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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1122

LEON DAVIS, JR.,

Appellant/Cross-Appellee

vs.

THE STATE OF FLORIDA,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE/CROSS-APPELLANT

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STATEMENT OF CASE AND FACTS

This is a case in which Defendant, for purposes of committing a robbery, came to the Headley Insurance Company, equipped with various items that he had previously obtained so that he could effectuate his crimes. When two business employees, Yvonne Bustamante and Juanita Luciano, would not give him money, Defendant doused them with gasoline and set them on fire. Both victims eventually died from severe burn injuries. Prior to Luciano's death, her child, Michael Bustamante, was delivered by cesarean section and died three days after his birth.

In late 2007, Defendant and his wife were experiencing financial difficulties, they had no income, they had reached credit limits on their credit cards and were behind on mortgage payments. (90/4001) In November 2007, Defendant's wife took a leave without pay because she had difficulties with her pregnancy. (90/3996) Defendant cancelled insurance on one car because they could not afford it but was paying the insurance for their second car. (90/3997, 4003) At that time, Defendant did not even have a cell phone because he could not afford it. (90/4004)

On December 7, 2007, Defendant purchased a .357 Dan Wesson gun from his cousin, Randy Black, for $220. (90/4052-56) Black gave Defendant a handful of .38 ammunition. (90/4058-59)

On December 13, 2007, in the morning hours, Defendant went to Wal-Mart where he purchased a ball cap, a gray T-shirt, an orange cooler, a Bic lighter, and

gloves. (85/3197-3228; 3183, 87/3475-86) Jennifer Debarros, a Wal-Mart employee, saw Defendant in the store and talked to him about getting together for his son's birthday. (86/3270)

Around 8:00 a.m., Defendant came to the house of his sister, India Owens, and stayed there for an hour. (86/3344-46) Then, Defendant and Owens went to a body shop to drop off Owens' car. (86/3346-47) After dropping off Owens' car, they proceeded to the Enterprise where they rented a car. (86/3346-51)

Soon thereafter, Defendant and Owens went to Beef'O'Brady's restaurant where they had a lunch with Derrick Johnson and his cousin, Matt. (86/3354-57; 88/3743) Defendant's mood began to change and he became distraught and aggravated. (86/3422)

After finishing the lunch around 1:38 p.m., Defendant went to Owens' home to help her rearrange the furniture. (86/3354-57; 88/3743) Defendant asked Johnson, who at that time was living with Owens, if he had some duct tape. (88/3745-47) Johnson directed Defendant to find it by himself in the garage because he had to go to work. (88/3745-47) Johnson got to work at 2:30 p.m. (88/3754, 3761)

Around 3:30 p.m., Defendant came to the Headley Insurance Company equipped with a gun, duct tape, a Bic lighter and a gas can. (82/2584; 80/2400; 88/3745-47; 90/4052-56) He locked the door to prevent customers from entering

and placed duct tape on the lens of the surveillance camera. (80/2302-03) Defendant restrained two Headley employees, Yvonne Bustamante and Juanita Luciano, with duct tape. (83/2771; 85/3163-64) Defendant demanded that Bustamante and Luciano give him money. (85/3163-64; 82/2638) One of them activated a panic alarm. (91/4175; 4242-43, 4258-59; 80/2400) Because the two women did not give him money, Defendant doused them with gasoline and set them on fire. (82/2638; 85/3163-64) Somehow Bustamante and Luciano managed to free themselves and proceeded to escape the burning building. (82/2593-94) Defendant started shooting and he shot Bustamante in the hand. (81/2467-68)

At the same time, Evelyn Anderson tried to enter the front door of the building, but it was locked. (82/2587) She looked around when she heard three pops and noticed smoke that was coming out. (82/2587, 2591) At that moment, Defendant came out of the building with something like a bag under his arm. (82/2590) Defendant told Anderson that there was a fire inside the building and walked away. (82/2587-89) The next moment, Bustamante ran out of the building, screaming for help. (82/2594-95) She was burned badly and her clothes burned off. (82/2594-95) Anderson tried to help her by trying to get the fire off of her body. (82/2595)

While this was happening, Fran Murray, Vicky Rivera and Brandon Greisman (who were living in the building across the street), saw the smoke at

Headley and went to see what had happened. (81/2461-63) Greisman came around the corner of the building and Bustamante ran into him. (83/2869) She was hysterical, asking for help, she was badly burned, and her skin was melting. (83/2869-71)

The next moment, Bustamante moved and Greisman was able to clearly see Defendant's face as he was walking towards Greisman. (83/2879-80) Defendant pulled out his gun from an orange lunch bag, pointed it at Greisman and shot him in the nose. (83/2880-82) Greisman fell on the ground. (81/2467-68) Murray came in time to see Bustamante holding her hands up, badly burned, with her skin coming off of her body. (81/2462-66) She was also able to see Greisman getting shot. (81/2467-68)

Carlos Ortiz, who also followed Greisman, Rivera and Murray, to check what was happening across the street, came in time to see Greisman walking back and holding his face, after he got shot. (84/3038-39) When Greisman saw Ortiz, he pointed at Defendant and said, "That guy shot me." (84/3040) Ortiz looked at Defendant and was able to clearly see his face because he was afraid that Defendant could come after him too. (84/3042-43) Ortiz was also able to observe Defendant as he walked away to the house at 118 West Stewart and drove off in a black Nissan. (84/3046-47)

Murray approached Greisman to help him stop the bleeding from the nose

and also assisted him to get to his home. (81/2474-75) She then immediately returned in front of Headley where she saw Bustamante leaned against an SUV. (81/2475-81) Bustamante was screaming, her skin was rolling off of her body and Murray could smell flesh. (81/2481) Bustamante was screaming that she was thirsty and hot. (81/2481)

Murray immediately went to Havana Nights Restaurant across the street to bring some water for Bustamante. (81/2481-82) There she saw Juanita Luciano who also managed to escape the building and enter the restaurant. (81/2481-82) Murray took the water and brought it to Bustamante. (81/2482-84) Bustamante told Murray that she did not understand why anyone would rob her because she did not have any money. (81/2486) Then, Bustanmante voiced to Murray, "Please pray, I'm not going to make this Fran." (81/2486) Bustamante also told Murray that a black man hurt her and that everything should have been on the video tape. (81/2486)

In about 15 minutes, the medical assistance came to the parking lot of Hadley. (81/2484) Ernest Froehlich and John Johnson, paramedics, observed that Bustamante was badly burned, her clothing was also burned and her skin was hanging off of her body. (82/2685-87; 83/2765-66) They put Bustamante in an ambulance truck. (82/2685-88) Bustamante's hands and knees were charred, she had third degree burns but could speak coherently. (82/2693)

Lt. Joe Elrod, who was dispatched to the crime scene, came to the ambulance truck where Bustamante was placed on a stretcher. (82/2633-34; 2701) Lt. Elrod immediately observed that she was badly burned, with 80% of her body surface burned and her skin was coming off. (82/2636-37) Lt. Elrod thought that she was not going to survive. (82/2636-37) Lt. Elrod immediately asked Bustamante who did this to you and she told him that it was Defendant. (82/2637) Bustamante explained that Defendant was a prior client at the insurance company. (82/2637) Bustamante also said that Defendant tried to rob her and that because he did not get the money, he threw the gas on her. (82/2638) After he got Defendant's name, Lt. Elrod immediately transferred that information through the radio. (82/2646)

After finishing with Bustamante, Lt. Elrod went to Havana Nights because he learned that another woman was injured too. (82/2641) When he came there, no ambulance personnel was present. (T82. 2642-45) He observed that Luciano was pregnant and in even worse condition than Bustamante. (82/2642)

When Johnson finished assisting Froehlich in starting the medical procedure with Bustamante, he went to Havana Nights restaurant to assist Luciano. (83/2768) Johnson saw Luciano was severely burned, naked, and had a plastic tape around her wrists and neck. (83/2771) Luciano was conscious and able to talk clearly. (83/2772) She complained that she was set on fire, that it burned around her wrists,

and that she was in pain. (83/2772) She also told Johnson that she was pregnant. (83/2777)

Shortly thereafter, more medical personnel came to assist Luciano. (82/2775-80) George Bailey, another paramedic, assessed that 80% of Luciano's body was burned, and that she had 2nd and 3rd degree burns. (85/3155-59) Luciano told Bailey that there was a robbery, that she was bound with a tape and set on fire. (85/3163-64) She knew the person who did it. (85/3163-64)

Soon afterwards, Bustamante and Luciano were transported to the hospital where they eventually died. (85/3167; 82/2775-80) Prior to Luciano's death, her child, Michael Bustamante, was delivered by Caesarian section. (88/3707) Michael was born alive and died three days later. (88/3707) Greisman was taken to the hospital where he had surgery. (83/2896-97)

Around 4:00-4:30 p.m., after he completed his crime spree at Headley, Defendant went to the house of his brother Garrion Davis. (89/3835; 3882-84) He took a shower. (89/3835) Defendant told Davis that he had robbed somebody. (89/3835) He left after 10 minutes. (89/3882-84)

Defendant then proceeded to the Mid Florida Credit Union in Winter Haven. (86/3424) At 4:23 p.m., he made a cash deposit in the amount of $148.

Around 5:00 p.m., Defendant went to Fonda Roberts' house where he borrowed Fonda's phone which he used for a couple of minutes. (89/3782-84) He

called his sister, Noniece DeCosey and asked her to pick him up at McDonald's in Winter Haven. (89/3895-97) Barry Gaston, a private investigator who knew Defendant, found out that the police were looking for him. (87/3571-73) He made arrangements with Defendant's sister, India Owens, that they meet Defendant at Circle K store so he could safely turn himself in. (87/3575-77; 86/3361-62)

Soon thereafter, DeCosey, Defendants' mother and Defendant went to the Circle K store where they met with Gaston and Owens. (87/3578-80; 86/3363-64; 89/3899) When Gaston approached Defendant, Defendant told him that he had hurt somebody. (87/3580-81) Defendant had a red mark on his nose. (89/3908)

The group then drove to Polk County Sheriff's Substation in Lake Wales where Defendant surrendered. (87/3581-82) On their way to the police, Defendant was crying the whole time. (86/3370; 87/3582) Defendant kept saying, "I hurt somebody, mom." (87/3583)

When Defendant was arrested, he had a visible injury on his nose. (81/2410-15) Defendant's vehicle, a 2005 Nissan Altima, was found in front of the Lagoon Night Club in Winter Haven. (81/2421-28, 2437-38; 90/3936-39, 3947-49)

When the police came to the crime scene, shortly after the incident, Bustamante identified Defendant as the person who robbed and set her and Luciano on fire. (82/2637) The police processed the crime scene and found, among other items, a Bic red lighter, duct tape, and a gas can. The police came into

possession of video footage from the Wal-Mart, that showed that in the morning of the day of the incident, Defendant bought a Bic lighter, gloves, and an orange six-pack cooler. (85/3197-3228; 3183, 87/3475-86) Gloves and traces of petroleum were found in Defendant's vehicle that was recovered at Lagoon Nightclub. (90/4047) Witnesses described that Defendant had put his gun into an orange-ish lunch bag. (81/2472-73, 83/2880-82, 84/3049-50)

Greisman and Ortiz identified Defendant as the person who shot Greisman in front of the Headley. (83/2899-2900, 84/3062-68) Defendant confessed that he had robbed and hurt somebody. (89/3835, 87/3583)

The investigation revealed that six days before the incident, Defendant purchased a .357 Dan Wesson gun and procured a handful of .38 ammunition. (90/4052-56) Ballistic examination revealed that the projectiles from the crime scene were of a .38 or .357 caliber class**.** (90/4018-29)

As a result, Defendant was charged by indictment with the first degree murder of Michael Bustamante (Count I), first degree murder of Yvonne Bustamante (Count II), first degree murder of Juanita Luciano (Count III), attempted first degree murder of Brandon Greisman (Count IV), armed robbery (Count V), first degree arson (Count VI) and possession of a firearm by a convicted felon (Count VII). (2/73-78)

In her taped statement to the police, Ashley Smith testified that on the day of the incident, as she was pulling in front of Havana Nights restaurant, a pregnant lady ran out from the insurance building, bleeding and screaming for help. (SR1. 1) She was burned all over her body. (SR1. 2) Smith parked her car and took the woman into the restaurant. Id. She did not have any fire on her at that moment and kept mentioning that her friend was killed. Id. Then, Smith ran out of the restaurant, heard three shots and saw a second woman on fire, who ran out of the insurance building. Id. At the same moment, Smith saw a black man in a gray shirt fleeing the scene in a black Nissan Altima which had rims on it. (SR1. 2)

In her deposition, Smith stated that the woman inside the Havana Nights was screaming so much that Smith had to go outside to call 911. (SR1. 20) While she was on the phone, Smith saw another burned woman run out of the building and jump on Evelyn Anderson's truck. (SR1. 22) A few moments later, Smith saw a man running out of the building and a few minutes after, she heard gunshots. (SR1. 24) She described the man as a black man, with a gray shirt, but she did not see his face. (SR1. 28-29) Smith heard gunshots after she saw the man run out of the building, (SR1. 29) He fled in a car that appeared to be Nissan Altima with rims. (SR1. 30)

Prior to trial, Defendant filed motions to exclude victim Luciano and Bustamante's hearsay statements. (10/1565-68) Defendant stated that both Luciano

and Bustamante made certain statements regarding the incident and the perpetrator before they were sent to the hospital. As grounds, Defendant asserted that there was insufficient evidence to prove personal knowledge regarding the identity of the perpetrator, that the statements are inadmissible hearsay and violated the Confrontation Clause and that the probative value was substantially outweighed by the danger of unfair prejudice. Id.

Defendant also filed a motion to suppress an in-court identification by Brandon Greisman. (10/1584-86) He argued that he did not receive a copy of the photo lineup shown to Greisman. Id. He further argued that unless the lineup was provided to Defendant, any in-court identification should be suppressed because it violated his right to confront witnesses, the right to effective assistance of counsel, and due process rights. Id.

In his motion to suppress in-court identification by Carlos Ortiz, Defendant argued that any identification was tainted because of the use of the suggestive photopack where Defendant's photo had a 2007 book-in number and the rest of the photos all had either 1993 or 1994. (10/1596-99) He also stated that Defendant's hair was shorter and not as thick as other people, and that Defendant was much older than other people. Id. He also argued the violation of his confrontation rights and due process. Id.

At the hearing on the motions to exclude Bustamante and Luciano hearsay statements, Frances Murray testified that on December 13, 2007, she lived at 123 ½ Stuart Avenue and was familiar with that area. (11/1607) She was sitting on the porch at her apartment with Vicky Rivera. (11/1612) At one moment, they saw smoke across the street and went there to see what happened. Id. Brandon Greisman, who was sitting on his front porch, went with them too. (11/1613) Murray and Rivera walked to the alleyway by the building that they thought was on fire. (11/1615) Then they saw the smoke and heard sounds like firecrackers, "pop, pop, pop." (11/1615) Rivera ran back towards her house to get the telephone. (11/1616) Murray went around the side of the building and saw Greisman hit the ground because he was shot in the face. (11/1616)

As she was watching Greisman falling down to ground, Murray saw Bustamante walking with her hands up and a man was walking behind her. (11/1618) Bustamante went to the front of the building and a man that was behind her walked down Phillips Street, headed to the north. (11/1618, 1625) Murray explained that when she first saw Bustamante, Bustamante was coming out of the alleyway, and Murray did not actually see her coming out of the building. (11/1620) Bustamante was burned so badly so that her skin was rolling off of her, her hands were tied with gray duct tape, and her clothes was melting. (11/1621-23)

Bustamante was screaming “Please, I need something to drink. Please, please, I’m hot. I’m hot. I’m hot. It hurts so bad.” (11/1623)

Bustamante then walked to the front of the building and Murray went to help Greisman. (11/1626) Murray ripped off her shirt and put it on Greisman’s nose to stop the bleeding. (11/1627) After she finished helping Greisman, Murray went to the front of the Headley office where she saw Bustamante leaning against an SUV. (11/1627) Murray explained that Bustamante was the woman she first saw coming out of the building and then had contact with her when she was at the front of the building. (11/1628) When Bustamante was leaning against an SUV, she was screaming and asking for water. (11/1628)

Murray then went across the street to Havana Nights restaurant to get some water. (11/1628) There, Murray noticed Luciano, sitting in the booth. (11/1629) Luciano was also burned and bleeding. (11/1630)

Murray took the water and immediately returned to Bustamante. (11/1631) She helped Bustamante to drink the water because her lips were burned and her skin was peeling over her lips. (11/1631) Murray asked Bustamante if she knew who did this to her and she said that it was a black man and that it was on camera. (11/1631) Bustamante then kept repeating that her body hurt so bad. (11/1631) Bustamante told Murray, “Please keep me in your prayers. I’m not going to make it.” (11/1631) Murray then told Bustamante that her name was Fran and that she

would come to see her and Bustamante responded that she was not going to make it. (11/1632) Murray stayed with Bustamante until the paramedics and police arrived. (11/1633) She helped load Bustamante into the ambulance. (11/1633) Bustamante's skin was so badly burned that paramedics had difficulty putting her on the bed. (11/1633) Once Bustamante was loaded, Murray went to see Greisman. (11/1633)

On cross, Murray said that she did not ask Bustamante who did it to her. (11/1664) She asked Bustamante what had happened and Bustamante said that a black man taped her, doused her with gasoline and that it was on camera. (11/1664-65)

Vicky Rivera testified that first time she saw Bustamante was behind the Headley insurance building, where the dumpster was located. (11/1676) Bustamante was leaning against the dumpster. (11/1676) She was burned from head to toe, her clothes were completely burned off and she had gray tape around her neck and head. (11/1677) Rivera approached Bustamante and asked her what happened and she just said "call 911." (11/1679)

Rivera ran to her house to call 911. (11/1679) After she called 911 from her home, Rivera came back and saw Bustamante again in front of the Headley insurance building, leaning against an SUV. (11/1680-81) Rivera observed

Bustamante's skin was burned, she was screaming for water several times, and she was in pain. (11/1682) Murray then went to get some water. (11/1683)

Soon thereafter, Rivera left that area before police and paramedics came. (11/1683) Rivera confirmed that she first saw Bustamante behind the insurance building and then again in front of the building. (11/1684-85)

On cross, Rivera stated that when she came to the front of the building, Murray was already there. (11/1697) Murray then went to get some water. (11/1698) Rivera saw Murray giving water to Bustamante but she did not hear if they talked because she was standing a little bit away. (11/1698)

Evelyn Anderson testified that on December 13, 2007, around 3:00 pm, she went to the Headley insurance to make a payment. (11/1706) She parked her Tahoe in front of the building and walked up to the front door that appeared to be locked. (11/1708) She walked around and came back to the door she previously tried to open. (11/1708) At that moment, a black, nicely dressed man with a cap, came out of the door. (11/1709) He told Anderson that there was a fire in the building. (11/1710) Before the man came out, Anderson heard three pops and saw the smoke coming out. (11/1711) The man walked away towards the Havana Nights restaurant. (11/1712)

A few seconds after the man came out, a woman ran out of the door. (11/1712) She was naked, bleeding, had burned clothes hanging off of her and her

skin was falling off. (11/1713) The burned woman was repeatedly asking for help. (11/1714, 1717) The woman got into Anderson's Tahoe but then got out and was standing outside on the truck. (11/1715)

Soon thereafter, the paramedics came and put the woman on the stretcher. (11/1715-16) One of the paramedics asked her what had happened and who did it to her and the woman "said Leon Davis." (11/1716, 1718)

On cross, Anderson said that she did not see any woman giving Bustamante the water. (11/1729) Anderson explained that at first nobody was at the scene but that later, people started coming. (11/1730) Anderson did not recognize either Murray or Rivera from the scene but they could have been there close to Yvonne as she was not paying attention. (11/1730) She could not remember if anyone gave Yvonne any water but it was possible that Murray or Rivera gave her some. (11/1731)

Dr. Stephen Nelson testified that he performed an autopsy on Bustamante. (11/1744) She died due to thermal injuries encompassing 80-90% of her total body surface area. (11/1745) She also had a gunshot wound to her left wrist. (11/1745) A person doused with gasoline and set on fire would immediately feel pain and would be able to move around and talk. (11/1750, 1756) Bustamante suffered second and third degree burns. (11/1751) When someone is burned over 85% of

their body, there is about 15% chance of survival. (11/1753) The person with injuries like Bustamante's would be able to communicate. (11/1757)

Dr. Nelson also performed an autopsy on Luciano. (11/1753) The cause of her death was complications from thermal burns due to a commercial business fire. (11/1753) She had third degree burns with 90% of her body surface burned. (11/1759) There could have been some areas of her body that had fourth degree burns. (11/1759) Her pain perception would have been similar to Bustamante's and she would be able to move, talk and be coherent. (11/1761)

Joe Elrod, a police lieutenant, testified that on December 13, 2007, he received information from a dispatcher that someone had been shot in the area of Central Avenue and Phillips Street and that the shooter was fleeing the area, going north on Phillips Street. (12/1779-80) Lt. Elrod was approaching the scene while initially looking for a suspect with a gun. (12/1781-82)

When Lt. Elrod arrived at the scene, he saw that a person had been shot right through the nose but that the injury was not life threatening. (12/1782-83) There were no medical personnel at the scene. (12/1783) The injured man told him that his injury was related to the incident at the burning building and that there were other people injured too. (12/1783) The injured man explained to Lt. Elrod that after he heard a woman screaming, he ran to the building to help. (12/1783-84) When he arrived there, he saw a woman on fire and a black man who was throwing

stuff on her. (12/1783-84) The injured man further told Lt. Elrod that he then went to help the burned woman but at that moment the black man shot him. (12/1784)

Lt. Elrod immediately went to the front of the Headley Insurance building where he saw ambulance personnel and an injured person. (12/1784-85) He observed a badly burned female with almost her entire body burned. (12/1789) He thought that she was not going to survive because of the extensive injuries she had suffered. (12/1791) Lt. Elrod talked to the injured woman as she was conscious and could talk clearly. (12/1793) He immediately asked the woman who did this to her and she answered that it was Leon Davis and that he was a client of her insurance company. (12/1793) The woman said that Davis came to the insurance company demanding money and when she refused to give it to him, he threw gasoline on her and her colleague and set them on fire. (12/1793-94) Lt. Elrod then helped the medical personnel put the injured woman in the ambulance. (12/1798)

At that moment, Lt. Elrod was approached by someone who told him that the other injured person was in the restaurant across the street. (12/1798-99) He immediately went to the restaurant where he saw a woman who was burned even worse than the woman on the gurney. (12/1799) The woman was seated in a chair and there were no medical personnel present. (12/1799) Lt. Elrod observed that approximately 90% of her body was burned, her skin fell off and she was visibly pregnant. (12/1802-04)

Lt. Elrod asked the woman who did that to her and she responded by asking how was the other woman. (12/1802-03) Lt. Elrod responded that the other woman was also burned badly. (12/1803) Then, he asked again if she knew who did this to her and she answered by asking him if the other woman told him who it was. (12/1803) After Lt. Elrod confirmed that the other woman did say who it was, the woman asked him if the other woman said that it was Leon. (12/1803) Lt. Elrod confirmed. (12/1803) Then, the woman told Lt. Elrod that Leon Davis was the person who hurt her. (12/1803) The woman said that Defendant was a client of her company, that she knew him personally and that her husband knew him too. (12/1803) She further stated that Defendant tried to rob her and her colleague and when they did not want to give him what he wanted, he set them on fire. (12/1803) The burned woman also said that Defendant was throwing the gasoline on them even after they were burning and trying to run out the door. (12/1803-04)

The next moment, the woman threw up her hands and said: "Look what he did to me." (12/1804) Lt. Elrod stated that he was surprised that the woman was still conscious considering the extent of the injuries she suffered. (12/1804-05) Soon thereafter, when he heard an ambulance coming, he ran outside to make sure that they would come to the restaurant and help the injured victim. (12/1805-06)

On cross, Lt. Elrod testified that based on what he saw on the day of the incident, he determined that both women knew that they were going to die.

(12/1808-09) He could not remember any particular woman assisting the burned woman in the parking lot because he was just focused on the victim but he had noticed people around. (12/1812)

John Calvin Johnson, III, a paramedic, testified that in the afternoon of December 13, 2007, he went with his partner, Ernest Froehlich, to Headley Insurance in Lake Wales. (12/1823) There, he saw a burned woman that was leaned against an SUV. (12/1823-24) He was with her briefly because he heard that there was somebody else injured in a nearby café. (12/1828-29) He observed an officer approach her and the woman was speaking. (12/1824) Johnson heard the woman say "Davis did this." (12/1824) The woman also said the first name of the person but Johnson did not catch it. (12/1824-25) Johnson explained that the woman was yelling "Davis did this" while a police officer was approaching her and before the officer asked her any questions. (12/1825-27) Because the woman was already receiving medical assistance, he left to the restaurant across the street to help another injured person. (12/1828)

In the restaurant, Johnson observed a severely burned woman, with third degree burns. (12/1829) He noticed that this woman had only a part of her panties on her and had charred tape around her neck and wrists. (12/1830) The woman said that she was still burning underneath the tape. (12/1830) The skin came off of her and she was in pain. (12/1837) She was able to talk. (12/1830)

Johnson then went to get the medical kit and he came back to the restaurant to help the woman. (12/1831-32) He poured water onto the area around her wrists because she had charred tape around it. (12/1832) There was also charred tape around the woman's neck and ankles as well. (12/1834) Johnson observed that both victims had breathed flame and he knew that people who deeply breathed flames never survived. (12/1836-37)

Ernest Froehlich, an EMT driver, testified that on December 13, 2007, he arrived in front of Headley Insurance in Lake Wales with John Johnson, a paramedic. (12/1849) At the scene, he observed a chaotic situation, people were directing him in different directions where injured people were located. (12/1849) He first went to see Bustamante who was standing by an SUV in the parking lot. (12/1849) Bustamante was in shock, she had all of her clothes burned off. (12/1850) Froehlich and Johnson got Bustamante in the ambulance. (12/1852) At one moment, a police officer came into the ambulance and asked Bustamante if she knew who did this to her. (12/1855) Bustamante "raised up and like hollered, Leon Davis." (12/1856) The police officer left and Froehlich stayed alone with Bustamante. (12/1861) After she told Froehlich that she was shot in the hand and that she had two kids, Bustamante started crying. (12/1861)

George Bailey, a paramedic, testified that on December 13, 2007, he and Josh Thompson responded to a shooting at Headley Insurance Company. (12/1878)

They came to the Havana Nights restaurant. (12/1877-78) Bailey saw a severely burned woman who had about 80% of her body burned. (12/1879) Her skin came off and some of her clothes were charred to her. (12/1879-80) The woman was in shock. (12/1884) She was put into the ambulance and given oxygen. (12/1884) The woman told Bailey that a man poured a can of gas on her and her friend and set them on fire. (12/1887-88) Based on severity of injuries that the woman sustained, Bailey thought that she was not going to survive. (12/1905)

Joshua Thompson, an emergency medical technician, testified that the woman in the Havana Nights restaurant was critically injured, had second and third degree burns and about 80 percent of her body was burned. (12/1934-36) The woman was in pain. (12/1939) She seemed quiet and did not move a lot. (12/1939) She said that a man poured gas on her, lit her on fire and that she knew who he was. (12/1939)

Hewett Tarver, a flight nurse, testified that she first dealt with Bustamante when she was in the ambulance of Polk County EMS. (13/1954) Bustamante was in lot of pain, and her whole body was burned. (13/1954-55)

Shannon Hall, a flight paramedic, testified that she dealt with Luciano and observed that Luciano was burned from head to toe. (13/1979, 1972) Around 80-90% of her body was burned and Hall thought that a chance for survival was very slim. (13/1973-74)

Christopher Cate, a paramedic, testified that Bustamante had severe burns on the entire body surface, her skin was sloughing off, and she was in severe pain. (13/1983-87)

After completing the examination of the witnesses, the parties suggested that the trial court should consider Ashley Smith's police statement and deposition because she would not be able to testify due to medical reasons. (13/1988, 1992) The trial court agreed with the parties' suggestion. (13/2035)

At the hearing on the motions to suppress in-court identifications by Greisman and Ortiz, Greisman testified that on the day of the incident, he bumped into a burned woman in the front of the insurance building. (15/2439) Greisman observed a man walking towards him and the woman because he thought that the man was coming to help. (15/2440) Greisman was able to see the man's face. (15/2441-42) At one moment, the man pulled a gun out of his orange-ish lunch bag and pointed it at Greisman. (15/2444) Greisman turned around in an attempt to escape. (15/2445) The next moment, he saw blood on his chest and realized that he was shot in the nose. (15/2445)

Greisman then saw the man who shot him leaving the scene. (15/2446) Greisman explained that he took a good look at the man's face when the man approached him and not after he shot at him. (15/2446) Greisman was transported to the Lake Wales Medical Center where he stayed overnight and underwent

surgery. (15/2447) Greisman was not allowed to watch TV and read newspaper and he complied with these instructions. (15/2448-49)

The next morning, Greisman's mother took him to the police station. (15/2449) The police officers showed Greisman a photo lineup for a possible identification. (15/2450-51) The officers did not tell him that the perpetrators' photograph was in the photopack nor that the perpetrator was arrested. (15/2450-51) Greisman immediately pointed to the picture of the perpetrator because he remembered his face. (15/2451-52) Greisman identified the photo lineup with his signature. (15/2451-52) Greisman was 100% sure that he identified the right person as the shooter. (15/2455)

Officer Lynette Townsel testified that she did not talk to Greisman before he came to the police station for identification. (16/2487-88, 2539) When showed a photopack, Greisman immediately, without hesitation, made the identification. (16/2499) Townsel explained that the numbers below the photographs represented the book-in numbers. (16/2515-17) She received the pictures from the Sheriff's office. (16/2515-17) Greisman did not know what the numbers represented nor did he say anything about it. (16/2516) The photographs itself did not show the specific date when somebody was booked in. (16/2517)

Townsel stated that she made a copy of the original photo pack for her record but inadvertently kept the original instead of a copy. (16/2507-09) When

she found out that she had put the original photo pack at her home, she immediately turned it to the evidence room. (16/2510)

On cross, Townsel stated that the book-in numbers below the pictures did not show the date of the booking but did have a book-in year. (16/2521) Defendant was the only person booked in 2007. (16/2521) She explained that when she found the original photo pack at her house she thought that it was a copy but that Captain Foy thought that it was an original. (16/2530) On redirect, Townsel stated that the same photo pack was shown to Ortiz except that the pictures were moved in different places. (16/2540)

Carlos Ortiz testified that on the day of the incident, around 3:30 p.m., he saw smoke from the building across the street from his building. (17/2740-41) He went there following his neighbor, Greisman. (17/2740-41) At one moment, Ortiz lost sight of Greisman. (17/2742) When Ortiz approached the corner, Greisman was coming back holding his bloody face (17/2742) Greisman was approximately ten feet away from Ortiz. (17/2742) The next moment, Greisman said, "I been shot in the face. That guy shot me in the face." (17/2743) When Greisman made this statement, he pointed towards the man that was walking behind him. (17/2743) Ortiz immediately looked over and saw a tall black man with an orange-ish cooler type bag, walking down the street. (17/2744-45) Ortiz looked at the man as he walked down the Phillips Street. (T17. 2742) Ortiz was able to see the black man's

face and his eyes because he was looking at him as he was concerned that he was going to shoot again. (17/2747-48) He observed that the black man was about 6'3" tall. (17/2746) Ortiz also observed that the man was walking towards the back of the house on 118 Stuart, and that a black Nissan Maxima was parked there. (17/2749)

When the police came, Ortiz told Officer Black that he wanted to talk to him but Black told him that he was busy. (17/2753) On December 17, a female officer came to talk to Ortiz at his house. (17/2755-56) The detective showed Ortiz a photo lineup and he immediately made an identification. (17/2757-58) Ortiz stated that he was 100% sure he made a correct identification. (17/2761) Ortiz did not see any news nor did he read newspapers before he was shown a photopack. (17/2761)

Ortiz also stated that he had seen the shooter before, at the gate of the Florida Natural, where he used to work. (17/2760-63) Then, Ortiz identified Defendant as the perpetrator he saw at the crime scene. (17/2764)

On cross, Ortiz stated that the black man he saw at the scene had short hair and was about 25-30 years old. (17/2782-83) As to the hair, he explained that he looked like he had a small Afro hair and by an Afro hair style he considered a short hair and a type of hair that all colored people have. (17/2782) Ortiz stated that the people in the photopack all looked like they were between 25-30 years old. (17/2784) As to the facial hair, Ortiz stated that the black man had something like

shadows, that could have been an outline of a mustache and a goatee but that he was not hundred percent sure. (17/2786-87)

Officer Lynette Townsel testified that she saw Ortiz on December 17th at his home. (17/2803) Townsel showed Ortiz a photopack while she was taking his statement because during the conversation he mentioned that he saw the shooter. (17/2806-07) The photopack she showed Ortiz was put up by Sheriff's department. (17/2808) It had the same photographs like Greisman's photopack except that the pictures were placed in different order. (17/2816) Ortiz immediately made the identification from the photopack and did not have any hesitation. (17/2812) Ortiz did not look at the numbers that appeared on the photo pack nor did he say anything about it. (17/2813)

The trial court entered an order allowing Ortiz's in-court identification. (18/2827-43) The court found that there was nothing suggestive in the manner in which the police presented the photopack. (18/2836-37) The trial judge stated that he looked at the photo pack and did not find anything suggestive about it. (18/2832) The court also found nothing suggestive about the book-in numbers under the pictures. (18/2833) The judge observed that the six men all had similar features (with similar skin tones, with either no facial hair or very faint facial hair, short hair), and were of about the same age. (18/2832-36)

The trial court then stated since he did not find the photopack to be suggestive, he did not have to make a finding as to whether a suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. (18/2836-37) However, the court further stated that he took into account the factors required by the law related to the second prong of the analysis and found nothing to suggest that Ortiz's identification from the photopack and his in-court identification would have been unreliable. (18/2836-39) The court found that Ortiz was able to clearly see Defendant from approximately 13 yards, that he was certain about the identification he made, that he made an identification four days after the incident, and that he remembered that he had seen Defendant before the day of the incident at the place where he used to work. (18/2836-39)

The trial court also entered an order allowing Greisman's in-court identification. (19/3043-44) The court reasoned that there was nothing suggestive in Greisman's photopack. (19/3043-44) The court noted that the only difference between Ortiz and Greisman photopack was that the pictures 1 and 2 were inverted. Id. The court noted that Greisman testified that Defendant wore a gray shirt and that there was a man in the photo pack with a gray shirt too. Id. The court also noted that he considered the fact that Greisman went to the hospital after he got shot, had surgery and was taken to the police first thing after he woke up the next morning. Id.

The trial judge denied Defendant's motion to exclude Bustamante's hearsay statements. (19/3074-81) The court found that any statements made by Bustamante to Murray, Rivera, Anderson, and Smith were admissible under one or more of the following exceptions: a spontaneous statement, an excited utterance, or a dying declaration. Id. The court found these statements were not testimonial and thus not subject to the confrontation clause. Id. Any testimonial statements made by Bustamante to Lt. Elrod that these women overheard were admissible as dying declarations. Id. Any statement made to Lt. Elrod was admissible under one of the exceptions: a spontaneous statement, an excited utterance or as a dying declaration. Id. The trial court specifically found that Bustamante's statements qualified as a dying declaration because she believed her death was imminent. Id. It also found that Bustamante's statements that could be considered testimonial were admissible under dying declaration as the dying declaration had survived Crawford. Id.

With regards to the motion to exclude Luciano's statements, the trial judge granted it as to testimonial statements made by Luciano to Lt. Elrod, or other law enforcement personnel and with regard to testimonial statements made by Luciano to law enforcement personnel that were overheard by persons that were not members of law enforcement. (19/3074-81) Luciano's statements to Lt. Elrod were inadmissible as a dying declaration because although Luciano was aware of the seriousness of her injuries, there was insufficient evidence to demonstrate that she

reasonably believed her death was imminent. Id. The trial judge also granted the motion with respect to the statements made by Luciano to questions from medical personnel that were not made for purposes of medical diagnoses or treatment. Id. The trial judge otherwise denied the motion. Id.

Prior to trial, the State filed a Motion in Limine to Exclude the Testimony of Defendant's Expert on Eyewitness Identification. (19/2997-3002) The State argued that the Defense should have been required to make a proffer of the substance and foundation of the expert's testimony and asked the trial court to schedule a hearing so that Defendant could proffer the expert's testimony. (19/2997-3002) The State argued that unless Dr. Brigham's opinions have substantially changed since 2006, that his testimony should have been excluded as it was in State v. McMullen, 714 So. 2d 368 (Fla. 1998) and Simmons v. State, 934 So. 2d 1100 (Fla. 2006).

At the hearing on the motion, the State argued that the expert's testimony on eyewitness identification should not be allowed unless it would aid the jury. (21/3410) Further, allowing the expert to testify as to various issues such as, stress level, weapon focus, cross racial identification accuracy, would have been impermissible as commenting on an eyewitness's credibility. (21/3411) The strength of a witness's ability to make an identification should be accomplished through cross examination and closing arguments. (21/3411-12) The State further argued that it would have been an abuse of discretion to allow Dr. Brigham's

testimony and that if the court were to allow it, then the defense would had to meet the Frye standard. (21/3416)

Defense argued that Dr. Brigham should be allowed to testify because the jury had no expertise about mistaken eyewitness identification. (21/3413-14)

After hearing the arguments from the parties, the trial court ruled that it would allow Dr. Brigham to testify about general problems with eyewitness identification but not to render an opinion related to any particular witness. (21/22. 3432-36)

After the trial court entered an oral ruling, the State argued that there should be a Frye hearing where the trial court could determine the admissibility of the expert testimony on the reliability of eyewitness identification. (22/3436-37) The trial court granted the State's request for a Frye hearing. Id.

After the trial court entered its ruling, the State filed a Motion for Reconsideration or continuance of trial on the admissibility of expert testimony on eyewitness identification. (22/3579-82) The State argued that the trial court abused its discretion in admitting Dr. Brigham's testimony and scheduling the Frye hearing, over the State's objection, without receiving any evidence which would have established the Frye foundation and without providing the State with an opportunity to challenge the admissibility of such testimony. (22/3580-81)

At the hearing on the motion, the State expressed its concern that it would have been impossible to effectively continue selecting the jury on the subject issue of the eyewitness identification when it was unclear whether the Defense was going to be able to meet the Frye standard with regards to Dr. Brigham's scientific methodology related to that issue. (22/3451-52) The State also stressed that it was not able to adequately prepare for the trial because it had to prepare for the Frye hearing in the middle of the jury selection process because Dr. Brigham had not yet been deposed. (22/3459-62) The defense opposed the motion for continuance because the State had a week to prepare for the Frye hearing. (22/3497-98)

After hearing the arguments from both sides, the trial court denied State's motion for reconsideration or continuance on grounds that other Florida courts allowed an expert testimony concerning an eyewitness identification. (22/3588-91)

At the Frye hearing, Dr. Brigham testified that he had testified in criminal trials as an eyewitness identification expert in Florida and other states as well. (24/3885-88) He opined that a high level of stress impairs an accuracy of eyewitness identification. (24/3890) The Kassin study phrased this statement about the influence of high levels of stress on the accuracy of witness identification, in order to elicit general acceptance in the scientific community. (24/3890) He based this opinion on the studies, published in journals and peer reviewed, and experiments conducted by himself and by other psychologists. (24/3891-97) These

studies and experiments were conducted mostly using college students and there were attempts to use people from general population as well. (24/3897)

Based on the studies conducted, Dr. Brigham opined that the presence of a weapon impairs an eyewitness' ability to accurately identify the perpetrator. (24/3898-3902) He opined that someone who witnessed a crime could unconsciously make a mistake and identify as a perpetrator a person they have seen in some other situation. (24/3902-04) The eyewitnesses are generally more accurate when identifying people of their own race. (24/3904-06) An eyewitnesses' confidence in an identification did not always correlate to the accuracy of the identification. (24/3907-08) He also opined that the memory loss after the event was greatest right after the event and that the passage of time affected the accuracy of the perpetrator. (24/3909-10)

On cross, Dr. Brigham testified that he conducted the majority of experiments in a laboratory setting utilizing students who would watch the video or see pictures of an incident. (24/3913-17) Experiments that involved stress have never subjected the person who viewed the videos to the stress of having been harmed or injured. (24/3934) Dr. Brigham was not aware that in some archival studies that involved real people who witnessed crimes the researchers came to different conclusions as to the weapon focus than in the laboratory studies. (25/3968-69) Dr. Brigham was not aware of any archival studies related to

unconscious transference and race bias. (25/3969) He stated that a meta analysis, which dealt with laboratory experimentation or field studies, showed that stress interferes with the memory, but that this meta analysis did not deal with real life archival studies. (25/3972-73)

Dr. Ronald Fisher, a professor of psychology and an expert in eyewitness memory, testified that the concepts Dr. Brigham testified about were generally accepted in the scientific community. (25/4038-40, 4052-56) He explained that in the Kassin study, the experts who responded to the survey, generally accepted the concepts that Dr. Brigham testified about. (25/4034-46)

On cross, as to the Kassin study, Dr. Fisher testified that about a third of 180 people responded to this study and that the study was anonymous. (25/4073-76) Dr. Fisher admitted that he had never done any laboratory experimentation that involved stress, weapon focus or cross racial bias. (25/4088-89) He conducted an experiment related to the confidence assurance correlation in a classroom setting where someone walked into a classroom, made a comment and a week later the students were asked to make the identification. (25/4090-98) As a result of this experiment, he concluded that the confidence level of the students who made the identification was not highly correlated with accuracy. (25/4098)

Dr. Fisher also conducted one experiment that involved an attempted commission of a crime, but students could not know at the time whether there was

a crime involved. (25/4101-02) Dr. Fisher confirmed that he was aware that, as to the level of the stress and weapon focus, some archival studies that were based on examination of real crime victims, showed different results than in laboratory setting. (26/4117-18)

Dr. Elizabeth Loftus testified that the concepts Dr. Brigham testified about, impairment of identification related to high stress, presence of weapon, unconscious transference, cross-race effect, confidence in identification and memory loss were generally accepted in the scientific community. (26/4179-4202)

On cross, as to the stress impairment, Dr. Loftus stated that she had conducted experiments in the classroom setting, with college students as viewers who watched the video or picture of an actual or recreated crime. (26/4227-33) She never did any studies that involved talking to a real crime victims related to subject concepts. (26/4240) The Kassin survey was anonymous and only 64 out of 197 individuals responded to it. (26/4206-07) 53% of 197 respondents were employed in the United States and she did not know what percentage of those 64 respondents actually worked in the United States. (26/4206-11)

The State's expert witness, Dr. Rogers Elliott, testified that he conducted experiments and research regarding the concept of the stress arousal and determined that the participants never went down in their performance. (27/4311-12) The students who were participants in laboratory experiments that viewed

simulated incidents were not watching or participating in a real crime. (27/4318-19) He opined that the only way to determine the effect of the stress that would approximate what a real crime victim would have felt, included interviewing the real crime victims. (27/4313-15, 4323-24) The research he performed based on that methodology showed that the people who suffered most violence and were under higher stress, had better memories and were able to make better identifications. Id. He disagreed with the Kassin's study and opined that an eyewitness confidence is a good predicator. (27/4332)

As to the Kassin study, Elliott stated that the survey was not made by a representative sample of peers. (27/4332-42) As to the cross race bias concept, he opined that it was flawed because it was not based on lineup studies but only on the face recognition. (27/4342-46) He also disagreed with the concept of the unconscious transference because it could not occur if someone was not familiar with a person and it also lacked empirical basis. (27/4347, 4364, 4387) It was not proper to make the generalization from the laboratory findings related to the subject concepts and apply it to real life crime situations because at least half of the average jurors understood the subject concepts. (27/4352-58) Elliott stated that his opinion related to the subject concepts was in minority compared to the general scientific community that dealt with the eyewitness identification. (27/4407)

Dr. Ebbe Ebbesen, testified that, as to the eyewitness identification, the results based on laboratory experiments could not be generalized and applied to real life crime situations. (27/4420-23) Kassin's statement that high stress interfered with an eyewitness memory was too generalized and vague and was generally accepted in the scientific community by people who tend to uniformly testify for the defense and that it was not generally accepted by all peers. (27/4425-27, 4430-31) As to the Kassin's statement that the presence of a weapon impairs an eyewitness's ability to accurately identify the perpetrator, Dr. Ebbesen opined that the archival studies that were based on actual witnesses did not support that statement. (27/4436-37) As to the cross race effect on the eyewitness identification, he stated that there were three different methods used to study the accuracy which all lead to different conclusions and that this statement was generally accepted by peers who tend to testify in the court but that he was not sure about the rest of the scientific community. (27/4453-60) As to the unconscious transference, Dr. Ebbessen testified that he was not aware of any scientific theory that would have underlined such statement. (27/4463-64)

Dr. Ebbesen further opined that a common juror was able to understand the subject concepts and that a research psychologist could not help jurors to be more accurate in their assessment of whether or not an eyewitness is accurate in identification. (28/4468-70) There was a danger of making generalization based

upon research performed in a laboratory setting and transferring such generalization to a real crime situation because an average juror could be pushed to believe that an eyewitness was incorrect in identification if he was under high stress or if there was a cross race or weapon presence issue. (28/4468-70)

On cross, Dr. Ebbesen testified that some of his statements related to the Kassin study were in the minority compared to people from the Kassin study. (28/4479-80) He did not know if his position was in the minority compared to psychologists who study human memory. Id. He opined that the relevant community has not been surveyed. Id. It was generally accepted in the relevant scientific community that it was less likely that someone would be able to identify a suspect if more time elapsed between the observation of a suspect and the time when the actual identification had been made. (28/4486-87) He stated that it was generally accepted that sometimes people can identify somebody other than the person they have seen. (28/4490)

As to the cross race effect in identifications, Dr. Ebbesen stated that he did not know of any study involving a meta-analysis that has shown that there was not such effect. (28/4495) From the perspective of people who responded to the Kassin study, Dr. Ebbesen stated that his opinion about the subject concepts was in the minority. (28/4504-05)

Defense argued that based on the testimony presented, the concepts related to eyewitness identification met the Frye test and that it would be helpful for the jury to know about it. (28/4530-57)

The State argued that there was a lack of showing of scientific principle that applies to topics that Dr. Brigham purported to testify about as he based his studies on experiments he conducted solely in laboratory settings. (28/4575-4577) Dr. Brigham could not be considered an expert because he made his findings solely on laboratory experiments and thus could not have made conclusions as to how an actual crime victim would have performed in terms of the ability to make an accurate identification. (28/4619-20) Also, the laboratory findings that did not agree with the actual archival studies, and could not have been generalized to explain how human behavior operates. (28/4581) The Kassin study did not represent the relevant scientific community. (28/4587-92) Dr. Brigham's testimony would not assist the jury, and the State did not intend to prove Defendant's guilt solely based on eyewitnesses' testimony but on other independent evidence as well. (28/4566-74)

The trial court denied the State's Motion in Limine to Exclude the Testimony of Defendant's Expert Witness on Eyewitness Identification except as to the testimony that concerns the concept of "unconscious transference." (41/6603-18) The trial court held that Dr. Brigham's testimony would be helpful in

assisting the trier of fact concerning stress, weapon focus, forgetting curve, confidence and cross racial bias. (41/6612) The trial court further found that these concepts were generally accepted by peers and that appropriate scientific community were those peers surveyed in the Kassin Survey 2001. (41/6614-18)

On October 21, 2010, the case proceeded to trial. (51/8389) During his testimony, Ernest Froehlich, an EMT, testified that Bustamante told a police officer that Defendant was the perpetrator. (51/9168-69) Froehlich then stated that Bustamante had no doubt in her mind when she made the statement. Id. Defense moved for a mistrial on the ground that the Froehlich's statement was an impermissible comment on her credibility. (51/9170-72) On October 28, 2010, the trial court declared a mistrial on the ground that it was improper to comment on the credibility of another witness who is deceased. (55/9183-84)

On January 18, 2011, the case proceeded to trial. (79/2135) Paula Maney, a CSI, testified that she processed the crime scene at Headley Insurance. (80/2256) Maney identified photographs that showed an overview of the crime scene, a burnt item, a vehicle, an ashtray with blood on it, a Bic red lighter, traces of blood and skin, a possible bone fragment, duct tape, burnt clothing, bullet holes, traces of blood in the parking lot of Havana Nights, a burnt chair, a cash box, paper debris, a fire extinguisher, a burned shoe, a burned gas can, a red lighter, and a Leon Davis

file. (80/2258-2311, 2323-41) Maney processed the scene for possible fingerprints. (80/2359-64)

On cross, Maney testified that she did not find any fibers at the scene. (80/2374-76) She did not hear that any of fingerprints she collected at the scene belonged to Defendant. (80/2385) There was no DNA evidence linking Defendant to the crime scene. (80/2388)

Fran Murray testified that she and Vicky Rivera went across the street, where Headley Insurance Company was located, after they saw smoke coming from that direction. (81/2461-63) Murray heard three pops, and then, she saw Bustamante coming out from the back of the building. (81/2462-63) Murray noticed that Bustamante had her hand put up, she had gray tape around her wrists, her clothes was melted on her body, her skin was falling off of her body and her hair was melted to her scalp. (81/2466)

The next moment, Murray noticed that Greisman, who also went across the street to check what happened, got shot and fell backwards. (81/2467-68) Murray did not see if Bustamante got shot at that moment too but she learned later that she did get shot in her hand. (81/2467-68) Murray explained that while all this was happening, she saw a black man walking behind Bustamante. (81/2469-71) The man was six three to six four tall, around 230 pounds, was in his late 20s or early 30s, stocky build, and he had a pair of shorts. (81/2469-71) Murray observed the

man put his black gun into an orange-ish lunch pail as he was walking away towards north on Phillips Street. (81/2472-73) Murray could not see the black man's face so she was not able make an identification. (81/2473)

Anndee Kendrick, a CST, testified that she tested the following clothing items for the presence of blood: a pair of blue athletic pants, a black T-shirt, and black shorts. (81/2539-41) The results came back negative. (81/2539-41) She processed bullet holes at Headley Insurance and collected pieces of projectile and jacketing. (81/2544-45) She also processed numerous items she found at the scene for potential fingerprints. (81/2560-63)

Evelyn Anderson described the man who came out of Headley as a nice looking and nicely dressed young man. (82/2592-93) The woman who came out from the building jumped into Anderson's car, but she soon thereafter came out and leaned against the vehicle. (82/2595) Anderson stayed with the woman until paramedics arrived. (82/2597) Paramedics put the burned woman on the stretcher and asked her what happened. (82/2597) Anderson heard that the woman said, "Leon Davis did it". (82/2597-98) Anderson could not identify the black man she saw because she did not see him clearly. (82/2599-2600)

Lieutenant Joe Elrod testified that upon arrival at the crime scene, he saw a man who was shot and bleeding badly from the nose. (82/2630-31) The injured man told Lt. Elrod that when he heard screaming, he went to see what happened.

(82/2632) The injured man saw a lady on fire and a guy who was after the woman, throwing stuff on her. (82/2632) The man behind the woman then shot the injured man. (82/2632)

Ernest Froehlich, an EMT, testified that when Bustamante was lying on the stretcher, a police officer stepped on the back of the truck. (82/2701) Froehlich heard the police officer ask Bustamante if she knew who did this to her and that she responded that it was Leon Davis. (82/2700-02)

John Johnson, a paramedic, testified that he heard the burned woman at the parking lot tell the police officer that Davis was the perpetrator. (83/2769) Johnson could not remember if the woman mentioned the first name of the perpetrator. (83/2769)

Sergeant David Black testified on December 13, 2007, Carlos Ortiz tried to talk to him but since he was busy coordinating the crime scene he did not talk to Ortiz until December 17th. (83/2810-11) During the course of investigation, he talked to Jessica Lacy, an employee at Mid Florida Credit Union. (82/2834-35) He showed her a photo pack and she identified Defendant as a person who did a transaction with her on December 13, 2007. (83/2834-35)

Brandon Greisman testified that on December 13, 2007, he saw from his home the smoke across the street. (83/2862-63) He went with Rivera to check what happened. (83/2868) Greisman came around the corner of the antique store

building and a burned woman ran into him. (83/2869) The woman was smoking, hysterical, her skin was melting, her clothes was burned off, and she was asking for help (83/2870-71)

The next moment, when the burned woman moved, Greisman saw a black man, around 6'2" tall. (83/2878-79) Greisman was able to see the face of the black man and he made an eye contact with him as the man was walking towards him. (83/2879-80) The next moment, the black man pulled out a gun from an orange or red lunch bag, pointed it at Greisman and shot him in the nose. (83/2880-82) Greisman did not notice at first that he got shot but later after he went back to his house. (83/2884-86) He explained that as the black man was moving towards him and before he pulled out a gun, Greisman was focused on the black man's face and could see him clearly. (83/2888, 2879)

Greisman testified that he was taken to the hospital where he had surgery. (83/2896-97) When he was released the next day, his mom drove him to the police station. Id. They did not talk about what had happened. (83/2896-97)

At the police station, the officers showed him the pictures and asked if he recognized anyone. (83/2899) The officers did not say anything about the investigation or that the perpetrator was in the photopack. (83/2899) Greisman immediately pointed at the picture of the Defendant. (83/2899-2900) Greisman identified the photo line up as the one he signed and initialed at the police station.

(83/2901) Greisman stated that he did not talk to anyone nor watched TV or read newspapers before he went to the police. (83/2908-09) Greisman then made an in-court identification of Defendant. (83/2902-03) He stated that Defendant was the person who shot him in front of the Headley and that he was certain in his identification. Id.

On cross, Greisman testified that he could not remember if the black man pulled the gun out of his right or left hand. (84/2929) The black man was wearing long pants, possibly like work pants. (84/2978-79) Although he was focused on the gun, Greisman could not remember if the black man had gloves or long or short sleeves. (84/2980-82) He could not remember if the black man had facial hair but stated that he probably did not. (84/2983-2992) He did not have a mustache but if he did it was something fairly light. (84/2985)

On redirect, Greisman testified that he identified Defendant from the photopack because he could remember Defendant's face since he observed Defendant approaching him. (84/3007-08) Greisman saw Defendant clearly before he pulled out the weapon and at that particular moment, he was not trying to determine whether he had any facial hair or what style of hair he had. (84/3008-09) Greisman was certain that the person he identified as Defendant was the person who shot him. (84/3010)

Carlos Ortiz described Defendant as a big guy, around 30 years old, who had a gun and a red bag that looked like a lunch bag. (84/3049-50) Ortiz recognized him from Florida Natural where he worked. (84/3052) Sometime after the incident, Ortiz saw Sergeant Black in front of the insurance building and tried to talk to him but Black told him that he would get back to him. (84/3059-61)

The police came to see him four days after the incident. (84/3059-61) Ortiz did not watch any news before a police officer came to his house. (84/3062-68) When a police officer showed him photographs, he immediately, without doubt, made an identification of Defendant. (84/3062-68) Ortiz then made an in-court identification of Defendant. (84/3065-66) He stated that Defendant was the person who he saw in front of Headley walking away and who he identified in the photo line-up. Id. Ortiz stated he had no doubt in his identification. Id.

On cross, Ortiz testified that the black man had a chrome gun, a revolver. (85/3093) Ortiz observed a Nissan Maxima parked behind the house at 118 West Stewart. (85/3111-12) He saw the black man went behind this house and then, a Nissan Maxima drove away. (85/3111-12) He stated that the man did not have a beard but could have had a shade on his face that could have been like a goatee. (85/3102) He observed that the black man had curly hair. (85/3103-04) Ortiz could not say for sure if the man had a small Afro hairstyle but that he was sure that Defendant was the person he saw. (85/3105) Ortiz explained that the last time he

could have been at Florida Natural was around May or June of 2007. (85/3136-37) He was not sure how many times he saw the black man at Florida Natural but he was sure that he saw him previously at the gate area. (85/3137-38)

Mark Gammons, a manager at Wal-Mart, testified that on December 13, 2007, he found out that there was a robbery at the insurance company. (85/3181) When he got home, he saw a picture of Defendant on the news and immediately remembered that he saw him in the store that morning. (85/3183) Defendant asked him where the gloves were located. (85/3183) Gammons notified the police that Defendant was in his store on December 13. (85/3191) They went through the video footage and saw that Defendant made purchases. (85/3191) When Defendant approached Gammon in the store, he was five to seven feet away, and Gammon could clearly observe him. (85/3195-96)

Next, the surveillance video tape from Wal-Mart was played before the jury. (85/3197-3214) Gammons identified Defendant as he entered the store, went to a cash register, walked through the gloves area and the area where he purchased a Bic lighter. (85/3197-3214) Gammons identified a receipt that showed a purchase of the following items: a cap, a fruit of the loom long sleeve shirt and a six can cooler. (85/3222-24) Gammons identified the second receipt that showed a purchase of the gloves. (85/3225) Gammons identified Defendant as the man who asked him where the gloves department was located. (85/3226-27) Gammons said

that he was focused on Defendant when he talked to him and was certain in his identification. (85/3226-27) Gammons identified the third receipt which showed a purchase of a Bic lighter. (85/3228)

Jennifer Debarros, a Wal-Mart employee, testified that she knew Defendant around ten years. (86/3259) Debarros identified Defendant from the Wal-Mart surveillance video. (86/3269-70) She saw Defendant in the store and talked to him about getting together for his son's birthday. (86/3270) Jessica Stroud, a manager at Beef O'Bradey in Lake Wales, identified a surveillance video made on December 13, 2007 that was handed to the police that same evening. (86/3330-36)

Jessica Lacy testified that in December of 2007 she was employed at the Mid Florida Credit Union in Winter Haven. (86/3424) Lacy testified that she was familiar with a man by the name of Leon Davis, and that he was a customer who used to come to her branch once in two weeks. (87/3427)

Then, a video was played before the jury. (87/3435-37) Lacy identified Defendant as the customer she dealt with at 4:23 p.m., on the day of the incident (87/3435-37) Defendant made a deposit in cash. (87/3435-37) Lacy noticed that Defendant had blood on his face and something that looked like scratches, on his nose, lip and chin. (87/3437, 3447-48)

Lacy identified Defendant from the photographs that police officers showed to her as a person she dealt with on the day of the incident. (87/3439-40) Lacy

identified a deposit slip she gave Defendant to fill out. (87/3441) Defendant made a deposit in the amount of $148. (87/3442-43) Before this deposit was made, Defendant had a balance on his account in the amount of $5.33. (87/3442-43)

Lieutenant Louis Giampavolo, testified that on December 13, 2007, he had personal contact with Defendant at the Bureau of Criminal Investigations at the Bartow Air Base. (87/3500-01) Giampavolo testified that while he was with Defendant in the interview room, he noticed that Defendant had apparent scratches or a burn on his nose. (87/3504-05)

Dawn Henry testified that she dated Defendant from 1998 to 2003 and that they had a child together. (87/3514-16) In December of 2007, Defendant and his wife had two cars, blue Nissan Maxima and black Nissan Altima. (87/3526) They did not use the Nissan Maxima because they could not afford it. (87/3526-27) Defendant did not have a cell phone at that time. (87/3528-29)

Ann Bowdry Lopez, a CST, testified that on December 28, 2007, she took photographs of Luciano at Orlando Regional Medical Center while Luciano was still alive. (88/3682) The State then stated that it intended to admit into evidence Exhibits 8045 through 8051 that consisted of pictures of Luciano that Lopez had taken. (88/3682-85) The defense did not object. (88/3683-84) The exhibits were then entered into evidence. (88/3684) Lopez identified the subject photographs of Luciano that showed her left leg, the torso, and the left side of her head. (88/3684-

85) Lopez confirmed that these pictures were accurate representations of how Luciano looked like when the pictures were taken. (88/3685)

Kimberly Hancock, a CST, testified that she attended the autopsy of Michael Bustamante on December 16, 2007. (88/3687) Hancock identified the photographs from Michael's autopsy that she had taken that day. (88/3688-90) The State then offered that the photos be admitted into evidence as Exhibits 8061 through 8067. (88/3687-88) The defense did not object. (T88. 3688) Thus, the exhibits were entered into evidence. (88/3688)

Hancock attended the autopsy of Bustamante. (88/3690-94) She identified the pictures from the autopsy that she had taken. (88/3690-94) Hancock stated that the photos accurately represented how Bustamante looked like on that day. (88/3691) The State then offered that these photos be admitted into evidence as Exhibits 8001 through 8023. (88/3691-92) The defense did not object. (88/3691) Thus, the exhibits were entered into evidence. (88/3691)

Hancock testified that on January 4, 2008, she attended the autopsy of Luciano. (88/3695-96) She identified the photographs that she had taken. (88/3695-96) She stated that the photographs accurately represented how Luciano looked on the day of the autopsy. (88/3696) The State then offered that these photos be admitted into evidence as Exhibits 8031 through 8044. (88/3696) The

defense did not object. (88/3695-96) Thus, the exhibits were entered into evidence. (88/3696)

Dr. Stephen Nelson, a medical examiner, testified that Michael Bustamante died three days after his delivery via Caesarian section. (88/3707) Dr. Nelson identified photographs from Michael's autopsy that were previously entered into evidence as Exhibits 8061-8065. (88/3707-08) The photos showed the redness on Michael's body. (88/3708) Dr. Nelson explained that the redness had nothing to do with thermal injuries to his mother but to prematurity. (88/3708) The cause of death of Michael Bustamante was extreme prematurity due to a preterm delivery in a mother who had suffered thermal injury. (88/3709) Michael was delivered due to his mother's burn injuries. (88/3709)

Dr. Nelson identified the photographs that were previously introduced into evidence as Exhibits 8001 through 8023. (88/3710-18) Exhibits 8002 and 8003 showed Bustamante, swollen, with gauze on her body and a tube in her mouth. (88/3710) Dr. Nelson explained that the cause of swelling was the loss of fluids due to extensive burns. Id. The Exhibit 8004 showed the legs with incisions that had to be made due to the swelling, and burned skin. (88/3711) The Exhibit 8005 showed the incisions that extended up the sides of legs and thighs and burned areas of the skin in that area. (88/3713-14) The Exhibit 8006 showed the expanded abdomen and burns in that area and on her hands as well. Id. That picture also

showed that there was no burn on Bustamante's wrist which was consistent with that area being covered with a binding. (88/3714) The Exhibits 8007 and 8008 showed more incisions on the arm, upper extremity and burns in those areas. (88/3714-15) The Exhibit 8009 showed that Bustamante had a surgical procedure because of which her abdomen was not completely back together. Id. A stopgap was placed to cover the internal organs. Id. The Exhibits 8010, 8011, 8012, 8013, 8014, 8015 all showed more incisions that went down to the skeletal muscle and burned skin in that area as well. (88/3715-16) The Exhibit 8016 showed Bustamante's back. (88/3717) That area was relatively unburned in the areas where she had a bra and a waist band. Id. The Exhibits 8017 and 8018 showed the buttocks with more incisions. Id. The Exhibit 8019 showed the burned face. Id. Dr. Nelson also identified a photo that showed a bullet wound on the left hand. (88/3718)

Dr. Nelson testified that Yvonne Bustamante had 80 to 90% of her body burned, with second and third degree burns. (88/3712) When a person gets their nerve endings burned, they do not feel the pain because the nerve endings are gone and when someone is set on fire, they would feel a lot of pain. (88/3713) Bustamante was shot in the left hand. (88/3718) The cause of her death was thermal burns to 80 to 90% of the total body area. (88/3719)

Dr. Nelson performed an autopsy of Juanita Luciano and determined that she had about 90% of her body area burned. (88/3719-21) Dr. Nelson identified photographs that were previously entered into evidence as Exhibits 8032-8051. (88/3720-26)

The Exhibit 8033 showed the burned area around the mouth and the shoulder covered in gauze. (88/3720) The Exhibit 8033 showed the burned areas of the back. Id. The Exhibit 8034 showed the lower extremities that were charred and burned. (88/3722) The Exhibit 8035 showed the legs and the burns in that area. Id. The Exhibits 8036 and 8037 showed the tops of the feet and the charring on the toes. Id. The Exhibits 8038 and 3039 showed the areas around the shoulder, under the breast, the wrist and the waist. (88/3723-24) These areas were spared of the burning which is consistent with the clothing she had that protected her (a bra and a waist band). (88/3723-24) The Exhibit 8040 showed a fasciectomy on the left leg. Id. The Exhibits 8041 and 8042 showed the torso and various lines where the skin grafts have been paced. (88/3725) The Exhibit 8044 showed the burns on the face. Id.

Dr. Nelson then stated that the Exhibits 8045-8051 depicted Luciano when she was still alive at the hospital. (88/3725-26) The Exhibits 8045, 8046 and 8047 showed the burned areas of her body. Id. The Exhibits 8048 and 8049 showed the various monitoring devices that Luciano was attached to. Id. The Exhibits 8050

and 8051 showed the absence of injuries on the sides of the face. Id. The cause of death of Luciano was complications of thermal burns due to the commercial business fire. (88/3726)

Dr. Nelson further testified that based on the photographs of Defendant's injuries, he had an abrasion on his nose and perhaps an abrasion on his upper lip. (88/3727) Dr. Nelson also identified an abrasion on Defendant's left side of the nostril that could have been a burn or an abrasion. (88/3727-28)

Brian Cogswell, a detective at Polk County Sheriff's Office, testified that he recovered a digital video recorder from the scene at the Headley Insurance. (89/3769-70) He also recovered videos from Beef'O'Brady's, McDonald's in Winter Haven, Enterprise Rental Car in Haines City and Circle K store in Alturas. (89/3770-73)

Detective Jeff Batz testified that he investigated a cause and origin of the fire at Headley Insurance. (89/3799) Batz determined that a flame type device, like a lighter, was used to ignite the area of origin. (89/3816) An ignitable liquid was used to ignite the fire in the storage room and bathroom. (89/3816-17) There were three points of origin, separate in nature. (T89. 3817-18) The fire started with an open flame type device and an accelerant was used on all three areas. (89/3817-18)

Garrion Davis, Defendant's brother, testified that on December 13, 2007, Defendant came to his house and washed his face outside. (89/3835) Davis noticed

that Defendant had a scratch on his face. (89/3835) Defendant told Davis that he had robbed somebody. (89/3835) Defendant took a shower inside the house. (89/3835) Defendant asked Davis if he could use his phone but eventually did not use it. (89/3836)

On cross, Davis testified that when Defendant came to his house he was wearing tennis shoes, a black T-shirt and black basketball shorts. (89/3837-38) Davis could not remember making the statement to Detective Collins that he obtained no information of Defendant being involved in any serious crime while Defendant was at his house. (89/3840-43)

On redirect, Davis testified that he could not remember making the statement before the Grand Jury that Defendant told him he had robbed somebody. (89/3876-77)

Melissa Davis, Garrion Davis' wife, testified that on December 13, 2007, between 3:00 and 4:30 p.m., Defendant came to their house and stayed around ten minutes. (89/3882-84) After Defendant left, her husband had teary eyes, flustered and appeared to be kind of down. (89/3885)

Linda Davis, Defendant's mother, testified that when she returned from her trip to Puerto Rico (that she could not remember when it was), she visited Defendant. (89/3932) During that visit, Defendant showed her a handgun he got from Randy Black. (89/3933-35)

Jacqueline Roland, Defendant's neighbor, testified that she had seen Defendant doing lawn work at his yard with a lawn mower. (90/3976-77)

Victoria Davis, Defendant's wife, testified that she worked as a waitress, in Olive Garden since February of 2006, and was making $200-300 per week. (90/3955-96) Defendant stopped working for Florida Natural sometime in 2007. (90/3999) Defendant kept a gas can in the garage. (90/4005)

James Kwong, a firearms analyst, testified that he examined bullets he received from the Polk County Sheriff's Office and determined that the caliber of the bullets was either a .38 special or a .357 magnum because both have a same diameter. (90/4018-29) It is possible to fire a .38 caliber bullet in a .357 caliber gun but not the opposite. (90/4022) Kwong came up to a list of 21 possible manufacturers that could have made firearms with rifling characteristics of the subject bullet and one of the manufacturers was Dan Wesson. (90/4022-23) A difference between a revolver and a semiautomatic handgun is that after you fire from a semiautomatic, the cartridge will eject out of firearm where after you fire from a revolver, the cartridge stays in the cylinder. (90/4023-24)

Deputy Fire Marshal Kurt Lathrop, certified accelerant detection canine handler, testified that his examination of Defendant's vehicle revealed traces of petroleum on the driver's floor mat and the passenger rear floor mat. (90/4047)

William Wagle, the owner of Wagle's pawnshop, identified a receipt that showed that on November 30, 2007, he sold a .357 magnum Dan Wesson revolver to Randy Black. (90/4076-78)

Virginia Vazquez testified that in December of 2007, after she watched the news and heard of the incident at Headley Insurance, she remembered that she had seen Defendant a week before at Headley. (90/4091-94) Vazquez saw Defendant talking to Bustamante. (90/4094-96) Vazquez noticed that Defendant was looking at everything in the office, the ceiling and walls as well. (90/4098)

Ryan Bennett, a crime laboratory analyst, testified that in December of 2007, he received items from Detective Jeff Batz for testing: fabric and a cloth rag, burned clothing, burned shoes, burned paper, burned debris, carpet and rubber matting, which came positive for gasoline. (91/4123-29)

Dr. Davis Auerback, a neonatologist, testified that Michael Bustamante died three days after delivery, as a result of prematurity complications. (91/4141-42) The condition of Michael's mother who was under tremendous amount of stress and circumstances of Caesarian delivery affected the chances of his survival. (91/4138-39) Michael was 24 to 25 weeks gestation, weighed 760 grams and the chances of survival of babies born under these circumstances would be around 60%. (91/4138)

Kelly Curlee, a teller at Mid Florida Credit Union, testified that she knew Defendant from high school and that he had been coming to her branch at Lake Wales every Thursday at the same time. (91/4149) Curlee testified that on June 6, 2007, Defendant wanted to do a transaction but he could not do it because his account was overdrawn. (91/4150-51) Defendant got very upset and started cursing. (91/4150-51) Curleee informed him that his insurance payments increased over months and that he needed to talk to his insurance company. (91/4153)

Jacqueline Hare testified that Luciano started working at Headley Insurance in 2007. (91/4162-64) Hare knew Defendant as a customer and Yvonne usually dealt with him. (91/4168-70) Luciano assisted Defendant once when he cancelled his policy. (T91. 4168-70)

Headley's policy was to keep $50 in cash in drawers and anything above that amount would be placed in the safe. (91/4175) Hare identified the document made by Bustamante and it represented Defendant's cancelled policy. (91/4179-81) She identified correspondence between Nationwide Insurance and Bustamante regarding Defendant's policy. (91/4182-85) On October 25, 2007, Luciano did a cancellation of Defendant's policy. (91/4187-88)

Robert Hitchcock testified that he worked as an office manager with Headley Insurance from 2001 to 2006. (91/4207) Hitchcock identified documents that showed that on August 21, 2007, Defendant's policy with Nationwide was

cancelled and the policy with Victoria Insurance became effective. (91/4214) On October 18, Defendant made a billing change on Victoria policy, he was required to pay $651, and the policy was cancelled on 19th. (91/4220-21)

Scott Headley, the owner of Headley Insurance Agency, testified that on June 3, 2004, he wrote a Nationwide policy for Defendant for his 2003 Nissan Altima. (91/4250) That policy was cancelled on August 21, 2007. (91/4250) Then, Defendant opened a policy with Victoria Insurance company for a 2007 Nissan Maxima. (91/4251-55) That policy was cancelled on October 19, 2007. (91/4251-55) After the incident, Headley determined that $860 in currency was missing. (91/4258-59)

Detective Ivan Navarro testified that black gloves and jackets were recovered from Defendant's Nissan Altima. (91/4269-72) Navarro searched Defendant's residence and found several items of lawn equipment that operated on gas. (91/4275)

Detective Ben Metz testified that when he came in contact with Defendant, he noticed that Defendant had an injury in the area of nose that appeared to be a burn mark. (92/4290-91) Defendant was wearing a black T-shirt, black basketball shorts and tennis shoes. (92/4290-91)

Officer Lynett Townsel testified that she met with Greisman on December 14, 2007. (T92. 4315-17) She showed him a photopack and Greisman immediately

pointed to one of the photographs. (92/4315-17) Townsel also met with Ortiz on December 17, 2007. (92/ 4318-21) She showed him a photopack and Ortiz immediately pointed to Defendant's photograph. (92/4318-21)

On cross, Townsel testified that Greisman's photopack got lost for a while but was later found in the storage shed at her home. (92/4325-26) It was determined that the lost photopack was the original. (92/4325-26) On redirect, Townsel explained that the procedure required that every document has a photocopy and that somehow the original photopack was put in with photocopies instead with the evidence. (92/4326)

The State rested its case. (92/4343) Defense witness, Sylvia Long, testified that in 2007, she had her car insurance through Headley and she would make payments in person. (92/4346-47) In December of 2007, she went to Headley to make a payment but could not remember the exact date. (92/4347-50) She remembered that that was the day when the fire happened in Headley. (92/4347-50) Long saw Bustamante dealt with an angry black man who was raising his voice on her while Bustamante was trying to calm him down. (92/4353-54) The man was wearing a long sleeved, buttoned, dark color shirt, casual pants, and had an inch long, African American hair. (92/4355-58)

On cross, Long testified that she did not contact the police after the incident. (92/4359) The first time she spoke to the police was in 2010. (92/4359) Long

talked to Detective Navarro and told him that she could not remember how much time had passed between the incident she saw at the Headley and the incident she saw on TV. (92/4364-65)

Pamela Grooms, a staffing specialist at Spartan Service staffing company, testified that based on the company records, Ortiz started working for Florida Natural on January 2, 2008. (92/4375-76) Ortiz did not work for Florida Natural in 2007 but did work in January of 2006 and from November through December 11 of 2006. (92/4376-77) At Florida Natural, gates used by temporary employees were not utilized by permanent employees and these gates were far away from each other. (92/4378-79)

On cross, Grooms testified that in 2006 and 2007 there were other staffing agencies that provided temporary workers for Florida Natural. (92/4384-85) Ortiz worked not just during the season. (92/4391-97) He worked all over the plant in different areas and he would come to work at different times. (92/4391-97)

Linda Valentine, an operations manager at Spartan Staffing, testified that Ortiz could have worked for Florida Natural through another agency. (92/4403-04) She could not remember seeing him in 2007. (92/4403-04) On cross, Valentine testified that other staffing agencies provided temporary workers for Florida Natural. (92/4405-06)

Joseph Swanson, a human resources manager at Florida Natural, testified that Defendant worked for Florida Natural as a permanent employee, from June 7, 1999 to October 21, 2005 and from November 14, 2005 to September 7, 2007. (92/4409-12) Employees parked in parking lots closest to their work area. (92/4416) On weekends, only the northwest gate would have been opened and employees needed an access card for it because their card was programmed only for facility they worked in. (92/4417) On cross, Swanson testified that during the weekends both temporary and permanent employees would have used the same gate. (92/4424) During the break, employees were allowed to move around the plant and were not restricted on their work area. (92/4427)

Detective Kelli Collins testified that she handled an internal affairs investigation involving Melissa Sellers related to her contact with Defendant on December 13, 2007. (92/4433-34) Garrion Davis told her that Defendant never said to him that he robbed somebody and that he had no information that Defendant committed a serious crime. (92/4438-39) Davis called her a few days after the interview and changed his story by stating that he did not recall that he had made a different statement to another agency. (92/4441-42) On cross, Collins testified that Davis told her during the interview that Defendant never said to him that he had robbed somebody but did say that he hurt somebody. (93/4471-72)

Vicky Davis testified that she kept her black gloves in her Nissan Altima. (93/4489) Defendant was sometimes working security for his uncle and he also cut hair. (93/4491-93) On the day of the incident, she has been out of work for a month and a half and her medical bills were paid by Medicaid. (93/4494) Defendant was unemployed but could have relied on their family for help. (93/4496-4500)

Indiana Decosey Owens testified that prior to December 13, 2007, Defendant did the yard work for her and she also offered him a loan. (93/4505, 4515-17)

Defendant testified that he bought his 2003 Nissan Altima from his father who was a salesman. (93/4534-36) He insured the car through Headley Insurance but the car got destroyed in an accident. (93/4534-36) He then purchased a 2005 Nissan Altima which he traded for 2007 Nissan Maxima in August of 2007. (93/4536-37) Defendant got a Victoria policy on the Maxima before he went to pick up the car. (93/4537) He later cancelled that policy and that was the last time he went to Headley. (4539) Defendant had a tattoo with his son's name on his right forearm. (93/4541-42)

Defendant worked for Florida Natural from June of 1999 until October of 2005. (93/4547) He worked on Dock One as a forklift operator. (93/4547) After a month, he came back to work for Florida Natural where he stayed until September

2007. (93/4548) He always used the west gate and the parking lot next to it. (93/4548)

After Florida Natural, Defendant worked for the City of Lake Wales but on December 13, 2007, he did not work for the City anymore. (93/4549-52) In 2007, he was adjudicated guilty of six charges of theft and he had to pay restitution in the amount of $2,400 as well as court costs in the amount of $1,000. (93/4552-55) In 2002, he was adjudicated guilty of petit theft and sentenced for six months probation. (93/4557-58) In December 2007, Defendant bought a gun from Randy Black which he later sold to a man he knew as "Red". (93/4558-60)

On December 13, 2007, around 7 a.m., Defendant went to Dawn Henry's house. (93/4563) Then, around 7:15 a.m., he picked up India and they went to the Mid Florida bank. (93/4564-65) Then, Defendant and India left her car at a body shop and rented a car at the Enterprise in Haines City. (93/4565)

Sometime thereafter, they went to Beef'O'Brady's in Lake Wales, where they had a lunch. (93/4566) Then, Defendant and India purchased furniture and then went to India's house to unload it. (93/4567) Defendant stayed at her house for 45 minutes. (T93. 4568)

After he left India's house, Defendant went to the Rec center. (93/4569) On his way there, Defendant got into a fight with a man who almost hit his car. (93/4569) The man jumped out of his car and started cursing Defendant. (93/4570)

Defendant and the man (who appeared to be a "Jack Boy" gang member) started to fight. (93/4569-71) Defendant got hit in the face a couple of times and his shirt got ripped off. (93/4570) Eventually, they stopped the fight. (93/4571) At first, Defendant wanted to go inside the Rec center to talk with the man but he changed his mind because he knew that the man was associated with "Jack Boys" gang. (93/4571)

After the fight, Defendant went to his brother Garrion's house where he took a shower. (93/4574-75) He told Garrion that he got into a fight with a "Jack boy." (93/4574-75) Sometime later, Defendant went to Mid Florida to make a deposit. (93/4575) On his way there, he stopped by a payphone and called his wife. (93/4575)

Then, Defendant went to Fonda Roberts' house where he used her phone to call a friend, Milo. (93/4576) Then, Defendant went to McDonald's in Winter Haven where he also used the phone to call Dawn Henry. (93/4575-76) Henry told him that he was on the news and needed to turn himself in. (93/4575-78) Defendant called his sister Noniece who picked him up, and they proceeded to Circle K. (93/4579) At Circle K, Defendant and Noniece met with India and Barry Gaston. (93/4579) Then, the group went to the Sheriff's Substation in Lake Wales where Defendant turned himself in. (93/4579)

On cross, Defendant testified that his monthly mortgage payment was $1,500 and that he did not make a payment for December of 2007. (93/4585) Close to the end of November, he was no longer working for the City of Eagle Lake. (93/4588-89) On December 6, 2007, he received a final paycheck from the City. (93/4588-89)

When he and India made a stop at the bank, he did not make a deposit of $148 (which he later deposited at the branch on Cypress Gardens Boulevard) because he left the cash money in his car. (93/4590-91) Even though he did not have any cash on him, he left $148 in the car. (93/4592) Defendant deposited money in his savings account which had a balance of $5.33. (93/4592)

Defendant cancelled the Victoria policy because he could not afford it. (93/4597-98) He also had an obligation each month to pay his mortgage, a Visa credit card, and to make a payment for his car. (93/4597-98) Defendant denied telling Garrion Davis that he had robbed somebody. (93/4601-02) He also denied telling India and Gaston what had happened to him that afternoon. (93/4604-06) He did not say anything to Dawn Henry and Noniece either. (93/4604-06) Defendant first became aware that the police were looking for him when he was in the vehicle with his mother. (93/4613) She told him that the media said he had hurt somebody. (93/4613)

On redirect, Defendant testified that he did not use his Visa credit card up to the limit and that he could have used a line of credit with Mid Florida. (94/4618-19) Defendant's father used to loan him money when he needed it and his sister India offered to help financially. (94/4619-20) At India's house, he "stepped in a pile of dog crap" that got on his pants and damaged his shoe. (94/4621-22) That was the reason why he asked for a piece of tape. (94/4621-22)

Linda Davis testified that she offered Defendant to help him by moving in with him and his wife and contributing to the household expenses. (94/4628)

Dawn Henry testified that when Defendant called her, she immediately asked him what did he do. (94/4702-03) Defendant was confused, and he asked Henry what was said on TV. (94/4704) Henry told him that he should have turned himself in. (94/4705) On cross, Henry testified that Defendant did not tell her anything about the fight he had. (94/4713-14)

Leon Marion testified that he dated Defendant's mother back in the 80's and that he knew Defendant personally. (94/4725-31) On December 13, 2007, he saw Defendant at Lowe's around 1:00 p.m. (94/4725-31) On cross, Marion testified that prior to December 13, 2007, he used to see Defendant often because Defendant would come to Lowe's three or four times a month. (94/4734-35) Marion did not remember that in his deposition he testified that the last time he met Defendant before the incident, was 10 or 15 years ago. (94/4735-36) At Lowe's, he

did not talk to Defendant because he was in hurry. (94/4737-38) On redirect, Marion testified that in his deposition, he talked about not having played basketball with Defendant for 10 or 15 years. (94/4740)

William Gaut, a former law enforcement officer, testified that the photopack violated the standards because it contained book-in numbers on the photopack which implied the age difference between Defendant and other individuals. (94/4766-69) Also, two or three individuals had facial hair and only two individuals had gray shirts while others had white. (94/4766-69) The photopack was not proper when you had a witness who indicated that the individual they saw appeared to be about 30 years old, had no facial hair and was wearing a gray shirt. (94/4767-72) Defendant's picture was ten months old. (94/ 4773-74)

On cross, Gaut testified that considering the fact that on the day of his arrest, Defendant had an injury on his nose, he would not have put that picture of Defendant in the photopack but would have waited until the injury would not have been visible. (94/4781-82) Gaut stressed that it would have been a problem to wait until the wound was healed because the witnesses could have lost the memory or could have seen the suspect on TV. (94/4782-83) When a witness personally knows the individual from the photopack it would not matter if that person wore a gray shirt or had a facial hair. (95/4788-89)

Dr. John Brigham testified that studies show that high levels of stress impair the accuracy of an eyewitness identification. (95/4854-55) The experiments that dealt with a lower level of stress showed that even a low level of stress interferes with the ability to remember faces of the people involved. (95/4856-57) The studies showed that when a weapon was involved in an eyewitness identification, a person's attention was focused on the weapon rather than on the face of the person holding that weapon. (95/4858-59) This resulted in people being less able to recognize the perpetrator later. (95/4858-59) The studies also showed that the rate for a memory loss for an event was the greatest right after the event. (95/4860-61) People were generally better in identifying people of their own race. (95/4865) An eyewitness' confidence did not always correlate to the accuracy of the identification. (95/4866-67)

On cross, Dr. Brigham testified that most of his experiments were conducted in a college setting with students as subjects. (95/4868-69) The only experiments he performed outside the college setting were the ones involving bank tellers and convenience store clerks. (95/4868-69) The experiment included showing to students photographs of faces or people holding an object in their hand. (95/4877-80) He sometimes showed video tapes of reenacted crimes such as a staged purse snatching. (95/4877-80) In experiments related to the stress, he used the threat of giving an electrical shock or injection. (95/4881-83)

Dr. Brigham admitted that there could be some people who would get more focused and had a better memory when faced with a stressful situation. (95/4887) Dr. Brigham had never done any archival studies that involved talking to actual crime victims and learning about their experience as to the ability to see the perpetrator when under the stress when somebody pointed a gun at them. (95/4898) He was aware that archival studies came to different conclusions from the college setting experiments. (95/4897-99) He would not have been surprised if archival studied showed that individuals who were exposed to a high level of stress were able to more accurately identify the perpetrator. (95/4900-01) Dr. Brigham agreed that the real crime victims might have been differently motivated than college students. (95/4910) On redirect, Dr. Brigham testified that the concepts he testified to were generally accepted in the scientific community. (95/4918-19)

Richard Smith analyzed the part of the Wal-Mart video where a black man's arm was extended over the counter. (95/4947-51) He concluded that he would have expected to see a contrast on the man's arm indicating a tattoo if there was one. (95/4947-51)

Defendant testified that on December 13, 2007, he did not own a gas can and that he had a gas can back in October which he damaged with an edger. (95-96/4955-56) Defendant refilled his mower with a gasoline that was left in the gas can. (96/4956)

After deliberating, the jury found Defendant guilty for Counts I-VI.[1] (97/5235-36) As to counts IV (attempted first degree murder) and V (armed robbery), the jury specifically found that Defendant possessed and discharged a firearm). (97/5235-36)

At penalty phase, Angela Bryson testified that on December 13, 2007, Defendant was on probation and under her supervision. (98/5345-46)

Dr. Stephen Nelson testified that with regards to the pain sensation, both Bustamante and Luciano, felt the pain immediately after the fire started to consume their skin. (98/5349-50) Both victims suffered third and fourth degree burns on 80 to 90% of their body surface areas. (98/5350) The third degree burns are painful and they produce the burning sensation up to the point at which the nerve endings under the skin are damaged. (98/5350) Both victims could have been in shock after the gasoline was poured on their body, that they would have been consciously feeling the pain, and that adrenalin would have made them move around. (98/5366-67) Both victims would have been aware of the fact that their clothing was burning off of them and that their skin was coming off. (98/5367) They would have felt the pain up until the point the nerve endings were destroyed. (98/5368-69) The fact that Luciano complained to medical personnel that she felt a burning sensation in

[1] The possession of firearm by a convicted felon charge (Count VII) was severed from the trial.

the area where she was bound, evidenced that the pain sensation was still in effect at that time. (98/5369) The pain would not have prohibited victims from communicating with other people. (98/5370) If the flight nurse administered medication that resulted in a medically or chemically induced coma, the victims would not have felt any pain at that point. (98/5372) Both victims would have been capable of being conscious of what was going on from the moment they were burned up until the medically induced coma. (98/5372-73)

The State presented the victim impact statements prepared by Ebelia Rodriguez, Bustamante's mother, Alicia Gary, Bustamante's cousin, Adelita Luciano, Luciano's sister, and Brendita Luciano, Luciano's sister. (98/5378-82)

Damon Lugo, Bustamante's son testified that his family was a happy family of four, and since his mother's death they were a family of three, lonely and sad. (98/5383)

The State rested its case. (98/5387) The defense witness, Dawn Henry, Defendant's former wife, testified that their son was born with Downs Syndrome. (98/5389) Defendant was supportive and has loved his son anyways. (98/5390) Defendant was a big part of his son's life. (98/5391) When Henry met Defendant, he had just got out of the military because he attempted to hurt himself. (98/5393) She noticed Defendant showed signs of obsessive compulsive disorder and mood swings. (98/5394-95) Defendant was never diagnosed with any mental health

condition and had never taken medications. (98/5395) On the day of the incident, Defendant appeared lost and confused and did not sound like himself. (98/5398-99)

Linda Davis, Defendant's mother, testified that, when Defendant was a child he was beaten up by other kids. (98/5403) When Defendant was eight years old, another boy put his private part in Defendant's mouth. (98/5404) Defendant was bullied through the school years. (98/5406) Davis had a roommate, Denine Clark, who for some time lived alone with Defendant when he was 12 or 13 years old. (98/5407) Once, Defendant showed Davis his back all beat up and cut and told her that Clark had beaten him with an extension cord. (98/5407-10) When Defendant grew up, he told Davis that Clark used to whip him all the time. (98/5411) When Defendant was younger, he made statements that he wanted to kill himself so she took him to a family counseling center. (98/5413-14) When Defendant was in the military, he wanted to kill himself because he had issues with some guy. (98/5416) She found out through Defendant's friend that he tried to commit suicide by running into a concrete pole. (98/5417-25) When Defendant came back from the military, he had mood changes. (98/5425-27) When she picked up Defendant on the day of the incident, she told him what the media had said about him. (98/5430) Defendant started crying and said he did not hurt anybody. (98/5430-31)

India Owens testified that she noticed that Defendant engaged in obsessive compulsive behavior. (98/5434-35) When she saw Defendant on the day of the incident, he was crying like an infant. (98/5437) Defendant was a compassionate, loving and outstanding man. (98/5438) He was bullied in school by other kids. (T98. 5441-43) Ms. Clark was verbally abusive towards Defendant. (98/5445) She used to beat Defendant with an extension cord and water hose. (98/5445) As a result, Defendant had injuries all over his body. (98/5445-46) Once, he was badly beaten by Clark and his skin was torn apart. (98/5447-48)

After deliberating, the jury recommended that the trial court impose death sentences by a vote of 8-4 for the murder of Michael Bustamante, and by a vote of 12-0 for the murders of Yvonne Bustamante and Juanita Luciano. (100/5573-74)

At the Spencer hearing, no new evidence was presented. (65/10734-65) The parties presented legal arguments from their sentencing memos. Id.

The trial court agreed with the jury's recommendation as to the Luciano and Bustamante murders and imposed a death sentence for the murder of Yvonne Bustamante, a death sentence for the murder of Juanita Luciano, a life sentence for the murder of Michael Bustamante, a life sentence for the attempted first-degree murder of Brandon Greisman, a life sentence for the armed robbery while in possession of a firearm and 30 years imprisonment for the first-degree arson. (66/10843-64) The Court found that the following aggravating circumstances

applied to both Bustamante and Luciano: Defendant was previously convicted of a felony and was on felony probation-some weight; CCP-great weight; Defendant was contemporaneously convicted of another capital felony or a felony involving the use or threat of violence-very great weight; the capital felony was committed while Defendant was engaged in the commission of, or attempt to commit or in flight after committing or attempting to commit any robbery or arson-moderate weight; pecuniary gain-little weight; and HAC-great weight. (66/10845-56) The trial court found that the following aggravating circumstance applies only to Bustamante-the capital felony was committed for the purpose of avoiding or preventing a lawful arrest-some weight (66/10851-53) The trial court found the following statutory mitigating circumstance: Defendant committed the crime while he was under the influence of extreme mental or emotional disturbance-little weight. (66/10862-63) The trial court found that the following statutory mitigating circumstance was not established-Defendant has no significant prior criminal history. (66/10862) The trial court found the following non-statutory mitigating circumstances: Defendant was the victim of bullying throughout his childhood-slight to moderate weight; Defendant was the victim of sexual assault as a child-slight to moderate weight; Defendant was the victim of both physical and emotional child abuse by a caretaker-moderate weight; Defendant was the victim of overall family dynamics-very little weight; Defendant served in the U.S. Marine

Corps-very little weight; Defendant has a history of being suicidal, both as a child and as an adult-slight weight; Defendant was diagnosed with a personality disorder-slight weight; Defendant has a history of depression-slight weight; stress Defendant was dealing with at the time of the incident-little weight; Defendant was a good person in general-very slight weight; Defendant was a good worker-very slight weight; Defendant was a good son, good sibling, and good husband-very slight weight; Defendant was a good father to a child with Down syndrome-moderate weight; Defendant exhibited good behavior during the trial as well as other Court proceedings-very slight weight and Defendant exhibited good behavior while in jail-little weight. (66/10857-62)

This appeal follows.

SUMMARY OF THE ARGUMENT

1. The trial court properly admitted Bustamante's statements as a dying declaration. The totality of circumstances indicated that she believed her death was imminent. Pursuant to Crawford, Bustamante's declaration was admissible under the Confrontation Clause. The forfeiture by wrongdoing doctrine was not the basis for the trial court's ruling. The trial court properly found the avoid arrest aggravator.
2. The trial court properly denied Defendant's motions to exclude identifications of Defendant by Greisman and Ortiz. The out-of-court identification procedure

was not improperly suggestive. No substantial likelihood of irreparable misidentification led to the identifications of Defendant.

3. The issue regarding the admission of autopsy photographs is unpreserved. Defendant failed to show that fundamental error occurred. The photographs were relevant to illustrate the medical examiner's testimony.
4. Defendant's death sentences are proportionate.
5. Defendant's convictions are supported by competent, substantial evidence.
6. The trial court abused its discretion in not admitting Luciano' statements as a dying declaration.
7. The expert testimony concerning the factors that could impair the accuracy of eyewitness identifications did not meet the Frye standard. Such testimony did not assist the jury in understanding the evidence. The scientific principle underlying the expert's testimony was not reliable.

ARGUMENT

I. BUSTAMANTE'S STATEMENTS TO LT. ELROD WERE PROPERLY ADMITTED AS A DYING DECLARATION. THE AVOID ARREST AGGRAVATOR WAS PROPERLY FOUND.

Defendant asserts that the trial court abused its discretion in admitting Bustamante's statements to Lt. Elrod as a dying declaration in which she identified Defendant as the perpetrator. Defendant also contends that these statements

violated his confrontation rights. Further, Defendant contends that the trial court abused its discretion in admitting the statements under the forfeiture by wrongdoing doctrine as an alternate ground. Finally, Defendant asserts that the trial court abused its discretion in finding the avoid arrest aggravator. However, the trial court did not abuse its discretion in admitting these statements.[2] The avoid arrest aggravator was properly found.

Here, Bustamante's statements are properly considered a dying declaration. After conducting an extensive hearing, the trial court found that Bustamante's statements qualified as a dying declaration. (19/3074-81) The trial court found that the evidence showed that Bustamante reasonably believed her death was imminent, particularly in light of her statements to Frances Murray that she was not going to make it, and that Murray should pray for her. (19/3080) The trial court's findings are supported by the evidence.

This Court has held that statements are admissible as dying declarations where the statements were made by a declarant who believed that his death was

[2] A trial judge's ruling on the admissibility of evidence will not be disturbed absent a clear abuse of that discretion. Valle v. State, 70 So. 3d 530, 546 (Fla. 2011). The court's discretion is abused if its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence. McDuffie v. State, 970 So. 2d 312, 326 (Fla. 2007). The sufficiency and propriety of the predicate for a dying declaration is a mixed question of the law and fact, and a trial court's determination of the issue will not be disturbed unless clearly erroneous. Teffeteller v. State, 439 So. 2d 840 (Fla. 1983).

imminent and inevitable and concerned the cause of the declarant's death. Williams v. State, 967 So. 2d 735, 749 (Fla. 2007). While the declarant must have believed that he was about to die, it is not necessary for there to be a verbal expression of that belief for the statement to qualify as a dying declaration. Hayward v. State, 24 So. 3d 17, 30 (Fla. 2009). However, this Court has consistently upheld the admission of a statement as a dying declaration where the declarant did verbalize the expectation of death. Williams, 967 So. 2d at 748-49; Pope v. State, 679 So. 2d 710, 713 (Fla. 1996).

Defendant asserts that there was insufficient evidence that Bustamante believed, at the time she made the statements, that she had no hope of recovery and that her death was imminent. However, the totality of circumstances support the finding that Bustamante gave a dying declaration. When Murray first saw Bustamante, right after she got burned and before paramedics arrived, she was badly burned, her skin was coming off of her body, her clothes were melting, she was screaming that she was in severe pain and that she was hot and in need of water. When Murray came back with the water, she helped Bustamante drink it because her lips were burned and her skin was pealing over her lips. Bustamante voiced to Murray that she was in pain, that she was not going to make it and that she should pray for her. Also, Rivera and Anderson both testified that Bustamante was badly burned, bleeding, naked, in severe pain and that her skin was falling off.

Moreover, when Lt. Elrod first saw Bustamante, she was placed in an ambulance and was receiving a medical assistance. He observed that she was badly burned and he estimated that she was not going to survive and was aware of it. Although her entire body was burned, she was able to tell Lt. Elrod that Defendant hurt her and Luciano by setting them on fire after they refused to give him money. Also, Calvin Johnson testified that he heard Bustamante yelling "Davis did this" before the police officer had even asked her anything. Moreover, Froehlich and Cate both testified that Bustamante was in shock due to severe burns she had suffered, her clothes was burned off and she was in severe pain. Furthermore, Dr. Nelson's testimony verified Bustamante's critical condition after she had suffered severe burn injuries, second and third degree burns encompassing 80-90% of her body, and got shot in the hand. Dr. Nelson also opined that when someone is burned more than 85% of their body, there is only about 15% chance of survival. Given these circumstances, Bustamante's statements were properly admitted as a dying declaration.

This Court has found victims' statements to be dying declarations under like circumstances. See Williams, 967 So. 2d at 749(finding the statements made by the victim to the officer at the crime scene, in which the victim identified the defendant as her assailant, were admissible as a dying declaration. The officer arrived minutes after the victim made 911 call, during which she told the operator that she

had been stabbed and that she was dying and by the time the paramedics and the officer arrived, the condition of the victim had not improved); Jones v. State, 36 So. 3d 903, 908-09 (Fla. 4th DCA 2010)(the victim's statements to the detective identifying the defendant as the perpetrator were admissible as a dying declaration where the detective testified that when he first observed the victim in the ambulance, he was pale and clammy looking, his breathing was labored, and he lost a quite a bit of blood); Williams v. State, 947 So. 2d 517 (Fla. 3d DCA 2006)(finding as a dying declaration the victim's statements identifying the defendant as a perpetrator, in response to the police questioning minutes after he was shot, as he was bleeding and attempting to push his intestines back into his body. The responding officer questioned him immediately, rather than following the procedure and waiting the investigator to arrive because the victim was gravely injured and appeared to be dying).

Defendant's assertions that Bustamante's statements violated the Confrontation Clause and that dying declarations are not exempt from the right of confrontation on historical grounds are without merit. In Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004), the United States Supreme Court recognized that it had always considered dying declarations to be admissible under the Confrontation Clause and stated that it was not disturbing this line of precedent. The Court acknowledged that "although many dying declarations may not be testimonial,

there is authority for admitting even those that clearly are." Id. As a result, it has been recognized that dying declarations are admissible even after Crawford.

Moreover, in its more recent decision in Giles v. California, 554 U.S. 353, 358 (2008), the US Supreme Court has acknowledged that the dying declaration exception would not offend the Constitution. The Court held that, "we have previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfronted. The first of these were declarations made by a speaker who was both on the brink of death and aware that he was dying." Id. at 358. See also State v. Martin, 695 N.W. 2d 578 (Minn. 2005); People v. Monterroso, 101 P. 3d 956 (Cal. 2004); Cobb v. State, 16 So. 3d 207, 211-12 (Fla. 5th DCA 2009)(holding that dying declarations are an exception to the right of confrontation); White v. State, 17 So. 3d 822, 825 (Fla. 5th DCA 2009)(same).

Moreover, Defendant even admits that there is a split of authority as to his argument against recognizing dying declarations as an exception to Crawford, and that his position is in the minority. (p. 80 of Initial Brief) The State's position is that the majority of jurisdictions agree that excluding dying declarations as violative of the right of confrontation "would not only be contrary to all the precedents in England and here, acquiesced in long since the adoption of these constitutional provisions, but it would be abhorrent to that sense of justice and

regard for individual security and public safety which its exclusion in some cases would inevitably set at naught." Monterroso, 101 P. 3d at 972. Under these circumstances, Bustamante's statements do not involve confrontation clause concerns.

Defendant relies on Michigan v. Bryant, 131 S. Ct. 1143 (2011), Delhall v. State, 95 So. 3d 134 (Fla. 2012), and People v. Clay, 926 N.Y.S. 2d 598 (N.Y. App. Div. 2011) to support the trial court's finding that the statements were testimonial and also to support his argument that the statements were improperly admitted. However, the State does not contest the lower court's finding that Bustamante's statements to Lt. Elrod were testimonial. Even if testimonial, those statements were admissible under the dying declaration exception to the Confrontation Clause under Crawford. As such, the reliance on the above cited cases does not help Defendant's argument at all. The trial court did not abuse its discretion in admitting the statements.

Defendant next asserts that the trial court abused its discretion in admitting Bustamante's statements relying on the forfeiture by wrongdoing doctrine as an alternate ground for admissibility. However, the trial court admitted Bustamante's statements as a dying declaration and not under the forfeiture by wrongdoing doctrine. (19/3074-81) An isolated reference to this doctrine was made in the portion of the trial court's order, where the court gave the reasoning related to its

ruling that the dying declaration exception survived Crawford. (19/3077-80) In that process, the trial court cited Williams v. State, 947 So. 2d 517 (Fla. 3d DCA 2006), concerning the issue of whether a dying declaration had survived Crawford. The court merely observed that the Williams court had discussed the doctrine of forfeiture by wrongdoing but the court's order does not, in any way, rely on the doctrine as an alternative basis for admission of these statements. (19/3078-79) As such, Defendant's assertion that the trial court erroneously considered the forfeiture doctrine as an alternate ground for admissibility is meritless.

Even if this Court finds that the trial court erred in admitting Bustamante's statements, such error was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The State presented evidence in the form of an eyewitness testimony of Greisman and Ortiz who identified Defendant as the person who shot Greisman, Defendant's confession that he had committed the robbery and hurt somebody, eyewitness testimony and video footage that on the morning of the day of the incident, Defendant bought a Bic lighter, gloves, an orange six-pack cooler, and a shirt, testimony that a Bic lighter, duct tape and a gas can were found at the crime scene, evidence that black gloves were found in Defendant's car, eyewitness testimony that during the commission of the crime, Defendant had put a gun into an orange-ish lunch bag, testimony that Defendant asked Derrick Johnson to give him duct tape, testimony that Bustamante and

Luciano had a gray tape around their wrists, eyewitness testimony that after the crime, Defendant had blood and scratches on his face and that these injuries could have been burn injuries, evidence that Defendant owned a gas operated lawn mower, testimony that Defendant kept a gas can in his garage and that a gas can was found at the scene, testimony that, six days before the incident, Defendant bought a .357 Dan Wesson gun and procured a handful of .38 ammunition, ballistic evidence that the projectiles from the crime scene were of a .38 or .357 caliber class, evidence that traces of petroleum were found in Defendant's vehicle. Given the substantial evidence of Defendant's guilt, any error in the admission of Bustamante's statements cannot be said to have affected the verdict and was, therefore harmless. Defendant's convictions should be affirmed.

Finally, Defendant challenges the finding of the avoid arrest aggravator. Defendant contends that the possible motive for the killings was the financial distress that he suffered and anger directed towards Headley Insurance because of the increase of his insurance payments. However, this issue is meritless.

This Court's review of the of the trial court's finding regarding an aggravator is limited to whether the trial court applied the correct law and whether its findings are supported by competent, substantial evidence. Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997). As the trial court's findings here did apply the correct law and are supported by competent, substantial evidence, they should be affirmed.

With regard to the avoid arrest aggravator, the trial court found:

The Florida Supreme Court has held that "the facts supporting the commission of murder to avoid arrest must focus on the defendant's motivation for the crime." Looney, 803 So. 2d at 676 (citing Rodriguez, 753 So. 2d at 48). "In order to establish that the murder was committed for the purpose of avoiding or preventing a lawful arrest…, the evidence must prove that the sole or dominant motive for the killing was to eliminate a witness." Id. at 676 (citing Zack v. State, 753 So. 2d 9, 20 (Fla. 2000); Consalvo v. State, 697 So. 2d 805, 819 (Fla. 1996)). "The mere fact that the victim knew and could identify the defendant, without more, is insufficient to prove this aggravator." Looney, 803 So. 2d 676 (citing Consalvo, 697 So. 2d at 819).

The evidence in this case clearly established that the defendant went to Hadley Insurance on December 13, 2007, armed with a handgun, and equipped with duct tape. The defendant also possessed gloves and a Bic lighter, which he purchased in advance of the crime. After he entered the building, he locked the front door to prevent customers from entering. Crime scene technicians found duct tape over the lens of the surveillance camera inside the insurance agency. Both of the victims were duct taped to chairs and were no longer a threat to the defendant. He then poured gasoline over both women, and set them on fire. The Fire Marshall found two other points of origin for the fire inside the agency. The final point of origin was at or near the front door.

Jackie Hare testified that that she worked for Hadley Insurance Agency in Lake Wales from 2005 to December 4, 2007. She knew Leon Davis as a client. She said that Yvonne Bustamante normally took care of Mr. Davis when he came to the agency. Ms. Hare identified numerous documents from Mr. Davis' file that have been generated by Yvonne Bustamante. One was a hand written note by Yvonne Bustamante indicating that she had called Nationwide Insurance in reference to "Leon's" (calling the defendant by his first name)equipment. On August 20, 2007, Mr. Davis changed his auto insurance from Nationwide Insurance to Victoria. Yvonne Bustamante handled that transfer. On October 25, 2007, approximately six(6) weeks before the incident, Mr. Davis cancelled his policy with Victoria. His signature and Yvonne Bustamante's signature were on

the cancelled document.

Robert Hitchcock, a former Hadley Insurance Agent, testified that the Lake Wales agency was not a high volume office and was more "one on one with the customers." Scott Headley, the owner of Hadley Insurance, testified that Yvonne Bustamante was a full service agent for him and worked at the Lake Wales office for nine (9) years. Leon Davis had been insured with Hadley Insurance the entire time Ms. Bustamante worked there. Juanita Luciano worked at the Lake Wales office for almost three years.

Fran Murray, who lived one block North of Hadley Insurance Company, testified that around 3:00 p.m., on December 13, 2007, she saw smoke coming from that area. She walked across the street to investigate and heard three (3) "pops." She observed Yvonne Bustamante coming out of the back door of Hadley Insurance, on fire with large chunks of skin coming off of her. She was trying to free her hands where she was bound with duct tape. She also observed a tall black male and saw him shoot Brandon Greisman. After she assisted Mr. Greisman, Ms. Murray went to the front of the insurance office and saw Ms. Bustamante leaning against a white S.U.V. She was asking for water. When Ms. Murray returned with water, Ms. Bustamante said to her, "Please pray for me. I'm not going to make it." At that time, paramedics arrived and loaded Ms. Bustamante onto a stretcher. Lt. Joe Elrod of the Lake Wales Police Department arrived at Headley Insurance. As the medical personnel were loading Ms. Bustamante, he observed a "Hispanic female that was badly burned." He said her skin was "beginning to slough off." Lt. Elrod testified, "I knew she was going to die, so I tried to get information from her on who did it to her. She told me Leon Davis… that she knew him and he was a prior client of theirs in the insurance company."

Based on the evidence, this Court concludes that once the women were bound and duct taped to the chairs and the robbery was completed, the only reason to kill Yvonne Bustamante was to prevent her from identifying the defendant as the perpetrator.

Thus, the Court finds that, based on the totality of the circumstances, this aggravating circumstance was proven beyond and to the exclusion of every reasonable doubt as it applies to Yvonne Bustamante, and assigns it some weight. Chamberlain, 881 So. 2d 1087 (Fla. 2004).

The Court further finds that the State failed to prove beyond a

> reasonable doubt that the sole or dominant motive for the murder of Juanita Luciano was to eliminate a witness.

(66/10851-53)

In order to establish the avoid arrest aggravator where the victim is not a law enforcement officer, the State must show beyond a reasonable doubt that the sole or dominant motive for the murder was the elimination of a witness. Hernandez v. State, 4 So. 3d 642, 667 (Fla. 2009). In such cases, proof of the intent to avoid arrest or detection must be very strong. Id. Moreover, this Court has approved the finding of the avoid arrest aggravator based on circumstantial evidence, without any direct statements by the defendant indicating a motive to eliminate a witness. Serrano v. State, 64 So. 3d 93, 114 (Fla. 2011). Even without direct evidence of the defendant's thought process, the avoid arrest aggravator can be supported by circumstantial evidence through inference from the facts shown. Id. at 114. Circumstantial evidence generally relied upon to prove this aggravator includes whether the victim knew and could identify the killer, whether the defendant used gloves, wore a mask, or made incriminating statements about witness elimination, whether the victim offered resistance, and whether the victim was confined or was in a position to pose a threat to the defendant. Id.

This Court has also held that the fact that the defendant had other motives for the killing, does not preclude the application of the avoid arrest aggravator.

Howell v. State, 707 So. 2d 674, 681-82 (Fla. 1998)(holding that ample evidence was presented in support of the conclusion that witness elimination was Howell's dominant motive for the murder of Bailey. The fact that Howell may have had other motives for the murder, does not preclude the finding of this aggravator).

In the case at hand, competent and substantial evidence was presented that Defendant murdered Bustamante for the purpose of avoiding arrest. The evidence was presented that Defendant came to Hadley equipped with a gun, duct tape, a gas can, a Bic lighter and gloves, which he procured in the morning of the day of the incident. (90/4052-56; 88/3745-47); (85/3222-28) Defendant placed duct tape on the lens of the surveillance camera. (80/2302-03) Before completing the robbery, Defendant restrained both victims with duct tape. (81/2466; 83/2771; 85/3163-64; 88/3714, 3723) He then poured gasoline over them and set them on fire. (82/2638) This evidence shows that Defendant procured the equipment for committing his crimes in advance and his determination that his criminal acts would not be detected. Also, the fact that he restrained the victims before completing the robbery, shows that they did not pose a threat to him.

Moreover, the evidence was also presented that Defendant was a longtime client of Headley and that Bustamante was the employee who was assisting him in person. Bustamante told Ltn. Elrod that Defendant was her customer. (82/2637) Numerous documents that were prepared by Bustamante for Defendant confirmed

that. (91/4180-87) On one of such documents, there was a handwritten note made by Bustamante referring to Defendant by his first name, "called Nationwide to see about Leon's custom equipment." (91/4183) Approximately six weeks before the incident, Bustamante handled the cancellation of Defendant's policy with Victoria. (91/4187) Under these circumstances, Defendant intended to eliminate Bustamante to prevent his arrest. As the record indicates, after he restrained the victims and completed the robbery, he could have left without murdering them. However, Bustamante knew Defendant and could have identified him. As such, there was little reason to kill her other than to eliminate the only person who knew him well, as a witness to his actions.

This Court has upheld the avoid arrest aggravator under similar circumstances. In Henry v. State, 613 So. 2d 429 (Fla. 1992), the defendant entered the office, disabled two victims, the store employees, one by tying her up and blindfolding her and other by a blow to the head. He then robbed the office. Defendant left the office, but returned, threw a liquid on the bludgeoned victim and set her on fire. This Court upheld the avoid arrest aggravator and reasoned that after disabling both victims, Defendant could have affected the robbery without killing them. "The victims knew Henry, however, and, even though one survived long enough to identify him, the evidence supports finding that Henry intended to eliminate these witnesses to prevent arrest." Id. at 433; see also Willacy v. State,

696 So. 2d 693 (Fla. 1997)(the defendant bludgeoned the victim and tied her hands and feet together. Because the victim no longer posed an immediate threat to him, and because she was his neighbor and could identify him easily, this Court concluded that Defendant had little reason to kill the victim except to eliminate her as a witness); Thompson v. State, 648 So. 2d 692 (Fla. 1994)(holding that after the defendant obtained money from the victims, there was little reason to kill them other than to eliminate sole witnesses to his actions). Like in Henry, Willacy, and Thompson, here, the victims were restrained and posed no threat to Defendant. Like in all the above citied cases where the victims knew the defendants, here, Bustamante knew Defendant and could identify him easily.

Defendant relies on Menendez v. State, 368 So. 2d 1278 (Fla. 1979), asserting that like in Menendez, here, the motive for the killing was a mere speculation. However, Menendez is inapplicable to the facts of our case. In Menendez, the defendant robbed a jewelry store and shot the owner using a silencer firearm. A customer happened onto the scene in time to see the defendant emptying the safe. The customer provided the description and the police soon thereafter arrested the defendant. This Court did not uphold the avoid arrest aggravator because the evidence did not show what events proceeded the murder and it was only known that the weapon was brought to the scene. In other words, the motive for the murder in Menendez could have been based on any number of

reasons. Here, on the other hand, the evidence was presented that Defendant knew Bustamante knew him and could later identify him to the police. Moreover, Defendant had no logical reason for binding Bustamante and then setting her on fire except for the purpose of murdering her to prevent detection. Moreover, Defendant acted to prevent his detection by disabling the surveillance camera. Even if the avoid arrest factor was improperly applied, such error would be harmless in light of the other serious aggravating factors and the minimal mitigation. Defendant was sentenced to death for Luciano's murder without application of this factor, based on the same five aggravating factors that still apply if avoid arrest were to be stricken for the Bustamante murder. As the trial court applied the correct law and its findings are supported by competent substantial evidence, the avoid arrest aggravating circumstance should be affirmed.

II. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTIONS TO EXCLUDE IDENTIFICATIONS OF DEFENDANT MADE BY GREISMAN AND ORTIZ.

Defendant challenges both the out-of-court and in-court identification of himself made by Greisman and Ortiz. He contends that the photopacks were impermissibly suggestive because they included the book-in numbers. Defendant also contends that their in-court identifications were not reliable. However, this issue is without merit.

> The test for suppression of an out-of-court identification is two-fold: (1) whether the police used an unnecessary suggestive procedure to obtain the out-of-court identification; and (2) if so, considering all the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. See Thomas v. State, 748 So. 2d 970, 981 (Fla. 1999); Green v. State, 641 So. 2d 391, 394 (Fla. 1994); Grant v. State, 390 So. 2d 341, 343 (Fla. 1980). The factors to be considered in evaluating the likelihood of misidentification include:
>
> > [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and confrontation.
>
> Grant, 390 So. 2d at 343 (quoting Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L.Ed. 2d 401 (1972)). If the procedures used by the police in obtaining the out-of-court identification were not unnecessary suggestive, however, the court need not consider the second part of the test. See Thomas, 748 So. 2d at 981; Green, 641 So. 2d at 394;
> Grant, 390 So. 2d at 344.

Rimmer v. State, 825 So. 2d 304, 316 (Fla. 2002).

Here, the trial court found that no evidence indicated that Ortiz's and Greisman's identifications of Defendant were the result of any suggestion. (18/2832-2836; 19/3043-44) The court also found nothing suggestive about the book-in numbers under the pictures. (18/2833) The trial court based its determination on the fact that when he looked at the photopack, he paid little attention to the numbers but instead had focused on the pictures (18/2833) The trial

judge explained that he did not realize that these numbers represented a year until the defense counsel pointed that out to him. (18/2833-34) The Court also found that no substantial likelihood of irreparable misidentification let to Ortiz's identification of Defendant. (18/3836-39)

Based on the facts surrounding these two identifications, Defendant cannot demonstrate any abuse of discretion resulting from the trial court's decision to admit the testimony of Greisman and Ortiz. Thomas v. State, 748 So. 2d 970, 981 (Fla. 1999). Where rulings denying motions to suppress evidence come to an appellate court clothed with a presumption of correctness, a reviewing court must interpret the evidence and reasonable inferences therefrom in a manner most favorable to the trial court's ruling. Johnson v. State, 717 So. 2d 1057, 1062 (Fla. 1st DCA 1998).

Defendant first challenges Greisman's and Ortiz's pre-trial identifications. As stated above, the first inquiry concerns whether the police used an unnecessary suggestive procedure to obtain the out-of-court identification. In arguing that an improperly suggestive procedure was employed to obtain identification of Defendant by Greisman and Ortiz, Defendant relies on the fact that the book-in numbers were placed under the photographs, and that only Defendant's book-in number began with 2007 whereas other five began with either 93 or 94. According to Defendant the fact that only Defendant's book-in number began with 2007 and

the fact that the crime occurred that same year, tainted Greisman's and Ortiz's subsequent identifications.

Here, the police did not employ unnecessary suggestive procedures in obtaining the pre-trial identifications. Greisman and Ortiz were shown the same photopack. (15/2367, 2378) The only difference was that the pictures numbered 1 and 2 were inverted. Pictures did not show the date of the booking but only the book-in year. (15/2367, 2378) Detective Townsel testified that when she showed the photopack to Greisman and Ortiz, they both immediately, without hesitation, identified Defendant. Neither of them looked at the numbers, did not know what they represented and did not say anything about it. Both Greisman and Ortiz testified that when showed the photopack, they immediately pointed to Defendant. Under these circumstances, the trial court properly found that there was nothing suggestive about the out-of-court identification procedure.

In Buchanan v. State, 575, So. 2d 704, 707-08 (Fla. 3d DCA 1991), a case involving photo line-up identifications similar to the one in this case, the Third District has ruled that the police did not use an unnecessarily suggestive procedure. In Buchanan, the police used a photo array in which only the defendant's picture contained a number one. The defendant argued that this number suggested that the defendant was the number one suspect. None of the witnesses who identified the defendant testified that the number one influenced their selection. Here, all

photographs, and not just Defendants, contained the numbers underneath the pictures. Moreover, Detective Townsel testified that neither Greisman nor Ortiz looked at the numbers nor did they say anything about it. Also, they immediately made identifications. The trial court's order should be affirmed.

Defendant's reliance on Henderson v. United States, 527 A. 2d 1262 (D.C. App. 1987), State v. Davis, 504 A. 2d 1372, (Conn. 1986), Adkins v. Commonwealth, 647 S.W. 2d 502 (Ky. App. 1982) and Brown v. Commonwealth, 564 S.W. 2d 24 (Ky. App. 1978) for the proposition that the police employed an unnecessarily suggestive procedure because of the inclusion of the book-in numbers on the photopack, is without merit. In Henderson, the DC Court of Appeals found the photo pack unnecessarily suggestive not because the date shown on the defendant's picture was much more recent but on the other factors as well. The court found that in the photo array the defendant's photograph stood out dramatically because the quality of the photographic print was poor, the defendant was the only individual with the facial hair, the defendant was substantially bald while other men had normal hairlines, and the defendant's picture was much more recent, was unnecessarily suggestive. The Court further held that any of these factors alone probably would not have made the array suggestive but only taken together. Unlike in Henderson, here, the photopack was of a good quality, all men

had similar facial features, similar skin tones, short hair and looked about the same age group.

In Davis, like in Henderson, the Supreme Court of Connecticut found that the totality of factors made the photopack suggestive (the defendant appeared in the photograph wearing clothing similar to that worn by the robber at the time of the crime, the photograph had a recent arrest date and the victim knew that the suspect was in the custody). Unlike in Davis, here, the pictures did not contain the arrest date but only the year. Moreover, unlike in Davis, here, Ortiz and Greisman did not know that Defendant was in custody. Moreover, besides Defendant, one more person appeared in a gray shirt.

In Adkins, the defendant challenged the pre-trial identification procedure based on the fact that the men in the photopack did not resemble him. As Adkins did not even involve the inclusion of any numbers on the photopack, it is inapplicable here.

In Brown, the Kentucky Court of Appeals found the pre-trial identification procedure unnecessary suggestive in which the eyewitnesses to the robbers' flight from the scene of the robbery were shown seven photographs, in which the two defendants' photographs contained the date of the robbery and the legend "ROB", and in which only one other photograph contained the legend. The Court reasoned that, "any person of ordinary intelligence would conclude that the persons in these

two photographs had been arrested for the robbery on the very date of the McDonald's Restaurant robbery." 564 S.W. 2d at 27. Unlike in Brown, here, the photopack did not contain the arrest date nor any kind of legend that would refer the subject crimes.

Defendant also argues that Ortiz's in-court identification was tainted by the fact that Detective Townsel stated that she could not remember whether she told Ortiz (after he identified Defendant) that he identified the right guy. Defendant interprets this statement as if Townsel confirmed the correctness of identification. However, the record contradicts this assertion. Detective Townsel testified that the whole conversation between her and Ortiz was recorded. (17/2814) She explained that after Ortiz identified Defendant, she did not tell him that he had made the right identification and that if she had said something to that effect, it would have been recorded. Id. Townsel could not remember if she had made such statement after the tape was turned off. Id. Under these circumstances, the identification procedure was not tainted.

Even if Townsel had told Ortiz that he had made the right identification, that would not have bolstered the subsequent in-court identification of Defendant. Fitzpatrick v. State, 900 So. 2d 495, 519-20 (Fla. 2005)(the fact that the witness was informed that he picked the right photograph out of photo array prior to the

defendant's suppression hearing did not unduly bolster the witness's in-court identification of the defendant).

Even if this Court finds that the procedure employed with regard to pretrial identifications was unnecessarily suggestive, the evidence shows that no substantial likelihood of irreparable misidentification led to the identification of Defendant by Greisman and Ortiz. First, Defendant asserts that Greisman had a limited opportunity to observe Defendant. This assertion is contradicted by the evidence. Greisman testified that when the burned woman bumped into him, he observed Defendant as he was walking towards him and the woman. His attention was heightened by the fact that he thought Defendant was coming to help. (84/3008) He explained that he took a good look at Defendant's face and made an eye contact with him. (83/2879-80) Greisman he was focused on Defendant's face and could see him clearly. (83/2888, 2879) This demonstrates a sufficient degree of attention to negate any likelihood of misidentification.

The remaining relevant factors fail to establish any likelihood of misidentification on Greisman's part. Defendant failed to demonstrate any significant inaccuracy with regards to Greisman's description of Defendant. Greisman described Defendant as a black man, and around 6'2" tall. He also stated that Defendant was wearing long pants but could not remember if he had a facial hair, gloves or long or short sleeves. Greisman explained this by the fact that he

was focused on Defendant instead on his facial hair or a hair style (which he stated was not a full Afro, and it was an inch long). (84/3008-09) Moreover, Greisman's certainty in selecting Defendant from the photopack was 100%. And, the length of time between the time and confrontation was insignificant because the identification was made the next day. Before he made an identification, Greisman did not watch TV nor read newspapers. (83/2908-09) The police did not make any suggestion that Defendant was in the photopack. (83/2899) Under these circumstances, Greisman's identification of Defendant was reliable.

Second, Defendant asserts that Ortiz had a limited opportunity to observe Defendant. This assertion is contradicted by the evidence. Ortiz testified that he saw Defendant's face when Greisman pointed at him said, "That guy shot me." (84/3040) Ortiz looked Defendant in the eyes. (84/3043) His level of attention was heightened by the fact that Ortiz wanted to make sure that Defendant would not come after him. (84/3043) This demonstrates a sufficient degree of attention to negate any likelihood of misidentification.

The remaining relevant factors fail to establish any likelihood of misidentification on Ortiz's part. Ortiz's description of Defendant was accurate (a big, black guy, around 30 years old), despite the fact that he could not say for sure if Defendant had a small Afro hair style. (85/3105) He explained this by the fact

that he was not focused on Defendant's hair style but on his eyes, "I was looking at his eyes, never forgot them." (85/3147)

Moreover, Ortiz had no doubt in selecting Defendant from the photopack. Ortiz's certainty in his identification was even more significant in light of the fact that he had seen Defendant before the incident, at Florida Natural, where they both used to work. (84/3052, 3137-38) Finally, Ortiz viewed the photopack only four days after the incident. He testified that he did not watch any news before he made the identification. (84/3062-68) Under these circumstances, Ortiz's identification of Defendant was reliable. Therefore, the trial court's ruling denying Defendant's motions to suppress identifications of Defendant should be affirmed.

Even if this Court finds that the trial court erred in admitting the pre-trial and in-court identification of Defendant by Greisman and Ortiz, such error was harmless beyond a reasonable doubt. State v. DiGuilio, 491. So. 2d 1129 (Fla. 1986). The State presented evidence in the form of a dying declaration made by Bustamante who identified Defendant as the perpetrator and described what he had done to her and Luciano, Defendant's confession that he had committed the robbery and hurt somebody, eyewitness testimony and video footage that on the morning of the day of the incident, Defendant bought a Bic lighter, gloves, an orange six-pack cooler, and a shirt, testimony that a Bic lighter, duct tape and a gas can were found at the crime scene, evidence that black gloves were found in

Defendant's car, eyewitness testimony that during the commission of the crime, Defendant had put a gun into an orange-ish lunch bag, testimony that on the day of the incident, Defendant asked Derrick Johnson to give him duct tape, evidence that Bustamante and Luciano were bound with a tape, eyewitness testimony that after the crime, Defendant had blood and scratches on his face and that these injuries could have been burn injuries, evidence that Defendant owned a gas operated lawn mower, testimony that Defendant kept a gas can in his garage and that a gas can was found at the scene, testimony that, six days before the incident, Defendant bought a .357 Dan Wesson gun and procured a handful of .38 ammunition, ballistic evidence that the projectiles from the crime scene were of a .38 or .357 caliber class, evidence that traces of petroleum were found in Defendant's vehicle, and testimony that Defendant was a customer of Hadley insurance and that Bustamante dealt with him on many occasions. Given the substantial evidence of Defendant's guilt, any error in the admission of pre-trial and in-court identification of Defendant cannot be said to have affected the verdict and was, therefore harmless. Defendant's convictions should be affirmed.

III. THE ISSUE REGARDING THE ADMISSION OF AUTOPSY PHOTOGRAPHS IS UNPRESERVED AND MERITLESS.

Defendant asserts that the admission and introduction of 43 gruesome photographs was fundamental error as these photographs were not relevant to any issue in dispute. However, this issue is unpreserved and without merit.

It is well settled that to preserve an issue about the admission of evidence for appellate review, an appropriate objection must be made before the trial court. Golden v. State, 114 So. 3d 404, 406 (Fla. 4th DCA 2013). Here, Defendant did not object when the State offered to admit into evidence Exhibits 8045-8051, that consisted of pictures of Luciano while she was still alive at the hospital. (88/3683-84) He also did not object when the State offered to admit the photographs from the autopsy of Michael Bustamante (Exhibits 8061-8067), the photographs from the autopsy of Yvonne Bustamante (Exhibits 8001-8023) and the photographs from the autopsy of Juanita Luciano (Exhibits 8032-8044). (88/3688, 3691, 3695-96) As such, this issue is unpreserved.

Because this issue was not preserved, Defendant would only be entitled to relief if he could show that the fundamental error occurred. Smith v. State, 28 So. 3d 838, 857 (Fla. 2009). Fundamental error had been defined as the type of error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. Hayward v. State, 24 So. 3d 17, 42 (Fla. 2009). Here, Defendant cannot

demonstrate fundamental error because no error occurred related to the admission of the subject photographs.

This Court has held that gruesome photographs are admissible so long as they are relevant and "not so shocking in nature as to defeat the value of their relevance." Looney v. State, 803 So. 2d 656, 668 (Fla. 2001)(quoting Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990)). As such, gruesome photographs that are "independently relevant or corroborative of other evidence" are properly admitted. Id. Moreover, the test for admissibility is relevance, not necessity. Pope v. State, 679 So. 2d 710, 713 (Fla. 1996); Jones v. State, 648 So. 2d 669, 679 (Fla. 1994). In fact, this Court had held that "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." Arbelaez v. State, 898 So. 2d 25, 44 (Fla. 2005)(quoting Henderson v. State, 463 So. 2d 196, 200 (Fla. 1986)).

Moreover, this Court has held that photographs are admissible if they assist the medical examiner in explaining the nature of wounds and the manner in which they were inflicted. Pope, 679 So. 2d at 713-14; Brooks v. State, 787 So. 2d 765 (Fla. 2001). They are also admissible to show the manner of death, the location of wounds, and identity of the victim. Larkins v. State, 655 So. 2d 95, 98 (Fla. 1995) In fact, the only time this Court had found that the photographs were not admissible was in the situation where the gruesome nature of the photographs was

caused by the factors apart from the crime itself so that they were irrelevant to the circumstances surrounding the murder. Czubak v. State, 570 So. 2d 925, 928-29 (Fla. 1990)(the photographs showed the victim's body disturbed by the dogs after the crime); Hertz v. State, 803 So. 2d 629 (Fla. 2001)(the photographs depicted the effect of the fire that occurred after the victim's death); Looney v. State, 803 So. 2d 656, 670 (Fla. 2001)(same).

Applying these standards here, it is obvious that no error occurred. The subject photographs were admitted into evidence during the testimony of Lopez and Hancock, crime scene technicians, who took the photographs. Both Lopez and Hancock properly authenticated and identified the photographs and testified that they were genuine. See §90.901 Fla. Stat. (2010)(authentication is a condition precedent to the admission of evidence). These photographs were subsequently introduced during the testimony of the medical examiner, Dr. Nelson.

In particular, during the testimony of Dr. Nelson, the State first referred to the autopsy photographs (Exhibits 8061-8067) of Michael Bustamante. The pictures depicted the redness on Michael's body and assisted Dr. Nelson in explaining to the jury that the redness was caused by the prematurity and determining that the premature delivery (that was caused by his mother's burn injuries) was the cause of death.

The introduced autopsy photographs (Exhibits 8002-8019) of Yvonne Bustamante, depicted the swollen body, different areas of the burned skin, the incisions on different areas of the body, and parts of the body that were relatively unburned. The photographs assisted Dr. Nelson in explaining to the jury that the swelling was caused by the loss of fluids due to the extensive burns, that because of the swelling, the incisions had to be made so that the blood flow could have been facilitated. Dr. Nelson was also able to identify the level of extensity of the burns in different areas of the body. The photographs also assisted Dr. Nelson in showing the area of the wrist that had no burns and explaining that that it could have been due to the binding of some kind (which was also consistent with the testimony that she was tied up with duct tape). The photographs also assisted Dr. Nelson in explaining the cause of death (thermal burns) and the percentage of the total burned body area (80-90%) as well as the degree of the burns (2nd &3rd degree).

Finally, the State introduced autopsy photographs of Luciano (Exhibits 8032-8044) and photographs while she was still alive (Exhibits 8045-8051), that depicted different areas of the burned body, the charred areas of the body and the areas that were unburned. These photographs assisted Dr. Nelson in identifying the level and extensity of the burns in different body areas and determining the cause of death (thermal burns), the percentage of the total burned area (90%) and the

degree of the burns (3rd and 4th degree). Dr. Nelson was also able to explain to the jury that the absence of burns on Luciano's wrists could have been explained with the application of some binding (consistent with the testimony that the victim was tied with duct tape).

As can be seen from the foregoing paragraphs, the photographs were relevant to illustrate Dr. Nelson's testimony, and the location of the wounds he noted on the victims. The photographs also assisted Dr. Nelson in explaining to the jury the nature and extent of the injuries and the manner in which they were inflicted. Moreover, the photographs were also relevant for the medical examiner's determination of the cause of death. In addition, the photographs of Luciano while she was still alive were also relevant to show how Luciano's body appeared at the time the police arrived at the hospital due to the fact that the pictures could not have been taken at the crime scene as she was immediately transported to the hospital because of the severity of the injuries. Under these circumstances, the photographs of the victims introduced by the State were relevant and not unduly prejudicial. As such, no error occurred regarding the admission of the subject photographs.

Furthermore, under similar circumstances, this Court has upheld the admission of photographs when they were necessary to explain a medical examiner's testimony, the manner of death and the location of the wounds. See

Davis v. State, 859 So. 2d 465, 477 (Fla. 2003); Floyd v. State, 808 So. 2d 175, 184 (Fla. 2003); Douglas v. State, 878 So. 2d 1246, 1256 (Fla. 2004); Pope, 679 So. 2d at 713-14. As no error occurred regarding the admission of the subject photographs, this claim should be denied.

Defendant's reliance on Shootes v. State, 20 So. 3d 434 (Fla. 1st DCA 2009) and Stephenson v. State, 31 So. 3d 847 (Fla. 3d DCA 2010), in order to support his argument that his right to a fair trial was prejudiced by the introduction of the photographs is without merit. In Stephenson, the defendant was on trial for an aggravated manslaughter. The prosecutor commented on cross and during the closing argument, on the fact that the defendant contemplated the abortion of the child. Since the defendant did not object, the Third District found that fundamental error occurred since the comment was irrelevant to the issue presented at trial and the prejudice of the evidence outweighed any probative value. In Shootes, the First District found the fundamental error where the defendant's right for a fair trial was prejudiced by the presence of large number of law enforcement officers in the courtroom on the last day of trial for an aggravated assault, stemming from an incident in which the defendant fired a gun at officers who attempted to detain him. As neither Shootes nor Stephenson concerned the issue of the admissibility of the gruesome photographs at all, they are inapplicable here. This claim should be denied.

IV. DEFENDANT'S SENTENCE IS PROPORTIONATE.

While Defendant did not raise the issue of proportionality, this Court has a duty to address the proportionality in each capital case.

"Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991).

A comparison of this crime and its circumstances to other cases reveals that the sentence of death is warranted here. For example, the facts of this case are remarkably similar to the facts in Willacy v. State, 696 So. 2d 693 (Fla. 1997) and Henry v. State, 613 So. 2d 429 (Fla. 1993). In Henry, this Court upheld two death sentences. Before robbing the store, the defendant disabled two employees. In fact, he lured the first victim into the restroom and persuaded her to let him tie her up under the guise of protecting her from robbers. The defendant then disabled the other victim by hitting her in the head. He stole the money and left. The defendant then returned with a liquid accelerant which he poured on the victims and set them on fire. The aggravators were: the murder was committed in the course of a robbery and arson, the murder was committed to avoid arrest, pecuniary gain, HAC

and CCP. Mitigation consisted of one statutory factor-the defendant had no prior criminal history and one nonstatutory factor-service in Marine Corps.

In Willacy, the defendant bludgeoned, bound, choked and strangled the victim who surprised him during the burglary. The defendant moved the victim into another room because the victim would not die and obtained a can of gasoline from the garage. The defendant then doused the victim with gasoline and set her on fire. This Court upheld the sentence of death. The trial court found five aggravators: the murder was committed in the course of a robbery, arson and burglary, the murder was committed to avoid arrest, pecuniary gain, HAC and CCP. 37 mitigating factors were considered by the trial court. Most of the proposed factors were cumulative to others and of a general nature (the defendant was kind to other people, he was compassionate, the defendant exhibited concern for others). The trial court rejected six factors and assigned the others little weight.

Here, Defendant's case was even more aggravated than in Willacy and Henry. Besides finding the same 5 aggravators like in those two cases (the murders were committed during the commission of armed robbery and arson, pecuniary gain, CCP, HAC and avoid arrest (applied only to Yvonne Bustamante)), here, the trial court also found two additional aggravators-the capital felony was committed by Defendant who was previously convicted of a felony and was on felony probation and Defendant was contemporaneously convicted of another capital

felony or felony involving the use or threat of violence to the person (Defendant was found guilty of the first degree murders of Michael Bustamante, Yvonne Bustamante, Juanita Luciano and the attempted first-degree murder of Brandon Greisman). Here, the trial court found one statutory mitigator-Defendant was under the influence of extreme mental or emotional disturbance, and assigned it a little weight. The nonstatutory mitigation consisted of 15 factors and was related to Defendant being the victim of bullying throughout the childhood, being the victim of sexual assault as a child, being abused by a caretaker, service in the US Marine Corps, being suicidal, having a personality disorder and a history of depression, dealing with the stress at the time of the incident, being a good person, a good worker, and a good family man, and him behaving good in jail and during the trial, to which all the trial court assigned moderate, slight or very little weight. Under these circumstances, Defendant's sentence should be affirmed.

V. THE EVIDENCE WAS SUFFICIENT TO CONVICT DEFENDANT.

While Defendant has not addressed the sufficiency of the evidence to sustain the conviction, this Court has a duty to address the sufficiency of evidence in each capital case. Ferguson v. State, 417 So. 2d 639, 642 (Fla. 1982). Whether the evidence is sufficient is judged by whether it is competent and substantial. See Blake v. State, 972 So. 2d 839, 850 (Fla. 2007). "In determining the sufficiency of

the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." Bradley v. State, 787 So. 2d 732, 738 (Fla. 2001); see also Simpson v. State, 3 So. 3d 1135, 1147 (Fla. 2009) (applying competent, substantial evidence standard to determine sufficiency of the evidence).

In the case at bar, the State presented direct evidence against Defendant in the form of a dying declaration, eyewitness testimony, Defendant's confession, and the physical evidence linking Defendant to the murders. Direct evidence is evidence which requires only the inference that what the witness said is true to prove a material fact. Ehrhardt, Florida Evidence §401.1 (2010 Edition). As such, the State presented competent, substantial evidence to support Defendant's convictions.

Here, Bustamante identified Defendant as the person who robbed and set her and Luciano on fire. Greisman and Ortiz identified Defendant as the person who shot Greisman in front of the Headley Insurance.

Defendant confessed to Garrion Davis that he had committed the robbery. Defendant confessed to Barry Gaston that he had hurt somebody.

The surveillance video from Wall-Mart showed that in the morning of the day of the incident, Defendant bought a Bic lighter, gloves, an orange six-pack

cooler, and a gray T-shirt. James Riley confirmed that Defendant made these purchases. Jennifer DeBarros identified Defendant from the video since she knew him personally and had talked to him in the store that morning. Mark Gammons also confirmed that Defendant was in Wall-Mart that morning and that he asked Gammons where to find gloves. A Bic lighter, duct tape, and a gas can were found at the crime scene. Murray, Greisman and Ortiz testified that Defendant had put a gun into an orange-ish lunch bag.

Jessica Lacey testified that on the day of the incident, at 4:25 p.m., Defendant made a cash deposit in the amount of $148 at Mid Florida Credit Union in Winter Haven. She observed Defendant had blood and scratches on his face. Stacy Greatens testified that when Defendant was arrested, he had a recent injury on his nose. Dr. Nelson testified that Defendant had an abrasion on his nose and his upper lip and opined that the injury on the left side of nostril could have been a burn or an abrasion.

Derrick Johnson testified that on the day of the incident, Defendant asked him if he had some duct tape. Luciano told Bailey that she was bound with tape and set on fire. Murray and Johnson testified that Bustamante and Luciano had a tape around their wrists. Dr. Nelson confirmed that both victims had absence of burns in the wrist areas and that it was consistent with those areas being covered with a binding.

Victoria Davis testified that Defendant owned a gas operated lawn mower and had kept a gas can in the garage. A gas can was found at the crime scene. Traces of petroleum were found in Defendant's vehicle.

Randy Black testified that six days before the incident, Defendant bought a .357 Dan Wesson gun and procured a handful of .38 ammunition. Ballistic evidence revealed that the projectiles from the crime scene were of a .38 or .357 caliber class.

Under these circumstances, the State presented sufficient evidence to sustain Defendant's convictions. His convictions should be affirmed.

STATE'S CROSS-APPEAL

VI. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT ADMITTING THE STATEMENTS MADE BY LUCIANO TO LT. ELROD AS A DYING DECLARATION.

The trial court abused its discretion when it refused to admit the statements made by Luciano to Lt. Elrod identifying Defendant as a person who committed the robbery and set her and Bustamante on fire, as a dying declaration.

The State incorporates its arguments discussed in Issue I with reference to the standard of review for the trial court's ruling on the admission of evidence and the predicate and requirements for admitting statements as a dying declaration. The

State also incorporates its arguments regarding the admissibility of a dying declaration under the Confrontation Clause.

After conducting a pre-trial hearing on Defendant's motion to exclude Luciano's hearsay statements, the trial court ruled that Luciano's statements to Lt. Elrod were inadmissible as a dying declaration because there was insufficient evidence to demonstrate that she reasonably believed her death was imminent. (19/3074-81) In explaining its findings, the trial judge stated that there was testimony by several members of medical personnel and Lt. Elrod who all testified that based upon looking at Luciano they knew she was not going to survive. (19/2406-07) The judge also stated that Dr. Nelson determined the minimal chances of her survival. (19/2408) The judge reasoned that he could have considered Luciano's statement, "Look what he did to me," under the totality of circumstances, connect it with the testimony from other witnesses and conclude that she knew that she was badly injured. Id. In explaining the reasons why he did not do so, the trial judge stated that he found that under Hayward, Luciano's statements did not qualify as a dying declaration. (19/2408-11)

The trial court's ruling was based on an erroneous view of the law and on an erroneous assessment of the evidence. Here, under the totality of the circumstances standard, Luciano's statements should have been admitted as a dying declaration. Lt. Elrod testified that at the time he found Luciano there was no medical

personnel present, that he immediately estimated she was severely burned than Bustamante, that she had around 90% of her body burned, and that her skin was coming off. (12/1799-1804) At one point, after Luciano told Lt. Elrod that Defendant was the perpetrator and explained what he had done to her, she exclaimed, "Look what he did to me." (12/1804) Elrod testified that he was surprised that Luciano was conscious considering the extent of the injuries she had suffered and that he determined that she would not survive. (12/1804-05, 1808-09)

Moreover, Ashley Smith, the woman who first encountered Luciano, stated in her deposition that Luciano was bleeding and screaming for help. (SR1. 1-2) She also stated that Luciano was screaming so hard that she had to go outside of the restaurant to call 911. (SR1. 20)

Furthermore, the medical personnel that dealt with Luciano, Bailey, Thompson, Hall and Johnson, all testified that she was in pain and shock, severely burned (80-90%), and that her skin came off of her body. (12 &13/1829-37, 1879-1905, 1934-39, 1972-79) They all estimated that she would not survive. Id. Additionally, Dr. Nelson determined that Luciano had 90% of her body burned and had 3rd & 4th degree burns. (11/1759) Given these circumstances, Luciano's statements should have been admitted as a dying declaration.

The Florida courts have found the victims' statements admissible as a dying declaration under similar circumstances and particularly where the victim did not

expressly declare the belief in its dying condition. See Henry v. State, 613 So. 2d 429, 431 (Fla. 1993)(statement admissible as a dying declaration where the victim who was set on fire and had burns over more than 90% of her body, had told a police officer what had happened after being taken to a hospital and where she did not expressly declare that she knew she was going to die. The court relied on severity of injuries to prove the victim knew of her pending death); Teffeteller v. State, 439 So. 2d 840, 843 (Fla. 1983)(the victim's statement that he was "going," coupled with statements from the doctors that based on the severity of the injuries, the victim knew he was dying, was admissible as a dying declaration); Price v. State, 538 So. 2d 486, 489-90 (Fla. 3rd DCA 1989)(finding the victim's statements to be a dying declaration even though the victim did not verbally express the belief that death was imminent and the victim asked to be taken to the hospital); Labon v. State, 868 So. 2d 1222, 1224 (Fla. 3d DCA 2004)(finding statement made to the officer shortly before the surgery was a dying declaration where the victim did not expressly utter he believed he was going to die. The victim's condition was severe enough he could have believed he would die).

Moreover, the trial court's clearly erroneous view of the law and erroneous assessment of the evidence is even more evident in light of the fact that it admitted Bustamante's statements but not Luciano's despite the fact that numerous

witnesses testified that Luciano's injuries were even more severe and that she made her statements while she had not yet received any medical assistance at all.

The trial court's reliance on Hayward v. State, 24 So. 3d 17 (Fla. 2009), in support of its findings was erroneous. In Hayward, the victim's statements were inadmissible as a dying declaration where the medical examiner testified that someone in the victim's condition "would know something was radically wrong," and the victim knew that he was receiving medical attention. Unlike in Hayward, here, Luciano made statements before any medical help arrived. Moreover, here, Lt. Elrod testified that Luciano knew that she was going to die. Furthermore, all paramedics and technicians that saw Luciano, estimated that she was not going to survive. Also, Dr. Nelson testified that Luciano suffered 3rd &4th degree burns, that 90% of her body was burned and that when someone is burned over 85% of their body, there is about 15% chance of survival. Finally, unlike in Hayward where the victim did not make any statements as to his belief in his imminent death, here, Luciano, after she described what happened to her, exclaimed, "Look what he did to me." Under these circumstances, Luciano's statements were admissible as a dying declaration. The trial court's order should be reversed.

VII. THE TRIAL COURT ERRED IN FINDING THAT THE EXPERT TESTIMONY CONCERNING THE FACTORS THAT COULD IMPAIR THE ACCURACY OF EYEWITNESS IDENTIFICATIONS MET THE FRYE STANDARD.

The State submits that the trial court erred in finding that the testimony of Dr. Brigham met the Frye standard. The testimony concerned an opinion on how certain factors, such as stress, weapon focus, forgetting curve, confidence, unconscious transference and cross-race bias could affect memory and perception, and thus impair the accuracy of eyewitness identifications. The subject testimony should have been excluded by the trial court because the science underlying the proposed testimony was not reliable, did not assist the trier of fact, was not helpful to the jury because it is within common knowledge of a layperson and it invaded the province of the jury in evaluating witness' credibility.

The standard of review of a Frye ruling is de novo and therefore the trial court's ruling is entitled to no deference. Brim v. State, 695 So. 2d 268, 274 (Fla. 1997). This is interpreted such that an appellate court may examine expert testimony, scientific and legal writings, and judicial opinions in making its determination. Hadden v. State, 690 So. 2d 573, 579 (Fla. 1997).

After conducting the Frye hearing, the trial court ruled that Dr. Brigham's testimony would be helpful in assisting the trier of fact concerning stress, weapon focus, forgetting curve, confidence and cross racial bias. (41/6612) It reasoned that

based on the testimony of Dr. Loftus and Dr. Fisher, studies and research have shown that an average person would not have a full understanding of how the subject factors relate to eyewitness identification. (41/6611) The trial court further found that these concepts were generally accepted by peers and that the appropriate scientific community are those peers surveyed in the Kassin Survey 2001. (41/6614-18)

This Court has never pronounced a per se rule on the admissibility of expert testimony on eyewitness identifications.[3] However, this Court has decided in several cases that dealt with the subject issue, that it was not an abuse of discretion to exclude such testimony. See Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1981)(holding that facts affecting the reliability of testimony of an eyewitness to the robbery and murder were within ordinary experience of jurors and did not require any expertise beyond common knowledge of jurors); Johnson v. State, 438 So. 2d 774, 777 (Fla. 1983)(holding that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony); McMullen v. State, 714 So. 2d 368, 372-73 (Fla. 1998)(the trial judge did not abuse its discretion in refusing to allow the introduction of expert testimony

[3] This Court has not yet applied the Frye standard related to the expert testimony on eyewitness identifications.

regarding the reliability of eyewitness testimony. This Court has further stated that Johnson v. State, 438 So. 2d 774 (Fla. 1983), could have been interpreted as a per se rule of inadmissibility of that type of testimony); Lewis v. State, 572 So. 2d 908, 911 (Fla. 1991)(there was no abuse of discretion in excluding the expert testimony where the expert offered general comments about how witness arrives at conclusion; jury was capable of assessing an eyewitnesses credibility without the expert assistance); Simmons v. State, 934 So. 2d 1100, 1117 (Fla. 2006)(affirming disallowing expert's testimony concerning the psychological factors that contribute to erroneous witness identification).[4]

Moreover, it is improper for a witness, to comment on reliability of an eyewitness identification. See Cyprian v. State, 661 So. 2d 929, 930 (Fla. 4th DCA 1995)(testimony as to whether it was common for robbery victims to initially be unable to identify their attackers, but later to identify them with certainty was an improper comment on reliability of an eyewitness identification); Williams v. State, 619 So. 2d 1044 (Fla. 4th DCA 1994). Based on this principle alone, the trial court should have excluded Dr. Brigham's testimony without conducting a Frye hearing at all.

Relying on the above cited decisions of this Court, the State submits that Dr.

[4] In both McMullen and Simmons, Dr. Brigham was excluded from testifying concerning the reliability of an eyewitness testimony.

Brigham's testimony as to the eyewitness identification should not have been admitted because it did not assist the jury in understanding the evidence or in determining a fact in issue. Ramirez v. State, 651, So. 2d 1164, 1167 (Fla. 1995)(in order to admit expert testimony concerning a new scientific principle, the trial judge, first, must determine whether expert's testimony concerning a new or novel scientific principle will assist the jury in understanding the evidence or in determining a fact in issue).[5] As such, the first prong of Ramirez was not satisfied for several reasons.

First, Dr. Brigham's testimony as to the factors that affect the accuracy of eyewitness identification would have been unhelpful, confusing to the jury and within a common knowledge of a layperson. In that regard, both Dr. Ebbesen and Dr. Elliott, testified that such expert testimony would not help jurors to be more accurate in their assessment of identification accuracy and that an average juror is able to understand the subject concepts. (28/4354-58, 4468-70) Dr. Elliott

[5] The admission into evidence of expert opinion testimony concerning a new or novel scientific principle is a four-step process. First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue. Second, the trial judge must decide whether the expert's testimony is based on a scientific principle that is sufficiently established to have gained general acceptance in the particular field in which it belongs. Third, the trial judge must determine whether the particular witness is qualified as an expert. Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may accept or reject. Id. at 1167.

explained that at least half of the average jurors understand and agree with the subject concepts and would not need a lecture about it because it is within their common experience. Id. Dr. Ebbesen explained that an average juror would have been able to understand the concept, that if someone was under high stress, they might not be able to accurately make their identification at some later time. (28/4468-69)

Second, there are other means that can provide a jury with sufficient information to evaluate the reliability of eyewitness identification such as, cross-examination, jury instructions and closing arguments. See Johnson, 438 So. 2d at 777.

Third, Dr. Brigham's testimony did not assist the jury in assessing the accuracy of eyewitness' identification as this was not a case where the State intended to prove Defendant's guilt solely based on eyewitness' identification and where there was little or no corroborating evidence connecting Defendant to the charged crimes.[6]

[6]In People v. LeGrand, 8 N.Y. 3d 449, 452 (N.Y. 2007), the Court held that the trial court erred in refusing to admit expert testimony when the conviction rested almost entirely on eyewitness identifications with little or no corroborating evidence connecting the defendant to the crime. In addition, eyewitness identifications were made seven years after the incident and only after one of the multiple eyewitnesses was able to identify the defendant in a lineup and photo array. Unlike in LeGrand, here, the evidence besides eyewitness identification was

In that regard, the record indicates that the State's case did not essentially rest upon the reliability of testimony of eyewitnesses Greisman and Ortiz but on other corroborative evidence as well. Bustamante made statements, admitted as a dying declaration, identifying Defendant as a perpetrator. Defendant confessed that he had committed the robbery and hurt somebody. The following evidence was also presented: eyewitness testimony and video footage that on the morning of the day of the incident, Defendant bought a Bic lighter, gloves, an orange six-pack cooler, and a shirt, testimony that a Bic lighter, duct tape and gas can were found at the crime scene, evidence that gloves were found in Defendant's car, eyewitness testimony that during the commission of the crime, Defendant had put a gun into an orange-ish lunch bag, testimony that on the day of the incident, Defendant asked Derrick Johnson to give him duct tape, testimony that Bustamante and Luciano had a tape around their wrists, testimony that after the crime, Defendant had blood and scratches on his face and that these injuries could have been burn injuries, evidence that Defendant owned a gas operated lawn mower, testimony that Defendant kept a gas can in his garage and that a gas can was found at the scene, testimony that, six days before the incident, Defendant bought a .357 Dan Wesson gun and procured a handful of .38 ammunition, ballistic evidence that the projectiles from the crime

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presented that connected Defendant to the crime. Also, Greisman made an identification one day after the incident, and Ortiz four days after.

scene were of a .38 or .357 caliber class, evidence that traces of petroleum were found in Defendant's vehicle. In light of the above evidence, which independently identify Defendant as a perpetrator, the expert's testimony would have been of no assistance in connecting Defendant to the charged crimes.

Defendant has not met the burden under Frye as there was no sufficiently reliable scientific principle involved concerning expert testimony on eyewitness identification with reference to the subject concepts. In Ramirez, 651 So. 2d at 1167, this Court held that in order to admit into evidence an expert opinion testimony concerning a new scientific principle, the trial judge must decide whether the expert's testimony is based on a scientific principle that is sufficiently established to have gained general acceptance in the particular field in which it belongs. This Court has stressed that the principal inquiry under the Frye test is whether the scientific theory or discovery from which an expert derives an opinion is reliable. Id. Moreover, in Brim v. State, 695 So. 2d 268, 272 (Fla. 1997), this Court held that merely counting a majority of the members of the relevant scientific community is not controlling; the trial court must also consider the quality of the evidence supporting or opposing the principle. Here, the scientific principles that Dr. Brigham derived his opinion from, were not reliable for the following reasons:

First, the expert testimony with respect to the area of eyewitness

identification should not have been admitted as sufficiently established scientific principle because the dynamics of an actual crime scene cannot be recreated in the laboratory and because laboratory results are not transferable to identifications made by eyewitnesses of actual crimes. In that regard, Dr. Brigham testified that he had conducted experiments only in laboratory settings, using students who watched video or saw pictures of an incident. (24/3913-17) The experiments that involved the effect of stress on accuracy of identification, have never exposed students to the actual stress of being harmed. (24/3934) In coming to his conclusions, Dr. Brigham admitted that the meta analysis methodology (that applies to laboratory experimentation), does not involve dealing with the real life archival studies. (25/3972-73) He also confessed that he was not aware that in archival studies (studies based on examination of real crime victims), the researchers came to different conclusions then in laboratory experiments. (24/3968-69)

Dr. Fisher admitted that he was aware that as to the stress effect and weapon focus, the archival studies showed different results than in laboratory settings. (26/4117-18) Moreover, Dr. Fisher also admitted that he has never done any laboratory experimentation that involved the stress, weapon focus or cross-racial bias concepts. (25/4090-98) He explained that he conducted an experiment related to the confidence assurance correlation principle. It was conducted in a classroom setting where someone walked into a classroom, made a some comment and where

a week later the students were asked to make an identification. (25/4090-98) Based on this experiment, Dr. Fisher concluded that the level of confidence of those students who made an identification was not highly correlated with an accuracy. (25/4098)

Dr. Loftus also confessed that, as to the stress impairment concept, she had never performed any studies that involved talking to real crimes victims. (26/4240) She only performed experiments in the classroom settings that involved students watching video or picture of an actual or recreated crime. (26/4227-33)

On the other hand, Dr. Elliott testified that studies that involved talking to the real crime victims showed that people who were under higher stress could make better identifications and that experiments he performed concerning the stress showed that the stress did not affect the accuracy of identification. (27/4311-15, 4323-24) Dr. Ebbesen agreed with Dr. Elliott. (27/4425-27, 4430-31) Both Dr. Elliott and Dr. Ebbesen testified that the results based on laboratory experiments could not be generalized and applied to real life crime situations. (27/4352-58, 4420-23) Dr. Ebbesen stressed that there is a danger of making such generalization because an average juror would be pushed to believe that an eyewitness is incorrect if there was an issue involved concerning the subject concepts. (27/4468-70) Under these circumstances, the scientific principle underlying Dr. Brigham's opinion related to the reliability of eyewitness identifications were not proven sufficiently

reliable. As such, it should have been excluded.

Second, the trial court erroneously found that the appropriate scientific community consists of those individuals surveyed in the Kassin survey 2001. The Kassin survey involved questionnaires (with statements related to factors that affect eyewitness identification) that were mailed to 197 prospective respondents and only 53 % of these respondents were employed in the United States. (41/6621) Response rate to Kassin survey was 34 %. (41/6621) Further, it was unknown how many respondents (of these 34 %) actually worked in the United States because the survey itself was anonymous.

Moreover, despite the fact that Dr. Elliott testified that his views were in the minority, he stressed that the Kassin survey was not made by a representative sample of peers and pointed out the fact that it was anonymous. (27. 4332-42) Moreover, as to the stress and cross race effect, Dr. Ebbesen testified that these concepts were generally accepted by people who tend to testify in court because they generally testify for the defense. (27/4425-27, 4430-31, 4453-60) He also stated that his position was in minority related to people from the Kassin study but that the relevant scientific community was not surveyed. Given the above evidence, it is clear that the science underlying the testimony of Dr. Brigham has a very low level of reliability. As such, the Frye test has not been met. Therefore, the State asks this Court to find that the expert's testimony as to the eyewitness

identification was erroneously admitted into evidence.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE/CROSS-APPELLANT** was furnished by electronic transmission to STEVEN BOLOTIN, Assistant Public Defender, at appealfilings@pd10.state.fl.us, sbolotin@pd10.state.fl.us, mjudino@pd10.state.fl.us, this 3rd day of March 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Times New Roman 14-point font.

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