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IN THE SUPREME COURT OF FLORIDA

PATRICK ALBERT EVANS, :

Appellant, :

vs. : Case No. SC12-2160

STATE OF FLORIDA, :

Appellee. :

:

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

REPLY BRIEF OF APPELLANT

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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.

In its brief, Appellee conflates the issue of circumstantial evidence of identity with circumstantial evidence of premeditated intent. (See Appellee's Br. at 31-32.) Appellee argues that the 911 tape is direct evidence of identity of the perpetrator even though Appellant's issue has nothing to do with the issue of identity. The issue, as presented in Appellant's brief, concerns only the issue of the sufficiency of the evidence of premeditated intent. There is absolutely no direct evidence of the perpetrator's intent or state of mind in this case, and this Court should not be taken in by the State's straw-man argument.

"Intent, a state of mind, is rarely susceptible of direct proof. It is almost always shown solely by circumstantial evidence." Green v. State, 90 So. 3d 835 (Fla. 2d DCA 2012); State v. Waters, 436 So. 2d 66, 71 (Fla. 1983) ("The element of intent, being a state of mind, often can only be proved by circumstantial evidence."). When, as here, 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 (Fla. 3d DCA 1983) (citations omitted).

Appellee also argues that the 911 tape is direct evidence relevant to this issue. That is not correct. In Kocaker v. State,

119 So. 2d 1214, 1224-25 (Fla. 2013), cited in Appellee's brief, this Court explained: "Direct evidence is evidence which requires only the inference that what the witness said is true to prove a material fact. . . . Circumstantial evidence is evidence which involves an additional inference to prove the material fact." Direct evidence of intent would be an unequivocal declaration by the perpetrator stating his intent or motive to kill, or a confession mentioning the perpetrator's state of mind.[1] In this case, the state of mind (intent) of the perpetrator has to be inferred from the statements made in the tape because there is nothing on the 911 tape that constitutes direct evidence of intent.

Appellee cites Floyd v. State, 850 So. 2d 383 (Fla. 2002), and Pagan, 830 So. 2d 792, arguing that this case was not a circumstantial evidence case. Both of these cases had direct evidence of premeditated intent. Before the murder of his wife'e mother, the defendant in Floyd threatened to kill someone his wife loved in retaliation for her behavior. In Pagan, the defendant confessed his intent to kill the occupants of the house during the

[1] See, e.g., Williams v. State, 70 So. 3d 726 (Fla. 4th DCA 2011) (concluding that the defendant's statement to a former girlfriend that he would retaliate and kill his wife if the abuse continued, and the defendant's confession that he prayed before stabbing his wife, were direct evidence of premeditation); Pagan v. State, 830 So. 2d 792, 803-804 (Fla. 2002) (finding that the defendant's confession and his statements to friends evincing intent and motive were direct evidence of premeditated intent); LaMarca v. State, 785 So. 2d 1209 (Fla. 2001) (finding that the defendant's statement, five months before the murder, that he intended to kill the victim constituted direct evidence of his "fully formed conscious purpose to kill").

home invasion robbery. There is no such evidence in this case.

Appellee argues that that the evidence in this case does not establish that the shooting was in the "heat of passion" because Mr. Evans knew that his wife was "with a date." (Appellee's Br. at 34) Knowing that his wife was with some unknown person she hardly knew, and seeing them nude and engaging in a sexual encounter, are two very different things, both emotionally and legally. In Febre v. State, 158, Fla. 853, 30 So. 2d 367, 369 (Fla. 1947), as in this case, "[i]t [did] not appear that the defendant knew of any improper relationship between the deceased and the wife of the defendant, until the defendant opened the door, and saw this nude man." In this case, there was no evidence that the victims had that kind of relationship prior to that night, and there was no evidence Mr. Evans knew that they did.

Appellee argues that "heat of passion" would allow any "unhappy, disenchanted, or scorned partner" an excuse to commit murder. (Appellee's Br. at 35) That statement is hyperbole because the defense of "heat of passion" is a partial defense that negates the element of premeditation in first-degree murder or the element of depravity in second-degree murder. See Villella v. State, 833 So. 2d 192, 195 (Fla. 5th DCA 2002). It does not excuse the crime.

Appellee claims that Appellant did not preserve the argument that the shooting of Mrs. Evans was reflective and without forethought. Appellant's JOA argument refutes that claim because, in his initial motion for judgment of acquittal, counsel argued

that the fact that Mrs. Evans screamed prompted the shootings:

> [T]he audio indicates – that 911 tape indicated that these deaths were precipitated by a single explosive act of violence when Mrs. Evans begins to scream, and it was within just second of the shot that impacted Mr. Taylor that Mrs. Evans was shot as well. So there's a very, very, short period of time, probably less than just a couple of seconds.

(37:T1639) In his final motion, counsel argued: "The audio, the 911 tape, again, indicates a single explosive act of violence resulting after Ms. Evans begins to scream." (39:T2022) Appellee also claims that that the theory that Mr. Taylor may have gone for the gun was not presented below. However, during closing argument, the prosecutor conceded that the evidence supported a theory that Mr. Taylor made a move toward the perpetrator after Mrs. Evans yelled, saying, "And about that same moment is when either Jerry moves to Rick or Rick moves to Jerry, but he kills Jerry within 2 feet." (40:T2189)

Appellee also argues that the victims did not put up any resistance. (Appellee's Br. at 34) Whether or not they did is unknown. Although the evidence is consistent with that assumption, it is also consistent with an assumption that they were resisting, because obviously they were not complying with the request to sit on the bed where the gunman could make sure they were not reaching for a weapon. Because the audiotape is not a videotape, and because there were no eyewitnesses, there is no evidence regarding what Mr. Taylor did before he was shot.[2]

[2] On page 35, Appellee implies that Mr. Taylor was shot before Mrs. Evans started screaming. This is not correct. The evidence showed that Mrs. Evans screamed before Mr. Taylor was shot. Also,

Appellee argues that this case is similar to Floyd, 850 So. 2d 383; however, the facts in Floyd are very different from the facts in this case. Floyd killed his mother-in-law after telling his wife a couple of nights before the murder that he was going to kill someone she loved as punishment for her drinking. Hours before the murder, Floyd got into a heated argument with his wife that ended with her seeking shelter at the Sheriff's Office after Floyd repeatedly rammed her car. When the deputy tried to take Floyd into custody, Floyd fled. About four hours later, Floyd arrived at the house of his mother-in-law, where he had dropped his wife's children off earlier in the day.

In Floyd, the evidence showed Floyd fired three shots as his mother-in-law fled the house. One of them struck his mother-in-law in the head. A neighbor heard Floyd arguing with the victim in her home about 25 minutes before the shooting and the neighbor heard Floyd say, "Why did she have to involve the G -- D-- crackers?" When the police arrived, they discovered that the door had been kicked in. Floyd also confessed to a friend that he shot his mother-in-law because she threatened to call the police on him. Therefore, many factors, other than the fact that Floyd brought a gun to the scene, demonstrated premeditation.

Bringing a gun to the scene is not inconsistent with a theory that the perpetrator intended to confront or scare the victims, and the use of a firearm is insufficient in itself to prove premeditation. For example, in Mungin v. State, 689 So. 2d 1026

(..continued)
the audiotape cannot reveal when Mrs. Evans moved onto the patio.

(Fla. 1995), this Court found that the facts were not inconsistent "with a killing that occurred on the spur of the moment" even though the defendant procured the gun in advance and shot the store clerk once in the head. The Court noted that there were no statements indicating an intent to kill and there were no eyewitnesses to the events preceding the shooting. Id. at 1029. In Cummings v. State, 715 So. 2d 944 (Fla. 1998), the Court reduced a conviction to second-degree murder even though the defendants had a motive, armed themselves, and went to the residence and shot at it numerous times, 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. In Febre, 30 So. 2d 367, the defendant had a gun in his possession when he arrived at his wife's apartment and used his key to enter it, and that fact was not inconsistent with his theory that the murder was committed in the "heat of passion." In Kormondy v. State, 703 So. 2d 454 (Fla. 1997), the fact that the defendant brought a gun to the victim's house was not inconsistent with a theory that the shooting was accidental. See also Graham v. State, 793 So. 2d 15 (Fla. 2d DCA 2001) (holding the evidence was insufficient to prove premeditation even though Graham must have taken action to obtain a firearm).

Appellee cites other distinguishable cases on heightened premeditation in support of its position.[3] In Buzia v. State, 926 So. 2d 1203 (Fla. 2006), the defendant went to the victims' home

[3] In this case the State did not ask for the "CCP" aggravator.

to confront them and rob them. He waited at the home for 20 minutes for someone to arrive. Mrs. Kersch allowed Buzia to wait on the porch, but she eventually let him inside where he attacked her without warning and robbed her. Buzia confessed to police that when Mr. Kersch arrived home, he considered telling him what he had done, but then made the conscious decision to attack him. When Mr. Kersch tried to get up, Buzia punched him again to incapacitate him. Buzia took money from Mr. Kersch and then decided to go the garage and get an ax. He told police he abandoned that ax and got another when he heard Mrs. Kersch moaning in the bedroom. He then hit Mr. Kersch with the ax and went into the bedroom and hit Mrs. Kersch with the ax. Clearly, Buzia had already robbed the couple before he took his time to get one ax and then another one from the garage.

In Gregory v. State, 118 So. 2d 770, 775 (Fla. 2013), cited by Appellee, the defendant and his ex-girlfriend were never married. Gregory made prior threats to shoot his ex-girlfriend by "blow[ing] her head off," and he knew she was in a relationship with a specific man. On the night of the shooting, Gregory entered the victim's grandparents' house, located a shotgun in the closet, and loaded it. The evidence showed that the shotgun was difficult to load, and the defendant had to sneak past the grandparents' bedroom to get to the victims' room. The victims were sound asleep when the shots were fired. In affirming the finding of the CCP aggravator, this Court wrote:

> It has been clearly established, without refutation, that he placed the loaded weapon at

> point blank range and aimed at the heads of the respective victims where he killed each of them in execution style with devastating shots to the heads of both victims **in an act that was totally consistent with his earlier announced plan.**

Gregory at 783-84 (emphasis added). In this case, there was no earlier announced plan.

This case is also unlike Pham v. State, 70 So. 3d 485 (Fla. 2011), which was cited by Appellee. In Pham, the defendant went to his wife's apartment, tied up his wife's daughter so she could not escape, and waited for an hour to ambush his wife when she entered the room. Pham brought two knives with him and hid them and the phone. In Wheeler v. State, 4 So. 3d 599 (Fla. 2009), the defendant engaged in several separate prolonged gun battles with officers who were investigating an allegation of domestic violence. Wheeler continued his assault, which included "pumping" his shotgun, even after he fled into the woods. At one point he yelled, "I'm going to fucking kill you, man." See id. at 605-606.

Appellee argues that the fact that, under the Rules of Civil Procedure, Mr. Evans' answer to the divorce petition would have been due on December 23rd had something to do with the shootings. There is no evidence to support an inference that the fact that an answer to a divorce petition, which would be drafted by a lawyer, had anything to do with Appellee's state of mind. Appellee also argues that Appellant had many chances to leave the victims unharmed. First, this is not a case where the State sought the CCP aggravator. Therefore, the CCP cases cited by Appellee do not

apply. Also, this is not a case in which the defendant came to steal and ended up killing the homeowner, or killed the victim after the robbery was completed, as was the case in Alston v. State, 723 So. 2d 148 (Fla. 1998), which was cited by Appellee. See id. at 162 (noting that Alston "had ample opportunity to release Coon after the robbery"). In Buzia v. State, 926 So. 2d 1203, 1214 (Fla. 2006), this Court noted that "Buzia had the opportunity to leave the residence with the Kersches' money and valuables without committing further harm."

Nevertheless, as pointed out in the Initial Brief, the encounter on the 911 tape took place in about 29 seconds. Because there is no evidence that Appellant entered the residence with the intent to kill,[4] or that he ever had the fully-formed premeditated intent to kill, there is no evidence showing that Appellant had the prolonged opportunity (as did the defendant in Gregory) to leave the victims alive.

Without explaining how the facts in this case are not "lacking and incomplete," Appellee claims that they are not. In this case, there were no prior threats, there is no confession, and there were no eyewitnesses. There is no evidence of prior animosity. In fact, the evidence showed that Mr. and Mrs. Evans were getting along fine that day. As the prosecutor conceded to

[4] For example, if Mr. Graham saw the perpetrator, the perpetrator made absolutely no attempt to hide the fact he was there. Someone planning a murder would not approach a neighbor, pet his dog, and ask the dog's name. However, someone who was merely "snooping" without an intent to do anything for which the police would be looking for a suspect, might just do that so that he could continue snooping.

the jury, the facts do not show whether the gun was already in Appellant's truck, and they do not show if the perpetrator had the gun with him before he entered the house. There is no evidence that the door to the residence was locked, and there is no evidence regarding what occurred before the 911 call. In the 911 call, the perpetrator does not say anything regarding his state of mind. Therefore, for these reasons, and for the reasons laid out in Appellant's Initial Brief, the State failed to prove premeditated intent in this case.

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.

Appellee argues that the issue is not preserved because a consent defense was not presented to the jury. However, the issue is preserved because, as Appellee acknowledges, it was presented to the court as part of the motion for judgment of acquittal. Also, it is not uncommon for a defendant to present an alibi defense and, at the same time, claim that the State failed to prove the elements of the charged offense.[5]

[5] See, e.g., Olsen v. State, 751 So. 2d 108 (Fla. 2000) (noting that the defendant claimed that he was not the killer and contested the burglary charge on the issue of consent to be in the residence); Balzourt v. State, 75 So. 3d 830 (Fla. 2d DCA 2011) (noting that the defendant argued both that the evidence did not prove he committed the crime and that the evidence did not support premeditation).

Appellee does not confront or acknowledge the State's evidence showing an on-going, never-revoked and never-limited consent to enter, but instead argues that Appellant's alibi defense somehow relieved the State of its burden to disprove the affirmative defense of consent established by its own witnesses. Evidence establishing the affirmative defense of consent or license to enter was presented by the State in its case in chief because Molly Rhoades testified that Mr. Evans visited the condo often and that he had the habit of walking into the house unannounced. She also testified that they never told him that practice was not acceptable, meaning that they never expressly limited or withdrew that consent. (34:T1192) The evidence showed that the couple was still married, and the State's case established that there was no forced entry. There was absolutely no evidence the door to the condo was locked.

Evidence presented by the State can establish a defendant's affirmative defense of consensual entry. See Delgado v. State, 776 So. 2d 233, 240 (Fla. 2000), *superseded by statute on other grounds* (citing B.D.K. v. State, 743 So. 2d 1155, 1158 (Fla. 2d DCA 1999)). In B.D.K., the juvenile presented no evidence whatsoever. Nevertheless, the appellate court found that "the evidence presented by the State established B.D.K.'s affirmative defense to the escape charge based upon the unlawfulness of the arrest." See id. at 1158. In Collett v. State, 676 So. 2d 1046 (Fla. 1st DCA 1996), the trial court erred in denying the defendant's motion for judgment of acquittal in a burglary case

because the State's evidence established the affirmative defense that the premises in question were open to the public. See also Moncrieffe v. State, 55 So. 3d 736 (Fla. 4th DCA 2011) ("In this case, the evidence presented by the state, which demonstrated the unlawfulness of the defendant's arrest and his ensuing confinement and custody by Lauderhill police, all of which arose out of the same facts and circumstances, established the defendant's affirmative defense to the escape charge.").

In K.L.T. v. State, 561 So. 2d 338 (Fla. 5th DCA 1990), the appellate court held that the trial court should have granted the child's motion for dismissal because the State's own witnesses established that the child acted in self-defense, which was an affirmative defense to the charge of manslaughter. See also Brown v. State, 454 So. 2d 596, 598 (Fla. 5th DCA 1984) (stating, "where the State's evidence clearly shows that a homicide was committed in self-defense, courts of this State have not hesitated to reverse jury convictions and to discharge the wrongfully convicted defendant").

Appellee argues that Appellant did not meet his burden of production of evidence that he had consent to enter the condo; however, the court ruled, and the State agreed, that Appellant met his burden because the court read the third element of the jury instruction for burglary, requiring the State to prove a lack of license or invitation to enter. That element is read only if the defendant has met his burden of production. See Fla. Std. Jury

Inst. 13.1.[6] The State did not object to this instruction. See Petrucelli v. State, 855 So. 2d 150, 154 (Fla. 2d DCA 2003) ("When consent is placed in issue, the State has the burden to establish that consent was not given or that the person who gave consent did not have the legal ability to give consent."). Given the lack of objection, Appellee is precluded from arguing that Appellant failed to meet his burden.

In arguing that "Defendant's murderous acts negate any consent defense," Appellee conflates sections 810.02(1)(b)1 and 810.02(1)(b)2.c, arguing that the forcible felony itself negated the consent to enter. If the State was proceeding on a theory that Appellant had permission to enter the condo, the State should have asked the court for an instruction charging the elements of section 810.02(1)(b)2.c, which states: "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." See also Fla. Std. Jury Instr. Crim., 13.1 Burglary (charge applicable to an allegation of "remaining in").[7]

The statute and jury instruction on "remaining in" ((1)(b)2.c) assume there was consent to enter. If the Legislature meant that committing a forcible felony inside a dwelling or

[6] The jury instruction reads: "Give element 3 only if defendant meets his or her burden of production that he or she had an invitation or license to enter. . . ."

[7] The Indictment did not charge burglary; therefore, the State was not limited in its request for a jury instruction for burglary as the underlying felony for first-degree murder.

structure is a burglary "regardless" of whether or not there was consent to enter, the Legislature could have said so, but it chose not to do so when it overruled Delgado. The Legislature provided only two alternatives, one where the defendant has no consent, and one where he does. The fact that the statute requires that the prosecution choose between these theories, and that it does not cover "implied non-consent" or "implied revocation of consent," cannot be held against Appellant. Furthermore, criminal statutes are to be strictly construed. See § 775.012, Fla. Stat. ("The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.").

Because the State never asked for the jury instruction applicable to section 810.02(1)(b)2.c, it cannot now argue that the jury instruction actually given (and the law on which it is based) should be construed in a manner consistent with a theory under which they chose not to proceed. Because the State did not ask for this charge, and because that charge was not given, the State is stuck with an interpretation of the statute that precludes a theory of implied non-consent or implied revocation of consent.

Appellee cites section 810.015(2) for the proposition that the Legislature intended that the burglary statute be construed in conformity with cases holding that consent is withdrawn by a criminal act. (See Appellee's Br. at 45.) However, section

810.015(2) has absolutely no application to the instant case. That section states that it is the intent of the Legislature that section 810.02(1)(a) be construed in conformity with pre-Delgado cases such as Raleigh v. State, 703 So. 2d 437 (Fla. 1997). Section 810.02(1)(a) pertains only to offenses "committed on or before July 1, 2001." This offense occurred in 2008, and falls under section 810.02(1)(b). Appellee also cites Bradley v. State, 33 So. 2d 664, 681 & n.17 (Fla. 2010), a case in which the offense occurred in 1995, which was before the amendment to the burglary statute in 2001. Therefore, the pre-Delgado pre-amendment cases in footnote 17 do not apply to this case. Furthermore, even though Bradley's case may have been within the Delgado window, Bradley's "consent" could not be obtained by a co-conspirator, and the victim expressly told the perpetrators to leave before he was killed. Therefore, there was an express revocation, unlike in this case. See Bradly, 33 So. 2d at 682-83.

Finally, this was not a case in which a stranger or "servant" had a limited consent to enter an apartment (as would a maintenance man) for the purpose of performing services. For that reason, State v. Sawko, 624 So. 2d 751 (Fla. 5th DCA 1993), (cited by Appellee) is distinguishable. Appellant and Mrs. Evans were still married, and there was no evidence that Appellant's permission to be in the condo was ever limited or revoked. Nothing in the record suggests that consent to enter was ever withdrawn expressly or by implication communicated to Appellant. See D.R. v. State, 734 So. 2d 455, 460 (Fla. 1st DCA 1999).

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.

First, this issue is properly preserved.[8] Appellant argued below that it was the "province of the jury" to determine if the voice was Appellant's because the detective "**had no prior contact with [Appellant].**" Counsel argued, "**[The detective] is not a family member or close friend or anybody that had communications in the past with him. The only information that he has to qualify himself to render this opinion would be listening to him speak to his family on jail calls.**" (35:T1396) During the exchange, the court asked the prosecutor if he was qualifying the detective as an expert, and the prosecutor replied, "Nope." (35:T1396-97) It is clear that the judge understood the objection, and knew that the detective was not being qualified as an expert; however, the judge actually ruled that the evidence was admissible because it invaded the province of the jury, noting that the jury could compare the voices on the tapes themselves.[9] (35:T1396) Therefore, the issue

[8] Appellee claims, ". . . [T]he Defendant argues that Detective Judy's testimony was improper because Detective Judy had never met the Defendant before this investigation and Detective Judy was not qualified as a voice identification expert. These arguments were not presented below, and therefore, are not preserved for appeal." (Appellee's Br. at 50-51).

[9] The judge stated: "The comparison is a known voice exemplar

was properly before the court.

As pointed out in the Initial Brief, the correct objection is that the officer's opinion "invades the province of the jury" because there is no showing that the officer has prior knowledge of the defendant's voice or appearance. See Ruffin v. State, 549 So. 2d 250 (Fla. 5th DCA 1989) (holding that the officer's identification of the defendant on a video "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); Bowers v. State, 104 So. 3d 1266, 1268-69 (Fla. 4th DCA 2013) (holding that the proper objection was that the detective's comparison of the defendant's photograph with a video of the offense "invaded the province of the jury").

Appellee argues: "The Defendant does not dispute that Detective Judy became sufficiently familiar with Defendant's voice." (Appellee's Br. at 50) That statement completely ignores all of the cases cited by Appellant that show that a lead detective's lay opinion is absolutely not admissible when the only thing the detective is doing is what the jury could do – compare the known voice exemplar with the voice on the 911 tape. Appellee

(..continued)
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. . . ." (35:T1396-97) The judge then had the jury taken out so that the prosecutor could play the jail calls to make sure there was no problem; however, the prosecutor had no intention of playing the jail calls to the jury. (35:T1398)

does not distinguish the facts of any of these cases, and Appellee does not argue that these cases are wrongly decided; the brief simply ignores them.

Appellee seems to argue that the detective was familiar with Appellant's voice because he listened to the 911 recording more than 50 times; however, listening to the 911 recording would not familiarize the detective with Mr. Evans' voice because that recording was not a "known exemplar." Finally, none of the cases cited in § 901.6 of Charles W. Ehrhardt's Florida Evidence (2013 Ed.) (cited by Appellee at 51-52), support Appellee's position that "familiarity" with the defendant's voice can be acquired by a lay witness by comparing a known exemplar to the evidence at trial.

Appellee cites an unpublished opinion, U.S. v. Metayer, 2013 WL 5942597 (11th Cir. 2013), in support of its claim that Detective Judy's testimony was admissible. Aside from the fact that the opinion is unpublished, Metayer is not persuasive because the detective testified that he had personally spoken to the defendant and was familiar with his voice. Also, Brown v. City of Hialeah, 30 F.3d 1433 (11th Cir. 1994), cited in Metayer and cited by Appellee, has no relevance to the issue in this case. In Brown, an officer wearing a recording device went into a drug sting, during which Brown pulled a gun and threatened to kill the officer. Other officers who were listening to the transaction rushed in, and a struggle ensued. Brown involved a lawsuit filed by Brown for excessive force used during the arrest. During the

trial, an officer who apparently recognized the voices of his fellow officers on the tape (and may even have been in the room at the time the tape was made), was allowed to testify regarding the contents of the tape. In Brown, it is clear that there was no issue regarding whether the officer was familiar with the voices on the tape, which were probably those of his fellow officers.[10]

Appellee speculates that playing the jail calls to the jury would have been "time-consuming" and "tedious." (Appellee's Br. at 54) Neither of these excuses was expressed to the trial court. Appellee also offers that the jail calls might not have been admissible because the probative value of tapes might have been outweighed by "the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Id. Again, none of these excuses were offered to the trial court; the prosecutor simply chose not to introduce the jail calls. Because Appellee's assertions have no record support, it is equally possible that the prosecution chose not to play the calls because the calls were of poor quality and would undermine the detective's opinion, or that the calls between Mr. Evans and his loved ones would humanize Mr. Evans. In either case, even if Appellee's hypothetical reasons were true, for the reasons argued in the Initial Brief, those reasons would not make the detective's inadmissible opinion testimony

[10] "A review of the record reveals that the trial court allowed Officer Pugliese to identify voices he recognized based upon his familiarity with the voice of the speaker." Brown, 30 F.3d at 1437.

admissible.

Appellee argues that counsel never specifically used the words "improper bolstering" while objecting. That is fair enough; however, Appellant's counsel argued that allowing the detective to identify the voice was prejudicial because Judy was the "case agent" in the case, and that his testimony would be a "comment on the guilt" of Appellant.[11] (35T:1395-96) Given this objection, Appellee does not deny that inadmissible testimony from a lead detective would augment the harmful nature of the error.

Appellee demonstrates why the error was harmful by pointing out that Detective Judy's inadmissible testimony was more persuasive that Pamela Ashby's because Ashby had not heard Appellant's voice in three years. That is precisely why the error is so prejudicial and why the prosecution wanted to introduce Judy's identification testimony. It is also clear from Appellee's brief that Appellee believes that the 911 tape was the most important piece of evidence against Appellant. For that reason, the error assumes greater importance, and because the State cannot say that Detective Judy's identification did not sway the jury, a new trial is required.

[11] Counsel also argued: "The only information that he has to qualify himself to render this opinion would be listening to him speak to his family on jail calls. So when you take that as being his only ability, at the same time looking at the prejudicial value of allowing the actual case agent to tell the jury I think he's guilty, I think that is inappropriate because that's, essentially, what that is doing." (35:T1396)

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.

To be absolutely clear, contrary to Appellee's argument,[12] the prosecutor had no good-faith belief that Mr. Evans hired a private investigator. He had a "good-faith belief" only that Mrs. Evans told some unidentified people that she had the subjective belief that Mr. Evans might have hired a detective. Therefore, the question, and its implication, were completely unfair because the question implied that the prosecutor had actual knowledge that Mr. Evans hired a private investigator, and the jury was left with a terribly misleading and damaging insinuation.[13]

The prosecutor's question was based on the unsubstantiated subjective belief of the victim, and that belief could not be verified or subjected to cross-examination. Furthermore, that unsubstantiated belief was hearsay communicated to another party,

[12] Appellee's brief states: "The prosecutor had a reasonable basis to believe that an investigator had been hired, but the jury heard the Defendant deny that he had hired anyone." (Br. of Appellee, p. 36)

[13] Appellee implies, without specifically claiming, that Appellant's objection was untimely. (pp. 55-56) However, as pointed out in Appellant's initial brief, the proper time for the objection is after the State fails to back up its insinuation in rebuttal. See Marrero v. State, 478 So. 2d 1155 (Fla. 3d DCA 1985).

and somehow it got to the prosecutor. Not only is that information inadmissible as utter speculation, the fact that it was pure conjecture was not revealed to the jury. The only way the question would not have been misleading would have been if the prosecutor asked, "Isn't it true that Mrs. Evans told [someone] that she thought you had hired a private detective to investigate Jerry Taylor?" However, that question also would have been completely objectionable and improper impeachment for a variety of reasons, the least of which being that Appellant would have no way of knowing if that were true.

Appellee's reliance on Carpenter v. State, 664 So. 2d 1167 (Fla. 4th DCA 1995), is misplaced. First, the question in Carpenter involved an impeaching statement, which was purportedly made by the defendant himself. In that case, the prosecutor asked: "Mr. Carpenter, isn't it true that after you shot Brian Soini, you told David Jaworski that you shot [Soini] because you were sick and tired of the crap, that's all?" Id. at 1167. Not only was the defendant on notice of the statement against interest because it was in a police report, the jury was on notice that the statement was allegedly made by a named party who claimed that Carpenter made the statement.

What is more important is that in Carpenter the judge sustained the objection and gave a limiting instruction. See id. at 1168, 1169 ("The court sustained the objection, denied the motion for mistrial, and instructed the jury that a question is not evidence and that the jury should not consider a question to

which an objection is sustained."). In this case, the judge overruled the objection and flatly refused to give a limiting instruction as counsel requested.

Appellee asserts that, in Carpenter, the court concluded "that an attorney's good faith belief in asking an impeaching question does not require facts supported only by admissible evidence." (Appellee's Br. at 58) That is certainly not the holding in Carpenter. Clearly, in Carpenter, the State could have called Jaworski to impeach Carpenter, and the evidence was admissible because it was an admission made by Carpenter. See § 90.803(18), Fla. Stat. Although the court cited cases in which the defendant's reputation witnesses were impeached by prior bad acts of the defendant, which would not have been admissible, that issue was not part of the court's holding. Even if that were the holding, Carpenter recognizes that a good-faith belief has to be supported by actual facts and not pure conjecture. In Carpenter, the court wrote:

> In Michelson, after recognizing the dangers in allowing questions to character witnesses about rumors and gossip, the Court observed:
>
> > Wide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse. The trial judge was scrupulous to so guard it in the case before us. He took pains to ascertain, out of presence of the jury, that the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to defendant's reputation. He satisfied himself that counsel was not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box. (Footnote

omitted.)

Id. at 1169 (quoting Michelson, 335 U.S. at 480-81, 69 S.Ct. at 221). In this case, the target of the question was not an actual event; it was mere speculative opinion, and the prosecutor asked "a groundless question to waft an unwarranted innuendo into the jury box."

The error in this case is absolutely harmful and it makes no difference that the prosecutor did not repeat the accusation in closing argument (which he could not do because there was no evidence produced at trial that a private investigator was ever consulted). Because there was no limiting or curative instruction, the insinuation was unchallenged, and contrary to Appellee's assertion, the suggestion is incriminating under the facts of this case.

The State had to prove premeditation. The question suggested that Mr. Evans knew that his wife was involved with Taylor, when there was no evidence to that effect. It suggested, contrary to all the other evidence, that Mr. and Mrs. Evans were not on good terms. It suggested that Mr. Evans was stalking his wife and that he was jealous and possessive. It suggested a great deal of pre-planning, i.e., premeditation, a major issue in the case. Furthermore, an allegation of spying on one's spouse would turn the jury against Appellant because hiring an investigator to spy on someone is just an awful thing to do.

In Carpenter, the court stated that "wafting before the jury questions which have no basis in fact can be fatal to the

defendant." Id. at 1169 (citing United States v. Nixon, 777 F.2d 958, 970 (5th Cir. 1985)). This question had no basis in fact and the fact that it was an "isolated question" makes no difference because the question itself was a "bombshell" that did not need repeating because the jury would never forget it. In fact, it is doubtful that a curative instruction could "unring that bell." Also, if, in the context of this case, hiring an investigator was "an innocent act" that did not tend to prove a material fact in issue as Appellee claims, why did the prosecutor put it before the jury, and why was he so quick to defend his decision to do so?

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.

In its brief, Appellee tries to minimize the prejudicial comments of the prosecutor by pointing out that there was a lot of testimony in this case. The ratio of testimony to the amount of closing argument has never been the measure of whether or not a prosecutor's arguments are improper, and the sheer length of trial testimony should not be a consideration in the determination of harmless error. In fact, when there is substantial testimony and evidence presented at trial, closing argument becomes even more significant as a summary of the evidence and as an argument

stating the conclusions to be drawn therefrom. Also, no matter how long or short Mr. Loughery's rebuttal closing argument was, it was the last thing that the jurors heard before the instructions were read, and Appellant did not get to reply to the most egregious portions of the argument.

Appellee misconstrues defense counsel's argument in order to justify the prosecutor's comment, "I mean, only in a world populated by defense attorneys would that be true." Defense counsel argued that the fact that the perpetrator left incriminating items behind showed that the murders were not preplanned and that, contrary to the State's theory, there was no planning of a cover-up of the killings:

> Because think about that. The suggestion from the State is that Rick Evans not only planned this murder, okay, but he also planned the coverup. All right? Because the gun is gone. But there in the bedroom sitting right there in plain view is the holster left behind.
>
> There is two shell casings, one that is sitting right there on the carpet, and the other one is sitting right there on the patio, okay, that aren't picked up by the shooter. They are just left there behind.

(40:T2106) A little later counsel argued:

> Of course, the shell casings are left behind. The holster is left behind. And let's think about that for a minute with the shell casings left behind. I think the State suggested to you in one of their comments earlier that Rick Evans planned this murder – both murders. That after the homicides he took steps to cover himself up by taking the phone and cleaning it off and getting rid of the gun.

(40:T2112) And later:

> And let's just say for a moment in this panic that the holster is left behind and the casings are left behind. . . . [Let's] say he

> committed the homicide. He's forgotten the shell casings behind, and he gets home. Now, he is there in his house all night long. The gun safe is there. The Glock box is there.
>
> The State says, Well, he's thrown away – he's covering his tracks because he decided to get rid of the gun and throw it away, hide it someplace, or throw it off a bridge. He's already cleaned the phone off. He's probably wore gloves so there wouldn't be any fingerprints in the house of him. All these things that he planned out and how he planned his escape, and then when he gets home and he has a chance to sit back and reflect about everything, he does absolutely nothing to get rid of the two shell casings that are a part of his Glock package that he's owned since it was brand new in 2005.

(40:2113-14) Clearly, as Appellant pointed out in his Initial Brief, in this part of his argument, defense counsel was addressing the prosecution's theory that Appellant preplanned the murders in a very deliberate and premeditated manner and that he preplanned a cover-up of the murder because he disposed of the gun.[14] (See Appellee's Br. at 75-76) Counsel also legitimately argued that if Appellant did commit the murders, he would have disposed of the gun box and test-fired shell casings. (40:T2115-16)

Either way, it is obvious from the above that defense counsel did not argue that Appellant was simply "not guilty because of the incriminating evidence against him," as Appellee claims on page 67 of its brief. Counsel was arguing, at most, that it didn't make

[14] Counsel was clearly rebutting the theory of premeditation argued by the prosecution. (See 40:T2058: "And he planned to get rid of the evidence in this case. There was no firearm found in this case."; 40:2061: "And we know that there is no DNA found on [the phone]. And I'm going to suggest to you that there are two things that can probably make that true. One is that whether Mr. Evans was wearing gloves that night or he wiped the phone off as

sense that a person who pre-planned a murder would have left evidence at the scene and forgotten to dispose of the evidence in the gun safe or that it leaving the evidence in the gun safe suggested a lack of a guilty mind. Therefore, contrary to Appellee's argument, the prosecutor's comment was not a "fair reply" to defense counsel's argument. (Appellee's Br. at 69, 70)

Nevertheless, the above is beside the point and a distraction because the prosecutor's "pot shot" at Appellant's defense, his counsel, and defense attorneys in general is the main issue, and that comment was certainly not a "fair reply." The prosecutor's comment was not "acceptable" as argued by Appellee. (Appellee's Br. at 69) Saying that "only in a world populated by defense attorneys would that be true," implies that Appellant's defense attorney is either delusional, illogical, or dishonest, as are all defense attorneys, because they live in their own little world that does not follow the rules of the real world. Such a comment is never acceptable. It was flippant, disrespectful, derisive, and completely unnecessary.

Appellee also argues that it was acceptable for Mr. Loughery to refer to Appellant's defense as "bad TV." (Appellee's Br. at 70-71) Calling a defense "bad TV" is calling it an elaborate fiction, and one that is poorly conceived and written, at that. In Sheridan v. State, 799 So. 2d 223 (Fla. 2d DCA 2001), Mr. Loughery was specifically called out by name in the opinion for inappropriate comments, which included Mr. Loughery's calling the

(..continued)
he placed it back down on the counter downstairs.").

defendant's theory of defense "desperate." See id. at 225-26. Calling the defendant's defense "bad TV" or saying that counsel's logic would only be true in a world populated by defense attorneys are far worse than calling the defense "desperate."

Contrary to Appellee's argument, arguing to the jury, "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," is an argument denigrating the defense. Appellee separates the sentences in order to mitigate the clear implication made by the prosecutor that Appellant was grasping at straws and that Appellant had the right to ask for a jury trial even though his exercise of that right was frivolous.

In Bouley v. State, 132 So. 3d 1232 (Fla. 1st DCA 2014), the appellate court held that a comment on the choice to exercise the right to trial was a denigration of the fundamental right to a jury trial. In Bouley, a case issued after Appellant's brief was filed, the court explained that a comment on the right to a jury trial was not an invited response, writing:

> In response to defense counsel's closing argument that the evidence against his client was thin, the prosecutor in his closing told the jury:
>
> > We're here because this defendant exercised his Constitutional right to a jury trial. It doesn't mean it's a close call. It doesn't mean the evidence is thin. It just means that he's exercised his Constitutional rights.
>
> This comment was highly improper, denigrating the fundamental right to a jury trial; and it was not a legitimate "invited response" to defense counsel's closing, there being many obvious ways to counter a claim of "thin" evidence without

> impugning the exercise of a constitutional freedom. This commentary exceeds that in Bell v. State, 723 So. 2d 896, 897 (Fla. 2d DCA 1998), which held harmless a prosecutor's comment that the "only one reason we're here" was because the defendant had a right to a jury trial. The statement here -- though brief -- was more damning, made in the penultimate paragraph of the prosecution's closing rebuttal argument, leaving defendant without a reply to jurors.

Id. In this case, there were a lot of ways to counter Appellant's argument without denigrating the defense in this way. No matter what the objection, it is clear that the comments on Appellant's right to jury trial were improper and a denigration of his right to a jury trial in a capital case.

The trial judge's failure to sustain the objection to the prosecutor's remark that "most homicides are committed by family members," is another instance in which the prosecutor's impropriety remained unchecked. Clearly, there was no evidence presented on this point. For some reason, Appellee mentions that Appellant did not ask for a mistrial after the objection to this remark was overruled. It is unnecessary to ask for a mistrial because the judge overruled Appellant's objection. See Simpson v. State, 418 So. 2d 984, 987 (Fla. 1982) (stating that "where a timely objection is made to an improper comment . . . , and the objection is overruled, thus rendering futile a motion for mistrial, the issue of the admission of such comment is properly preserved for appeal"); Robinson v. State, 989 So. 2d 747, 750 (Fla. 2d DCA 2008) ("[T]o preserve an error founded on an objection at trial, it is necessary to move for a mistrial only

when the objection is sustained, not when it is overruled."). Also, this comment was made very early in rebuttal argument, (40:T2172), and the worst was yet to come.

Appellee asserts, without factual support, that defense counsel did not object to Mr. Loughery's mocking and sarcastic comments because he did not think they were inappropriate. (Appellee's Br. at 77) That conclusion is unwarranted. The failure to object is a common problem, and the law is replete with instances in which trial counsel did not object, for inexplicable reasons, to improper arguments which prompted appellate court reversals. See, e.g., Ruiz v. State, 743 So. 2d 1 (Fla. 1999) (noting that counsel failed to object to many of the arguments claimed as error on appeal); Brooks v. State, 762 So. 2d 879, 899 (Fla. 2000) (reversing despite the fact that counsel failed to object to many of the improper comments); Collins v. State, --- So.3d ----, 2014 WL 1255831, 39 Fla. L. Weekly D673 (Fla. 5th DCA Mar. 28, 2014) (finding fundamental error in the prosecutor's unsupported argument that the defendant pressured the victim to drop the charges, even though counsel failed to object); Charriez v. State, 96 So. 3d 1127 (Fla. 5th DCA 2012) (reversing because the cumulative effect of the prosecutor's improper remarks denied the defendant a fair trial even though counsel failed to object to each of the comments). In Servis v. State, 855 So. 2d 1190 (Fla. 5th DCA 2003), the court reversed for a new trial even though there were no objections to some of the prosecutors comments and although other objections were general.

Appellee argues that the prosecutor's reference to Appellant as a "control freak" was a "logical inference" supported by the record, but Appellee fails to cite the record evidence that would support such a derogatory comment. Appellee also claims that when the prosecutor gave his personal opinion regarding the professionalism of Appellant's first lawyer, the comment was a "fair reply" to the testimony of Appellant's brother. The prosecutor said, "If the lawyer told him not to go to the police, he should be disbarred." (40:T2205) First, the concept of "fair reply" concerns a reply to counsel's argument, not to defense testimony. Second, as argued in the Initial Brief, the comment was not supported by evidence in the record and the comment was clearly an expression of the prosecutor's opinion. The prosecutor was not a witness on the issue of professional ethics in this case. For that reason, he had no place giving his personal opinion on the actions of Appellant's prior counsel.

Appellee claims that when the prosecutor mocked Appellant's expert witness, a toxicologist, the mocking was nothing more than a "fair reply" to Appellant's theory of defense. Although the prosecutor is free to comment on the evidence, he is not free to mock the Appellant, his defense, or his witnesses. Appellee does not attempt to explain or justify the blatant mocking of Appellant's testimony and his wealth ("I'm this big moneymaker. I got this big job. I got planes, all this kind of stuff" 40:T2214-15), or the prosecutor's mocking of Appellant's testimony by comparing it to a screen test ("You know, this was 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. . . He wouldn't get that role. I mean, that was – I don't even know the word. It was surreal . . . At one point it almost sounded like he had a Jamaican accent." 40:T2216).

None of these comments was fair comment or necessary in order to make a point, and it is not "rank speculation" to assert that these comments were inappropriate, because it is obvious from the cold record that they were.

Appellee argues that the prosecutor was free to comment on Appellant's testimony regarding whether or not it was his voice on the tape. Although the prosecution may comment on the evidence, the prosecutor may not belittle or ridicule the defendant, or give his personal opinion regarding what Appellant's voice sounded like as was the case here. In Ruiz, 743 So. 2d 1, 4, this Court explained: "A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence." Furthermore, a prosecutor is to strike hard, not foul, blows. See Berger v. United States, 295 U.S. 78, 88 (1935).

Appellee argues that the prosecution's misstatement of the law on "heat of passion" was negated by the jury instructions. Appellee also argues that the prosecutor merely urged the jury to follow the court's instructions. In this case, there was no

separate "heat of passion" instruction, and the general instruction on first-degree murder could not counteract the misstatement of the law that was very specific. (See Appellant's Initial Brief.)

In its brief, Appellee treats every instance of prosecutorial misconduct as an isolated incident without acknowledging that this Court does not review each of the allegedly improper comments in isolation. Instead, the Court examines "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 the defendant of a fair trial. See Braddy, 111 So. 3d at 837 (citing Card v. State, 803 So. 2d 613, 622 (Fla. 2001)).

In Card, this Court wrote: "We do not examine allegedly improper comments in isolation. Rather, the Court examines the totality of the errors in the closing argument and determines whether the cumulative effect of the numerous improprieties deprived the defendant of a fair penalty phase hearing." Card, 803 So. 2d at 622 (citing Muhammad v. State, 782 So. 2d 343, 361 (Fla. 2001); Brooks, 762 So. 2d 879, 899; Ruiz, 743 So. 2d 1, 7; and Gore v. State, 719 So. 2d 1197, 1203 (Fla. 1998)).

Appellant's Initial Brief demonstrates that there were eleven separate instances of prosecutorial misconduct, and one misstatement of the law. Of those eleven instances, most of them involved sarcasm, rudeness, and derision, aimed at Appellant, his counsel, and his defense. The closing argument made by Appellant's

counsel was courteous and dignified, and for that reason, the prosecutor was not "fighting fire with fire." When a man is on trial for his life, how many instances of prosecutorial misconduct are "not enough"? How many rude, sarcastic, mocking, and demeaning comments is a tolerable amount?

Appellee also claims that the evidence against Appellant was "overwhelming." However, what Appellee fails to realize that the evidence of premeditation was tenuous. When a prosecutor treats the defense with this much disrespect, it cannot be said that his tone did not affect the jury's decision to convict Appellant of first-degree murder as opposed to some lesser-included offense.

ISSUES VI, VII, AND VIII

Appellant relies on the arguments and authorities in his Initial Brief in reply to Appellee's arguments in these issues.

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 5th day of May, 2014.

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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