In the Supreme Court of Florida

LEO LOUIS KACZMAR III,

Appellant,

v. CASE NO. SC10-2269

STATE OF FLORIDA,

Appellee.

______________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, LEO LOUIS KACZMAR III, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is the direct appeal of a capital case. Kaczmar murdered his father's girlfriend, when she refused his sexual advances, by stabbing her at least 93 times, including in her back as she attempted to flee. The jury recommended death by eleven to one. The trial court found four aggravators including HAC and sentenced Kaczmar to death.

The Grand Jury indicted Leo Louis Kaczmar for three counts. Count I was first-degree murder of Maria Ruiz by stabbing her with a knife on December 12, 2008 or December 13, 2008, charging both premeditated murder and felony murder with attempted sexual battery as the underlying felony, a violation of § 782.04(1)(a), Florida Statutes. Count II was first-degree arson of a dwelling, a violation of §

806.01(1)(a), Florida Statutes. Count III was attempted sexual battery with a deadly weapon, a violation of § 894.011(3), Florida Statutes. (R. Vol. 1 9-11).

The State gave notice of its intent to seek the death penalty pursuant to rule 3.202. (R. Vol. 1 41). The State also provided a list of the aggravating circumstances it was seeking. (R. Vol 6 998).

Guilt phase

At trial, Kaczmar was represented by two defense counsel, Christopher Anderson and Francis Shea. The Honorable William Wilkes presided. The guilt phase was conducted on August 9-12, 2010. Following jury selection, the prosecutor and defense counsel gave opening statements.(T. Vol. 12-13; T. Vol 14 232-287). There was an on-the-record colloquy with the defendant during the state's opening statement to the effect that he agreed with defense counsels decision not to object to the prosecutor's references tp the defendant's cocaine use for strategic reasons. (T. Vol. 14 237).

Defense counsel theory of defense was reasonable doubt. (T. Vol. 14 285). Defense counsel attacked one of the State's witnesses, Filancia, as a three time convicted felon unworthy of belief. He also attacked the attempted sexual battery charge because there was "not one iota of evidence" of rape or attempted rape because there was no semen found on the victim's body. He also alluded, at several points, to a possible second male being involved. (T. Vol. 14 280,281,284).

The medical examiner, Dr. Jessie Giles, a forensic pathologist, testified. (T. Vol. 15 419-461). Dr. Giles has been a medical

examiner for 20 or 21 years and has performed approximately 4,500 autopsies. (T. Vol. 15 422).

On December 14, 2008, Dr. Giles performed the autopsy of the victim in this case, Maria Ruiz. (T. Vol. 15 422). The victim was five foot five and weighed 134 pounds. (T. Vol. 15 425). The victim was clothed but there were five cuts in the upper back of her blouse and one in the front chest area which matched the stab wounds of her body. (T. Vol. 15 426). The victim's nails were very short. (T. Vol. 15 427). She had injuries to her hands but not her nails. (T. Vol. 15 427). He took fingernails clippings. (T. Vol. 15 427). Almost her entire body minus the right side of her face, had burn damage from the fire. (T. Vol. 15 428). Her legs were severely burned. (T. Vol. 15 428). There was not soot in her lungs. (T. Vol. 15 428). The victim had no carbon monoxide in her blood. (T. Vol. 15 429). In his expert opinion, she was dead before the fire burned her body. (T. Vol. 15 428,430). The victim also had no alcohol or drugs in her blood. (T. Vol. 15 429).

Dr. Giles testified that the cause of death was hypovolemic shock from the multiple stab wounds, in layman's terms, she bleed to death. (T. Vol. 15 430). The death was a homicide. (T. Vol. 15 430). There were about 100 stab wounds to the victim's body. (T. Vol. 15 431). Dr. Giles labeled 93 separate wounds. (T. Vol. 15 431-432). These 93 wounds were from a sharp object such as a knife. (T. Vol. 15 432).

The stab wounds were on her neck, chest and back. (T. Vol. 15 436). Five of the stabs went into her lungs. (T. Vol. 15 436). One stab wound went from her outer right arm all the way through the arm

near her armpit and a short distance into her chest. (T. Vol. 15 448). The victim blunt force injuries from a punch or a fall on her face, left shoulder, and right forearm. (T. Vol. 15 433).

Most of the stab wounds were consistent with a single edge knife with a blade of 5 inches or longer. (T. Vol. 15 434). While the medical examiner could not rule out a second knife, all of the wounds could have come from the same knife. (T. Vol. 15 435).

The most significant wounds were the deep slashes about the victim's neck. (T. Vol. 15 436). One of these went all the way through the larynx into the esophagus. (T. Vol. 15 436). Three major arteries of her neck were cut, two entirely in half. (T. Vol. 15 436,441). The brachiocephlic artery was severed in two locations. (T. Vol. 15 442). That was a fatal injury. (T. Vol. 15 442). The internal carotid artery was almost severed. (T. Vol. 15 442). These injuries would cause rapid blood loss and unconsciousness. (T. Vol. 15 442). She would have been rendered unconscious within seconds of receiving these injuries. (T. Vol. 15 442). The victim, however, did not aspirate any blood into her lungs. (T. Vol. 15 443-444). For these reasons, the medical examiner testified that the wounds to the neck severing the arteries occurred during the end of the attack. (T. Vol. 15 444). The neck wounds occurred "toward the end of everything, not the beginning."(T. Vol. 15 445). The attack lasted several minutes at the least. (T. Vol. 15 445).

Dr. Giles also testified as to the victim's defensive wounds. (T. Vol. 15 445). He explained that when a person defends herself from an attack that they block the attack with their arms causing wounds

to the hand, forearm, or to the palm of the hand if the person attempts to grab the knife. (T. Vol. 15 445-446). There were defensive wounds on Maria Ruiz's right hand, her fingers were cut and her right palm. (T. Vol. 15 447). And the web of her left hand was cut down to the carpal bones. (T. Vol. 15 447). There were a total of ten defensive wounds on the victim. (T. Vol. 15 447). The victim put up a fight to avoid being stabbed. (T. Vol. 15 448). The medical examiner also performed a standard sexual battery kit. (T. Vol. 15 452).

David Hendrix, who was employed by Hess, testified. (T. Vol. 15 522-523). In December of 2008, he was the general manager of the Hess Gas station in Green Cove Spring on the corner of Highway 315 and Highway 17. (T. Vol. 15 523). He testified as to the store's computer records of the receipt of the sales. (T. Vol. 15 524). He identified State exhibit #138 as a receipt from that store, store #138. (T. Vol. 15 525). The date on the receipt was December 13, 2008. (T. Vol. 15 525). The time was 5:59:12 am. (T. Vol. 15 527). It was a $2.00 cash transaction for gas. (T. Vol. 15 526). The store had inside video surveillance. (T. Vol. 15 528). He gave the tape of the video surveillance to law enforcement. (T. Vol. 15 528).

Detective Sharman of the Clay County Sheriff's Office, testified. (T. Vol. 15 542). He was with the robbery/homicide section in December of 2008. (T. Vol. 15 543). He was the lead investigator of the arson/homicide investigation of Maria Ruiz's death. (T. Vol. 15 543). At 9:30 p.m., on December 13, 2008, he interviewed the defendant. (T. Vol. 15 543-544). Detective Sharman read Kaczmar his

Miranda rights. (T. Vol. 15 544-547 - exhibit 132). The interview was both videotaped and audio recorded. (T. Vol. 15 548).

Sergeant Mahla had told Detective Sharman that he saw what appeared to be blood on Kaczmar's socks. (T. Vol. 15 549). Detective Sharman asked Kaczmar what was on his socks and Kaczmar responded his blood. (T. Vol. 15 550). Kaczmar said that he had cut himself while fishing on oyster shells. (T. Vol. 15 550). Kaczmar then showed the detective a cut on his upper calf. (T. Vol. 15 550). The detective asked Kaczmar if her had any other injuries. (T. Vol. 15 551). Kaczmar had additional injuries including a small cut on his left thumb that was fresh and scratch marks on his right hand. (T. Vol. 15 551). Kaczmar said the fresh cut on his thumb was a fishing injury from a hook and scratch marks on his right hand were from a fishing line. (T. Vol. 15 551). Kaczmar said he went fishing between 2:00 and 3:00 am that morning. (T. Vol. 15 552). The detective took photographs of Kaczmar's injuries. (T. Vol. 15 552 - exhibits 112,115,118). Kaczmar was 6 feet 5 inches tall and weighed 280 pounds. (T. Vol. 15 554).

The prosecutor played a DVD of Detective Sharman's interview with Kaczmar. (T. Vol. 15 555-608- Vol. 16 621). During the interview, Detective Sharman told the defendant that they needed his clothes. (T. Vol. 15 606). Detective Sharman assured the defendant that he would give him additional clothes. (T. Vol. 15 606). The detective told him that they can get his clothes for testing. (T. Vol. 15 606). The detective told the defendant that he was free to go and he did not have to wait for the tests. (T. Vol. 15 607). Detective Sharman told him he needed his socks because they had blood on them. (T. Vol.

15 609). Kaczmar said they were his last pair. (T. Vol. 16 615-616). Detective Sharman gave him a replacement pair of socks. (T. Vol. 16 617).

Detective Matthew Edmonson of the Clay County Sheriff's Office testified. (T. Vol. 16 628). He went to the Hess gas station to collect the store's video surveillance from Dave Hendrix. (T. Vol. 16 630-631). The photograph from the video were published to the jury. (T. Vol. 16 712-713 - exhibit #150, #151).

Maria Lam of the Florida Department of Law Enforcement, biology section, testified. (T. Vol. 16 659). She performed STR DNA testing of the victim's blood. (T. Vol. 16 664,667). She performed STR DNA testing of the defendant's swab. (T. Vol. 16 669). She performed STR DNA testing of the defendant's sock. (T. Vol. 16 671). All 34 different areas of the socks were positive for blood. (T. Vol. 16 672). She took five cuttings for DNA testing from each sock. (T. Vol. 16 672). The results were a mixture. (T. Vol. 16 673). The major contributor to the DNA mixture was the victim, Maria Ruiz. (T. Vol. 16 675). The blood on Kaczmar's sock matched the victim's DNA profile at one in 880 billion southeastern Hispanics. (T. Vol. 16 678). There was also a third donor. (T. Vol. 16 679). There was no semen on Maria's underwear. (T. Vol. 16 683).

Kevin McElfresh, a population geneticist, testified. (T. Vol. 16 696). He has a Ph.D. in population genetics. (T. Vol. 16 697). He testified that Maria Ruiz's blood was one the defendant's socks. (T. Vol. 16 705).

Detective Charles Humphrey of the Jacksonville Sheriff’s Office testified. (T. Vol. 16 741). He was contacted by the Clay County Sheriff’s Office in February of 2010 to perform undercover work in this case. (T. Vol. 16 741). He posed as Carlos Rivera when meeting with the defendant Leo Kaczmar at the Clay County jail. (T. Vol. 16 742). He had four meetings with the defendant and three of those four meetings were recorded.

The first meeting was on March 19, 2010. (T. Vol. 16 742). Detective Humphrey introduced himself to the defendant as “Carlos” a friend of Bill Filancia. (T. Vol. 16 743). The recording of this meeting was played for the jury. (T. Vol. 16 744-746). Detective Humphrey also explained that, at the first meeting, the defendant gave him a map of the location of Ryan Modlin’s trailer and he was to place clothing underneath the trailer and then call crime stoppers in a scheme to frame Ryan for this murder. (T. Vol. 16 748-750).

The second meeting was on April 2, 2010 (T. Vol. 16 750). The recording of the second meeting was played for the jury. (T. Vol. 16 750-755). Detective Humphrey also explained that, at the second meeting, the defendant explained that this wife, Priscilla Kaczmar, who was to pay him $300.00 for planting the evidence was running late. (T. Vol. 16 755). The defendant also told the detective about a knife with blood on it. (T. Vol. 16 758). The third meeting was not recorded due to an equipment malfunction. (T. Vol. 16 759).

The defendant told him that his wife would be wearing a blue smock. (T. Vol. 16 756). Detective Humphrey, acting at Carlos, met with the defendant’s wife, Priscilla Kaczmar, at McDonalds. (T. Vol. 16 756).

She paid him $200.00 (T. Vol. 16 756-757). He met the defendant's wife a second time at the parking lot of the jail at which she paid him the remaining $100.00. (T. Vol. 16 759).

Detective Humphrey, acting at Carlos, had a fourth meeting with the defendant on April 16, 2010. (T. Vol. 16 760). The recording of the fourth meeting was played for the jury. (T. Vol. 16 761-762). Detective Humphrey also explained that, at the fourth meeting, he and the defendant discussed finding a person to commit perjury and create an alibi for the defendant. (T. Vol. 16 762-763).

All the schemes originated with the defendant; none of them were the detective's idea. (T. Vol. 16 763-764). Part of a recording was played for the jury in which the defendant said that Bill Filancia was the "only one that knows everything about my case." (T. Vol. 16 766).

The State rested. (T. Vol. 17 845). Defense counsel moved for judgment of acquittal. (T. Vol. 17 845-848). The trial court denied the motion. (T. Vol. 17 848). The defendant did not testify. The trial court conducted a colloquy regarding the defendant's right to testify. (T. Vol. 17 850-852).

The defense called one witness, Michael Goldner, to testify. (T. Vol. 17 852). He testified regarding the inventory he conducted of the defendant's truck on January 8, 2009. (T. Vol. 17 853). He found no blood in the truck. (T. Vol. 17 855). He performed a phenolphthalein test which was negative for blood. (T. Vol. 17 857).

The defense rested. (T. Vol. 17 861). Defense renewed the motion for judgment of acquittal. (T. Vol. 17 862). The trial court denied the renewed motion. (T. Vol. 17 862).

The prosecutor and defense counsel presented closing arguments of the guilt phase. (T. Vol. 17 867-964). The trial court instructed the jury. (T. Vol. 17 970-988; R. Vol 8 1477-1476 - written jury instructions.). The trial court instructed the jury on (1) first-degree murder, both premeditated and felony murder with attempted sexual battery as the underlying felony; (2) first-degree arson; and (3) attempted sexual battery. (T. Vol. 17 970; 972; 974; 977;988). The trial court instructed the jury on the lesser included offenses to first-degree murder of second-degree murder and manslaughter. (T. Vol. 17 974-976). The trial court instructed the jury on the lesser included offenses to first-degree arson of second-degree arson. (T. Vol. 17 977-978). The trial court did not instruct the jury on any lesser included offenses of attempted sexual battery. The trial court explained the verdict form to the jury (T. Vol. 17 986-987). The trial court excused the alternate jurors, Ms. Nicholay and Mr. Salemi, from deliberations but explained that it was possible that they could be needed for the penalty phase. (T. Vol. 17 989-990).

The jury began deliberations at 1:08 pm. (T. Vol. 17 989). The jury returned with a question about the definition of sexual battery. (T. Vol. 17 990; R. Vol. 8 1474 - written question #1). After a discussion with the prosecutor and defense counsel, the trial court give the standard jury instruction on sexual battery. (T. Vol. 17

990-993). The jury returned to its deliberations at 1:53. (T. Vol. 17 993).

The jury requested a read-back of William Filancia's testimony. (T. Vol. 17 993-994; R. Vol. 8 1476 - written question #2). The prosecutor noted it would take some time to prepare a transcript. (T. Vol. 17 994). Defense counsel objected to any read back of this testimony. (T. Vol. 17 994). The trial court explained to the jury that the court was not in a position to provide them with a read back. (T. Vol. 17 994-995). The trial court did not read back this witnesses testimony. The jury returned to its deliberations at 2:26. (T. Vol. 17 995).

The jury also requested additional instructions on attempts, whether thinking or talking about attempting a crime counted as an attempt. (T. Vol. 17 995; R. Vol. 8 1474 - written question #3). After discussion with counsels, the trial court instructed the jury to rely on the written jury instructions. (T. Vol. 17 997). The jury returned to its deliberations at 3:25. (T. Vol. 17 997).

The jury returned with a verdict at 3:34. (T. Vol. 17 997). The jury found the defendant guilty on count I, first-degree murder as charged. (T. Vol. 17 997-998). The jury also found the defendant guilty on count II, first-degree arson as charged.(T. Vol. 17 998). Additionally, the jury found the defendant guilty on count III, attempted sexual battery as charged. (T. Vol. 17 998). The jury's written verdict reflects these findings (R. Vol. 8 1494). The jury was polled. (T. Vol. 17 998). All twelve jurors, Becky Sue Callahan, James Henry, Brian Schmidt, James Martin, Constance Robbins, Gerald

Herndon, Mary Lacey, Robert Johnson, James Rossini, Yvette Sims, Pedro Martinez, and Jeisha Matos-Torres, agreed that this was their verdict. (T. Vol. 17 998-999).

Penalty phase

The next day, on August 13, 2010, the trial court conducted the penalty phase. (T. Vol. 18 1007). Defense counsel objected to any argument regarding the CCP aggravator because there was no evidence of advanced planning. Rather, the defendant just "flew off the handle and went berserk." (T. Vol. 18 1008-1009). Defense counsel also objected to any argument regarding the HAC aggravator. (T. Vol. 18 1009-1010). The trial court inquired as to the victim's numerous defensive wounds. Defense counsel averred that the HAC aggravator was negated by the frenzied attack citing *Jones v. State*, 332 So.2d 615 (Fla. 1976) and *Buford v. State*, 403 So.2d 943 (Fla. 1981). (T. Vol. 18 1010). The trial court denied both objections. (T. Vol. 18 1011). The prosecutor and defense counsel gave opening statements in the penalty phase. (T. Vol. 18 1016-1024.). Defense counsel told the jury that they were never required to recommend death. (T. Vol. 18 1021).

The State introduced a stipulation regarding Kaczmar's prior conviction for robbery as exhibit #1 (T. Vol. 18 1025). The trial court read the stipulation to the jury. (T. Vol. 18 1025-1027). Kaczmar was convicted, in Clay County case number 2001-716-CF, of a robbery, in which, he and a co-perpetrator repeatedly struck and kicked the victim and then took the victim's robbery and jewelry. (T.

Vol. 18 1026). The prosecutor then read a letter from the victim's brother, Alfredo Eugenio Ruiz, describing their happy childhood. (T. Vol. 18 1027-1028). The brother's letter explained that the victim had a daughter Katherine Ruiz. (T. Vol. 18 1028,1029). He informed the jury that Maria was a straight A student who excelled in every subject. (T. Vol. 18 1029). The victim had a Master's degree and was a religious person who would not harm or bother anyone. (T. Vol. 18 1029). The State rested.
(T. Vol. 18 1030).

Defense counsel presented six witnesses - five lay witnesses and a psychiatrist. John Hough, a good friend of the defendant, who owned a garage door company, testified regarding a fishing trip where the defendant pulled him out of the water after an accident. (T. Vol. 18 1030-33). The trial court read a stipulation regarding the defendant's good behavior in prison. (T. Vol. 18 1033-1034). The defendant while in prison previously had obtained a G.E.D. and received only one D.R. (T. Vol. 18 1034).

Defense counsel then called the defendant's maternal grandmother, Martha Moody, who testified the defendant helped her around the house. (T. Vol. 18 1035). She testified that the defendant's relationship with his father was not good because his father "was kind of a bully" and tried to get the defendant to lie in court against his mother. (T. Vol. 18 1037). She testified that the defendant had a good relationship with his grandfather - they were fishing buddies and spent a lot of time together. (T. Vol. 18 1038,1040). The defendant was 12 or 13 years old when his grandfather died. (T. Vol. 18 1038).

The defendant saw his grandfather die. (T. Vol. 18 1038). They were living on Smith Lake and were out swimming. (T. Vol. 18 1039). His grandfather had a bad heart and went underwater. (T. Vol. 18 1039). The defendant pulled his grandfather out of the water. (T. Vol. 18 1040). She testified that the defendant was never mean to her two dogs. (T. Vol. 18 1041). The defendant had a dog named Chocolate that lived with her which he treated well. (T. Vol. 18 1041). She testified that the defendant was respectful to her and treated his friends well. (T. Vol. 18 1041-1042). On cross, she admitted that his parents spoiled the defendant because he was an only child. (T. Vol. 18 1042-1043).

Defense counsel presented Katherine Casleton, the defendant's aunt. (T. Vol. 18 1044-1045). She was "very, very close" to the defendant. (T. Vol. 18 1046). Before she got married and had children of her own, she would spend any of her spare time with him. (T. Vol. 18 1047). He would babysit her children for her. (T. Vol. 18 1048). The defendant would protect scrawny little children who were being bullied. (T. Vol. 18 1049). She believed that when the defendant turned 16 or 17 years old, he got in with the wrong type of friends and that was the turning point in his life. (T. Vol. 18 1048, 1053-1054). When the defendant was arrested the first time, she decided that could not have that in her children lives. (T. Vol. 18 1054). She disliked Ryan Modlin as a bad influence. (T. Vol. 18 1054-1056).

Her brother was not a good father to the defendant. (T. Vol. 18 1056). He was inconsistent, not reprimanding the defendant when he

needed it but then losing it over something minor. (T. Vol. 18 1056). Her brother was an alcoholic. (T. Vol. 18 1057). She testified she saw her brother strike the defendant on multiple occasions. (T. Vol. 18 1058). Her brother would hit the defendant with his fists. (T. Vol. 18 1059). He also hit the defendant in the head rather than his butt. (T. Vol. 18 1060). When the defendant received his G.E.D. he made a copy and sent it to his father, but his father did not even open it. (T. Vol. 18 1060). Her brother's comments to his son were 90% negative and he did not praise the defendant. (T. Vol. 18 1061). Her brother was not a good influence. (T. Vol. 18 1063).

The defendant was prosecuted as an adult when he was 15-17 years old and went to adult prison. (T. Vol. 18 1061-1070). Kaczmar told his aunt he intended to change his ways but she saw him going back to his old ways. (T. Vol. 18 1061-1062,1064). Her visits became less and less at that point. (T. Vol. 18 1063).

Defense counsel presented Ryan Modlin. (T. Vol. 18 1068). He testified that he and the defendant were best friends. (T. Vol. 18 1069). He testified that the defendant's father was an alcoholic who was "just hateful." (T. Vol. 18 1069-1070). The defendant's father would called him fat and worthless and other nasty names. His mother getting remarried was hard on the defendant. (T. Vol. 18 1071).

He admitted both he and the defendant were drug users on a daily basis. (T. Vol. 18 1072,1075). They used crystal meth; marijuana; and cocaine. (T. Vol. 18 1074). Ryan was with the defendant the night of the murder until 11:00. (T. Vol. 18 1077). Kaczmar was acting paranoid that night. (T. Vol. 18 1076-1077).

Defense counsel listed the witnesses including the defendant's wife, Priscilla Kaczmar; Dave Evans; and the defendant's father, Leo Kaczmar that he had decided not to call. (T. Vol. 18 1078). The defendant personally consented to the decision not to call these witnesses. (T. Vol. 18 1078).

Defense counsel also called the defendant's mother, Tammy Evans, to testify. (T. Vol. 18 1079). She was married to the defendant's father 12-14 years. (T. Vol. 18 1080). His father was an extreme alcoholic who would get "violent and mean" when drinking. (T. Vol. 18 1080-1081). The defendant was born February 26, 1983. (T. Vol. 18 1083). Her ex-husband would beat her in front of the defendant. (T. Vol. 18 1083). His father would punch the defendant. (T. Vol. 18 1084). His father would call him fat-ass and abused the defendant mentally. (T. Vol. 18 1084). Her ex-husband busted the window in the living room and she shot him with her son present. (T. Vol. 18 1087-1088).

She testified that the defendant did good in school and did not have any problems until the divorce. (T. Vol. 18 1091). After the divorce everything changed. (T. Vol. 18 1091). He started getting into trouble. (T. Vol. 18 1092). The defendant and his father were close but his father did not care anymore. (T. Vol. 18 1092). She remarried and has been happily married for 10 years. (T. Vol. 18 1092). The defendant and her new husband Evans went into the Tree service business together. (T. Vol. 18 1093). The defendant was a good reliable partner. (T. Vol. 18 1094). The defendant calls her on mother's day and her birthday. (T. Vol. 18 1096). He enriches her

life. (T. Vol. 18 1097). She admitted that she spoiled the defendant. (T. Vol. 18 1098).

Defense counsel called Dr. Miguel Mandoki, a psychiatrist, to testify. (T. Vol. 18 1099). Dr. Miguel Mandoki was board certified in psychiatry and child psychiatry. (T. Vol. 18 1100). He reviewed school records and jail records. (T. Vol. 18 1101).

Dr. Mandoki testified that the defendant was not insane. (T. Vol. 18 1102). Dr. Mandoki testified that the defendant was overindulged as a child. (T. Vol. 18 1103). His parents while materially supportive, were not emotionally supportive. (T. Vol. 18 1104). His childhood was traumatized by his father's alcoholism and violence. (T. Vol. 18 1107). Despite the mother's fear and knowledge of the father's violence, the mother allowed the defendant to live with his father at the tender age of 13 just as he was becoming an adolescent. (T. Vol. 18 1107). The defendant did not bond strongly with his mother. (T. Vol. 18 1109). He also had anger towards his father. (T. Vol. 18 1115).

Dr. Mandoki testified as to the effects of long-term drug abuse. (T. Vol. 18 1116). Dr. Mandoki testified that at the time of the murder, it was "impossible" for the defendant to have known what he was doing or to know right from wrong. (T. Vol. 18 1116-1117). Dr. Mandoki testified the defendant's parents should have sought treatment. (T. Vol. 18 11). His parents should have sought psychiatric treatment for the defendant. (T. Vol. 18 1117-1118). The school should have sought professional assistance was well. The defendant was left behind in the priorities of both parents. (T. Vol.

18 1118). The defendant was basically raising himself. (T. Vol. 18 1118). The defendant was a bright kid. (T. Vol. 18 1118). Dr. Mandoki testified that the defendant does not know right from wrong due to the manner in which he was raised. (T. Vol. 18 1120).

Dr. Mandoki testified to the significance of the victim being his father's girlfriend. (T. Vol. 18 1119). It bespoke of the defendant's anger toward his father. (T. Vol. 18 1119). The number of stabs showed the defendant's degree of anger at his father. (T. Vol. 18 1138).

Dr. Mandoki met with the defendant once in May of 2010 for two hours. (T. Vol. 18 1121). He did not write a written report. (T. Vol. 18 1122). He did not review the police reports of the interview with Detective Sharman. (T. Vol. 18 1123). He did not review the medical examiner's report. (T. Vol. 18 1123,1125). He spoke with the defendant's mother for about one hour. (T. Vol. 18 1129).

Dr. Mandoki testified that the defendant was not mentally impaired. (T. Vol. 18 1131). He did not observe any cognitive or neurophysiological deficits. (T. Vol. 18 1131). He did not perform any I.Q. testing. (T. Vol. 18 1131). Dr. Mandoki testified that the defendant's intelligence was above average. (T. Vol. 18 1131-1132). The defendant had a normal mental state. (T. Vol. 18 1133).

The defense rested. (T. Vol. 18 1140). The prosecutor and defense counsel gave closing arguments. (T. Vol. 18 1143-1171). The trial court then instructed the jury. (T. Vol. 18 1171-1186; R. Vol. 8 1528-1529 - penalty phase written jury instruction). The trial court instructed the jury that their recommendation "must be given great

weight." (T. Vol. 18 1172; R. Vol. 8 1529). The trial court instructed the jury on four aggavating circumstances: 1) prior violent felony; 2) during the course of an attempted sexual battery; 3) HAC and 4) CCP. (T. Vol. 18 1177-1179; R. Vol. 8 1532-1533). The trial court instructed the jury on mitigating circumstances. (T. Vol. 18 1180-1182). The jury started deliberations at 2:28 p.m. (T. Vol. 18 1186). The defendant entered a plea regarding the tampering with a witness charges. (T. Vol. 18 1187-1192). The jury finished deliberations at 2:56 p.m. (T. Vol. 18 1193). The jury recommended death by a vote of eleven to one (11-1). (T. Vol. 18 1194; R. Vol. 8 1499). The jury was polled. (T. Vol. 18 1194-1196).

Spencer **Hearing**

On September 10, 2010, the trial court conducted a *Spencer* hearing.[1] (T. Vol. 19 1200-1203). The prosecutor did not present any additional evidence. (T. Vol. 19 1202). Defense counsel Shea discussed the defense sentencing memorandum. (T. Vol. 19 1202-1203). Defense counsel noted that he proposed 22 mitigators. (T. Vol. 19 1203). The trial court ordered the State to write a sentencing memorandum as well. (T. Vol. 19 1203).

Sentencing

[1] *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

Defense counsel wrote a sentencing memorandum. (R. Vol. 9 1549-1566). Defense counsel argued that the State's four proposed aggravating circumstances lacked factual support, or, in the alternative, were entitled to little weight. (R. Vol. 9 1551-1554). Defense counsel argued that the CCP aggravator did not apply based on defense psychiatrist's testimony, Dr. Miguel Mandoki, that the stabbing was a result of the defendant's anger toward his father and was a "sudden and impulsive burst of activity" rather than being pre-planned. (R. Vol. 9 1553). Defense counsel argued for three statutory mitigators including both mental mitigators and the age mitigator because Kaczmar was 25 years old at the time of the crime. (R. Vol. 9 1555-1557). Defense counsel then proposed nineteen non-statutory mitigators. (R. Vol. 9 1557-1585).

The State also wrote a sentencing memorandum "in support of imposition of the death penalty." (R. Vol. 9 1568-1579). The State recounted the facts of the crime including the ten blunt force injuries to the victim and the over 93 stab wounds. (R. Vol. 9 1568). The State noted that the victim had twenty defensive wounds and that the fatal wounds to the victim's throat occurred at the end of the brutal attack. The State sought four aggravators: 1) the prior violent felony based on a prior robbery that the defendant stipulated to; 2) during the course of an attempted sexual battery; 3) HAC based on the victim's extensive injuries both from blunt force and the stabbings as well as the numerous defensive wounds; and 4) CCP . (R. Vol. 9 1569-1572). The State's sentencing memo addressed the proposed statutory mitigation. (R. Vol. 9 1572-1574). The State's

sentencing memo also addressed the proposed non-statutory mitigation. (R. Vol. 9 1575-1578). The State's sentencing memo also addressed the proposed no significant prior criminal history statutory mitigator pointing out that Kaczmar had a prior conviction for burglary of a dwelling; robbery; soliciting a minor via a computer; and failing to register as a sex offender. (R. Vol. 9 1578). The State urged that all four agggravators should be given great weight; the mitigation only little weight; and that the trial court impose a death sentence. (R. Vol. 9 1578-1579).

On November 5, 2010, the trial court conducted the sentencing hearing. (T. Vol. 19 1205-1236). Defense counsel noted that on page 15 of the trial court sentencing order, the trial court gave great weight to the jury's death recommendation. (T. Vol. 19 1207). Defense counsel argued based on *State v. Steele*, 921 So.2d 538 (Fla. 2005), that because the jury recommendation was not unanimous, the trial court should give the jury's death recommendation only slight weight. (T. Vol. 19 1207). The trial court denied the motion for new trial. (T. Vol. 19 1208-1209). The trial court then read the written sentencing order. (T. Vol. 19 1209-1234). The trial court orally sentenced the Leo Louis Kaczmar III to death for the murder of Maria Ruiz on count I; to 30 years' incarceration on count II; and to 15 years' incarceration on count III. (T. Vol. 19 1233-1234).

On November 5, 2010, the trial court entered a written sentencing order. (R. Vol. 9 1582-1597 - sentencing order). The trial court found four aggravating circumstances: 1) the prior violent felony aggravator based on a prior robbery, which the trial court gave great

weight; 2) the "during the course of a felony" aggravator based on the attempted sexual battery, which the trial court gave great weight; 3) the heinous, atrocious and cruel (HAC) aggravator, which the trial court gave great weight; and 4) the cold, calculated and premeditated (CCP) aggravator, which the trial court gave great weight. (R. Vol. 9 1582-1587).

The trial court considered five statutory mitigators including both mental mitigators. (R. Vol. 9 1587). The trial court rejected the extreme mental or emotional disturbance mitigator finding that this mitigator was not proven based on the defense's psychiatrist, Dr. Mandoki's testimony that "the Defendant's mental status was normal." (R. Vol. 9 1587-1589). The trial court also rejected the minor participation mitigator as not being applicable because the defendant was not an accomplice; rather, the defendant committed the murder alone. (R. Vol. 9 1589). The trial court then rejected the extreme duress mitigator as not proven. (R. Vol. 9 1589 citing *Toole v. State*, 479 So.2d 731, 734 (Fla. 1985)(stating that "duress" refers not to internal pressures but rather to external provocations such as imprisonment or the use of force or threats)). The trial court also rejected the substantially impaired mental mitigator as not proven. (R. Vol. 9 1589-1590). The trial court then rejected the age as a mitigator because the defendant was 24 years old at the time of the crime and of above average intelligence, not below average. (R. Vol. 9 1590-1591 citing *Scull v. State*, 533 So.2d 1137, 1143 (Fla. 1988)(explaining that while an age of twenty-four alone could not

establish a mitigating factor, emotional age can be found as mitigation)). The trial court found no statutory mitigator.

The trial court then considered nineteen non-statutory mitigators and found fourteen non-statutory mitigators (R. Vol. 9 1591-1595). The trial court rejected the five proposed non-statutory mitigators of 1) being sentenced to adult prison as a juvenile; 2) lack of adult male mentors; 3) being torn by the extremes of parental abuse and overindulgence; 4) good prison inmate; and 5) the disparate treatment of the "co-suspect" Christopher Ryan Modlin.[2] The trial court, however found the fourteen non-statutory mitigators: 1) the defendant was raised by an alcoholic father; 2) the defendant was raised by a physically and emotional abusive father; 3) the defendant was emotionally traumatized as a child by witnessing his grandfather drowning and his mother shooting his father; 4) the defendant had been taught to lie in court; 5) the defendant lacked the normal mother-son bonding and relationship; 6) the defendant was kind to animals; 7) the defendant was a loyal friend; 8) the defendant was a good, reliable business partner; 9) the defendant has a loving relationship with his aunt, Cathy Casleton; 10) the defendant was protective of the younger members of his family; 11) the defendant suffered from the long term effects of illegal drug use; 12) the defendant was impaired by illegal drugs on the evening of this murder; 13) the defendant did not receive counseling; and 14) the defendant showed respect to the judge and

[2] Christopher Ryan Modlin is referred to as Ryan Modlin in the trial testimony and in this brief.

jury. The trial court accorded the fourteen non-statutory mitigators all slight weight.

The trial court then concluded that the "aggravating circumstances in this case far outweigh the mitigating circumstances." (R. Vol. 9 1596). The trial court gave great weight to the jury's eleven to one recommendation of death. The trial court then sentenced the defendant to death on Count I; thirty years' incarceration on count II (arson); and fifteen years incarceration on count III (attempted sexual battery) to run concurrently. (R. Vol. 9 1596-1597).

SUMMARY OF ARGUMENT

ISSUE I

Kaczmar asserts that the trial court improperly denied his motion to dismiss the attempted sexual battery count because there was none of the defendant's semen on the victim. Kaczmar was not convicted of sexual battery, however, he was convicted of attempted sexual battery. Appellate counsel argues that, while Kaczmar's behavior was "obnoxious" and "puerile," Kaczmar was only trying to get "lucky." This Court rejected this exact type of argument in *Gudinas v. State*, 693 So.2d 953, 962-963 (Fla. 1997), as straining "credulity" and being "wholly without merit." Thus, the trial court properly denied the motion to dismiss the attempted sexual battery count.

ISSUE II

Kaczmar asserts that the trial court abused its discretion in allowing the State to call his wife to testify regarding a scheme to frame Ryan Modlin in violation of the husband-wife privilege. First, much of the wife's testimony was facts and her own acts, which are not covered by the privilege. Only communications are covered by the privilege. Furthermore, regarding her testimony about her husband's statements, there is an exception to the marital privilege for joint crimes. The defendant and his wife were co-conspirators engaging in a joint crime to plant evidence. Moreover, the error, if any, was harmless because the wife's testimony regarding the plan was cumulative to two of the State witnesses' testimony regarding the plan. Deputy Humphrey, who was acting undercover as Carlos,

testified at length regarding the scheme including both his meetings with the defendant and his meetings with the defendant's wife. Most of his meetings with the defendant were recorded and those recordings were played for the jury. The jury heard about the scheme from the defendant's own mouth. Additionally, because the plan showed consciousness of guilt which is used to establish identity and identity was firmly established through DNA, the error was harmless.

ISSUE III

Kaczmar asserts the trial court committed fundamental error by not giving a special jury instruction on heat-of-passion. This issue is not preserved. Defense counsel did not request a heat-of-passion jury instruction either orally or in writing. Even if the claim had been preserved, Kaczmar was not entitled to a heat-of-passion instruction. First, heat-of-passion is not a defense to felony murder. Moreover, the defendant was not entitled to a heat-of-passion jury instruction even on the premeditated theory of first-degree because, even under his version of events, there was no adequate provocation. The law does not recognize a victim of a felony physically resisting that felony as a type of provocation. The trial court properly instructed the jury. There was no error, much less fundamental error.

ISSUE IV

Kaczmar asserts the trial court abused its discretion by preventing defense counsel from discussing various opinions

regarding the heat-of-passion defense with the jury. IB at 35. Defense counsel was attempting to explain the defense of heat-of-passion when he had not requested a special jury instruction on heat-of-passion or sudden combat. But defense counsel never requested a special jury instruction on the heat-of-passion defense. It is not proper for defense counsel to discuss an entire legal concept that is not covered by the jury instructions. A defense counsel who does so is, in effect, writing his own jury instructions. Defense counsel wanted to define the heat-of-passion defense rather than having the trial court do so. Thus, the trial court properly precluded defense counsel from giving a different definition of premeditation than that in the standard jury instruction and from defining a defense himself.

ISSUE V

Kaczmar asserts that the rule of completeness required the admission of the entire recording of his meetings with the undercover officer discussing planting evidence including his exculpatory statements without the admission of his three prior convictions. The State agreed that the rule of completeness applied, but then explained, if the entire recording was played, including the defendant's exculpatory statements, his prior convictions were admissible to impeach those statements. As both this Court and several district courts have held, if exculpatory statements of a defendant are introduced via another witness under the rule of completeness, the defendant's prior convictions become admissible.

Invoking the rule of completeness has consequences. Thus, the trial court properly denied the motion to allow the defendant to make exculpatory statements without his prior convictions being admitted.

ISSUE VI

Kaczmar asserts that the trial court erred in finding the CCP aggavator. He asserts the murder occurred as part of an emotional frenzy and that he lacked a plan or design to murder. His claim of not having a plan to harm the victim is belied by the fact Kaczmar had a knife in his pocket. Furthermore, the error, if any, in finding the CCP aggravator was harmless. There are three remaining aggravators including HAC and the mitigation was minimal. No statutory mitigator was found by the trial court. Thus, the trial court properly found the CCP aggravator.

ISSUE VII

Kaczmar asserts the trial court improperly denied his motion for judgement of acquittal regarding the first-degree premeditated murder theory. Specifically, Kaczmar contends that there is no evidence of premeditation. He claims that he killed the victim "in the heat of the moment." The extensive, repeated stabbing in this case took more than a moment. There were over 93 wounds on the victim, twenty or so, of which were defensive wounds. And five of those wounds were to her back inflicted by the defendant as she attempted to flee. The defendant took the knife from the victim that she was using in a vain attempt to protect herself, but he did not stab her

with that knife. Rather, he used his own knife. There was ample evidence of premeditation from the facts of the murder itself. Thus, the trial court properly denied the motion.

ISSUE VIII

Kaczmar asserts the trial court improperly denied his motion for judgement of acquittal regarding the arson count. Specifically, Kaczmar contends that a convicted felon's testimony is not competent, substantial evidence. This Court has repeatedly held that a witness' credibility is a matter of fact for the jury to determine. Additionally, the State introduced photographs of the defendant purchasing gas at the Hess gas station early that morning shortly before the fire started. Moreover, the perpetrator of the murder was obviously the same person as the perpetrator of the arson. And the State introduced DNA evidence proving the identity of the murderer. Kaczmar murdered Maria Ruiz and then purchased gas to burn the house with her body in it, in a vain attempt to avoid detection. There was competent, substantial evidence and therefore, the trial court properly denied the motion.

ISSUE IX

Kaczmar asserts that this Court should recede from its numerous cases holding that Florida's death penalty statutes does not violate *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court should not recede from its solid wall of precedent rejecting *Ring* claims. Appellant provides no reason for this Court

to do so. Furthermore, *Ring* does not apply to this particular case because the prior violent felony aggravator is present. Recidivist aggravators are exempt from the holding in *Ring*. Kaczmar had previously been convicted of robbery. The prior violent felony aggravator is not required to be found by the jury under any view of *Ring*. Furthermore, one of the aggravating circumstances found by the trial court was the during-the-course-of-a-felony aggravator. This Court has repeatedly held that *Ring* does not apply to cases where the jury convicts a defendant in the guilty phase of a separate felony. The jury convicted Kaczmar of attempted sexual battery. *Ring* was satisfied in the guilt phase in this particular case. Moreover, the jury necessarily found an aggravating circumstance when recommending a death sentence. Kaczmar's jury recommended a death sentence. In Florida, a jury must find an aggravating circumstance before recommending a death sentence. Thus, Florida's death penalty statute does not violate the Sixth Amendment right to a jury trial, as this Court has repeatedly held.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED THE MOTION TO DISMISS THE ATTEMPTED SEXUAL BATTERY COUNT? (Restated)

Kaczmar asserts that the trial court improperly denied his motion to dismiss the attempted sexual battery count because there was none of the defendant's semen on the victim. Kaczmar was not convicted of sexual battery, however, he was convicted of attempted sexual battery. Appellate counsel argues that, while Kaczmar's behavior was "obnoxious" and "puerile," Kaczmar was only trying to get "lucky." This Court rejected this exact type of argument in *Gudinas v. State*, 693 So.2d 953, 962-963 (Fla. 1997), as straining "credulity" and being "wholly without merit." Thus, the trial court properly denied the motion to dismiss the attempted sexual battery count.

The trial court's ruling

Kaczmar filed a motion to dismiss count III of the indictment, the attempted sexual battery count, pursuant to rule 3.190(c)(4), arguing that "unsupported by material facts." (T. Vol. 3 519-520). Kaczmar then filed an amended motion to dismiss count III of the indictment arguing that the undisputed fact that the defendant expressed a desire to have sex with the victim did not establish a prime facie case of attempted sexual battery. (T Vol. 5 836). The state filed a traverse asserting there were material facts in dispute. (T. Vol. 7 1148-1149). The State's traverse noted that the defendant confessed to his bunkmate, William Filancia, that when the victim resisted his sexual advances, the defendant chased the victim within the house and stabbed

her numerous times. (T. Vol. 7 1148). The trial court denied the motion to dismiss count III. (T. Vol. 8 1370 - no. 44)

At trial, after the State rested, defense counsel moved for a judgment of acquittal on the first-degree murder count asserting that the State failed to prove that the underlying attempted sexual battery for the felony murder theory occurred. (T. Vol 17 845-848). Defense counsel did not argue lack of premeditation. The trial court, however, denied the motion as to all three counts. (T. Vol 17 848; T. Vol. 8 1381 - written order).

Preservation

This issue is preserved. Kaczmar filed a motion in the trial court on this basis and obtained a ruling. *Baker v. State*, - So.3d. -, 2011 WL 2637418, 6 (Fla. 2011)(explaining to be preserved, the issue or legal argument must be raised and ruled on by the trial court quoting *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008)).

Standard of review

The standard of review is *de novo*. *McDuffie v. State*, 970 So.2d 312, 332 (Fla. 2007)(noting appellate courts review the denial of a motion for judgment of acquittal under the *de novo* standard).

Merits

This Court must consider the evidence and all reasonable inferences from the evidence in a light most favorable to the State when determining whether the trial court properly denied a motion for judgment of acquittal. *McDuffie v. State*, 970 So.2d 312, 332 (Fla. 2007)(citing *Fitzpatrick v. State*, 900 So.2d 495, 507 (Fla. 2005)). Where the State has presented competent, substantial evidence of the

crimes charged, the trial court does not err in denying a motion for judgment of acquittal and submitting the case to the jury. *McDuffie*, 970 So.2d at 332 (citing *Conde v. State*, 860 So.2d 930, 943 (Fla. 2003).

To establish the crime of attempt, the State must "prove a specific intent to commit a particular crime and an overt act toward the commission of the crime." *Gudinas v. State*, 693 So.2d 953, 962 (Fla. 1997). The State established Kaczmar's intent to commit a sexual battery by the testimony of Ryan Modlin. And the State established that Kaczmar engaged in numerous overt acts toward the commission of the attempted sexual battery including pounding on the door of the bathroom that the victim took sanctuary inside of, by locking herself inside the bathroom, and then, by going outside the house and pounding on the bathroom window.

In *Gudinas*, this Court rejected a claim that the trial court should have granted a judgment of acquittal regarding the attempted sexual battery count. *Gudinas*, 693 So.2d at 962-963. At the parking lot of a bar, Gudinas followed an earlier victim who got in her car and locked the door. *Gudinas*, 693 So.2d at 956. Gudinas tried to open the passenger door, then he tried to open the driver's door, then he attempted to smash the window of the car while screaming, "I want to f_ _ _ you." Gudinas only ceased his attempt to gain entry to the car when the victim blew the horn.

On appeal, Gudinas contended that the "evidence does not reveal an overt act to support the charge of attempted sexual battery" and that the evidence failed to exclude the reasonable hypothesis that

he was merely soliciting her for a consensual sex act. *Gudinas*, 693 So.2d at 962-963. The crux of Gudinas' argument was that he was "stating his desire, albeit in a socially unacceptable manner, to engage in perfectly legal, consensual sexual intercourse." *Gudinas*, 693 So.2d at 962. This Court found that such an argument "strains credulity." *Gudinas*, 693 So.2d at 962. This Court concluded that any support for that hypothesis was dispelled by the victim's "unequivocal rejection of Gudinas' advances toward her." This Court distinguished it prior case of *Rogers v. State*, 660 So.2d 237, 241 (Fla. 1995), because, in *Rogers*, when the victim refused Rogers' advances and orders to remove her clothes, Rogers left her alone. *Gudinas*, 693 So.2d at 962. This Court found Gudinas' argument to be "wholly without merit." This Court affirmed the trial court's denial of the motion for judgment of acquittal on the attempted sexual battery count.

Here, as in *Gudinas*, the victim locked herself inside a bathroom. Here, as in *Gudinas*, the defendant attempted to enter the bathroom first by pounding on the door and then going outside in the cold and pounding on the bathroom window. Here, as in *Gudinas*, the defendant shouted obscenities at the victim so loudly that a neighbor heard. Additionally, in this case, unlike *Gudinas*, the defendant got into, not one but two, shoving matches with the victim. Maria Ruiz physically manifested her refusal to have sex with the defendant in no uncertain terms by pushing the defendant away repeatedly. Here, as in *Gudinas*, the crux of Kaczmar's argument was that he was "stating his desire, albeit in a socially unacceptable manner, to engage in

perfectly legal, consensual sexual intercourse." Similarly, here, appellate counsel argues that, while Kaczmar's behavior was "obnoxious" and "puerile," he was only trying to get "lucky." IB at 19, 48. This argument "strains credulity" as much as this Court found the argument in *Gudinas* did.

Kaczmar's reliance on *Rogers v. State*, 660 So.2d 237, 241 (Fla. 1995), is as misplaced as this Court found *Gudinas*' reliance to be and for much the same reasons. IB at 22. Kaczmar did not leave the victim alone here. The defendant, unlike the defendant in *Rogers* but like the defendant in *Gudinas*, continued his attempted rape despite the victim's manifest resistance. Thus, the trial court properly denied the motion to dismiss.

<u>Harmless error</u>

Citing *Yates v. United States*, 354 U.S. 298, 312, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), appellant asserts that an error in a general verdict is not subject to harmless error analysis. IB at 24-25. *Yates*, however, has been overruled by the United States Supreme Court. The United States Supreme Court has recently clarified that a general verdict based on multiple theories of guilt, one of which is legally invalid, is not a structural error. Rather, such errors are subject to harmless error analysis. *Hedgpeth v. Pulido*, 555 U.S. 57, 129 S.Ct. 530, 532, 172 L.Ed.2d 388 (2008)(agreeing with a concession that harmless error applies); *see also Skilling v. United States*, - U.S. -, -, 130 S.Ct. 2896, 2934, 177 L.Ed.2d 619 (2010)(noting that *Yates* errors are now subject to harmless error analysis citing *Pulido*). Indeed, the three "dissenters" in *Pulido*

did not disagree about *Yates*; rather, they concluded that the error was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), which is the harmless error test in federal habeas cases. In other words, the dissenters applied a harmless error analysis to the issue as well. So, actually *Pulido* was unanimous on the issue of overruling *Yates*. See also *United States v. Spellissy*, 2011 WL 3629910, 2 (11th Cir. August 16, 2011)(stating: "*Yates* errors, are subject to harmless error analysis" citing *Pulido*).

However, even if *Yates* was still good law, it would not apply to this claim. Kaczmar's claims is not a legal one; rather, it is a factual one. Kaczmar is not arguing that there was some legal flaw in the attempted sexual battery felony murder theory. Rather, he is asserting that there was insufficient evidence of the underlying attempted sexual battery. *Yates* does not apply to claims of factual insufficiency. *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1992). This Court has repeatedly distinguished a *Yates* claim of legal error from a *Griffin* claim of factual insufficiency and explained that claims of legal and factual insufficiency are not synonymous. *Monlyn v. State*, 894 So.2d 832, 837 (Fla. 2004)(citing *Fitzpatrick v. State*, 859 So.2d 486, 491 (Fla. 2003)). *Yates* only applies to legal flaws. So, even if *Yates* was still viable, it would not apply to Kaczmar's factual claim. If this Court finds sufficient evidence of premeditated murder, the insufficiency of the evidence of felony murder, if any, is of no moment and the conviction for first-degree murder should be affirmed.

There certainly was sufficient evidence of premeditated murder in this case. Kaczmar repeatedly stab a woman who had numerous defensive wounds. There were five stab wounds to her back, which Kaczmar inflicted as she attempted to flee. There were over 93 wounds on the victim. Moreover, the defendant took the knife from the victim, that she was using in a vain attempt to protect herself, but he did not stab her with that knife. Rather, he used his own knife from his pocket. Kaczmar had armed himself with his own knife prior to the victim arming herself. Additionally, the time frame of this crime establishes premeditation - actually it establishes heightened premeditation. The defendant, as part of the attempted sexual battery, harassed the victim to the point that she felt it was necessary to lock herself in the bathroom. Having forced the victim into the bathroom, Kaczmar still did not cease his advances. Rather, he went out of the house and continued to harass and frighten her by beating on the bathroom window to the point that she felt it was necessary to arm herself. When she went into the kitchen and armed herself, Kaczmar still continued. He then punched the victim and took the knife from her. It was at this point that he stabbed her 93 times including slashing her throat. Furthermore, it was the last of the injuries that were fatal. Kaczmar stabbed her until she died. Because this was a premeditated murder, any error in denying the judgment of acquittal regarding the felony murder theory was harmless. The conviction for first-degree murder should be affirmed.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE TO CALL THE DEFENDANT'S WIFE TO TESTIFY REGARDING A PLAN TO FABRICATE EVIDENCE? (Restated)

Kaczmar asserts that the trial court abused its discretion in allowing the State to call his wife to testify regarding a scheme to frame Ryan Modlin in violation of the husband-wife privilege. First, much of the wife's testimony was facts and her own acts, which are not covered by the privilege. Only communications are covered by the privilege. Furthermore, regarding her testimony about her husband's statements, there is an exception to the marital privilege for joint crimes. The defendant and his wife were co-conspirators engaging in a joint crime to plant evidence. Moreover, the error, if any, was harmless because the wife's testimony regarding the plan was cumulative to two of the State witnesses' testimony regarding the plan. Deputy Humphrey, who was acting undercover as Carlos, testified at length regarding the scheme including both his meetings with the defendant and his meetings with the defendant's wife. Most of his meetings with the defendant were recorded and those recordings were played for the jury. The jury heard about the scheme from the defendant's own mouth. Additionally, because the plan showed consciousness of guilt which is used to establish identity and identity was firmly established through DNA, the error was harmless.

The trial court's ruling

Prior to trial, defense counsel filed a "motion to suppress (A) all surreptitiously monitored or recorded, confidential, jail

conversations and (B) all communications between the defendant and his wife." (Vol. 6 1025-1042; T. Vol. 7 1281 - corrected motion). The motion, however, conceded that there were warning signs posted in the jail that telephone calls would be monitored or recorded. (Vol. 6 1025-1026). Nonetheless, defendant asserted that his telephone calls violated the husband-wife privilege as codified in § 90.504. (Vol. 6 1027). The supporting memorandum of law asserted that because the defendant and Priscilla Kaczmar were married at the time, the State's use of the wife violated the husband-wife privilege. (Vol. 6 1040-1041). Prior to trial, another judge, Judge Skinner, heard the various pre-trial motions filed by defense counsel. (R. Vol. 10 1729-1824). Many of these motions were the standard pre-trial capital case motions, including a motion to suppress surreptitiously monitored and recorded jail recordings, conversations and all communication. (R. Vol. 10 1815). Defense counsel explained that the second half of that motion was dealing with the husband-wife privilege. (R. Vol. 10 1816).

The prosecutor explained that he did not intend to use any taped phone calls made at the jail between the defendant and his wife. (R. Vol. 10 1816). The prosecutor noted, however, that he did intend to call the wife to testify regarding paying an undercover cop $300.00 dollars to plant evidence and tamper with witnesses. (R. Vol. 10 1816-1817). Defense counsel argued that that was covered by the husband-wife privilege. (R. Vol. 10 1817). The prosecutor asserted that the privilege did not apply to a husband and wife when they are co-conspirators conspiring to commit another felony. (R. Vol. 10

1817). The trial court agreed and denied the motion. (R. Vol. 10 1817). The trial court entered a written order summarily denying the motion to suppress. (R. Vol. 7 1340).

At trial, the defendant's wife, Priscilla Kaczmar, was called by the prosecution to testify. (T. Vol 14 329-345). She testified that she had been married to the defendant for nearly five years and that they had two children. (T. Vol 14 331). In 2008, she and the defendant and their two young daughters, had been living in Green Cove Springs on Dothan Road for two months. (T. Vol 14 330). On Friday, December 12, 2008, as was her custom, she took the children to her mother's house to spend the night, so her mother could see the grandchildren and the defendant could spend Friday nights with his friends. (T. Vol 14 331, 335). It was her custom not to return until the next morning. (T. Vol 14 335-336).

She testified that the defendant was high that day when she got home from work. (T. Vol 14 334). The defendant had been using cocaine. (T. Vol 14 334). The next morning, around 7:30 am, she received a phone call from the defendant at her mother's house. (T. Vol 14 336). The prosecutor asked her what the defendant said to her on the phone (T. Vol 14 337). Defense counsel objected based on the husband-wife privilege. (T. Vol 14 337). The trial court removed the jury. (T. Vol 14 337).

The prosecutor asserted that the telephone conversation was not covered by the husband-wife privilege because it was not a confidential communication. (T. Vol 14 338). The defendant had the same conversation regarding the fire with Teddy Modlin immediately

preceding the defendant's call to his wife. (T. Vol 14 338). The prosecutor also noted that the defendant's phone call explained the wife's actions. (T. Vol 14 338). Because the subject of the fire was the same subject the defendant was discussing with other people, it was not a protected communication. (T. Vol 14 338). Defense counsel stated that the conversation did not occur in a public place and was not said within the earshot of anyone else, it was privileged. (T. Vol 14 338). The prosecutor also noted that it was the defendant's statements. (T. Vol 14 338). The trial court overruled the objection. (T. Vol 14 338).

The jury returned and the wife's testimony continued. (T. Vol 14 339). She testified that she reviewed the phone records. (T. Vol 14 339). She testified that the defendant told her on the phone that the house was on fire and not to return home. (T. Vol 14 339). She, however, took the children, in their pajamas, back to the house on Dothan Road. (T. Vol 14 339). She arrived at the house on Dothan Road after 8:00 am (T. Vol 14 340). The fire rescue and police were there when she arrived. (T. Vol 14 340). She testified that the defendant was not there. (T. Vol 14 340).

On cross, she testified that both the defendant and Ryan Modlin were high on drugs that Friday. (T. Vol 14 340). She explained that when you are big and you take cocaine, you sweat. (T. Vol 14 341). She testified that both her husband and Modlin were big. (T. Vol 14 341). Her husband told her on the phone that night they were planning on starting a bonfire in the backyard that Friday night. (T. Vol 14

341-342). It was chilly that night. (T. Vol 14 342). She also testified that Modlin stole her car. (T. Vol 14 343).

On re-direct, she testified that Modlin stole her car after these events and there was no connection with the theft of the car to these events. (T. Vol 14 343). On recross, she testified that the defendant was close to their daughters. (T. Vol 14 344).

The State later recalled the defendant's wife, Priscilla Kaczmar, to testify. (T. Vol. 17 836). Defense counsel renewed his objection based on the husband-wife privilege. The trial court excused the jury. The prosecutor explained that there previously had been a motion in limine litigated before Judge Skinner, who had ruled that the wife's testimony was not covered by the privilege. (T. Vol. 17 837). The prosecutor then explained that "these statements go to a husband and wife acting as coconspirators to commit new felony offenses" and "that's not privileged." The trial court overruled the objection and allowed the State to recall the wife as a witness. (T. Vol. 17 837).

The defendant's wife, Priscilla Kaczmar, then testified again. (T. Vol. 17 837-845). The prosecutor had her identify photographs in State's exhibit #150 and #151. (T. Vol. 17 838). She identified her husband in the two photographs of exhibit #151. (T. Vol. 17 838). She testified that in March of 2010, she worked as a maid and as a waitress at the Waffle House. (T. Vol. 17 838-839). She made approximately $1,100 dollars a month from her two jobs to support herself and two children. (T. Vol. 17 839).

Between December of 2008 and March of 2010, she was in regular contact with the defendant via telephone and visiting him in jail on Fridays. (T. Vol. 17 839). She testified that around March 10, 2010, the defendant asked her to get $300.00 dollars together. (T. Vol. 17 839-840). The defendant informed her that it was for a friend, William, whose nickname was Bill, who was "going to help him with whatever he was going to do." (T. Vol. 17 840). The friend was an inmate who was in the same dorm as the defendant. (T. Vol. 17 840). The defendant had indicted to her that Mr. Filancia was a friend. (T. Vol. 17 840). The defendant told her that the $300.00 dollars was "to plant clothes and a knife for Ryan." (T. Vol. 17 841).

The defendant told her to wear her blue smock from My Maids and to meet a person at McDonald's. (T. Vol. 17 841-842). She met a person at McDonald's who said his name was Carlos. (T. Vol. 17 842). She met Carlos a second time at the jailhouse parking lot. (T. Vol. 17 842-843). At the first meeting, at McDonald's, she gave Carlos $200.00 dollars of the $300.00 dollars. (T. Vol. 17 843). At the second meeting, at the jailhouse parking lot, she gave Carlos the remaining $100.00 dollars. (T. Vol. 17 843). She testified that $300.00 dollars represented "a whole lot of money" to her. (T. Vol. 17 844).

Priscilla Kaczmar then explained to the jury that Carlos was in fact an undercover cop and that she was arrested and charged for her participation in the planting evidence scheme. (T. Vol. 17 844). She told the jury that she entered a plea to the charges. (T. Vol. 17 844). And she was a convicted felon as a result. (T. Vol. 17 845).

Preservation

This issue is preserved. Defense counsel objected to the testimony on the same grounds he asserts as error on appeal and obtained a ruling from the trial court.

Standard of review

The standard of review for a trial court's ruling on the admissibility of evidence is abuse of discretion. *Williams v. State*, 967 So.2d 735, 753 (Fla. 2007). Trial courts have wide latitude in the admission of evidence. *Valle v. State*, - So.3d -, -, 2011 WL 3667696, 11 (Fla. 2011)(stating that it "is well settled that the admissibility of evidence is within the sound discretion of the trial court, and the trial court's determination will not be disturbed on appellate review absent a clear abuse of that discretion" citing *Rimmer v. State*, 59 So.3d 763, 774 (Fla. 2010)). Merits

The husband-wife privilege statute, § 90.504, Florida Statutes, provides:

> (1) A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife.
>
> (2) The privilege may be claimed by either spouse or by the guardian or conservator of a spouse. The authority of a spouse, or guardian or conservator of a spouse, to claim the privilege is presumed in the absence of contrary evidence.
>
> (3) There is no privilege under this section:
>
> > (a) In a proceeding brought by or on behalf of one spouse against the other spouse.
> >
> > (b) In a criminal proceeding in which one spouse is charged with a crime committed at any time against the person or property of the other spouse, or the person or property of a child of either.

> (c) In a criminal proceeding in which the communication is offered in evidence by a defendant-spouse who is one of the spouses between whom the communication was made.

A party to a marriage may prevent their spouse from disclosing confidential communications made during the marriage. See generally CHARLES W. EHRHARDT, FLORIDA EVIDENCE, 459-467 (ed. 2011). However, as Professor Ehrhardt explains, the marital privilege does not extend to "facts" or "acts." CHARLES W. EHRHARDT, FLORIDA EVIDENCE, 462 & n.3 (ed. 2011)(citing *Kerlin v. State*, 352 So.2d 45 Fla. 1977)). This Court in *Kerlin*, relying on Wigmore's treatise on evidence and McCormick's treatise on evidence, explained that the privilege "extends only to communications, not to acts which are in no way communications." *Kerlin*, 352 So.2d at 51. This Court in *Kerlin* held that a wife's testimony as to observed conduct was properly admitted into evidence. *Kerlin*, 352 So.2d at 53; *see also Pereira v. United States*, 347 U.S. 1, 6, 74 S.Ct. 358, 361–362, 98 L.Ed. 435 (1954)(observing that the privilege, generally, extends only to utterances, and not to acts.).

All of the wife's testimony regarding who she met; where they met; and what happened at those meetings; what she said to Carlos and verse versa, are facts and acts that are not covered by the marital privilege. Her communications with Carlos were not marital communications, even though she was acting at the behest of her husband. Furthermore, as Professor Ehrhardt explains, there is an exception to the marital privilege, recognized by many courts, for communications regarding joint crimes.[3] As the Eighth Circuit

[3] *United States v. Picciandra*, 788 F.2d 39, 43 (1st Cir. 1986)(stating that "communications concerning crimes in which the

explained in *United States v. Evans*, 966 F.2d 398, 401 (8th Cir. 1992),

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spouses are jointly participating, however, do not fall within the protection of the marital communications privilege.”); *United States v. Estes*, 793 F.2d 465, 468 (2nd Cir. 1986)(agreeing with the “partnership in crime” exception to the marital privilege); *United States v. Ammar*, 714 F.2d 238, 258 (3d Cir. 1983)(joining “the other circuits in holding that communications between spouses pertaining to ongoing or future criminal activity, are not protected against disclosure by the privilege for confidential marital communications.”); *United States v. Broome*, 732 F.2d 363, 365 (4th Cir. 1984)(holding “that where marital communications have to do with the commission of a crime in which both spouses are participants, the conversation does not fall within the marital privilege.”); *United States v. Mendoza*, 574 F.2d 1373, 1381 (5th Cir. 1978)(holding “that conversations between husband and wife about crimes in which they are jointly participating when the conversations occur are not marital communications for the purpose of the marital privilege, and thus do not fall within the privilege's protection of confidential marital communications.”); *United States v. Sims*, 755 F.2d 1239, 1243 (6th Cir. 1985)(joining the other circuits “in adopting the joint participants exception as applied to confidential marital communications.”); *United States v. Kahn*, 471 F.2d 191, 194 (7th Cir. 1972)(observing “where both spouses are substantial participants in patently illegal activity, even the most expansive of the marriage privileges should not prevent testimony.”); *United States v. Evans*, 966 F.2d 398, 401 (8th Cir. 1992)(discussed in detail infra); *United States v. Price*, 577 F.2d 1356, 1365 (9th Cir. 1979)(conclude that the rule should be that, where a husband and wife are engaged in a criminal conspiracy, the extrajudicial statements of either made in furtherance of the conspiracy may be admitted against the other.); *United States v. Neal*, 743 F.2d 1441, 1447 (10th Cir. 1984)(holding “that conversations between husband and wife about crimes in which they conspire or participate or, after the fact, participate in, are not privileged marital communications.”); *Gill v. Commonwealth*, 374 S.W.2d 848, 851 (Ky. 1964)(holding since the husband and wife were both accused of being particeps criminis, they should be denied the right to assert that any testimony in respect to their criminal acts, alleged to have been jointly committed by them, constitute a privileged communication.); *State v. Smith*, 384 A.2d 687, 693-694 (Me. 1978)(explaining that the purpose behind the marital privilege is not served by permitting spouses engaged in criminal activity to raise a shroud of secrecy around their communications regarding that activity and holding when both spouses are active participants in ongoing criminal conduct, communications in furtherance of that conduct are not privileged).

discussing the "widely accepted exception" to the marital confidential communications privilege, which permits witness-spouse testimony about confidential communications involving future or ongoing crimes in which the spouses were joint participants at the time of the communications. *Evans*, 966 F.2d at 401 quoting 2 Weinstein's Evidence 505-36 (1991). The Eighth Circuit characterized the rationale for the "partners in crime" exception as "compelling" explaining that the privilege was designed to "protect confidential marital communications in order to encourage the sharing of confidences between spouses." But where the communications involve the spouses' joint criminal activity, "the interests of justice outweigh the goal of fostering marital harmony." *Evans*, 966 F.2d at 401. The Eighth Circuit noted that every circuit that has considered the partners in crime exception to the marital confidential communications privilege has adopted it in one form or another. *Evans*, 966 F.2d at 401; *but see Johnson v. State*, 451 So.2d 1024 (Fla. 1st DCA 1984)(refusing to engraft an criminal exception to the marital privilege because the statute does not except from the husband-wife privilege confidential communications between husband and wife made in furtherance of a crime); *Smith v. State*, 344 So.2d 915, 919 (Fla. 1st DCA 1977)(refusing, in a pre-evidence Code case, to recognize an exception to the marital privilege for communications made in the furtherance of a crime). Professor Ehrhardt endorses this exception stating that the "interests of justice would be served" if the marital privilege did not cover joint criminal activity. EHRHARDT, FLORIDA EVIDENCE at 466. Other commentators agree, explaining that where both

spouses are substantial participants in patently illegal activity, even the most expansive view of the marital privilege should not prevent testimony. Note, *Future Crime or Tort Exception to Communications Privilege*, 77 Harv.L.Rev. 730, 734 (1964).

Kaczmar's reliance on *Jackson v. State*, 603 So.2d 670, 671 (Fla. 4th DCA 1992), is misplaced. *Jackson* involved the issue of whether a statement that was "incidental to" or "because of" the marital relationship were privileged. The Fourth District rejected that distinction. But that issue is not present in this case. The prosecutor did not argue that the wife's testimony was admission because it was only incidental to the marriage. Rather, the prosecutor relied on the crime exception to the privilege.

<u>Harmless error</u>

Violation of privileges are subject to harmless error. See *United States v. Abram*, 171 Fed.Appx. 304, 310, 2006 WL 690850, 4 (11th Cir. 2006); *Kerlin v. State*, 352 So.2d 45, 53 (Fla. 1977)(finding a violation of the marital privilege to be harmless). "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Yates v. Evatt*, 500 U.S. 391, 403, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991). The jury would have heard much of the wife's testimony regardless of the marital privilege because much of her testimony was not covered by the privilege. *United States v. Short*, 4 F.3d 475, 479 (7th Cir 1993)(finding any violation of the marital privilege to be harmless where the "bulk of her crucial testimony" and other substantial

evidence against the defendant was properly admitted). It is only her testimony regarding what her husband told her about the plan that is at issue.

However, the wife's testimony regarding her husband's statements about the plan to fabricate evidence was cumulative to Bill Filancia's testimony that Kaczmar was planning to fabricate evidence. While acknowledging that the wife's testimony was cumulative to Filancia's testimony, Kaczmar asserts that the difference was Filancia's lack of credibility, but this ignores undercover Deputy Humphrey's testimony as well as the physical evidence. He asserts that the only evidence besides the wife's testimony regarding the scheme to plant evidence to frame Ryan Modlin was Filancia's testimony. IB at 29. This is a misreading of the record. Deputy Humphrey testified at length regarding the scheme including both his meetings with the defendant and his meetings with the defendant's wife.

Deputy Humphrey, acting undercover as Carlos, met with the defendant's wife on two occasions. Deputy Humphrey, acting undercover as Carlos, met with Kaczmar on four occasions. These conversations involved the defendant agreeing to pay "Carlos" in a scheme to frame Ryan Modlin for the murder of Maria. The meetings involved manufacturing and planting evidence. Those conversations were recorded and played for the jury. The jury heard about the scheme to frame Modlin straight out of the defendant's own mouth. Kaczmar does not point to even a single statement made by his wife during her

testimony that was not testified to by Deputy Humphrey as well during his testimony.[4]

Appellate counsel admits that the wife’s testimony, minus his privilege claim, would be admissible to show consciousness of guilt. But consciousness of guilt in this case goes to identity of the perpetrator and there simply was never any doubt regarding that. As the prosecutor noted in closing, the physical evidence, including the DNA on the sock and the photographs from the Hess gas station showing the defendant purchasing the $2.00 worth of gas to burn the trailer was evidence “alone which convicts” Kaczmar. (T. Vol. 17 962). As the prosecutor told the jury, the testimony of Modlin, Filancia, and the defendant’s wife were all “just piling on.” (T. Vol. 17 962).

The blood on Kaczmar’s sock, taken from him by law enforcement on the day of the murder, had the victim’s blood on it. The blood on his sock matched the victim’s DNA profile at one in 880 billion Hispanics. Kaczmar’s conduct of adding his own blood to the sock during the interview also shows consciousness of guilt. Additionally, the defendant had a fresh cut on his left thumb and cuts on his right hand,

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[4] Although he does not seem to be raising as part of this issue the wife’s testimony regarding her husband calling her to tell her the house was on fire, that was largely cumulative as well. Teddy Modlin, a neighbor who lived near Kaczmar’s grandmother house and who was Ryan’s uncle, testified that his son Tom called the defendant to tell him about the fire and that a body was discovered. (T. Vol. 14 321-325). Teddy took the phone from his son at one point and during that conversation the defendant told him that his uncle was in the hospital, so the body must be that of his father’s girlfriend Maria. Teddy Modlin testified that Kaczmar did not seem “very concerned” about the fire. (T. Vol. 14 326). His concern was that his kid’s stuff was in the house. (T. Vol. 14 327). However, Kaczmar’s focus is on the scheme to frame Ryan Modlin. IB at 29.

as well, which comports with the violent struggle that was part of this murder. These are all hard facts, objectively documented, that do not depend on credibility determinations. The error was unimportant to the issue of identity. Any violation of the privilege was harmless.

ISSUE III

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY NOT *SUA SPONTE* GIVING A SPECIAL JURY INSTRUCTION ON THE HEAT-OF-PASSION DEFENSE? (Restated)

Kaczmar asserts the trial court committed fundamental error by not giving a special jury instruction on heat-of-passion. This issue is not preserved. Defense counsel did not request a heat-of-passion jury instruction either orally or in writing. Even if the claim had been preserved, Kaczmar was not entitled to a heat-of-passion instruction. First, heat-of-passion is not a defense to felony murder. Moreover, the defendant was not entitled to a heat-of-passion jury instruction even on the premeditated theory of first-degree because, even under his version of events, there was no adequate provocation. The law does not recognize a victim of a felony physically resisting that felony as a type of provocation. The trial court properly instructed the jury. There was no error, much less fundamental error.

The trial court's ruling

There is no ruling from the trial court on whether the proposed special jury instruction on heat-of-passion is a correct statement of the law or whether the defendant was entitled to such a jury

instruction under his version of events because defense counsel did not propose a special jury instruction on heat-of-passion.

Preservation

This issue is not preserved. Kaczmar did not submit in writing a special jury instruction on heat-of-passion to the trial court as required by the rule. Fla. R.Crim. P. 3.390(c). The requirement that any proposed special jury instruction be submitted in writing is not a technical one. The purpose of the writing requirement is that trial courts should not be placed in the position of having to guess what wording would satisfy defense counsel. Trial courts should not have to do defense counsel's homework for him. If defense counsel wishes to have a heat-of-passion instruction he must do the hard work of formulating one, so the trial court can rule whether it is a correct statement of the law of heat-of-passion and whether such an instruction is warranted.

None of this occurred in the trial court. Kaczmar did not submit a heat-of-passion jury instruction to the trial court in writing as required or even orally. This issue is not preserved.

Nor is the issue properly presented on appeal. Even on appeal, Kaczmar still does not state exactly what heat-of-passion jury instruction he believes should have been given. He does not state what elements such a heat-of-passion defense should have contained and how the defendant qualified for such an instruction under those elements. While this Court is in a better position than the trial court because at least the issue is being raised, this Court is only in a marginally better position. This Court cannot determine if the

proposed special jury instruction on heat-of-passion is a correct statement of the law because there is no proposed jury instruction in the initial brief. The State is being put in the position of guessing what the proposed jury instruction on heat-of-passion would have been and then comparing the claim of heat-of-passion to that guess. This is not properly developed and therefore, should not be addressed. *Belcher v. State*, 961 So.2d 239 (Fla. 2007)(finding a claim to be insufficiently pled on appeal where counsel did not articulate why the photograph was particularly inflammatory in the brief). This claim is insufficiently pled on appeal as well as unpreserved.

<u>Standard of review</u>

Normally, the standard of review for a trial court decision to give or refuse to give a special jury instruction is reviewed for an abuse of discretion. *Durousseau v. State*, 55 So.3d 543, 555-556 (Fla. 2010)(observing that the decision to provide a particular instruction to the jury is within the discretion of the trial court); *Hoskins v. State*, 965 So.2d 1, 14 (Fla. 2007)(noting that an appellate court reviews the denial of a requested instruction for an abuse of discretion). However, Kaczmar is raising the issue as one of fundamental error and the standard of review for fundamental error is necessarily *de novo* because there is no ruling from the trial court. *Blackmon v. State*, 58 So.3d 343, 345 (Fla. 1st DCA 2011)(observing that claims of fundamental error are reviewed *de novo*); *Beckham v. State*, 884 So.2d 969, 970 (Fla. 1st DCA 2004)(stating: "We have *de novo* review of the question of law whether the trial court

fundamentally erred by failing to give a complete and accurate jury instruction. . . ”).

This is one of the myriad of problems with fundamental error. Appellant has obtained a favorable standard of review on appeal from not raising the issue in the trial court than he would be entitled to if he had properly requested the jury instruction in the trial court. This is one of the many reasons why the concept should be limited to the most egregious of errors. This highlights the wisdom of United States Supreme Court’s recent statement about how fatal it is to the criminal justice system to extend the fundamental error doctrine to such prototypical trial errors as jury instructions. *Puckett v. United States*, 556 U.S. 129, -, 129 S.Ct. 1423, 1428, 173 L.Ed.2d 266 (2009)(noting “anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal.”).

<u>Fundamental error</u>

The United States Supreme Court limits claims of structural error in jury instruction to errors in the reasonable doubt instruction. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124L.Ed.2d 182 (1993). All other errors are subject to harmless error review including the complete omission of an element of the crime. *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *Mitchell v. Esparza*, 540 U.S. 12, 124 S.Ct. 7, 11, 157 L.Ed.2d 263 (2004).

Florida courts are more generous than federal courts regarding claims of fundamental error. In Florida, only errors in the jury instruction regarding the elements of the crime that the state must prove and that are in dispute are considered candidates for fundamental error. Errors in affirmative defense jury instructions are not fundamental error. *Martinez v. State*, 981 So.2d 449, 455 (Fla. 2008)(observing "[w]e have never held that the failure to give an instruction or to give an erroneous instruction on an affirmative defense always constitutes fundamental error" citing *Smith v. State*, 521 So.2d 106, 108 (Fla. 1988)); *Holiday v. State*, 753 So.2d 1264, 1270 (Fla. 2000)(holding an erroneous jury instruction on the affirmative defense of entrapment was not fundamental error); *Sochor v. State*, 619 So.2d 285, 290 (Fla. 1993) (holding a erroneous jury instruction on the affirmative defense of involuntary intoxication was not fundamental error). The error or omission in the affirmative defense of heat-of-passion jury instruction is not fundamental error.

Errors regarding special jury instructions must be preserved. Florida courts do not entertain claims of fundamental error regarding special jury instructions. In *Gavlick v. State*, 740 So.2d 1212, 1213 (Fla. 2d DCA 1999), the Second District refused to consider a claim that the trial court erred in failing to give a special jury instruction with an expanded definition of "enterprise" in a fraudulent check passing operation prosecution. The Second District explained that absent special or extenuating circumstances, "the failure to file a written request for a special instruction precludes appellate review, particularly as here, where the oral request was

to redefine an issue covered by the Standard Jury Instructions." *Gavlick*, 740 So.2d at 1213 (citing *Wilson v. State*, 344 So.2d 1315 (Fla. 2d DCA 1977) and *Holley v. State*, 423 So.2d 562 (Fla. 1st DCA 1982)). This claim must be preserved and it was not. The failure to give a special jury instruction is not fundamental error.

Merits

To be entitled to a special jury instruction, the defendant must prove that: (1) the special instruction is supported by the evidence; (2) the standard instruction does not adequately cover the theory of defense; and (3) the special instruction is a correct statement of the law and not misleading or confusing." *Wheeler v. State*, 4 So.3d 599, 605 (Fla. 2009)(quoting *Stephens v. State*, 787 So.2d 747, 756 (Fla. 2001)). A trial judge is not required to give an instruction where there is no nexus between the evidence in the record and the requested instruction. *Wheeler v. State*, 4 So.3d 599, 605 (Fla. 2009)(citing *Mora v. State*, 814 So.2d 322, 330 (Fla. 2002)).

The standard jury instructions are adequate. This Court has rejected claims that a special jury instruction on heat-of-passion was necessary to correctly explain the law even when the issue was preserved. *Coday v. State*, 946 So.2d 988, 995 (Fla. 2006)(finding no abuse of discretion in the trial court decision to deny a special jury instruction on heat-of-passion and concluding that the standard jury instruction on excusable homicide was sufficient to explain heat-of-passion in the context of premeditation relying on *Kilgore v. State*, 688 So.2d 895 (Fla. 1996)).

Furthermore, as will be explained in greater detail, any proposed jury instruction on heat-of-passion would not be a correct statement of the law because heat-of-passion is not a defense to felony murder. Nor is Kaczmar's theory of provocation a correct statement of the law. The law does not recognize a victim of a felony physically resisting that felony as a type of provocation.

Heat-of-passion in Florida

Florida has long recognized the defense of heat-of-passion. *Villella v. State*, 833 So.2d 192, 195 (Fla. 5th DCA 2002)(citing *Whidden v. State*, 64 Fla. 165, 59 So. 561 (1912). The Florida Supreme Court in *Whidden* defined heat-of-passion as a "sudden transport of passion, caused by adequate provocation, if it suspends the exercise of judgment, and dominates volition, so as to exclude premeditation and a previously formed design, may not excuse or justify a homicide, but it may be sufficient to reduce a homicide below murder in the first degree, although the passion does not entirely dethrone the actor's reason." *Whidden v. State*, 64 Fla. 165, 59 So. 561 (1912). In *Febre v. State*, 158 Fla. 853, 30 So.2d 367 (1947), the Florida Supreme Court explained the reasoning underlying the defense of heat-of-passion:

> The law reduces the killing of a person in the heat of passion from murder to manslaughter out of a recognition of the frailty of human nature, of the temporary suspension or overthrow of the reason or judgment of the defendant by the sudden access of passion and because in such case there is an absence of malice. Such killing is not supposed to proceed from a bad or corrupt heart, but rather from the infirmity of passion to which even good men are subject. Passion is the state of mind when it is powerfully acted on and influenced by something external to itself. It is one of the emotions of the mind known as anger, rage, sudden resentment, or terror. **But for passion to constitute a mitigation of the crime from murder to manslaughter, it must arise from legal provocation**.

Febre, 30 So.2d at 369.

Heat-of-passion can be a complete defense if the killing occurs by accident and misfortune in the heat-of-passion, upon any sudden and sufficient provocation. *Villella*, 833 So.2d at 195 (citing § 782.03, Fla. Stat.). Or heat-of-passion can be used as a partial defense to negate the element of premeditation in first-degree murder or the element of depravity in second-degree murder thereby reducing the crime to manslaughter. *Villella*, 833 So.2d at 195;*Johnson v. State*, 969 So.2d 938, 952 (Fla. 2007)(explaining a killing done in the heat-of-passion makes the killing second-degree murder or manslaughter citing *Douglas v. State*, 652 So.2d 887, 890 (Fla. 4th DCA 1995)("[A] jury can find a defendant who has killed in the heat of passion guilty of either second degree murder or manslaughter ....")(citing *Forehand v. State*, 126 Fla. 464, 171 So. 241 (1936)); see also *Palmore v. State*, 838 So.2d 1222, 1224 (Fla. 1st DCA 2003)(stating the heat-of-passion negating the depraved mind element of second-degree murder is a valid defense in Florida citing *Paz v. State*, 777 So.2d 983 (Fla. 3d DCA 2000)).

However, for heat-of-passion to mitigate the crime from premeditated murder to manslaughter, it must arise from legal provocation. *Collins v. State*, 88 Fla. 578, 585, 102 So. 880, 882 (Fla. 1925)(explaining that for passion to constitute a mitigation of the crime from murder to manslaughter, it must arise from legal provocation." citing 1 Michie on Homicide, § 38); *Febre*, 30 So.2d at 369. A leading treatise on criminal law explains that the provocation must be reasonable and gives examples where provocation has

traditionally been considered to be reasonable including battery; mutual combat; assault; illegal arrest; adultery; words; and injuries to third persons. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, 654-664 (2nd ed. 1986)(discussing the concept of provocation and its requirements at length). The Model Penal Code reduces murder to manslaughter when the homicide is "committed under the influence of extreme mental of emotional disturbance for which there is reasonable explanation or excuse" and determines the reasonableness "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." Model Penal Code § 201.3. The classic example of a heat-of-passion is a husband discovering his wife in bed with another man. *Paz v. State*, 777 So.2d 983, 984 (Fla. 3rd DCA 2000)(describing the crime where the husband killed a man who sexually assaulted his wife "as classic case of manslaughter based on adequate legal provocation"); *Villella v. State*, 833 So.2d 192, 195 (Fla. 5th DCA 2002)(reversing for a new trial in a first-degree murder conviction where heat-of-passion was the defense but the evidence of the wife's affair was improperly excluded and collecting cases where the husband killed his wife after discovering her affair).

Kaczmar was not legally entitled to a jury instruction on heat-of-passion regarding the felony murder theory.
Heat-of-passion is not a defense to felony murder, only premeditated murder. *People v. Robertson*, 95 P.3d 872, 874 (Cal. 2004)(explaining and citing cases), *overruled on other grounds*, *People v. Sarun Chun*, 203 P.3d 425 (Cal. 2009); *People v. Balderas*, 711 P.2d 480, 510 (Cal. 1985)(explaining that neither "heat of passion" nor provocation can

ever reduce a felony-murder to voluntary manslaughter and giving such an instruction would be error); *Barron v. State*, 627 So.2d 582, 583 (Fla. 2d DCA 1993)(pointing out that heat-of-passion is not a defense to first-degree felony murder). As this Court has noted, a defendant's state of mind is immaterial for felony murder because the felony is said to supply the intent. *Fleming v. State*, 374 So.2d 954, 956, n.1 (Fla. 1979); *State v. Enmund*, 476 So.2d 165, 168 (Fla. 1985)(noting that the malice aforethought for felony murder is supplied by the felony). Heat-of-passion does not apply to felony murder. The concept of provocation simply has no application in the felony murder context. Kaczmar was also charged with felony murder with attempted sexual battery as the underlying felony as well as premeditated first-degree murder. He was not legally entitled to a heat-of-passion jury instruction regarding the first-degree felony murder charge.

Furthermore, Kaczmar was not entitled to a jury instruction on heat-of-passion on the premeditated theory either. Because appellate counsel does not provide a jury instruction on heat-of-passion in his brief, the State will use the Eleventh Circuit's pattern jury instructions as a model.[5] Those pattern jury instructions provide that the "phrase 'heat of passion' means an emotional state that is generally provoked or induced by anger, fear, terror, or rage. In order for this provocation to be an 'adequate

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[5] The State cannot use Florida's standard jury instruction on the heat-of-passion defense as a model because there isn't one.

provocation,' it must be of a kind that would naturally cause a reasonable person to temporarily lose self control and to commit the act upon impulse and without reflection but which did not justify the use of deadly force."

Kaczmar claims that because he became "really angry," when the victim resisted his advances and attempted to defend herself from his unwanted advances, he is entitled to a heat-of-passion jury instruction. IB at 31. No, Kaczmar is not entitled to a heat-of-passion instruction merely because he became angry. The law requires that there be adequate provocation. A woman defending herself from an attempted rape is not what the law recognizes as adequate provocation. Moreover, one may not provoke oneself and then rely on a heat-of-passion defense. Just as one may not place oneself in a position and then claim duress based on that position, a defendant may not attempt to rape a woman and then use that woman defending herself as "provocation." *Cf. United States v. Harris*, 104 F.3d 1465, 1473 (5th Cir. 1997)(noting that one of the elements of the affirmative defense of duress is that the defendant did "not recklessly or negligently place himself in such a situation."); *United States v. Gatti*, 2011 WL 3047657 (5th Cir. 2011)(noting that the duress defense was not available to the defendant who recklessly placed himself in the situation at issue by agreeing to engage in criminal activity). It was Kaczmar who provoke this situation, not the victim. Kaczmar was the aggressor even under his version of events.

The California Supreme Court has rejected a similar claim of fundamental error in a capital case. *People v. Balderas*, 711 P.2d 480,

510-511 (Cal. 1985). Balderas claimed that the trial court erred by not *sua sponte* instructing the jury on voluntary manslaughter based on heat-of-passion and sudden quarrel. *Balderas*, 711 P.2d at 510. During a kidnapping and robbery, the defendant knocked the victim down. *Balderas*, 711 P.2d at 488. When the defendant turned his back, the victim hit the defendant with an object. The defendant then shot the victim and took the victim's wallet for gas money. The victim bleed to death.

On appeal, Balderas claimed that the victim's hitting him entitled him to a jury instruction on voluntary manslaughter based on heat-of-passion or sudden quarrel. He asserted that the trial court erred by not *sua sponte* instructing the jury on voluntary manslaughter. As the California Supreme Court observed, rejecting this claim, a victim's resistance causing an attacker's rage simply cannot be the basis for any theory of provocation. *Balderas*, 711 P.2d at 511; see also *People v. Rodriguez*, 2007 WL 1765115, 19 (Cal. App. Ct. 2007)(explaining the scope of the holding in *Balderas* and explaining that "predictable conduct by a resisting victim does not constitute sufficient provocation."). Kaczmar was not entitled a heat-of-passion instruction based on such a theory of provocation. Kaczmar was not legally entitled to such a jury instruction.

Furthermore, the evidence did not support giving a heat-of-passion jury instruction. The victim here was not the defendant's wife or girlfriend as in the classic cases of heat-of-passion manslaughter. *Paz, supra*; *Villella, supra*. The victim was his father's girlfriend. This case was the exact opposite of the fact pattern of classic

manslaughter. The evidence did not support giving a heat-of-passion jury instruction even if one had been requested.

Kaczmar's reliance on *Palmore v. State*, 838 So.2d 1222 (Fla. 1st DCA 2003), is misplaced. IB at 33. First, *Palmore* is not a fundamental error case. Rather, the issue of a special jury instruction on the heat-of-passion defense was preserved in *Palmore*. Defense counsel requested such an instruction in the trial court and properly preserved the issue in *Palmore*. Furthermore, the facts of *Palmore* are more akin to the classic example of heat-of-passion. Indeed, the facts of *Palmore* are even more extreme than the classic fact pattern. This case, in contrast, is the opposite of the classic cases of manslaughter. Thus, the trial court would have properly refused to give a heat-of-passion instruction regarding either premeditated murder or felony-murder. And therefore, no error occurred, much less fundamental error.

Harmless error

Claims of fundamental error are not subject to harmless error analysis because, "by its very nature, fundamental error has to be considered harmful. If the error was not harmful, it would not meet our requirement for being fundamental." *Jackson v. State*, 983 So.2d 562, 576 (Fla. 2008). But this is another reason why the concept of fundamental error should be invoked only in the rarest of cases based on the most compelling of arguments. This is not that rare case.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN LIMITING CLOSING ARGUMENT BY PREVENTING DEFENSE COUNSEL FROM READING LANGUAGE FROM OPINIONS TO THE JURY ? (Restated)

Kaczmar asserts the trial court abused its discretion by preventing defense counsel from discussing various opinions regarding the heat-of-passion defense with the jury. IB at 35. Defense counsel was attempting to explain the defense of heat-of-passion when he had not requested a special jury instruction on heat-of-passion or sudden combat. But defense counsel never requested a special jury instruction on the heat-of-passion defense. It is not proper for defense counsel to discuss an entire legal concept that is not covered by the jury instructions. A defense counsel who does so is, in effect, writing his own jury instructions. Defense counsel wanted to define the heat-of-passion defense rather than having the trial court do so. Thus, the trial court properly precluded defense counsel from giving a different definition of premeditation than that in the standard jury instruction and from defining a defense himself.

<u>The trial court's ruling</u>

On August 12, 2011, both the State and the defense presented closing argument in the guilt phase. (T. Vol. 17 867-964). The prosecutor discussed the concept of premeditation. (T. Vol. 17 871). The prosecutor then discussed the facts supporting premeditation. (T. Vol. 17 871-880).

Before giving closing argument, defense counsel explained to the trial court that his object in closing was to concede to second-degree murder. (T. Vol. 17 815-916). The trial court obtained an on-the-record agreement of the defendant to this strategy. (T. Vol. 17 916). One of the defense counsel, Mr. Shea, was discussing the

concept of premeditation explaining that it “has a special and legal definition.” (T. Vol. 17 918). While the “law does not fix an exact period of time that must pass,” “the period of time must be long enough to allow reflection by the defendant” (T. Vol. 17 918). Defense counsel then observed that there is “a whole series of cases that say what premeditation is, what premeditation is not, and I’ve kind of made an outline here of some of these issues that have come up as to defining premeditation.” (T. Vol. 17 919). Defense counsel continued, “premeditation is an operation of the mind.” “A killing is not premeditated when it is ...”

The prosecutor objected. (T. Vol. 17 919). The trial court removed the jury. The prosecutor noted that it sounded like defense counsel intended to read various court opinions or caselaw to the jury. The prosecutor noted that the trial court would instruct the jury on the definitions including the definition of premeditation. (T. Vol. 17 919). The prosecutor noted that arguing to the jury based on other court opinions was improper.

Defense counsel responded by stating that he did not intend to “cite any opinions” to the jury. Defense counsel referred to the law of heat-of-passion or sudden provocation not being premeditated. Defense counsel then observed that in his view, “this case is perfect with the facts that are in this case.” Defense counsel stated “I just wanted to infer to them that a moment of heat-of-passion” and stated that “I won’t be reciting cases.”

The prosecutor responded that defense counsel can make arguments based on the evidence but noted that the defense had agreed to the

jury instructions on premeditation. The prosecutor noted that the defense had not requested any special jury instructions. (T. Vol. 17 920).

The trial court sustained the prosecutor's objection noting "that's what jury instructions are about." (T. Vol. 17 921). The trial court ruled that defense counsel could make arguments but he did not want defense counsel "citing any more cases."

Defense counsel continued his closing. He discussed premeditation arguing that it was "elusive." (T. Vol. 17 937). He argued for second-degree murder. (T. Vol. 17 943-944). In rebuttal closing, the prosecutor argued that the jury should reject second-degree murder. (T. Vol. 17 955-956).

<u>Preservation</u>

This issue is preserved. Defense counsel explained his position to the trial court when the prosecutor objected.

<u>Standard of review</u>

The standard of review is abuse of discretion. Trial courts have wide discretion in controlling closing arguments. *Merck v. State*, 975 So.2d 1054, 1061 (Fla. 2007)(observing that a trial court has discretion in controlling opening and closing statements, and its decisions will not be overturned absent an abuse of discretion citing *Dufour v. State*, 905 So.2d 42, 64 (Fla. 2005)).

<u>Merits</u>

While an attorney in closing argument may relate the applicable law to the facts of the case, he may not instruct the jury on the law. Rather, the trial court instructs the jury as to the law through jury

instructions. See *Taylor v. State*, 330 So.2d 91, 93 (Fla. 1st DCA 1976)(stating: "it is not the prerogative of an attorney in his closing arguments to instruct the jury on the law, it is entirely appropriate for an attorney in closing argument to relate the applicable law to the facts of the case" and noting "one of the purposes in having a conference on jury instructions before closing arguments is to allow the attorneys to be aware of the law so that they will be able to properly relate the law to the facts in their argument); *Metropolitan Publishers Representatives, Inc. v. Arnsdorff*, 267 S.E.2d 260 (Ga. App. Ct. 1980)(holding that trial court did not err in refusing to permit counsel, in closing argument, to read to the jury from a reported case of this court because the jury shall receive the law exclusively from the trial judge); *Wilcox v. Glover Motors, Inc.*, 153 S.E.2d 76, 80 (N.C. 1967)(reversing for a new trial where counsel read to the jury excerpts from the published opinions of the Court and observed that the fact situation in the reported cases was the same as in that particular case); *Piccolo v. Woodford*, 35 S.E.2d 393, 396 (Va. 1945)(finding counsel reading from a published opinion in closing argument to be reversible error). When counsel explains the law using cases as example that is not covered by the actual jury instructions, he is actually expanding the jury instructions without the trial court's approval. There is little point in having standard jury instructions if such a practice is condoned. Defense counsel here was attempting to explain the defense of heat-of-passion when he had not requested a special jury instruction on heat-of-passion or sudden combat. Defense counsel

may not recite or read cases to the jury explaining how provocation can negate premeditation without seeking and being granted a special jury instruction on the defense of provocation.

Appellate counsel asserts the defense counsel never intended to "cite any opinions" to the jury; rather, defense counsel wanted "to use" those opinions. Appellate counsel does not explain the difference between "citing" and "using" or how defense counsel was going to accomplish this without telling the jury about the facts and holdings of those cases. IB at 39. If appellate counsel means that defense counsel never intended to read the actual numerical cite of the cases to the jury, that is not the problem. It is giving the jury the substance of the cases, in contravention of the jury instructions, that is the problem. Appellate counsel proposes that defense counsel can give examples of fact patterns and the law from cases such as *Clowers v. State*, 31 So.3d 962, 965 (Fla. 1st DCA 2010)(distinguishing verbal versus physical provocation). No, counsel may not discuss the concept of provocation from *Clowers* or any other case without obtaining a special jury instruction on provocation first. Defense counsel may not hold forth on an area of the law, including definitions of concepts such as provocation and heat-of-passion, not covered in the jury instructions at will. The rule against counsel giving the law to the jury was designed to prevent counsel from misstating the law and confusing the jury. And the wisdom of the rule is illustrated by this case. Defense counsel's statements to the trial court explaining what he wanted to tell the jury show that he did not understand the law of heat-of-passion. Defense counsel stated this

"happened out of passion or out of just a sudden or unprovoked circumstances." (T. Vol. 17 920). If the crime was "unprovoked," then the defense of heat-of-passion does not apply. Defense counsel would have misinformed the jury regarding the law of provocation.

Appellate counsel cites no case from any court allowing defense counsel hold forth on an area of the law not covered in the jury instructions. *Jean v. State*, 27 So.3d 784, 786-787 (Fla. 3d DCA 2010), certainly is not such a case. In *Jean*, defense counsel wanted to argue based on the jury instructions that the defendant was not in lawful custody and was precluded from doing so. Here, in contrast to *Jean*, the concepts of provocation and heat-of-passion were not covered by defense counsel and defense counsel did not request a special jury instruction on those matters. Thus, the trial court properly restricted defense counsel from explaining the law of heat-of-passion or sudden combat to the jury.

Harmless error

The error, if any, in restricting defense counsel's closing argument to the jury instruction, was harmless error. The trial court properly and adequately defined the concept of premeditation using the standard jury instructions. Kaczmar does not point to any particular argument that he was precluded from making regarding the evidence of, or lack of, premeditation from the trial court restriction. The error was harmless.

ISSUE V

WHETHER THE TRIAL COURT PROPERLY DENIED THE MOTION IN LIMINE TO REQUIRE THE STATE NOT TO EDIT THE DEFENDANT'S EXCULPATORY STATEMENTS FROM THE RECORDINGS OF THE UNDERCOVER MEETINGS? (Restated)

Kaczmar asserts that the rule of completeness required the admission of the entire recording of his meetings with the undercover officer discussing planting evidence including his exculpatory statements without the admission of his three prior convictions. The State agreed that the rule of completeness applied, but then explained, if the entire recording was played, including the defendant's exculpatory statements, his prior convictions were admissible to impeach those statements. As both this Court and several district courts have held, if exculpatory statements of a defendant are introduced via another witness under the rule of completeness, the defendant's prior convictions become admissible. Invoking the rule of completeness has consequences. Thus, the trial court properly denied the motion to allow the defendant to make exculpatory statements without his prior convictions being admitted.

<u>The trial court's ruling</u>

The State filed a motion in limine to preclude defense counsel from questioning the State's witnesses regarding exculpatory statements made by the defendant. (R. Vol. 6 996 - motion in limine #3). After jury selection but prior to opening statements, defense counsel argued that the State's motion should be denied because "the state wants to cut off the part of them where the defendant denies doing the crime". (T. Vol. 14 221). Defense counsel distinguished the state cases by noting the State was calling these witnesses not the defense. (T. Vol. 14 221). The prosecutor cited *Kelly v. State*, 857 So.2d 949 (Fla. 4th DCA 2003), and *Moore v. State*, 943 So.2d 296 (Fla.

1st DCA 2006), as being on point and explained that, under the rule of completeness, the defendant was entitled to play the entire tape including his assertions of innocence but if he did, the State was then entitled to inform the jury that the defendant had three prior convictions. (T. Vol. 14 223-225). Defense counsel's position was that the State needed to "put on the whole thing" and "state can't selectively edit" (T. Vol. 14 225-226). Defense counsel averred that the cases relied upon by the prosecutor were different because those cases involved defense counsel eliciting the exculpatory statements and here the exculpatory statements were not coming in via cross-examination. (T. Vol. 14 226). The trial court denied the motion. (T. Vol. 14 227).

At trial, Detective Sharman testified regarding his interview with Kaczmar on December 13, 2008, shortly after the murder and arson. A videotape of that interview was played for the jury. On cross-examination of the detective, defense counsel asked the detective if Kaczmar denied setting the fire during the interview. (T. Vol. 16 625). The prosecutor objected based on the trial court's prior ruling "unless they understand the consequences." (T. Vol. 16 625). The trial court sent the jury out to hear argument of counsel. The prosecutor noted that defense counsel's question was going to elicit exculpatory statements made by the defendant because "you can't get any more exculpatory than that as a denial to committing one of the crimes." (T. Vol. 16 625). The prosecutor also noted that the question asked by the detective during the interview was whether the defendant knew of anyone who would have wanted to set the house

on fire and defendant answered no. The prosecutor observed based on the trial court's prior ruling, that if he wanted "to continue down this road," it was fine with the prosecutor but "it comes with consequences." (T. Vol. 16 625). Defense counsel withdrew the question. (T. Vol. 16 625).

Deputy Charles R. Humphrey of the Jacksonville Sheriff's Office testified. (T. Vol. 16 741). He was contacted by the Clay County Sheriff's office to do undercover work in this case as Carlos Riviera. He met with the defendant four times at the Clay County jail. (T. Vol. 16 742). He was introduced as a friend of Bill Filancia. (T. Vol. 16 743).

These meeting were recorded. (T. Vol. 16 743). The recordings of three of the four meetings were played for the jury with the deputy narrating the events. (T. Vol. 16 743-762). Defense counsel renewed his objection to the editing of the exculpatory statements. (T. Vol. 16 744).

Preservation

This issue is preserved. Defense counsel made a motion raising the same grounds as he asserts as error on appeal and properly obtained a ruling from the trial court. *McWatters v. State*, 36 So.3d 613, 639 (Fla. 2010)(explaining that for an issue to be preserved for appellate review, the specific legal argument or ground must be presented to the trial court citing *Kokal v. State*, 901 So.2d 766, 778-779 (Fla. 2005)), *cert. denied*, 131 S.Ct. 510 (2010); *Baker v. State*, - So.3d. -, 2011 WL 2637418, 6 (Fla. 2011)(explaining to be preserved, the issue or legal argument must be raised and ruled on

by the trial court quoting *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008)).

Standard of review

The standard of review for a trial court's ruling on the admissibility of evidence is abuse of discretion. *Williams v. State*, 967 So.2d 735, 753 (Fla. 2007). Trial courts have wide latitude in the admission of evidence. *Valle v. State*, - So.3d -, -, 2011 WL 3667696, 11 (Fla. 2011)(stating that it "is well settled that the admissibility of evidence is within the sound discretion of the trial court, and the trial court's determination will not be disturbed on appellate review absent a clear abuse of that discretion" citing *Rimmer v. State*, 59 So.3d 763, 774 (Fla. 2010)).

Merits

The introduction of related writings or recorded statements statute, § 90.108(1), Florida Statutes, provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously. An adverse party is not bound by evidence introduced under this section.

This statute is commonly referred to as the "rule of completeness." *Larzelere v. State*, 676 So.2d 394, 401 (Fla. 1996).

Under the rule of completeness, when a party introduces part of a statement, confession, or admission, the opposing party is ordinarily entitled to bring out the remainder of the statement. *Ramirez v. State*, 739 So.2d 568, 580 (Fla. 1999). As Professor Ehrhardt explains, the purpose of the rule of completeness is to avoid the

potential for creating misleading impressions by taking statements out of context. CHARLES W. EHRHARDT, FLORIDA EVIDENCE, 56-63 (ed. 2011). This Court has also observed that the "purpose of the 'rule of completeness' is to avoid the potential for creating misleading impressions by taking statements out of context." *Evans v. State*, 808 So.2d 92, 104 (Fla. 2001).

The rule of completeness is from the common law. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172, 109 S.Ct. 439, 451, 102 L.Ed.2d 445 (1988)(observing that the common law rule of completeness underlies Federal Rule of Evidence 106 and explaining the common law rule citing 7 J. Wigmore, Evidence in Trials at Common Law § 2113, p. 653 (J. Chadbourn rev. 1978)).[6] The rule of completeness applies to verbal statements as well written or recorded statements. *Ramirez v. State*, 739 So.2d 568, 580 (Fla. 1999)(citing *Christopher v. State*, 583 So.2d 642, 646 (Fla. 1991).

This Court has held that where the State offered defendant's inculpatory statement, the trial court erred in preventing defendant from cross-examining the witness about exculpatory statements made in the same conversation because the state opened the door by proving a part of the conversation, "it cannot close it upon the defendant

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[6] The Federal Evidence Code also contains a version of the rule of completeness. The remainder of or related writings or recorded statements, rule 106, Federal rules of evidence, provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

so that he cannot offer the other part of the conversation which relates to the same subject matter." *Morey v. State*, 72 Fla. 45, 72 So. 490 (1916)(quoting *Thalheim v. State*, 38 Fla. 169 (Fla. 1896)). Rather, "the whole conversation should be before the jury." *Morey*, 72 Fla. 45, 72 So. at 493.

The prosecutor agreed that the rule of completeness applied and he was willing to play the entire tape on the condition the defendant's three prior convictions were then admitted. This Court, the First District, the Fourth District and the Fifth District have all held that, when a non-testifying defendant admits exculpatory statements via another witness, his prior convictions are then admissible to "impeach" those statements. *Huggins v. State*, 889 So.2d 743, 755-756 (Fla. 2004); *Moore v. State*, 943 So.2d 296 (Fla. 1st DCA 2006); *Kelly v. State*, 857 So.2d 949 (Fla. 4th DCA 2003); and *Fisher v. State*, 924 So.2d 914, 916–917 (Fla. 5th DCA 2006). This principle includes a defendant invoking the rule of completeness as well as cross-examination by defense counsel. As the First District explained in *Moore*, although the defendant did not testify at trial, he introduced exculpatory statements made to the police by invoking the rule of completeness, and when "a defendant successfully introduces his hearsay statements into evidence, the credibility of the declarant may be attacked just as if the declarant had testified as a witness." *Moore*, 943 So.2d at 297.

In *Freeman v. State*, - So.3d -, -, 2011 WL 4031529, 2 (Fla. 1st September 13, 2011), the First District held that the prior convictions of a non-testifying defendant are admissible if the

defendant opens the door by introducing his exculpatory statements via another witness. Freeman was convicted of sale of cocaine within 1,000 feet of a church and possession of cocaine. At trial, a detective involved in the undercover operation, testified that a co-perpetrator identified Freeman as the source of the cocaine. On cross-examination, defense counsel asked the detective whether Freeman "denied everything." The trial court, relying on *Werley v. State*, 814 So.2d 1159 (Fla. 1st DCA 2002), ruled defense counsel opened the door to the admissions of Freeman's prior convictions by asking that question. Freeman's three prior felony convictions were then admitted.

On appeal, the First District explained that the State can use a defendant's prior convictions to impeach exculpatory hearsay statements of a defendant, who does not testify, but gets the statements into evidence through another witness. *Freeman v. State*, - So.3d - (citing *Huggins v. State*, 889 So.2d 743, 756 (Fla. 2004); *Werley v. State*, 814 So.2d 1159, 1163 (Fla. 1st DCA 2002); *Gonzalez v. State*, 948 So.2d 877, 878 (Fla. 4th DCA 2007); and *Fisher v. State*, 924 So.2d 914, 916–17 (Fla. 5th DCA 2006)). The First District relied on this Court's decision in *Huggins v. State*, 889 So.2d 743, 756 (Fla. 2004), in which this Court held appellant "opened the door to his own impeachment" where defense counsel "indirectly elicited" appellant's exculpatory statement "by including it as an implied assumption" in the question posed to witness. Freeman actually did not dispute this law; rather, he disputed that the statement was an exculpatory statement. *Freeman*, - So.3d at -, 2011 WL 4031529 at *1. The First

District, however, concluded that the statement "denied everything" was, in fact, exculpatory. The First District concluded that the defendant's prior convictions were properly admitted and affirmed the convictions.

In *Huggins v. State*, 889 So.2d 743, 755-756 (Fla. 2004), this Court held that admission of the defendant's nine prior convictions as impeachment was proper although the defendant did not testify because defense opened the door. At trial an issue arose as to whether Huggins had shaved his pubic region to avoid being infested with lice. Defense counsel asked the correctional officer if "Mr. Huggins ever directly contact you and indicate that he had crabs?" The State objected on the basis of being hearsay but then defense counsel rephrased the question as "did Mr. Huggins ever shave his pubic region after complaining of lice?" The State then ask the officer, "So your answer to counsel's question was based upon what Mr. Huggins told you?"

This Court concluded that the defendant opened the door to his prior convictions with these questions. This Court agreed with the First and Fourth Districts on the point of law that a defendant who chooses not to testify but who succeeds in getting his own exculpatory statements into evidence is subject to having those statements impeached by felony convictions. *Huggins*, 889 So.2d at 756 (citing *Kelly v. State*, 857 So.2d 949 (Fla. 4th DCA 2003); *Werley v. State*, 814 So.2d 1159 (Fla. 1st DCA 2002); *Llanos v. State*, 770 So.2d 725 (Fla. 4th DCA 2000)). This Court quoted a treatise concerning the functionally identical federal evidence provision: "A defendant who

chooses not to testify but who succeeds in getting his or her own exculpatory statements into evidence runs the risk of having those statements impeached by felony convictions" *Huggins*, 889 So.2d at 756 (quoting 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 806.04(2)(b) (Joseph M. McLaughlin ed., 2d ed.2002).[7]

Kaczmar asserts that these cases do not apply. IB at 44. But these cases do apply. While most of these cases involve introduction of the exculpatory statement via cross-examination rather than by invoking the rule of completeness, the underlying principle is the same. The principle is that a defendant may not put his exculpatory statements before the jury from whatever source and escape being impeached with his prior convictions. 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 806.04(2)(b) (Joseph M. McLaughlin ed., 2d ed. 2002)(noting that a defendant who chooses not to testify but who succeeds in getting his or her own exculpatory statements into evidence runs the risk of having those statements

[7] Justice Pariente dissented in *Huggins*, in part, because the impeachment concerned a collateral matter of lice, which was, in her view, "far from the question of the defendant's guilt of the charged murder." *Huggins*, 889 So.2d at 772-776 (Pariente, J., dissenting). She distinguished the majority cases as being limited to situations when the defense elicits hearsay statements indicating the defendant's innocence of the crime charged. This case is just such a situation. Here, unlike *Huggins*, the defense was using the rule of completeness to elicit "hearsay statements indicating the defendant's innocence of the crime charged." Kaczmar's exculpatory statement were about this murder.

Additionally, Kaczmar's prior convictions were not introduced in this case. Rather, his exculpatory statements were excluded. So, there is no 403 balancing issue in this case unlike *Higgins*. There necessarily was no prejudice too because the prior convictions were not admitted during the guilt phase. Even the dissent in *Huggins* should view the trial court's ruling in this case as proper.

impeached by felony convictions). Defense counsel invoking the rule of completeness is the functional equivalent of defense counsel engaging in cross-examination. Either way, the defendant's exculpatory statements are being place before the jury and the same principles apply. If defendant manages to present his exculpatory statements regardless of the exact mechanism for doing so, either by cross-examination or by invoking the rule of completeness or by any other mechanism, he has opened the door to his priors. The defendant opens the door regardless of which key he employs.

Furthermore, *Moore v. State*, 943 So.2d 296 (Fla. 1st DCA 2006), is directly on point. *Moore*, like this case, involved a defendant introducing his exculpatory statements by invoking the rule of completeness. Appellant counsel misreads *Moore* when stating that it says the same thing as *Kelly* which never discussed the rule of completeness. IB at 44. This observation, while accurate regarding the *Kelly* decision, is inaccurate regarding the *Moore* decision. The rule of completeness was specifically referred to in *Moore*. *Moore*, 943 So.2d at 297 (stating: the defendant "succeeded in introducing exculpatory statements made to the police under the rule of completeness.").

Regardless of the source, if a defendant's statements of innocence are admitted at the defendant's behest, the jury is entitled to weigh the credibility of the defendant's statements with the information that he is a convicted felon, like any other witness under the attacking and supporting credibility of declarant statute, § 90.806(1), Florida Statutes, and the conviction of certain crimes as

impeachment statute, § 90.610, Florida Statutes. The defendant becomes a declarant by playing the entire recording. Kaczmar provides no real theory as to why he should be exempted from these two statutes.

While the State agrees that the defendant must open the door, Kaczmar opened the door by invoking the rule of completeness. For example, the State may not invoke the rule of completeness to insist on introducing the defendant's exculpatory statements and then introduce the defendant's prior convictions. If the defendant agrees to editing of his exculpatory statements, then the state cannot invoke the rule as a means of getting in the defendant's prior convictions. But here Kaczmar did not agree to the editing of his exculpatory statements.

The flaw in defense counsel's argument is the view that the State is introducing the exculpatory statements. The State was not introducing them. The prosecutor wanted to play the redacted version of the recording without the exculpatory statements and, in fact, that is what occurred at trial. The jury never heard the exculpatory statements and the defendant's prior convictions were not introduced. The prosecutor merely agreed to play the entire recording on the condition that the State could then introduce the prior convictions. The State never introduced the defendant's statements.

Kaczmar had two options and two options only: 1) do not invoke the rule of completeness or 2) invoke the rule of completeness and have the entire recording played but also have his prior convictions admitted. Kaczmar really seeks a third option of having the entire

recording played but without his prior convictions being admitted as the price. However, that third option is not available under the law. If he invokes the rule of completeness, then his prior convictions are admitted to impeach his exculpatory statements. Kaczmar, in effect, seeks to testify without being cross-examined. Thus, the trial court properly denied the motion to invoke the rule of completeness without the prior convictions being admitted.

Harmless error

Violations of the rule of completeness are subject to harmless error analysis. *Larzelere v. State*, 676 So.2d 394, 402 (Fla. 1996)(finding a violation of the rule of completeness but also finding the "error to be harmless because there is no reasonable probability that exclusion of the redacted statements affected the outcome of the jury's verdict."). Here, the error, if any, was harmless. Even if the trial court had allowed the defendant to play the entire recording including his denials of involvement without his prior convictions being introduced as a consequence, it would not have affected the jury's verdict. These exculpatory statements were made during an undercover recording of the defendant attempting to frame another person for this murder. Protestations of innocence made while scheming to manufacture and plant evidence ring hollow. The context itself refutes any claim of innocence.

Furthermore, the victim's blood was on Kaczmar's socks. His self-serving, exculpatory statements about being innocent on the recording would not have impressed the jury in light of the unrefutable scientific DNA evidence of his guilt. Additionally,

Kaczmar's concerns about what the testing of his socks would reveal were obvious to the jury from the recording of Detective Sharman's interview with him at 9:30 p.m., the same day as the murder. He did not want to give the detective his socks. The error, if any, was harmless.

ISSUE VI

WHETHER THE TRIAL COURT CLEARLY ERRED IN FINDING THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATOR? (Restated)

Kaczmar asserts that the trial court erred in finding the CCP aggavator. He asserts the murder occurred as part of an emotional frenzy and that he lacked a plan or design to murder. His claim of not having a plan to harm the victim is belied by the fact Kaczmar had a knife in his pocket. Furthermore, the error, if any, in finding the CCP aggravator was harmless. There are three remaining aggravators including HAC and the mitigation was minimal. No statutory mitigator was found by the trial court. Thus, the trial court properly found the CCP aggravator.

The trial court's ruling

The trial court found the CCP aggavator and gave it great weight. Specifically, the trial court found:

> The Florida Supreme Court has set forth four factors to prove this aggravating circumstance: 1) the killing was the product of a cool and calm reflection rather than an act prompted by emotional frenzy, panic, or a fit of rage; 2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident; 3) the defendant exhibited heightened premeditation; and 4) the defendant had no pretense of moral or legal justification. *Jackson v. State*, 648 So. 2d 85 (Fla. 1994).
>
> Evidence presented at trial established that the Defendant expressed a desire to have sex with Maria Ruiz earlier in the evening in which the crime occurred. He also indicated a desire

to get her under the influence of drugs so he could have sex with her. During that time the Defendant turned up the volume on a pornographic movie he was watching in his bedroom so that Maria Ruiz could hear it. He also tried to be Maria Ruiz to come into his bedroom under the pretense of telling her she caused a bathtub to leak water into his room. All of these efforts were ignored by the victim.

The Defendant made statements to his cellmate, William Fillancia, that once Christopher Ryan Modlin, the Defendant's friend and only witness in the house, left for the night, the Defendant decided to make sexual advances toward Maria Ruiz. The Defendant had already armed himself with a fold-up knife that was in his pants pocket once he started making sexual advances. During this time, Maria Ruiz fled from the Defendant into the safety of the bathroom. The Defendant went outside and banged on the bathroom wall and window in order to get her to exit the bathroom. The neighbor, Julie Ferrell, and her grandson, Nathan Ferrell, heard loud banging and screaming from the Defendant's property. Julie Ferrell recognized the voice as that of the Defendant.

The Defendant then went back inside and confronted Maria Ruiz in the kitchen where she had armed herself with a knife for protection. The Defendant disarmed Maria Ruiz by punching her in the face. He took his own knife from his pants pocket, opened it, and began stabbing her. Maria Ruiz was stabbed over one hundred times, with more than twenty defensive wounds. Blood evidence showed that the victim was stabbed in the hallway of the house, as well as the kitchen area. There was also evidence that the victim tried to flee from the Defendant because she was stabbed in the back several times. In the medical examiner's opinion, the wounds that were fatal in and of themselves were some of the last ones inflicted on Maria Ruiz.

Once Maria Ruiz was dead, the Defendant calmly changed his clothes and cleaned up. He then drove to a nearby gas station to purchase two dollars worth of gasoline. When he returned the Defendant parked his car at a vacant lot on a separate street to avoid having himself or his vehicle seen by other. The Defendant then walked through a wooded area and through a hole in the back fence of his property. The Defendant proceeded to pour gasoline throughout the residence, including near the victim's body, and set it on fire. The Defendant then drove into Jacksonville, Florida, where he tried to establish an alibi of having been fishing all morning. The Defendant's actions before, during, and after the murder exhibit cool, and calm reflection, and heightened premeditation. This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed in this case.

(R. Vol. 9 1585-1587)

Preservation

This issue is preserved. Defense counsel objected to the trial court finding the CCP aggravator in his sentencing memorandum. Defense counsel argued that the CCP aggravator did not apply based on defense psychiatrist's testimony, Dr. Miguel Mandoki, that the stabbing was a result of the defendant's anger toward his father and was a "sudden and impulsive burst of activity" rather than being pre-planned. (R. Vol. 9 1553).

Standard of review

The standard of review is clearly erroneous. *Russ v. State*, - So.3d -, -, 2011 WL 4389041, 9 (Fla. September 22, 2011)(observing that "this Court's task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding" quoting *McWatters v. State*, 36 So.3d 613, 642 (Fla.), *cert. denied*, 131 S.Ct. 510 (2010)). The clearly erroneous standard of review is enormously deferential to the trial court. To be clearly erroneous, the trial court's decision must strike the appellate court "as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

Merits

This Court in *Jackson v. State*, 648 So.2d 85, 89 (Fla. 1994), established a four-part test regarding the CCP aggravator: 1) to establish that the murder was cold, the killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; 2) to establish that the

murder was calculated, the defendant must have had a careful plan or prearranged design to commit murder; and 3) to establish that the murder was premeditated, the defendant must have exhibited heightened premeditation; and 4) there must have been no pretense of moral or legal justification. The CCP aggravator concerns the defendant's state of mind, intent, and motivation. A plan to kill cannot be inferred solely from a plan to commit another felony. Rather, the murderer must "fully contemplate effecting the victim's death." *Turner v. State*, 37 So.3d 212, 225 (Fla. 2010). This Court has noted that the heightened premeditation necessary for CCP is established where the defendant had ample opportunity to release the victim but instead, after substantial reflection, "acted out the plan he had conceived during the extended period in which the events occurred." *Turner v. State*, 37 So.3d 212, 225-226 (Fla. 2010)(citing *Hudson v. State*, 992 So.2d 96 (Fla. 2008)). This Court has explained that heightened premeditation exists "where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder." *Owen v. State*, 862 So.2d 687, 701 (Fla. 2003). Kaczmar could have stopped attempting to rape the victim or even stopped stabbing the victim at any point. Because it was the last of the 93 stab wounds that were fatal, she could well have lived. But Kaczmar did not.

Kaczmar's reliance on *Geralds v. State*, 601 So.2d 1157 (Fla. 1992), is misplaced. This Court recently observed in *Turner v. State*, 37 So.3d 212, 225 (Fla. 2010), that *Geralds* "does not provide a complete description of this Court's heightened premeditation analysis." In

Geralds, this Court found that the murder was not CCP where the defendant planned a burglary rather than a murder and where the defendant used a knife he obtained from the victim's kitchen rather than one brought to the scene. Here, in contrast, Kaczmar brought his own knife. Kaczmar had a knife in his pocket to deal with the victim. Accordingly, the trial court properly found the CCP aggravator.

Harmless error

Errors in finding aggravators are subject to harmless error analysis. When this Court strikes an aggravating factor on appeal, "the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence." *McWatters v. State*, 36 So.3d 613, 642 (Fla. 2010)(affirming the death sentence after striking the CCP aggravator but finding the error to be harmless because three strong aggravating factors, each given great weight by the trial court, remained: 1) prior violent and capital felonies (contemporaneous murders and sexual batteries); (2) the capital felony was committed while in the attempt, commission, or flight from a sexual battery; and (3) HAC and there was minimal mitigation), *cert. denied*, 131 S.Ct. 510 (2010).

Even if the trial court erred in finding the CCP aggravator, the death penalty is still the appropriate punishment. Here, as in *McWatters*, there are three remaining aggravators including HAC. And in a murder where the victim was punched in the face; then stabbed 93 times; has extensive defensive wounds and it is only the last of those 93 stabbings that were fatal, there can be no argument that the

HAC aggravator was not properly found. And, indeed, appellate counsel does not attempt to make one. Furthermore, the mitigation here, as in *McWatters*, was minimal. Neither of the statutory mental mitigators was found by the trial court. No statutory mitigator was found. The fourteen non-statutory mitigators found by the trial court were all given slight weight. Any error in finding CCP was harmless.

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL REGARDING THE PREMEDITATED MURDER THEORY? (Restated)

Kaczmar asserts the trial court improperly denied his motion for judgement of acquittal regarding the first-degree premeditated murder theory. Specifically, Kaczmar contends that there is no evidence of premeditation. He claims that he killed the victim "in the heat of the moment." The extensive, repeated stabbing in this case took more than a moment. There were over 93 wounds on the victim, twenty or so, of which were defensive wounds. And five of those wounds were to her back inflicted by the defendant as she attempted to flee. The defendant took the knife from the victim that she was using in a vain attempt to protect herself, but he did not stab her with that knife. Rather, he used his own knife. There was ample evidence of premeditation from the facts of the murder itself. Thus, the trial court properly denied the motion.

The trial court's ruling

After the State rested, defense counsel moved to a judgment of acquittal on the first-degree murder count asserting that the State failed to prove that the underlying sexual battery for the felony murder theory occurred. Defense counsel did not argue lack of premeditation. (T. Vol 17 845-848). The trial court denied the motion as to all three counts. (T. Vol 17 848).

Standard of review

The standard of review is *de novo*. *McDuffie v. State*, 970 So.2d 312, 332 (Fla. 2007)(noting appellate courts review the denial of a motion for judgment of acquittal under the *de novo* standard).

Merits

This Court must consider the evidence and all reasonable inferences from the evidence in a light most favorable to the State when determining whether the trial court properly denied a motion for judgment of acquittal. *McDuffie v. State*, 970 So.2d 312, 332 (Fla. 2007)(citing *Fitzpatrick v. State*, 900 So.2d 495, 507 (Fla. 2005)). Where the State has presented competent, substantial evidence of the crimes charged, the trial court does not err in denying a motion for judgment of acquittal and submitting the case to the jury. *McDuffie*, 970 So.2d at 332 (citing *Conde v. State*, 860 So.2d 930, 943 (Fla. 2003).

In *Hodges v. State*, 55 So.3d 515, 541 (Fla. 2010), this Court held that the evidence was sufficient to find Hodges guilty of first-degree murder both on the theory of premeditated murder and on the theory of felony murder. Hodges entered the victim's home and raped her. Hodges then hit the victim with a claw hammer fracturing her skull.

He also stabbed the victim with a steak knife, including in the neck, which cut her jugular vein. The victim had four life-threatening wounds to her head and neck. When the victim's family arrived, Hodges broke a bedroom window and fled thorough it, taking the victim's purse. *Hodges*, 55 So.3d at 519-520(recounting facts of the crime). This Court reviewed the capital case for sufficiency of the evidence. *Hodges*, 55 So.3d at 541. This Court noted that the victim was killed by head wounds inflicted with a hammer and neck wounds inflicted by a knife. This Court noted that one of the neck wounds was an incised wound that was four and three-quarter inches long, and the stab wound cut the victim's jugular vein. The medical examiner had "identified four separate wounds that would each have been life-threatening" as well as "other, nonlethal wounds that were indicative of defensive wounds." This Court noted that it had previously held that "the deliberate use of a knife to stab a victim multiple times in vital organs is evidence that can support a finding of premeditation." *Hodges*, 55 So.3d at 541 (citing *Williams v. State*, 967 So.2d 735, 758 (Fla. 2007)(quoting *Perry v. State*, 801 So.2d 78, 85–86 (Fla. 2001)). This Court concluded that given this evidence of multiple injuries to the head and neck, a reasonable jury could have concluded that the perpetrator formed a premeditated intent to kill. See also *Williams v. State*, 967 So.2d 735, 757-759 (Fla. 2007)(rejecting a claim of lack of premeditation where the defendant did not bring the knife used in the murder with him and actual cause of death may have been from the infection of the six or seven stab wounds because the defendant

"unquestionably stabbed" the victim "in areas of her body where vital organs were located.")

Kaczmar contends that there is no evidence of premeditation. He claims that he killed the victim "in the heat of the moment." The extensive, repeated stabbing in this case took more than a moment. There were over 93 wounds on the victim, twenty of which were defensive wounds and five of which were to her back inflicted by the defendant as she attempted to flee. Here, as in *Hodges*, "the deliberate use of a knife to stab a victim multiple times in vital organs is evidence that can support a finding of premeditation."

Moreover, the defendant took the knife from the victim, that she was using in a vain attempt to protect herself, but he did not stab her with that knife. Rather, he used his own knife from his pocket. Kaczmar had armed himself with his own knife prior to the victim arming herself.

Additionally, this argument about the heat of the "moment" ignores the entire context and time frame of this crime. The defendant, as part of the attempted sexual battery, harassed the victim to the point that she felt it was necessary to lock herself in the bathroom. Having forced the victim into the bathroom, Kaczmar still did not cease his advances. Rather, he went out of the house and continued to harass and frighten her by bounding on the house to the point that she felt it was necessary to arm herself. When she went into the kitchen and armed herself, Kaczmar still continued. He then punched the victim and took the knife from her. It was at this point that he stabbed her 93 times including slashing her throat. All of this

took much more than a “moment.” There was able evidence of premeditation from the facts of the murder itself. Thus, the trial court properly denied the motion.

ISSUE VIII

WHETHER THE TRIAL COURT PROPERLY DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL REGARDING THE ARSON COUNT? (Restated)

Kaczmar asserts the trial court improperly denied his motion for judgement of acquittal regarding the arson count. Specifically, Kaczmar contends that a convicted felon's testimony is not competent, substantial evidence. This Court has repeatedly held that a witness' credibility is a matter of fact for the jury to determine. Additionally, the State introduced photographs of the defendant purchasing gas at the Hess gas station early that morning shortly before the fire started. Moreover, the perpetrator of the murder was obviously the same person as the perpetrator of the arson. And the State introduced DNA evidence proving the identity of the murderer. Kaczmar murdered Maria Ruiz and then purchased gas to burn the house with her body in it, in a vain attempt to avoid detection. There was competent, substantial evidence and therefore, the trial court properly denied the motion.

The trial court's ruling

After the State rested, defense counsel moved to a judgment of acquittal asserting that the State failed to prove arson because "evidence doesn't support the elements . . ." (T. Vol 17 848). The trial court denied the motion observing that the "place burnt down" and a witness had testified that Kaczmar told him that he had set the fire. (T. Vol 17 848).

Standard of review

The standard of review is *de novo*. *McDuffie v. State*, 970 So.2d 312, 332 (Fla. 2007)(noting appellate courts review the denial of a motion for judgment of acquittal under the *de novo* standard).

Merits

This Court must consider the evidence and all reasonable inferences from the evidence in a light most favorable to the State when determining whether the trial court properly denied a motion for judgment of acquittal. *McDuffie v. State*, 970 So.2d 312, 332 (Fla. 2007)(citing *Fitzpatrick v. State*, 900 So.2d 495, 507 (Fla. 2005)). Where the State has presented competent, substantial evidence of the crimes charged, the trial court does not err in denying a motion for judgment of acquittal and submitting the case to the jury. *McDuffie*, 970 So.2d at 332 (citing *Conde v. State*, 860 So.2d 930, 943 (Fla. 2003). However, where a verdict depends upon a determination of the credibility of witnesses, an appellate court will ordinarily not disturb it. *Tibbs v. State*, 397 So.2d 1120 (Fla. 1981). "The fact that the evidence is contradictory does not warrant a judgment of acquittal since the weight of the evidence and the witnesses' credibility are questions solely for the jury." *Morrison v. State*, 818 So.2d 432, 451 (Fla. 2002)(quoting *Donaldson v. State*, 722 So.2d 177, 182 (Fla. 1998)). As the Fourth District recently observed, rejecting a claim that a witness' testimony lacked credibility, it is not that appellate court's role, "nor the role of the trial court ruling on a motion for judgment of acquittal, to assess the credibility of the State's witnesses." *Ramsammy v. State*, 43 So.3d 100, 108 (Fla. 4th DCA 2010).

There is direct evidence of arson in this case. Kaczmar told his cell mate, William Filancia, that he committed arson and that cellmate testified about those conversations to the jury. The jury was well aware that the cellmate was a convicted felon who had cut a deal with the prosecution. Indeed, defense counsel's cross-examination of this witness started with his three prior convictions and the fact that he was receiving a cap on his sentence of twenty years in exchange for his testimony when he had originally been facing a potential life sentence. (T. Vol 17 814-815). This was a credibility determination for the jury. And they made it.

Furthermore, the State introduced photographs of the defendant purchasing $2.00 worth of gas at the Hess gas station at 5:59 am the morning after the murder. This was shortly before the 911 call made by Eva Mitchell reporting the fire at the house on Dothan Road at 6:10 am. Additionally, after buying $2.00 worth of gas at the Hess gas station, Kaczmar inexplicably purchased $10.00 worth of gas in Jacksonville that same morning.

Moreover, the perpetrator of the murder was obviously the same person as the perpetrator of the arson. The trial court was entitled to consider all the evidence regarding who the perpetrator of the murder was, including the victim's DNA on the defendant's sock, in determining the judgment of acquittal on the arson count. There is competent, substantial evidence of arson and therefore, the trial court properly denied the motion for judgment of acquittal on the arson count.

ISSUE IX

WHETHER THIS COURT SHOULD RECEDE FROM ITS EXTENSIVE PRIOR PRECEDENT THAT FLORIDA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL? (Restated)

Kaczmar asserts that this Court should recede from its numerous cases holding that Florida's death penalty statute does not violate *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court should not recede from its solid wall of precedent rejecting *Ring* claims. Appellant provides no reason for this Court to do so. Furthermore, *Ring* does not apply to this particular case because the prior violent felony aggravator is present. Recidivist aggravators are exempt from the holding in *Ring*. Kaczmar had previously been convicted of robbery. The prior violent felony aggravator is not required to be found by the jury under any view of *Ring*. Furthermore, one of the aggravating circumstances found by the trial court was the during-the-course-of-a-felony aggravator. This Court has repeatedly held that *Ring* does not apply to cases where the jury convicts a defendant in the guilty phase of a separate felony. The jury convicted Kaczmar of attempted sexual battery. *Ring* was satisfied in the guilt phase in this particular case. Moreover, the jury necessarily found an aggravating circumstance when recommending a death sentence. Kaczmar's jury recommended a death sentence. In Florida, a jury must find an aggravating circumstance before recommending a death sentence. Thus, Florida's death penalty statute does not violate the Sixth Amendment right to a jury trial, as this Court has repeatedly held.

<u>The trial court's ruling</u>

Kaczmar filed an "*Apprendi*-type motion to (1) dismiss the indictment and (2) require special jury verdict forms and (3) require specific jury findings on sentencing issues. (R. Vol. 4 648-672). This motion was pre-trial motion No. 16. (R. Vol. 4 647). The trial court denied the motion. (R. Vol. 10 1811).

Preservation

This issue is preserved. Kaczmar properly filed a motion and obtained a ruling from the trial court. *Baker v. State*, - So.3d. -, 2011 WL 2637418, 6 (Fla. 2011)(explaining to be preserved, the issue or legal argument must be raised and ruled on by the trial court quoting *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008).

Standard of review

The standard of review is *de novo*. Constitutional challenges to statutes are reviewed *de novo*. *Miller v. State*, 42 So.3d 204, 215 (Fla. 2010)(stating "[w]e review a trial court's ruling on the constitutionality of a Florida statute de novo" regarding a Sixth Amendment challenge to Florida's death penalty scheme pursuant to *Apprendi* and *Ring*).

Merits

The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The United States Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) held that the Sixth Amendment requires that aggravating factors, necessary under Arizona law for imposition of the death penalty, be found by a jury.

Ring was the application of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to capital cases. Arizona's death penalty statute, which was at issue in *Ring*, was judge-only capital sentencing. Florida's death penalty statute, in contrast, as the *Ring* Court itself noted, is a hybrid system involving both a judge and a jury. *Ring*, 536 U.S. at 608, n.6, 122 S.Ct. at 2442, n.6 (noting that Arizona, like Colorado, Idaho, Montana and Nebraska, "commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges" and noting that four States, Alabama, Delaware, Florida and Indiana, "have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations."). Florida's scheme is jury plus judge sentencing, not judge only sentencing.

This Court has repeatedly, over the years, rejected *Ring* challenges to Florida's death penalty scheme. As this Court has recently noted: "we have repeatedly rejected constitutional challenges to Florida's death penalty under *Ring*." *Ault v. State*, 53 So.3d 175, 205-206 (Fla. 2010)(rejecting a *Ring* challenge to Florida's death penalty scheme citing *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), and *King v. Moore*, 831 So.2d 143 (Fla. 2002)). Kaczmar provides no reason for this Court to recede from this solid wall of precedent.

Ring does not apply to this particular case. One of the aggravating circumstances was the prior violent felony aggravator. Kaczmar had previously been convicted of robbery. This aggravator is not required to be found by the jury under any view of *Ring*. There is an exception to *Ring* for recidivist aggravators. The United States Supreme Court exempted prior convictions from the holding of *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), explaining that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), survived *Apprendi* and *Ring*. *Tai A. Pham v. State*, - So.3d -, -, 2011 WL 2374834, 6 (Fla. June 16, 2011)(explaining that the express exceptions to *Apprendi* that were unaltered by *Ring*). This Court has repeatedly rejected *Ring* claims where the prior violent felony aggravator is present. *Evans v. State*, 975 So.2d 1035, 1052-1053 (Fla. 2007)(rejecting a *Ring* claim where the prior violent felony aggravator was present citing *Duest v. State*, 855 So.2d 33, 49 (Fla. 2003)).

Moreover, if *Ring* applied and required that the jury find one aggravator, then *Ring* was satisfied in the guilt phase in this particular case. One of the aggravators found by the trial court was the "during the course of a felony" aggravator. The jury found Kaczmar guilty of attempted sexual battery in the guilt phase. Basically, the jury unanimously found this aggravator in the guilty

phase by convicting him of attempted sexual battery. *Ring* was satisfied before the penalty phase even began. As this Court recently reiterated in *Baker v. State*, - So.2d -, -, 2011 WL 2637418, 16 (Fla. July 7, 2011), "*Ring* is not implicated when the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony." *Baker*, - So.2d at - citing *McGirth v. State*, 48 So.3d 777, 795 (Fla. 2010)(citing *Robinson v. State*, 865 So.2d 1259 (Fla. 2004)). Accordingly, *Ring* is not violated in a case where the jury unanimously finds an aggravator in the guilty phase by convicting a defendant of an underlying felony.

The United States Supreme Court, in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), a case that was a precursor to *Apprendi* and *Ring,* explained that Florida's death penalty does not violate the Sixth Amendment. It was a footnote in *Jones* stating "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," that essentially become the holding in *Apprendi*. *Jones*, 526 U.S. at 243 n.6.[8] The *Jones* Court

[8] Minus the language in *Jones* regarding the indictment clause because the federal indictment clause does not apply to the states. *Hurtado v. California*, 110 U.S. 516, 538, 4 S.Ct. 111, 28 L.Ed. 232 (1884)(holding that the Indictment Clause of the Fifth Amendment is not incorporated against the states via the Due Process Clause); *Branzburg v. Hayes*, 408 U.S. 665, 688 n. 25, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972)). Neither *Ring* nor Apprendi affected this. *Williams v. Haviland*, 467 F.3d 527, 532 (6th Cir. 2006)(noting that *Apprendi*'s holding does not mention any requirements related to the *indictm*ent and explaining the difference between the footnote in *Jones* and the

explained that if there is a jury recommendation of death, the Sixth Amendment right to a jury trial is not violated. The *Jones* Court explained that in *Hildwin*, a Florida case, a jury made a sentencing recommendation of death, thus "necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." *Jones*, 526 U.S. at 251, 119 S.Ct. at 1228. See also *State v. Steele*, 921 So.2d 538, 546 (Fla. 2005)(explaining that a finding of an aggravator "is implicit in a jury's recommendation of a sentence of death" citing *Jones*). A jury in Florida is instructed that they may not recommend death unless they find an aggravator. So, a jury that recommends death has necessarily found at least one aggravator. According to both the United States Supreme Court in *Jones* and the

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holding in *Apprendi*). This Court has repeatedly reject claims that the aggravator must be listed in the indictment. *Tai A. Pham v. State*, - So.3d -, -, 2011 WL 2374834, 6 (Fla. 2011)(stating that "this Court has repeatedly rejected the argument that aggravating circumstances must be alleged in the indictment" citing *Coday v. State*, 946 So.2d 988, 1006 (Fla. 2006); *Ibar v. State*, 938 So.2d 451, 473 (Fla. 2006); *Blackwelder v. State*, 851 So.2d 650, 654 (Fla. 2003); ain *Kormondy v. State*, 845 So.2d 41, 54 (Fla. 2003); and *Rogers v. State*, 957 So.2d 538, 554 (Fla. 2007)). Furthermore, even if the aggravators were required to be alleged in the indictment, there would be no error, there is no error. As one court explained citing Blackstone, courts should not reverse otherwise proper convictions simply because the prosecution proceeded by information rather than by indictment because: "The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment." *United States v. Gabrion*, 648 F.3d 307, 330 (6th Cir. 2011)(citing 4 William Blackstone, Commentaries *305). If this observation was true in Blackstone's day, it is even more true today. With Florida's modern extensive discovery practices, there simply can be no argument that a defendant lacked notice of the aggravators.

Florida Supreme Court in *Steele*, a jury's recommendation of death means the jury found an aggravator which is all *Ring* requires.

Kaczmar's jury recommended death by a vote of eleven to one. His jury necessarily found at least one aggravator in order to recommend death. There can be no violation of the Sixth Amendment right to a jury trial where the defendant had a jury and that jury necessarily found an aggravator.

Harmless error

Furthermore, if even there had been a violation of the Sixth Amendment right to a jury trial, violations of the Sixth Amendment right to a jury trial, including *Ring* claims, are subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)(finding that error in the judge determining the issue of materiality rather than properly submitting the materiality issue to the was harmless). A rational jury would have found an aggravator. Specifically, a rational jury would have found the HAC aggravator in a case where the victim was stabbed 93 times and who had numerous defensive wounds and whose throat was slit. Any error was harmless.[9]

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[9] Although not raised as an issue on appeal, this Court reviews the proportionality of the death sentence in every capital case. *Barnes v. State*, 29 So.3d 1010, 1028 (Fla. 2010)(noting that "this Court reviews the death sentence for proportionality regardless of whether the issue is raised on appeal"). The death sentence in this case is proportional. The trial court found four aggravators, including HAC and not a single statutory mitigator. This court has found the death sentence proportionate in similar factual cases with similar aggravators and mitigators. See *Williams v. State*, 967 So.2d 735, 765-767 (Fla. 2007)(rejecting a claim of disproportionality where there were three aggravators including HAC and two statutory mitigators given little weight and five non-statutory mitigators

CONCLUSION

The State respectfully requests that this Honorable Court affirm the convictions and death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Assistant Public Defender David A. Davis, 301 South Monroe Street Suite 401, Tallahassee, FL 32301 this 20th day of October, 2011.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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given then slight weight in a case where the victim was stabbed six or seven times). Here, the victim was stabbed 93 times and there were no statutory mitigators found. The death sentence in this case is proportional.