he was telling her. (R.4 498). Hayward complained that he did not know why he called Smith, because he accomplished nothing except cursing at her for not listening to him and for not doing what he told her to do. (R.4 500). He told her he did not have any reefer, and the police knew that. (R.4 500-01).

Smith also tells Hayward that the police knew to whom he had sold the .357, and she asked if Hayward has sold the gun. He admitted having sold the .357, the one he found at the scene. (R.4 502-03). Hayward told Smith his version of events of

finding the gun and shooting himself accidentally. In response to the question why he told her this, Hayward replied that he wanted her to know what he told the police "Do you understand me?" (R.4 505). Hayward asked Smith to prove she was on his side by giving "that" to Charles or his brother. (R. 511)

<u>"Reefer" as code for gun</u> - As the court indicated, Hayward went "ballistic" when Smith discussed the gun. (R.26 1718, 1722; R.27 1896-97). When Smith noted the police did not have the murder weapon, Hayward became incensed and in a less than articulate manner, but certainly with more colorful language, wondered how he could counter the charges with his lawyer and a girlfriend as "dumb" as Smith who would discuss the weapon even though he had told her not to say anything. He also told Smith she had to get something out of the apartment that was in a drawer, he spoke about "reefer," which all knew did not exist, but how she had to give what he spoke about to Charles or his brother. Hayward also admitted selling the .357. (R.4 500-11). Together, this information was relevant to this case as the murder weapon, with Hayward's blood on it, was found in the utility room in Smith's rooming house. The urgency of Hayward's pleas for Smith to remove the "reefer", which Hayward admitted did not exist, and that Smith should "listen to him" and get rid of it coupled with his strong reaction when Smith mentioned the gun, yet to be found by the police, leads to the reasonable

conclusion that "reefer" is code for gun. (R.27 1896-97). Such conversations showed Hayward's consciousness of guilt and were admitted properly.

Hayward's reliance upon U.S. v. Peoples, 250 F.3d 630 (8th Cir. 2001) is misplaced as the facts of that case are distinguishable. In Peoples, there was no indication contained in the statement that the comment "bought him a ticket" meant killed the victim as reported by an FBI Agent. However, in the instant case, as noted above, from the entire context of Hayward's statement, his reference to "reefer" which he admits did not exist, but that Smith should listen to him and get rid of it as well has his volatile reaction when Smith mentioned the gun, forms a clear connection between "reefer" and gun. It is not an unreasonable argument, and clearly one not more prejudicial than probative, especially when the gun was found in the utility room and no reefer or other drugs were found in the apartment search on the day of Hayward's arrest.

Derogatory statement about judge, counsel, and Smith - Again, the tenor or Hayward's conversations with Smith were that she was not listening to him and she was saying things on the telephone that she should not say. It was in response to her reference to the gun, still undiscovered, that Hayward disparaged the judge, his counsel, and Smith. However, this merely shows the concern Hayward had for his situation and the

frustration he felt at having to rely upon Smith, who would not listen to him, said inappropriate things on a jail telephone, and interrupted him repeatedly during their time-limited conversation. Moreover, it would not be possible, and if attempted would have lead to a misleading account, to remove the vulgarity from the tape. Not only was this the way Hayward spoke, but to remove such language would leave large gaps, which themselves could be misinterpreted. It cannot be said that the jurors would be so aghast at this language or the manner in which Hayward conversed that they would disregard their oaths and convict him of murder on that basis alone.

While Hayward claims that his frustration with the system is not an element of the case, his frustration does show his consuming fear at his situation and intense focus on extricating himself from the charges which in turn showed consciousness of guilt. These efforts include coaching Smith on what to say and not say to the police and to dispose of an item hidden in the room – a number of pounds of reefer – reefer which did not exist. Merely because Hayward used vulgarity to refer to the judge, counsel, and Smith does not establish it would be so swayed by those comments to convict. The probative value of this relevant evidence was not outweighed by its prejudicial nature.

Hayward points to Gore v. State, 719 So.2d 1197, 1199 (Fla.

1998) for support. Yet, <u>Gore</u> is distinguishable on several levels. First, the question about Gore's abandonment of his child was posed in contravention of a court order to refrain for such inquiry. Second, child abuse (abandonment of a naked two-year old child in thirty-degree weather) is a crime, whereas here, Hayward was using disparaging terms to refer to the judge and others in a telephone conversation with his girlfriend and talking about having a quantity of reefer which he admitted he did not have and the State made clear did not exist. These issues are not of equal prejudicial value. Third, the discussion of other collateral crimes, Gore having sex with underage girls, had not been properly noticed nor was it an issue in the case. Conversely, the conversations were in Hayward's own words, and addressed his consciousness of guilt in that he spoke of how he wanted his girlfriend to interact with the police on this case, and to take care of certain matters, including the disposal of the gun. The anger he showed when Smith could not or would not follow his directions and his response to his having to fight the murder charges with someone like her shows Hayward's guilt making it relevant to the case. This Court should affirm. Had Hayward not been guilty, he would not be fighting so hard to get Smith to hide evidence, stop giving the police damaging evidence, and to conform her version of events to Hayward's account.

Smith's pregnancy and expressed love for Hayward – Hayward complains that his reactions to Smith's news that she was pregnant and to her protestations of love should have been withheld from the jury. Yet again, his reactions were relevant to his consciousness of guilt. It showed that all he could concentrate on was having Smith dispose of the gun and have her story coincide with his. Only when the tapes are heard in their entirety is the content understandable. Throughout the tapes Hayward expresses his frustration with Smith because she wants to talk about things that are not of paramount importance given Hayward's incarceration and pending charges. Continually he tried to keep Smith on point, but she kept interrupting with issues not relevant to Hayward's criminal situation. His reactions showed that his all consuming concern was to find a way to extricate himself from the charges, which in turn showed consciousness of guilt, a relevant and admissible issue.

Neither Dennis v. State, 817 So.2d 741, 762-63 (Fla. 2002) nor Wyatt v. State, 641 So.2d 355, 358 (Fla. 1994) support Hayward's claim. The evidence in Dennis showed that the defendant was a jealous person which did not further the issue in that murder case. However, it was found to be harmless. Likewise, in Wyatt, testimony on the defendant's feigned conversion to Christianity was found to be harmless error. Here, however, Hayward's discussions directly went to his

actions following the murder of Destefano and how he was trying to get his girlfriend to help by hiding evidence and making sure their stories were the same. These actions go to consciousness of guilt.

Similarly, Hayward's actions would be of import to the jury deciding his sentence. Given that such were relevant and admitted properly in the guilt phase, they were available for the jury to consider in the penalty phase. Gonzalez v. State, 700 So.2d 1217, 1219 (Fla. 1997) is distinguishable as there the error involved admission of the co-defendants' confessions. Here, we have Hayward's conversation with Smith discussing his present situation and how she could assist him. Likewise, Burns v. State, 609 So.2d 600, 607 (Fla. 1992) does not require reversal as there the prosecutor improperly used what amounted to victim impact testimony admitted in the guilt phase to rebut a potential defense argument and then later to compare the characters of the defendant and victim in the penalty phase. That is not the case here. The State incorporates its answer to **Issue VII** (victim impact testimony admitted properly and prosecutor argued within constitutional dictates). Instead, we have Hayward talking about his case, what he wants his girlfriend to do to assist him, and directions to her not to talk to the police. All is relevant to both guilt and penalty.

However, even if the tape should not have been played, the

admission of this evidence was harmless beyond a reasonable doubt as to the guilt and penalty phases under DeGuilio. The State reincorporates its harmless error argument set forth in **Issue II** (R.24 1458-61 1516-30, 1569-70, 1576-77; R.25 1580-92, 1604-11, 1616-30, 1637-40, 1682, 1690-94, 1696-97; R27 1854-60, 1863-64, 1914-19, 1926-40, 1943-53, 1957-58, 1962-68; R.28 2009-20) and also notes Hayward confessed to the burglary of Destefano's car and confirmed all of the events of the robbery/murder while claiming he was watching someone else do the shooting. Such overwhelming evidence proves that admission of Hayward's taped conversations with Smith were harmless beyond a reasonable doubt. Likewise, it was harmless as to penalty. Again the State relies on its argument in **Issue VII** and adds that the prior violent felony aggravator (for a second degree murder conviction) is very weighty and when coupled with the emerged aggravators of felony murder and robbery balanced against very weak nonstatutory mitigation (see **Issue X** on proportionality), the manner in which Hayward spoke to his girlfriend and the language he used would not cause a death recommendation.

ISSUE IV

THE EVIDENCE OF PREMEDITATION WAS SUFFICIENT TO WITHSTAND A MOTION FOR JUDGMENT OF ACQUITTAL (restated)

Here, Hayward contends that his motion for judgment of

acquittal ("JOA") on the issue of premeditation should have been granted. (IB 76) The State disagrees as there is substantial, competent evidence supporting the court's denial. A *prima facie* case had been set forth establishing premeditation, thus, the issue properly was given to the jury to decide. Even if the JOA should have been granted, a general verdict form was used, and the record, including McDowell's eyewitness account as well as Hayward's statements, established felony murder and supports the conviction and affirmance on appeal.

A *de novo* standard of review applies to motions for JOA. Pagan v. State, 830 So.2d 792 (Fla. 2002). This Court stated:

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

Pagan, 830 So.2d at 803 (citations omitted). See Conde v. State, 860 So.2d 930, 943 (Fla. 2003) (noting where State produced direct evidence, court's determination will be affirmed if record contains competent, substantial evidence to support

ruling); Crump v. State, 622 So.2d 963, 971 (Fla. 1993). When a defendant seeks a JOA, he "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). "The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal." Lynch, 293 So.2d at 45.

It is the State's position that the special test for circumstantial evidence does not apply here as McDowell gave direct testimony as to what he saw and Hayward confessed to portions of the crimes, including admitting to hearing the "robber" tell Destefano to "give it up" after which he was shot. The jury could draw the conclusion that the shooting was intentional given the respective postures of the parties, the conversations which took place before and during the shooting, and believe Hayward was reporting what he did, but merely attributing it to another person given McDowell's eyewitness account and the blood evidence. The State's evidence rebutted Hayward's theory that someone else did the shooting as McDowell heard the victim plead he had nothing more and saw Hayward standing over his victim just after Destefano shot his assailant, yet, Hayward claimed he had shot himself after the

true killer and fled.[18] Nonetheless under either standard, the JOA was denied properly.

> Premeditation can be shown by circumstantial evidence. Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit reflection, and in pursuance of which an act of killing ensues. Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned.

Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984 (1982)(citation omitted)

Hayward points to Kirkland v. State, 684 So.2d 732 (Fla. 1996); Mungin v. State, 689 So.2d 1026 (Fla. 1995); and Terry v. State, 668 So.2d 954 (Fla. 1996). Each is distinguishable from the instant case and none support Hayward's position. In Kirkland, the defendant knew the victim, displayed no animus toward her, was "mildly retarded" and had not exhibited or

[18] While much is made of McDowell's testimony regarding a 10 to 15 minute gap between the first and final shot, it is clear from the entirety of his testimony that there was confusion regarding minutes and seconds. Moreover, it is up to the jury to determine the facts. Here, they apparently determined it was seconds McDowell was referring to when he reported hearing two shots and right after a third louder shot.

possessed an intent to kill before the homicide. This Court, in Mungin, reviewed the case under the special circumstantial evidence standard, and determined there was a single gunshot wound to the head which was equally consistent with a spur of the moment killing especially where there were no witnesses, statements, or continued attack. In Terry, this Court concluded there was no evidence of premeditation based upon the lack of evidence of how the shooting occurred. Terry, 668 So.2d at 964.

The evidence in this case establishes that Destefano was accosted at gun point. Hayward ordered Destefano to "give it up" and shot him once in the leg, a non vital area. In response, Destefano fell to a knee and pled that he had nothing more. Even with this knowledge, and while Destefano was in this vulnerable position, Hayward shot a second time. This shot was fired as Hayward stood over Destafano and the bullet hit the lung and diaphragm making it difficult to breath, and the liver and large and small intestines. These would cause death from internal bleeding. (R.1652-53-68)

Unlike Kirkland, Hayward came armed to the scene and there was no indication of IQ issues. Further, the parties did not know each other, thus, the lack of prior animus is of no account. Similarly, Mungin and Terry do not assist Hayward in that there was a witness, McDowell, who saw Hayward standing over Destefano as he was pleading he had nothing more. The

events leading up to the shooting were that Destefano was told to "give it up" and after being brought to his knees by one shot, Hayward took aim again and shot a second time into Destefano's chest. While the shots were in succession, the final one, given the trajectory would have been to Destefano's chest as he was vulnerable and kneeling. Destefano's falling to a knee required Hayward to re-aim for Destefano's chest and pull the trigger a second time, this hitting him in a vital area. From these actions the jury could find intent, not some spur of the moment shooting.

Premeditation has been found in other cases. See Pietri v. State, 644 So.2d 1347, 1352 (Fla. 1994) (finding premeditation where defendant shot a police officer at close range after being stopped for a traffic violation). Cf. Evans v. State, 838 So.2d 1090, 1095 (Fla. 2002) (finding premeditation in part on fact defendant aimed gun at victim and fired single shot). Here, it is clear Hayward had to re-aim his gun to shoot Destefano. Initially, DeStefano was standing, but after being shot, he was on a knee. As a result, to shoot him in the chest, Hayward would have to re-aim and shoot in a downward direction as he stood above his victim. Such is a reasonable inference from the evidence, and should be a fact for the jury to decide, based on Dr. Digg's testimony about the relative positions of the parties and McDowell's testimony that he saw Hayward standing over the

victim as he was pleading he had nothing more.

However, if this Court concludes that the JOA on premeditation should have been granted, the conviction remains proper under felony murder as there is factual support for that theory of prosecution. Recognizing that this Court had affirmed a conviction in Mungin because alternate grounds existed, Hayward asserts that the instruction on premeditation there was correct, but in his case erroneous, thus, he should be granted relief as the premeditation instruction may have allowed the verdict to rest on a legally invalid theory. (IB 80-82)

The State disagrees that the instruction on premeditation was incorrect; See Spencer v. State, 645 So.2d 377, 382 (Fla. 1994) (finding the standard jury instructions sufficient to explain premeditation) and incorporates is answer to **Issue VI** here. However, even if this Court finds the premeditation instruction improper, reversal is not required because the jury also convicted Hayward of robbery, and he does not challenge the robbery conviction here. As a result, there is clear proof that the jury relied upon a factually supported legal theory of guilt. Although Delgado v. State, 776 So.2d 233 (Fla. 2000) has been negated by a new burglary statute, Steverson v. State, 787 So.2d 165, 167-68 (2d DCA 2001) supports the State's position that reversal is not required.

In *Delgado*, the court construed the burglary

statute, section 810.02(1), Florida Statutes (1989), and held that a burglary based on the “remaining in a structure” provision was limited to factual situations where the defendant enters a structure lawfully and subsequently secretes himself or herself from the host. 776 So.2d at 240. Under that limitation, Steverson's burglary conviction rested upon a legally inadequate theory. Nevertheless, Steverson's first-degree murder conviction is valid. In bringing a charge of first-degree murder, the State does not have to charge felony murder separately in the indictment but may prosecute the charge of first-degree murder under alternative theories of premeditated and felony murder when the indictment charges premeditated murder. *Kearse v. State*, 662 So.2d 677, 682 (Fla.1995); *O'Callaghan v. State*, 429 So.2d 691, 695 (Fla. 1983). A general verdict of guilt of first-degree murder arising from an alternative theory of premeditation or felony murder is valid where there is evidentiary support for one theory and the alternative theory is not legally inadequate. *San Martin v. State*, 717 So.2d 462, 469-70 (Fla. 1998). On the other hand, such a general verdict must be set aside where one theory lacks evidentiary support and the alternative theory is legally inadequate, or where it is impossible to determine which alternative was relied upon where there is evidentiary support for one theory but the other is legally inadequate. Mr. Steverson was charged with first-degree murder on the dual theories of premeditated murder and felony murder. The State relied on both armed burglary and/or armed robbery to support its felony murder theory. While it was not necessary that the State charge Mr. Steverson separately with the felonies upon which its felony murder theory was based, it did, in fact, do so. Mr. Steverson was found guilty by reason of a special verdict of each of the separately charged offenses of first-degree murder, armed burglary with an assault, and armed robbery. Therefore, even though Mr. Steverson's conviction for the burglary offense is legally insupportable pursuant to *Delgado*, his general verdict for first-degree murder is valid because we know by reason of the special verdicts that the jury found evidentiary support for both premeditated murder and felony murder based on the legally adequate charge of armed robbery.

Steverson, 787 So.2d at 167-68.

Further, because the instruction was proper, Mungin supports the State's position that the conviction should be affirmed and notes that this Court has affirmed first-degree murder convictions in other cases where a general verdict form is used and the evidence supports the alternate theory, in this case felony murder. See Crain v. State, 894 So.2d 59, 73 (Fla. 2004) (opining "A general guilty verdict rendered by a jury instructed on both first-degree murder alternatives may be upheld on appeal where the evidence is sufficient to establish either felony murder or premeditation."); San Martin v. State, 717 So.2d 462, 470 (Fla. 1998) (opining "reversal is not warranted where the general verdict could have rested upon a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which the evidence was sufficient"); Mungin, 689 So.2d 1029-30 (same).

During the hearing on the motion for JOA, the State limited its argument to robbery being the under lying felony for felony murder. (R.28 2035). The evidence was that Destefano reported being robbed, McDowell heard the victim plead that he had nothing else, and Hayward reported the Destefano was robbed after the assailant told him to "give it up" and then was subsequently shot. Destefano was shot during the course of these events based on his dying declaration and McDowell's

account. Also, Hayward's blood was found in Destefano's pocket, on the murder weapon, items taken for Destefano's car, and on ten dollar bill given to Smith later that morning. Further, Destefano usually carried ten dollars with him on his paper route. Hayward admitted taking Destefano's gun and items from the car. (R.24 1458-61 1516-30, 1569-70, 1576-77; R.25 1580-92, 1604-11, 1616-30, 1637-40, 1682, 1690-94, 1696-97; R27 1854-60, 1863-64, 1914-19, 1926-40, 1943-53, 1957-58, 1962-68; R.28 2009-20). Such is substantial, competent evidence supporting felony murder with the underlying robbery felony. This Court should affirm.

ISSUE V

IDENTITY OF THE SHOOTER WAS PROVEN (restated)

Hayward challenges his conviction claiming the State failed to prove identity of the shooter and argues that a motion for JOA should be granted when the State's circumstantial evidence fails to prove guilt. (IB 83-84) In making this argument, he fails to point to a record cite where this issue was raised below; in fact, it was not part of his motion for judgment of acquittal (R.28 2034-40). As such, the matter is not preserved. Steinhorst. Moreover, there was both direct and circumstantial evidence of guilt which established identity. The conviction should be affirmed.

Review of the denial of a motion for JOA is de novo. See

Pagan, 830 So.2d at 803; Conde, 860 So.2d at 943 (noting where State produced direct evidence, court's determination will be affirmed if record contains competent, substantial evidence to support ruling). When a defendant seeks a JOA, he "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch, 293 So.2d at 45. "The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal." Id. As the State noted above, both direct and circumstantial evidence were presented, See **Issue IV**, the special circumstantial evidence standard need not be invoked. Pagan, 830 So.2d at 803. However, under either standard, the state presented substantial, competent evidence that Hayward was the shooter and rebutted his theory of innocence. The jury is not required to believe a defendant's testimony. See Cochran v. State, 547 So.2d 928, 930 (Fla. 1989).

The State presented McDowell who just after hearing three shots saw Hayward standing over Destefano. The State repeats its earlier argument that while much is made of McDowell's testimony regarding a 10 to 15 minute gap between the first and final shot, it is clear from the entirety of his testimony that only a few moments passed between the shots and McDowell opening the door. Moreover, it is up to the jury to determine the

facts, and McDowell's apparent confusion allows the jury to make such determinations. Here, the reasonable finding of the jury was that just seconds passed given McDowell's later account and description that he heard shots, "pow, pow, pow", two shot and then a louder third shot. Right after that he opened the door and saw Hayward standing over Destefano.

This comports with Destefano's statement the he shot at his attacker, and rebuts Haywrd's claim that he watched as another shot Destefano and stepped in to take what he could get for the car and to pick up the .357, only to shoot himself in the hand. If Hayward were not the attacker, he would not have been the one shot be Destefano and found standing over him by McDowell. Instead, there should have been a fourth shot, the one where Hayward shot himself after Destefano had shot at his attacker. Because there was no fourth shot, it was reasonable for the jury to conclude Hayward was shot by Destefano after Hayward had mortally wounded Destafano.

Also, it is of no moment that McDowell did not see a gun as he heard the shots and Hayward was wearing a large pullover with pockets large enough to hide a weapon. The placement of the guns in his pocket(s) is a reasonable inference, as McDowell did not see the weapons. However, Smith reported that Hayward returned home with a silver revolver with a black handle meeting the description of Destefano's gun, and sold it to a friend.

Also, the murder weapon, with Hayward's blood on it was found in the rooming house laundry room. Likewise, it is just unreasonable and unbelievable that Hayward's "robber" would leave both the murder weapon and Destefano's gun conveniently at the scene for Hayward to recover for a profit. Also, given Hayward's ever changing account, the jury could discount his "other robber theory." The record reflects that Hayward changed his versions from being stabbed by Smith, to having been robbed by two men, a black male and a Hispanic, on 18th Street, to witnessing two men rob Destafano, to finally watching one black male demand Destefano to "give it up" then shot him, only to leave the murder weapon at the scene.

The moments between McDowell hearing the shots and opening the door and seeing just Destefano kneeling with Hayward standing over him rebuts Hayward's unreasonable, unbelievable assertion that between 3:00 to 4:00 a.m. he witnessed another black male rob and shoot Destefano, and he, instead of calling for help though it prudent to accost the victim further by taking money and property, including his .357, from his person and car. The DNA evidence also confirmed McDowell's account of Hayward's movements after the shooting, starting with Hayward's blood on Destefano's pants, in his car, and on items from the car. Hayward, who had claimed he had lost all his money earlier in the evening was able to give Smith a bloody ten dollar bill

later that morning. Destefano was known to carry only ten dollars during his morning paper delivery. Further, as McDowell reported Hayward went through the car, then around it, and stopped near a light to examine his bleeding hand. The trail then continued behind McDolwell's building, as he reported Hayward's movements, and toward the rooming house where Smith had her residence and Hayward stayed periodically.

Taken together, this evidence[19] established identity, it is more than a strong suspicion, it is substantial, competent evidence supported by eyewitness testimony and DNA results. This Court does not have to determine that every reasonable hypothesis of innocence was excluded by the State's evidence, but it must determine that there was competent, substantial evidence for the jury to make such a determination. See Darling v. State, 808 So.2d 145, 155 (Fla. 2002); State v. Law, 559 So.2d 187, 188 (Fla.1989). This evidence rebuts Hayward's theory of innocence, and makes it a question for the jury, which the jury resolved against Hayward. The conviction should be affirmed.

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[19] See summation of testimony included in harmless error analysis of Issues II, III, and IV. (R.24 1458-61 1516-30, 1569-70, 1576-77; R.25 1580-92, 1604-11, 1616-30, 1637-40, 1682, 1690-94, 1696-97; R27 1854-60, 1863-64, 1914-19, 1926-40, 1943-53, 1957-58, 1962-68; R.28 2009-20).

ISSUE VI

THE PREMEDITATION INSRUCTION CORRECTLY STATES THE LAW (restated)

It is Hayward's position the court erred in overruling his objection to the standard jury instruction for premeditation as it fails to state that "premeditated design" is an element of the charge, and thus, relieves the State of its burden of persuasion as to that element, and as to proving that the killing was committed after a fully formed intent was formed. He adds that there must be more than simple premeditation proven (IB 88-89). The State submits that this issue is not preserved for appeal in that these specific complaints were not asserted below. Further, this Court had reaffirmed the constitutionality of the instruction, thus, the matter is meritless.

The standard of review applied to a decision to give or withhold a jury instruction is abuse of discretion. See Coday v. State, 946 So.2d 988, 994 (Fla. 2006); Parker v. State, 873 So.2d 270, 294 (Fla. 2004); James v. State, 695 So. 2d 1229, 1236 (Fla. 1997) (noting court has wide discretion in instructing jury). "'Issues pertaining to jury instructions are not preserved for appellate review unless a specific objection has been voiced at trial.' *Overton v. State*, 801 So.2d 877, 901 (Fla.2001); *see also State v. Delva*, 575 So.2d 643, 644 (Fla.1991) (holding that instructions are subject to the

contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred)." Coday, 946 So.2d at 995. Here, Hayward made a general written objection to the constitutionality of the standard instruction on premeditation; he did not state with specificity the reasons for his challenge.[20] (R.2 244). Hence the matter is unpreserved and Hayward will have to prove fundamental error. Steinhorst. However, even if this Court reaches the merits, it should uphold the instruction.

Recently, in Coday, this Court reviewed a similar challenge to the standard instruction on premeditation and dispensed with

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[20] When the motion was argued, as is expected of an officer of the court, counsel noted for the judge that his claims had been repeatedly rejected on appellate review. Counsel stated: "Judge, and let me first state for the record tha tI've discussed this with Mr. Hayward. Bottom line is, Judge, is obviously I've read all the motions that we filed, because I filed them. I've read the state's response. And the defendant is ready to concede at this time that the state's responses are well taken and that the court could enter an order denying each and every one of the motions. And that doesn't mean we're not telling you that if there's something later that the status of the law could change or some new factual issue could arise, might not cause us to come by – come back and ask you to reconsider one of the motions. But bottom line is the staus of the law at this time is that those motions should be denied. They are simply being filed in order to protect Mr. Hayward in case there is a change in the law somewhere down the line. (SR.2 42). The court followed counsel's concession, but allowed him to return if there a change in the law occurred. (SR.2 54). Later, the court noted that all arguments were preserved. (R30 2293-94). Although the court made that statement, the State submits that such was not sufficient to preserve the issue for appellate review as Hayward has now expanded upon his argument; in fact he is making an argument not presented below.

the matter opining: "it is clear that there was no error because the trial court gave the standard jury instruction on premeditation. *See Kilgore*, 688 So.2d at 898 (holding standard jury instructions are sufficient to explain premeditation)...." Coday, 946 So.2d at 995.

As this Court announced in Blackwood v. State, 777 So.2d 399, 406 (Fla. 2000), premeditation is:

> "a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues." .... Premeditation may "be formed in a moment and need only exist 'for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.'" ... Premeditation can be established by circumstantial evidence.

Blackwood v. State, 777 So.2d 399, 406 (Fla. 2000) (citations omitted). Such language mirrors the standard instruction. Citing McCutchen v. State, 96 So.2d 152 (Fla. 1952), Hayward asserts that the standard instruction in misleading as it fails to properly inform the jury about "premeditated design" and that there must be proof of deliberations both before and at the time of the killing. (IB at 88-89).

In Spencer, 645 So.2d at 382, this Court quoted McCutchen for the definition of premeditation and reasoned:

> Spencer also argues that the standard instruction on first-degree murder is constitutionally deficient because it fails to adequately instruct the jury that a "premeditated design" is a statutory element of

> first-degree murder. We find no merit to this argument. Section 782.04(1)(a), Florida Statutes (1991), defines premeditated first-degree murder as the unlawful killing of a human being "[w]hen perpetrated from a premeditated design to effect the death of the person killed or any human being." ...
>
> ...
>
> The standard first-degree murder instruction, which was given to the jury in the instant case, provides in relevant part that "killing with premeditation" is
>
> killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> Fla.Std. Jury Instr. (Crim.) 63. This instruction addresses all of the points discussed in McCutchen, and thus properly instructs the jury about the element of premeditated design.

Spencer, 645 So.2d at 382. See Henyard v. State, 689 So.2d 239, 245, n.5 (Fla. 1996) (finding standard premeditation instruction proper); Pietri v. State, 644 So.2d 1347 (Fla. 1994); Brown v. State, 565 So.2d 304, 307 (Fla. 1990). A similar determination was reached in Default v. State, 800 So.2d 647, 650 (Fla. 5th DCA 2001) wherein the District Court rejected the claim that the standard instruction did not instruct the jury regarding deliberations or opportunity to reflect. As held in Coday, this Court must reject this latest challenge.

ISSUE VII

VICTIM IMPACT EVIDENCE WAS ADMITTED PROPELY (restated)

Hayward offers that the court erred in permitting victim impact testimony. He then complains that the State used this evidence improperly in closing argument. (IB 91-92). These are separate issues. Victim impact evidence is permissible and there was no error in permitting Destefano's sister, fiancé and mother from reading short statements. The thrust of the argument here is addressed to how the State used that testimony later. Neither the claim that the State discussed facts not in evidence or that it comparing the Destefano and Hayward improperly are preserved for appeal. Further, the arguments were proper inferences from the evidence.

Admission of evidence is within the court's discretion, and its ruling will be affirmed unless there has been an abuse of discretion. See Williams, 967 So.2d at 748; Trease, 768 So.2d at 1053, n.2. This Court has affirmed that victim impact evidence is admissible where limited by § 921.141(7), Fla. Stat. (2005) and is "designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." See Franklin v. State, 965 So.2d 79, 98 (Fla. 2007); Huggins v. State, 889 So.2d 743, 765 (Fla. 2004), cert. denied, 545 U.S. 1107 (2005); Farina v. State, 801 So.2d 44, 52 (Fla. 2001. As such, the denial of Hayward's

general objection to such evidence was proper especially in light of the State's agreement to follow the dictates Payne v. Tennessee, 501 U.S. 808, 823-24 (1991).

The pith of Hayward's argument though, is that the State did not follow the law, and instead argued facts not in evidence and improperly compared the characters of Destefano and Hayward during the penalty phase closing argument. However, there was no contemporaneous objection raised to the State's closing argument (R.33 2553-54), thus this issue is unpreserved and fundamental error must be shown. San Martin v. State, 717 So.2d 462, 467 (Fla. 1998); Riechmann v. State, 581 So.2d 133, 138-39 n.12 (Fla. 1991).

Control of prosecutorial argument lies within the trial court's sound discretion, and will not be disturbed absent an abuse of discretion. See Esty v. State, 642 So. 2d 1074, 1079 (Fla. 1994), cert. denied, 514 U.S. 1027 (1995). "Wide latitude is permitted in arguing to a jury. [c.o.] Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982). In arguing to a jury "[p]ublic prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws." Spencer v. State, 133 So.2d 729, 731 (Fla. 1961), cert. denied, 372 U.S. 904 (1963). "In the penalty phase

of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial." Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985). See Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984). "Any error in prosecutorial comments is harmless, however, if there is no reasonable possibility that those comments affected the verdict." King v. State, 623 So. 2d 486, 488 (Fla. 1993); Watts v. State, 593 So. 2d 198 (Fla.), cert. denied, 505 U.S. 1210 (1992). Reversal is not required for comments which do not vitiate the whole trial or "inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." Bertolotti, 476 So. 2d at 134. The harmless error analysis applies to prosecutorial misconduct claims. State v. Murray, 443 So. 2d 955, 956 (Fla. 1984).

> ... prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." [c.o.] The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth in Chapman v. California, 386 U.S. 18 ... and its progeny.... Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.

Murray, 443 So. 2d at 956. In determining whether an error is

harmless, the court must determine beyond a reasonable doubt that the comment did not contribute to the guilty verdict. Id. "In order for the prosecutor's comments to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994).

To preserve a claim of prosecutorial misconduct "the defense must make a specific contemporaneous objection at trial." San Martin, 717 So.2d at 467; Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982) (finding misconduct issue unpreserved where only general objection made, followed by motion for mistrial). Even where an objection is sustained, but the defense does not seek a curative instruction or mistrial, the matter is not preserved. Riechmann, 581 So.2d at 138-39 n.12. See, Holton v. State, 573 So.2d 284 (Fla. 1990).

Diane Destefano's victim impact testimony related to the purchase of a motorcycle discussed in part: "Danny was also a hard worker. He worked earlier in his life so he could save up and buy anything. This early purchased sparked a love of motorcycles. From that point on he worked harder so he could purchase a motorcycle until he could afford his ultimate dream,

a Harley." (R.31 2435). From this, the State argued that the first purchase was a moped and then Destefano was able to buy a motorcycle which was later traded up for a Harley Davidson motorcycle. (R.33 2553-54). No objection was raised to the State's argument or characterization of the evidence. It appears form the entire statement that Mrs. Destefano was reporting that her son had made a purchase which sparked his interest in motorcycles and then he was able to buy a motorcycle and later afford a Harley. Arguing that the first purchase was a moped seems reasonable given the context of the testimony. Further, assuming the transcript is accurate, the statement that the first purchase was a moped and that Destefano sold successive motorcycles to get a Harley is not an argument that is so egregious or sympathetic to the victim that it would cause the jury to recommend death. Moreover, purchasing a motorcycle and later getting a Harley is a reasonable inference from what Mrs. Destefano stated. Again, this comment, which did not garner an objection, is not something which would cause the jury to disregard it oath and recommend death.

With respect to the State's characterization of Destefano as a hard worker who made choices in his life as an introduction to the discussion of the aggravators and Hayward's life choices is not an improper comparison of the victim and defendant. The prosecutor did not ask the jury to compare these individuals in

any improper way. He merely noted that each made choices in life that brought them to where they were that day. This does not violate the dictates of Franklin, 965 So.2d at 98; Windom v. State, 656 So.2d 432, 438 (Fla. 1995), or Payne. This is not a case where the defendant and victims were compared directly.

In Miller v. State, 926 So.2d 1243, 1255 (Fla. 2006), this Court determined that the argument by the State telling the jury that the defendant did not care for the victim or his family, but now wants the jury to care for him and focus only on his life and family was not an improper comparison. Miller was contrasted to Thomas v. State, 748 So.2d 970, 985 n. 10 (Fla. 1999) ("[A]sking a jury to show as much mercy to a defendant as he showed the victim is a clear example of improper prosecutorial misconduct, which constitutes error and will not be tolerated.") and Richardson v. State, 604 So.2d 1107, 1109 (Fla.1992) (concluding that the prosecutor was not allowed to ask the jury to show the defendant as much pity as he showed the victim). The State's penalty phase argument was similar to Miller in that it showed both parties were similarly situated, without asking the jury to compare or form a sentencing decision on those factors.

Hayward's reliance on Mahn v. State, 714 So.2d 319, 398 (Fla. 1998); Omelus v. State, 584 So.2d 563 (Fla. 1991); and Preston v. State, 564 So.2d 120 (Fla. 1990) is misplaced as each

is dealing with the striking of an aggravator which should not have been given to the jury as each was unsupported. This is quite different from the instant matter where the victim impact evidence is not part of the weighing equation and the State's argument was merely that each man had choices to make in his life which brought him to the place the jury was that day.

The jury was instructed that the victim impact evidence was to be considered merely to show Destefano's uniqueness and the loss to the community. The evidence could not be used to form an aggravator or rebut a mitigator. Further the sentence was to be based on the aggravator and mitigation instructed by the court. Sutton v. State, 718 So.2d 215, 216 n. 1 (Fla. 1st DCA 1998) (finding law presumes jurors followed judge's instructions in the absence of contrary evidence); U.S. v. Olano, 507 U.S. 725, 740 (1993)(finding there is a presumption, absent contrary evidence, jurors follow court's instructions). The jury heard of Hayward's 1988 conviction for second degree murder and two armed robbery convictions before he robbed and killed Destefano. (R.31 2389-2427) By its guilt phase verdict, it found felony murder/robbery and pecuniary gain. No statutory mitigation was offered, and the non-statutory mitigation was addressed to Hayward's childhood without a father; however he had the love of his family; financial difficulties; and academic problems, but later earned a GED. This Court has noted that the prior violent

felony aggravator is a very weighty aggravating factor. Rivera v. State, 859 So.2d 495, 505 (Fla. 2003) (finding prior violent felony aggravator a weighty factor); Porter v. State, 788 So.2d 917, 925 (Fla. 2001) (same). The State's brief argument on this point, even if improper, did not so fundamentally taint the penalty phase or cause the jury to recommend death especially in light of Hayward prior murder conviction.

ISSUE VIII

HAYWARD'S DEATH SENTENCED BASED ON AND EIGHT TO FOUR MAJORITY RECOMENDATION IS CONSTITUTIONAL (restated)

Here, Hayward asserts that his death sentence is unconstitutional because it is based on a bare majority vote and allows for the finding of just one aggravator. (IB 93-95) While questions of law, are reviewed *de novo*, Elder v. Holloway, 510 U.S. 510, 516 (1994), this Court has rejected these challenges previously, and Hayward has not given a valid basis to revisit the matter. This Court should affirm.

Bare majority – As an initial point, this Court has rejected the allegation that an eight to four vote, such as here, is a bare majority. See, Sexton v. State, 775 So.2d 923, 937 (Fla. 2000) (stating this was not a bare majority vote case because the jury recommended the death penalty by a vote of eight to four."). Hayward claims that the statute does not authorize such a vote; however, it does not prohibit it and this

Court has determined that a majority vote is sufficient. See Rose v. State, 425 So.2d 521 (Fla. 1983). Further, claims that Florida's capital statute is unconstitutional because it permits majority votes for death sentences has been rejected. See Stewart v. State, 872 So.2d 226, 228, n.2 (Fla. 2003); Doorbal v. State, 837 So.2d 940, 963 (Fla.) cert. denied, 539 U.S. 962 (2003); Hunter v. State, 660 So.2d 244 (Fla.1995) (citing James v. State, 453 So.2d 786, 792 (Fla. 1984)). Johnson v. Louisiana, 406 U.S. 356 (1972) does not assist Hayward in that the issue there was whether a less than unanimous vote on guilt/innocence was constitutional. Given Florida's capital scheme, majority votes and single aggravator sentences meet constitutional muster, where the vote is merely a recommendation and the court independently evaluates the appropriate sentence. Hayward has not offered a valid basis for this Court to revisit this settled law.

Single aggravator - In 1973, this Court was called upon to determine if Florida's death penalty statute was constitutional. State v. Dixon, 283 So.2d 1, 2-3 (Fla. 1973), superseded by statute as stated in State v. Dene, 533 So.2d 265 (Fla. 1988). Before this Court in Dixon was the exact language at issue here. Interpreting the statute, in light of a challenge that the aggravators were vague and did not "provide meaningful restraints and guidelines for the discretion of judge and jury,"

this Court stated: "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided...." Dixon, 283 So.2d 1, 8-9. Based upon this interpretation, a single HAC aggravator sentence was affirmed in LeDuc v. State, 365 So.2d 149, 152 (Fla. 1978). Since then, this Court has affirmed several single aggravator cases where there was little mitigation, thus, should an aggravator be stricken, the death sentence remains proper as Boyd's mitigation in minimal. See Butler v. State, 842 So.2d 817, 832-34 (Fla. 2003); Blackwood v. State, 777 So.2d 399 (Fla. 2000); Cardona v. State, 641 So.2d 361 (Fla. 1994), denial of postconviction relief reversed, 826 So.2d 968 (Fla. 2002). This Court must affirm.

ISSUE IX

CAPITAL STATUTE IS CONSTITUTIONAL (restated)

Although he concedes that this Court has rejected similar constitutional challenges previously, Hayward asserts that Florida's capital sentencing is unconstitutional. He cites to Ring v. Arizona, 536 U.S. 584 (2002) claiming constitutional infirmity given: (1) the death recommendation is not unanimous; (2) death eligibility occurs at time of conviction, thus, there is a lack of narrowing of the class eligible for the death penalty; and (3) there is no standard of proof for finding

mitigation. Additionally, Hayward points to the Eighth Amendment claiming it forbids: (1) misleading the jurors on the sentencing role as discussed in Caldwell v. Mississippi, 472 U.S. 320 (1985); and (2) where the jury is not guided properly regarding mitigation and where it fails to consider mitigation properly with regard to finding and weighing mitigation as well as aggravation.

Ring v. Arizona - Hayward has offered nothing new to call into question the well settled principles that death is the statutory maximum sentence, death eligibility occurs at time of conviction, Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001), and that the constitutionally required narrowing occurs during the penalty phase where the sentencing selection factors are applied to determine the appropriate sentence. All of Hayward's challenges under Ring have been rejected. See Perez v. State, 919 So.2d 347, 377 (Fla. 2005); Parker v. State, 904 So.2d 370, 383 (Fla. 2005); Jones v. State, 845 So.2d 55, 74 (Fla. 2003); Porter v. Crosby, 840 So.2d 981 (Fla. 2003). Moreover, Hayward has three prior violent felony convictions (1988 second degree murder, and two armed robberies), and the instant robbery and burglary convictions. This Court has rejected challenges under Ring where the defendant has a prior violent felony conviction. See Robinson v. State, 865 So.2d 1259, 1265 (Fla. 2004) (announcing "prior violent felony involve[s] facts that were

already submitted to a jury during trial and, hence, [is] in compliance with Ring"); Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (same). Relief must be denied and Hayward's convictions and sentences affirmed.

Further, Hayward's challenges to the instructions regarding the standard of proof for mitigation and the balancing of the aggravation and mitigation have been rejected. In Williams, this Court stated:

> ...this Court has repeatedly rejected the argument that the standard penalty phase jury instructions impermissibly shift the burden to the defense to prove that death is not the appropriate sentence. *See, e.g., Elledge v. State*, 911 So.2d 57, 79 (Fla. 2005); *Sweet v. Moore*, 822 So.2d 1269, 1274 (Fla.2002). This Court in *Sweet* further rejected a claim of error where a trial court failed to instruct the jury that "it was required to find beyond a reasonable doubt that the aggravators outweighed the mitigators before recommending a sentence of death." *Id.* at 1275. Finally, in *Bogle v. State*, 655 So.2d 1103, 1108 (Fla. 1995), we rejected the claim that a jury instruction which provides that a mitigator may be considered if the jury is reasonably convinced of its existence erroneously restricts the evidence that a jury may consider in mitigation. Accordingly, we reject these claims.

Williams, 967 So.2d at 761. Hayward has offered nothing requiring reconsideration of this settle matter.

Caldwell v. Mississippi – Here again, this Court has rejected challenges to the statute under Caldwell. A Caldwell error is committed when a jury is misled regarding its sentencing duty so as to diminish its sense of responsibility

for the decision. "To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989). This Court has recognized the jury's sentencing role is merely advisory, and the standard instructions adequately and constitutionally advise the jury of its responsibility; "the standard jury instruction fully advises the jury of the importance of its role, correctly states the law, [] and does not denigrate the role of the jury." Brown v. State, 721 So. 2d 274, 283 (Fla. 1998)(citation omitted). See Burns v. State, 699 So. 2d 646, 654 (Fla. 1997) (holding instruction correctly states law and advises jury of importance of its sentencing role), cert. denied, 522 U.S. 1121 (1998); Turner v. Dugger, 614 So. 2d 1075, 1079 (Fla. 1992) (finding Caldwell does not control Florida law on capital sentencing); Combs v. State, 525 So. 2d 853, 855-58 (Fla. 1988) (rejecting claim standard jury instruction is unconstitutional under Caldwell or applicable to Florida death cases). The jury was instructed adequately and in compliance with constitutional dictates. The statute is not implicated by Ring or Caldwell. The Court should affirm.

ISSUE X

HAYWARD DEATH SENTENCE IS PROPORTIONAL

Although Hayward did not challenge his sentence on proportionality grounds, this Court independently reviews death sentences for proportionality. See Floyd v. State, 913 So.2d 564, 578 (Fla. 2005); Porter v. State, 564 So.2d 1060 (Fla. 1990). For this Court's convenience, the following is provided.

Proportionality review is to consider the totality of the circumstances in a case compared with other capital cases. Urbin v. State, 714 So.2d 411 (Fla. 1998). It is not a comparison between the number of aggravators and mitigators, but is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). The function is not to reweigh the factors, but to accept the jury's recommendation and the judge's weighing. Bates v. State, 750 So.2d 6, 14 (Fla. 1999).

Here the jury recommended death by an eight to four vote and the court found aggravation of prior violent felony and felony murder/pecuniary gain. There was no statutory mitigation and eight non-statutory mitigating factors of very little to some weight - (1) Hayward could have gotten life sentence (very little weight); (2) grew up without a father (some weight); (3) loved by family (little weight); (4) had academic problems

(little weight); (5) obtained GED in prison (little weight); (6) will make good adjustment to prison (little); (7) had financial stress at time of crime (little weight); and (8) Hayward had capacity for rehabilitation. As is evidence from this list of mitigation, six of the eight received little to very little weight. It cannot be said that this type of mitigation is compelling.

This Court has affirmed death sentences with similar factors. See Miller v. State, 770 So.2d 1144 (Fla. 2000) (affirming sentence for murder committed during an attempted robbery where court found prior violent felony and merged felony murder with pecuniary gain along with 10 nonstatutory factors including victim did not suffer, alternative sentence was life without parole, defendant turned himself in, remorse and apologized to victim's family, cooperated with police, suffered emotional distress over the death of his sister and close cousin, had a frontal lobe defect that affected inhibition and control of impulses, would likely do well in prison, loved by his family/performed good deeds, and adjusted well to incarceration); Pope v. State, 679 So.2d 710 (Fla. 1996) (holding sentence proportionate as pecuniary gain and prior violent felony outweighed two statutory mitigating circumstances of extreme mental/emotional disturbance and impaired capacity to appreciate criminality of conduct and several nonstatutory

mitigating circumstances); Clark v. State, 613 So.2d 412 (Fla. 1992), cert. denied, 510 U.S. 836 (1993) (affirming death sentence based on prior violent felony and pecuniary gain/felony murder) and no mitigation); Freeman v. State, 563 So.2d 73 (Fla.1990) (finding proportionality for murder committed during burglary based on prior violent felony and felony murder/financial gain and four nonstatutory mitigators including defendant had low intelligence and was abused by step-father). Similarly, Hayward's sentence should be found proportional.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Gary Lee Caldwell, Esq., Office of the Public Defender, 421 Third Street, West Palm Beach, FL 33401 this 5th day of August, 2008.

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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