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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-0001

LEON DAVIS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

STATEMENT OF CASE AND FACTS

This is a case in which Defendant, while attempting to commit a robbery of the BP station, murdered Pravinkumar Patel and Dashrath Patel, execution style. Defendant was connected to these murders, among other evidence, through the ballistic and eyewitness evidence from the Headley Insurance case.

In late 2007, Defendant and his wife were experiencing financial difficulties, they had no income, they had reached credit limits on their credit cards and were behind on mortgage payments. (S6. 869-71) In November 2007, Defendant's wife took a leave without pay because she had difficulties with her pregnancy. (S6. 866) Defendant cancelled insurance on his Nissan Maxima because they could not afford it, but was paying the insurance for his wife's Nissan Altima. (S6. 872-74) In December 2007, Defendant was driving his wife's car and did not have a cell phone because he could not afford it. (S5. 852)

On December 7, 2007, around 12:00-2:00 p.m., Defendant purchased a .357 Dan Wesson gun from his cousin, Randy Black, for $220. (S5. 730-32) Black gave Defendant a handful of .38 ammunition. (S5. 732)

Sometime after 8:00 p.m., Defendant came to the area where the BP station on Highway 557 was located and he backed his wife's Nissan Altima into a cattle gap area just north of the station. (S3. 407-09, 355-59, 385, 430)

Just before 8:52 p.m., Pravinkumar Patel and Dashrath Patel, the BP station

employees, switched off the light in the store and went outside to change the prices on the gas sign. (S4. 545) Prakashkumar Patel, a store clerk, closed the door and stayed inside to change the prices on the register. (S4. 546)

At 8:52 p.m., Defendant, masked and with a gun in his hand, approached the store door, trying to open it. (S4. 548-49, 557) As he was unable to open the door, Defendant pointed a gun towards Prakashkumar. (S4. 548-49) He fired a shot at Prakashkumar through the glass. Id. The bullet hit a chapstick box on the counter. (S4. 552-54) Prakashkumar went down on the floor, pushed a silent alarm button and called 911. (S4. 554)

The next moment, Defendant went towards the area where Pravinkumar and Dashrath were located, fired two shots into their heads, killing them instantly. (S4. 554-55, 557, 526, 524) Then, Defendant immediately ran back to the store trying to open the door again. (S4. 556, S2. 317-18) As he was unable to open it, Defendant left in the northerly direction. (S2. 317-18)

At 9:12 p.m. the police came to the scene. (S3. 327-30) After five minutes, Prakashkumar came to the front door. (S3. 331-32) He told the police that Pravinkumar and Dashrath were missing. (S3. 333, 341-42) The police went to look for them and their bodies were found southeast from the store. (S3. 334, S3. 347) The police canine directed the police in the northerly direction along Highway 557, where the tire tracks were found. (S3. 348-50) The video from the

surveillance system inside the BP store was retrieved. (S2. 307)

On December 13, 2007, in the morning hours, Defendant went to Wal-Mart where he purchased an orange six can cooler. (S4. 661, S5. 714-15) Mark Gammons, a Wal-Mart manager, assisted Defendant in the store. (S4. 644-45) Jennifer Debarros, a Wal-Malt employee, saw Defendant in the store and talked to him about getting together for his son's birthday. (S5. 690)

Around 3:00 p.m., Defendant came to the Headley Insurance Agency. (S4. 607-08) At the same time, Evelyn Anderson tried to enter the front door of the building, but it was locked. (S4. 606-07) At that moment, Defendant (who she described as a tall, black man) came out of the building with something like a bag under his arm. (S4. 610) The next moment, Yvonne Bustamante came out of the building too. (S4. 610)

While this was happening, Fran Murray, Vicky Rivera and Brandon Greisman (who were living in the building across the street), saw the smoke at the Headley Agency and went to see what had happened. (S3. 466, S1. 71-71) Greisman came around the corner of the building and saw Bustamante. (S1. 71-72) The next moment, Bustamante moved and Greisman was able to clearly see Defendant's face as he was walking towards Greisman. (S1. 73-74) Defendant pulled out his gun from an orange lunch bag, pointed it at Greisman and shot him in the nose. (S1. 75-76) Greisman fell on the ground. Id.

Carlos Ortiz, who also followed Greisman, Rivera and Murray, to check what was happening across the street, came in time to see Greisman walking back and holding his face, after he got shot. (S5. 757) When Greisman saw Ortiz, he pointed at Defendant and said, "That guy shot me in the face." (S5. 759) Ortiz looked at Defendant and was able to clearly see his face because he was afraid that Defendant could come after him too. (S5. 761) Ortiz was also able to observe that Defendant had a red lunch bag as he walked down the street in the northerly direction. (S5. 759-61)

Around 3:30 p.m., the medical assistance came to the Hadley crime scene. (S4. 634) Ernest Froehlich and John Johnson, the paramedics, assisted Bustamante and observed that she was shot in her left hand. (S4. 637, 641) Lt. Joe Elrod, who was dispatched to the crime scene, came to where Bustamante was receiving medical help. (S4. 621) Lt. Elrod immediately asked Bustamante, "Who did this to you?" She told him that it was Defendant and that he was a client at the insurance company. (S4. 623, S4. 636, S4. 639-40) This statement was heard by Froehlich, Johnson and Anderson (S4. 636, 639-40, 611)

Defendant's vehicle, a Nissan Altima, was found in front of the Lagoon Night Club in Winter Haven in connection with the Headley crimes investigation. (S4. 591-92)

When the police came to the BP crime scene, they recovered the tire tracks from the area just north of the station. These tracks were compared to the tires of Defendant's Nissan Altima and were found to be of the same tread design, size and noise treatment. The investigation revealed that on the day of the BP incident Defendant purchased a .357 Dan Wesson gun from Randy Black and procured a handful of .38 ammunition. Ballistic examination revealed that three projectiles recovered from the BP scene were fired from the same gun as three projectiles recovered from the Headley Insurance crime scene. The examination also revealed that the projectiles from both crime scenes were of a .38 or .357 caliber class, which included the Dan Wesson .357 gun Defendant bought from Black. Greisman and Ortiz identified Defendant as the person who shot Greisman in front of the Headley Insurance. Bustamante gave a dying declaration identifying Defendant as the person who shot her. Witnesses from the Headley scene described that Defendant had put his gun into an orange lunch bag. The video footage from Wal-Mart revealed that in the morning of the Headley Insurance incident, Defendant purchased an orange six can cooler. Witnesses observed a car that matched Defendant's Nissan Altima parked in the area north of the BP station around the time of the incident. Description given by Prakashkumar Patel of the BP perpetrator that matched Defendant's height and built was corroborated by the BP

surveillance video and the description of the perpetrator at the Headley scene given by Fran Murray and Evelyn Anderson.

As a result, Defendant was charged for the first-degree murder of Pravinkumar Patel (Count I), first-degree murder of Dashrath Patel (Count II), attempted first-degree murder of Prakashkumar Patel (Count III), attempted armed robbery of Prakashkumar Patel (Count IV), and possession of firearm by a convicted felon (Count V). (1. 46-50)

Prior to trial, Defendant filed, pro se, the Notice of Intent to Claim Alibi, along with a list of witnesses. (1. 95-103) Defendant claimed that his witnesses would confirm that, at the time of the incident, he was not present at the BP crime scene. Id. He also claimed an alibi as to the Headley Insurance case. Id. at 96.

On September 11, 2008, Defendant filed, a pro se Amended Notice of Intent to Claim Alibi. (2. 128-130) He stated that his wife, Victoria Davis, would confirm that, on December 7, 2007, around 9:00 p.m., he was in her presence, in Winter Haven. Id. As to the Headley Insurance case, he claimed that Garrion and Melissa Davis, would confirm that, on December 13, 2007, at 4:00 p.m., he was in their presence, at their residence in Winter Haven. Id.

On May 3, 2012, the State filed a Notice of Intent to Prove Other Crimes, Wrongs or Acts. (25. 4263-65) The State argued that the gun used in the crimes in the instant case was also used in the commission of the crimes in the Headley

Insurance case where Defendant has been convicted and sentenced to death. Id. In proving the identity of the perpetrator in this case, the State intended to rely on the evidence presented in Defendant's Headley Insurance trial to prove his identity in that case. Id. In particular, the State intended to call witnesses to prove that the same gun was used in both crime scenes as well as witnesses who would show that Defendant possessed the same gun on December 13, 2007, when the Headley crimes occurred. Id. The State further argued that another area of evidence involved in both events involved the car Defendant used in committing the Headley crimes, that matched the description of the car used in the instant murders. Id. The State stressed its position by arguing that Defendant's actions from December 13, 2007 were inextricably intertwined with the instant case events. Id.

Defendant filed a Motion in Limine as to the State's Notice of Intent to Prove Other Crimes, Wrongs or Acts. (25. 4330-31) Defendant wanted to prohibit the introduction of evidence arising out of and surrounding Headley crimes scene. Id. Defendant argued that he did not object to the testimony of Randy Black and William Wagle. Id. Defendant objected to presenting all other witnesses, James Kwong, Brandon Greisman, Carlos Ortiz, Lt. Joe Elrod ,Jennifer DeBarros, as well as presenting the video surveillance tapes from Wal-Mart, Beef-O-Brady's and Mid Florida Credit Union and presenting witnesses who would testify that Defendant used the same car in committing both crimes. (25. 4264-65, 4330-31)

Defendant argued that the presentation of this evidence would have been prejudicial, it involved improper character evidence, the evidence was based on hearsay and violated his right to due process and to confront witnesses. (25. 4330-31)

At the pre-trial hearing regarding the notice of intent and motion in limine, the State stressed that the testimony concerning the fact that Defendant was in the possession of the same gun that was used in committing the instant crimes and in the Headley crimes, as well as the testimony from the witnesses who saw Defendant with a gun in front of the Headley Insurance Agency was significant to prove that Defendant was the shooter in both crime scenes. (26. 4457-63) The State argued that the evidence from the Headley Insurance case should be admitted as inextricably intertwined with the instant case and not as the Williams rule evidence. (26. 4478-79) The defense objected to the admission of any evidence related to what had happened at the Headley incident. (26. 4466-69)

The trial court opined that after having reviewed the Headley Insurance case transcripts, it concluded that the evidence concerning the gun was inextricably intertwined with the case at bar. (26. 4455) The trial court also opined that it was necessary to hear evidence related to the identification of Defendant as the person who possessed a gun during the commission of the Headley Insurance crimes. (26. 4470-73) The defense agreed that the testimony of Randy Black concerning the

sale of a gun was admissible. (26. 4483-85)

The trial court rendered a written Order regarding Defendant's motion in limine and State's notice of intent. (27. 4603-05) The trial court found that the identification of Defendant at the Headley Insurance crime scene as the person carrying and discharging a firearm is relevant to demonstrate that Defendant was the perpetrator in this case and that such evidence was inextricably intertwined. Id. The trial court denied Defendant's motion in limine in general. Id. The trial court had ruled that the following limitations be set concerning the testimony of witnesses on direct examination: Randy Black was allowed to testify about the gun and Defendant's possession of a gun and this evidence was independently admissible; Greisman and Ortiz and Detective Townsell, were allowed to testify as to the identification of Defendant as the man with the gun at the Headley Insurance crime scene, Anderson, Lt. Elrod, Froehlich and Johnson were to testify about Bustamante's identification of Defendant as the person who shot her; Gammons and Debarros were to testify concerning their observations of Defendant at the Wal-Mart store and the purchase of a cooler; the videos from Mid Florida Credit Union, Beef's and Enterprise Leasing and testimony concerning those videos were admissible for comparative purposes in viewing the Wal-Mart video; Hare and Headley were allowed to testify about Defendant's prior business with Headley Insurance; Ortiz was allowed to testify as to his observations regarding the black

Nissan he had seen at Headley Insurance crime scene and James Kwong was to testify that he identified the gun used in the Headley crimes as the same gun used in committing the instant crimes. Id.

Defendant also moved to declare Florida's capital sentencing statute unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002). (25. 4332-59) The trial court denied this motion as contrary to the settled Florida law. (25. 4377-79; 26. 4437)

In the Headley Insurance case, prior to trial, Defendant filed a motion to exclude Bustamante's hearsay statements. (S21. 1565-68) Defendant stated that Bustamante made certain statements regarding the incident and the perpetrator before she was sent to the hospital. As grounds, Defendant asserted that there was insufficient evidence to prove personal knowledge regarding the identity of the perpetrator, that the statements are inadmissible hearsay and violated the Confrontation Clause and that its probative value was substantially outweighed by the danger of unfair prejudice. Id. Defendant filed this same motion in the instant case. (25. 4268-69)

In the Headley Insurance case, Defendant also filed a motion to suppress in-court identification by Brandon Greisman. (S21. 1584-86) He argued that he did not receive a copy of the photo lineup shown to Greisman. Id. He further argued that unless the lineup was provided to Defendant, any in-court identification should

have been suppressed because it violated his right to confront witnesses, the right to effective assistance of counsel, and due process rights. Id. At the hearing on the motion, Defendant filed an amended motion to suppress in-court identification by Greisman. (S30. 3070-72) As grounds, Defendant stated that a suggestive photo pack was used because next to each photo there was a book-in number (there was only one 2007 number that was Defendants' and all the other were either 1993 or 1994), Defendant's hair was shorter and not as thick as the other people, Defendant was older than the other people and Defendant was the only person that had a grey shirt. Id. Defendant also argued that the in-court identification should be suppressed because it would have violated the right to confront the witnesses, the right to effective assistance of counsel and due process rights. Id. Defendant filed this same motion in the instant case on the same grounds. (25. 4282-84)

In his motion to suppress in-court identification by Carlos Ortiz (also filed in the Headley Insurance case), Defendant argued that any identification was tainted because of the use of the suggestive photo pack where Defendant's photo had a 2007 book-in number and the rest photos all had either 1993 or 1994. (S21. 1596-99) He also stated that Defendant's hair was shorter and not as thick as other people, and that Defendant was much older than other people. Id. He also argued the violation of his confrontation rights and due process. Id. Defendant also filed this same motion in the instant case. (25. 4279-81)

At the Headley Insurance case, the trial court, with Judge Hunter presiding, held a hearing on the motions to exclude Bustamante hearsay statements. Frances Murray, testified that on December 13, 2007, she lived at 123 ½ Stuart Avenue and was familiar with that area. (12. 2009) She was sitting on the porch at her apartment with Vicky Rivera. (12. 2014) At one moment, they saw smoke across the street and went there to see what happened. Id. Brandon Greisman, who was sitting on his front porch, went with them too. (12. 2015) Murray and Rivera walked to the alleyway by the building that they thought was on fire. (12. 2017) Then they saw the smoke and heard sounds like firecrackers, "pop, pop, pop." Id. Rivera ran back towards her house to get the telephone. (12. 2018) Murray went around the side of the building and saw Greisman hit the ground because he was shot in the face. Id. preparation

As she was watching Greisman falling down to ground, Murray saw Bustamante walking with her hands up and a man was walking behind her. (12. 2026) Bustamante went to the front of the building and a man that was behind her walked down Phillips Street, headed to the north. (12. 2027) Bustamante was burned so badly so that her skin was rolling off of her, her hands were tied with gray duct tape, and her clothes was melting. (12. 2023-26) Bustamante was screaming "Please, I need something to drink. Please, please, I'm hot. I'm hot. I'm hot. It hurts so bad." (12. 2025) Bustamante then went walking to the front of the

building and Murray went to help Greisman. (12. 2028) Murray ripped off her shirt and put it on Greisman's nose to stop bleeding. Id.

After she finished helping Greisman, Murray went to the front of the Headley insurance where she saw Bustamante leaning against an SUV. (12. 2029) Murray explained that Bustamante was the woman she first saw coming out of the building and then had contact with her when she was at the front of the building. (12. 2028) When Bustamante was leaning against an SUV, she was screaming and asking for water. (12. 2030) Murray then went across the street to Havana Nights restaurant to get some water. (12. 2031) There, Murray noticed Luciano, sitting in the booth. Id. Luciano was also burned and bleeding. (12. 2032)

Murray took the water and immediately returned to Bustamante. (12. 2033) She helped Bustamante to drink the water because her lips were burned and her skin was peeling over her lips. Id. Murray asked Bustamante if she knew who did this to her and she said that it was a black man and that it was on camera. Id. Bustamante then kept repeating that her body hurt so bad. Id. Bustamante told Murray, "Please keep me in your prayers. I'm not going to make it." Id. Murray then told Bustamante that her name was Fran and that she would come to see her and Bustamante responded that she was not going to make it. (12. 2033-34) Murray stayed with Bustamante until the paramedics and police arrived. (12. 2034) She helped load Bustamante into the ambulance. (12. 2035) Bustamante's skin was

so badly burned that paramedics had a problem putting her on the bed. Id. Once Bustamante was loaded, Murray went to see Greisman. Id. On cross, Murray said that she did not ask Bustamante who did it to her. (12. 2061, 2066-67) She asked Bustamante what had happened and Bustamante said that a black man taped her, doused her with gasoline and that it was on camera. Id.

Vicky Rivera testified that first time she saw Bustamante behind the Headley insurance building, where the dumpster was located. (13. 2079) Bustamante was leaning against the dumpster. Id. She was burned from head to toe, her clothes was completely burned off and she had a gray tape around her neck and head. Id. Rivera approached Bustamante and asked her what happened and she just said "call 911." (13. 2081)

Rivera ran to her house to call 911. Id. After she called 911 from her home, Rivera came back and saw Bustamante again in front of the Headley insurance building, leaning against an SUV. (13. 2083, 2086-87) Rivera observed Bustamante's skin was burned, she was screaming for water several times, and she was in pain. (13. 2084) Murray then went to get some water. (13. 2085) On cross, Rivera stated that when she came to the front of the building, Murray was already there. (13. 2099) Murray then went to get some water. Id. Rivera saw Murray giving water to Bustamante but she did not hear if they talked because she was standing a little bit away. (13. 2100)

Evelyn Anderson testified that on December 13, 2007, around 3:00 pm, she went to the Headley insurance to make a payment. (13. 2109) She parked her Tahoe in front of the building and walked up to the front door that appeared to be locked. Id. She walked around and came back to the door she previously tried to open. (13. 2110) At that moment, a black, nicely dressed man with a cap, came out of the door. Id. He told Anderson that there was a fire in the building. (13. 2110-12) Before the man came out, Anderson heard three pops and saw the smoke coming out. (13. 2113) The man walked away towards the Havana Nights restaurant. (13. 2114) A few seconds after the man came out, a woman ran out of the door. (13. 2115) She was naked, bleeding, had burned clothes hanging off of her and her skin was falling off. (13. 2115-16) The burned woman was repeatedly asking for help. Id. The woman got into Anderson's Tahoe but then got out and was standing outside on the truck. (13. 2117) Soon thereafter, the paramedics came and put the woman on the stretcher. (13. 2118-19) One of the paramedics asked her what had happened and who did it to her and the woman "said Leon Davis." Id.

On cross, Anderson said that it could have been a police officer that asked the woman who did it to her but she remembered seeing nobody but two paramedics around her. (13. 2132-33) Anderson stated that other ladies were standing around too. (13. 2132-35) Anderson did not see any woman giving Bustamante the water. Id. Anderson explained that at first nobody was at the scene

but that later, people started coming. Id. Anderson said that she did not recognize Murray or Rivera from the scene but that they could have been there close to Yvonne but that she was not paying attention. Id.

Dr. Stephen Nelson testified that he performed an autopsy on Bustamante. (13. 2146) She died due to thermal injuries encompassing 80-90% of her total body surface area. (13. 2147) She also had a gunshot wound to her left wrist. Id. A person doused with gasoline and set on fire would immediately feel pain and would be able to move around and talk. (13. 2152) Bustamante suffered second and third degree burns. (13. 2152-53) When someone is burned over 85% of their body, there is about 15% chance of survival. (13. 2155) The person with injuries like Bustamante's would be able to communicate. (13. 2158)

Joe Elrod, a police lieutenant, testified that on December 13, 2007, he received an information from a dispatcher that someone had been shot in the area of Central Avenue and Phillips Street and that the shooter was fleeing the area, going north on Phillips Street. (13. 2180-81) Elrod was approaching the scene while initially looking for a suspect with a gun. (13. 2183) When Lt. Elrod arrived at the scene, he saw that a person had been shot right through the nose but that the injury was not life threatening. (13. 2183-84) There was no medical personnel at the scene. Id. The injured man told him that his injury was related to the incident at the burning building and that there were other people injured too. Id. The injured

man explained to Lt. Elrod that after he heard a woman screaming, he ran to the building to help. (13. 2184-85) When he arrived there, he saw a woman on fire and a black man who was throwing stuff on her. (13. 2185) The injured man further told Elrod that he then went to help the burned woman but at that moment the black man shot him. Id.

Lt. Elrod immediately went to the front of the Headley Insurance building where he saw an ambulance personnel and an injured person. (13. 2187) Lt. Elrod observed a badly burned female with almost entire body burned. (13. 2190) Lt. Elrod thought that she was not going to survive because of the extensive injuries she had suffered. (13. 2192) Lt. Elrod talked to the injured woman as she was conscious and could talk clearly. (13. 2193-94) Lt. Elrod immediately asked the woman who did this to her and she answered that it was Leon Davis and that he was a client of her insurance company. (13. 2194-95) The woman said that Davis came to the insurance company demanding money and when she refused to give it to him, he threw gasoline on her and her colleague and set them on fire. Id. Lt. Elrod then helped the medical personnel to put the injured woman in the ambulance. (13. 2197)

John Calvin Johnson, III, a paramedic, testified that in the afternoon of December 13, 2007, he went with his partner, Ernest Froehlich, to the Headley Insurance in Lake Wales. (13. 2224) There, he saw a burned woman that was

leaned against an SUV. Id. He observed an officer approach her and the woman was speaking. (13. 2225) Johnson heard the woman say "Davis did this." Id. The woman also said the first name of the person but Johnson did not catch it. Id. Johnson explained that the woman was yelling "Davis did this" while a police officer was approaching her and while the officer had not asked her any questions yet. (13. 2226)

Ernest Froehlich, an EMT driver, testified that on December 13, 2007, he arrived in front of Headley Insurance building in Lake Wales with John Johnson, a paramedic. (13. 2249) At the scene, he observed a chaotic situation, people were directing him to different directions where injured people were located. (13. 2250) He first went to see Bustamante who was standing by an SUV in the parking lot. Id. Bustamante was in shock, she had all of her clothes burned off. (13. 2252) Froehlich and Johnson got Bustamante in the ambulance. (13. 2255) At one moment, a police officer came into the ambulance and asked Bustamante if she knew who did this to her. (13. 2256) Bustamante "raised up and like hollered, Leon Davis." (14. 2256-57) A police officer left and Froehlich stayed alone with Bustamante. (13. 2258) After she told Froehlich that she was shot in the hand and that she had two kids, Bustamante started crying. (14. 2262)

Hewett Tarver, a flight nurse, testified that she first dealt with Bustamante when she was in the ambulance of Polk County EMS. (14. 2262) Bustamante was in lot of pain, and her whole body was burned. (14. 2353-59)

Christopher Cate, a paramedic, testified that Bustamante had severe burns on the entire body surface, her skin was sloughing off, and she was in severe pain. (14. 2384-86)

The Headley Insurance trial court denied Defendant's motion to exclude Bustamante's hearsay statements. (S30. 3074-81) The court found that any statements made by Bustamante to Murray, Rivera, Anderson, and Smith were admissible under one or more of the following exceptions: a spontaneous statement, an excited utterance, or a dying declaration. Id. The court found these statements were not testimonial and thus not subject to the confrontation clause. Id. Any testimonial statements made by Bustamante to Lt. Elrod that these women overheard were admissible as a dying declaration. Id. Any statement made to Lt. Elrod was admissible under one of the exceptions: a spontaneous statement, an excited utterance or as a dying declaration. Id. The trial court specifically found that Bustamante's statements qualified as a dying declaration because she believed her death was imminent. Id. It also found that Bustamante's statements that could be considered testimonial were admissible under dying declaration as the dying declaration had survived Crawford v. Washington, 541 U.S. 36 (2004). Id.

In the Headley Insurance case, the trial court also held a hearing on the motions to suppress in-court identifications by Greisman and Ortiz. Greisman testified that on the day of the incident, he bumped into a burned woman in the front of the insurance building. (S26. 2439) Greisman observed a man walking towards him and the woman because he thought that the man was coming to help. (S26. 2440) Greisman was able to see the man's face. (S26. 2441-42) At one moment, the man pulled a gun out of his orange-ish lunch bag and pointed it at Greisman. (S26. 2444) Greisman turned around in an attempt to escape. (S26. 2445) The next moment, he saw blood on his chest and realized that he was shot in the nose. (S26. 2445) Greisman then saw the man who shot him leaving the scene. (S26. 2446) Greisman explained that he took a good look at the man's face when the man approached him and not after he shot at him. (S26. 2446) Greisman was transported to the Lake Wales Medical Center where he stayed overnight and underwent a surgery. (S26. 2447) Greisman was not allowed to watch TV and read newspaper and he complied with these instructions. (S26. 2448-49)

The next morning, Greisman's mother took him to the police station. (S26. 2449) The police officers showed Greisman a photo lineup for a possible identification. (S26. 2450-51) The officers did not tell him that the perpetrators photograph was in the photopack nor that the perpetrator was arrested. (S26. 2450-51) Greisman immediately pointed to the picture of the perpetrator because he

remembered his face. (S26. 2451-52) Greisman identified the photo lineup with his signature. (S26. 2451-52) Greisman was 100% sure that he identified the right person as the shooter. (S26. 2455)

Officer Lynette Townsel testified that she did not talk to Greisman before he came to the police station for identification. (S27. 2487-88, 2539) When showed a photo pack, Greisman immediately, without hesitation, made the identification. (S27. 2499) Townsel explained that the numbers below the photographs represented the book-in numbers. (S27. 2515-17) She received the pictures from the Sheriff's office. (S27. 2515-17) Greisman did not know what the numbers represented nor did he say anything about it. (S27. 2516) The photographs did not show the specific date when somebody was booked in. (S27. 2517) Townsel stated that she made a copy of the original photo pack for her record but inadvertently kept the original instead of a copy. (S27. 2507-09) When she found out that she had put the original photo pack at her home, she immediately turned it to the evidence room. (S27. 2510)

On cross, Townsel stated that the book-in numbers below the pictures did not show the date of the booking but did have a book-in year. (S27. 2521) Defendant was the only person booked in in 2007. (S27. 2521) She explained that when she found the original photo pack at her house she thought that it was a copy but that Captain Foy thought that it was an original. (S27. 2530) On redirect,

Townsel stated that the same photo pack was shown to Ortiz except that the pictures were moved in different places. (S27. 2540)

Carlos Ortiz testified that on the day of the incident, around 3:30 p.m., he saw smoke from the building across the street from his building. (S28. 2740-41) He went there following his neighbor, Greisman. (S28. 2740-41) At one moment, Ortiz lost sight of Greisman. (S28. 2742) When Ortiz approached the corner, Greisman was coming back holding his bloody face (S28. 2742) Greisman was approximately ten feet away from Ortiz. (S28. 2742) The next moment, Greisman said, "I been shot in the face. That guy shot me in the face." (S28. 2743) When Greisman made this statement, he pointed towards the man that was walking behind him. (S28. 2743) Ortiz immediately looked over and saw a tall black man with an orange-ish cooler type bag, walking down the street. (S28. 2744-45) Ortiz looked at the man as he walked down the Phillips Street. (S28. 2742) Ortiz was able to see the black man's face and his eyes because he was looking at him as he was concerned that he was going to shoot again. (S28. 2747-48) He observed that the black man was about 6'3" tall. (S28. 2746) Ortiz also observed that the man was walking towards the back of the house on 118 Stuart, and that a black Nissan Maxima was parked there. (S28. 2749)

When the police came, Ortiz told Officer Black that he wanted to talk to him but Black told him that he was busy. (S28. 2753) On December 17, a female

officer came to talk to Ortiz at his house. (S28. 2755-56) The detective showed Ortiz a photo lineup and he immediately made an identification. (S28. 2757-58) Ortiz stated that he was 100% sure he made a correct identification. (S28. 2761) Ortiz did not see any news nor did he read newspapers before he was shown a photo pack. (S28. 2761) Ortiz also stated that he had seen the shooter before, at the gate of the Florida Natural, where he used to work. (S28. 2760-63) Then, Ortiz identified Defendant as the perpetrator he saw at the crime scene. (S28. 2764)

On cross, Ortiz testified that the black man he saw at the scene had a short hair and was about 25-30 years old. (S28. 2782-83) As to the hair, he explained that he looked like he had a small Afro hair and by an Afro hair style he considered a short hair and a type of hair that all colored people have. (S28. 2782) Ortiz stated that the people in the photopack all looked like they were between 25-30 years old. (S28. 2784) As to the facial hair, Ortiz stated that the black man had something like shadows, that could have been an outline of a mustache and a goatee but that he was not hundred percent sure. (S28. 2786-87)

Officer Lynette Townsel testified that she saw Ortiz on December 17th at his home. (S28. 2803) Townsel showed Ortiz a photo pack while she was taking his statement because during the conversation he mentioned that he saw the shooter. (S28. 2806-07) The photo pack she showed Ortiz was put up by Sheriff's department. (S28. 2808) It had the same photographs like Greisman's photo pack

except that the pictures were placed in different order. (S28. 2816) Ortiz immediately made the identification from the photo pack and did not have any hesitation. (S28. 2812) Ortiz did not look at the numbers that appeared on the photo pack nor did he say anything about it. (S28. 2813)

The Headley Insurance trial court entered the order allowing Ortiz's in-court identification. (S29. 2827-43) The court found that there was nothing suggestive in the manner in which the police presented the photopack (S29. 2836-37) The trial judge stated that he looked at the photo pack and did not find anything suggestive about it. (S29. 2832) The court also found nothing suggestive about the book-in numbers under the pictures. (S29. 2833) The judge observed that the six men all had similar features (with similar skin tones, with either no facial hair or very faint facial hair, short hair), and were of about the same age. (S29. 2832-36)

The trial court then stated since he did not find the photopack to be suggestive, he did not have to make a finding as to whether a suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. (S29. 2836-37) However, the court further stated that he took into the account the factors required by the law related to the second prong of the analysis and found nothing to suggest that Ortiz's identification from the photo pack and his in-court identification would have been unreliable. (S29. 2836-39) The court found that Ortiz was able to clearly see Defendant from approximately 13 yards, that he was certain about the

identification he made, that he made an identification four days after the incident, and that he remembered that he had seen Defendant before the day of the incident at the place where he used to work. (S29. 2836-39)

The trial court in the Headley Insurance case also entered the order allowing Greisman's in-court identification. (S30. 3043-44) The court reasoned that there was nothing suggestive in Greisman's photo pack. (S30. 3043-44) The court noted that the only difference between Ortiz and Greisman photo pack was that the pictures 1 and 2 were inverted. Id. The court noted that Greisman testified that Defendant wore a gray shirt and that there was a man in the photo pack with a gray shirt too. Id. The court also noted that he considered the fact that Greisman went to the hospital after he got shot, had a surgery and was taken to the police first thing after he woke up the next morning. Id.

The trial court in the case at bar held a pre trial hearing with reference to Defendant's motions to suppress in-court identifications by Greisman and Ortiz and motion to suppress Bustamante's hearsay statements that Defendant filed in this case as well. (25. 4387-90) As to the motions to suppress identifications, Defendant stated that since there was a hearing on the same motions in the Headley Insurance case and since the same motions were denied, the trial court should take the judicial notice of the record on appeal in the Headley case that relates to that issue. (25. 4388-90) The trial court took the judicial notice of the entire record in

the Headley case so the record could have been utilized by both parties for any appropriate issue. (25. 4389-90) The trial court adopted the rulings by the trial court in the Headley Insurance case as to the motions to suppress identifications by Greisman and Ortiz. (25. 4389) The trial court then denied the subject motions to suppress in the instant case. (25. 4390; 26. 4432-33)

As to the motion to exclude Bustamante hearsay statements, the trial court stated that it adopted the ruling from the Headley Insurance case and denied the motion. (25. 4392-96; 26. 4430) The trial court also made an independent determination that Bustamante's statement identifying Defendant was a dying declaration. (26. 4506-08)

At the September 10, 2012, pre-trial hearing, Defendant notified the trial court of his decision to exercise his right to have a bench trial. (27. 4723-4726) The State informed the trial court that it would proceed with a bench trial as well. (27. 4727) The trial court then conducted a colloquy with Defendant and found him competent to make his decision. (27. 4729-34)

On September 18, 2012, this case proceeded to a bench trial. (S1. 3) Brandon Greisman testified that after he was shot, he was transported to the Lake Wales Medical Center where he stayed overnight and underwent surgery. (S1. 78-79) He was not allowed to watch TV and read newspaper and he complied with these instructions. (S1. 81) The next morning, Greisman's mother took him to the

police station. (S1. 81) The police officers showed Greisman a photo lineup for a possible identification. (S1. 82) The officers did not tell him that the perpetrators' photograph was in the photopack. (S1. 82-83) Greisman immediately pointed to the picture of Defendant because he remembered his face. Id. Greisman identified the photo lineup with his signature. (S1. 84) Greisman was 100% sure that he identified the right person as the shooter. (S1. 85) Greisman then made an in-court identification of Defendant as the person with the gun who shot him. (S1. 85)

On cross, Greisman stated that the black man was wearing black work pants but could not remember what kind of shirt he had. (S1. 124) He described him as a big, 6-foot tall man, 30 to 37 years old. (S1. 127) The shooter had a small Afro, an inch long hair. (S1. 128-29) When the defense counsel pointed Greisman to the numbers below the photopack, Greisman explained that he did not know what those numbers meant. (S1. 137) The men from the photopack looked like they were around the same age. (S1.139)

John Dellavalle, CST, testified that on the December 7, 2007, around 22:41 p.m., he came to the BP station at Highway 557 in Polk County. (S2. 149) Dellavalle identified a photograph that depicted the cigarette display behind the cashier counter. (S2. 167) The photograph also showed a cigarette pack of Marlboro light cigarettes with a hole from the projectile that had hit it. (S2. 167-68) Dellavalle stated that Dashrath Patel had $23 in cash in his pockets and some

cards and papers. (S2. 178) Pravinkumar Patel had a wallet with $42 and some papers and cards. (S2. 178) Dellavalle testified that he was assisting Paula Maney, CST, at the Headley crime scene. (S2. 181) He was present when Maney collected a projectile near the Headley Insurance Agency and identified a photograph of the subject projectile. (S2. 184-86) He also identified a picture that showed a bullet hole inside of the Headley where another projectile was recovered. (S2. 186-87)

On cross, Dellavalle explained that the bullet went through the window, then went through the Chapstick dispenser striking the cigarette pack and ended up on the pizza counter. (S2. 195-96)

Detective Angela Macke, was involved in the investigation of the subject crimes. (S2. 204) During the course of the investigation, she became aware of the Headley incident that occurred in Lake Wales on December 13, 2007. Id. In May 2008, she placed property evidence tags on the wheels and tires that were removed from a Nissan Altima that was seized on December 13, 2007, in relation to the Headley crimes. (S2. 205-06)

Linda Hill, CST, testified that she attended autopsies of Pravinkumar and Dashrath Patel. (S2. 211-12) She recovered two projectiles form the heads of the victims. (S2. 213-19)

Stacy Greatens, CST, identified photographs that showed tire impressions she found at the crime scene and an unsmoked Newport cigarette. (S2. 229-30)

Most of the tire impressions were parallel in relation to Highway 557 and some were perpendicular (at a 90-degree angle). (S2. 231) She obtained casts of tire impressions. (S2. 233) She stated that, on December 14, 2007, she escorted a 2005 Nissan Altima, that was found at the Lagoon Nightclub, to the police warehouse. (S2. 247) The vehicle had all of its tires and a wheel when it was found that day. (S2. 248) During the search of the vehicle she found a black nylon jacket, black gloves, a Newport cigarette box, a vehicle registration on Victoria Campos' name and Defendant's FL driver's license. (S2. 267-72)

Glen Hayes, a computer forensic technician, testified that she retrieved the video from the video surveillance system inside the BP station. (S2. 307) The video was placed on the hard drive of the computer and there were 13 cameras in use that recorder images onto the hard drive. (S2. 308-11) The outside cameras were recording according to the motion sensing. Id. She also captured some still images. (S2. 311) She captured the image of the person that came with a gun and shot through the glass but was not able to see the face of that person from the video. (S2. 311-12) She created a video from the cameras that had events, around 9:00 p.m., on the day of the incident. (S2. 317) The video showed an individual approaching the store, then going off in the southeast direction, then coming back and then going northeast from the store. (S2. 317-18)

Jonathan Adkinson testified that he was familiar with the area of BP station on 557 because he used to drive by that location six days a week. (S3. 354) He was usually passing by that area between 7:30-11:00 p.m. Id. On December 7, 2007 he was traveling down I-4 that took him right in front of the BP station. (S3. 356) That evening he noticed a dark blue Nissan that was not parked in the parking lot of the BP station but was parked faced out, towards the road. (S3. 355-59) The vehicle had a billet grill on the front of the car. Id. Adkinson identified a photograph of the vehicle that looked similar to the vehicle he observed. (S3. 359) On cross, Adkinson testified that he passed the BP between 7:00 and 10:00 p.m. (S3. 362)

William Finley testified that back in December 2007, around approximately 8:40 p.m., he was passing by the BP station on 557 regularly. (S3. 381-82) On the night of the incident, Finley observed a vehicle parked off the road, right by the cattle gate. (S3. 385) He noticed the vehicle because he thought it was odd for that type of vehicle to be parked at that place because people who went hog hunting had different type of vehicles. (S3. 385-86) It was a dark colored, foreign made car. Id. It had very silver headlights and the wrap around plastic cover. (S3. 386)

Jessie Brown testified that on December 7 2007, she was passing by the BP station between 7:45-8:15 p.m. (S3. 407) That evening, when she was getting off of I-4, she noticed a car parked in the bushes which she though was unusual. (S3.

408-09) It was a black, four door, compact car that looked like it was tinted. (S3. 409-10) On cross, Brown explained that was regularly passing the BP station between 7:45-8:15 p.m. (S3. 413)

Stephanie Chism testified that on December 7, 2007, she was driving past the BP station on 557 around 9:00 p.m. (S3. 428) She observed a car backed up to the gate which she though was very unusual because she had never seen cars backed up on that place before. (S3. 430) The car was dark, like a sport sedan, it could have been Nissan Altima or Toyota Camry and had a silver grill. (S3. 431-32)

Mary Knight testified that on December 13, 2007, she worked for the Enterprise in Haines City. (S3. 440) She identified a video from the surveillance camera that was captured on that date. (S3. 440-41) The video was played before the trial judge. Id. Knight identified Defendant and his sister as persons who were in the store. (S3. 442-43) She testified that engaged in conversation with them for 15-20 minutes. (S3. 444) She identified Defendant in the courtroom as the person she was talking with that day. (S3. 446)

Detective Diane Kent testified that on December 13, 2007 she went with Detective Campbell to Defendant's residence at 851 Summer Glen in Winter Haven for the search purposes. (S3. 454-55) At the premises she found a pair of

athletic pants with a zipper on each side. (S3. 457) She also went to the Lagoon Nightclub where Defendant's vehicle was located. (S3. 458)

Fran Murray testified that on the day of the Headley incident, she saw Yvonne Bustamante, coming from behind the building. (S3. 467) She also saw a black man behind Bustamante who was headed towards Phillips Street. (S3. 467-68) He was approximately 6'4", weighted between 240-250 pounds, he looked like he was in his late 20s, early 30s. (S3. 468-69) As the man was walking, Murray saw him put something that could have been a gun into his reddish/orange soft cooler. (S3. 469, 472) Murray testified that she heard three pops, like gunshots, as she was coming behind the antique shop right before she saw Bustamante and the man. (S3. 471-72) Sometime later, she stayed with Bustamante in front of the Headley. (S3. 473) Murray saw Bustamante had a gunshot wound on her left wrist. Id. That afternoon she observed a mid sized black car parked in the general area across Phillips Street. (S3. 474-76) She noticed the car because it was in that area where cars normally were not parked. Id. The last time she saw the black guy was when he was crossing Stewart Street and did not see where he went from there. (S3. 475-76) On cross, Murray said that Bustamante told her that a black man did it and that he should be on camera. (S3. 498-99)

Dr. Stephen Nelson testified that he reviewed the records from the autopsies of Pravinkumar Patel and Dashrath Patel that were performed by Dr. Jinn. (S4.

522) Dr. Nelson identified a picture that showed an entrance gunshot wound to the head of Pravinkumar Patel. (S4. 524) Dr. Nelson explained that there was no exit wound and that the projectile was recovered from inside of the brain (S4. 524-25) The cause of death was a gunshot wound to the head. Id.

Dr. Nelson identified a picture that showed an entrance gunshot wound to the left side of the head of Dashrath Patel (S4. 526) As there was no exit wound, the projectile was recovered from the inside of the head. (S4. 526-27) The cause of death was a gunshot wound to the head. (S4. 527) The projectiles were turned over to CSTs, Lynda Hill and Tracy Stone. (S4. 528)

Prakashkumar Patel testified that in December 2007, he was working at the BP station on Highway 557, in Lake Alfred, as a store clerk. (S4. 539) He was closing the store every night around 9:00 p.m. (S4. 540) Pravinkumar and Dashrath were working with him on the evening of the incident. (S4. 541) Then the video from the surveillance camera was played. (S4. 544) Patel described the perpetrator as a black man, 6 feet tall and heavy. (S4. 551-52) Prakashkumar did not see the man's face but did see that he had a mask. (S4. 557)

Anndee Kendrick, a CST, testified that on December 17, 2007, she went to the crime scene at the Headley Insurance Agency to perform a follow-up work. (S4. 572) She recovered pieces of projectile and jacketing from the wall. (S4. 574-75)

Kimberly Hancock, a CSI, testified that on December 16, 2007, she recovered a fragment of the projectile from Bustamante's wrist. (S4. 583)

Babubhai Patel testified that he was the owner of the BP store back in 2007. (S4. 598-99) He had cameras that covered the inside and outside off the store that stayed on 24 hours and were motion activated. (S4. 600) The camera would stop if someone would walk away from it. Id.

Mark Gammons, a manager at Wal-Mart, testified that, on December 13, 2007, in the morning hours, he was approached by a tall, black man. (S4. 644-45) The man asked him where the gloves were located. Id. That same day he became aware of the incident at the Headley Insurance Agency. (S4. 647) He recognized from the news that the man he assisted in the store was Defendant. (S4. 648) A couple of days later, the police came to his store to find out if Defendant had purchased ammunition. (S4. 649) Gammons did not have any record about the purchase of ammunition but told the police that Defendant was at the store on the day of the incident. (S4. 652) He had a video from the surveillance camera that covered the time when Defendant was in the store. Id. The portion of the video was played and Gammons identified Defendant from the video as the person he assisted in the store. (S4. 652-62) Gammons identified a receipt that showed Defendant purchased a six can cooler. (S4. 661) He made an in-court identification of Defendant. (S4. 668)

William Wagle, the owner of the Wagle's pawnshop, identified a receipt that showed that on November 30, 2007, he sold a .357 magnum Dan Wesson revolver to Randy Black. (S5. 748-49)

Carlos Ortiz testified that he had seen the Headley shooter, who he identified as Defendant, before the incident, at the gate of the Florida Natural, where he used to work. (S5. 761-62) Sometime after the incident, Ortiz saw Sergeant Black in front of the insurance building and tried to talk to him but Black told him that he would get back to him. (S5. 764-65) The police came to see him four days after the incident. (S5. 765) Ortiz did not watch any news before a police officer came to his house. (S5. 766) When a police officer showed him photographs, he immediately made an identification of Defendant. (S5. 767) Ortiz then made an in-court identification of Defendant (S5. 768) He stated that Defendant was the person who he saw in front of Headley and who he identified in the photo line-up. Id.

On cross, Ortiz testified that he saw Defendant cross Stewart Street as he walked away. (S5. 777) Ortiz observed that a car was parked behind the house in the general area where Defendant was headed. (S5. 802-03) Ortiz stated that the car he saw was a black Nissan and believed that it was a Maxima. Id.

Jessica Lacy testified that on December 13, 2007, she worked as a bank teller at the Mid Florida Credit Union in Winter Haven. (S5. 834-35) Lacy testified that she was familiar with Defendant because he was a regular customer who used

to come to her branch once every two weeks. (S5. 835) On December 13, 2007, around 4:20 p.m., Lacy assisted Defendant in depositing $140 in cash to his account. (S5. 836-39) Lacy identified Defendant in the courtroom as the person she dealt with on the subject date. (S5. 841)

Dawn Henry, the mother of Defendant's child, testified that on December 13, 2007, between 6:30-7:00 a.m., Defendant dropped off their son at Henry's house. (S5. 851)

Victoria Davis, Defendant's ex-wife, testified that on December 7, 2007, Defendant left home between 6:00-7:00 p.m. (S6. 875-76) Davis remembered that Defendant was not being gone a long time, maybe an hour. (S6. 876) Defendant told her he was going to the store and had taken her car. Id. She did not remember when he returned that night. Id. The prosecutor then asked Davis to read a portion of her Grand Jury testimony where she talked about the subject incident. (S6. 876-77) When the prosecutor asked Davis again as to when Defendant returned home, she responded, "Like I said, if I'm sitting here saying I can remember, I can't. But if I'm going off this, and that's what I said, I'm not positive, but anywhere between 9:00 or 9:30." (S6. 877) Davis did not remember if Defendant brought something from the store. Id. When he came back, they left with Defendant's son to the gas station and Wendy's. (S6. 878)

On cross, the defense showed Davis the portion of her statement she gave to Detective Giampovollo where he asked Davis about Defendant leaving the house on the night of the incident. (S6. 881-82) Davis explained that Defendant left the house around 6:00 or 7:00 p.m. (S6. 883) His plan was not to stay long because they made dinner plans. Id. Davis remembered that the latest Defendant would have been back home was 9:30 p.m., but could have been home at 9:00 p.m., as well. (S6. 883)

On redirect, the prosecutor wanted to ask Davis about the statement she gave to Detective Giampovollo. (S6. 897) Davis was given the portion of the statement to refresh her recollection. Id. When the prosecutor then asked Davis if she told the detective that Defendant was gone for a few hours that evening, Davis responded, "I remember it wasn't long, so I don't think I would have said few hours." (S6. 898) When the prosecutor asked Davis if she could remember how long Defendant was gone that night, Davis responded that, "it wasn't too long, that it had to be somewhere around an hour, maybe a little more, or a little less, can't exactly tell you. I just know it wasn't that long because he knew I was sick." (S6. 898) Then, the prosecutor wanted to read to Davis a portion of her Grand Jury testimony concerning her statement as to Defendant's whereabouts on the night of the incident. (S6. 899) Defendant objected on grounds that Davis should have been allowed to see her statement so that she could refresh her memory because she

stated that she could not remember what she said, as opposed to reading it as an impeachment. Id. The State responded that it was a proper impeachment because it was impeaching her statement, "He was only gone a short time," which was an inconsistent statement (S6. 900-01) The trial court overruled the objection on the basis that it was a prior inconsistent statement. Id.

The prosecutor then read Davis the portion of her Grand Jury statement where she said that Defendant left home between 6:00 and 7:00 p.m. (S6. 901) Defendant objected because Davis already said that in her testimony. Id. The trial court overruled the objection on the ground that the statement was read only as a predicate. (S6. 902) Davis stated that she did not dispute making the statement. Id. Then, the prosecutor read the portion of Davis' statement where she said that Defendant returned home between 9:00 and 9:30 p.m. (S6. 903) Davis did not dispute that was the statement she had made. Id.

James Kwong, a firearms analyst, testified that he received for an examination two jacketed bullets, two bullet jacket fragments, two lead fragments and one lead core that were associated with the murders of Pravinkumar Patel and Dashrath Patel. (S5. 910-11) Kwong determined that these bullets were .38 caliber class bullets. (S5. 921) The bullets were consistent with .38 or .357 magnum caliber bullets. (S6. 921-22) They were fired from the same gun. Id. At least 21 manufacturers could have produced the gun that fired those bullets. (S6. 923)

Kwong was also submitted for examination one jacketed bullet that he made a report about on December 20, 2007. (S5. 911) He also received two jacketed bullets, six lead fragments that he referenced to in his January 4, 2008 report. (S6. 912) These three bullets (from the Headley crime scene) were fired from the same gun that fired bullets he examined related to Patel' case. (S6. 924-25) Kwong summarized his testimony by confirming that all bullets he received for examination were fired from the same gun. (S6. 925) Dan Wesson's .38 caliber revolver as well as .357 magnum revolvers had the same rifling profile as subject bullets. (S6. 925-26) It is possible to fire .38 caliber in a .357 caliber firearm but not the other way around. (S6. 926-27)

After completion of Kwong's testimony, the State and the defense stipulated the admission of certified copies of Defendant's two prior felony convictions. (S6. 934-36) The evidence of prior felony convictions was admitted for the limited purpose of proving the charge of the possession of a firearm by a convicted felon. Id.

Jessica Stroud, a manager at Beef'O'Bradey in Lake Wales, identified a surveillance video made on December 13, 2007 that was handed to the police that same evening. (S6. 942-43)

Deputy Mark Trexler testified that on December 13, 2007, he located a black car in the parking lot of the Lagoon Nightclub. (S6. 945-47)

Scott Hadley, the owner of the Headley Insurance Agency, testified that Bustamante cancelled Defendant's Nationwide insurance policy on August 21, 2007. (S6. 952) That same day, Defendant purchased a new, Victoria policy placing a down payment of $315.26. (S6. 954-56) A Victoria policy was cancelled on October 18, 2007. (S6. 956)

Sergeant David Black testified that on December 13, 2007, Carlos Ortiz tried to talk to him but since he was busy coordinating the crime scene he did not talk to Ortiz until December 17th. (S6. 964-67)

Officer Lynette Townsel testified that she met with Greisman on December 14, 2007. (S6. 974) She showed Greisman a photopack and he immediately pointed to one of the photographs. (S6. 974) Townsell also met with Ortiz on December 17, 2007. (S6. 980) She showed Ortiz a photopack and he immediately pointed to Defendant's photograph. (S6. 981) On cross, Townsell testified that Greisman's photopack got lost for a while but was later found in the storage shed at her home. (S6. 987-88)

Lynda Davis, Defendant's mother, testified that on December 9, 2007, Defendant showed her a gun in his garage. (S6. 999-1001) She stated that Defendant showed her a .45 automatic gun and not a .357. (S6. 1002) Defendant told her that he and Randy Black had a gun but did not remember if Defendant said that Black sold him a gun. (S6. 1003) Davis advised Defendant to get rid of the

gun because he was on probation and that possession of that gun could have caused him to violate his probation. (S6. 1004)

Jacqueline Hare testified that she worked at the Headley Insurance since 2006 and took a leave of absence in 2007. (S6. 1012) Defendant as a customer and Bustamante usually dealt with him. (S6. 1014) Bustamante cancelled Defendant's policy on August 21, 2007. (S6. 1015-16)

Detective Ivan Navarro testified that he was a lead detective on the BP murders. (S6. 1028) Technicians processed the door handle on the store for possible latent prints but no latents of value were recovered. (S6. 1030-31) Latent prints collected from around the door did not match Defendant. (S6. 1032) A DNA found on a Newport cigarette did not match Defendant. (S6. 1034) During the investigation, Navarro drove three routes from the BP station to Defendant's residence and determined that it was 22-23 minutes drive time between these two points. (S7. 1041-45)

Teresa Stubbs, a tire examiner, testified that she received photographs of tire impressions and markers as well as four tires from Defendant's Nissan Altima for the purposes of the examination. (S7. 1060-62) Stubbs determined that the impressions from the crime scene corresponded in design, physical size and noise treatment to any of the four tires she was provided and that any of the subject tires could have made the impressions. (S7. 1065-72) The tires were fairly new and

manufactured by Nankang. (S7. 1073-75) The impressions shared similar tread design features with the four tires. (S7. 1071-72) She was not able to determine physical size or noise treatment because of the condition of the impressions since there was not enough detail in the impressions for more conclusive determination which could be explained by the fact that impressions were made in the sand. (S7. 1072-74)

Sergeant Ivan Navarro testified that crime technicians photographed shoe impressions from the BP crime scene (S7. 1098) Navarro knew that shoes were seized from Defendant's residence. Id. He did not ask that impressions be compared with Defendant's shoes because they did not appear to resemble each other. (S7. 1099) The State rested its case. (S7. 1106)

Defendant moved for a Judgment of Acquittal. (S7. 1113) Defendant argued that a reasonable hypothesis of innocence applied to this case implies that a different person than Defendant who committed the BP crimes could have gotten rid of the gun and that Defendant came into possession of the gun after the actual BP perpetrator got rid of it. (S7. 1120-21) Moreover, there was no evidence that the gun Defendant bought from Black was in fact the gun used at the BP and Headley crimes. (S7. 1136) As to the attempted robbery charge, Defendant argued that the BP perpetrator had no intent to commit the robbery, that the crime was directed at the store employees and that there was no evidence as to the motive for

this crime. (S7. 1121-24) Defendant argued that the fact that the perpetrator fired at the store clerk indicated that he wanted to injure the clerk and not commit the robbery. (S7. 1137-40)

The State pointed out that the evidence was sufficient to support the attempted armed robbery charge. The evidence presented showed that Defendant intended to take money from the register and that after having been unable to gain entry, he noticed two victims outside and he killed them as they could have identified him. (S7. 1125-28) The State further argued that the evidence connected Defendant to the BP crimes, through the witnesses from both the BP and Headley crime scenes who gave a description of Defendant and his car, Randy Black's testimony that he sold .357 gun to Defendant on December 7, and the ballistic evidence that connected these two crimes. (S7. 1129-35)

The trial court denied a motion for the judgment of acquittal on all counts. (S7. 1140-41) As to the attempted robbery count, the trial court stated that there was a reasonable inference from the evidence that the perpetrator had intent to commit a robbery because he arrived to the store, dressed in black, with a mask on and armed. Id.

Defendant's witness, Pamela Grooms, a staffing specialist at Spartan Service staffing company, testified that based on the company records, Ortiz (who worked as a forklift operator) did not work for Florida Natural in 2007 but did work in

2006. (S7. 1156-59) At Florida Natural, gates used by temporary employees were not utilized by permanent employees and these gates were far away from each other. (S7. 1161-65) On cross, Grooms testified that in 2006 and 2007 there were other staffing agencies that provided temporary workers for Florida Natural. (S7. 1170) Ortiz worked not just during the season. (S7. 1172) On weekends both temporary and permanent workers used the same gate and during 2006, Ortiz worked weekends as well. (S7. 1175-76)

Linda Valentine, an operations manager at Spartan Staffing, testified that record indicated that Ortiz did not work through their company in 2007. (S7. 1184)

Joseph Swanson, a human resources manager at Florida Natural, testified that Defendant worked for Florida Natural as a permanent employee, from June 7, 1999 to October 21, 2005, and from November 14, 2005 to September 7, 2007. (S7. 1192) There was a specific gate that was used for temporary employees. (S7. 1196) On cross, Swanson testified that besides Spartan there were other agencies that provided workers for Florida Natural. (S7. 1201) During the weekends both temporary and permanent employees would have used the same gate. (S7. 1203-04) During the break, employees were allowed to move around the plant and were not restricted on their work area. (S7. 1207-08) A forklift operator could have been assigned to work anywhere within the company. (S7. 1208-09)

Leon Marion testified that he dated Defendant's mother back in the 80's and that he knew Defendant personally. (S7. 1220) On December 13, 2007, around 1:00 p.m., he saw Defendant at Lowe's. (S8. 1222-25)

Winford Melvin testified that on December 12, 2007, Defendant spent the whole day at Melvin's house. (S8. 1229) Defendant gave Melvin a shave and did not want to take money for the service. (S8. 1230)

India Decosey, Defendants' sister, testified that in December 2007, she talked to Defendant about providing him financial help. (S8. 1236-37) She previously watched the Wal-Mart video and stated that the black male on that video was not Defendant. (S8. 1238-39)

Noniece Decosey, Defendant's sister, testified that she watched the Wal-Mart video in July 2010, and stated that the black male on that video was not Defendant. (S8. 1243)

Richard Smith analyzed the part of the Wal-Mart video where a black man's arm was extended over the counter. (S8. 1303-04) He concluded that he would have expected to see a contrast on the man's arm indicating a tattoo if there was one. (S8. 1310)

After the completion of Smith's testimony, a redacted copy of Defendant's testimony from the Headley Insurance trial was admitted into evidence. (S8. 1337-41) At that trial, Defendant testified that in early December of 2007, he purchased

a gun from Randy Black. (33. 5669) Shortly after the purchase, Defendant showed the gun to his mother. Id. Defendant's mother advised him to get rid of the gun because he was on probation and was not supposed to have it. (33. 5670) Defendant admitted that he looked at his probation papers and determined that according to the probation conditions, he was not allowed to own a weapon. (33. 5670) Thereafter, he sold the gun for $200 to a person named "Red." (33. 5670-72)

Sylvia Long testified that in 2007, she had her car insurance through Headley and she would make payments in person. (S8. 1345) Around December 13, 2007, between 9:00-11:00 a.m., she went to the Headley Insurance to make a payment. (S8. 1346-49) Long saw Bustamante dealing with an angry black man who was raising his voice on her while Bustamante was trying to calm him down. (S8. 1349-51) The man was around six feet tall, had a long sleeved shirt, a khaki green type of pants, and had an inch long hair. (S8. 1352-54) On cross, Long testified that the first time she spoke to the police in September of 2010. (S8. 1355) Long could not remember the exact day of December 2007 when she went to Headley to make a payment. (S8. 1362)

Dr. John Brigham, a social psychologist, testified that studies show that high levels of stress impair the accuracy of eyewitness identification. (S8. 1379-82) The studies showed that when a weapon was involved into an eyewitness identification, a person's attention was focused on the weapon rather than on the face of the

person holding that weapon. (S8. 1383) This resulted in people being less able to recognize the perpetrator because they were also under stress. Id. The studies also showed that people were generally better in identifying people of their own race. (S8. 1384) An eyewitness confidence did not always correlate to the accuracy of the identification. (S8. 1385-86) The studies also showed that the rate for a memory loss for an event was the greatest right after the event. (S8. 1387) The time lapse between the observation and identification also affected the accuracy because of forgetting and other external information that the person was exposed to. (S8. 1388-89)

On cross, Brigham testified that most of his experiments were conducted in a college setting with students as subjects. (42. 1324-26) The only experiments he performed outside the college setting were the ones involving bank tellers and convenience store clerks. (42. 1316-23) Brigham performed an experiment concerning the weapon focus. (S9. 1406-09) In this experiment, Brigham showed to his students slides of pictures of 24 different people where half of the people held a weapon and the other half held a food item. (S9. 1406-09) There was no picture of someone pointing a gun at somebody. (42. 1327) The stress was produced by applying the noise while the students were viewing the photos. (42. 1328) He used the threat of giving an electrical shock for wrong answers in order to raise the stress level. (42. 1326) Students were asked in about 15 minutes from

the showing, to identify a particular person they saw in the slides. (42. 1328-30) Dr. Brigham admitted that there could have been some people who would get more focused and had a better memory when faced with a stressful situation. (42. 1340) He was aware that archival studies came to different conclusions from the college setting experiments related to the accuracy of identification when a person was under high stress. (42. 1343-44) The conclusions he testified about were based on his own research and other research that he was aware of. (42. 1345)

Dr. William Gaut, a former law enforcement officer, testified that the photopack showed to Greisman and Ortiz, violated the standards because it contained book-in numbers that could have potentially let a witness to pick up a 2007 guy simply because it was year 2007. (S9. 1451-52) The other thing was that the photopack implied the age difference between Defendant and other individuals where Defendant (who was 28 at the time) was put with other men who were 17-19 years old. (S9. 1452-53) Also, four individuals had a facial hair and only two individuals had grey shirts while others had white. (S9. 1454-55) Defendant appeared in the photopack with no facial hair and in grey shirt. Id. The photopack was not proper when you had a witness who indicated that the individual they saw appeared to be about 30 years old, had no facial hair and was wearing a grey shirt. (S9. 1453-56)

Defendant testified that on December 7, 2007, he went to pick up his son around 5:00 p.m., and had returned home around 6:10 p.m. (S9. 1476-77) Around 7:15 p.m., he left the house by himself and went to Eagle Ridge Mall for shopping. (S9. 1478) He stayed there until approximately 8:30 p.m. Id. He bought four shirts for his son in Dillard's for which he paid in cash. Id. He came back home close to 9:00 p.m. Id. He was wearing grey shorts and white T-shirt. Id. 25 minutes after he came back, he went with his wife and son to Wendy's. (S9. 1481) They came back home sometime after 10:00 p.m. (S9. 1482)

On cross, Defendant testified that after he shopped at the mall, he left the bag with clothes and receipts in his Nissan Altima. (S9. 1486) He took it out of the car sometime later. Id. After he was arrested, he did not make an effort to contact Dillard's to document his presence there. (S9. 1486-87) He stated that shirts and baby clothes could corroborate his statement that he was in Dillard's but that Dawn Henry and Victoria Davis should have been asked what happened to the clothes. (S9. 1488-89) He did not see anyone familiar at the mall that night. (S9. 1489) Defendant stated that in the evening of the incident, his gun was placed in a toolbox, in his garage, and that he told nobody that it was there. (S9. 1491-93)

The defense rested. (S9. 1503) Defendant renewed a motion for judgment of acquittal based on the same arguments he raised before. (S9. 1503-04) The trial court denied the motion on the same grounds as it announced before. Id.

After deliberating, the trial court found Defendant guilty as charged. (S10. 1627-28) As to Counts III and IV, the trial court specifically found that Defendant possessed and discharged a firearm. Id.

Before the penalty phase started, Defendant informed the trial court that he decided to waive the right to a jury trial at penalty phase portion of the trial. (S10. 1632) After conducting the colloquy, the trial court found that Defendant freely and voluntarily made his decision. (S10. 1633-34)

Dr. Stephen Nelson testified that Yvonne Bustamante died of thermal burns which she sustained over 80-90% of her body. (S10. 1648) Dr. Nelson identified photographs that showed burns on Bustamante's legs, face, chest, abdomen, hand, back, buttocks. (S10. 1649-55) He identified a photograph of the bullet fragments that was recovered from her left arm. (S10. 1654)

Dr. Nelson testified that Juanita Luciano also died of complications due to thermal burns. (S10. 1654) She had 90% of her body surface burned. Id. He identified photographs that showed burns on Luciano's face, left chest, back, buttocks, legs, lower extremities. (S10. 1656-58) Michael Bustamante died due to extreme prematurity. (S10. 1659)

Lt. Joe Elrod testified that when he first approached Bustamante, paramedics had already been assisting her. (S10. 1675-76) He started asking her questions about the incident because he knew she was going to die. (S10. 1676-77)

Bustamante told Lt. Elrod that Leon Davis did this to her. Id. She also said that he was a client of the insurance company and that she also knew him personally. Id. Bustamante also said that Defendant tried to rob her and her colleague and when they told him they had no money, Defendant threw gas on them and set them on fire. (S10. 1677) Bustamante said that Defendant bound them before setting them on fire. (S10. 1677)

At the Spencer hearing, the parties made arguments concerning their sentencing memos. (34. 5914-37) Defendant then addressed the trial court and stated that he had never traveled State road 557 in Lake Alfred, that Randy Black gave him only two bullets when he purchased a gun from him and that the gun was not loaded, that one of those bullets was fired at Black's residence that day, that he placed the gun at his home until he sold it three days later, that he was never acquainted with either Bustamante or Luciano and that the last time he was at the Headley Insurance was in October 2007. (34. 5937-41)

The trial court rendered a sentencing order finding Defendant guilty as charged and made a detailed explanation of its findings of guilt. (34. 5960-77) The trial court found the following aggravators: the capital felony was committed by a person previously convicted of a felony and under the sentence of imprisonment or placed on community control or felony probation-moderate weight; Defendant was previously convicted of another capital felony or of a felony involving the use of

threat of violence to the person-very great weight and the capital felony was committed while Defendant was engaged in the commission of, or an attempt to commit, or flight after committing, or attempting to commit a robbery-great weight. (34. 5969-70) The trial court found that the avoid arrest aggravator has not been proven. (34. 5970-71) The trial court found the following statutory mitigator: the capital felony was committed while Defendant was under the influence of extreme mental or emotional disturbance-little weight. (34. 5972) The trial court also found that the statutory mitigator, Defendant has no significant history of prior criminal activity, has not been proven. Id. The following nonstatutory mitigators were found: victim of bullying throughout childhood-moderate weight; victim of sexual assault as a child-moderate weight; victim of child abuse, both physical and emotional, by a caretaker-moderate weight; overall family dynamics-little weight; military service in the US Marine Corps-little weight; history of being suicidal both as a child and as an adult-slight weight; the diagnosed personality disorder-slight weight; history of depression-slight weight; stressors at time of the incident-little weight; good person in general-little weight; good worker-little weight; good son, good sibling, good husband-moderate weight; good father to child with Down's syndrome-moderate weight; good behavior during trial as well as other court proceedings-slight weight and good behavior while in jail and in prison-little weight. (34. 5972076) The trial court weighted the aggravating and mitigating

circumstances in this case and found that the aggravating circumstances outweighed the mitigating circumstances. Therefore, the trial court sentenced Defendant to death for the first degree murders of Pravinkumar Patel (Count I) and Dashrath Patel (Count II), life sentence for the attempted first-degree murder of Prakashkumar Patel (Count III), 20 years of imprisonment including a 20 year minimum mandatory sentence due to a discharge of a firearm for the attempted armed robbery (Count IV) and 15 years imprisonment including a three year minimum mandatory sentence for the possession of a firearm by a convicted felon (Count V). (34. 5976-77)

This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in admitting the inextricably intertwined collateral crime evidence from Defendant's Headley Insurance case. The evidence was relevant to show that the same gun was used at both crime scenes, that Defendant was the Headley shooter and that Defendants' car was observed at both scenes.

The issue regarding the alleged trial court's reliance on the facts not in evidence to find Defendant guilty is without merit. The trial court properly admitted and considered evidence of the prior convictions in the Headley Insurance case in its sentencing order. The facts from the Headley Insurance case were

properly considered by the trial court in support of the prior violent felony aggravator. The trial court based its verdict on independent findings of guilt.

The trial court did not abuse its discretion in allowing the State to impeach the testimony of Victoria Davis with the prior inconsistent testimony she gave before a Grand Jury and in admitting such statement as substantive evidence. Besides being inconsistent, Davis's prior statement related to a material issue of fact-Defendants' whereabouts on the evening of the incident.

The trial court's comments on the lack of evidence to corroborate Defendant's alibi defense was proper. Defendant voluntarily assumed a burden of proof by asserting an alibi defense.

The issue regarding the comment the trial court made in the sentencing order concerning Defendant's prior felony convictions is unpreserved and meritless. The court did not use this evidence beyond the scope discussed by the parties when it was admitted. The comment was even more proper as it was admitted through multiple sources of evidence.

The motion for judgment of acquittal was properly denied.

The evidence was sufficient to support the attempted armed robbery conviction. The aggravating circumstance of during the course of the attempted robbery was properly found.

The trial court properly admitted Bustamante's statements as a dying

declaration.

The trial court properly denied Defendants' motions to exclude identifications of Defendant by Greisman and Ortiz.

The trial court did not abuse its discretion in weighing two nonstatutory mitigators and in overall weighing the aggravating and mitigating factors.

Defendant's death sentences are proportionate.

The Ring claim was properly denied.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF THE INEXTRICABLY INTERTWINED COLLATERAL CRIMES.

Defendant asserts that the trial court erred in admitting the collateral crime evidence from the Headley crime scene, as inextricably intertwined with the subject crimes. Defendant further asserts that the admission of such evidence prejudiced Defendant as it was admitted for an improper purpose-to show Defendant's bad character and propensity to commit crimes. Finally, Defendant asserts that the State should not be permitted to argue admissibility of this evidence under the Williams rule theory. However, the trial court did not abuse its discretion

in admitting the collateral crimes evidence.[1]

Here, after conducting an extensive hearing, the trial court found that the identification of Defendant at the Headley crime scene, as the person carrying and discharging a firearm, was relevant to demonstrate that Defendant was the perpetrator here, and such evidence was inextricably intertwined with the case at hand. (27/4603-05) The trial court also set limitations on witness' testimony such that they were allowed to testify as to their identification of Defendant as the man with a gun at the Headley scene and the man who shot Bustamante, identification of Defendant at Wal-Mart as the person who purchased an orange six pack cooler, testimony that Defendant was a customer of Headley, testimony related to observations of a black Nissan and testimony concerning ballistic evidence. Id. The trial court did not abuse its discretion in admitting the evidence from the Headley case.

This Court has repeatedly acknowledged that "all evidence that points to a defendant's commission of a crime is prejudicial. The true test is relevancy." Ashley v. State, 265 So. 2d 685, 694 (Fla. 1972); Smith v. State, 866 So. 2d 51, 61

[1]A trial judge's ruling on the admissibility of evidence will not be disturbed absent a clear abuse of that discretion. Valle v. State, 70 So. 3d 530, 546 (Fla. 2011). The discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that the discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 Sp. 2d 1050, 1053 n.2 (Fla. 2000).

(Fla. 2004). Relevant evidence "is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." §90.403, Fla. Stat. (2010). Therefore, collateral crime evidence, such as bad acts not included in the charged offenses, is admissible when relevant to prove a material fact in issue, but is inadmissible when the evidence is relevant solely to prove bad character or propensity. See §90.404(2)(a), Fla. Stat. (2010). This court has repeatedly described the related concepts of "similar fact" evidence of collateral crime evidence admissible pursuant to Williams v. State, 110 So. 2d 654 (Fla. 1959) and §90.404, Fla. Stat. (2010), and evidence of other crimes which may be "dissimilar" but nonetheless relevant to the prosecution of the offense charged, pursuant to §90.402, Fla. Stat. (2010). See e.g. Bryan v. State, 533 So. 2d 744 (Fla. 1988); Sexton v. State, 697 So. 2d 833, 837 (Fla. 1997); Zack v. State, 753 So. 2d 9, 16-17 (Fla. 2000).

This Court has also held that occasionally when proving the elements of a crime, it becomes necessary to admit evidence of other bad conduct to adequately describe the offense or connect the elements of the offense because the charged offense and the other conduct are significantly linked in time and circumstances. See Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994); Henry v. State, 574 So. 2d 66, 70-71 (Fla. 1991)(the evidence of an inseparable crime should be admitted

when it is inextricably intertwined with the underlying crime and where it is impossible to give a complete or intelligent account of the crime charged without reference to the other crime). Evidence is inextricably intertwined if it is necessary to: 1) establish the entire context out of which the charged crimes arose; 2) provide an intelligent account of the crimes charged; or 3) adequately describe the events leading up to the crimes. State v. Rambaran, 975 So. 2d 519 (Fla. 3d DCA 2008). Where evidence of an uncharged crime is intertwined inextricably with the charged offense, evidence of the collateral crime is admissible independent of the provisions of the rule governing character evidence where it is impossible to give a complete or intelligent account of the crime charged without referring to the other crime. Morrow v. State, 931 So. 2d 1021 (Fla. 3d DCA 2006).

Here, the trial court did not abuse its discretion in admitting the inextricably intertwined collateral crime evidence from Defendant's Headley Insurance case as relevant because it served to prove that: 1) the same gun was used in the Headley crimes and the subject crimes, 2) Defendant was the person who possessed and discharged that gun on December 13, 2007 (the date when the Headley crimes occurred), 3) the description of the car from the Headley crime scene matched the description of the car at the BP murder scene, and 4) projectiles recovered from the Headley scene matched projectiles from the BP murder scene.

No serious contention can be made that the evidence of the Headley crimes

from December 13, 2007, was not relevant to the prosecution of this double homicide. Defendant did not plead guilty or confess to the police and thus did not relieve the State of its burden to prove his guilt beyond a reasonable doubt. Consequently, it was important to establish Defendant's possession of the murder weapon and his identity as the murderer. This Court has routinely allowed evidence linking a defendant to a weapon even where such evidence implicates a collateral crime. See Remeta v. State, 522 So. 2d 825, 827 (Fla. 1988) (upholding admission of collateral crimes evidence because the same gun was used in both crimes and established defendant's possession of murder weapon); Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988) ("The facts that Amoros was seen in possession of a gun on a prior occasion and that the bullet fired from that gun on the previous occasion identified it as the same weapon used to kill the victim in the instant offense rendered the evidence relevant whether the circumstances constituted a crime or not."); Hall v. State, 403 So.2d 1321, 1324 (Fla. 1981)(finding collateral crime evidence consisting of the murder of a police officer was admissible to prove identity where the murder weapon was found under the subsequently murdered police officer's body and to "show the general context in which the criminal action occurred.").

The State's theory was that Defendant was the perpetrator at both crime scenes as he possessed and discharged the same gun which he previously obtained

from Randy Black. Establishing a connection of Defendant to the murder weapon significantly aided in the State's satisfying its burden. Testimony about Defendant possessing and discharging a gun at the Headley Insurance crime scene was an important first step. As previously stated, we know that Defendant bought a Dan Wesson .357 gun from Randy Black on the afternoon of the BP crimes and that he was in the continuous possession of this gun on December 9, 2007, as Randy Black and Linda Davis testified to these circumstances. More importantly, Defendant confessed that on the night of the incident, he was in the possession of the gun and that he showed it to his mother on December 9.

Moreover, the eyewitness testimony of Brandon Greisman and Carlos Ortiz identifying Defendant as the person who shot Greisman, as well as that of Evelyn Anderson, Lt. Elrod, Ernest Froehlich and John Johnson, who were present when Yvonne Bustamante gave a dying declaration, identifying Defendant as the person who shot her, was relevant to show that Defendant was in fact the shooter at the Headley crime scene. This evidence was also corroborated by the testimony of Mark Gammons and Jennifer Debarros who identified a tall black man depicted in the Wal-Mart video as Defendant. This video also depicted and receipts corroborated that Defendant purchased a six can orange cooler on the morning of the Headley incident which also corroborated testimony that the perpetrator was seen at the scene with this same cooler. In that regard, although Fran Murray could

not identify Defendant as the person she saw at the Headley crime scene, she stated that a tall, black man she observed, carried an orange lunch pail in which he put something like a gun.

Moreover, the evidence that the same gun was used in both crime scenes was established by the testimony of James Kwong who stated that three projectiles fired from a gun used at the Hedley scene are identical to the three projectiles recovered from the BP scene and were fired from the same .38/.357 caliber class, which included the Dan Wesson .357 gun Defendant purchased from Black.

Furthermore, testimony from Carlos Ortiz that he saw a black Nissan at the Headley Insurance crime scene was relevant to connect the testimony from witnesses in this case who observed a dark, four-door Nissan car with "billet" grill around the time when BP murders were committed which again was relevant to demonstrate that Defendant was the perpetrator at both crime scenes.

Finally, Defendant asserts that because there was a six day break between the crimes, somebody could have committed the BP crimes and got rid of the gun and the fact that someone used a gun on a particular day does not prove the identity of a person who used the same gun a week before. However, the evidence belies this assertion. As previously mentioned, Defendant admitted that he was in the possession of the gun he bought from Black on the night of the incident and Defendant's mother confirmed that Defendant was in the possession of that gun

two days after the BP incident. In addition, the fact that ballistic evidence revealed that the bullets from both scenes were fired from the same gun and that Defendant was identified as the Headley shooter, leaves no doubt that Defendant was the BP killer and that Defendant's theory was contradicted by the evidence. Given these circumstances, the events from the Headley crime scene were inextricably intertwined with the subject crimes and were properly admitted.

Defendant also asserts that the prejudicial impact of the evidence from the Headley case outweighed the probative value. However, this argument is without merit. First of all, Defendant acknowledged that the trial court limited admission of some facts that it found to be overly prejudicial. (Initial brief, p. 56) Despite this fact, Defendant argues that the trial court used the evidence to impermissibly stack inferences to find Defendant was the perpetrator in this case. As Defendant admitted, the trial court had limited the admission of the Headley evidence so that it allowed the introduction of such evidence that pertained only to the identity of Defendant as the Headley shooter and ballistic evidence. To excise the Headley evidence from the trial would have eliminated the essential ballistic evidence that connected Defendant and the gun used in both crimes. This link was necessary because the firearms expert was unable to conclusively state that the bullets recovered from both crime scenes were fired from the same gun. This ballistic evidence was highly probative to linking the gun Defendant bought from Black

with the murders. Furthermore, the eyewitness testimony identifying Defendant as the Headley shooter was relevant to explain that he was in possession of the gun six day after the BP crimes. Thus, the Headley evidence was integral threads to weaving a complete story of the subject murders. The trial court did not abuse its discretion in allowing the admission of this evidence.

Under like circumstances, this Court found that the evidence of other crimes or acts was admissible because it was relevant and interwoven part of the conduct that was at issue. Wright v. State, 19 So. 3d 277, 291-93 (Fla. 2009)(holding that the trial court did not abuse its discretion by admitting, as inextricably intertwined collateral crimes evidence that occurred during the three-day time interval, evidence of a burglary where pistol was stolen, a drive-by shooting involving the stolen pistol, a high-speed car chase involving the car of one of the murder victims, a second uncharged carjacking and a foot chance that led to the defendant's arrest and the recovery of the pistol, in a trial of the defendant for two counts of first-degree murder, one count of carjacking with a firearm, two counts of armed kidnapping with a firearm and two counts of robbery with the firearm. Such evidence linked the defendant to one of the murder weapons and explained the defendant's possession of the weapon, provided a geographical nexus for each event, and established the context of a three-day crime spree by the defendant during which the charged offenses and the collateral crimes were committed);

Griffin v. State, 639 So. 2d 966, 969 (Fla. 1994)("Mr. Pasco's testimony was necessary to identify the gun and to show that the gun was stolen from the possession of its rightful owner. Nicholas Tarallo's testimony identified the individual who stole the gun as Griffin, thereby establishing possession. This evidence was essential to show Griffin possessed the murder weapon. Therefore, it is relevant.").

Defendant finally asserts that the State should not have been permitted to argue on appeal that the evidence was admissible under Williams rule theory. However, since the State never intended to rely on this theory, this argument is moot. The trial court's order should be affirmed.

II. THE ISSUE REGARDING THE ALLEGED TRIAL COURT'S RELIANCE ON THE FACTS NOT IN EVIDENCE TO FIND DEFENDANT GUILTY IS WITHOUT MERIT.

Defendant argues that the trial court improperly relied on the facts not presented in the guilt phase of this trial-the fact that Defendant was found guilty in the Headley Insurance case and details concerning how the Headley victims died. Defendant claims that the trial court failed to disregard these facts and base his guilty verdict only on the evidence presented in this case. However, this claim is speculative and must be rejected on appeal.

First of all, it should be noted that, the trial court made cites to the facts at

issue from the Headley Insurance case in its sentencing order and not in a required analysis of guilt. (34. 5960-77) Defendant incorrectly uses the phrase "analysis of guilt," even though here, we are talking about the sentencing order and findings from the penalty phase. At the penalty phase, a certified copy of Defendant's convictions from the Headley trial was admitted into evidence as State's Exhibit no. 4. (44. 1585-86, 33. 5742-72) Therefore, in its sentencing order, the trial court was citing the historical facts which properly included the prior convictions in the Headley Insurance case. As such, this evidence was properly admitted and considered by the trial court in its sentencing order in support of the prior violent felony aggravator. (34. 5969)

It should also be noted that, pre-trial, Defendant asked the trial court to take judicial notice of the whole Headley trial record on the ground that the trial court would need to get familiar with it in order to make rulings on pre-trial motions filed in this case. (25. 4388-89) The State did not object to this request. (25. 4388) The trial court took judicial notice of the entire Headley case record so that "the entire record is subject to utilization by both parties in this case for any issues they may feel are appropriate." (25. 4389-90) As such, the entire Headley case record was made a part of the record in this case. (S12-S111) Defendant now claims that the trial court improperly relied upon the facts from the Headley case and failed to base its verdict only on the evidence presented here which indicated that the trial

court did not independently make findings of guilt.

While noting in the portion of its sentencing order under "facts," that a robbery and two murders occurred in the Headley case, that the victims were bound and set on fire, and in noting in the portion of the order under "analysis of guilt," that Defendant was found guilty for these crimes, the trial court did not state it relied in anyway upon those facts in finding Defendant guilty in this case. (34. 5966-68, 5961, 5965-66) As previously explained, since the evidence of the prior convictions in the Headley case was admitted at penalty phase, it was properly considered by the trial court in its sentencing order. Also, since the trial court took judicial notice of the entire Headley record, it was even more proper to use those facts. Moreover, the above mentioned facts from the Headley case that the trial court noted in its sentencing order were de minimis facts which had no impact whatsoever upon the findings of guilt in this case considering the overwhelming evidence of Defendant's guilt. As such, the sentencing order shows that the trial court made findings of guilt that included the following: evidence that Defendant purchased a gun on the day of the BP incident that was the same caliber class of a firearm that was found at both crime scenes, evidence that the same gun was used at both crime scenes, Defendant's confession that he was in the possession of the gun he bought from Black on the day of the BP incident and two days after the fact, eyewitness testimony and Bustamante's dying declaration that Defendant was

the Headley shooter, physical description by witnesses from both crime scenes that matched Defendant which was also corroborated by the surveillance videos and evidence that showed that Defendant's vehicle was present at the BP crime scene at the time of the incident. (34. 5966-68)

Defendant's reliance on Bridges v. California, 314 U.S. 252 (1941), for the proposition that the court's decision has to be based solely on evidence admitted in the case is misplaced. Bridges dealt with an issue of whether the court's contempt power may be used to punish the media for statements made outside the court room that tend to interfere with the fair and orderly administration of justice in a pending case. The Court reversed the conviction for contempt based on out-of-court comment concerning pending cases. The Supreme Court held that the publications could not be held contemptuous of the court unless they posed a clear and present danger or a serious and imminent threat to the administration of justice. As this case concerned views and comments published in the newspapers regarding cases not finally determined and the constitutional protections of freedom of expression, it has nothing to do with the case at bar. Similarly Petterson v. Colorado, 205 U.S. 454 (1907)(the concern in this case was to prevent interference with the administration of justice by premature out-of-court statement. The Supreme Court held that a publication that has tendency to interfere with an orderly administration of justice in a pending action before the court amounts to a

contempt of court and can be punished as such). Moreover, Defendant's reliance on Dailey v. State, 594 So. 2d 254 (Fla. 1991), is also misplaced. In Dailey, the trial court noted in its sentencing order that it considered evidence from the co-defendant's prior trial. This Court held this was error because evidence from the co-defendant's trial was not presented in guilt phase of the defendant's trial which deprived him of the opportunity to rebut that proof. Unlike in Dailey, here, the evidence that was noted by the trial court was from Defendant's own trial. As such, the concern that Defendant did not have an opportunity to rebut evidence is not present here.

Nonetheless, even if Defendant can establish the trial court improperly utilized facts from the Headley Insurance case, he cannot establish any prejudice based upon this record. In fact, in its analysis, Defendant completely ignores the overall evidence that support the findings of guilt. Thus, any error in this case was clearly harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The evidence of Defendant's guilt was overwhelming. The State presented evidence in the form of ballistic evidence that three projectiles from the Headley murder scene and three projectiles from the instant murder scene were fired from the same gun and were of a .38/.357 caliber class, testimony that Defendant bought a Dan Wesson .357 gun from Randy Black, on the afternoon of December 7, 2007, Defendant's admission that he bought that gun and had it in his possession on the evening of the incident,

testimony of Defendant's mother and his admission that he displayed that gun to his mother on December 9, 2007, eyewitness testimony of people who saw a car parked just north of the BP station around the time when the murders were committed, that matched the description of Defendant's car, an expert testimony that the tire tracks from the crime scene corresponded the tires from Defendant's car, testimony of Prakashkumar Patel who gave a description of the perpetrator that matched Defendant's height and built and that description was also corroborated by the BP surveillance video, eyewitness testimony of Greisman and Ortiz who identified Defendant as the person who shot Greisman in front of the Headley Insurance, and Bustamante's dying declaration in which she identified Defendant as the person who shot her. Under these circumstances, there is no reasonable possibility that the error could have affected the verdict.

In a somewhat analogous situation, this Court found any error in considering extraneous facts in the sentencing order was harmless. In Morton v. State, 789 So. 2d 324, 333-35 (Fla. 2001), the defendant challenged the trial court's order on the ground that the resentencing judge improperly relied upon the original sentencing judge's sentencing order and essentially adopted verbatim the findings to support the aggravating and mitigating factors. In other words, the defendant claimed in adopting the previous sentencing order, the resentencing court utilized facts that were not presented in the resentencing proceedings to support the finding of the

aggravating and mitigating factors. This Court did not reverse, finding that although the court should not have used facts from the first sentencing order, there were material differences which showed that the court utilized its own independent judgment in sentencing the defendant. This Court stated, "we thus reject Morton's argument that the death penalty was unlawfully imposed in this case and that the sentence of death must be reversed because the trial judge adopted a majority of the findings from the original sentencing judge's sentencing order"). Id. at 334. The argument for finding any error harmless is even more compelling than in Morton because here, the trial court properly considered the Headley facts in its sentencing order. Defendant's convictions should be affirmed.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO IMPEACH THE TESTIMONY OF VICTORIA DAVIS WITH THE PRIOR INCONSISTENT TESTIMONY SHE GAVE BEFORE A GRAND JURY AND IN ADMITTING SUCH STATEMENT AS SUBSTANTIVE EVIDENCE.

Defendant asserts that the trial court abused its discretion in allowing the State to impeach Victoria Davis with the prior inconsistent statement she gave before a grand jury and in admitting such statement as substantive evidence concerning Defendant's whereabouts at the time of the BP incident. However, the

trial court did not abuse its discretion in allowing the impeachment of Davis and in admitting her prior inconsistent statement as substantive evidence.[2]

While Defendant asserts that Davis should not have been allowed to be impeached because she made no prior inconsistent statement but instead only stated that she had no recollection, the trial court did not abuse its discretion in rejecting this argument. In order to be inconsistent, a prior statement must either directly contradict or materially differ from the expected testimony at trial. State v. Hoggins, 718 So. 2d 761, 771 (Fla. 1998); Fogel v. Mirmelli, 413 So. 2d 1204, 1207 (Fla. 3d DCA 1982).

Under section 90.801(2)(a) Fla. Stat. (2010), when a declarant testifies at trial and is subject to cross-examination, a prior inconsistent statement is admissible as substantive evidence of the facts contained in the statement if it was given under oath, subject to the penalty of perjury, at a trial, hearing, or other proceeding, or in a deposition. This Court interpreted this rule such that the prior inconsistent statement of a witness, if given under oath before a grand jury, may be

[2] The admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 611 (Fla. 2000). The discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that the discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 Sp. 2d 1050, 1053 n.2 (Fla. 2000).

admitted into evidence not only for impeachment purposes but also as substantive evidence on material issues of fact. Moore v. State, 452 So. 2d 559, 562 (Fla. 1984); Ibar v. State, 938 So. 2d 451, 463 (Fla. 2006); see also Webb v. State, 426 So. 2d 1033 (Fla. 5th DCA 1983).

The reasoning in support of admission of prior inconsistent statement as substantive evidence is that, the requirement of a formal proceeding and an oath provides additional assurances of reliability. Ehrhardt, Florida Evidence §801.7, p.797 (2010 ed). If a prior statement is admissible only to impeach, when the jury does not believe the declarant's explanation that he did not make the prior statement, and they find it to be true, it is unreasonable to expect them to limit the use of the statement only to assessing the credibility. Id. If the jurors find that, in fact, the prior statement was made and was true, it is difficult, if not impossible, for them no to consider it. Id. In order to permit impeachment of a witness by showing that grand jury testimony was inconsistent with trial testimony, former statement must be inconsistent with the present testimony and must relate to material matters pertaining to subject matter of cause. Hills v. State, 428, So. 2d 318, 319-20 (Fla. 1st DCA 1983).

Here, after Davis testified on direct, that even though she did not remember when Defendant returned home on the night of the incident but did remember that he had not been gone a long time, the State gave Davis to read a portion of her

Grand Jury testimony to refresh her memory. (S6. 876-87) Although Davis insisted that she could not remember, she stated that it could have been anywhere between 9:00 or 9:30 p.m. (S6. 877) On cross, Davis stated again that after leaving the house, Defendant did not stay long and that the latest he could have been back home was 9:30 p.m., but insisted that he could have been back by 9:00 p.m., as well. (S6. 883)

When on redirect, the prosecutor gave Davis the portion of her statement to the police (in which she stated that Defendant was gone for few hours), to refresh her recollection, and asked her if that was the statement she gave, Davis responded, "I remember it wasn't long, so I don't think I would have said a few hours." (S6. 898) When the prosecutor asked Davis again if she could remember how long Defendant was gone that night, she responded that, "it wasn't too long, that it had to be somewhere around an hour, maybe a little more, or a little less, can't exactly tell you, I just know it wasn't that long because he knew I was sick." (S6. 898) Finally, when the prosecutor attempted to impeach Davis with her Grand Jury testimony, the defense objected that it was an improper impeachment because Davis claimed she had no recollection what she had said. After the trial court overruled the objection on the basis that Davis's statement, that Defendant was gone for a short time, was a prior inconsistent statement, the prosecutor read Davis a portion of her statement to the Grand Jury in which she stated that Defendant

returned home between 9:00 p.m. and 9:30 p.m. (S6. 903) As a result, Davis stated that she did not dispute making the statement before the Grand Jury. (S6. 903)

Under these circumstances, it is clear that the statement Davis gave before the Grand Jury, that Defendant returned home between 9:00 p.m. and 9:30 p.m., directly contradicted her trial testimony, that he was only gone for a short period of time. As such, Defendant's assertion that the trial court should not have allowed the impeachment because Davis testified that she had no recollection, which was not an inconsistent statement, is belied by the record and without merit. In fact, the record shows that Davis stated throughout her testimony that she did remember that Defendant was only gone for a short time.

Moreover, besides being inconsistent, the former statement related to a material issue of fact, that is, Defendant's whereabouts on the evening of the BP murders. The statement that Defendant could have returned home by 9:30 p.m., was material and necessary to show that Defendant was able to commit crimes at the BP around 8:52 p.m. and get home by 9:30 p.m. In support of this argument goes the testimony of Detective Ivan Navarro who stated that he determined that three possible routes from the BP station to Defendant's home were of 22-23 minutes driving distance. (S7. 1041-45). Under these circumstances, the trial court did not abuse its discretion in finding that the statements were inconsistent and allowing the impeachment with prior inconsistent statement. Moreover, the trial

court properly used Davis's prior inconsistent statement as substantive evidence, that Defendant arrived home between 9:00 and 9:30 p.m. (34. 5962-63) See Moore; Webb; Hills.

Defendant's reliance on Brooks v. State, 918 So. 2d 181 (Fla. 2005) and Espinoza v. State, 37 So. 3d 387 (Fla. 4th DCA 2010), for the proposition that it is error to allow impeachment of a witness whose trial testimony is that of no recollection, is without merit. Both Brooks and Espinoza involved a situation where at trial, a witness claimed inability to recall making earlier statement and did not give testimony inconsistent with it at trial. Under these circumstances, this Court and Fourth District held that it was improper to impeach a witness because there was no true inconsistency. Unlike, Brooks and Espinoza, here, Davis did make an inconsistent statement. Although she claimed that she could not remember the exact time Defendant returned home, she did remember that he was not gone for a long time. That statement was truly inconsistent with her prior statement that Defendant returned home between 9:00 and 9:30 p.m. As such, here, the impeachment was proper.

Likewise, Defendant's reliance on Morton v. State, 689 So. 2d 259 (Fla. 1997) and Dudley v. State, 545 So. 2d 857 (Fla. 1989),[3] for the proposition that it was improper to admit prior inconsistent statement as substantive evidence, is without merit. In Morton, the concern was a potential abuse in using a prior inconsistent statement under the guise of impeachment where the primary purpose was to place before the jury substantive evidence that was otherwise inadmissible. However, here, that was not the case since Davis's prior inconsistent statement was admissible as substantive evidence under section 90. 801(2)(a). Dudley (same).

Finally, Defendant also asserts that Davis's prior inconsistent statement she gave before a grand jury could not be used as substantive evidence because it was not offered by the State for that purpose. In other words, Defendant claims that even if Davis's grand jury testimony was admissible as substantive evidence, the State was required to actually move it into evidence and the State did not do so. However, this argument is without merit. First of all, Defendant objected the admission of the subject prior inconsistent statement on the ground that it was not impeachable. (S6. 899-900) When the trial court overruled Defendant's objection, he did not ask the trial court that the evidence be considered only for the limited

[3] Rodriguez v. State, 753 So. 2d 29, 47 (Fla. 2000), receded from both Morton and Dudley to the extent they hold that a prior inconsistent statement cannot be used as substantive evidence in a penalty phase proceeding.

purpose. (S6. 899-901) More importantly, it should be noted that once the evidence is admitted, the trial court can use it for any cognizable and legitimate purpose, that including as substantive evidence as well. Under these circumstances, the trial court properly used Davis's prior inconsistent statement as substantive evidence.

Even if this Court finds that the trial court erred in allowing the Davis's impeachment and in admitting her prior inconsistent statement as substantive evidence, such error was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The evidence of Defendant's guilt was overwhelming. The State presented evidence in the form of ballistic evidence that three projectiles from the Headley murder scene and three projectiles from the instant murder scene were fired from the same gun and were of a .38/.357 caliber class, testimony that Defendant bought a Dan Wesson .357 gun from Randy Black, on the afternoon of December 7, 2007, Defendant's admission that he bought that gun and had it in his possession on the evening of the incident, testimony of Defendant's mother and his admission that he displayed that gun to his mother on December 9, 2007, eyewitness testimony of people who saw a car parked just north of the BP station around the time when the murders were committed, that matched the description of Defendant's car, an expert testimony that the tire tracks from the crime scene corresponded the tires from Defendant's car, testimony of Prakashkumar Patel who gave a description of the perpetrator that matched

Defendant's height and built and that description was also corroborated by the BP surveillance video, eyewitness testimony of Greisman and Ortiz who identified Defendant as the person who shot Greisman in front of the Headley Insurance, and Bustamante's dying declaration in which she identified Defendant as the person who shot her. Under these circumstances, there is no reasonable possibility that the error could have affected the verdict.

IV. THE TRIAL COURT'S COMMENTS ON THE LACK OF EVIDENCE TO CORROBORATE DEFENDANT'S ALIBI DEFENSE WAS PROPER.

Defendant asserts that in its analysis of guilt, the trial court made an improper comment on Defendant's failure to corroborate his alibi thereby shifting the burden of proof on Defendant to prove his innocence. However, this claim is without merit.

This Court has held that it is proper to comment on a defendant's failure to produce evidence when a defendant voluntarily assumes some burden of proof by asserting the defense of alibi, self defense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the State. Rodriguez v. State, 753 So. 2d 29, 38-39 (Fla. 2000); Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991).

After the trial court made factual findings as to direct evidence that proved that Defendant was the perpetrator at the BP and Headley Insurance crime scenes,

the trial court then made findings as to circumstantial evidence of Defendant's guilt:

> The circumstantial and non-circumstantial evidence concerning the Headley Insurance Agency crimes, proves beyond reasonable doubt, that Leon Davis, Jr. robbed the Headley Insurance Agency and killed Yvonne Bustamonte and Juanita "Jane" Luciano as was found by the Jury in that case. The gun used in those crimes was also used to murder Pravinkumar C. Patel and Dashrath Patel. Beyond the fact that the Defendant purchased a Dan Wesson .357 revolver from Randy Black and all six projectiles recovered from the two crime scenes are consistent with having been shot from the same type of firearm, there are numerous other circumstantial facts that lead to the conclusion, beyond a reasonable doubt, that Leon Davis, Jr., committed the BP murders.
>
> Leon Davis, Jr. was facing some very serious financial seatbacks. He did not have a job, and his wife was on leave from her employment due to a problem pregnancy. His credit cards were maxed out, and he only had a few dollars in his accounts at Mid Florida Federal Credit Union. He was behind on his mortgage payments, and he owed money on a loan to the bank. He had even given up his cell phone. Due to an inability to pay his insurance payments, he parked his Nissan Maxima and was using his wife's car. He was also facing his son's, Garrion's, upcoming birthday and the Christmas holidays.
>
> In spite of his financial difficulties, Mr. Davis decided to purchase a gun and spent $220.00 on a Dan Wesson .357 revolver. This was a very strange purchase, and an unlawful act, in light of the fact that the Defendant was a convicted felon on felony probation at the time of his acquisition of the firearm.
>
> On the evening of December 7, 2007, Mr. Davis left his home sometime between 6:00 p.m. and 7:00 p.m. in his wife's Nissan Altima, allegedly to go shopping. His whereabouts are unknown until he returned somewhere after 9:00 p.m. to 9:30 p.m. Mr. Davis claims he was at the Eagle Ridge Mall, but there is no evidence whatsoever to corroborate that claim.
>
> Sometime between 8:00 p.m. and 9:00 p.m. on December 7, 2007, four different people saw a (collectively described) dark, four

> door, Nissan automobile, with a sporty rounded front end, including what was described as a "Billet" grille. The four different descriptions, individually and collectively, describe the black Nissan Altima being driven by the Defendant, Leon Davis, Jr., on December 7, 2007.In addition to several witnesses observing the same vehicle parked just north of the BP Station, tire tracks were discovered that, according to an FDLE tire track expert, "correspond" to the tires removed from the black Nissan Altima owned by Victoria Davis and driven by Leon Davis Jr., on December 7, 2007.
>
> Finally, the videos depict a tall, right handed perpetrator, who was described by Prakashkumar Patel as a black male and that coincides with the Defendant's height and build.
>
> The evidence comes down to this: Leon Davis Jr., was positively identified as the gun wielding perpetrator of the Headley Insurance Agency crimes and was convicted of those crimes. That same gun that was used in at the Headley crime scene was used at the BP station by a tall black man who, after murdering two Patel victims, headed north on foot towards an area where a black Nisan automobile, with a noteworthy grille, was seen parked, backed into a cattle gap area. That car left tire tracks that correspond to the tires on the black Nissan Altima being driven by Leon Davis Jr. on December 7, 2007. Leon Davis Jr. bought a Dan Wesson .357 revolver on December 7, 2007, admits to having it that evening, showing it to his mother on December 9, 2007, and was seen in possession of a firearm at Headley Insurance Agency on December 13, 2007. The three projectiles fired from a gun used at Headley Insurance Agency office are identical to the projectiles recovered from the BP station crime scene and were all fired from the same .38/.357 caliber class of firearm, which includes the Dan Wesson .357 firearm purchased by Leon Davis, Jr. from his cousin, Randy Black.

(34. 5967-68)(emphasis added) Here, Defendant asserted an alibi defense by claiming during his testimony, that at the time of the incident he was at the Eagle Ridge mall. (S9. 1478) In particular, he claimed that he left the house around 7:15 p.m. and stayed at the mall until approximately 8:30 p.m. (S9. 1478) When on

cross the State asked Defendant if he could corroborate that he was in fact at the mall, he responded that he did not have any witnesses to confirm his alibi. (S9. 1486-89)

As can be seen from the foregoing, Defendant voluntarily assumed a burden of proof by asserting an alibi defense, by claiming that at the time of the murders he was at the shopping mall. As such, the trial court was permitted to comment on the fact that Defendant failed to produce evidence in support of his affirmative defense. This comment was even more appropriate in light of the fact that Defendant admitted that he had no corroborating evidence to support his alibi and the State presented evidence rebutting Defendant's alibi hypothesis. Under these circumstances, since Defendant had the burden to present evidence in support of his alibi defense, the trial court properly commented on the lack of corroborating evidence in support of such defense. Rodriguez; see also Buckrem v. State, 355 So. 2d 111, 112 (Fla. 1978)(holding that the State did not err in commenting on the defendant's failure to call alibi witnesses where the defendant asserted an alibi defense and claimed that at the time of the murder he was at his friend's house).

Defendant's reliance on the line of cases in support of his assertion that his due process rights were violated by shifting the burden of proof to him to disprove that he was at the crime scene, is misplaced as these cases have no application here. Stump v. Bennett, 398 F. 2d 111 (8th Cir. 1968), involved an issue of

constitutionality of Iowa's jury instruction related to the defendant's alibi which required the defendant to assume the burden of persuasion by a preponderance of evidence in establishing an alibi. The Eight Circuit held the alibi instruction unconstitutional since it shifted to the defendant the burden of proving his non-presence on the crime scene, thereby placing the burden which traditionally lies with the state-the burden that the defendant was present at the crime scene and did in fact commit the crime he was charged for. Similarly, in Smith v. Smith, 454 F. 2d 572 (5th Cir. 1971), the Fifth Circuit invalidated the Georgia alibi jury instruction that placed on the defendant the burden to exclude the possibility of the presence at the crime scene. Unlike in Stump and Smith, here, the issue does not concern giving an alibi jury instruction that shifted the burden of proof on the defendant. In fact, here, no such instruction was given to the trial judge. (34. 5862-86) Here, the issue concerns the trial judge commenting on the evidence when Defendant asserted an affirmative defense by claiming that he was at the shopping mall at the time of the murders and the State presented evidence that Defendant was in fact present at the crime scene. As such, Stump and Smith have no application here. Robinson v. State, 316 A. 2d 268 (Md. App. 1996)(same).

U.S. v. Rahseparian, 231 F. 3d 1257 (10 Cir. 2000), concerned a sufficiency of evidence to convict the defendant for a mail fraud and the conspiracy. The Tenth Circuit held that the defendant's false exculpatory statements cannot by themselves

prove the government's case. Here, the issue does not concern the sufficiency of evidence to convict Defendant based solely on his exculpatory statements. Moreover, here, Defendant did not make exculpatory statements per se. Rather, he raised an affirmative defense by claiming an alibi. As such, Rahseparian is not on point here.

U.S. v. Burse, 531 F. 2d 1151 (2d Cir. 1976), concerned a failure to caution a jury against considering disbelieved alibi testimony as evidence of the defendant's guilt. The Second District held that it was a reversible error to fail to give such cautionary instruction when it was requested and the evidence against the defendant was not overwhelming. The concern in Burse was that when jurors, untrained in the law, disbelieved alibi testimony and could view the failure of the defense as a sign of the defendant's guilt. Burse is inapplicable because here, the issue did not concern a failure to give a requested alibi instruction and the evidence against Defendant was overwhelming.

Finally, Defendant seems to claim that the trial court based its findings of guilt as if the only circumstantial evidence were the ones concerning Defendant's financial difficulties and the purchase of a gun from Randy Black. However, this is an incorrect representation of the trial court's findings. As the cited portion of the trial court's order indicates, besides the overwhelming evidence of Defendant's guilt that was presented through the ballistic evidence (connecting Defendant as

the murderer at the Headley and BP murder scenes) and the evidence that Defendant used the same gun (which he previously purchased from Black) at both crime scenes, the trial court also found other circumstantial evidence that supported the findings of Defendant's guilt. As such, based on the evidence presented, the trial court found that four witnesses placed Defendant at the BP crime scene (contradicting his alibi defense), by observing his vehicle parked at the scene as well as the expert opinion that the tire tracks from the crime scene corresponded the tires from Defendant's vehicle. Moreover, considering the overwhelming evidence of Defendant's guilt, even if this Court finds that the trial court erred in commenting on the lack of corroborating evidence in support of Defendant's alibi defense, such error was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The State also relies and re-incorporates the harmless error analysis in Issues II, III and VIII. Defendant's convictions should be affirmed.

V. THE ISSUE REGARDING THE COMMENT THAT THE TRIAL COURT MADE IN THE SENTENCING ORDER CONCERNING DEFENDANT'S PRIOR FELONY CONVICTIONS IS UNPRESERVED AND MERITLESS.

Defendant asserts that the trial court improperly relied on evidence that Defendant was a convicted felon at the time he purchased a gun and used that fact as circumstantial evidence of Defendant's guilt thereby violating his due process

rights. Defendant also asserts that this was error since this evidence was admitted for the limited purpose of proving the charge of a felon in the possession of a firearm. However, this issue is unpreserved and meritless.

In order to preserve an issue regarding the deficiency in the trial court's sentencing order, a defendant has to bring the alleged deficiency to the trial court's attention. Orme v. State, 25 So. 3d 536, 553-54 (Fla. 2009)(Canady, J., concurring). Here, Defendant never did anything to bring the alleged deficiency in the sentencing order to the attention of the trial court. In other words, Defendant should have asked the trial court to clarify for what purpose it was using the prior felony convictions. As Defendant failed to do that, this issue is unpreserved.

Even if this issue had been preserved, the trial court had still properly commented on the evidence that Defendant was a convicted felon on felony probation at the time when he purchased a firearm. Generally, all relevant evidence is admissible, unless precluded by law. See §90.402, Fla. Stat. (2010). Relevant evidence is defined as evidence tending to prove or disprove a material fact. §90.401, Fla. Stat. (2010). Relevant evidence, however, is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. §90.403 Fla. Stat. (2010). Thus, the prerequisite for admissibility is relevancy.

Here, the evidence of Defendant's prior grand theft convictions was admitted for the purpose of proving the crime of possession of a firearm by a convicted felon. (S6. 934-36) Before the parties stipulated the admission of this evidence, the defense stressed that this evidence should be admitted for the limited purpose of establishing prior felony convictions. (S6. 935) Although this evidence was admitted for this limited purpose, Defendant never argued before the trial court for what other particular purpose the court should not have considered it. Moreover, besides being relevant for proving the subject charge, this evidence was also relevant to show that since Defendant was on probation at the time when he purchased a gun, he was a convicted felon on probation and was not allowed to have a firearm.

In its sentencing order, the trial judge in no way used the evidence of Defendant's prior felony convictions beyond the scope that was discussed by the parties when it was admitted. (S6. 934-36, 34. 5966-68)[4] Contrary to Defendant's assertions, the trial court only relied on the fact that the gun was purchased when Defendant was on probation and not allowed to buy a gun. When it was established that Defendant had two prior grand theft convictions, it was not the circumstances of those convictions but the circumstances of Defendant being on felony probation

[4]Due to the page limitations, the State relies and re-incorporates the portion of the sentencing order that was cited in Issue IV.

that the trial court relied on in noting that it was strange and unlawful for Defendant to buy a gun. (34. 5967) Under these circumstances, this no more than a gratuitous comment by the trial court had nothing to do with the actual guilty verdict considering the overwhelming evidence of Defendant's guilt.

Furthermore, the trial court's comment was even more proper in light of the fact that the evidence that Defendant was on the felony probation at the time of the purchase of a gun was admitted through other sources of evidence as well. First, during his testimony at the Headley Insurance trial, Defendant admitted that he was on felony probation when he purchased a gun, that he was aware that he was not allowed to have a firearm and that by this purchase he violated the conditions of his probation. (33. 5669-70) Defendant's mother testified to these circumstances as well. (S6. 1004) As such, since there were multiple sources of evidence that Defendant was a convicted felon and that he had violated his probation when purchased a gun, the comments were proper.

Furthermore, the reason for limiting the use of evidence of Defendant's prior felony convictions was not violated by the trial court's consideration of it in the above mentioned manner in any way. Generally, in most jury trials, a charge of a felon in the possession of a firearm would have been severed because the fact that the defendant was a felon should not have been used against him. The purpose behind this is to avoid a prejudicial effect of the fact that the defendant is a

convicted felon and the facts of the convictions, so that the jury does not think that the defendant is a criminal based on his criminal history and convict him on that basis. See Old Chief v. United States, 519 U.S. 172, 181 (1997)("although … 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged-or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment-creates a prejudicial effect that outweighs ordinary relevance"). Here, the spirit of this rule that typically excludes this type of evidence in jury trials has not been violated or compromised in any way since this was a bench trial.

Finally, considering the overwhelming evidence of Defendant's guilt, even if this Court finds that the trial court erred in considering the fact that Defendant was a convicted felon on felony probation when he purchased a firearm, such error was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In this case, considering the overwhelming evidence of Defendant's guilt, compelling ballistic evidence that identified Defendant as the shooter at both, BP and Headley Insurance crime scenes, combined with eyewitness testimony that Defendant was the person who possessed and discharged a firearm in front of the Headley, the testimony that the tire tracks from the BP crime scene corresponded to the tracks of Defendant's vehicle, there is no reasonable possibility that the error

could have affected the verdict. The State also relies and re-incorporates the harmless error analysis in Issues II, III and VIII.

Moreover, the consideration of the evidence of Defendant being a convicted felon and on felony probation was certainly harmless in light of the fact that such evidence was cumulative as it was also admitted through other sources of evidence-his admission and Lynda Davis' testimony. See Singleton v. State, 303 So. 2d 420, 421 (Fla. 2d DCA 1974). Given the substantial evidence of Defendant's guilt and the evidence being cumulative anyway, any error in the trial court's comment cannot be said to have affected the verdict and was, therefore harmless. Defendant's convictions should be affirmed.

VI. THE MOTION FOR JUDGMENT OF ACQUITTAL WAS PROPERLY DENIED.

Defendant asserts that the evidence is insufficient to support the verdicts and that the State stacked inference upon inference to establish guilt. However, this issue is without merit as the trial court properly denied the motion for JOA.[5]

[5] A *de novo* standard of review applies to motions for judgment of acquittal. Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002). This Court has stated:

> In reviewing a motion for judgment of acquittal, a *de novo* standard of review applies. … Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. … If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. … However, if the State's evidence is wholly

In moving for a JOA, a defendant "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974). This Court in State v. Law, 559 So. 2d 187, 188-89 (Fla. 1989), stated:

> Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. The question of whether the evidence fails to exclude all reasonable hypothesis of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse.
>
> . . . .
>
> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the State. The State is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. Once that threshold burden s met, it becomes the jury's duty to determine whether the evidence is

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> circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence.

(citations omitted). "Proof based entirely on circumstantial evidence can be sufficient to sustain a conviction in Florida." Orme v. State, 677 So. 2d 258, 261 (Fla. 1996).

> sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

(citations and footnotes omitted). In moving for his judgment of acquittal after the close of the State's case and renewing the motion at the close of all the evidence, Defendant focused on the fact that identity of the BP perpetrator was not proven and that there was only circumstantial evidence presented. His theory of innocence was that he was the victim of misidentification and that some other tall, black man who committed the BP crimes got rid of the gun, which Defendant acquired after the fact. Defendant also asserted an alibi defense by claiming that on the evening of the incident he was shopping at a mall and that he came back home by 9:00 p.m. The State refuted this by showing that Defendant purchased a gun on the day of the incident from Randy Black, that he showed that gun to his mother two days after the fact, that projectiles from the BP and Headley Insurance crime scenes were consistent with the gun he purchased, that Defendant was identified as the Headley shooter, that his car was seen at the BP crime scene, that the tire tracks found at the scene corresponded the tires from his car and that he could have returned home as late as 9:30 p.m. The trial court considered the evidence and reasoned that there was sufficient evidence presented that supported the denial of the JOA. (S7. 1140-41, S9. 1503-04) The court applied the correct standard, and this Court, under its review, should affirm.

Here, the State presented competent, substantial evidence to support the verdict. Randy Black testified that he sold a Dan Wesson .357 gun to Defendant, on December 7, 2007. Defendant admitted that he bought that gun and had it in his possession on the evening of the BP incident. Defendant's mother, Lynda Davis testified that Defendant was in the possession of the gun he got from Black on December 9, 2007, and Defendant admitted it as well. Ballistic evidence revealed that three projectiles from the Headley Insurance crime scene and three projectiles from the BP murder scene were fired from the same gun. The projectiles from both crime scenes were of a .38 or .357 caliber class, which included the Dan Wesson .357 gun Defendant purchased from Randy Black. The State also presented eyewitness testimony that Defendant was the perpetrator at the Headley crime scene. As such, Brandon Greisman and Carlos Ortiz identified Defendant as the person who shot Greisman in front of the Headley Insurance. Yvonne Bustamante gave a dying declaration identifying Defendant as the person who shot her. This declaration was heard by Lt. Elrod, Ernest Froehlich, John Johnson and Evelyn Anderson.

The State also presented additional evidence that showed that Defendant was the Headley crime scene perpetrator. The surveillance video from Wall-Mart showed that on December 13, 2007, in the morning hours, Defendant purchased an orange six pack cooler. James Riley confirmed that Defendant made this purchase.

Mark Gammons and Jennifer DeBarros identified Defendant from the video as the person they saw in the store. Murray, Greisman and Ortiz testified that they saw Defendant carrying an orange lunch cooler.

Defendant's alibi defense was contradicted by the testimony of his wife, Victoria Davis, who testified that on the night of the BP incident, Defendant could have arrived home as late as 9:30 p.m. Equally important is the fact that BP crimes occurred at 8:52 p.m., and that it was possible for Defendant to commit these crimes and get home by 9:30 p.m. This was confirmed by the testimony of Detective Ivan Navarro, who determined that the driving time distance between the crime scene and Defendant's home was 22-23 minutes long.

Moreover, Jonathan Atkinson, William Finley, Jessie Brown, and Stephanie Chisholm all testified that they observed a car parked in an area north of the BP station, around the time of the incident that matched with Victoria Davis's Nissan Altima. These witnesses collectively described the car they observed as a dark, four-door Nissan, with a front "billet" grille. Defendant admitted that he was driving his wife's car on the night of the incident. Theresa Stubbs, a tire track expert, confirmed that the tire tracks found near the area just north of the BP station were of the same tread design, size and noise treatment as the tires removed from Victoria Davis's Nissan Altima.

The State also presented the testimony of Prakashkumar Patel, who gave a description of the BP perpetrator that matched Defendant's height and built. This description was corroborated by the BP surveillance video and testimony of Fran Murray and Evelyn Anderson. Under these circumstances, the State established each element of the crimes and that Defendant was the perpetrator and rebuffed his defense that he was not present at the BP crime scene at the time of the incident and that he was misidentified.[6] This Court should affirm.

VII. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE ATTEMPTED ARMED ROBBERY CONVICTION.

Defendant asserts that the trial court erred in denying the motion for JOA on the attempted armed robbery charge. Defendant also asserts that the trial court erred in finding the aggravating circumstance of during the course of the attempted robbery. However, this issue is without merit.[7]

In order to prove attempted armed robbery, the State must show: 1) the formation of an intent to commit the crime of robbery; 2) the commission of some physical act in furtherance of the robbery, and 3) the use of a firearm. Franqui v. State, 699 So. 2d 1312, 1317 (Fla. 1997). Intent may be proved by considering the

[6]The sufficiency of evidence in support of the attempted armed robbery charge is discussed in Issue VII.

[7] For the standard of review for the JOA and circumstantial evidence standard, the State refers to the caselaw cited in Issue VI.

conduct of the accused before, during and after the alleged attempt along with any other relevant circumstances. Cooper v. Wainwright, 308 So. 2d 182, 185 (Fla. 4th DCA 1975).

In moving for his judgment of acquittal on the attempted armed robbery count, Defendant's theory was that there was no intent to commit the robbery, that this was a hate crime directed towards employees and that there was no evidence as to the motive for committing this crime whatsoever. According to Defendant, the absence of intent to rob was evidenced by the fact that by shooting at the store clerk, the perpetrator in fact wanted to hurt him and not rob him. The lack of the intent was also evidenced by the fact that the two murder victims' were not robbed as their pockets were not turned out and the wallet was found at the person of one victim. The State refuted this by showing that the masked perpetrator came to the close store door and after having been unable to open it, fired at the direction of the store clerk, that then he ran towards the victims who were murdered by the gas sign, and then came back to the store trying to open it again but without success. The trial court considered the evidence and denied the JOA on the attempted armed robbery charge. The court reasoned that the evidence was sufficient to show intent to commit a robbery where a masked and armed perpetrator came to the store that was located in an isolated area, attempting to gain entrance and shooting at the

store clerk. (S7. 1140-41) The trial court applied the correct standard and this court should affirm.

Defendant has not carried his burden to show a lack of substantial, competent evidence of the attempted armed robbery of Prakashkumar Patel. First of all, it should be noted that Defendant was charged for the attempted armed robbery of the store clerk, Prakashkumar Patel, and not the two murder victims. As such, Defendant's contention as to the absence of intent to rob because the money from the murder victims was not taken, is without merit because, as stated, Defendant was not charged for attempting to rob the murder victims in the first place.

As to the actual attempted armed robbery charge of Prakashkumar Patel, the record contains evidence sufficient to support the verdict. The video from the surveillance camera depicted and Prakashkumar testified that Defendant, dressed in dark clothing, hooded and masked, approached the locked door of the BP store, right before the closing. (S4. 540, 557, 548-49) He was trying to open the door. (S4. 548-49) After Prakashkumar, who was standing at the counter, shouted that the store was closed, Defendant pulled out a gun, pointed it towards Patel and fired off a shot. (S4. 551-54) The video further depicted that Defendant after being unable to open the door and take the money, ran towards the area where Pravinkumar Patel and Dashrath Patel were changing the price sign. (S4. 554-55;

S2. 317-18) Prakashkumar heard two shots being fired. (S4. 557) The video further depicted that Defendant ran back to the store front door trying to open it again. (S2. 317-18) After being unable to open the door, Defendant left in the northerly direction. Id. Under these circumstances, the evidence was sufficient to establish that Defendant committed the attempted armed robbery. This Court should affirm.

Defendant next asserts that the trial court erred in finding the aggravating circumstances of during the course of an attempted armed robbery. However, this issue is meritless.

This Court's review of a trial court's finding regarding an aggravator is limited to whether the trial court applied the correct law and whether its findings are supported by competent, substantial evidence. Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997); see also Cave v. State, 727 So. 2d 227, 230 (Fla. 1998). As the trial court's findings here did apply the correct law and are supported by competent, substantial evidence, they should be affirmed.

With regard to during the course of an attempted armed robbery, the trial court found:

> In Count 4 of the Indictment, the Defendant, Leon Davis, Jr., was charged with Attempted Armed Robbery. The evidence adducted at trial proves beyond and to the exclusion of all reasonable doubt that the Defendant was attempting to rob the BP Station and the murders of Pravinkumar C. Patel and Dashrath Patel occurred during the attempted robbery or the flight after attempting the robbery.

> The surveillance cameras clearly depict a perpetrator, hooded, masked, and dressed in dark clothing, approaching the locked door at the BP station. After Prakashkumar Patel signaled the store was closed, the perpetrator lifted a gun, pointed it into the store, and fired off a shot in the direction of Prakashkumar Patel.
>
> The surveillance cameras then depict the perpetrator running out towards the area where Pravinkumar C. Patel and Dashrath Patel were changing out the price sign.
>
> The evidence further discloses that the perpetrator had stationed a car somewhat north of the BP station and waited for the BP station to be closed for business when he approached it.
>
> The perpetrator was clothed in dark clothing and wearing a hood and mask.
>
> The evidence, along with the other evidence concerning what was going on in Mr. Davis's life leads to the inescapable conclusion that he was attempting to rob the BP station and was thwarted in doing so by a locked door.
>
> For whatever reason, his attention was drawn to Pravinkumar C. Patel and Dashrath Patel who were murdered, execution style, out by the gas sign. The perpetrator is then seen running back to the BP station, trying the door again, and, failing to open it, leaving in a northerly direction.
>
> The Court finds that this Aggravator has been proven beyond and to the exclusion of all reasonable doubt and assigns it great weight.

(34. 5970) With regard to the aggravating circumstance of during the course of an attempted robbery, Appellee refers this Court to the argument contained in the previous paragraphs of this issue, in order to avoid the repetition. The trial court's findings are supported by the evidence and should be affirmed.

Finally, Defendant asserts that without this aggravating factor, the death sentence would be disproportionate. However, even without this aggravating factor, this Court has upheld the death sentence under similar circumstances. See

McMillian v. State, 94 So. 3d 572, 581-83 (Fla. 2012)(the case involved a premeditated shooting murder and attempted shooting murder of a police officer. Two aggravators were found: the defendant was on felony probation at the time of the murder and prior violent felony based on the conviction for the attempted murder. The mitigation consisted of: no significant history of prior criminal activity, IQ of 76, proper behavior during trial, mental or emotional distress at the time of the murder, consistent employment history and close family relations. This Court upheld the sentence of death). This Court should affirm.

VIII. BUSTAMANTE'S STATEMENTS TO LT. ELROD WERE PROPERLY ADMITTED AS A DYING DECLARATION.

Defendant asserts that the trial court abused its discretion in admitting Bustamante's statements to Lt. Elrod as a dying declaration in which she identified Defendant as the perpetrator. Defendant also contends that these statements violated his confrontation rights. Further, Defendant contends that the trial court abused its discretion in admitting the statements under the forfeiture by wrongdoing doctrine as an alternate ground. However, the trial court did not abuse its discretion in admitting these statements.[8]

[8]A trial judge's ruling on the admissibility of evidence will not be disturbed absent a clear abuse of that discretion. Valle v. State, 70 So. 3d 530, 546 (Fla. 2011). The court's discretion is abused if its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence. McDuffie v. State, 970 So. 2d

Here, Bustamante's statements are properly considered a dying declaration. After conducting an extensive hearing, the trial court in Defendant's Headley Insurance case found that Bustamante's statements qualified as a dying declaration. (S30/3074-81) The trial court found that the evidence showed that Bustamante reasonably believed her death was imminent, particularly in light of her statements to Frances Murray that she was not going to make it, and that Murray should pray for her. (S30/3080) After conducting a hearing in the case at bar on the exact same motion and reviewing the record from the Headley hearing and Judge Hunter's ruling, the trial court here made an independent determination that the statements qualified as a dying declaration. (25. 4390, 26. 4430, 4506-08) The trial court's findings are supported by the evidence.

This Court has held that statements are admissible as dying declarations where the statements were made by a declarant who believed that his death was imminent and inevitable and concerned the cause of the declarant's death. Williams v. State, 967 So. 2d 735, 749 (Fla. 2007). While the declarant must have believed that he was about to die, it is not necessary for there to be a verbal expression of that belief for the statement to qualify as a dying declaration.

312, 326 (Fla. 2007). The sufficiency and propriety of the predicate for a dying declaration is a mixed question of the law and fact, and a trial court's determination of the issue will not be disturbed unless clearly erroneous. Teffeteller v. State, 439 So. 2d 840 (Fla. 1983).

Hayward v. State, 24 So. 3d 17, 30 (Fla. 2009). However, this Court has consistently upheld the admission of a statement as a dying declaration where the declarant did verbalize the expectation of death. Williams, 967 So. 2d at 748-49; Pope v. State, 679 So. 2d 710, 713 (Fla. 1996).

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

Moreover, when Lt. Elrod first saw Bustamante, she was placed in an ambulance and was receiving a medical assistance. He observed that she was badly burned and he estimated that she was not going to survive and was aware of it.

Although her entire body was burned, she was able to tell Lt. Elrod that Defendant hurt her and Luciano by setting them on fire after they refused to give him money. Also, Calvin Johnson testified that he heard Bustamante yelling "Davis did this" before the police officer had even asked her anything. Moreover, Froehlich and Cate both testified that Bustamante was in shock due to severe burns she had suffered, her clothes was burned off and she was in severe pain. Furthermore, Dr. Nelson's testimony verified Bustamante's critical condition after she had suffered severe burn injuries, second and third degree burns encompassing 80-90% of her body, and got shot in the hand. Dr. Nelson also opined that when someone is burned more than 85% of their body, there is only about 15% chance of survival. Given these circumstances, Bustamante's statements were properly admitted as a dying declaration.

This Court has found victim's statements to be dying declarations under like circumstances. See Williams, 967 So. 2d at 749(finding the statements made by the victim to the officer at the crime scene, in which the victim identified the defendant as her assailant, were admissible as a dying declaration. The officer arrived minutes after the victim made 911 call, during which she told the operator that she had been stabbed and that she was dying and by the time the paramedics and the officer arrived, the condition of the victim had not improved); Jones v. State, 36 So. 3d 903, 908-09 (Fla. 4th DCA 2010)(the victims statements to the detective

identifying the defendant as the perpetrator were admissible as a dying declaration where the detective testified that when he first observed the victim in the ambulance, he was pale and clammy looking, his breathing was labored, and he lost a quite a bit of blood); Williams v. State, 947 So. 2d 517 (Fla. 3d DCA 2006)(finding as a dying declaration the victim's statements identifying the defendant as a perpetrator, in response to the police questioning minutes after he was shot, as he was bleeding and attempting to push his intestines back into his body. The responding officer questioned him immediately, rather than following the procedure and waiting the investigator to arrive because the victim was gravely injured and appeared to be dying).

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

Moreover, in its more recent decision in Giles v. California, 554 U.S. 353,

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

Moreover, Defendant even admits that there is a split of authority as to his argument against recognizing dying declarations as an exception to Crawford, and that his position is in minority. (p. 111-12 of Initial Brief) The State's position is that the majority of jurisdictions agree that the exclusion the dying declaration as violative of the right of confrontation "would not only be contrary to all the precedents in England and here, acquiesced in long since the adoption of these constitutional provisions, but it would be abhorrent to that sense of justice and regard for individual security and public safety which its exclusion in some cases would inevitably set at naught." Monterroso, 101 P. 3d at 972. Under these circumstances, Bustamante's statements do not involve confrontation clause

concerns.

Defendant relies on Michigan v. Bryant, 131 S. Ct. 1143 (2011), Delhall v. State, 95 So. 3d 134 (Fla. 2012), and Davis v. Washington, 547 U.S. 813 (2006) to support the trial court's finding that the statements were testimonial and also to support his argument that the statements were improperly admitted. However, the State does not contest that Bustamante's statements to Lt. Elrod were testimonial because it does not really matter here whether the statements were testimonial or not. Even if testimonial, those statements were admissible under dying declaration exception to the Confrontation Clause under Crawford. As such, the reliance on the above cited cases does not help Defendant's argument at all. The trial court did not abuse its discretion in admitting the statements.

Defendant next asserts that the trial court in the Headley case abused its discretion in admitting Bustamante's statements relying on the forfeiture by wrongdoing doctrine as an alternate ground for admissibility. However, the trial court admitted Bustamante's statements as a dying declaration and not under the forfeiture by wrongdoing doctrine. (S30/3074-81) The reference to this doctrine was made in the portion of the trial court's order, where the court gave the reasoning related to its ruling that the dying declaration exception survived Crawford. (S30/3077-80) In that process, the trial court cited Williams v. State, 974 So. 2d 517 (Fla. 3d DCA 2006), that concerned the issue of whether a dying

declaration had survived Crawford. The court merely observed that the Williams court had discussed the doctrine of forfeiture by wrongdoing but the court's order does not, in any way, rely on the doctrine as an alternative basis for admission of these statements. (S30/3078-79) As such, Defendant's assertion that the trial court erroneously considered the forfeiture doctrine as an alternate ground for admissibility is meritless.

Even if this Court finds that the trial court erred in admitting Bustamante's statements, such error was harmless beyond a reasonable doubt. State v. DiGuilio, 491. So. 2d 1129 (Fla. 1986). The State presented evidence in the form of ballistic evidence that three projectiles from the Headley murder scene and three projectiles from the instant murder scene were fired from the same gun and were of a .38/.357 caliber class, testimony that Defendant bought a Dan Wesson .357 gun from Randy Black, on the afternoon of December 7, 2007, Defendant's admission that he bought that gun and had it in his possession on the evening of the incident, testimony of Defendant's mother and his admission that he displayed that gun to his mother on December 9, 2007, eyewitness testimony of people who saw a car parked just north of the BP station around the time when the murders were committed, that matched the description of Defendant's car, an expert testimony that the tire tracks from the crime scene corresponded the tires from Defendant's car, testimony of Prakashkumar Patel who gave a description of the perpetrator that

matched Defendant's height and built and that description was also corroborated by the BP surveillance video, eyewitness testimony of Greisman and Ortiz who identified Defendant as the person who shot Greisman in front of the Headley Insurance. Given the substantial evidence of Defendant's guilt, any error in the admission of Bustamante's statements cannot be said to have affected the verdict and was, therefore harmless. Defendant's convictions should be affirmed.

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

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

> The test for suppression of an out-of-court identification is two-fold: (1) whether the police used an unnecessary suggestive procedure to obtain the out-of-court identification; and (2) if so, considering all the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. See Thomas v. State, 748 So. 2d 970, 981 (Fla. 1999); Green v. State, 641 So. 2d 391, 394 (Fla. 1994); Grant v. State, 390 So. 2d 341, 343 (Fla. 1980). The factors to be considered in evaluating the likelihood of misidentification include:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and confrontation.
>
> Grant, 390 So. 2d at 343 (quoting Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L.Ed. 2d 401 (1972)). If the procedures used by the police in obtaining the out-of-court identification were not unnecessary suggestive, however, the court need not consider the second part of the test. See Thomas, 748 So. 2d at 981; Green, 641 So. 2d at 394;
> Grant, 390 So. 2d at 344.

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

After conducting an extensive pre-trial hearing on the motion to exclude identifications, the trial court in the Headley Insurance case found that no evidence indicated that Ortiz's and Greisman's identifications of Defendant were the result of any suggestion. (S29/2832-2836; S30/3043-44) The court also found that he found nothing suggestive about the book-in numbers under the pictures. (S29/2833) The trial court based its determination on the fact that when he looked at the photopack, he paid little attention to the numbers but instead had focused on the pictures (S29/2833) The trial judge explained that he did not realize that these numbers represent year until the defense counsel pointed that out to him. (S29/2833-34) The court also found that no substantial likelihood of irreparable misidentification let to Ortiz's identification of Defendant. (S29/3836-39)

Subsequently, in this case, after considering the exact same motions filed by Defendant and reviewing the record in the Headley Insurance case, the trial court adopted the rulings made by Judge Hunter in the Headley Insurance case, and denied the subject motions on the same grounds. (25. 4390, 26. 4432-33)

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

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

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

Here, the police did not employ unnecessary suggestive procedures in obtaining the pre-trial identifications. Greisman and Ortiz were shown the same photopack. (S26/2367, 2378) The only difference was that picture number 1 and 2 were inverted. Pictures did not show the date of the booking but only the book-in year. (S26/2367, 2378) Detective Townsel testified that when she showed the photopack to Greisman and Ortiz, they both immediately, without hesitation, identified Defendant. Neither of them looked at the numbers, did not know what they represented and did not say anything about it. Both Greisman and Ortiz testified that when showed the photopack, they immediately pointed to Defendant. Under these circumstances, the trial court properly found that there was nothing suggestive about the out-of-court identification procedure.

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

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

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

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

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

In Adkins, the defendant challenged the pre-trial identification procedure based on the fact that the men in the photopack did not resemble him. As Adkins did not even involve the inclusion of any numbers on the photopack, it is inapplicable here. In Brown, the Kentucky Court of Appeals found the pre-trial identification procedure unnecessary suggestive in which the eyewitnesses to the robbers' flight from the scene of the robbery were shown seven photographs, in which the two defendants' photographs contained the date of the robbery and the legend "ROB", and in which only one another photograph contained the legend. The Court reasoned that, "any person of ordinary intelligence would conclude that the persons in these two photographs had been arrested for the robbery on the very

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

Even if this Court would find that the procedure employed with regard to pretrial identifications was unnecessarily suggestive, the evidence show that no substantial likelihood of irreparable misidentification led to the identification of Defendant by Greisman and Ortiz. First, Defendant asserts that Greisman had a limited opportunity to observe Defendant. This assertion is contradicted by the evidence. Greisman testified that when the burned woman bumped into him, he observed Defendant as he was walking towards him and the woman. His attention was heightened by the fact that he thought Defendant was coming to help. (S95. 3008) He explained that he took a good look at Defendant's face and made an eye contact with him. (S94. 2879-80) Greisman he was focused on Defendant's face and could see him clearly. (S94. 2888, 2879) This demonstrates a sufficient degree of attention to negate any likelihood of misidentification.

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

hair, gloves or long or short sleeves. Greisman explained this by the fact that he was focused on Defendant instead on his facial hair or a hair style (which he stated was not a full Afro, and it was an inch long). (S95. 3008-09) Moreover, Greisman's certainty in selecting Defendant from the photopack was 100%. And, the length of time between the time and confrontation was insignificant because the identification was made the next day. Before he made an identification, Greisman did not watch TV nor read newspapers. (S94. 2908-09) The police did not make any suggestion that Defendant was in the photopack. (S94. 2899) Under these circumstances, Greisman's identification of Defendant was reliable.

Second, Defendant asserts that Ortiz had a limited opportunity to observe Defendant. This assertion is contradicted by the evidence. Ortiz testified that he saw Defendant's face when Greisman pointed at him said, "That guy shot me." (S95. 3040) Ortiz looked Defendant in the eyes. (S95. 3043) His level of attention was heightened by the fact that Ortiz wanted to make sure that Defendant would not come after him. (S95. 3043) This demonstrates a sufficient degree of attention to negate any likelihood of misidentification.

The remaining relevant factors fail to establish any likelihood of misidentification on Ortiz's part. Ortiz's description of Defendant was accurate (a big, black guy, around 30 years old), despite the fact that he could not say for sure if Defendant had a small Afro hair style. (S96. 3105) He explained this by the fact

that he was not focused on Defendant's hair style but on his eyes, "I was looking at his eyes, never forgot them." (S96. 3147)

Moreover, Ortiz had no doubt in selecting Defendant from the photopack. Ortiz's certainty in his identification was even more significant in light of the fact that he had seen Defendant before the incident, at Florida Natural, where they both used to work. (S95. 3052, 3137-38) Finally, Ortiz viewed the photopack only four days after the incident. He testified that he did not watch any news before he made an identification. (S95. 3062-68) Under these circumstances, Ortiz's identification of Defendant was reliable. Therefore, the trial court's ruling denying Defendant's motions to suppress identifications of Defendant should be affirmed.

Even if this Court finds that the trial court erred in admitting the pre-trial and in-court identification of Defendant by Greisman and Ortiz, such error was harmless beyond a reasonable doubt. State v. DiGuilio, 491. So. 2d 1129 (Fla. 1986). Considering the overwhelming evidence of Defendant's guilt, compelling ballistic evidence that identified Defendant as the shooter at both, BP and Headley murder scenes, combined with Bustamante's dying declaration in which she identified Defendant as the person who shot her, the testimony that the tire tracks from the BP crime scene corresponded to the tracks of Defendant's vehicle, there is no reasonable possibility that the error could have affected the verdict. The State also relies and re-incorporates the harmless error analysis in Issues II, III and VIII.

X. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN WEIGHING TWO NONSTATUTORY MITIGATING FACTORS AND IN OVERALL WEIGHING THE AGGRAVATING AND MITIGATING FACTORS.

Defendant challenges the weight that the trial court gave to the nonstatutory mitigators it found-stressors at time of the incident and good person in general. Defendant also asserts that the trial court distorted the overall weighing process by attributing greater weight to one of the aggravating factors. However, this issue is without merit.

The weight assigned to a mitigator is within the trial courts discretion and subject to the abuse of discretion standard. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000); Trease v. State, 768 So. 2d 1050 (Fla. 2000) (receding in part from Campbell; holding that though judge must consider all mitigators, little or no weight may be assigned). Judicial discretion is abused when the judicial action is arbitrary, fanciful, or unreasonable, or where no reasonable man would take the view adopted by the trial court; however, if a reasonable man could differ as to propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. Canakaris v. Canakaris, 382 So. 2d 1197, 1202-03 (Fla. 1980).

With respect to the nonstatutory mitigating factors at issue, the trial court stated:

> Stressors at the time of incident.
>
> It is obvious that the Defendant was under some financial stress in December 2007. By that time, he had lost his long term, good paying job at Florida Natural Growers and had gone to work for the City of Eagle Lake. However, he also lost that job and received his last paycheck from the City of Eagle Lake on December 6, 2007.
>
> The Defendant's wife, Victoria Lynn Davis, was on a leave of absence from her job due to problems with her pregnancy. The family owed past due mortgage payments and had maxed out their credit cards. The Defendant did not have any significant amount of cash in the bank and was facing his son's upcoming birthday and the Christmas holidays.
>
> His son, Garrion Davis, was born with Down's syndrome, and the Defendant was actively participating in this upbringing. It is clear that he spent a lot of time with his son, Garrion Davis.
>
> The Court finds this mitigating circumstance has been proven by a greater weight of the evidence, but it does not justify a decision to rob a convenience store and murder two victims in the course of the attempted robbery.
>
> The Court assigns this mitigator little weight.
>
> Good person in general.
>
> The evidence establishes that the Defendant, Leon Davis Jr., was a loving husband, who was devoted to his Down's syndrome son, Garrion Davis. He was also actively involved in his family, regularly seeing his brother and his sisters.
>
> It appears that he was very well regarded by his entire family, his friends, and his employers.
>
> The Court finds this mitigator has been proven by a greater weight of the evidence but, in light of the murders at Headley Insurance Agency, assigns it little weight.

(34. 5974-75) Clearly, the trial court gave careful consideration of the evidence presented in support of the subject mitigating factors and weighted them accordingly. As to the stressors at the time of incident mitigator, Defendant insists that the trial court abused its discretion in assigning it diminished weight based not on the virtue of that mitigator but on the determination of whether that mitigating circumstance justified the commission of the offense. The State disagrees. It is clear that the trial court assigned little weight to this mitigator based on the evidence presented through the testimony of Victoria Davis, that Defendant had financial difficulties and was dealing with the upbringing of his son who was born with Down's syndrome. Assigning little weight was within the trial court's discretion and the trial court should not be criticized for merely explaining why it did not give more weight to it. The trial court merely made a comment as to why it assigned little weight to this mitigator by noting that the stress Defendant was experiencing was not of such a great intensity to justify Defendant's actions. Moreover, even if the trial court's comment can be looked at as poorly worded, it does not suggest in any way that the weighting process was influenced by anything else but the evidence presented. More importantly, even if the comment is to be found to be improper in the weighing context, it would not affect the ultimate sentence imposed.

As to the claim concerning the good person in general mitigator, it cannot be said that no reasonable person would not have assigned this mitigator little weight considering the contradicting evidence in the record. Defendant seems to argue that the trial court assigned diminished weight to this factor considering the Headley crimes and that (according to Defendant) this was improper as the evidence of these crimes were presented solely for establishing the aggravator of prior violent felony. The record gives no support for this assertion because the evidence that was presented in support of this mitigator at the penalty phase through the admission of the testimonies from the Headley trial from Dawn Henry, Lynda Davis and India Owens was conflicting and inconsistent with other presented evidence. In that regard, Dawn, Lynda and India all testified that Defendant was a good person, caring and compassionate, devoted to his siblings, his son and his son's mother and that he was providing and taking care of his family. (33. 5802-03, 5810; 34. 5840, 5849-50) However, these testimonies were contradicting with the evidence presented at the penalty phase through the testimony of Dr. Stephen Nelson and Lt. Elrod related to the circumstances of the Headley crimes where Defendant doused Bustamante and Luciano on fire during the robbery causing extensive burns to 90% of their bodies due to which they both died. As such, the trial court did not abuse its discretion in assigning little weight to the mitigator it found, and the sentences should not be disturbed.

Finally, Defendant claims that the trial court distorted the overall weighing process when it overlooked the fact that one of the aggravators was assigned moderate weight. In conclusion of the sentencing order the trial court summarized its findings and stated:

> This Court tried the case without a Jury and, therefore, there is no Jury Recommendation concerning what is an appropriate Sentence in this case.
>
> The State has proven, beyond and to the exclusion of all reasonable doubt, 3 Statutory Aggravators, to which the Court has assigned great weight. The Court has also found numerous Mitigators exist and have been proven.
>
> In weighing the aggravating factors against the mitigating factors, the Court understands that the process is not simply a quantitative analysis but a qualitative one. It is the Court's duty to look at the nature and quality of the aggravating and mitigating circumstances that have been established.
>
> Under such analysis, the aggravating circumstances in this case far outweigh the mitigating circumstances.

(34. 5976) It is clear from the foregoing that the trial court was merely summarizing its findings in the conclusion of the sentencing order where he noted that the aggravators were assigned great weight. This does not suggest that the trial court did not independently weight all aggravators against all mitigators nor that it affected the weighing process in any way. Assuming we take the trial court's words literally, that the aggravator that was assigned moderate weight was regarded as given great weight, then, it should be noted that the aggravator that was assigned very great weight was regarded favorably to Defendant-as given only

great weight. In any event, the subject wording by the trial court can be looked at simply as a mistake or poor wording which in the whole context does not reflect the inconsistency but just a summary of the overall findings. To the extent that there is any actual conflict, it would not affect the weighing process or the ultimate sentences imposed. The sentences should be affirmed.

XI. DEFENDANT'S SENTENCE IS PROPORTIONATE.

Defendant next argues that his sentence is disproportionate. This claim is wholly without merit.

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

This Court has upheld death sentences on proportionality grounds under similar circumstances. For example, in Carter v. State, 576 So. 2d 1291 (Fla. 2989), the defendant was convicted for two counts of first-degree murder for killing two people while robbing the store. This Court upheld a death sentence for one victim based on the three aggravators, 1) the defendant was under the sentence

of imprisonment at the time of the capital felony (parole), 2) prior violent felonies (based on the armed robbery and the first-degree murder of the second victim) and 3) the murders were committed during the commission of the robbery. These aggravators were balanced against nonstatutory mitigator of deprived childhood.

In Pagan v. State, 830 So. 2d 792 (Fla. 2002), this Court upheld a sentence of death for double homicide where three aggravators were-prior violent felony, murders were committed during the commission of armed burglary and armed robbery and CCP. These aggravators were balanced against nonstatutory mitigators that concerned his deprived childhood, his attention deficit disorder, his borderline personality disorder, his good relationship with friend and relatives, his good conduct while in custody, to which the trial court assigned little or some weight.

In Taylor v. State, 937 So. 2d 590 (Fla. 2006), the sentence of death was upheld where three aggravators were, prior violent felony, the murder was committed while the defendant was on the felony probation and pecuniary gain. The mitigation consisted of thirteen nonstatutory factors, including that the defendant was under some mental disturbance at the time of the crime, psychological trauma due to abuse and neglect, learning disabilities, neurological impairments, history of substance abuse, the defendant was under the influence of alcohol at the time of the crime, good employee, cooperation with the police and the attempts to recover from drug dependence.

In Jennings v. State, 718 So. 2d 144, 154 (Fla. 1998), the defendant was convicted of robbing the restaurant and murdering three restaurant employees in the process for which he received three separate death sentences. This Court upheld a death sentence based on the three aggravators, 1) murders were committed during the course of a robbery, 2) the avoid arrest aggravator and 3) CCP. These aggravators were balanced against statutory mitigator-no significant history of prior criminal activity and eight nonstatutory mitigators related to the defendant's deprived childhood, that the accomplice was not sentenced to death, cooperation with the police, good employment history, loving relationship with his mother, ability to form caring relationships, caring for children and good courtroom behavior, to which the trial court assigned little or some weight.

In Jones v. State, 690 So. 2d 568 (Fla. 1996), the sentence of death was upheld for the first-degree murder of Monique Stow. Three aggravators were: prior violent felony based on the contemporaneous conviction for attempted first-degree murder, CCP and pecuniary gain. These three aggravators were balanced against mitigation related to: no significant prior criminal history, service in the Navy, that the defendant was married and had two children, and supportive parents.

In Bryant v. State, 785 So. 2d 422 (Fla. 2001), the sentence of death was upheld for the shooting death of the victim, during the robbery of the victim's store. The aggravators found were: prior violent felony, the capital felony was

committed while the defendant was engaged in the commission of the robbery and the murder was committed for the purpose of avoiding a lawful arrest. These aggravators were balanced against the nonstatutory mitigator of remorse which the trial court assigned little weight.

Here, the aggravation and mitigation was similar to the above cited cases as the three aggravators were balanced against insubstantial mitigation. Defendant committed two first-degree murders during the attempted commission of the robbery and while he was on felony probation. In addition, the prior capital felony aggravator was supported by the conviction for two first-degree murders of Yvonne Bustamante and Juanita Luciano (the Headley Insurance crimes). The mitigation was weak. It included a statutory mitigator, that Defendant was under the influence of extreme mental or emotional disturbance to which the trial court assigned little weight. The nonstatutory mitigation related to Defendant being bullied throughout childhood, him being a victim of sexual assault, him being a victim of child abuse, his military service, his personality disorder, history of depression, him being good worked and having good relationship with relatives and his son and him behaving good while in jail, to which all the trial court assigned little, slight or moderate weight.

The cases relied upon by Defendant do not show that his sentence is disproportionate. Livingston v. State, 565 So. 2d 1288 (Fla. 1988), involved a

defendant who was 17 at the time of murder and extensively used drugs and his childhood was marked by severe beatings by his mother's boyfriend after which the defendant's intellectual functioning was at best marginal. Unlike in Livingston, where two aggravators were found, during the commission of the robbery and prior violent felony, here, the trial court also found that Defendant committed the murders while on felony probation. Moreover, here, prior violent felony aggravator was based on Defendant's conviction for two capital murders in the Headley Insurance case. More importantly, unlike Defendant, Livingston was a minor at the time he committed the murder and he extensively used drugs. Although the trial court found that Defendant was the victim of child abuse by his caretaker, and assigned it moderate weight, there was no evidence of severe physical abuse like in Livingston.

In Lloyd v. State, 524 So. 2d 396 (Fla. 1988), this Court found the death sentence disproportional because only one aggravator was found, that the murder was committed during the commission of the attempted robbery and balanced against one statutory mitigator, that the defendant had no significant history of prior criminal activity. Unlike in Lloyd, here, besides during the commission of the attempted robbery, two additional aggravators were found, Defendant was on felony probation and prior conviction of capital felony based on double first-degree murders in the Headley Insurance case. Moreover, unlike in Lloyd, here, the trial

court found that the mitigator, no significant history of prior criminal activity, was not proven.

Jones v. State, 705 So 2d. 1364 (Fla. 1998), involved a single aggravating circumstance, combining during the course of the robbery and pecuniary gain factors. It also involved a substantial mitigation related to the defendant who was diagnosed with organic brain damage when he was two years old, had IQ of 76, read at first-grade level, had mental age of a child, had used drugs and alcohol prior to shooting, after shooting was hysterical and distraught and had cried the next day when the police told him that the victim had died. As already said, unlike in Jones, here, three aggravators were found. Besides during the commission of the attempted armed robbery, two additional aggravators were found, Defendant was on felony probation and prior conviction of capital felony based on double first-degree murders in the Headley Insurance case. None of the mitigation that was found in Jones was found here.

Thompson v. State, 647 So. 2d 824 (Fla. 1994), was a case where only a single aggravator was found, that the murder was committed during the course of the robbery. The mitigation consisted of the defendant who exhibited no violent propensities prior to the murder, was a good parent, received an honorable discharge from the Navy, had regular employment, was raised in the church and had no disciplinary problems. Unlike in Thompson, here, three aggravators were

found. Besides during the commission of the attempted armed robbery, two additional aggravators were found, Defendant was on felony probation and prior conviction of capital felony based on double first-degree murders in the Headley Insurance case. As such, none of these cases show Defendant's sentence is disproportionate. It should be affirmed.

Finally, Defendant seems to argue that this Court should take into consideration in conducting a proportionality review the fact that the first-degree murder convictions for the Headley Insurance crimes, that supported the prior felony aggravator, occurred after the instant murders. However, this argument is without merit. In conducting the proportionality review, this Court accepts the trial court's findings of aggravating and mitigating circumstances and their weight. State v. Henry, 456 So. 2d 466, 469 (Fla. 1984). Moreover, this Court has held that the prior convictions for murders that occur subsequent to the murders under consideration can be considered as an aggravator. Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977). Since here Defendant was convicted for the first-degree murders of Yvonne Bustamante and Juanita Luciano before his instant trial, the trial court properly considered it to support the prior capital felony/violent felony aggravator. Defendant's sentences should be affirmed.

XII. DEFENDANT'S CONSTITUTIONAL CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE IS WITHOUT MERIT.

Defendant argues that his death sentence violates Ring v. Arizona, 536 U.S. 584 (2002). Defendant further asks this Court to reconsider its analysis of the Ring decision. However, this claim is meritless.

Defendant's claim is not a basis for relief because he was also convicted of the underlying offense of the attempted armed robbery, which supports the aggravating circumstance of murder committed during the commission of a felony (attempted armed robbery). Since Defendant was convicted of the underlying felony of attempted armed robbery, that conviction takes his case outside the reach of Ring:

> This Court has consistently held that a defendant is not entitled to relief under Ring if he is convicted of murder committed during the commission of a felony, or otherwise where the jury of necessity has unanimously made the findings of fact that support an aggravator. See Baker, 71 So. 3d at 824 ("[W]e have previously explained that Ring is not implicated when the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony."); see also Douglas v. State, 878 So. 2d 1246, 1263–64 (Fla. 2004) (rejecting Ring claim where jury convicted defendant of committing murder during the commission of sexual battery); Caballero v. State, 851 So. 2d 655, 663–64 (Fla. 2003) (rejecting Ring claim where defendant was convicted by unanimous jury of committing murder during the commission of burglary and kidnapping); Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the

> mandates of the United States and Florida Constitutions"). Accordingly, under this Court's precedent, Ellerbee is not entitled to relief under Ring.

Ellerbee v. State, 87 So. 3d 730, 747 (Fla. 2012); Caylor v. State, 78 So. 3d 482, 500 (Fla. 2011) ("Furthermore, Caylor was contemporaneously convicted of aggravated child abuse and sexual battery involving great physical force by a unanimous jury during the guilt phase of his trial. Ring is not implicated when, as here, the trial court has found as an aggravating circumstance that the murder was committed in the course of a felony that was also found by the trial judge as the trier of fact during the guilt phase; see also McGirth v. State, 48 So. 3d 777, 795 (Fla. 2010), cert. denied, 131 S. Ct. 2100, 179 L. Ed. 2d 898 (2011)."); Reese v. State, 14 So. 3d 913, 920 (Fla. 2009); Baker v. State, 71, So. 3d 802, 824 (Fla. 2011); Aguirre-Jarquin v. State, 9 So. 3d 593, 601 n.8 (Fla. 2009).

Moreover, this Court has also repeatedly held that Ring does not apply to cases where the prior violent felony aggravating factor is applicable. Here, Defendant's claim is not a basis for relief because one of the aggravating circumstances present is a prior capital/violent felony conviction. See Conde v. State, 860 So. 2d 930, 959 (Fla. 2003); see also Overton v. State, 976 So. 2d 536 (Fla. 2007); Jones v. State, 855 So. 2d 611 (Fla. 2003); Silvia v. State, 60 So. 3d 959, 978 (Fla. 2011); Duest v. State, 855 So. 2d 33 (Fla. 2003); Partin v. State, 82 So. 3d 31 (Fla. 2011); Hodges v. State, 55 o. 3d 515 (Fla. 2010); Miller v. State, 42

So. 3d 204 (Fla. 2010); Peterson v. State, 2 So. 3d 146 (Fla. 2009). Under settled Florida law, there is no basis for relief under Ring.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by electronic service to Karen M. Kinney, Assistant Public Defender, at appealfilings@pd10.state.fl.us, kkinney@pd10.state.fl.us, mjudino@pd10.state.fl.us, this 4th day of April 2014.

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CERTIFICATE OF COMPLIANCE

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

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