IN THE SUPREME COURT OF FLORIDA

STEVEN DOUGLAS HAYWARD,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. SC07-1234
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court
Of the Nineteenth Judicial Circuit
In and For St. Lucie County, Florida

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ARGUMENT

I. WHETHER THE COURT ERRED IN ALLOWING INTO EVIDENCE DESTEFANO'S STATEMENTS TO OFFICER GRECCO.

A. The state did not prove an excited utterance under section 90.803(2), Florida Statutes.

The answer brief (AB) seems to rely mainly on Henyard v. State, 689 So. 2d 239, 251 (Fla. 1996). Henyard abducted Lewis and her little girls, raped Lewis, shot her repeatedly and left her for dead and murdered the girls. Lewis regained consciousness two hours later and went to a nearby house, where she collapsed covered with blood. She was awake but hysterical when an officer arrived, and she said she had been raped and shot and her girls had been kidnapped. Id. 242-43, 251. She testified to the same at trial. Thus, she was in a state of continuous hysterical excitement, except for when she was unconscious or collapsed and could not fabricate.

There is no reason that this Court should generalize from the extreme facts of Henyard a rule that would disturb the well-settled principle that the proponent bears the "burden … to show that the declarant did not have time to reflect." Pressley v. State, 968 So. 2d 1039, 1042 (Fla. 5th DCA 2007). At bar, the state did not show facts comparable to those in Henyard. McDowell did not say Destefano exhibited hysteria, and Williams said Destefano was "very serious" before the officer arrived. R24 1479.

"Where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be

excluded in the absence of some ***proof*** that the declarant ***did not*** engage in a reflective thought process." State v. Jano, 524 So.2d 660, 662 (Fla.1988) (e.s.). Cf. Evans v. State, 838 So.2d 1090, 1093 (Fla.2002) (statements inadmissible even though made while still under original excitement, as witnesses had time to reflect and state did not disprove reflection). In general, the proponent of hearsay must show an unambiguous predicate for admission. See Manuel v. State, 524 So.2d 734, 736 (Fla. 1st DCA 1988) (state did not lay predicate for admission of phone call supposedly made by Manuel: "By failing to unambiguously connect the defendant's voice to that of the telephone caller, the prosecution did not lay a proper predicate for the admissibility of the telephone communications."). Appellee has not meet its affirmative burden, and instead its brief discredits or ignores its own evidence.

First, appellee repeatedly disputes the testimony of McDowell, its main witness to the facts of the crime. It says he "appeared confused by the differences between minutes and seconds," AB 18, and showed "confusion regarding minutes and seconds." AB 65, n. 18, and says he was confused on this issue. AB 72-73.[1] In fact, he showed no such confusion.

The state asked how many minutes or seconds were between the first two shots and the third, and he said, "Oh, it was about 10, 15 minutes. About 10 or 15 minutes." R24 1520. He again said,

[1] Despite these attacks on McDowell's credibility, the state relies extensively on the accuracy of his testimony elsewhere in its brief. See AB 20, 29, 44, 64, 66-68, 70-75.

"Might have been about 10 or 15 minutes." R24 1521. He knew seconds from minutes, as he said it took about "two or three seconds" to open the door. Id. (It was not a vault door with an elaborate sequence to open.) The state did not impeach his testimony about the timing of the shots, did not claim surprise, and presented no contrary evidence.

Second, appellee ignores that Williams said Destefano was "very serious," and did not say he was upset, agitated or hysterical. Given this witness, who spoke with Destefano, the state did not meet its burden of proving that Destefano was in a state of continuing excitement when he spoke to Williams.

Appellee says at AB 20 that Destefano "exhibited signs of fear, difficulty breathing, and the effects of his internal bleeding from the gunshot wound to his chest" between the time McDowell and Williams saw him. The state did not present evidence of signs of fear at this time, and it did not show difficulty breathing before Grecco saw Destefano. Although Williams said Destefano "wasn't looking good at all," and was bent over, R24 1472, the state presented no testimony from him that Destefano was having difficulty breathing. The medical examiner said a bullet penetrated the diaphragm, but did not testify how long it would be before it would impair breathing. Anyway, difficult breathing does not prove absence of reflective thought. Internal bleeding would, at some point, make one start to be light-headed and dizzy, R25 1655-56, and the state did not show any significant dizziness be-

fore Destefano encountered Williams.

In the circumstances at bar, Destefano's state when he spoke to Grecco does not satisfy the state's burden. Cf. Beck v. State, 937 So.2d 821 (Fla. 4th DCA 2006) (error to admit statement of crying, hyperventilating victim who had time to reflect and state did not prove lack of reflection; "The victim's emotional state when speaking to the officer does not alter our conclusion."); Mariano v. State, 933 So.2d 111, 117 (Fla. 4th DCA 2006) ("The mere fact that Schaab was still upset and crying is not sufficient to show that reflective thought has not occurred."); Blandenburg v. State, 890 So.2d 267 (Fla. 1st DCA 2004) (no proof of lack of reflection where boy was stabbed in face, went to neighbor's, then to hospital where officer questioned him 15-20 minutes after incident while he was crying, upset and in pain).

B. The state did not prove a dying declaration under section 90.804(2)(b), Florida Statutes.

Appellee has even less of an argument that Destefano made a dying declaration.

First, it does not explain the obvious contradiction between excited utterances, which require the absence of reflection, and dying declarations, which require appreciation that death is imminent without hope for recovery.

Second, it relies solely on evidence that Destefano was badly injured and very upset, AB 24-25, which does not show a belief that death was impending, much less no hope for recovery.

Third, it relies on Henry v. State, 586 So.2d 1033 (Fla. 1991)

and Labon v. State, 868 So.2d 1222 (Fla. 3rd DCA 2004), which do not support its argument. In Henry, the declarant was beaten with a hammer, burned over 90% of her body, and made a statement at the hospital when she understood her condition and "***knew that she would die***," as corroborated by expert witnesses. 586 So.2d at 1035-36 (e.s.). The case at bar does not contain similar facts and the state did not show Destefano knew he would die.

In Labon, the declarant was in critical care at a hospital, had lost sensation to his legs, saw an IV tube put in his veins to drain blood and knew he was going into emergency surgery. Further, the district court used an incorrect legal standard in Labon. It relied on Castle v. State, 305 So.2d 794 (Fla. 4th DCA 1974), for the rule that the declarants must "believe[ ] death is imminent," without a requirement that they have lost all hope of recovery. Castle relied on Johnson v. State, 58 So. 540 (1912),[2] but it ignored that Johnson said that dying declarations are admissible

> upon the theory that when an individual is in constant expectation of death all temptation to falsehood, either of hope, interest, or fear will be removed, and the awful nature of the situation will be presumed to impress him as strongly with the necessity of a strict adherence to truth as the most solemn obligation of an oath administered in a court of justice.

Id. at 540-41.

Johnson relied on Gardner v. State, 45 So. 1028, 1031 (1908),

[2] Castle used this truncated version of the test because it was not concerned with the declarant's mental state. It was an arson case, and the issue was whether a dying declaration was inadmissible under Johnson, which held that dying declarations could be used only when the investigation involved the declarant's death.

which said "utmost care and caution should be exercised by the court in the admission of dying declarations." In Gardner, the victim had a short-range gunshot to the abdomen and "said he wasn't going to live," "said he knew he couldn't stand it long," and said "I can't live, but I want her punished for she tried to kill me." 45 So.2d at 1029-30. This Court found it "***exceedingly doubtful***" that a predicate for admission had been shown, and, regardless, the statement was inadmissible because it was "not signed by the deceased, nor is it shown that it was read to and assented to by him as being correct" as common law required. Id. at 1031 (e.s.).

At bar, the state did not make an adequate showing under cases such as Johnson, Gardner and Dixon v. State, 13 Fla. 636 (1869) (proponent must show "that he evidently believed he was ***without hope of recovery***.") (emphasis in original). See also Williams v. State, 967 So. 2d 735, 749 (Fla. 2007) ("declarant must believe death is imminent and inevitable with no hope of recovery"; victim said "I'm dying," "I can't make it anymore" and thought she had been stabbed in the heart).

C. The evidence violated the Confrontation Clause.

Appellee says the statement to Officer Grecco was not testimonial, and the Confrontation Clause does not apply to dying declarations and excited utterances. Appellant disagrees.

i. *Appellee has not proved its claim that the statement was not "testimonial."*

Apellee says the statement was not "testimonial" even though

it arose from police questioning about past events.

The Sixth Amendment forbids the use of "testimonial statements" by persons who cannot be cross-examined at trial. Crawford v. Washington, 541 US 31 (2004).[3] Crawford said such statements include those "taken by police officers in the course of interrogations". Id. at 52. It used "interrogation" not in "any technical legal" sense, but in the sense used in Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980), that is, words or actions reasonably likely to elicit a response. Crawford, 541 U.S. at 53, n. 4. At bar, Officer Grecco questioned Destefano. Hence, the statement was testimonial under Crawford.

Davis v. Washington, 547 U.S. 813 (2006) settled any question in this regard. Davis involved two consolidated cases, one involving Adrian Davis and the other Hershel Hammon. In the Hammon case, officers arrived at a home shortly after a domestic disturbance. They "heard no arguments or crashing and saw no one throw or break anything," and hence there was "no emergency in progress". Id. at 829-30. Amy Hammon made a statement which recounted "how potentially criminal past events began and progressed," and hence was testimonial. Id. at 830.

In the Davis case, McCottry called 911 ***while being beaten by***

[3] Crawford suggested, but never decided, that that non-testimonial statements are admissible. See id. at 53 ("even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class"). That issue was not before the Court, and both judicial conservativism and the Cases and Controversies provision of Article III forbid consideration of issues not squarely before the Court.

Davis. Id. at 817. Hence (id. at 831-32):

> … . The statements in Davis were taken when McCottry was alone, not only unprotected by police (as Amy Hammon was protected), but apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. McCottry's present-tense statements showed immediacy; Amy's narrative of past events was delivered at some remove in time from the danger she described. And after Amy answered the officer's questions, he had her execute an affidavit, in order, he testified, "[t]o establish events that have occurred previously." App. in No. 05-5705, at 18.

At bar, Destefano was not alone: he was with Williams and the officer and in the officer's protection, and was not in immediate danger from his assailant. He told of past events in response to questioning. Hence, his statement was testimonial.

Despite the foregoing, appellee relies at AB 26-27 on an edited excerpt from page 822 of Davis regarding ongoing emergencies The full quote shows that the Court was merely making an ad hoc distinction to deal with the two cases before it. The full paragraph, with the part omitted at AB 26-27 highlighted, is:

> ***Without attempting to produce an exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation-as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows***: 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 of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [FN omitted]

Thus, contrary to AB 27, the Court did not rule that one must

look to the purpose of the police inquiry. The accompanying footnote resolves any doubt on this point (id., n. 1):

> FN1. Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations-which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly not the result of sustained questioning. Raleigh's Case, 2 How. St. Tr. 1, 27 (1603).) And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.

Davis shows we must look to whether the declarant described ongoing events or past events. At bar, Destefano described past events, so that his statement violated the Confrontation Clause.

Finally, appellee's attempt at distinguishing State v. Lopez, 974 So.2d 340 (Fla.2008) makes no sense. AB 27 says there was no ongoing emergency in State v. Lopez because "the police had arrived and the attacker had left the victim's presence". The same is true at bar: the officer had arrived and the attacker had gone in the opposite direction from Destefano. Hence, there was no ongoing emergency.

ii. *Appellee has not proved its claim of Confrontation Clause exceptions for dying declarations and excited utterances*.

a. As said at pages 40-44 of the initial brief, Crawford hypothesized, but did not find, a dying declaration exception. Ap-

pellant will not repeat that argument here, but will note that the AB makes no effort to show that Destefano's statement met the formalized requirements of a dying declaration as such may have existed at common law. The early cases indicate that such statements were historically allowed only with the strictest procedural safeguards, cf. Gardner, which were not met at bar.

b. Appellee seeks to create an exception for excited utterances by expanding the "ongoing emergency" discussion in Davis to include statements about past events. Davis does not support appellee. Hammon was upset ***and the judge admitted her statements as "excited utterances."*** 547 U.S. at 820. Further, for all the officers knew, she might have had internal injuries. Likewise, McCrotty might have been badly injured when beaten, and Davis was a violent criminal loose on the streets. Nevertheless, the Court did not consider that such facts would allow either Amy Hammon's statements or McCrotty's statements after Davis had fled into the night under some doctrine of an "ongoing emergency."

Davis effectively overruled various pre-Davis cases cited at AB 27-28 (text and footnote).[4] (Remarkably, appellee cites Hammon

[4] These cases have no value, and appellee ignores, for instance, that its first case, People v. Cage, 120 Cal.App. 4th 770, 15 Cal.Rptr.3d 846 (Cal. App. 2004), was superceded by the state supreme court's decision in People v. Cage, 155 P.3d 205 (Cal.2007), which held that the victim's statement to an officer at the hospital ***violated the Confrontation Clause under Davis***, and that Demons v. State, 595 S.E.2d 76, 79-80 (Ga. 2004) involved a statement ***to a coworker rather than an investigating officer***. Fowler v. State, 809 N.E.2d 960 (Ind. App. 2004), ***was vacated*** by Fowler v. State, 829 N.E.2d 459 (Ind.2005) (no confrontation issue

v. State, 809 NE 2nd (Ind. App. 2004), ***which Davis reversed*!)** This Court should reject appellee's argument because Davis does not allow use of a police statement about past events.

D. Appellee has failed to show that the error was harmless beyond a reasonable doubt.

Appellee says the statement merely corroborated "[s]imilar information" from McDowell and so could not reasonably have affected the verdict. AB 29-30. It ignores that: (1) McDowell did not see the shooting or know who shot Destefano, (2) appellee itself has disputed McDowell's accuracy in its brief, and told the jury he gave an account that was difficult to understand, and even "wrong" in part, R30, 2246, 2263, and (3) McDowell testified, contrary to Destefano's statement, that the man did not have a stocking mask or stocking cap. R24 1537, 1539.

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

AB 35 notes the judge found appellant "made no statements between the time he was cuffed and the time he was given Miranda." It overlooks that the judge plainly erred: Mace testified appellant made the statement at the car in handcuffs:

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as declarant testified at trial and hence was available for cross-examination and Fowler forfeited right to question her). State v. Barnes, 854 A.2d 208 (Me.2004) held a statement at a police station was not testimonial, a view plainly contrary to the 2006 decision in Davis. See State v. Jensen, 727 N.W.2d 518, 526 (Wis.2007) (disagreeing with State v. Barnes). Thus, Anderson v. State, 111 P.3d 350 (Alaska App. 2005), which relied on State v. Barnes, was vacated by the Supreme Court. Anderson v. Alaska, 548 U.S. 924 (2006). Appellant also notes that Williams v. State, 909 So.2d 599 (Fla. 5th DCA 2005), in addition to being decided before Davis, is so terse as to have no precedential value.

Q And it's in the car that he makes this statement that you quoted him in your report?
A Just before -- when I opened the door just before he was to have a seat.
Q As you're placing him in the patrol car?
A Yes, sir.
Q He's handcuffed at that time?
A Yes, sir, I believe he was.

(R11 42-43). Hence, this case is unlike Taylor v. State, 855 So. 2d 1 (Fla.2003), relied on at AB 38-41. Taylor made no statement in handcuffs, while appellant made the statement to Mace in handcuffs and made statements in chains at the station.

Appellee says the confrontation in the corridor was not coercive despite the presence of a shotgun, saying it served "to ensure the officer's safety, which is department protocol. (R.11 54)". AB 40, n.12.[5] Regardless whether the shotgun was for officer safety, such does not detract from its coercive effect.

Circumstances may indicate a seizure "even where the person did not attempt to leave," and such circumstances include "the threatening presence of several officers, ***the display of a weapon by an officer***, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Kaupp v. Texas, 538 U.S. 626, 629-30 (2003) (e.s.). The shotgun created something much more serious than an ordinary encounter, especially with the threatening presence of several officers.

[5] Testimony at R11 54 does not support this claim about protocol, and the police did not say anything to appellant like, "Don't worry about the shotgun, it's just protocol." "Protocol" does not trump the Fourth Amendment.

Officers questioned appellant in the confined hallway and asked him to show his hand. In Delorenzo v. State, 921 So.2d 873 (Fla. 4th DCA 2006), Delorenzo was seated in a car, and an officer asked him to take his hand out of his pocket. Id. at 875. This request turned the encounter into a stop. See also Evans v. State, 546 So.2d 1125 (Fla. 3rd DCA 1989) (Evans was detained when officer saw him on park bench at 4 a.m. and "'asked' the defendant to take his hands out of his pockets, for, as Picallo stated, '[the officer's] own safety'"); Fortney v. State, 510 So.2d 967 (Fla. 5th DCA 1987) ("request of Fortney to open his hand" violated Fourth Amendment absent reason to think he had a weapon); Harrison v. State, 627 So.2d 583, 584 (Fla. 5th DCA 1993) ("Other Florida district courts have consistently held … even requests to remove a hand from a pocket causes a consensual encounter to become a seizure."); Lee v. State, 868 So.2d 577 (Fla. 4th DCA 2006) (stop occurred when officer "requested that Lee remove his hand from his pocket"); U.S. v. Manzo-Jurado, 457 F.3d 928 (9th Cir. 2006) (request that men "keep their hands where the agents could see them" constituted seizure). Cf. Davis v. State, 946 So.2d 575 (Fla. 1st DCA 2006) ("Merely stating that the officer 'asked' Dees to get out of the van and 'asked' her to take her hand from her pocket, does not change the fact that these statements were directives from a law enforcement officer, rather than simple requests that Dees was free to disregard."). From the foregoing, even if things began as a "consensual encounter," a stop occurred when appellant was ques-

tioned and asked to show his hand in the narrow hallway.

Appellee says appellant voluntarily went outside, but it ignores that a group of officers confronted him, questioned him and had him show his hand, and Det. Flaherty[6] then ***ordered his removal***: "***I told Officer Mace to take him away, to take him out*** because I wanted to talk to her, to Dorothy." R11 56 (e.s.). Mace's opinion that appellant voluntarily complied is of no consequence since a superior officer had just ordered his removal. Appellant made his statement to Mace (1) after being asked to show his hand, (2) after being ordered from the building, and (2) while in handcuffs.

Further, any consent given by appellant could not be valid since Mace grossly misrepresented to him the nature of the police activity. Mace did not tell appellant that he would be chained down at the station to prevent his escape while he was questioned about a murder.

Although Mace said appellant went to the station voluntarily, and told him he was not under arrest, his actions amounted to an arrest: he removed appellant at the instructions of a superior officer, took him to the station in handcuffs, and secured him with an ankle bracelet to an immovable fixed structure in an interrogation room. In People v. Dunaway, 402 N.Y.S.2d 490, 491 (NY App. 1978),

… three police officers went to defendant's home to ques-

[6] Page 54 of the initial brief erroneously referred to Flaherty as "Fletcher."

> tion him about his participation in the robbery. According to the police testimony, defendant was asked to come downtown to talk and did so voluntarily.

The state court held there was no arrest. The Supreme Court reversed, noting officers had picked Dunaway up on another officer's instructions, and holding the police action amounted to an arrest:

> In contrast to the brief and narrowly circumscribed intrusions involved in [Terry stops], the detention of petitioner was in important respects indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, ***he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was "free to go"; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody***. The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an "arrest" under state law. The mere facts that petitioner was not told he was under arrest, was not "booked," and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, see Cupp v. Murphy, 412 U.S. 291 (1973), obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in Terry and its progeny. Indeed, any "exception" that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are "reasonable" only if based on probable cause.

Dunaway v. New York, 442 U.S. 200, 212-13 (1979) (e.s.). Appellant was arrested under Dunaway. He was ordered from his home, taken in handcuffs to a police station, and chained down in an interrogation room ***to keep him from "trying to escape"***. R11 37. He was never told that he was "free to go"; in fact, he was physically restrained.

Appellant disagrees with argument at AB 42-45 that the police

had probable cause to arrest. "[C]ommon rumor or report, suspicion, or even 'strong reason to suspect'" do not amount to probable cause. Henry v. U.S., 361 U.S. 98, 101 (1959). For warrantless arrests, the probable cause standard "cannot be less stringent then where an arrest warrant is obtained." Wong Sun v. U.S., 371 U.S. 471, 479 (1963).

Appellee cites Chavez v. State, 832 So.2d 730 (Fla.2002) and McCarter v. State, 463 So.2d 546 (Fla. 5th DCA 1985). Chavez involved a report from Chavez's landlady, a classic citizen informant, that she found her stolen gun and the murder victim's property in Chavez's trailer. At bar, the state did not have a citizen informant with such evidence directly implicating appellant in the crime. In McCarter, the defense ***did not dispute*** probable cause in the trial court, and the appellate court held that he waived the issue, and discussed the issue only in dicta.[7] McCarter applies at bar only so far as it stands for the general rule that probable cause to arrest must be supported by reasonable trustworthy information.

At bar, the officers made an invalid arrest without probable

[7] The evidence showed that Cochran, a North Carolina resident, was subjected to repeated death threats from a man who lived in St. Augustine. McCarter then hired a woman to approach Cochran with an offer of a job. Next, McCarter adopted the name Alexander and made further mysterious but lucrative job offers, trying to arrange for Cochran's travel to Daytona Beach. Cochran hired an investigator and learned the true identities of the woman and "Alexander." He contacted the authorities, who arrested McCarter when he met Cochran at the airport. The court wrote in dicta that this evidence amounted to probable cause to believe that McCarter was attempting to kidnap Cochran.

cause. Cf. State v. Van Pieterson, 550 So.2d 1162 (Fla. 1st DCA 1989) (Neal admitted selling drugs to overdose victim, saying he got them from Van Pieterson; affidavit recited this information without mentioning Neal was promised immunity; held, "good faith" exception did not apply because of this material omission, and Neal's uncorroborated information did not supply probable cause); State v. Stevens, 574 So.2d 197 (Fla. 1st DCA 1991) (after Pflegl disappeared, Stevens was found working on Plfegl's van outside the apartment of Stevens' sister, gave false name to officer and said Pflegl might be at a bar; Pflegl's body was found three days later, and officers returned to apartment where van was still parked, and asked Stevens to come to station in front seat of a police car; Stevens later testified he thought he had to go with them; held, Stevens was arrested without probable cause when taken to station); State v. Rogers, 427 So.2d 286 (Fla. 1st DCA 1983), (officers arrested Rogers for murder of girlfriend when he was seen driving car like hers and tried to evade arresting officer; held, officers lacked probable cause).

Appellee says the following supports probable cause (AB 43-44): McDowell saw a black man with a wounded left hand go "in the direct path of the rooming house" as "corroborated by the blood trail";[8] two days later Linda Roberts reported a man with a possi-

[8] In fact, the state did not show the man went in a "direct path" to 2108 Avenue G. Det. Coleman said at the suppression hearing that McDowell said the man went west behind McDowell's building, which, he said, was "consistent with" someone going to 2108 Avenue G. R11 23-24. This is like saying that walking out the

ble gunshot wound at appellant's rooming house; Hayward did not give "a reasonable explanation for the wound to his hand, which, due to it being infected, indicated that the wound was not fresh";[9] Gatlin said (after appellant was taken to the station and chained without probable cause) that appellant "sold a chrome revolver with a black handle on February 1, 2005" and "Destefano's revolver was chrome with a black handle."[10]

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front door of the supreme court building is "consistent with" going to the intersection of College Avenue and Adams Street in Tallahassee. 2108 Avenue G was ***many blocks to the northwest*** of the scene of the shooting. One would have to go several blocks north to Avenue G and several blocks west to 21st Street to get to 2108 Avenue G from 1702 Avenue D (Avenue D and North 17th Street, R11 14-15). McDowell lost sight of the man as he passed 1704 Avenue D, and could not say he went toward a place several blocks to the northwest. The blood trail showed only that the man went west behind McDowell's building. R11 16-18. This was "consistent" with going to appellant's building only so far as it was consistent with going anywhere else on the planet.

[9] In fact, appellant did give a reasonable explanation, saying he had been cut. Nevertheless, the officers then asked him to show his hand, which converted any possible consensual encounter into a stop. See Lee, Fortney, and U.S. v. Manzo-Jurado. The state exploits this illegality when it bases probable cause on what the officers saw. Regardless, although Mace gave his non-medical opinion that the injury was inconsistent with a cut, he did not attribute any significance to the apparent infection. The state gave no basis for his diagnosis that the wound was infected and he did not say for know how old the infection was.

[10] In fact, the officers had heard from Edwards only that Destefano had "some type" of silver handgun, R11 13-14, and Det. Flaherty "believed" Destefano told Grecco his gun was a .357 revolver. R11 13. (Grecco later testified that Destefano identified the gun only as a .357. R14 1514.) It thus matched the Gatlin weapon only in general terms, and Gatlin did not say if appellant sold the gun before or after the murder, gave no basis for his information, and did not identify the buyer. Flaherty said he was told by Gagliano that Gatlin, who had just been arrested on serious felony charges, had said that on or about February 1 appellant sold a chrome revolver with a black handle to another individual. R11

In fact, the record shows that, when officers confronted appellant, they knew only that McDowell saw a man with a bleeding hand go around his building to parts unknown, and a man in appellant's apartment had a possible gunshot wound two days later. After the officers confronted and questioned appellant, they had information that he had been stabbed in the hand. After they had him open his hand, they had a lay opinion that his injury was infected and was not a stab wound. At this point, Det. Flaherty ordered appellant removed, and, in handcuffs, appellant said he had been shot in a robbery. This information was obtained during an illegal detention and could not be used for probable cause, and in any event did not supply probable cause. Mace took appellant to the station and chained him, plainly an arrest for Fourth Amendment purposes. Officers then obtained Gatlin's doubtful and vague statement, which did not supply probable cause under U.S. v. Koerth and Wong Sun.

AB 44 says appellant's statements, which formed a central feature of the trial, could not reasonably have affected the verdict under State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla.1986). Appel-

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65. Further, Gatlin had doubtful credibility and gave only vague information, so he did not supply probable cause independently of the information got by exploitation of the violation of appellant's rights. See U.S. v. Koerth, 312 F.3d 862 (7th Cir. 2002) (probable cause not supplied by named informant without showing he was reliable and without adequate factual showing except by conclusions and unsupported assertions; search upheld because officers relied on warrant in good faith). "If hearsay information forms some of the foundation for a determination of probable cause, the veracity and basis of knowledge of those supplying the hearsay information must be supplied." State v. Irizarry, 948 So.2d 39 (Fla. 5th DCA 2006) (information from named arrestee informant supplied probable cause because police showed both veracity and basis of knowledge).

lee does not say how it could be possible for the jury to ignore the statements, but instead seems to argue, contrary to the express language of State v. DiGuilio, that there was overwhelming evidence of guilt.

AB 44 says Destefano "carried only ten dollars with him during his morning deliveries," a fact not established by the record.[11] It says he said he fired at his attacker, which shows little about appellant's guilt and could be consistent with, for instance, a defense claim that appellant was hit by a stray shot. Also, jurors may have thought Destefano was delirious when speaking to Grecco, given Grecco's testimony.

The state next points to McDowell's testimony. Setting aside that the state says McDowell was inaccurate in other parts of its brief, its argument here ignores that McDowell did not see a gun in the man's hand, contrary to the state's theory that appellant was the robber and had a gun. Further, McDowell said the bleeding man wore a hat and not a stocking cap, R24 1537 (denying that he saw

[11] Appellee apparently relies on the following from Ms. Edwards' direct examination (R24 1461):

> Q Okay. Did he -- did you know him ever to carry any personal cash with him when he went out on these paper deliveries?
> A Very little.
> Q As little as maybe $10?
> A Yeah, little.

Thus, she said that, on some unspecified occasion, he carried very little money when making deliveries. The $10 figure came from the prosecutor and Edwards only vaguely confirmed that it was maybe as little as $10. She did not say that he usually carried only ten dollars, much less on the day of the murder.

anyone with a stocking cap, and later asserting "I didn't see no stocking cap."), 1539 ("he had a hat on his head"), whereas Destefano said the robber wore a stocking cap. R24 1514. Thus, he testified to facts contrary to the state's theory. He said this bleeding man with a hat was standing next to Destefano, which is consistent with appellant not being the robber yet getting his blood on Destefano.[12]

AB 44 says the man went toward the Avenue G address. But, as noted above, McDowell only saw the man go west around the building, and did not say he went to a place several blocks to the northwest. AB 44 says appellant had a bloody $10 bill, but, as already noted, Edwards did not say Destefano carried ten dollars. Further, appellant's bleeding is consistent with innocence: Destefano said the robber had a stocking cap, and McDowell said the bleeding man did not have a stocking cap. AB 44 says appellant had a gunshot to the hand, but the state had very little evidence of this outside of appellant's statements. It also says he sold Destefano's gun. Dorothy Smith, who had serious credibility problems and was in jail when she testified, said appellant sold Gatlin a gun she ***thought*** was silver. R27 1863-64. The state did not show this gun was Des-

[12] Appellant's blood also could have got on Destefano's clothes when Officer Holmes brought them to the scene. AB 7, n.2, says Holmes brought them in a "sealed container," but the record does not bear out this claim. Holmes did not testify, and Garrason only said the he (Garrason) left the pants "in the same container that they gave them to him in. I can't remember if this was plastic or paper." R25 1630. Garrason did not know what Holmes did with the pants before he saw him at the crime scene, and there was no testimony about a "sealed container."

tefano's. Finally, appellant's blood on the murder weapon did not so clearly establish guilt that jurors would not have been affected by appellant's statements.

Appellee has not met its high burden of showing beyond a reasonable doubt that appellant's statements did not affect the verdict. They figured prominently in the state's presentation, severely limited the defense strategy, and in effect forced appellant to testify to explain how his statement fit with other evidence in the case. This Court should order a new trial.

III. WHETHER THE COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO PORTIONS OF HIS RECORDED CONVERSATION WITH DOROTHY SMITH.

A. Appellee says appellant "appears to have withdrawn" his objection to the discussion of reefer. AB 46-47. Appellant submits that appellee has misread the record.

The court first addressed the recordings at R25 1701-07. Appellant made objections of relevancy and prejudice outweighing probative value, and provided a transcript with the objected-to parts highlighted. R25 1702-03. The state objected to addressing appellant's objections one-by-one. R25 1703. The state knew there was a relevancy objection on the reefer issue because it immediately turned to its theory that appellant was using a code for a gun. R25 1704. The court recessed for the weekend, during which it reviewed the materials.

On Monday, the court began the discussion by addressing the state about the recordings' relevance. Again, the state went

straight to the reefer issue, saying: "Marijuana is code for the murder weapon." R26 1715-16. The court indicated it would rule the reefer discussion admissible "[a]s long as it's made clear" appellant was not talking about dealing in marijuana. R26 1716-17. The state replied that it would argue appellant was talking about a gun and not marijuana, and the court said, "Okay." R26 1717.

Thus, the sequence was: Counsel began to detail specific objections. The state cut him off and addressed his objection about reefer by saying it was a code for the gun. On Monday, before the defense could say a word, the state again argued reefer was a code for the gun, and the judge agreed the references were admissible provided the state did not argue appellant was trafficking in marijuana. This is not a situation of an attorney gaining an advantage by letting an unknown error go undetected: the judge was on notice and had an opportunity to rule, ***which he did***. The purposes of the contemporaneous objection rule were met. See J.B. v. State, 705 So.2d 1376, 1378 (Fla. 1998) ("Most notably" rule gives judge chance to respond to the objection; it also keeps counsel from getting an advantage "by allowing unknown errors to go undetected").[13]

[13] Appellee also suggests counsel later waived the issue. In fact, he merely acknowledged that the court had ruled and moved to other issues. First, he said "there is no relevancy to any of it." R26 1720. Then, he moved to a discussion of "the areas … where we're focusing relevance versus prejudicial nature." Id. Thereafter, he said the "***other*** point specifically of relevancy" was a reference to a confession. R26 1725-26. Later he noted he had no further relevancy objections and acknowledged that the judge ***had already ruled*** on his relevance objection to the marijuana discussion: "Only other one specifically as to relevance was the issue

See also Woods v. State, 733 So.2d 980, 987 (Fla.1999) (despite vague objection, issue preserved where "the trial court and the State considered the objection as if it had been raised on hearsay grounds" and judge ruled on that ground).

Steinhorst v. State, 412 So.2d 332, 338 (Fla.1982) does not help appellee. Steinhorst was prosecuted for murders committed in a drug smuggling operation. Capo testified that Steinhorst confessed at Goodwin's home. Id. at 335-37. The defense was prevented from cross-examining Capo as to whether he had a major part in the drug operation. The defense said its questioning "was relevant to the issue of the witness's credibility." Id. at 337. On appeal, it argued for the first time that the evidence was admissible as substantive evidence to set up a defense that Capo and Goodwin had major roles and Capo shifted blame from the real killer (Goodwin) to Steinhorst, their hireling. Id. at 338. This Court held that the defense did not preserve this latter argument in the trial court. Id. Steinhorst does not apply at bar, where the judge was plainly aware that appellant objected to the marijuana discussion as irrelevant, and overruled his objection.

Appellee says appellant rejected the judge's offer of a limiting instruction about the marijuana at R26 1726. AB 50, n. 17 and AB 53. In fact, the judge did not offer an instruction about the

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with the refer [sic] and we've already dealt with that. And my understanding is he said in its context it is relevant." R26 1728-29.

marijuana at R26 1726 or elsewhere.[14] Further, such an instruction would necessarily favor the state and harm the defense, as it would support the state's claim that appellant used "reefer" as a code word for a gun.

Appellant disagrees with appellee's account of the CDs' contents. For instance, AB 55 says appellant "confirmed" at R4 491 that "he was shot with a .357." In fact, at R4 491, Smith recited various police claims, including that "they said you was shot with three fifty-seven, but they ain't said nothing about (indiscernible) you hear me." Appellant then said, "Yeah," which only indicated yes, he heard her. AB 55 says he "admitted" at R4 502-03 that he "sold the .357, the one he found at the scene." In fact, at R4 502-03, Smith recited police claims about the .357, and appellant then said he told "the man" he sold the gun "that fell off one of the dude". He was thus saying he told the police he sold the murder weapon and not the .357, since he told the officers that the "dude dropped his gun. I think he had done shot the dude. That dude ain't shoot him or nothing." R26 1824 That is, the robber "dude" dropped his gun after shooting the "dude" (Destefano) who "ain't shoot him or nothing".[15]

Thus, appellant told Smith he had told the officers he had ***already sold the murder weapon***, which he had picked up after the mur-

[14] There was a discussion of possible instructions about other matters on the tape, but not the marijuana. R26 1723-28.

[15] Appellee repeats this claim at AB 56, citing to R4 500-11. Again, appellant said only that he told "the man" that he sold the gun "that fell off one of the dude". R4 502-03.

derer dropped it. Hence, it would make no sense for him to be telling Smith that the murder weapon was still in the apartment or that Smith would have understood that "reefer" referred to the murder weapon.

Appellee presents no authority or coherent argument for its claim that reefer was "code for the murder weapon." R26 1716. It called Smith as a witness, but did not even ask if the murder weapon was in her apartment at the time of the phone call or whether reefer was code for it. Cf. Gosciminski v. State, - So.2d -, 2008 WL 4489264 (Fla. Oct. 8, 2008) (improper for state to suggest that victim's blood was on ring where evidence showed only that ring had some dark substance or dirt on it).

The state makes much of appellant's being "ballistic" when Smith said in the first conversation the officers had not found the gun, R27 1896-97, but his anger shows little. First, he was angry with Smith throughout both conversations. Second, he could have been just as upset about the possibility of the police finding the murder weapon in Gatlin's possession at the rooming house, since Gatlin would identify him as the seller, as he would be about the supposed possibility of their finding it in his own apartment. Third, the state has never shown how his anger ***on the first tape*** related to the discussion of reefer late ***on the second tape***.

In fact, the reefer discussion starting at R4 497 seemed to be a continuation of the discussion on the previous page (R4 496) of "shit" Smith was supposed to get from a drawer by the refrigerator.

Since they had just used the vague term "shit" at R4 496, Smith became upset when appellant explicitly identified it as reefer, an illegal susbstance. R 497-98. Her anger then fed his generalized and increasing anger with her and with his situation in general.

From the foregoing, the state did not present "clear and convincing" evidence that appellant committed the collateral crime of directing Smith to dispose of the murder weapon as required by Acevedo v. State, 787 So. 2d 127, 130 (Fla. 3rd DCA 2001) and State v. Norris, 168 So. 2d 541, 543 (Fla. 1964).

Appellee says the reefer evidence was 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." AB 57. But, just as the officers found no drugs in the apartment, so also did they find ***no gun***, so that the "reefer" said to be in the apartment could not have been a gun any more or less than it could be drugs. The fact that the gun was later found in the laundry room does not support the state's theory that the "reefer" was the gun, since that fact is consistent with appellant having sold it to Gatlin ("Profit") before he was arrested.

B. As to references to the judge and the lawyer and the woman on appellant's side, appellee makes no argument that these references went to an element of the crimes charged. Instead, it says their removal would leave "large gaps." AB 58. But recordings are played at trials all the time with portions deleted, and the ob-

jected-to portion would not have created "large gaps."

Appellee also says it "cannot be said that the jurors would be so aghast … that they would disregard their oaths and convict [appellant] of murder" because of the statements and that appellant did not "establish [the jury] would be so swayed by those comments to convict." Id. Appellee misapprehends the legal standard set out by the Legislature and the Evidence Code that: "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice … ." This standard does not require that the evidence be so drastic as to make jurors disregard their oaths. Cf. State v. Smith, 573 So.2d 306, 313 (Fla.1990). The remarks here had no probative value as to any element, and their zero probative value was far outweighed by the danger of unfair prejudice.

AB 58 also suggests that only a guilty person would experience "consuming fear at his situation and intense focus on extricating himself from the charges". As if an innocent person charged with murder would not have similar emotions!

Further, trying to coach a witness is consistent with innocence, and appellant's desire to dispose of drugs shows nothing about guilt or innocence of murder. AB 59 says: "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." In fact, the state never showed that he tried to get Smith to hide evidence. And

surely an innocent person would also not want someone to give the police damaging evidence and contradict the defense.

C. Appellee makes no real argument for the relevance of appellant's cursing Smith when she said she was pregnant with his baby and his indifference to her expressions of love, except to say he was trying to keep her on point as she was "interrupting with issues not relevant to Hayward's criminal situation." AB 60. Obviously, if these matters were not relevant to his criminal situation, they were also irrelevant to the issues before the jury, and hence were inadmissible.

D. Appellee has not met its burden of showing that the evidence could not reasonably have affected the jury. It simply refers this Court to its argument as to Point II, and makes a claim of "overwhelming evidence." AB 62. This Court ***has rejected*** the "overwhelming evidence" standard. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla.1986) ("The test is not … an overwhelming evidence test."); McDuffie v. State, 970 So.2d 312, 328 (Fla.2007) (rule is "well-established"). Appellant will not repeat what he said at Point II except to reiterate that he disagrees with appellee's factual assertions. Further, the defense explained appellant's blood on the murder weapon, since appellant said he carried it from the murder scene while bleeding.

IV. WHETHER THE EVIDENCE SUPPORTED A CONVICTION FOR MURDER BY PREMEDITATED DESIGN.

Appellant cannot agree with factual claims at AB 64-68: (1) Nothing can be concluded about the "respective posture of the par-

ties," and the state did not show anyone's posture when Destefano was shot. (2) The state did not show who Destefano was speaking with when he was shot. (3) McDowell did not say he saw appellant "standing over his victim just after Destefano shot his assailant". If that were the case, he would have seen Destefano with the gun or seen appellant taking it from him. He did not look out until well after Destefano was shot and what he saw proved nothing about premeditation.[16] (4) McDowell showed **no** "confusion regarding minutes and seconds": he testified to a gap of 10-15 ***minutes*** and ***not seconds***. R24 1520, 1521. (5) The state did not show appellant shot Destefano in the leg, then shot him a second time after he "fell to a knee and pled that he had nothing more". Aside from the fact that the state did not show appellant ever shot Destefano, (a) McDowell did not testify to hearing anything between the two shots, which went off in rapid succession, R24 1520, and (b) the medical examiner said only that it was possible the first shot hit Destefano in the leg, but qualified that "you would have a couple of scenarios here," R25 1666, and agreed there were "a number of hypotheticals as to how the victim might have been moving" when shot in the chest. R25 1668. (6) McDowell did not specifically say he

[16] Thus, the state did not prove premeditation in these cases in which the defendant was seen at the scene of the murder: Coolen v. State, 696 So.2d 738 (Fla.1997) (eyewitness saw Coolen stab victim without provocation); Mungin v. State, 689 So. 2d 1026 (Fla.1995) (Mungin was seen leaving store right after shooting); Terry v. State, 668 So. 2d 954 (Fla. 1996) (Terry seen leaving 30 seconds after shooting victim); Burttram v. State, 780 So.2d 224 (Fla. 2nd DCA 2001) (defendant pointed gun at victim then went in another room and shot victim).

"saw Hayward standing over Destefano as he was pleading he had nothing more." (7) The state did not show appellant "took aim again and shot a second time in Destefano's chest," as just noted. In sum, the record refutes the state's hypothesis.

Pietri v. State, 644 So.2d 1347 (Fla.1994) and Evans v. State, 838 So.2d 1090 (Fla.2002) do not support appellee. Pietri left a work release center and engaged in a crime spree in a stolen truck. An officer made a traffic stop, and witnesses saw Pietri shoot him from 3-8 feet away. Pietri, 644 So.2d at 1350. Shooting the gun required use of both hands, and the officer was shot in the heart. Id. 1352. Unlike at bar, eyewitnesses saw Pietri shoot the officer and there was no evidence of a struggle or a robbery gone bad, only a purposeful and deliberate slaying. In Evans, Evans told a fellow inmate "if he could get his hands on Johnson, ***he was going to kill her***." Evans, 838 So.2d at 1095 (e.s.). He then tracked her down and shot her. He claimed the gun went off when she grabbed it, a claim refuted by eyewitnesses. The state had much more evidence of premeditation in Pietri and Evans than at bar.

V. WHETHER THE EVIDENCE SHOWED BEYOND A REASONABLE DOUBT THAT APPELLANT WAS THE MURDERER.

Appellee says appellant did not preserve this issue for appeal, AB 71, but this Court reviews the sufficiency of the evidence in capital cases regardless whether the issue is raised below. See F.B. v. State, 852 So. 2d 226, 230 (Fla. 2003).

Appellee refers to argument at AB 63-65 that it had direct

evidence of what McDowell saw and that appellant confessed to parts of the crimes, so that the circumstantial evidence rule does not apply. This argument is refuted by Mayo v. State, 71 So.2d 899 (Fla.1954), State v. Law, 559 So.2d 187 (Fla.1989) and McArthur v. State, 351 So.2d 972 (Fla.1977), the main cases on the circumstantial evidence rule.

Mayo shot a constable in a gun battle on a Saturday afternoon. "***Several witnesses saw some or all of the shooting***." Mayo, 71 So.2d at 900 (e.s.). Mayo admitted the shooting, claiming in self-defense. Id. This Court applied the circumstantial evidence rule, holding the state did not refute his hypothesis. Id. at 904.

Law was convicted of murdering his girlfriend's child, "Little Jim" Dees, who died of blunt trauma to the head. Little Jim's brother testified that he ***saw Law beating Little Jim*** on the night of his death, State v. Law, 559 So.2d at 190, and Law admitted he roughhoused with Little Jim that night. Id. at 191. This Court applied the circumstantial evidence rule, but held that the state rebutted Law's various hypotheses of innocence based on a thorough review of the evidence. Id. at 192.

In McArthur, McArthur and her husband were alone in their home when the husband was killed by a gunshot to the face. When officers arrived, McArthur said she was holding the gun and it accidentally fired when the husband grabbed it. This Court applied the circumstantial evidence rule and reversed the conviction.

Thus, the circumstantial evidence rule applies even if (1) the

state has evidence putting the defendant with the victim at the time of the fatal episode, and (2) the defendant admits facts about the fatal episode.

Appellee merely pyramids hypotheses to make out a case for guilt. Further, appellant disagrees with factual assertions at AB 72-75. (1) McDowell made clear there were 10-15 minutes between the first two shots and the third that he heard. (2) His testimony did not exclude the possibility of a fourth shot: he indicated variously that he went to the bathroom between the first two shots and the third shot, R24 1542, or after the third shot, R24 1543, or after he looked out. R24 1540. There could have been a fourth shot that he did not hear while he was in the bathroom. (3) Smith did not say appellant came home "with a silver revolver with a black handle meeting the description of Destefano's gun." She only said that the next day he sold Gatlin a gun she thought was silver. R27 1683-84. (4) As already noted, the state did not show "Destefano was known to carry only ten dollars during his morning paper delivery." (The supplemental answer brief also says that appellant must have taken the ten dollar bill during the robbery because appellant "reported that he had been robbed or used all his cash on drugs." Supplemental answer brief, 7. In fact, appellant explained that he also had some other money on him that was not taken in the robbery. R28 2075-76.)

CONCLUSION

Appellant respectfully submits this Court should vacate the convictions and sentences, and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Initial Brief has been furnished to by U.S. Mail on Leslie Campbell, Counsel for Appellee, Assistant Attorney General, Counsel for Appellee, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, on 15 December 2008.

_____
GARY LEE CALDWELL

CERTIFICATE OF FONT SIZE

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

_____
GARY LEE CALDWELL