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IN THE SUPREME COURT OF FLORIDA

PATRICK A. EVANS,	:	
Appellant,	:	
vs.	:	Case No. SC12-2160
STATE OF FLORIDA,	:	
Appellee.	:	
_______________________________	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

On January 22, 2009, the Grand Jury for Pinellas County, Florida, returned an indictment against Appellant, Patrick A. Evans, charging him with two counts of first-degree premeditated murder for the deaths of Elizabeth Evans and Gerald Taylor with a firearm on December 20, 2008. (1:R93-94) On January 23, 2009, the State filed a notice of its intention to seek the death penalty. (1:R96)

Mr. Evans was tried by a jury before the Honorable Richard A. Luce on November 2-9, 2011. (30:T620 through 41:T2304) The following evidence was presented to the jury:

Patrick (Rick) Evans met Elizabeth (Beth) Evans in Asia while he was working for Jabil Circuit and she was working for one of its suppliers. (34:T1170, 1173-74) They began dating while Mr. Evans was separated from, but still married to, Mr. Evans' second wife, Andrea Evans. (34:T1212; 38:T1815) Mr. Evans separated from Andrea in 2003, and they were divorced in 2005. (38:T1821) Beth had a daughter named Molly Rhoades from a previous marriage, and Mr. Evans had a son named Cameron from his marriage to Andrea Evans. (34:T1168-69, 1175) Before the marriage, Beth and Molly moved into Mr. Evans' home on Hermosita on Pass-a-Grille Beach, and the couple was married on December 23, 2005. (34:T1174)

During Mr. Evans' marriage to Elizabeth, Andrea caused problems and many of their fights were about Andrea. (34:T1212) Beth's daughter admitted that at one time they called Andrea "the

crazy ex-wife." (34:T1212) Beth and Cameron were close because Cameron was a toddler when she began seeing Mr. Evans. (38:T1824) Cameron spent every other week with Mr. Evans, and he called Beth "Momma" or "Mom." (34:T1175, 1185; 38:T1824) There were custody issues between Mr. Evans and his ex-wife, Andrea, and there was evidence that Andrea was jealous of Beth's relationship with Cameron. (34:T1212-14; 38:T1824)

By October of 2007, the couple were having marital problems, and Mr. Evans began having an affair with his ex-wife, Andrea, because he wanted to see if he could put his original family back together for Cameron's sake. (34:T1214-15; 38:T1827-29) Beth had been laid off from her previous job, but she went back to work sometime in January of 2008 and began traveling again. (34:T1175, 1177, 1214) In February of 2008, Mr. Evans told Andrea that he no longer wanted the affair, and in April of 2008, he ended it. (38:T1830)

Mr. Evans filed for divorce on April 25, 2008. (34:T1178, 1189; 39:T1912) According to Molly Rhoades, after Mr. Evans filed for divorce, he changed the locks on the Hermosita home and moved her and her mother's clothing to a condominium owned by the couple at Point Brittany where Mr. Evans' mother lived. (34:T1179, 1217) Mr. Evans' mother moved into the guest room at the Hermosita house. (34:T1180) A week or so later, their belongings were moved back to the Hermosita house and they returned. (34:T1180)

Elizabeth Evans moved into a condominium in the Sun Ketch

Condominiums off Gulfport Boulevard at the end of May. (34:T1182) Rhoades testified that they did not get any furniture from the Homosita house and they did not have money to buy furniture because Mr. Evans did not give them any. (34:T1183, 1191) Rhoades thought that Beth had to pay for the furniture with a credit card. (34:T1185)

Rhoades testified that her mother loved Cameron and he would stay at the Sun Ketch condo once a week or every other week. (34:T1185) Mr. Evans would come to the condominium when Cameron was there. (34:T1186) They had two little Yorkshire Terriers. (34:T1194) Mr. Evans didn't like the dogs and they became yappy and bothersome when he was around. (34:T1221-22)

Mr. Evans dismissed his divorce petition on July 22, 2008. (34:T1189; 39:T1912) Molly Rhoades stated that by July, Mr. Evans was trying to reconcile with her mother. (34:T1186) Rhoades testified that he visited the Sun Ketch condo often and that he would come around and try to be nice. (34:T1187) He gave Elizabeth a diamond necklace for her birthday, which she kept, and Mr. Evans began wearing his wedding ring again. (34:T1186-87) He also began attending the Catholic Church when her mother attended, even though he never went before. (34:T1187) Rhoades stated that her mother was not pleased that he was trying to reconcile. (34:T1187)

Rhoades testified that they did not give Mr. Evans a key to the condo. However, when Mr. Evans came over to drop off Cameron, if the door was unlocked, he would just walk in. (34:T1192)

Although Rhoades said that this upset them, there was no evidence that they ever confronted him about this practice. (34:T1192) According to Rhoades, there was a time when Mrs. Evans' keys and phone went missing. Mr. Evans' mother returned the keys. The phone was found in Cameron's backpack and Mr. Evans returned it a few hours later. (34:T1192-93)

Elizabeth Evans filed for divorce on November 21, 2008. (10:R1892-95; 34:T1190) Rhoades testified that Elizabeth discovered that Mr. Evans was having an affair with Andrea because Andrea told her. (34:T1215-16) According to Rhoades, Beth and Andrea became friends and her mother filed for divorce because of the affair. (34:T1225, 1229) Andrea had been to the Sun Ketch condo many times and Andrea knew that Beth was going to be with Jerry Taylor the weekend of December 20, 2008. (34:T1229, 1230-31) Rhoades opined that Mr. Evans was "controlling" of Beth and Andrea, but she admitted that her mother and Mr. Evans had "ups and downs" in their marriage and she did not know what was going on between them. (34:T1225, 1227)

Rhoades testified that at the time of the murders Beth's cell phone did not work, so she kept the cordless phone handset in her bedroom. (34:T1199-1200) Rhoades also knew that Mr. Evans kept his handgun in the gun safe or in the center console in his truck and that he liked to hunt. (34:T1205)

Pamela Ashby and her son Teddy lived in the unit connected to Mrs. Evans' condo. (33:T1084) Ashby knew that Mr. Evans and Cameron would visit the townhouse frequently, and Cameron would

often spend the night there. (33:T1088-90) On Halloween night of 2008, Ashby and her son went trick or treating with Mr. Evans, Beth, and Cameron in Mr. Evans' neighborhood. (33:T1091) Mr. Evans told her that he and Elizabeth were estranged, but he felt as though they could work it out. (33:T1092) Ashby stated that it was not an angry comment. (33:T1107) Ashby said that Beth did not want to get back together; she just wanted to get on with her life. (33:T1092)

On Saturday, December 20, 2008, Beth took her daughter to the airport to visit her father for the holidays. (34:T1194) The day before that, Beth asked Mr. Evans to come to the condo to help her replace air filters and smoke alarm batteries. (38:T1847) That morning, Mr. Evans brought a ladder and helped her with the chores. He also helped her with the Christmas tree. (38:T1847) After that, they drove to Pasadena Carwash & Detail to have their cars detailed, and walked to a restaurant to meet with a real estate agent named Kerry Fuller to have brunch and discuss the possibility of a "short sale" of the Point Brittany condo. (38:T1847, 1848-49) They stayed at the restaurant for an hour or so, then picked up their cars and went back to Beth's condo. (38:T1850) Mr. Evans helped Beth move some things in her garage and retrieved his ladder and went home. (38:T1850)

Kerry Fuller, the real estate agent, confirmed the fact that the meeting took place, and he testified that they met mid-morning in a restaurant and discussed the possibility of doing a "short sale" to one of their mothers for a condominium they

owned. (37:T1712-13) He remembered that Mr. and Mrs. Evans arrived together and left together and sat on the same side of the booth opposite him. (37:T1713-15) Mr. Evans did most of the talking, but the discussion went back and forth between them. (37:T1714-15) They talked for 40 minutes to an hour and they seemed to be getting along. (37:T1715, 1718)

Around 5:00 that evening, Elliot Burke, a twenty-year-old who lived in the same development and was the ex-boyfriend of Molly Rhodes, saw Elizabeth Evans at the golf course where he worked. (32:T840, 843, 851; 34:T1197) She was with a man she introduced as "Jerry," and they hit balls on the driving range and left sometime around 5:15 to 5:30. (32:T852-854) Around 6:00 or 6:15 that evening, Burke saw an SUV he did not recognize in the driveway at Elizabeth Evans' condo. (32:T856, 860)

That evening Pamela Ashby had plans to meet Beth and another neighbor for dinner around 6:30. (33:T1093) Ashby was running late, so sometime around 6:15, she tried to call Beth to ask her to watch her son until someone came to pick him up, but she dialed Mr. Evans' phone by mistake. (33:T1096) She told Mr. Evans that she meant to call Beth, and Mr. Evans said either, "She's on a date," or "She's busy." (33:T1096-97) Ashby told him that she did remember that Beth had plans, and Mr. Evans told her he had seen her new car. (33:T1097-98) Ashby was surprised, but she did not know he was at the condo that morning. (33:T1097, 1105) Ashby said that there was nothing unusual about his tone of voice. (33:T1112) Immediately after that, Ashby called Beth, but there

was no answer. (33:T1098)

Scott Graham lived in the same condominium development as Elizabeth Evans, and knew she had two little Yorkshire Terriers. (32:T874-75) Graham was letting his dog out sometime around 6:45 when a man came up from between the condos to the back and asked if he had seen a couple of Yorkies. (32:T878-79, 899-900) The man asked the name of his dog, petted it, and then walked down the golf cart path in the general direction of the building where Elizabeth Evans' condo was. (32:T879, 883, 884) Graham admitted that it was dark when the man approached him. (32:T878, 890)

Graham described the man as 5' 9" or 5'10" and weighing 180 to 190 pounds, with short brown hair and blue jeans and a checkered shirt. (32:T886) Although he told the police what he saw that night, they did not show him any pictures. (32:T893) A couple of days later, Graham saw a picture of Gerald Taylor and realized he was not the man he saw that night. (32:T878-88) At some unspecified later date, he saw a picture of Mr. Evans and although he could not be sure, he thought it resembled the man he saw that night. (32:T887-88) A detective came to see Graham about 41 days later and asked him to describe the man, but they did not show him any photographs. (32:T893-94)

Ashby explained that to get into the entrance to Sun Ketch you put a key pass in or call to have someone let you in and one of the gates would swing open. (33:T1109-10) Graham testified that someone could park at the real estate office on the road and walk into the development. (32:T870, 872-73)

At 7:09 on the evening of December 20, 2008, the Pinellas County 911 operations center received a call from Elizabeth Evans' residence at 6080 Gulfport Boulevard. (32:T937-38, 942) When the connection was lost, they contacted law enforcement. (32:T942)

Leslie Perrico, a Pinellas County Sheriff's Office public safety telecommunitcator, received a call from the communications center regarding an abandoned line. (32:T959, 960) Perrico called the residence at 7:10 p.m. (32:T962) Someone answered the phone and she heard a scuffle and beeping sounds as if someone were trying to either dial a number or hang up. (32:T962) She heard more "scuffles," some voices in the background, and a couple of gunshots. (32:T962) Perrico remembered saying "hello" twice, but she did not identify herself because she wanted to hear the conversation in the background. (32:T963)

Perrico heard two male voices and one female voice arguing, and it sounded like an escalating domestic dispute. (32:T963-964, 965, 988) She heard a couple of crashes and people swearing, and then she heard nothing but music. (32:T965, 988) Songs were playing one after another and she stayed on the line for at least three songs. (32:T966) Perrico heard the deputies banging on the doors and identifying themselves, and she heard them make entry into the house. (32:T966) After dispatch told her the deputies were on the scene, she hung up the phone. (32:T966) The entire call lasted 15 or 16 minutes. (33:T1070)

Perrico explained that the calls were automatically

recorded. (32:T995) The recording stopped when she disconnected the call. (32:T967, 996) Perrico had no idea why there were large "dead spots" in the recording where there was no sound. (32:T989, 991; 33:T1078-79) Over defense objection, two versions of the recordings were played to the jury. The first recording, State's Exhibit 44, was 9 minutes long, and the second, State's Exhibit 46, was 16 minutes and 14 seconds long.[1] (32:T976-980; 35:T1405-07; Addendum) The longer recording had large gaps where there was no sound. Id.

On the recording, the entire event occurs in less than a half a minute, between the 38-second mark when the call-back line opens and when the timer reads one minute and 7 seconds when the second shot occurs. The recording starts with a conversation between the perpetrator and Mrs. Evans. He says, "Sit on the bed," and she says, "I'm gonna put a robe on." He tells her, "No, you're not." At that point, the phone beeps and Ms. Perrico can be heard saying, "Hello." The man says, "Sit on the bed," and Mrs. Evans tells him, "No." Perrico says, "Hello," again, and around the 44-second mark, Mrs. Evans says, "Rick." The man says, "Sit on the bed." Mrs. Evans says, "Rick" again. During that time the phone "beeps" once, and then twice. At 49 seconds, Mr. Taylor tells the man, "Put the gun down and I'll sit on the bed." The perpetrator tells Mr. Taylor, "Sit on the bed. Sit on the bed, Jerry." Mr. Taylor says, "I'll sit down. Let's put the gun – hey, hey, the gun

[1] In Appellant's copy of the record, the tapes are mislabled. The disc labeled as Exhibit 44 seems to be the 16-minute tape.

down." The phone "beeps," and the man tells Taylor, "Jerry, sit on the bed." (See Exhibit 46 in Addendum.)

At 59 seconds, Mrs. Evans screams for help and her voice becomes less loud as if she is moving away from the phone to the patio where she yells for help again at one minute and 2 seconds. The first shot happens about a second later at one minute and 3 seconds, while Taylor is saying, "Put the gun . . . ." Mrs. Evans asks the man, "Are you out of your fucking . . . ." Mrs. Evans is shot a couple of seconds after the first shot. (See Addendum.)

After the voices, there is the sound of the telephone beeping. Music can be heard in the background, and at around 1:20 to 1:39, banging and footsteps can be heard. Perrico says, "Hello," and the sound stops entirely around 1:46, even though the recording continues. The sound does not come on again until around 8:31 when the deputies knock on the door.[2] (See Addendum.)

At trial, over defense objection, Molly Rhoades identified Elizabeth Evans' voice on the 911 tape and identified Mr. Evans' voice as the one saying, "Sit on the bed." (34:T1207, 1210) Pamela Ashby identified Elizabeth and Patrick Evans' voices from the 911 tape. (33:T1103) Ashby admitted that the first time she listened to the call was during the week before trial. (33:T1113) She also admitted that the last time she heard Mr. Evans' voice

[2] The deputies knock again at 8:54 and the sound goes off again until 9:16 when the doorbell rings and the dogs bark. The doorbell rings at 9:49 and the dogs bark. The same thing happens at 10:22. Between the knocks and doorbell there is no sound. At 11 minutes and 31 seconds the deputies start yelling, "Sheriff's Office." The rest of the tape is of the deputies who entered through the open front door.

was three years before trial. (33:T1113) Over defense objection that the testimony would invade the province of the jury, Detective Judy identified Mr. Evans' voice based on his comparison of the 911 call to recorded phone calls made by Mr. Evans from the jail. (35:T1395-1408)

At 7:13 p.m., Pinellas Sheriff's Deputies Christopher Parkins and Bryant Duncan were dispatched to investigate the hang-up call, and they arrived at the townhouse in the gated community at 7:16. (31:T667-668, 749, 749) They did not have their lights or sirens on as they approached, but they did not see any vehicles leaving. (31:T750-751, 762-63) When they got to the condominium, Gerald Taylor's Land Rover was parked in front. (31:T670, 685-86; 35:T1319) Parkins knocked on the door and got no answer, but a small dog came to the door barking. (31:T672)

The front door was unlocked and there was no sign of forced entry. (31:T672-73, 35:T1318-19) They entered and eventually went upstairs. (31:T676) Because it was dark, they had to use their flashlights. (31:T676) They found Gerald Taylor lying on the floor in the master bedroom. (31:T676-77) He was nude and he had a bleeding wound on the right side of his neck. (31:T677, 679) Taylor was still alive, but unresponsive. (31:T677) Elizabeth Evans' body was found with a gunshot wound to the right side of her neck in a sitting position on the screened-in patio off the master bedroom. (31:T680, 681) There were no lights on in the patio, and Parkins was unable to see into it. (31:T680) Taylor was taken to the hospital where he was pronounced dead.

(35:T1317) He never regained consciousness and never provided any information. (35:T1318)

The dispatcher told the deputies they could hear Christmas music, meaning that there was an open line on the phone at the residence. (31:T747) They found a cordless phone on the counter in the kitchen, and one of the deputies switched off the phone. (31:T745, 747, 759)

Two shell casings were found at the scene. (31:T791) One was next to Taylor, between the body and the wall, and the other was underneath one of the chairs on the patio. (31:T678, 682, 719) An empty black "Uncle Mike's" holster was on the nightstand next to the bed. (31:T683, 32:T914) Mr. Taylor's wallet was on the counter in the kitchen, along with a watch, sunglasses, and a set of keys. (31:T716, 795) Two Yorkshire Terriers were in the house. (31:T683)

Sheriff's Lieutenant Richard Nalven went to Mr. Evans' residence on Hermosita on St. Pete Beach some time after 8:30 that evening. (34:T1243, 1258) There was a white F-150 Ford pickup truck in the driveway, but they did not touch it to see if it was warm and they did not look in the truck. (34:T1244, 1259-60)

Detective Edward Judy arrived around 11:00 and they attempted to make contact with Mr. Evans to tell him about his wife's death. (34:T1247; 35:T1324) No one responded even though they banged on the doors and windows. (34:T1248; 35:T1430) There was one light on upstairs at the back of the residence.

(34:T1265) They went through a gate to the back even though they did not have a warrant. (34:T1267) There was a brand new bicycle for a child with the tag still attached to it in the bed of the truck. (35:T1432) Around 11:30 that evening, Detective Judy touched the truck and found it was slightly warm. (35:T1432-33)

The next morning deputies arrested Mr. Evans after he came out of the house and got in his truck. (35:T1350) They took fingernail clippings and his clothing and performed a gunshot residue test. (35:T1438-1340) His truck was not processed for fibers or gunshot residue. (35:T1456-57) Mr. Evans was wearing his wedding ring when he was arrested. (39:T1936)

Autopsies showed that both victims died from gunshot wounds to the neck. (33:T1139) The medical examiner opined that the gun was between 2 to 24 inches away from Taylor when it discharged. (33:T1128) Elizabeth Evans' wound was to her left lower neck and the bullet went from left to right, front to back and downward. (33:T1133) The medical examiner smelled the odor of alcohol when he did the autopsies. (33:T1137) He also opined that there would have been gunshot residue on the clothing and skin of every person in the room. (33:T1146-48)

Ron Bell, a forensic toxicologist, testified for the defense that Elizabeth Evans' blood alcohol level was .074 grams per decimal liter, and that the alcohol consumption took place very close to death. (37:T1697, 1700) The amount of impairment would be consistent with two or three glasses of wine in a relatively short period of time. (37:T1707) Mrs. Evans also consumed Xanax

and Librium within 36 hours of death, but the amount could not be determined. (37:T1701, 1705) Bell testified that Mrs. Evans would have been impaired, and there would have been a synergistic effect caused by the combination of the drugs and alcohol. (37:T1703, 1705) The parties stipulated that the drugs had been legally prescribed. (37:T1709)

The murder weapon was never recovered. (35:1354T) During a search of Mr. Evans' home, law enforcement found a large gun safe around five feet tall with a dial. (35:T1355) A locksmith broke into it and they found a Glock .40 caliber box for a new gun, but the gun was missing. (35:T1356) The box had only one of the two magazines in it, a pair of gloves, and a receipt from Bill Jackson's dated November 22, 2005, for the Glock and a hip holster. (35:T1359, 1370-72, 1373) Bill Jackson's matched the receipt to an "Uncle Mike's" holster, and Detective Judy confirmed that it looked like the one found at the scene. (35:T1385-86)

The safe also contained ammunition and some rifles. (35:T1356) There were boxes of Speer Gold Dot hollow-point ammunition inside the safe, which matched the ammunition found at the scene. (34:T1361, 1379) There were two test-fire cartridges in a sealed packet in the Glock box, which matched the serial number on the box. (32:T929-935; 35:T1360) The FDLE determined that the casings found at the scene and the test-fired casings from the Glock box were fired from the same .40-caliber Glock. (36:T1601-10)

An officer from the St. Pete Beach Police conducted a traffic stop of Mr. Evans on October 23, 2007, and took a Glock .40-caliber firearm for safekeeping. (34:T1234) The holster read "Uncle Mike's Sidekick." (34:T1235) The Glock was released to Mr. Evans on October 29, 2007. (1237-38)

There was no DNA belonging to Mr. Evans on the gun holster, the telephone, or the fingernail clippings from the victims. (36:T1582) No fingerprints were found on the phone or the bullet casings. (31:T801-802, 817) No clothes matching the description given by Scott Graham were found either in Mrs. Evans' condo or in Mr. Evans' home. (35:T1447)

Sun Pass records showed that around 2:00 or 3:00 in the afternoon, Mr. Evans' vehicle crossed the Bay Way Bridge. (36:T1509) The receipt from Wal-Mart proved that Mr. Evans purchased a bicycle around that time. (36:T1510) There were no other records showing that the vehicle went through the toll that day, and the Sun Pass was still in the truck when it was parked in front of Mr. Evans' house. (36:T1511, 1561) There was only one bridge at Pass-a-Grille to Mr. Evans' home in Vina Del Mar. (36:T1504-05)

Detective Judy reviewed video images taken from a camera near the St. Pete Beach Police Department near the bridge at Pasadena, which was the other bridge Mr. Evans could have taken to the condo, and there was no evidence that Mr. Evans' truck crossed the bridge that evening. (36:T1505-08, 1512, 1519) However, for some unknown reason, there was no video recording

for the bridge during the relevant times. (36:1556)

Even though Mr. Evans' owned an airplane, the Sheriff's Office did not check to see if it was fueled or if a flight plan had been filed. (36:T1522, 1525) They did not check Mr. Evans' truck for fibers or gunshot residue, and they never processed the gunshot residue test from his hands. (36:T1529) There were keys found in the truck, but none of those keys fit the condominium at Sun Ketch. (36:T1572)

Detective Judy checked Mrs. Evans' condo at night and he could see into the living room and dining room area through the window dressing. (35:T1393) He testified that if someone was in the master bedroom and walked past the curtains, their shadows would be visible. (35:T1393) The detective also learned that Andrea Evans went back to court immediately after Mr. Evans' arrest to get custody of their son and to ask for money, including Mr. Evans' Jabil retirement settlement. (36:T1520)

Rodney Evans, Mr. Evans' youngest brother, testified that he was with Mr. Evans at his home until he drove him to the trolley stop just before 8:30 that evening. Rodney had to use the trolley because his license was suspended. (38:1753) He got to his brother's house that afternoon and used the electric keypad code to get into the house to wait for him. (38:T1755) He entered through the garage and got the fishing polls to set them up. (38:T1756) Patrick arrived less than 15 minutes later and they fished for a while and cooked some burgers. (38:T1757) They shot a game of pool and he helped Patrick get ski gear out of storage

and pack it up for a ski trip. (38:T1757)

While they were retrieving the ski equipment, someone called Rick's cell phone and he heard Rick say, "She's on a date." (38:T1757-58) Rick gave him a ride to the trolley, where he arrived at 8:20, and Rodney watched him cross the bridge back to his house. (38:T1764)

Rodney presented the actual trolley schedule for that night, but the transit system had already destroyed their videos by the time the investigators looked for them. (38:T1761; 1789, 1805) After Rick was arrested, Rodney did not go to the police to tell them he was with Rick because Rick's lawyer, Frank McDermott, told him not to do so. (38:T1769) The lawyer also told him that if the police asked questions, not to answer them. (38:T1770, 1805) Also, he was unsure of the time of the murders, and it wasn't until later that he realized that Patrick was with him during the relevant time period. (38:T1785-86, 1787)

Rodney testified that his brother had five firearms in the safe, a .30-06, 1100 Browning, a .38 revolver, a 40-millimeter Glock, and a 9-millimeter Glock. (38:T1773) When he went to the house after the search, all of the handguns were missing, and the police trashed the house and destroyed things during the search. (38:T1775, 1801) Rodney knew that his brother did carry a gun in his truck on certain occasions. (38:T1773)

Rodney testified that Mr. Evans filed for divorce because he was seeing his first wife again. (38:T1778) He knew that after his brother filed for divorce, he and Beth decided to try to work

on their marriage, because Beth confirmed it, but they decided to part ways and Beth filed for divorce. (38:T17879-80) Rodney admitted that he had two petit theft convictions. (38:T1806)

Patrick Evans (Appellant) testified that he was 44 years old and had a Bachelor of Science degree. (38:T1812) He began working for Jabil Circuits in 1989, and worked his way through each department until he became the vice president of global business units. (38:T1814) Before becoming a vice president, he was responsible for helping develop the Asia-Pacific region and lived in Hong Kong. (1814) He also lived in China and Singapore and traveled across the Asian Pacific Rim, Europe, and North America. (38:T1815)

He and Andrea were married in July of 1996 and his son Cameron was born in 2001. (38:T1812-13) He met Elizabeth in 2003 while he was living in Singapore while he and Andrea were separated and their divorce was pending. (38:T1815, 1817) They were married in 2005. (39:T1899)

His divorce to Andrea was final in January of 2005, and after the divorce, he gave her $153,000 a year in alimony and equitable distribution. (38:T1821) In 2008 it dropped to $93,000 a year, and after January of 2009, she would have gotten only $2,000 a month for child support. (38:T1821-22)

While he was married to Beth, there was no peace because of the tension between Beth and Andrea. (38:T1822-23) Beth and Cameron bonded and Cameron called Beth "Momma" or "Mom." (38:T1824) Andrea was jealous of Beth's relationship with Cameron

and they ended up in court because of it. (38:T1824)

Over a period of months of seeing Andrea at school events that Beth could not attend because of the tension, he decided it would be better for his son if he put his original family back together. (38:T187-29) He began having an affair with Andrea in October of 2007 because he and Beth were having problems. (38:T1829; 39:T1907) He and Beth talked about divorce before the affair, but Beth did not know about the affair. (39:T1908)

By February of 2008, he decided his relationship with Andrea would not work, and in April of 2008, the affair ended. (38:T1830) When he finally told Beth about the affair, he discovered that Beth already knew about it. (38:T1832) At that time, they decided to split up. (38:T1835)

After Mr. Evans filed for divorce, they had an argument, and he told Beth she needed to go the condominium at Point Brittany because he did not want her at the house. (39:T1910, 1923-24) She and Molly moved into the condo, but they came back in a couple of weeks, after he and Beth talked and cooled down. (38:T186; 39:T1910, 1924) In May, Beth moved into the Sun Ketch condo, which was closer to Molly's high school, in order to give Molly a good senior year. (38:T1837; 39:T1987-88) The lease was to run through her graduation in May of 2009. (39:T1988)

Beth started working for Tech Data in February of 2008 because they were having problems and she knew she needed to start to rebuild her career. (38:T1839; 39:T1925-26) His employment with Jabil came to an end in October of 2008, and he

left with a significant severance package, with payments that would be completed with a large payment in January of 2009. (38:T1845-46)

On July 22, 2008, Mr. Evans voluntarily dismissed the divorce petition by mutual agreement with Beth. (39:T1928-29) Beth filed for divorce in November of 2008 to make sure that she got part of his retirement settlement, and he agreed. (39:T1929) He wanted a stable relationship with Beth as a friend and wanted her to be able to see Cameron. (39:T1930) He did wear his wedding ring at times and he had it on when he was arrested. (39:T1936)

The day before the murders, Beth asked him if he could come to her condo to help her change air filters and to fix her smoke detectors. (38:T1847) She asked him to bring a ladder because she didn't have one. (38:T1847) On that Saturday, he went over with batteries and changed air filters and put batteries in the smoke detectors. (38:T1847) He also helped with the Christmas tree. (38:T1847) From there, they went to Pasadena Carwash & Detail. (38:T1848) They took separate cars to the car wash and left them there and walked together to the restaurant. (39:T1948)

They met with Kerry Fuller at a place called O'Bistro to discuss whether they could do a "short sale" of the Point Brittany condo. (38:T1848-49) They ordered eggs benedict and talked. (38:T1849-50) They were together for about an hour, and they told Fuller they would get back with him. (38:T1850) After they left, he and Beth went to the carwash, picked up their cars, and went back to her condo. (38:T1850) He got his ladder and

moved some things for her in the garage and went back to his house. (38:T1850)

His mother wanted to go pick out Cameron's bike together as a family, so they went to Wal-Mart, picked out a bike, and returned to his house. (38:T1850-51) When they got back, his brother, Rodney, was at the house. (38:T1851) After he and Rodney fished for a while and didn't catch anything, they grilled some burgers. (38:T1851) Mr. Evans had planned a ski trip with Cameron, his brother, Glenn, and a friend of Glenn's and their two girlfriends. (38:T1851-52) Rodney was not going that year. (38:T1852) He had some back problems, so his brother helped him pull out the heavier ski equipment. (38:T1852)

That evening Pam Ashby called him. (1852) Ashby said hello and said, "Beth?" (38:T1854) He told her she had the wrong number and asked who it was. (38:T1854) She told him she was trying to reach Beth and he told her Beth was out on a date and she might not be able to reach her. (38:T1854) He offered to give Ashby Beth's new number if she needed it. (38:T1854) They talked about Ashby's new car because he had done car research for her. (38:T1854) It was a short call. (38:T1854) He told Pam Ashby that Beth was out because Beth told him that morning that she would be out that night, but he did not know the name of the person she was seeing. (39:T1950-51)

He and Rodney played some pool and cleaned up. (38:T1855) Rodney needed to go, and he needed to get up early the next morning, so he dropped Rodney at the trolley. (38:T1855) He

returned home, took a shower, and folded some clothes. (38:T1855) He put on an action movie called "Triple X" and fell asleep before the movie ended. (38:T1855) He woke up around 5:30 or 5:45 the next morning and left the house to go for a run and grab a bite to eat on the beach. (38:T1855-56) That morning, he planned to run 6 miles, but he did not always wear underwear when he ran. (39:T1957) He said he was wearing the type of shorts that didn't require underwear. (39:T1957)

When he was arrested the sun was coming up, and out of nowhere, high beam lights came on and he had to stop so he got out of his vehicle. The officer drew assault rifles on him from all directions and he was ordered to hit the ground. (39:T1986) It was extremely frightening and unexpected, and in response, he urinated. (39:1982, 1986)

Mr. Evans explained that the movie was a loud action movie in "surround sound," and he did not hear anyone knocking or ringing the doorbell. (1855, 1856) Also, the sliding glass doors and the windows were double or triple paned and the floors in the bedroom were marble and it echoed in there. (38:T1861) He did not hear his cell phone because it was not in the bedroom. (39:T1952) He moved into the house in 1998, and although he renovated the house and added a second floor, he did not install a new doorbell. (39:T1953-54)

Mr. Evans owned five firearms, a rifle, a shotgun, and three handguns, one of which was a .40-caliber Glock. (38:T1864) He bought the Glock and an Uncle Mike's holster at Bill Jackson's in

2005. (38:T1865) He normally kept the guns in the safe and he kept the Glock in the holster. (38:T1865) The gun safe had a keypad with a digital code. (38:T1866) The code to the safe was 3369, which was Andrea's birth date. (38:T1818, 1866) He sometimes had the gun in his truck if he was going to the indoor shooting range at Bill Jackson's. (38:T1867) He had been there only three times. (38:T1867) He would also take it to his brother's house in Georgia. (38:T1867)

Beth and Andrea knew the combination to the safe. (38:T1869) The last time he saw the Glock was Thanksgiving of 2008. (38:T1870) Anyone could have had access to the truck if the doors were unlocked. (38:T1870)

During his affair with Andrea, he discovered that Andrea's financial situation was dire and her debts were mounting and she wanted more money from him. (38:T1831; 39:T1990) She did not have a college degree and she did not work during the marriage. (39:T1900) During the marriage Andrea spent a lot of money. (39:T1898) In May of 2008, Andrea started to ask him to give her cash instead of checks, so he gave her cashier's checks. (39:T1990) In July, he discovered that she had filed for bankruptcy. (39:T1991) After the affair was over, she still had access to his house on Hermosita, and because they shared custody, she would bring Cameron over every Monday. (38:T1840) He knew that she had been to Beth's condo. (38:T1840)

On February 18, 2008, someone entered Mr. Evans' house while they were out on his boat. (38:T1842) When they came home the

garage door was open and two designer handbags were missing from the laundry room. (38:T1842-43) However, expensive jewelry, electronics, and his watches were still there. (38:T1843) Because a bracelet that Cameron had given Beth for Christmas that read "Mom" was the only piece of jewelry missing, Beth suspected that Andrea had taken the items. (38:T1843; 39:T1989)

Andrea took him back to court for custody 20 days after he was arrested. (38:T1844) After that, she asked for more in equitable distribution. (38:T1845)

In rebuttal, the State presented the testimony of Detective Judy who testified that he did not hear any noise coming from Mr. Evans' house that night. (39:T2000) The detective stated that the shorts Mr. Evans was wearing when he was arrested did not have built-in underwear, and Mr. Evans was not wearing any underwear that morning. (39:T2002) Judy testified that there were rifles in the gun safe, but no other handguns or any other ammunition for a 9-millimeter or .38-caliber handgun. (39:T2013) There were no photographs of the contents of the safe, although 1,500 pictures were taken during the investigation. (39:T2014)

Appellant moved for a judgment of acquittal of the charge of first-degree premeditated murder and first-degree felony murder at the end of the State's case, and renewed his motion at the close of the evidence, both of which were denied. (37:T1635-56; 39:T2020-25, 2026-28) Appellant also objected to the jury charge on burglary as the underlying felony for felony murder on the grounds that the State failed to prove that Mr. Evans did not

have consent or license to be in the condominium. (39:T2026-28)

On November 9, 2011, the jurors found Mr. Evans guilty of first-degree murder as charged in both counts. (9:R1584-87; 41:T2295-97)

In penalty phase on November 10, 2011, Appellant presented the testimony of his mother, Marcie Evans, and his two brothers, Rodney Evans and Glenn Evans. (41:T3231-2350)

The evidence established that Mr. Evans was the oldest of three boys. (41:T2328) They grew up in Atlanta and they had a very close family. Id. Their father died when they were in their 20s. (41:T2340) Rodney testified that Patrick saved his life when he was struggling with mental health issues and addiction. (41:T2329)

Mr. Evans was an "overachiever." (41:T2336) He began flying planes at a young age and he would run marathons. (41:T2336) He was always a worker. (41:T2341) He started with Jabil as a co-pilot and worked his way into the corporate division. (41:T2341)

Mr. Evans was a wonderful father. He had a daughter in college, along with his son Cameron. (41:T2331) He coached little league and soccer and participated in the Boy Scouts. He taught his son how to snorkel, ski, and fish. (41:T2330) Rodney testified that Mr. Evans worked for everyone else and made sure their needs were met. (41:T2331) Mr. Evans gave to charity and helped children with cleft palates in the "Smile" program. (41:T2331-23) Because of his work, children were able to speak and lead normal lives. Id. He also provided scholarships for

Catholic School children. (41:T2332) When his mother's house burned down, he provided a place for her to live in Florida. (41:T2342, 2344)

Both of his brothers testified that he had been an inspiration to them. (41:T2329, 2335) Mr. Evans' relatives all testified that they supported him and would visit him in prison. (41:T2332, 2345, 2348)

The jury recommended the death penalty for the murder of Elizabeth Evans by a vote of 9 to 3 and for Gerald Taylor by a vote of 8 to 4. (9:R1600, 1601; 41:T2392-95)

A Spencer[3] hearing was conducted on April 16, 2012 (9:R1640-44), at which Mr. Evans declined to present any additional argument or evidence, and on July 27, 2012, the court sentenced Mr. Evans to death for both counts. (10:T1797-1811; 13:R2208)

In the sentencing order filed the same day, the court found two aggravating circumstances, that Appellant was previously convicted of another capital felony (§921.141(5)(b), Fla. Stat.), and that the capital felony was committed while Appellant was in the commission of or an attempt to commit a burglary (§921.141(5)(d), Fla. Stat.). (10:R1798-1803) The court afforded "great weight" to each of the aggravators. Id.

The court found one statutory mitigating factor, that Appellant had no significant history of prior criminal activity (§921.141(6)(a), Fla. Stat.), and afforded it "some weight." (10:R1804-5) The court rejected "the age of the defendant at the

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[3] Spencer v. State, 615 So. 688 (Fla. 1993).

time of the offense” as mitigation because Appellant was 41 years old at the time of the offenses and because there was no evidence he was mentally immature. (10:R1805-1806)

The court found the following non-statutory mitigating factors: Appellant’s strong work ethic and work history (moderate weight); Appellant’s significant relationships with his two children (little weight); the love and support of Appellant’s family (little weight); that Appellant has behaved appropriately in confinement and exercised appropriate courtroom behavior. (minimal weight); life in prison with no danger of committing any further violent act (little weight); charitable and humanitarian deeds (little weight). (10:R106-1811)

Appellant filed a notice of appeal on October 16, 2012. (10:R1815)

<u>SUMMARY OF THE ARGUMENT</u>

I. The trial court erred in denying Appellant's motion for judgment of acquittal of premeditated first-degree murder because the evidence showed, at most, that Appellant acted in the heat of passion when he realized that his wife was in the bedroom with another man. The State's evidence showed that Appellant had dismissed his divorce petition and that he was "courting" his wife and hoping for a reconciliation at the time of the murders. In addition, the evidence fails to exclude the reasonable hypothesis that Appellant confronted the victims with the intent to "scare off" Mr. Taylor, and that he did not have the premeditated intent to kill.

II. The evidence does not support felony murder because the State failed to prove the underlying felony of burglary of Mrs. Evans' condominium. Appellant shouldered his burden of coming forward with evidence to support the affirmative defense of permission or license to enter his wife's condominium; and therefore, the State had to disprove consent. The State's evidence showed that when Appellant visited the condominium and when he brought his son to visit Mrs. Evans, he would enter the condominium without knocking, and Mrs. Evans never told him not to do so. The parties were still married and on good terms, and on the morning of the homicides Appellant helped his wife with maintenance at the condominium.

III. The trial court erred in allowing Detective Judy to

testify that, in his opinion, the voice on the 911 tape was Appellant's voice. The detective did not know Appellant before this investigation, there is no evidence that he ever talked to Appellant before or during the investigation, and he is not an expert in voice comparison. The detective merely compared the voice on the 911 recording with phone calls made by Appellant from the jail. The State did not introduce the jail phone calls. The detective's testimony invaded the province of the jury because it was up to the jury to decide if the voices were the same. The error is not harmless because the jury would have placed great weight on the detective's opinion. Also, the State used the testimony to counter a perception of bias and to bolster the voice identifications made by Elizabeth Evans' daughter and by one of her friends, Pam Ashby, who had not heard Appellant's voice in the three years prior to trial.

IV. The court erred in denying Appellant's motions for mistrial or for a for a curative instruction after the prosecutor asked Appellant if he had hired a private investigator to investigate Gerald Taylor, the man who was killed with Appellant's wife. Appellant denied the allegation, but the State did not present a witness on rebuttal to substantiate the insinuation. The State put the idea before the jury in the form of a question, and the court should have granted a mistrial or given a curative instruction when no evidence was presented to support the inference. In light of the dearth of evidence supporting premeditation, the error was not harmless because the jury would

have believed that hiring an investigator was evidence of premeditation.

V. The prosecution's closing argument denied Appellant a fair trial. The prosecutors repeatedly ridiculed, mocked, and denigrated Appellant, his defense, and his counsel's argument, along with commenting on his right to a jury trial. The prosecutor also misled the jury with regard to the legal effect of the evidence by telling the jury that Appellant could not have acted in the heat of passion, and thus could not be guilty of second-degree murder or manslaughter, simply because the parties were in the process of a divorce and because the homicides did not occur in the marital home.

VI. Cumulative error denied Appellant a fair trial. In light of the weak evidence supporting first-degree murder, the State cannot show beyond a reasonable doubt that the prosecutor's insinuation that Appellant preplanned the murders by hiring a private investigator, along with the misstatement of the law on heat of passion second-degree murder and manslaughter, did not affect the verdict. In addition, numerous improper comments ridiculing Appellant's defense, mocking Appellant, and commenting on his right to jury trial, combined with the error in allowing the lead detective to render an opinion regarding the voice on the 911 tape denied Appellant his constitutional right to a fair trial.

VII. The trial court improperly minimized Appellant's mitigation, finding that mitigation evidence that he loved his

children deserved little weight because the victim’s daughter lost her mother. The fact that the victim’s daughter lost her mother was “victim impact” evidence not submitted to the jury. Also, that fact has nothing to do with whether or not Appellant loved his children. The court also erred in minimizing evidence that Appellant shared the love and support of his family by citing the fact that the crimes caused them heartache. Pursuant to the trial court’s reasoning, these factors could never be used in mitigation if either the victim or the defendant had a family.

VIII. Because the evidence failed to prove that the murders occurred during a burglary, the aggravator that the offenses were committed “while the defendant was engaged in the commission of or an attempt to commit a burglary” was not proven. Without this aggravator, this case presents a single aggravator, and the death sentence is disproportionate.

ARGUMENT

ISSUE I

WHETHER THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL OF PREMEDITATED FIRST-DEGREE MURDER WHEN THE EVIDENCE PROVED, AT MOST, "HEAT OF PASSION" HOMICIDES.

Heat of passion "can be used as a partial defense, to negate the element of premeditation in first degree murder or the element of depravity in second degree murder." Villella v. State, 833 So. 2d 192, 195 (Fla. 5th DCA 2002). Because this case presented a "classic crime of passion" where the defendant found his wife in bed with another man, see Douglas v. State, 652 So. 2d 887, 891 (Fla. 4th DCA 1995), and because the State failed to prove felony murder (Issue II), this Court should exercise its power under section 924.34, Florida Statutes, and reduce Appellant's convictions to manslaughter.[4]

The evidence in this case regarding premeditation was entirely circumstantial. The State's theory was that Appellant went to Elizabeth Evans' condo to "snoop" to see what she was doing, and that Appellant became enraged when he realized that she and Gerald Taylor went up to the bedroom. The State theorized that Appellant entered the house, confronted the victims, and shot

[4] Appellant's counsel moved for a judgment of acquittal after the State's case (37:T1635-1656) and renewed his motion at the close of the evidence, arguing that the circumstantial evidence failed to prove that Appellant acted with premeditation because the homicides were "classic heat-of-passion" offenses, and because the evidence was consistent with a theory that Appellant went into the house with the intention to confront or scare the victims and not to kill them. (37:T1640; 39:T2020-2025)

them. That theory is not inconsistent with homicides committed in the heat of passion as opposed to premeditated intent.

> Premeditation is defined as more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as the nature of the act to be committed and the probable result of that act.

Norton v. State, 709 So. 2d 87, 92 (Fla. 1997) (citing Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997) (quoting Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986))).

> Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.

Holton v. State, 573 So. 2d 284, 289 (Fla. 1990) (quoting Larry v. State, 104 So. 2d 352, 354 (Fla. 1958)).

Although premeditation may be proven by circumstantial evidence, “when the intent of an accused is sought to be established by the actions of the accused, the circumstantial evidence rule applies.” Tien Wang v. State, 426 So. 2d 1004, 1006 (Fla. 3d DCA 1983) (citations omitted). In order to prove the fact of premeditation by circumstantial evidence, “the evidence must be inconsistent with any reasonable hypothesis of innocence.” See Holton, 573 So. 2d at 289; Tillman v. State, 842 So. 2d 922, 925 (Fla. 2d DCA 2003); Wilson, 493 So. 2d at 1022; McArthur v. State, 351 So. 2d 972, 978 (Fla. 1977). See also Twilegar v. State, 42 So. 3d 177, 190 (Fla. 2010)(“Where the evidence of premeditation

is wholly circumstantial, . . . the following standard applies: not only must the evidence be sufficient to support the finding of premeditation, but the evidence, when viewed in the light most favorable to the State, must also be inconsistent with any other reasonable inference.")

"Where the State's proof fails to exclude a reasonable hypothesis the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained." Randall v. State, 760 So. 2d 892, 901 (Fla. 2000). See also Norton, 709 So. 2d at 92; Kirkland v. State, 684 So. 2d 732, 734 (Fla. 1996); Coolen, 696 So. 2d at 741; Bigham v. State, 995 So. 2d 207 (Fla. 2008) (citing Green v. State, 715 So. 2d 940, 944 (Fla. 1998)).

> A sudden transport of passion, caused by adequate provocation, if it suspends the exercise of judgment, and dominates volition, so as to exclude premeditation and a previously formed design, may not excuse or justify a homicide, but it may be sufficient to reduce a homicide below murder in the first degree, although the passion does not entirely dethrone the actor's reason.

Forehand v. State, 126 Fla. 464, 469-70, 171 So. 241, 243 (Fla. 1936) (citing Whidden v. State, 64 Fla. 165, 167, 59 So. 561 (Fla. 1912)).

> In the heat of passion the slayer is oblivious to his real or apparent situation. Whether he believes or does not believe that he is in danger is immaterial; it has no bearing upon the question. He is intoxicated by his passion, is impelled by a blind and unreasoning fury to redress his real or imagined injury, and while in that condition of frenzy and distraction fires the fatal shot. In that condition of mind, premeditation is supposed to be impossible, and depravity which characterizes murder in the second degree absent.

Disney v. State, 72 Fla. 492, 502, 73 So. 598, 601 (Fla. 1916). See also Palmore v. State, 838 So. 2d 1222, 1224 (Fla. 1st DCA 2003) ("Heat of passion negating the depraved mind element of second degree murder is a valid defense in Florida [and will] reduce second degree murder to manslaughter if accepted by the jury."); Lusk v. State, 498 So. 2d 902, 904 (Fla. 1987) ("In Forehand we held that a 'dominating passion' operates to exclude premeditation and reduces a first-degree homicide to a lesser degree of murder or manslaughter.").

In Febre v. State, 158 Fla. 853, 30 So. 2d 367 (Fla. 1947), the Court reduced a conviction for first-degree murder to manslaughter for the homicide of a man found naked with Febre's wife. The defendant and his wife had been separated for a month. The defendant had filed for divorce and the proceedings were almost final, and even though he was dating another woman, he was trying for a reconciliation with his wife. The defendant used his key to enter the apartment they used to share, shot, and struggled with the victim, who died from a skull fracture. The Court held that the evidence failed to show "a premeditated design to effect the death" of the victim even though the defendant would have known that the victim was inside the residence because he would have recognized the victim's car. The Court wrote:

> The law reduces the killing of a person in the heat of passion from murder to manslaughter out of a recognition of the frailty of human nature, of the temporary suspension or overthrow of the reason or judgment of the defendant by the sudden access of passion and because in such case there is an absence of malice. Such killing is not supposed to

> proceed from a bad or corrupt heart, but rather from the infirmity of passion to which even good men are subject. Passion is the state of mind when it is powerfully acted on and influenced by something external to itself. It is one of the emotions of the mind known as anger, rage, sudden resentment, or terror. But for passion to constitute a mitigation of the crime from murder to manslaughter, it must arise from legal provocation. . . .
>
> The act of the seducer or adulterer has always been treated as a general provocation. Sexual intercourse with a female relative of another is calculated to arouse ungovernable passion, especially in the case of a wife.

158 Fla. at 857 (citations omitted). See also Paz v. State, 777 So. 2d 983, 984 (Fla. 3d DCA 2000) (quoting Febre and reducing a conviction of second-degree murder to manslaughter where the defendant killed a man after realizing he had sexually assaulted his wife).

The unrefuted evidence in this case showed that Mr. Evans was still married to Elizabeth Evans. Mr. Evans had filed for divorce earlier in the year, but dismissed the petition in July. He visited Mrs. Evans at the Sun Ketch condominium often, and his son visited and stayed overnight there regularly. The State's theory was that Mr. Evans wanted to reconcile and continue the marriage, but Elizabeth wanted to move on with her life. The State presented evidence from Elizabeth Evans' daughter that Mr. Evans was coming to the condominium often, and that he would "make an effort to come around and be nice." (34:T1186-87) He bought his wife a diamond necklace for her birthday, and he began wearing his wedding ring again. In fact, he was wearing it when he was

arrested.

Appellant started going to Catholic Church on the days when his wife attended, even though he had never gone during the marriage. As late as Halloween of that year, Mr. Evans confided in Pamela Ashby that he thought that he and Elizabeth could repair their marriage. Although in November Mrs. Evans filed for divorce, later that same month or in early December, Mr. Evans helped her daughter Molly with community service hours for school, and they went as a family to the Boys and Girls Club to deliver food and toys. (34:T1223-24)

The evidence showed Elizabeth asked Mr. Evans to come to the condominium to help her with maintenance issues. On the morning of the homicides, Mr. Evans went to the condominium and helped her replace the batteries in smoke detectors and change air filters. He brought a ladder because she did not have one, and he used it to help with the Christmas tree. After that, they dropped their cars off to be washed and detailed, and they walked to a restaurant to meet Kerry Fuller, a realtor, to discuss the sale of a piece of property in which they both had an interest. The agent confirmed that they interacted congenially, and Fuller believed that they left together. From there they returned to the condominium where Mr. Evans retrieved his ladder and helped his wife move things in the garage.

The evidence showed Mr. Evans knew Elizabeth was meeting someone that evening because Pam Ashby dialed his number looking for Elizabeth and Mr. Evans told Ashby that she was on a date.

Ashby stated that Mr. Evans sounded "normal" during the call, and in closing argument, the prosecutor admitted there was no evidence that Appellant was planning to kill his wife when he talked to Ashby.

In closing argument, the prosecutor postulated that Appellant went to the condo to "snoop," and that he became upset because he could see inside the living room through the curtains and he could see when the victims went to the bedroom.[5] (40:T2183-85, 2190) That hypothesis was supported by evidence that the bedroom curtains were sheer and if someone moved in front of the light, their silhouettes could be seen from outside. The prosecutor admitted to the jury that there was no evidence regarding whether Appellant went back to his truck for the gun or whether he had the gun with him while he was spying on his wife. (40:T2183-84) The prosecutor described Appellant as "scared" and "outraged at what is going on." (40:T2188)

In all, the prosecutor described a state of mind consistent with heat of passion. Cf. Wilson v. State, 493 So. 2d 1019 (Fla. 1986), receded from on other grounds, Evans v. State, 838 So. 2d 1090 (Fla. 2002) (in which the evidence was inconsistent with a heat of passion killing of Wilson's father because the victim was

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[5] "How does he know that she is busy at that moment to tell [Pam Ashby], she can't help you. She is on a date . . . Has he seen Jerry Taylor's SUV parked in front of her condominium so he can say, She can't help you, she's on a date?" (40:T2178) "At 6:15 was he planning to kill her or kill them? Probably not. He was just snooping." (40:T2179) "Now, . . . we're talking about 6:45. So at 6:15 we talked to Pam Ashby. Was he there scoping the place out? Maybe not. But I suggest to you he had been around and he knew she was on a date at that moment. At 6:45, I suggest to you

brutally beaten with a hammer before he was shot through the forehead while sitting on the floor).

Regardless of whether the facts prove a sudden provocation that would reduce the charge to manslaughter, the circumstantial evidence wholly fails to establish premeditated first-degree murder because the evidence is not inconsistent with the reasonable hypothesis that Appellant entered the residence to confront the victims or to "scare off" Mr. Taylor. The State's evidence does not contradict an inference that when Appellant confronted the victims, he had no intent to kill them, but he fired the gun either when Mr. Taylor came toward him, or when Elizabeth yelled for help.

The deputies testified that the bedroom was dark. The holster and the bullet casings were left behind, which is something that would be unlikely if the killer planned the murders. The incident occurred very quickly, and the voices on the 911 recording show that the scene was chaotic and all three of the individuals were stressed and agitated. On the 911 recording, Mrs. Evans comments that Appellant is not in his right mind when she asks in an incredulous tone, "Are you out of your fucking [mind]?"

When evidence of the events surrounding the homicide are lacking or incomplete, this Court has found insufficient evidence of premeditated intent. See Bigham, 995 So. 2d 207 (holding that the evidence was insufficient to prove premeditated intent in a strangulation case); Norton, 709 So. 2d 87 (reducing a first-

(..continued)
that he's there looking around again." (40:T2182)

degree murder conviction to manslaughter and finding that the fact that the victim was shot once in the back of her head was insufficient to establish premeditation when there was no evidence regarding the events that led to the killing and evidence of a struggle was lacking); Kormondy v. State, 703 So. 2d 454 (Fla. 1997) (finding insufficient evidence of premeditation because the evidence was insufficient to prove that a contact gunshot wound to the victim's head was not accidental); Hall v. State, 403 So. 2d 1319 (Fla. 1981) (holding that the evidence was equally probative of an intent to disarm and shoot the deputy as it was with an intentional discharge of the gun without intent to kill).

The Court has also reduced convictions for first-degree murder on the grounds that the evidence simply did not exclude a theory that the defendant acted without premeditation. See Coolen, 696 So. 2d 738 (reducing a conviction to second-degree murder even though the victim was stabbed six times for no apparent reason); Cummings v. State, 715 So. 2d 944 (Fla. 1998) (reducing a conviction to second-degree murder even though the defendants had a motive, armed themselves, and went to the residence, because the evidence did not exclude the possibility that the defendants merely intended to frighten the occupant or damage his car and not to kill him); Randall, 760 So. 2d 892 (reducing convictions for the strangulation murder of two prostitutes to second-degree murder because the evidence was consistent with the reasonable hypothesis that Randall intended to choke his victims for sexual gratification, and not to kill

them).

In Kirkland, 684 So. 2d 732, the Court reduced a first-degree murder conviction to second-degree murder even though the victim had blunt force trauma in addition to slashing wounds to her neck because there was "no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide," "there were no witnesses to the events immediately preceding the homicide," and "there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide." Id. at 735. The Court also noted that the victim's mother testified that Kirkland owned a knife the entire time she was associated with him, and the State presented "scant, if any, evidence to indicate that Kirkland committed the homicide according to a preconceived plan." See id. at 735.

In this case, there is no evidence that Appellant exhibited, mentioned, or possessed an intent to kill the victims prior to the homicides. There was no evidence he procured the weapon in preparation for the homicides, and there was no evidence to indicate that Appellant acted according to a preconceived plan.

Appellant did not make any threatening statements about the victims prior to the homicides, nor was there any evidence of animosity or prior altercations. Cf. Fennell v. State, 959 So. 2d 810 (Fla. 4th DCA 2007) (refusing to find lack of premeditated intent when there was evidence of prior difficulties between the defendant and his girlfriend and when the defendant made

threatening statements a month before the murder and pulled a gun on the victim a week before the murder); Childers v. State, 713 So. 2d 431 (Fla. 2d DCA 1998) (noting evidence of previous altercations between the defendant and his wife, evidence that the attack took a full 10 minutes, and evidence that the defendant told a neighbor that if he discovered his wife with another man, he would kill her, and that he asked the neighbor how long it would take for something to decompose in a septic tank).

District courts have also found evidence of premeditation lacking under circumstances similar to those in this case. For example, in Graham v. State, 793 So. 2d 15 (Fla. 2d DCA 2001), the Second District reduced two convictions for premeditated first-degree murder of Graham's mother and young cousin even though there was evidence that he was angry with his mother and jealous of her attention to his young cousin and her boyfriend, whom he also tried to kill. The circumstantial evidence of premeditation was insufficient because Graham never threatened his mother or cousin and he did not seem upset when his father talked to him and his mother that morning. There was no evidence regarding when Graham obtained the weapon or as to what happened immediately before the shooting. See also Balzourt v. State, 75 So. 3d 830 (Fla. 2d DCA 2011) (noting that the defendant had not made any statements that he was going to kill the victim beforehand); Olsen v. State, 751 So. 2d 108, 111 (Fla. 2d DCA 2000) ("As in Kirkland, the State presented no evidence that Olsen exhibited, mentioned, or even possessed an intent to kill at any time prior

to the actual homicide. The State presented no witnesses to the events immediately preceding the homicide.”).

In Smith v. State, 568 So. 2d 965 (Fla. 1st DCA 1990), the court reduced Smith’s conviction to second-degree murder because the evidence did not rule out a killing in the heat of passion. The couple were divorced and living together. Apparently, they both were involved in affairs with other people, but there was no evidence regarding how the homicide occurred, or if the victim was alive when she was placed in the water. There was no evidence of the presence or absence of provocation and very little evidence of previous difficulties between Smith and the victim.

In this case, Mr. Evans did not make any statements to law enforcement demonstrating that he had premeditated intent. There is absolutely no evidence that Appellant made threats toward his wife or Mr. Taylor at any time. In addition, there is unrefuted evidence that Appellant was not upset that day when helped his wife with household chores and had an amicable brunch with her. He was not upset or angry when he spoke to Pam Ashby about an hour before the homicides. A sales receipt from Bill Jackson’s, along with evidence that law enforcement took the Glock during a traffic stop in October of 2007, proved that Mr. Evans owned the Glock since November of 2005. Therefore, there is no evidence he procured the weapon in anticipation of a homicide.

In Tien Wang, 426 So. 2d 1004, the defendant killed his wife’s stepfather who had traveled to Miami to rescue the defendant’s wife from him. A violent quarrel ensued, and although

there were no witnesses to the stabbing, three witnesses testified that they saw the husband chase the stepfather down the street, and one witness testified that the husband struck the stepfather. Noting that "[t]here was no direct evidence elicited by the State bearing on the element of premeditation," the district court concluded that the evidence was not inconsistent with the defendant's hypothesis that he had never fully formed a conscious purpose to kill. Id. at 1006.

In this case, there is no context for the 911 call because there is no evidence regarding what was happening before the recording. The communications center received a "hang up" call and Perrico had to place a call-back to the residence. There is no evidence regarding what happened between the initial call and the call back, and there was no evidence regarding what the caller heard or perceived before or during that time. The 911 recording itself depicts a scuffle and during the voices the phone "beeps" at least five times as if someone is grasping the phone and accidentally activating the buttons. At times the voices are garbled and they move away from, and closer to, the phone.[6]

[6] The court reporter's transcription of the tape does not capture the tenor or the timing of the event, and for that reason, this Court must review the actual recording. See Almeida v. State, 737 So. 2d 520, 524 n.9 (1999) (noting that the Court's independent review of the audiotaped statement clearly showed that the defendant asked a question, and stating that "the trial court had no special vantage point in reviewing this tape"); Cuervo v. State, 967 So. 2d 155, 160 (Fla. 2007) (stating that the Court conducted its own review of the audiotape of the interrogation); Banks v. State, 46 So. 3d 989, 998 (Fla. 2010) (indicating that the Court made an independent review of the surveillance video of

The recording shows that the entire event occurs in just 29 seconds, between 38 seconds when the call-back line opens and the second shot that is heard at one minute and 7 seconds. The call begins with the perpetrator telling Mrs. Evans to sit on the bed and she tells him that she is going to put on a robe. About 7 seconds after that, at the 45 or 47 second mark, there is sound indicating movement. The voices become more animated and Mrs. Evans says "Rick" twice. During that time the phone "beeps" a few times. At 49 seconds, Mr. Taylor tells the man to put down the gun. The perpetrator tells Mr. Taylor repeatedly to sit on the bed, and Mr. Taylor asks the man to put the gun down. At 59 seconds, Mrs. Evans screams for help and moves away from the phone, presumably to the patio where she yells for help again at one minute and 2 seconds. The first shot that hits Taylor happens only a second later, and Mrs. Evans is shot immediately after that, after the perpetrator moves to the porch. The phone must be in the perpetrator's hand, because Mrs. Evans' voice gets closer to the speaker, and her body is found on the patio.

In the 911 call, the perpetrator repeatedly tells "Jerry" to get on the bed, but it is clear that Jerry is not complying. In closing argument, the prosecutor admitted that the evidence supported a theory that Mr. Taylor moved toward Appellant immediately before he was shot based on the audio recording and

(..continued)
the defendant's prior violent felony). In addition, the court reporter added a caveat to the transcription of the recording: "Due to poor audio quality, State's Exhibit 44 could not be reported verbatim and was transcribed to the best of the reporter's ability." (32:T981; 33:T1100-01, 1052)

because he was shot at close range. (40:T2188) The evidence is consistent with a theory that the perpetrator panicked and shot Taylor when he went for the gun while Elizabeth Evans ran onto the patio naked and began to scream. Then, Elizabeth was shot reflexively without forethought. See Bell v. State, 768 So. 2d 22, 26 (Fla. 1st DCA 2000) (reversing two convictions for attempted first-degree murder because the evidence was not inconsistent with an inference that Bell shot "in haste, reflexively and without forethought").

Therefore, the evidence is consistent with a theory that Appellant entered the residence with the intent to confront the victims or to scare them or "scare off" Mr. Taylor. The fact that Appellant may have disposed of the gun is irrelevant with regard to premeditation. "[T]he fact that appellant may have taken steps to conceal evidence of a crime does not establish that he committed murder with a preconceived plan or design." Norton, 709 So. 2d at 93. "Efforts to conceal evidence of premeditated murder are likely to be as consistent with efforts to avoid prosecution for any unlawful killing." Id. (citation omitted).

In reviewing a motion for judgment of acquittal a de novo standard of review applies. Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002). If the state's circumstantial evidence reasonably supports the defendant's hypothesis as to the existence of premeditation, then every reasonable hypothesis of an unpremeditated killing has not been excluded. See Fowler v. State, 492 So. 2d 1344, 1348 (Fla. 1st DCA 1986).

Because the State's evidence supports the hypothesis that the homicides were committed in the heat of passion, the court erred in denying the motion for judgment of acquittal, and because the evidence is also insufficient to prove felony murder (Issue II), the convictions should be reduced accordingly.

ISSUE II

WHETHER THE COURT ERRED IN INSTRUCTING THE JURY ON BURGLARY AS THE UNDERLYING FELONY FOR FELONY MURDER OR WHETHER THE EVIDENCE IS INSUFFICIENT TO SUPPORT A VERDICT OF FELONY MURDER BECAUSE THE STATE FAILED TO PROVE APPELLANT LACKED CONSENT TO ENTER HIS WIFE'S CONDOMINIUM.

The State must prove the elements of the underlying felony in order to prove felony murder. See State v. Jones, 377 So. 2d 1163, 1164 (Fla. 1979). In this case, the State failed to prove the underlying felony of burglary.[7]

Appellant objected to the court's instructing the jury on felony murder based on burglary, arguing that the evidence showed that Mr. Evans had consent to enter the residence. (39:T2026-2027) Counsel added the argument to Appellant's motion for judgment of acquittal that had just preceded it (39:T2020-25), and argued that the evidence showed that Mr. Evans visited the condo often and that on the day of the homicides, he was there in the morning doing maintenance for his wife with her obvious permission.[8] (39:T2026-27) Counsel argued that the couple was still legally married at the time and there was no evidence that Mr. Evans did not have consent to "come and go" from the residence. (39:T2027)

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[7] Appellant was neither charged with, nor convicted of, burglary.

[8] Counsel amended the motion for judgment of acquittal to include the argument that the State failed to prove that Appellant did not have consent to be in the condominium. (See Volume 39:T2020-27) Also, "In appeals where the death penalty has been imposed, this Court independently reviews the record to confirm that the jury's verdict is supported by competent, substantial evidence." Davis v. State, 2 So. 3d 952, 966–67 (Fla. 2008) (citing Fla.R.App.P.

The prosecutor argued that Appellant did not have a key to the condominium and that the evidence was clear that the victims did not let Appellant into the condo because they were "in a state of undress." (39:T2028) The prosecutor also asserted, "So whether they invited him in and he had a gun, which, of course, there is not evidence of that, it would still be he entered that house with the intent to commit the crime, even if it was to scare them as the Defense has argued before." (39:T2028)

The court overruled the objection and read the first part of the jury instruction for burglary for "entering with intent to commit an offense" applicable to §810.02(1)(b)1., Fla. Stat. The court also read the third element of the instruction, which is given if the defendant meets his burden of production that he had an invitation or license to enter the structure. See Fla. Std. Jury Instr. (Crim.) 13.1. See also Bryant v. State, 102 So. 3d 704 (Fla. 1st DCA 2012); State v. Waters, 436 So. 2d 66 (Fla. 1983). The instruction given was:

> To prove the crime of burglary, the State would have to prove the following three elements beyond a reasonable doubt:
>
> One, Patrick Evans entered a structure owned by or in the possession of Elizabeth Evans.
>
> Element two, at the time of the entering of the structure, Patrick Evans had the intent to commit an offense in the structure.
>
> Element three, Patrick Evans was not licensed or invited to enter the structure.
>
> If the license or invitation to enter was obtained by Patrick Evans' trick, fraud, or deceit,

(..continued)
9.142(a)(6)).

> then the license or invitation to enter was not valid.

(41:T2243, 2247-48) The jury was not instructed under the "remaining in" portion of the burglary statute, §810.02(1)(b)2.c., Fla. Stat. ("Notwithstanding a licensed or invited entry, remaining in a dwelling, structure or conveyance to commit or attempt to commit a forcible felony, as defined in s. 776.08").

The instruction read to the jury requires a presumption that the perpetrator entered without the consent of the occupant, and the State did not object to the instructions as read. Also, during closing argument, the prosecutor argued that the theory underlying the burglary was non-consent: "[H]e is in a house where he has no business being, at a time specifically where he's got no business being there." (40:T2077) In rebuttal, the State argued that "there is no question it was felony murder because he went in the house armed. . . . They didn't let him in naked with a gun to come in and accost them." (40:T2217)

Therefore, it is clear that the State elected to proceed on a theory that Appellant was not licensed or invited to enter the condo, and it is clear that the jury could not have found that Appellant committed felony murder based on a finding that he "remained in" the dwelling. See State v. Robbins, 936 So. 2d 22, 26 (Fla. 5th DCA 2006) (finding that because the jury was not instructed that it could find the defendant guilty of aggravated battery with a weapon, it was clear that the verdict was for the alternative theory of aggravated battery causing great bodily

harm).

The prosecutor's argument in support of the instruction, that the jury could find Appellant committed a burglary even if the victims invited him in, would have been germane only if the State conceded that Appellant had consent to enter but that he "remained in" the premises with the intent to commit a forcible felony therein because the two theories, non-consent and "remaining in," are mutually exclusive.[9]

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[9] The "plain language of section 810.02(1)(b) 2.c. requires the State to prove a licensed or invited entry because it is an element of the offense." See Harris v. State, 48 So. 3d 922, 924 (Fla. 5th DCA 2010). Section §810.02(1)(b) 2.c., Florida Statutes provides in relevant part:

> To prove the crime of burglary, the State must prove the following two elements beyond a reasonable doubt: (1) *Defendant had permission or consent to enter a structure owned by or in the possession of the victim*. (2) Defendant, after entering the structure, remained therein with the intent to commit or attempt to commit a forcible felony inside the structure.

(Emphasis supplied.) See Woodhall v. State, 94 So. 3d 666, 668-69 (Fla. 5th DCA 2012) (stating that "when the State charges a defendant pursuant to the 'remaining in' burglary statute, it is required to present evidence establishing that the defendant was licensed or invited to enter the structure occupied by the victim") (internal quotation omitted); Harris, 48 So. 3d at 923-25 (holding that a defendant who pushed his way into an apartment could not be convicted of burglary under a theory of "remaining in" because the statute requires that the "remaining in" be done "notwithstanding a licensed or invited entry," meaning that the initial entry must be proven to be with the consent of the occupants); State v. Herron, 70 So. 3d 705 (Fla. 4th DCA 2011) (holding that the defendant could be convicted of burglary under a theory that he "remained in" the dwelling with the intent to commit a battery because the evidence showed that the victim revoked her permission for him to enter by telling him to leave). In Woodall, because the State chose to present evidence of unlawful entry, he could not be convicted on a theory of "remaining in" the conveyance as charged in the information.

Because no "remaining in" instruction was given, consent to enter is a complete defense to felony murder.[10] See Delgado v. State, 776 So. 2d 233, 236 (Fla. 2000)[11] ("[I]f a defendant can establish either that the premises were open to the public or that the defendant was an invitee or licensee, then the defendant has a complete defense to the charge of burglary."); Ducas v. State, 84 So. 3d 1212 (Fla. 3d DCA 2012) (holding that because there was no evidence the CVS was not open to the public, the defendant had a "complete defense" to the burglary charge).

Even though consent to enter is an affirmative defense, see State v. Hicks, 421 So. 2d 510 (Fla. 1982); §810.015(3), Fla. Stat., once the defense is raised, "the burden then shifts to the state to disprove the defense beyond a reasonable doubt." Metales v. State, 963 So. 2d 989, 990 (Fla. 4th DCA 2007) (citing Hansman v. State, 679 So. 2d 1216, 1217 (Fla. 4th DCA 1996)). See also Petrucelli v. State, 855 So. 2d 150, 154 (Fla. 2d DCA 2003) (noting that when consent is placed in issue, it is the State's burden to establish that consent was not given or that the person who gave consent did not have the legal ability to do so).

Evidence presented by the State can establish a defendant's affirmative defense. Delgado, 776 So. 2d at 240 (citing B.D.K. v. State, 743 So. 2d 1155, 1158 (Fla. 2d DCA 1999)). In this case, the State's evidence provided much of the evidence regarding

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[10] It should be noted that there was no evidence Appellant entered by fraud, trick, or deceit.

[11] Abrogated by §810.015, Fla. Stat., c. 2001-58, §2, Laws of Florida.

consensual entry.

The evidence showed Appellant was in the condominium on the morning of the homicides. She asked him to come to the condo with a ladder to help her with smoke detectors and to help her change air filters. While Appellant was there, he helped with the Christmas tree. After they had brunch with the realtor, they returned to the condo together where Mr. Evans retrieved his ladder and helped his wife move things in her garage.

Molly Rhoades, Elizabeth Evans' daughter, confirmed the fact that Appellant came to the condo often and that his son was a frequent overnight visitor. Rhoades testified that when Appellant arrived at the condo, he would enter without knocking. Although she testified that she and her mother didn't particularly like it, there was no evidence that they ever told Appellant not to do it. Although Appellant may have had the opportunity to copy Mrs. Evans' keys, there was absolutely no evidence that he did so or that he wanted to do so. There was no evidence of forced entry and no evidence that the front door of the condo was locked that night, and there was no evidence that Mrs. Evans asked her husband not to come to the condo that night. Therefore, there was no evidence that consent to enter was ever withdrawn expressly or by implication, or that non-consent to enter was ever communicated to Mr. Evans. See Breen v. State, 68 So. 3d 365 (Fla. 1st DCA 2011) (reversing a conviction for burglary with an assault or battery because the defendant's girlfriend had never revoked her consent for him to live in the apartment).

In order to prove that the entry was without consent, the State has to prove that the defendant knew that his entry was without consent. "The elements of burglary are the '(1) knowing entry into a dwelling, (2) knowledge that such entry is without permission, and (3) criminal intent to commit an offense within the dwelling.'" M.E.R. v. State, 993 So. 2d 1145, 1146 (Fla. 2d DCA 2008)(quoting R.J.K. v. State, 928 So. 2d 499, 502 (Fla. 2d DCA 2006)). Accord D.R. v. State, 734 So. 2d 455, 457 (Fla. 1st DCA 1999); T.S.J. v. State, 439 So. 2d 966, 967 (Fla. 1st DCA 1983).

In Metales, 963 So. 2d 989, the trial court erred in denying the motion for judgment of acquittal of burglary because the State did not rebut Metales' defense that the fiancé of the woman who lived in the apartment gave him to consent to enter while he was evading an officer. In Hansman, 679 So. 2d 1216, the court vacated a conviction for burglary because the State presented the testimony of only two of the three occupants of the house, thereby failing to disprove Hansman's defense that the third resident gave him consent to enter. See also Eltaher v. State, 777 So. 2d 1203, 1204 (Fla. 4th DCA 2001) (holding that the defendant could not be convicted of trespass as a lesser of burglary when he stole items from the victim's condominium after she invited him inside because "[b]eing an invitee is a complete defense to a charge of burglary"); Hinchcliff v. State, 765 So. 2d 179 (Fla. 2000) (reversing burglary convictions because the defendants were invited into the victim's home prior to any crime being

committed).

In D.R., 734 So. 2d at 459–60, cited in Breen, 68 So. 3d 365, the court reversed an adjudication for burglary because the State failed to disprove the juvenile's defense that he believed he had consent to be in the trailer. Although the victim told the teenager they were leaving, he never testified unequivocally that he told the juvenile he could no longer be in the trailer. For that reason, the State failed to prove that the child had knowledge that he entered the trailer without permission. See id. at 457.

Although there is a concept of "implied consent," there is no corresponding concept of "implied non-consent." See Delgado, 776 So. 2d at 238-242. Although section 810.015(3) provides that lack of consent may be proven by circumstantial evidence, in a circumstantial evidence case involving consent to enter a dwelling, a judgment of acquittal is appropriate when the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. Aguirre-Jarquin v. State, 9 So. 3d 593, 605 (Fla. 2009) (citing Atwater v. State, 626 So. 2d 1325, 1328 (Fla. 1993)). In Aguirre-Jarquin, in contrast to this case, the evidence showed, and the defendant admitted, that before the murders he was expressly warned not to come into the home without an invitation. In this case, no such evidence was adduced.

In Robinson v. State, 989 So. 2d 747 (Fla. 2d DCA 2008), the court granted a new trial because the prosecutor misstated

evidence concerning whether the lessee had withdrawn consent for Robinson to be in the house before he burst in and attacked a guest. The court noted that there were "conflicting inferences" because there was no competent evidence that the lessee/host expressly withdrew his consent for Robinson to be in the house. The defendant was an invitee that night and on other occasions. A witness testified that other guests removed Robinson from the house and that she assumed the host wanted him out of the house because he had become obnoxious. When Robinson returned, a guest locked him out of the house in full view of the lessee/host, and he broke down the door to get in. Because the forceful entry was only circumstantial evidence that Robinson entered without consent, the mischaracterization of the evidence was reversible error.

In this case, if the Court were to hold that Appellant should have known that he would not have consent to enter the condo at that time, that holding would allow the State to elevate any crime to a felony and any murder to a capital offense whenever the homicide took place indoors based on an inference of "implied non-consent." In other words, the defendant would be charged with knowing, without being told, that he would not be permitted on the premises under certain circumstances (that he may or may not perceive at the time of entry) even though no such conditions were ever expressed to him. This type of "absurd result" was rejected by this Court. See Delgado, 776 So. 2d at 239 (rejecting the argument of "implied revocation" of a privilege to remain in the

dwelling once the defendant committed a criminal act (citing Davis v. State, 737 So. 2d 480, 484-86 (Ala. 1999) (Almon J., dissenting))).[12]

Whether or not the evidence is circumstantial, a revocation of consent, either before the entry or while a defendant remains inside a structure, must be unequivocal (as opposed to implied) in order to have legal effect. See Delgado; Bradley v. State, 33 So. 3d 664, 683 (Fla. 2010) (noting that the victim clearly and unequivocally told his assailants to "get out" of the house before he was attacked, thus expressly revoking any consent the wife may have given); Stenson v. State, 756 So. 2d 118 (Fla. 3d DCA 2000) (stating that the victim testified that although she invited the defendant into her home to talk, she also testified that she repeatedly asked him to leave once he began to beat her).

Therefore, because the evidence failed to prove burglary, the evidence failed to prove both felony murder and premeditated murder. Upon retrial, Appellant cannot be tried for first-degree murder because double jeopardy prohibits a defendant from being convicted on a theory upon which an appellate court has acquitted him for insufficient evidence. See Balzourt, 75 So. 3d at 838.

[12] Although the "remaining in" instruction was not read to the jury, it should be noted that there was no evidence on the 911 recording that Mrs. Evans told the man to leave the condo.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN ALLOWING DETECTIVE JUDY TO GIVE HIS OPINION THAT THE VOICE ON THE 911 RECORDING WAS APPELLANT'S BASED ON HIS COMPARISON OF THE RECORDING WITH PHONE CALLS MADE BY APPELLANT FROM JAIL WHEN THE DETECTIVE HAD NEVER MET OR SPOKEN TO APPELLANT AND WHEN HE HAD NO SPECIAL EXPERTISE.

The court erred in allowing Detective Judy to give his opinion that Mr. Evans' voice was on the 911 recording based on his comparison of the voice with recorded phone calls made by Mr. Evans from the Pinellas County Jail. (35:T1394-95, 1397) The State did not introduce the jail calls, and there was no evidence that before the investigation the detective had never met Mr. Evans or heard his voice.

Counsel objected to Detective Judy's testimony (35:T1395, 1408), arguing that the detective did not have any prior contact with Mr. Evans and that the State was qualifying him to render an opinion based solely on his listening to recorded calls from the jail. (35:T1396) Counsel argued that Judy was usurping "the province of the jury." (35:T1396) Counsel also argued that Detective Judy was the case agent and that allowing him to render and opinion would be prejudicial and inappropriate and would be a comment on the guilt of Mr. Evans. (35:T1395-95)

The court overruled the objection, stating:

> The comparison is a known voice exemplar from a jail call and he's heard the unknown voice. And the jury can do that. There is no reason why this detective can't do that and recognize it's only his opinion. You're not qualifying him as some

> sort of an expert with voice waves and all that. . . . So whatever limited probative value – it doesn't rise to the level that it's prejudicial to your client in light of prior identifications.

(35:T1396-97) Judy then identified Mr. Evans' voice as the person saying, "Get on the bed," "Sit on the bed," and "Jerry, sit on the bed." (35:T1408)

Identification by voice alone has long been thought to involve grave dangers of prejudice to the suspect. Macias v. State, 673 So. 2d 176, 180 (Fla. 4th DCA 1996) (citing Commonwealth v. Miles, 420 Mass. 67, 648 N.E.2d 719, 728 (1995) (quoting Palmer v. Peyton, 359 F.2d 199, 201 (4th Cir. 1966))). However, in certain cases, voice identifications are admissible. See, e.g., England v. State, 940 So. 2d 389, 400-401 (Fla. 2006) (holding that it was permissible for a witness to identify the defendant's voice on an answering machine message that had been destroyed because the witness had known the defendant since he was a teenager); Cason v. State, 211 So. 2d 604, 604 (Fla. 2d DCA 1968) (holding that a witness to a robbery could identify the defendant's voice because he had heard him speak over the phone over a period of several years and on one occasion to an audience of physicians). However, such an identification has been allowed only when the witness is sufficiently familiar with the defendant's voice. See, e.g., State v. Cordia, 564 So. 2d 601 (Fla. 2d DCA 1990) (allowing officers to identify the voice of a fellow officer whom they had known for years).

Generally, officers are not permitted to identify a

defendant's image or voice unless there is evidence that the officer has had prior contact with him or her. For example, in Edwards v. State, 583 So. 2d 740 (Fla. 1st DCA 1991), a deputy employed a confidential informant to make controlled purchases of cocaine while monitoring him with sound and video equipment. The defendant objected to the deputy's testifying that he recognized the defendant as the person on the videotape making the sale. The appellate court held that the deputy's identification was inadmissible because the deputy "did not assert that he had any prior knowledge of appellant or that he had witnessed the transaction apart from the tape, nor was he qualified as an expert in videotape identifications." Id. at 741. The court also held that an objection that the testimony "invaded the province of the jury" was sufficient to preserve the error noting:

> [U]nder proper conditions, such as the state laying a predicate showing that [the deputy] had prior knowledge of or a special familiarity with appellant that would enable him to identify her or that he was particularly qualified as an expert in videotape identification, [the deputy's] identification testimony might be deemed admissible, *if* [the deputy] were not identified to the jury as a police officer.

Id. at 741 (citing Hardie v. State, 513 So. 2d 791 (Fla. 4th DCA 1987) (reversing a conviction for grand theft on the grounds that officers identifying the defendants on a videotape should not have been identified as police officers and noting that the police officers who identified photographs of the defendants knew them from prior contact)).

In Bowers v. State, 104 So. 3d 1266 (Fla. 4th DCA 2013), the

court held that it was error to allow an officer who had never had contact with the defendant to testify that the defendant was one of the people in a surveillance video after he compared a photograph of the defendant to the video.[13] In Ruffin v. State, 549 So. 2d 250 (Fla. 5th DCA 1989), the State introduced a videotape of a drug purchase made by an undercover officer, and over objection, three police officers who were not present for the undercover transaction testified that, in their opinion, Ruffin was the man in the videotape. The Fifth District held that this opinion testimony invaded the province of the jury because the officers were not witnesses to the crime, were not specially familiar with the defendant, or were not qualified as experts in identification, writing:

> This was an invasion of the province of the jury. When factual determinations are within the realm of an ordinary juror's knowledge and experience, such determinations and the conclusions to be drawn therefrom must be made by the jury. See McGough v. State, 302 So. 2d 751, 755 (Fla. 1974). [The three officers] were not eyewitnesses to the crime, they did not have any special familiarity with Ruffin, and they were not qualified as any type of experts in identification.

Id. at 251.

In Proctor v. State, 97 So. 3d 313, 313-315 (Fla. 5th DCA 2013), the court reversed convictions for uttering and grand theft because the trial court allowed a detective to identify the defendant as the man cashing two stolen checks after he compared

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[13] However, in Bowers, the court held that the error was not preserved by a proper objection that "without expertise or prior knowledge of the defendant, this line of questioning would invade the province of the jury." See Bowers, 104 So. 3d at 1270.

the bank's surveillance video with Proctor's photo and signature found in a state driver's license database. The appellate court concluded that "[t]he jurors should have been allowed to determine for themselves whether Proctor was the person shown in the surveillance video." In Charles v. State, 79 So. 3d 233 (Fla. 4th DCA 2012), the court held that a detective's opinion testimony identifying the defendant as the person depicted in a surveillance video invaded the province of jury because the detective was not an eyewitness, had no special familiarity with defendant, and was not otherwise qualified as an expert in video identification. The court stated that the "jurors should have been left to determine for themselves whether [Charles] was the person in the surveillance video." Cf. Day v. State, 105 So. 3d 1284 (Fla. 2d DCA 2013) (holding that allowing a police officer to identify the defendant from a video was proper because the officer knew the defendant from prior contacts with her, but reversing because revealing that the witness was an officer was prejudicial).

In Cordia, 564 So. 2d 601, the court held that two police officers could identify the voice of another officer on a recording of a bomb threat call even though those officers did not receive the original call. In contrast to this case, the opinion testimony was allowed specifically because the State asserted that the officers knew the defendant "for a significant period of time," and had spoken to him in person and over the telephone and police radio. See id. at 601.

Based on Cordia, in State v. Benton, 567 So. 2d 1067, 1068 (Fla. 2d DCA 1990), the Second District stated:

> A lay witness may offer his opinion about the identification of another person, including identification of a voice, as in Cordia, or from a photo "if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." United States v. Robinson, 804 F.2d 280, 282 (4th Cir. 1986). See also, Hardie v. State, 513 So. 2d 791 (Fla. 4th DCA 1987), *rev. denied,* 520 So. 2d 586 (Fla. 1988). It is not necessary that the identification witness be an eyewitness to the crime itself.

In Barrientos v. State, 1 So. 3d 1209 (Fla. 2d DCA 2009), the Second District held that a corporal in the Sheriff's Office could identify the voice that he heard while monitoring a drug deal through a listening device as that of the defendant only because the officer testified that he remembered the defendant's "deep, raspy voice" from a previous occasion four years earlier. Id. at 1211.

In this case, there was no showing that Detective Judy was "more likely" to correctly identify the voice on the 911 tape than the jury would have been. Detective Judy had never met Mr. Evans before this investigation. In fact, there was no evidence that the detective had spoken to Mr. Evans during the investigation. The detective's comparison was made solely on his listening to the recorded phone calls. Detective Judy was not qualified as an expert, nor was there any claim that he had any special training or skill in voice identification. Compare United States v. Diaz-Arias, 717 F.3d 1, 10-16 (1st Cir. 2013) (finding

that the officer who compared the defendant's voice from recorded phone calls (which, unlike in this case) were admitted into evidence, to the recorded drug transactions was a native Spanish speaker who was very familiar with intonations and accents from the Dominican Republic and could identify the defendant's idiosyncratic speech patterns).

In this case, the trial judge allowed the voice comparison even though he realized that the jury was capable of making the comparison. ("The comparison is a known voice exemplar from a jail call and he's heard the unknown voice. And the jury can do that. There is no reason why this detective can't do that and recognize it's only his opinion.") The State should have played the tapes and allowed the jury to reach its own conclusion; it was not the detective's place to make the comparison for them.

Allowing Detective Judy to give his opinion that it was Mr. Evans' voice on the 911 tape was improper bolstering. In Carter v. State, 115 So. 3d 1031 (Fla. 4th DCA 2013), the defendant testified that he thought the witnesses had gotten together after the incident to compare their stories because their statements were inconsistent with those they gave to law enforcement at the scene. In rebuttal, the State presented the deputy who took the statements, and the deputy was allowed to testify that the witnesses' statements were consistent with one another. On appeal, the court held that one of the reasons the deputy's testimony was inadmissible was that "the deputy's testimony constituted improper bolstering." Id. at 1037-38. The court

opined that the proper way to introduce the evidence was to introduce the actual written or oral statements and not the deputy's opinion about their consistency. In this case, the proper way to introduce the evidence would have been for the prosecutor to play the jail calls and allow the jury to make the comparison.

"Error in admitting improper testimony may be exacerbated where the testimony comes from a police officer." Proctor, 97 So. 3d at 315 (citing Martinez v. State, 761 So. 2d 1074, 1080 (Fla. 2000)). "There is the danger that jurors will defer to what they perceive to be an officer's special training and access to background information not presented during trial." Id. When a police officer, who is generally regarded by the jury as disinterested and objective and therefore highly credible is the corroborating witness, the danger of improperly influencing the jury becomes particularly grave. Barnes v. State, 576 So.2d 439, 439 (Fla. 4th DCA 1991) (holding that an officer could not testify to the victim's prior consistent statement (citing Perez v. State, 371 So. 2d 714, 716-17 (Fla. 2d DCA 1979))). See also Bartlett v. State, 993 So. 2d 157, 166-167 (Fla. 1st DCA 2008)(noting that with regard to self-defense the jury could have held the opinions of the lead investigator in higher regard than the testimony of any other lay witness, thereby reinforcing the prejudice).

An appellate court reviews a trial court's decision to admit evidence under an abuse of discretion standard; however, that

discretion is limited by the rules of evidence. Hudson v. State, 992 So. 2d 96, 107 (Fla. 2008). The harmless error test places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

The error is prejudicial reversible error because the other voice identifications came from Elizabeth Evans' daughter Molly Rhodes and Pamela Ashby, her neighbor. Not only were Elizabeth Evans and Ashby close friends, after Ashby left the witness stand, defense counsel informed the court that she attempted to "stare down" Mr. Evans. (33:T1119) In addition, Ashby admitted on cross-examination that she had not heard Mr. Evans' voice in the three years before trial. (33:T1113) The State cannot argue that the error was insignificant because the prosecutor would not have introduced Detective Judy's testimony if he did not believe that it was necessary to do so to remove the issue of possible bias or misidentification in the voice identifications. Therefore, for the reasons stated herein, a new trial is required.

ISSUE IV

WHETHER THE COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL AND MOTION FOR A CURATVE INSTRUCTION AFTER THE PROSECUTOR'S QUESTIONS ON CROSS-EXAMINATION OF APPELLANT INSINUATED THAT HE HIRED A PRIVATE INVESTIGATOR TO INVESTIGATE GERALD TAYLOR WHEN THE PROSECUTOR'S ASSERTED "GOOD FAITH" BASIS FOR THE QUESTION DID NOT SUPPORT THE INFERENCE AND WHEN THE STATE FAILED TO PRESENT SUCH EVIDENCE IN REBUTTAL.

Questions asked during cross-examination must have a good-faith basis. King v. State, 89 So. 3d 209, 224 (Fla. 2012) (citing Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989)). Also, an inference left by such questioning must be supported by sufficient evidence. See Gosciminski v. State, 994 So. 2d 1018, 1023-24 (Fla. 2008). The prosecutor insinuated, without evidentiary support, that Mr. Evans hired a private investigator to investigate Gerald Taylor. The court erred in failing to grant a mistrial, or in failing to give a curative instruction once it became clear that the prosecutor was not going to present any evidence to substantiate this implication.

During the State's cross-examination of Mr. Evans, after Mr. Evans said he did not know the name of the person Elizabeth was seeing that night, the prosecutor asked Mr. Evans if he recalled pressing her to get information about Jerry Taylor. (39:T1951) When Mr. Evans answered that he did not recall having a conversation like that, the following ensued:

> THE PROSECUTOR: Do you recall telling her that you actually knew where he lived and how many kids he had?

> MR. EVANS: I don’t recall that I knew anything about Gerald Taylor, sir.
>
> THE PROSECUTOR: Isn’t it true that you hired a private investigator to find out information about Jerry Taylor prior to December 20th of 2008?
>
> MR. EVANS: No, sir.

(39:T1951)

After the State’s rebuttal, Appellant moved for a mistrial, arguing that the State put on a rebuttal case, but did not present any evidence to support the innuendo. (39:T2016-18) Counsel argued that the prosecution put before the jury an insinuation that Mr. Evans hired an investigator to investigate Jerry Taylor, which implied that he was stalking his wife and trying to get information about the man she was seeing. Counsel argued that it was prosecutorial misconduct to ask the question without the proof to back it up. (39:T1017)

The court denied the motion for mistrial, stating the prosecutor’s question was “not evidence,” that “[i]t’s the answer that’s evidence,” and Mr. Evans answered “no.” (39:T2018) Appellant asked for a curative instruction:

> I would specifically ask this Court to instruct this jury that that question, . . . is to be completely disregarded because there is no fact or substance to that. So I’m asking to do a corrective instruction to this jury so they understand that they aren’t to consider that because the implication was that it happened. That’s why he asked it that way. And then the answer is no.

(39:T2019) The court denied the request for a curative instruction. (39:T2019) After the ruling, the prosecutor

interjected that he had a "good-faith basis" to ask the question, stating:

> [T]here had been information from the victim in this case that she had told other people, which would be hearsay, that she believed that the Defendant had hired a private investigator because that morning of December 20th when he was pressing her about who she was going out with that night, and she finally said Jerry Taylor, he then told her where he lived and how many children he had. So she believed that he had probably hired a private investigator.
>
> So that is the reason I asked that question. I didn't really expect him to answer it truthfully, but I certainly had a good-faith basis in asking it. So that is the reason why I did it. I wasn't just making stuff up to try to make him look bad. There was an actual basis in fact why I asked it.

(39:T2019-20)

The prosecutor did not have a "good-faith" basis for asking the question. All he had was inadmissible hearsay speculation from the victim, in which the victim jumped to the unsubstantiated conclusion that Mr. Evans might have hired an investigator to investigate Jerry Taylor.

In Gosciminski, 994 So. 2d 1018, the defendant was charged with killing a woman and stealing her ring. Part of the evidence against him was the fact that he displayed a distinctive diamond ring to co-workers on the day of the murder. Because the ring was never recovered, the State presented a recreation of it to witnesses for identification. Witnesses who picked the ring out of the lineup noted that the ring they actually saw was old, dirty, and covered with a dark substance. One witness identified the recreated ring, but stated that the ring displayed by the

defendant had “black around it.” During cross-examination, the prosecutor asked the defendant if he remembered that testimony and commented, “The black, the blood that you didn't even bother wiping off that ring before you wanted to show off to these people?” See id. at 1023.

In Gosciminski, this Court held that the trial court erred in overruling an objection to the State’s suggestion that there was blood on the ring, and reversed the murder conviction because the prosecutor did not have a good-faith basis for asking the question or making the suggestion in the form of a question. The Court held that the State presented insufficient evidence to support the inference that the darkness on the ring was blood even though photographs of the body showed a large quantity of blood around the victim’s hands. See id. at 1024.

In this case, the prosecutor explained that the victim “believed” that Mr. Evans had “probably” hired a private investigator. The victim’s subjective belief, apart from being inadmissible, is not a fact that could support the inference. “It is axiomatic that counsel cannot ask questions of a witness that have no basis in fact and are merely intended to insinuate the existence of facts to a jury.” Del Monte Banana Co. v. Chacon, 466 So. 2d 1167, 1172 (Fla. 3d DCA 1985); Corrao v. State, 79 So. 3d 940, 944 (Fla. 1st DCA 2012).

“It is impermissible for the state to insinuate impeaching facts while questioning a defense witness without evidence to back up those facts.” Braddy v. State, 111 So. 3d 810, 853 (Fla.

2012) (citing Shimko v. State, 883 So. 2d 341, 343 (Fla. 4th DCA 2004)). "This is true for questions which insinuate impeaching facts, the proof of which are non-existent, and those insinuating impeaching facts which, although said to exist, are not yet later proved." Id. (citing Smith v. State, 414 So. 2d 7, 7 (Fla. 3d DCA 1982)). (Internal quotation marks omitted). In Smith, the court noted that the difference between these types of questions "is one of degree only, and either interrogation, because not followed by actual impeachment, is condemnable." Id. at 7. See also Braddy, 111 So. 3d at 853.

In Braddy, in penalty phase, the prosecutor asked Braddy's wife if he had had extramarital affairs and specifically named two women as possible objects of Braddy's affections. Although Braddy's wife denied any knowledge of affairs, the State did not present any evidence that Braddy had been unfaithful. This Court found the line of questioning to be improper.

In Gonzalez v. State, 572 So. 2d 999 (Fla. 3d DCA 1990), after the defendant testified that he was in fact the victim who was abducted, the prosecutor asked the defendant if he was hired to "get rid" of the victim. The prosecutor did not present evidence to substantiate the insinuation. The court reversed, finding the evidence to be inflammatory, writing, "In proving a set of facts, the prosecutor should avoid innuendos or insinuations and, instead, should rely on the testimony of the witnesses and the facts established in evidence." Id. at 1000 (citing Bennett v. State, 316 So. 2d 41 (Fla. 1975)).

Counsel’s motion for mistrial at the end of the State’s rebuttal was sufficient to preserve the error. In Marrero v. State, 478 So. 2d 1155 (Fla. 3d DCA 1985), the prosecutor attempted to impeach a defense witness with a statement purportedly made to him in his office. Even though the witness denied making the statement, the prosecutor did not produce a witness to the statement. The court explained:

> It thus appears that an objection and a motion for mistrial made at the time the predicate question is asked is premature: If the impeaching evidence is later produced, the harm of the question is cured; but if the impeaching evidence is not produced, then, retroactively, the question is objectionable, and if prejudicial enough, mistrial is warranted. It follows, then, that a motion to strike the question and instruct the jury should be made when the State has concluded its case without producing any impeaching evidence, or if striking and a curative instruction will not cure the harm, a motion for mistrial should be made at that time. Thus, in the present case, while no error was committed in overruling the premature objection and denying the motion for mistrial, it was error to deny the defendant's renewed motion for mistrial made when the prosecutor rested without putting on impeachment evidence in rebuttal.

Id. at 1157-58 (footnotes omitted).

In addition, the prosecutor should not have asked Mr. Evans if he “actually knew where [Taylor] lived and how many kids he had” because the prosecutor did not introduce the impeachment. Laying a predicate for the introduction of a prior inconsistent statement is inappropriate when a prosecutor has no intention of calling a witness to verify the statement. “When this suggested witness is not actually called to give the impeaching testimony

under oath, all that remains before the jury is the suggestion- *from the question*- that the statement was made. When that occurs, the conclusion that must be drawn is that the question was not asked in good faith, and that the attorney's purpose was to bring before the jury inadmissible and unsworn evidence in the form of his questions to a witness." Tobey v. State, 486 So. 2d 54, 55 (Fla. 2d DCA 1986) (citing Marrero v. State, 478 So. 2d 1155, 1157 (Fla. 3d DCA 1985)). But see Carpenter v. State, 664 So. 2d 1167 (Fla. 4th DCA 1995) (holding that a prosecutor need not produce a witness to a prior inconsistent statement if the court is satisfied that a good-faith basis exists for the insinuated fact).

"A prosecutor's question not supported by the evidence can be highly prejudicial." Corrao, 79 So. 3d at 944 (finding that asking the defendant if he offered to plead guilty to a misdemeanor required reversal when the defendant denied the same and no evidence of the offer was presented on rebuttal).

A trial court's denial of a motion for mistrial is reviewed by an abuse of discretion standard, see Cole v. State, 701 So. 2d 845, 852 (Fla. 1997), as is the court's denial of a curative instruction. See Isreal v. State, 837 So. 2d 381, 389 (Fla. 2002).

In this case, the prosecutor put before the jury inadmissible and unsworn testimony in the form of insinuating questions and the court failed to give a curative instruction. The error cannot be harmless because the prosecutor used the

insinuation as unsubstantiated proof of identity because the man on the 911 recording called the victim "Jerry," a fact that Mr. Evans said he did not know. The prosecutor also used the improper suggestion to prove premeditation because the clear implication is that there would have been prior preplanning if Appellant hired a private investigator to investigate Jerry Taylor.

Although in closing argument the prosecutor did not argue directly that Mr. Evans hired an investigator, it is clear that the prosecutor's theory was that Mr. Evans was stalking his wife and Jerry Taylor. The improper question bolstered this theory.

Because this error, in addition to other errors argued herein, denied Appellant a fair trial, reversal is required.

ISSUE V

WHETHER THE PROSECUTOR'S CLOSING ARGUMENT DEPRIVED APPELLANT OF A FAIR TRIAL WHEN THE PROSECUTOR RIDICULED AND DENIGRATED APPELLANT AND HIS DEFENSE, COMMENTED ON HIS RIGHT TO A JURY TRIAL, AND MISSTATED THE LAW WITH REGARD TO SECOND-DEGREE MURDER AND MANSLAUGHTER.

Mr. Evans was denied his due process right to a fair trial by prosecutorial misconduct during closing argument. Although a defendant is not entitled to a completely error-free trial, he or she has a constitutional right to a fair trial free of harmful error. Johnson v. State, 53 So. 3d 1003, 1007 (Fla. 2010) (citing Goodwin v. State, 751 So. 2d 537, 538–39, 541 (Fla. 1999)).

During closing argument, the prosecution misstated the legal effect of the evidence, commented on Appellant's right to a jury trial, and repeatedly ridiculed Appellant's defense and counsel's arguments. Most of the improper comments were made in the State's rebuttal argument, and for that reason, Appellant had no opportunity to respond.[14]

During summation, Appellant's counsel legitimately argued that the evidence did not prove preplanning or premeditation because the perpetrator left two casing shells and a holster at the crime scene, but carried the telephone downstairs. (40:T2106, 2111-12) In other words, if the killer had planned the murders, he would not have left incriminating objects behind. Counsel also argued that if Mr. Evans had committed the murders, he would have

[14] Rebuttal closing argument was made by Mr. Loughery, whereas the initial closing was made by Mr. Labruzzo.

gotten rid of the test-fired shells and the gun box in his safe because he was home alone all night. (40:T2113-15) During rebuttal, the prosecutor countered that argument by ridiculing it:

> Does he reflect and say, Hmmm, I need to pick up these shells, and I need to pick up my holster? No, he doesn't.
> And it's amazing that Mr. Parry suggests the reason he's not guilty is because there is evidence against him. Okay? Because the shells are there, he clearly didn't do it because he would have picked them up. ***I mean, only in a world populated by defense attorneys would that be true.***

(40:R2190-91)[15]

The prosecutor also belittled the defense by calling it "bad TV":[16]

> But the defense of this, I suggest, is somebody else did that and intentionally left that stuff so the police would believe that he did it, that he's being framed, that the Defendant would do it. What a clever frame these people had that they could – this real murderer, that he could get Beth and Jerry to go along with this perfect script where they actually called him Rick and they could scream and do all this stuff. And they had it on the 911 tape.
> And he could kill them and then he could leave the holster and leave the casings so they would think – because they stole the gun from Rick earlier so they would think that Rick did it. ***I mean, talk about bad TV. That wouldn't even make it***

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[15] Counsel objected and moved for a mistrial, on the grounds that the argument was clearly inappropriate and that it was "prosecutorial misconduct" to argue that "only in a world populated by defense attorneys." (40:T2191) The court denied the motion, and instructed the prosecutor to "move on." Id.

[16] Appellant's counsel objected to the comment and argued that the prosecutor was continuing to denigrate and belittle the defense. (40:T2194-95) The court overruled the objection, and for good measure, counsel moved for a mistrial, which was also denied. (40:T2195)

on TV.

(40:T2194)

A prosecutor may not ridicule a defendant or his theory of defense. See Riley v. State, 560 So. 2d 279, 280 (Fla. 3d DCA 1990); Johns v. State, 832 So. 2d 959 (Fla. 2d DCA 2002) (holding that a prosecutor's argument denigrating the defense that the defendant was just in the wrong place at the wrong time was improper); Miller v. State, 712 So. 2d 451, 452-53 (Fla. 2d DCA 1998) (reversing because the prosecutor ridiculed the defendant's voluntary intoxication defense); Servis v. State, 855 So. 2d 1190, 1193 (Fla. 5th DCA 2003) (finding that the prosecutor disparaged the defense by commenting that the defense was "doing all they can to throw whatever they can against the wall and see what sticks"); D'Ambrosio v. State, 736 So. 2d 44 (Fla. 5th DCA 1999) (repeatedly referring to the defense as "innuendo, speculation, and a sea of confusion that defense counsel prays you get lost in" was an improper attack on the defense and defense counsel); Henry v. State, 743 So. 2d 52, 53 (Fla. 5th DCA 1999) (prosecutor's calling the defense the "most ridiculous defense" he had ever heard was improper); Izquierdo v. State, 724 So. 2d 124, 125 (Fla. 3d DCA 1998) (referring to the defense as a "pathetic fantasy" found to be improper); Melton v. State, 402 So. 2d 30 (Fla. 1st DCA 1981) (finding a comment that it was amusing how defense attorneys come up with arguments "just to try to thwart the jury using common sense" highly improper and unethical). In Franqui v. State, 59 So. 3d 82, 98 (Fla. 2011),

this Court found that the prosecutor's comment that "the world" of the defendant's mental mitigation expert was "through the looking glass at Disney World" and "make believe" was improper denigration of Franqui's mitigation.

"The impropriety of a prosecutor disparaging or denigrating the person of defense counsel is now well established." Barnes v. State, 743 So. 2d 1105, 1106-1107 (Fla. 4th DCA 1999) (condemning an argument referring to previous defense counsel's testimony as "the mercenary actions of . . . a hired gun") (citations omitted). The prosecutor in this case also denigrated the defense when he told the jury "there is not a lot you can argue," and in the same breath he commented on Appellant's constitutional right to a jury trial:[17]

> They throw it out there as if it's out there. So we looked at some financials of Andrea to suggest – you know, folks, when you got a guy on tape doing a murder and using his gun, I'm going to suggest there is not a lot you can argue. This is what America is about. Everybody has the right to a jury trial.

(40:T2210-11)

Immediately after the court overruled the objection, the prosecutor continued: "So in America everybody has a right to a jury trial regardless of the evidence against you. It could be on videotape. It could be in front of a hundred priests. You have a right to a jury trial." (40:T2210-11) Counsel objected and moved

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[17] Appellant's counsel objected that the prosecutor was "denigrating the defense" and moved for a mistrial. (40:T2211) The court overruled the objection and denied the motion for mistrial. Id.

for a mistrial, which the court overruled and denied. (40:T2211)

It is improper for the prosecution to comment on the defendant's choice to exercise his right to a jury trial in closing argument. See Bell v. State, 723 So. 2d 896, 897 (Fla. 2d DCA 1998) (finding that the court erred in overruling an objection after the prosecutor told the jury that the "only one reason we're here" was because Bell had a right to a jury trial); Johns, 832 So. 2d at 962 (finding that the prosecutor improperly disparaged the defendant for having exercised his right to trial); Lewis v. State, 879 So. 2d 101, 103 (Fla. 5th DCA 2004) ("Clearly it is improper to comment on a defendant's right to a jury trial."); Frazier v. State, 197 Md.App. 264, 284-289, 13 A.3d 83, 95-98 (Md. App. 2011) (finding it improper for prosecutor to ask the jury why the defendant wanted a jury trial in light of his confession, and arguing, "Guilty people have a right to a trial. That what we had today").

The court also erred in overruling Appellant's objection[18] after the prosecutor bolstered the State's case by arguing that "most homicides are committed by family members or friends," when no evidence was presented to support that argument:

> Now, what do you think goes through the police's head at that point? Before they know anything else, they would say – common sense would tell you, she's got an estranged husband. We better look into that. There you go. Maybe. Maybe that person did it. Or maybe he's a suspect. He's suspected. Because, as you all know, most homicides are committed by

[18] Counsel objected on the ground that the fact that most homicides are committed by family members or friends was not in evidence. (40:T2173) The court overruled the objection. (40:T2173)

family members or friends.

(40:T2172) Although attorneys are allowed wide latitude to argue to the jury during closing argument and to draw logical inferences from the evidence, counsel may not urge the jury to consider facts not in evidence. See Patrick v. State, 104 So. 3d 1046, 1065 (Fla. 2012) (citations omitted).

Appellant was denied a fair trial when the prosecutor made other statements that were sarcastic, that mocked Appellant's testimony and his defense, and misstated the law and the legal implications of the evidence. Many of these were made in rebuttal argument, and for that reason, Appellant's counsel did not get to respond. Although Appellant did not object to the following improper argument, if the errors destroy the essential fairness of a criminal trial, they cannot be countenanced regardless of the lack of objection. Dukes v. State, 356 So. 2d 873, 874 (Fla. 4th DCA 1978).

For example, in rebuttal, the prosecutor argued sarcastically: "Again, amazing that evidence is – that shows he did do it is actually evidence that he didn't do it." (40:T2199) And even though Mr. Evans testified that law enforcement officers frightened him when they rushed in to surround him, pointing assault rifles and other weapons at him, the prosecutor mocked the Appellant: "He got pulled over and wet his pants. The thing about that is you don't wet your pants unless you realize, Oh, my God, I've been busted for murder. He just left his house. The bathroom was right there. It's not like it's that far to go."

(40:T2200) In addition to the improper tone, there is no evidence to support a conclusion that the only reason a person would "wet [his] pants" would be if they were guilty as opposed to startled or frightened.

The prosecutor also inserted his personal opinion regarding the professionalism of Mr. Evans' first lawyer who was hired to assist him immediately after the arrest. Appellant's brother, Rodney Evans, testified that he did not tell the police he was with Appellant on the night of the murders because the lawyer told him not to speak to law enforcement. The prosecutor tried to prove that Appellant's brother was not telling the truth by arguing, "If the lawyer told him not to go to the police, he should be disbarred." (40:T2205) The assertion was not supported by the evidence, and it is not true.

The prosecutor also called Mr. Evans a "control freak" and argued that he was "a person who wants to run the show." (40:T2214) He then mocked Appellant by putting words into his mouth: "I'm this big moneymaker. I got this big job. I got planes, all this kind of stuff." (40:T2214-15) "Closing arguments must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." Serrano v. State, 64 So. 3d 93, 111 (Fla. 2011) (citations omitted).

"There is no reason, under any circumstances, at any time for a prosecuting attorney to be rude to a person on trial . . . ." Ryan v. State, 457 So. 2d 1084, 1089 (Fla. 4th DCA 1984)

(finding it improper for the prosecutor to characterize the defendant as a rich and manipulative woman in closing argument (citing Green v. State, 427 So. 2d 1036, 1038 (Fla. 3d DCA 1983))).

The prosecutor derided Appellant's expert and the defense theory that Beth incorrectly assumed the intruder was Mr. Evans, partly because she had been drinking while taking prescription medication:

> Now, ***this Ron Bell*** who testified about Beth being .074, ***come on***. She had two or three glasses of wine. She could have – know, she has not been presumed to be impaired to drive a car. ***And we are supposed to think she is so intoxicated or impaired that she misidentifies her estranged husband***?

(40:T2215) Although the prosecutor could question Appellant's theory, his sarcastic tone was inappropriate and degrading, and when he called Appellant's expert "this Ron Bell," the statement was meant to demean the forensic toxicologist.

The prosecutor also ridiculed Appellant's testimony and defense counsel by calling counsel's request for Appellant to repeat the words from the 911 recording, as "a screen test where they said, Okay, here is your line. Say get on the bed, Jerry. All right? Roll 'em. Get on the bed, Jerry. Thank you. Next." (40:T2216) The prosecutor remarked, "He wouldn't get the role," and called the testimony "surreal." Id. He also interjected his opinion by arguing, "At one point it almost sounded like he had a Jamaican accent." (40:T2216) The prosecutor ultimately drove his point home with more sarcasm: "Yeah, that's him saying I didn't

do this. You know, none of this evidence, none of this baby that we talked about, the baby in the bath water, none of this is me because I testified it's not." (40:T2216)

Apart from the sarcastic and belittling comments, the prosecution misstated the law and the legal implications of the evidence with regard to second-degree murder and manslaughter.

Appellant's counsel, in renewing his motion for judgment of acquittal after the defense case, argued that this act "was absolutely a classic heat-of-passion offense." (39:T2120-2024) Counsel argued that there was a "sudden emotional type provocation," and pointed out that Mr. and Mrs. Evans were still married and that she was engaged in something that would have "enraged" someone in that situation. (39:T2021) Counsel also argued that the fact that the shooting occurred in the victim's house was not evidence of premeditation. (39:T2023)

In a preemptive response to an anticipated "heat of passion" argument, the prosecutor misstated the law and misstated the legal effect of the evidence regarding "heat of passion." First, the prosecutor minimized and denigrated the importance of the instructions on the lesser-included offenses by saying, "Well, just like the Court is required to read to you the instructions on what is excusable and justifiable homicide, the Court is also required by law to provide to you what are known in the law as lesser included offenses. Okay?" (40:T2078) The prosecutor then told the jury with regard to the lesser offenses upon which they would be instructed:

What varies greatly in this case is a second degree murder is not one of premeditation. It is one that the law instructs you that it is an act done by an – imminently dangerous to another or demonstrating a depraved mind without regard for human life. And it's often referred to in society as one of heat of passion and one of a – I guess, really, the heat of passion is how it's described out in society.

I will suggest there is one major fact in this case that allows you to say this is not second degree murder. This is not heat of passion because of the main fact of where this occurs. It occurs in the bedroom of Elizabeth Evans. Okay?

I'm going to suggest to you some facts that would make it a second degree murder but are not the facts of this case.

Had this been a situation where they were not engaged in divorce proceedings and Mr. Evans had not initially filed for divorce proceedings from Ms. Evans, had he not had an affair with her, had they not been living in separate homes, had they all been living at the Hermosita address and one day from one of his many business trips he comes home and he walks into his master bedroom and finds Ms. Evans – Elizabeth Evans in bed with Mr. Taylor in his home, and the home that they shared, that the one of passion and the one of anger could be – it could be so great as to account for a situation that would be heat of passion.

But those are not the facts of this case. The facts of this case are completely different from that. Again, I hate to be going over the same facts over and over again, but they apply in so many different ways.

The Defendant knows from Pam Ashby that she is out on a date. Not that she is going out on a date later. He says she is out on a date right now at 6:30. He has knowledge of where they are at and what they are doing.

. . . Again, it's just where it occurs in relation to Mr. Evans. It's in a location where he has no business being.

You can't bring – you can't subject yourself to a situation. You can't run into the house with a gun knowing they are out on a date, and divorce proceedings are pending, and somehow claim that I am so outraged by what I saw, I pulled out a gun and I started firing at people. Because I was so blinded by my passion and my anger, I just pulled out a gun and in a depraved mind started shooting it at these individuals. Because that's just not

the evidence in this case.

(40:R2078-80)

As argued in Issue I above, a jury can find that a defendant acted "not from premeditation but from a depraved mind regardless of human life or in the heat of passion, which would make the killing second-degree murder or manslaughter." Johnson v. State, 969 So. 2d 938, 952 (Fla. 2007). Heat of passion "can be used as a partial defense, to negate the element of premeditation in first degree murder or the element of depravity in second degree murder." Villella, 833 So. 2d at 195. "Heat of passion" negating the depraved mind element of second degree murder is a valid defense in Florida. See Palmore, 838 So. 2d at 1224 (stating that heat of passion would reduce second degree murder to manslaughter if accepted by the jury). In this case the prosecutor erroneously described "heat of passion" as a characteristic of only second-degree murder without telling the jury that heat-of-passion killings can also be manslaughter. (40:T2078)

The prosecutor misstated that law because, under the law, the jury could have found either second-degree depraved mind murder or "heat of passion" manslaughter even though, at the time of the killing, Mrs. Evans' divorce petition was pending and even though the killing did not take place in the marital home.

In Febre, 30 So. 2d 367, the Court reduced the defendant's conviction to manslaughter, finding that Febre acted in the heat of passion. In that case, the defendant and his wife had been separated for a month. The defendant had filed for divorce and the

proceedings were almost final, and even though he was dating another woman, he was trying for a reconciliation with his wife. The defendant used his key to enter the apartment that they used to share, shot, and struggled with the victim, who died from a skull fracture.

In Auchmuty v. State, 594 So. 2d 859 (Fla. 4th DCA 1992), the defendant had been estranged from his wife for nearly a year and they were living apart. He entered his wife's apartment after he saw another man's car parked in front of it and shot the man to death after finding him in bed with his wife. The appellate court reversed the conviction for first-degree murder, holding that evidence suggesting that the defendant acted in the heat of passion should have been admitted. In Billeaud v. State, 578 So. 2d 343 (Fla. 1st DCA 1991), the appellate court held that the trial judge should have allowed evidence of the wife's prior extra-marital affairs because the evidence was relevant to prove that the murder was a crime of passion. In Billeaud, the defendant was convicted of first-degree murder for stabbing his wife's paramour to death after the wife left the defendant and moved into the victim's mobile home. Clearly, the fact that the offense took place after the separation and that it occurred in the victim's mobile home did not preclude a defense of heat of passion.

In fact, the defense of "heat of passion" is not limited to domestic situations. See Johnson, 969 So. 2d at 951-952 (noting in a case in which the defendant strangled a woman he had just

met in a nightclub, that the jury could have found that the murder occurred in the heat of passion); Forehand v. State, 126 Fla. 464, 171 So. 241 (Fla. 1936) (reversing a conviction for first-degree premeditated murder arising out of a bar fight because the evidence did not exclude the possibility that the defendant acted with adequate provocation establishing heat of passion).

Counsel may not contravene the law and the jury instructions in arguing to the jury. Cave v. State, 476 So. 2d 180, 186 (Fla. 1985). A prosecutor may not misstate the law or the legal effect of the evidence. See Dicks v. State, 75 So. 3d 857 (Fla. 1st DCA 2011) (finding prosecutor's assertions that the defendant could be guilty of "entering" the dwelling if he entered the backyard were error, if not fundamental error in light of the fact that defendant was found underneath the structure stealing wire); Profitt v. State, 978 So. 2d 228 (Fla. 4th DCA 2008) (reversing in part because the prosecutor told the jury that under Florida law an out-of-court identification is considered to be stronger than in-court identification).

In Fullmer v. State, 790 So. 2d 480 (Fla. 5th DCA 2001), the court reversed a conviction for lewd and lascivious act in the presence of a child after the prosecutor told the jury that it made no difference under the law if the defendant displayed a rubber penis and not his penis to the children. In Tuff v. State, 509 So. 2d 953 (Fla. 4th DCA 1987), the court held that, along with other improper arguments, the prosecutor's argument

suggesting that the defendant could be found guilty of manslaughter by culpable negligence under a standard of ordinary negligence instead of culpable negligence required reversal in spite of the lack of an objection.

In this case, the prosecutor misled the jury into thinking that, legally, the facts in this case precluded a verdict of second-degree murder or manslaughter. This is particularly egregious in that the State's own theory was that Mr. Evans was trying to reconcile with his wife and that he became enraged when he saw her in the bedroom with another man. The victims were shot while they were nude and while they were engaged in a sexual encounter, and the evidence was consistent with a theory that Taylor rushed the perpetrator, which prompted the shooting.

There was unrebutted evidence that Mr. Evans and his wife spent the morning together, meeting with a realtor, doing maintenance in her condominium, and washing their cars. The realtor testified that the couple seemed to be normal and that they sat together on the same side of the booth. At the time of the shooting, it was Mrs. Evans' petition that was pending. Mr. Evans still wore his wedding ring, and Pam Ashby testified that Mr. Evans told her at Halloween that he thought they could repair the marriage. Molly Rhoades testified that after Mr. Evans dismissed the divorce petition in July, he courted Elizabeth -- going to her church and buying her a diamond necklace for her birthday.

Given this evidence, the prosecution was concerned that the

jury would return a verdict for one of the lesser offenses. The prosecutor could argue to the jury that the evidence supported the greater charge, but he could not argue that the jury could not render a verdict of second-degree murder or manslaughter unless the murders took place in Mr. Evans' home and unless divorce proceedings were not pending.

An appellate court reviews a trial court's ruling on the propriety of comments made during closing argument for abuse of discretion. See Braddy, 111 So. 3d at 837. (citing Salazar v. State, 991 So. 2d 364, 377 (Fla. 2008)). However, the Court considers improper argument for which there is no objection in connection with preserved error. In Ruiz v. State, 743 So. 2d 1, 7 (Fla. 1999), the Court explained:

> The State argues that because defense counsel failed to object to several of the prosecutor's guilt and penalty phase statements he is barred from raising this issue on appeal. We disagree. When the properly preserved comments are combined with additional acts of prosecutorial overreaching set forth below, we find that the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted.

See also Braddy, 111 So. 3d at 837 ("We do not review each of the allegedly improper comments in isolation; instead, we examine the entire closing argument with specific attention to the objected-to and the unobjected-to arguments in order to determine whether the cumulative effect of any impropriety deprived Braddy of a fair trial."). See also Card v. State, 803 So. 2d 613, 622 (Fla. 2001) (same).

The role of the appellate courts is to ensure that criminal trials are free of harmful error, the presence of which would require reversal, and the harmless error rule is concerned with the due process right to a fair trial and preserves the accused's constitutional right to a fair trial by requiring the state to show beyond a reasonable doubt that the specific errors did not contribute to the verdict. Johnson, 53 So. 3d at 1007. Because the State's arguments denied Appellant his right to a fair trial, reversal is require.

ISSUE VI

WHETHER THE CUMULATIVE ERROR IN THE GUILT PHASE DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT AND UNDER ARTICLE I, SECTION 9, OF THE FLORIDA CONSTITUTION.

Apart from the fact that the evidence did not support the verdicts of first-degree murder, multiple errors cited above denied Appellant his constitutional right to a fair trial. Where multiple errors are found, even if deemed harmless individually, the cumulative effect of such errors may deny to defendant the fair and impartial trial that is the inalienable right of all litigants. Hurst v. State, 18 So. 3d 975, 1015 (Fla. 2009) (citing Brooks v. State, 918 So. 2d 181, 202 (Fla. 2005)).

In this case, the prosecution pushed the jury into a verdict of premeditated first-degree murder by misstating the law on the lesser-included offenses and by insinuating that Mr. Evans hired a private investigator to investigate Gerald Taylor. When the numerous other instances of improper closing argument are considered in combination with these errors and the error in allowing Detective Judy to identify Appellant’s voice on the 911 recording, it is clear that Appellant was denied a fair trial.

In DiGuilio, 491 So.2d at 1139, the Court set out the test to be applied in determining whether an error is harmful:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by

> simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

See also Williams v. State, 863 So. 2d 1189, 1189-90 (Fla. 2003) (reaffirming the harmless error test in DiGuilio). Because it cannot be said that the errors cited herein did not affect the verdict, reversal for a new trial is required.

ISSUE VII

WHETHER THE TRIAL COURT IMPROPERLY MINIMIZED THE EVIDENCE WHEN IT WEIGHED APPELLANT'S MITIGATION.

In the penalty phase, the defense presented Mr. Evans' mother and brothers to testify that he is loved by his family, that he was a good father and provider, and that he took care of his family. Under non-statutory mitigation titled "The defendant has two children with whom he had a significant relationship at the time of the homicides," the court wrote:

> In light of the Defendant's murder convictions, the Court is skeptical of the Defendant's capacity to provide Alexia and Cameron with 'positive advice.' Additionally, the Court observes that Molly Rhoades, Elizabeth Evans' daughter from a previous relationship, testified during trial, identifying her mother's voice in the inculpatory 911 call. Rhoades' testimony leads to the obvious point that Elizabeth Evans will not be around for her daughter ever again. . . The Defendant's crimes forever deprived Elizabeth Evans' family of her presence. The Court is hesitant to consider the Defendant's ability to continue a relationship with his own children when no such thought was afforded the victims' families.

(10:R1807) The judge went on to note that Evans' son had a loving relationship with the victim, and she was going to maintain that relationship after the divorce. The court wrote: "It is disingenuous of the Defendant to now invoke his relationship with these children when it is apparent that no such forethought or consideration was used on their behalf preceding the murders." (10:R1808) The court then found that the mitigating factor had been proven, but assigned it "little weight." (10:R1808)

The fact that Molly Rhoades and the victims’ families lost their loved ones does not mean that Appellant failed to prove that he was a good father before the homicides or that his children still loved him, nor does Rhoades’ loss logically diminish those facts. Pursuant to the trial judge’s reasoning, any time a defendant kills a victim who has children, the fact that the defendant was a good father with a good relationship with his children could not be used as mitigation. Also, simply because the defendant committed the offense, he could not cite his relationship with his own children in mitigation because the criminal behavior caused collateral harm to them.

In Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990), the trial court found “possible” non-statutory mitigation because Nibert “had an abused childhood.” However, the court discounted the mitigation because at the time of the murder the Defendant was 27 years old and had not lived with his mother since he was 18. This Court reversed the sentence, finding that the trial judge “failed to properly weigh a substantial number of statutory and nonstatutory mitigating circumstances,” writing:

> We find that analysis inapposite. The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary.

Id. at 1062. As in Nibert, an acceptance of the trial judge’s

analysis would mean that a defendant’s relationship with his family could never be used if the victim had a family, or if he or she had children who might be assumed to be adversely affected by the crime.

In addition, the fact that Molly Rhoades, Cameron Evans, and the victims’ families lost their loved ones is “victim impact” evidence that was not presented to the jury or to the court. Although properly presented victim impact evidence can be considered, it is doubtful that it can be used to rebut a mitigating factor. See, e.g., Snelgrove v. State, 107 So. 2d 242, 257 (Fla. 2012) (approving a jury instruction stating that victim impact evidence is not to be considered in establishing either an aggravating circumstance or rebuttal of a mitigating circumstance).

The judge did a similar thing in weighing the mitigating factor that Appellant "shares love and support with his family." The judge wrote that Mr. Evans "failed to consider the aftermath and the heartache that would befall his family as a consequence [of the murders]." The court also wrote that the fact that his loving relationship with his family "did not deter his commission of the offenses, the instant invocation and reliance on such relationship as a mitigating factor is diminished." (10:R1808) The court wrote, “Consequently, while the Court finds that this mitigating factor has been proven, due to the unique circumstances of this case the Court assigns it little weight.” (10:R1808)

The fact that criminal behavior affects the family of the accused is not "unique" to this case; it is a factor that is shared in almost every case in which the defendant has a family. Also, the fact that Appellant's love for his family did not deter his actions has nothing to do with whether or not his family loves and supports him now.

In Hurst v. State, 819 So. 2d 689 (Fla. 2002), the defendant argued that the court improperly minimized the weight of mitigation associated with his religious activities and community service by assigning them little weight. However, in Hurst, the trial judge did not use inappropriate considerations in the weighing process. Instead, the court merely found that the mitigating factors "had not been established to an appreciable degree" and accorded them little weight. See id. at 699-700.

Although this Court reviews a trial court's decision regarding the relative weight to be given mitigating circumstances for an abuse of discretion, see Kearse v. State, 770 So. 2d 1119, 1133 (Fla. 2000), in this case the court abused that discretion, and a new sentencing is required.

ISSUE VIII

WHETHER THE AGGRAVATOR THAT THE MURDERS WERE COMMITTED DURING THE PERPETRATION OF A BURGLARY HAS TO BE STRUCK FOR LACK OF EVIDENCE AND WHETHER THE DEATH SENTENCE IS DISPROPORTIONATE.

As argued in Issue II above, the evidence failed to prove that Appellant committed the homicides during the perpetration of a burglary. Without that aggravating circumstance, this case becomes a single-aggravator case. "As a general rule, 'death is not indicated in a single-aggravator case where there is substantial mitigation.'" Almeida, 748 So. 2d at 933 (citing Jones v. State, 705 So. 2d 1364 (Fla. 1998)).

"Our law reserves the death penalty only for the most aggravated and least mitigated murders." Almeida, 748 So. 2d at 933 (citing Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993)). In determining whether death is a proportionate penalty, this Court has explained:

> "[W]e make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." We consider the totality of the circumstances of the case and compare the case to other capital cases. This entails "a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." In other words, proportionality review "is not a comparison between the number of aggravating and mitigating circumstances."

Williams v. State, 37 So. 3d 187, 205 (Fla. 2010) (quoting Offord v. State, 959 So. 2d 187, 191 (Fla. 2007)).

The remaining aggravator is the prior violent felony for the double homicide. Although this case involved a double homicide, it was an isolated incident with emotional implications. Appellant was 41 years old at the time and he had no prior offenses unrelated to this event. He was a successful executive who was trying to win back his wife. He "snapped" when he found her in a sexual encounter with another man. See Wright v. State, 688 So. 2d 298 (Fla. 1996) (finding death sentence disproportionate when the defendant's prior felony was related to the ongoing struggle between him and his wife.)

This is not a case like Rodgers v. State, 948 So. 2d 655 (Fla. 2006), in which the Court affirmed a death sentence in a single-aggravator case where the defendant killed his wife. In Rodgers, the court noted that the defendant's previous violent felony was a conviction for manslaughter of his live-in girlfriend years before. The Court found the aggravator was particularly "weighty" because it was of the same type as the one for which he was being sentenced – the murder of a woman with whom he lived.

In this case, because there was a single aggravator, Appellant's death penalty is not proportionate, and the sentence should be remanded for imposition of a life sentence.

CONCLUSION

In light of the foregoing arguments and authorities, Appellant respectfully requests that he be granted a new trial on the lesser-included offenses of manslaughter. In the alternative, Appellant requests that he be given a new trial on charges of second-degree murder.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Attorney General's Office at capappTPA@myfloridalegal.com, and U.S. mailed to the Appellant, Patrick Albert Evans, Inmate No. R74761, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL, 32026, on this 21st day of October, 2013.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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