IN THE SUPREME COURT OF FLORIDA

WYDELL JODY EVANS,

Appellant,

v. CASE NO. SC00-468

STATE OF FLORIDA,

Appellee.

_________________________/

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENTS 42

POINT I
THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF TWO POLICE OFFICERS AS TO EXCITED UTTERANCES MADE BY WITNESSES. . 45

POINT II
THE TRIAL COURT DID NOT ERR IN DENYING EVANS' MISTRIAL MOTION BASED ON ALLEGATIONS THAT THE PROSECUTOR'S REBUTTAL CLOSING ARGUMENT IMPROPERLY SHIFTED THE BURDEN OF PROOF TO HIM. . . . 60

POINT III
THE TRIAL COURT DID NOT GIVE INCOMPLETE AND CONFUSING JURY INSTRUCTIONS IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS. 64

POINT IV
THE TRIAL COURT DID NOT ERR IN DENYING EVANS' MOTION FOR JUDGMENT OF ACQUITTAL AS TO PREMEDITATION AND/OR KIDNAPPING. 68

POINT V
THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO PRESENT PORTIONS OF THE PSI DURING THE PENALTY PHASE. 80

POINT VI
APPELLANT'S DEATH SENTENCE IS NOT DISPROPORTIONATE; THE TWO AGGRAVATORS FAR OUTWEIGH THE NONSTATUTORY MITIGATION. 88

CONCLUSION 93

CERTIFICATE OF SERVICE 93

CERTIFICATE OF COMPLIANCE 93

TABLE OF AUTHORITIES

CASES

Archer v. State,
673 So. 2d 17 (Fla. 1996)
cert. denied, 519 U.S. 876 (1996) 64, 65

Breedlove v. State,
413 So. 2d 1 (Fla 1982) 60, 61

Brown v. State,
124 So. 2d 481 (Fla. 1960) 64

Chariot v. State,
679 So. 2d 844 (Fla. 4th DCA 1996) 59

Cole v. State,
701 So. 2d 845 (Fla. 1997),
cert. denied, 523 U.S. 1051 (1998) 81, 89

Consalvo v. State,
697 So. 2d 805 (Fla. 1996),
cert. denied, 523 U.S. 1109 (1998) 90

Crump v. State,
622 So. 2d 963 (Fla. 1993) 68

Davis v. State,
703 So. 2d 1055 (Fla. 1997),
cert. denied, 524 U.S. 930 (1997) 90

Gore v. State,
26 Fla. Law Weekly S257 (Fla. April 19, 2001) 76

Henyard v. State,
689 So. 2d 239 (Fla. 1996) 56, 57, 58

Jent v. State,
408 So. 2d 1024 (Fla. 1981) 45

Jones v. State,
748 So. 2d 1012 (Fla. 2000) 83, 86

Koon v. State,

513 So. 2d 1253 (Fla. 1987) 81, 82, 83, 86

Kormondy v. State,
703 So. 2d 454 (Fla. 1997) 58

Larry v. State,
104 So. 2d 352 (Fla. 1958) 69

Lusk v. State,
498 So. 2d 902 (Fla. 1986) 75

Mansfield v. State,
728 So. 2d 636 (Fla. 2000) 90

Miller v. State,
770 So. 2d 1144 (Fla. 2000) 68, 69

Morton v. State,
459 So. 2d 322 (Fla. 3d DCA 1984) 66

Paramore v. State,
229 So. 2d 855 (Fla. 1969),
modified, 408 U.S. 935, 92 S. Ct. 2857,
33 L. Ed. 2d 751 (1972) 60

Parker v. State,
641 So. 2d 369 (Fla. 1994) 62

Ray v. State,
755 So. 2d 604 (Fla. 2000) 45

Rodriguez v. State,
753 So. 2d 29 (Fla. 2000) 83, 86

Rogers v. State,
26 Fla. L. Weekly S115 (Fla. March 1, 2001) 68

Rogers v. State,
660 So. 2d 237 (Fla. 1995) 50, 51, 52, 55

Ruiz v. State,
743 So. 2d 1 (Fla. 1999) 60, 61

Sanford v. Rubin,
237 So. 2d 134 (Fla. 1970) 64

Shellito v. State,
701 So. 2d 837 (Fla. 1997) 90

State v. Wilson,
686 So. 2d 569 (Fla. 1996) 66

Steinhorst v. State,
412 So. 2d 322 (Fla. 1982),
cert. denied, 522 U.S. 1022 (1997) 47, 58, 80, 81

Stewart v. State,
420 So. 2d 862 (Fla. 1982),
cert. denied, 460 U.S. 1103 (1983) 66

Stoll v. State,
762 So. 2d 870 (Fla. 2000) 45, 46, 50, 55

Thomas v. State,
326 So. 2d 413 (Fla. 1975) 60

Tibbs v. State,
397 So. 2d 1120 (Fla. 1981) 68

STATEMENT OF THE CASE AND FACTS

Twenty-two year old Erica Foster, then in custody on pending criminal charges, testified that she, April Holmes, and the victim, Angel Johnson, were stopped in April's car on the side of a street when a car driven by Sammy Hogan and containing the defendant, Wydell Evans, and Lino Odenat pulled in behind them. (R 984, 985, 988, 989). Evans told Angel "to get out of the car." (R 989). She did, and the two of them conversed. (R 989). Afterwards, Angel asked Erica "to ride to Cocoa with them." (R 989). Erica agreed, and she entered the car driven by Sammy; Evans was in the front passenger seat, Lino was behind him, Erica was in the middle, rear seat, and Angel was beside her behind the driver. (R 991). Upon entering the car, Erica noticed that Lino "had a gun on his lap," but because "he's known to have guns on him all the time," she "didn't really think nothing then."[1] (R 993).

They drove for awhile and decided to stop for gas and snacks. (R 992, 994). Sammy started to pull into a 7-Eleven, but Evans "didn't want to stop," commenting there "was a detective car or police car" at the store. (R 992). Evans added

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[1] She described the gun as being black, similar to those carried by police, with a sliding top. (R 993-94).

that the store was "the police's second home," and instructed Sammy to "[k]eep going." (R 992). Eventually, the car was stopped at an acceptable store, and Evans told Angel to go inside for snacks. (R 994). While she was inside the store, Evans and Lino were standing outside the car with Erica and

> we was talking about the meaning of love and stuff. And he was saying to me I don't know the meaning of love and what would I do if there was a gun to my head and I said, I don't know, I would probably be scared if I had a gun to my head.

(R 995). When Angel returned, "everybody got back in the car." (R 995).

Angel was Evans' brother's long-time girlfriend. (R 986-87). Someone had "told Angel's boyfriend that she was cheating on him." (R 996). Evans said: "You're not going to cheat on my brother like my girlfriend cheated on me." (R 996). Angel asked Erica to "tell Wydell that I love O.J.;" Erica did. (R 996).

At that point, Angel "put a smile on her face and he pulled out the gun." (R 996). The barrel of the gun was pointed "[e]xactly towards her [Angel]." (R 998). "Angel put up her hands" and said: "All right, Wydell, All right." (R 997). She also said: "Stop, Wydell, Stop." (R 998). When "she put a grin on her face . . . he shot the gun."[2] (R 998). Angel fell into

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[2] On cross, Erica indicated that Evans said something like "'You think this is funny.'" (R 1029-30). She also made it clear that

Erica's lap. (R 998).

Angel was "gasping for breath," and she said: "Wydell, You shot me for real, You shot me for real." (R 999, 1016). Lino began "to roll the window down and Wydell said, Don't roll the window down." (R 999).

At that point, "there was a disturbance in the courtroom audience." (R 999). The victim's father was identified as the one causing the disturbance. (R 1000). Defense counsel told the court "[w]e need to remove that person from the rest of this trial." (R 1000). The judge spoke with Mr. Johnson and gave him the choice to sit quietly or leave. (R 1013). Mr. Johnson chose to leave. (R 1013-14).

Thereafter, the matter of the failure of Lino Odenat to appear to testify was taken up by the court. (R 1014-15). At the conclusion of that issue, defense counsel moved "for a mistrial based on the outburst" of Mr. Johnson. (R 1015). The trial judge denied the motion, finding that "the episode" with Mr. Johnson did not "affect the integrity of the trial in this case and I think the matter has been properly and expeditiously

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there was no "tussling . . . over the gun. He meant to shoot her. She did not hit his hand so the gun could go off. . . ." (R 1032-33).

resolved." (R 1015).

Direct examination of Ms. Foster continued. (R 1016). She related that "Lino was trying to give Angel some air because she was gasping for breath." (R 1016-17).

The gun Evans shot Angel with was the same one Erica had earlier seen in Lino's lap. (R 1017). After shooting Angel, Evans said: "That bitch is dead, she's dead." (R 1017). Evans then directed Sammy "to take him to Eau Gallie." (R 1018). A little later, Evans "gave it [the gun] back to Lino and told Lino to dispose of the gun." (R 1018, 1020).

Sammy stopped the car where Evans directed at "the side of the road where . . . Big Dick stays . . . .." (R 1019). There were "a whole bunch of other guys outside," and Evans exited the car and spoke "to Big Dick and 19." (R 1019). Erica began telling Sammy "to pull off, pull off." (R 1020). "Lino put his foot out the door and he said, When I get out of the car I want you all to pull off." (R 1020). However, Sammy refused "because he was scared." (R 1020).

When Evans saw Lino step from the car, he "pointed his finger back and Lino got back in the car and he said, He know what we doing, and he said, I'm tired of seeing stuff like this." (R 1020). At that point, Evans left the group, "got back in the car and had us drive up into this parking lot," a short

distance from "Big Dick's house." (R 1020, 1021). Evans was at Big Dick's for "about three to four, five minutes." (R 1034).

At the parking lot, Evans

> looked at Sammy and he said, If you tell anybody that I did this I'll kill you. And then he looked back at me and he said, I'll kill you, If I go to jail I'm going to get out because I've done something like this before and I've got out before. He said, If I don't get out I have somebody to kill you and your family.

(R 1021). Erica believed Evans' threats and was afraid. (R 1022, 1023).

Thereafter, Evans removed a tape, wiped it with a towel and got out, saying "Lino, come on." (R 1022). Lino exited with the gun. (R 1022).

Then, Evans "said, You all drive her to the hospital." (R 1022). At that point, Erica took the driver's seat, and Sammy sat in the back with Angel. (R 1022). They drove to the hospital. (R 1022).

Erica testified that she would have stayed in the vehicle after the shooting to take Angel to the hospital. (R 1023). She said they did not take Angel to the hospital immediately after she was shot "[b]ecause Wydell was not going to let us." (R 1024).

Angel had stopped gasping and "[t]hat's why Lino was trying to . . . roll the window down so she could get some air." (R

1024). When Erica took over the driving, "Sammy said he felt her pulse and that she was getting cold, to, you know, speed up." (R 1024). Erica "started driving more fast and running red lights and everything, trying to get her to the hospital." (R 1024).

At the hospital, Erica talked to some police officers and "lied and said it was a bad drug deal because I was scared from when Wydell threatened me . . . Wydell said he was gonna kill me." (R 1025). She "just said that Angel sold a white man some bad stuff and that he shot her." (R 1025). One of the officers was Officer Yorkey whom Erica knew, and she told Erica that she could tell she was lying. (R 1025). At that point, Officer Yorkey "told me that Angel was dead, that's when I told her Wydell had shot her." (R 1025).

Erica identified a photo of the windshield of the car Sammy was driving. (R 1028). She said that Evans punched the windshield and cracked it "[a]fter Sammy say, You shot that girl, You shot that girl. Then he punched the windshield and he said, Shut the fuck up." (R 1028).

On cross, the defense brought out that Evans had been at Erica's house a day or so before the murder with the victim; it was the first time she had seen him. (R 1036, 1037). Evans had "looked at me crazy," and Erica had "asked Angel to get him to

leave. And then that's when they left." (R 1038). Erica was aware that Evans "had just gotten out of jail . . .." (R 1038). Erica asked Angel to get Evans to leave because she was "afraid of him." (R 1051).

Melbourne Police Officer Wendy Yorkey testified that on the morning of October 22, 1998, she was on patrol. (R 1174, 1175). She was sent to the hospital where she met Erica Foster out in the hallway. (R 1176). When Officer Yorkey spoke with Erica, "she was extremely upset." (R 1177). Erica "kept on saying that, He's going to kill me, He's going to kill me," and "[s]he was very hesitant" to talk about the incident. (R 1177).

Officer Yorkey "was trying to comfort her and trying . . . to calm her down," and she asked her about what happened, "who?" (R 1178). Erica continued to be "real hesitant" and to say "she was afraid to say." (R 1178). The officer suggested that if she was afraid to say, perhaps she would write it down. (R 1178). Erica "wrote Wydell, W-Y-D . . .." (R 1178). At this point, defense counsel objected "on the basis that this is hearsay." (R 1178-79). The trial judge overruled the objection on the basis of the excited utterance exception to the hearsay rule. (R 1179).

After Erica wrote Wydell on the paper, "the other family members caught on that it was Wydell and they said it was Wydell

Evans. They knew right away who she was speaking of." (R 1180). The officer "didn't speak with her anymore." (R 1180).

Officer Yorkey transported Sammy to the police department. (R 1180). In the patrol car on the way to the police department, the officer "tried to talk to him and comfort him and let him calm down a little bit, got him a cup of coffee, tried to get him to relax and calm down because he was pretty distraught and upset of what had occurred." (R 1193).

At the station, she "sat him down and . . . tried to talk to him, calm him down, reassure him . . .." (R 1180). Sammy "was pretty shook up and asked me if I could write it down for him." (R 1181). After she completed taking his statement, Officer Yorkey had no other involvement in the case. (R 1195).

Veteran Melbourne Officer Lt. Mark Laderwarg spoke with Sammy Hogan, who he knew, at the hospital. (R 1196, 1199). Sammy "was extremely upset." (R 1199). "He was shaking. He was sweating. He was talking extremely rapidly." (R 1199). When Lt. Laderwarg asked what Sammy told him, defense counsel interposed a hearsay objection. (R 1199). The State responded that it was an "excited utterance," and the judge ruled that the exception applied. (R 1200).

Sammy told the officer that "he was in the car with . . . at least three other people, and said the passenger of the car

had shot Angel Johnson . . . who was sitting in the backseat." (R 1200). He told the officer that Evans pointed the gun at him and then at Angel. (R 1215). However, Sammy refused to tell him "who did the shooting."[3] (R 1200). Lt. Laderwarg "tried to get his confidence" so he would "tell me who," but "he said, No, I'm scared he'll kill me, He'll kill me." (R 1213). Eventually, however, he told the officer that "Wydell Evans" was the shooter. (R 1214).

Eighteen year old Sammy Hogan, a resident of the Department of Juvenile Justice, testified that Evans is "related to my niece." (R 1056-57). Angel "was my best friend." (R 1058). Evans had asked him for a ride to Cocoa earlier in the day. (R 1063). Lino was with Evans when Sammy stopped to get Evans. (R 1064).

After Sammy, Evans, Lino, Angel, and Erica left the roadside, they went to get gasoline. (R 1067). Evans directed him away from certain stations because of police presence. (R 1067). They stopped at a Mobil; Sammy pumped the gas, and Angel went inside to pay for it. (R 1067-68).

Shortly after leaving the Mobil station, an argument between

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[3] At that time, other officers had previously spoken to Sammy. (R 1200).

Angel and Evans broke out. (R 1068). Evans charged Angel had cheated on his brother. (R 1068). Sammy said: "No, she's not. So he got mad at me, told me to mind my own . . . goddam business, don't tell him how to run his brother's affairs." (R 1068). At this point, Evans punched Sammy's windshield, cracking it. (R 1069). "[T]hen, he says something, so she says something and then she laughed. . . . And then he turn[ed] around saying, You think it's funny, You think it's funny? And that's the part he shot her."[4] (R 1069). As he pulled the gun on her, Angel said: "Wydell, I'm sorry, I'm sorry." (R 1072). Angel "did not touch the gun." (R 1072). The gun was "[t]he kind you pull back." (R 1092).

After shooting Angel, "he threatened me and my cousin that was in the car." (R 1071). He said:

> if we tell he'll kill us, if he don't kill us he'll get somebody else to kill us, he'll kill the whole family, he know where we stay. Then he started threatening us in the car. He said if I had a chance to go ahead and pull out and he said take him to Eau Gallie, so we went to Eau Gallie.

(R 1072-73). While saying this, Evans pointed the gun "towards me and Erica['s] head." (R 1073). He and Erica promised

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[4] This was the first time that Sammy had seen the gun. (R 1070). He described it as a .9 millimeter with a pull back firing mechanism. (R 1070).

"Wydell, We promise we ain't gonna tell, We ain't gonna tell." (R 1073).

Evans ordered Sammy to take him to Eau Gallie to Big Dick's house. (R 1073). He did. (R 1073). Although Sammy wanted to go "get help for her," he did not because Evans "had a gun to our head and we couldn't at that time." (R 1073). He was afraid Evans would shoot him, if he did not follow his instructions. (R 1074).

While Evans talked to Big Dick, the others were "trying to figure out how we're going to get away from him." (R 1074). Throughout this time, Evans was "[v]ery close" to the car the others were in. (R 1075). In fact, Evans was so close that "[a]ll he had to do was turn around and get back in the car." (R 1096).

Evans had given Lino the gun, and Lino said "he was gonna step out of the car," and they were "to go ahead and pull off and go to the hospital." (R 1075-76). As Lino stepped from the car, Evans immediately said: "What the fuck you doin', Get your dumb ass back in the damn car." (R 1076). Lino had not even stepped away from the door at this point, and Evans came back and got in the car. (R 1076). Upon entering the vehicle, Evans "asked Lino for the gun back, got the gun back." (R 1076). Sammy estimated that they were at Big Dick's house "about a

minute or two." (R 1076).

Evans ordered Sammy into a housing project parking lot. (R 1076). Upon Sammy's compliance, Evans "started threatening us. He took his tape out of the tape player, He said if we tell he gonna do this, he gonna kill us." (R 1076). Evans said:

> . . . [H]e was gonna kill us if we tell, he was gonna get the whole family, he know where we stay at. And so I told him, I said Wydell, You can't do this, You can't do this because this is my niece. So he's saying, I'm trusting you all, I'm trusting you all, If you tell I swear to God I'll kill you, I'm not playin'. I'm dead-ass serious is what he said, swore on his grandma's grave.

(R 1077). He told them to "[m]ake up an excuse, Say something, I don't care what you say." (R 1077). Upon exiting the car, Evans "tried to wipe his fingerprints and stuff down from the car . . .." (R 1077). Lino exited with Evans. (R 1084).

As Erica drove to the hospital, she phoned someone "and told them that Angel had got shot." (R 1078). Sammy was in the back with Angel, and "[s]he was still breathing," but "was real weak and she say, Sammy, He shot me, Help me, Help me. I said, Don't worry, You're gonna be okay, You'll make it, Don't worry." (R 1078). They ran stop signs and red lights to get Angel to Holmes Regional Hospital. (R 1078).

When they were confronted by police at the hospital, he and Erica "was scared at first so we went ahead with the story that Erica went with. We said it was a guy in a two-door yellow

Cougar that shot her at first." (R 1079). However, Sammy asked the police "to call my mother's old partner down," Mark Laderwarg, and he "told him what happened." (R 1079).

Later, Sammy found a bullet shell casing "in the back" of his car, behind the window, after the police released it to him. (R 1079, 1080). He called the police and "gave it to them." (R 1080).

When identifying photos of his car, Sammy mentioned "Evans' court papers on the floor." (R 1083). These were his "[p]robation officer papers." (R 1083).

On re-cross, Sammy said that the day before Angel's murder, she had gone to "his mother['s] house" because she learned "he got out of jail . . .." (R 1108). There did not seem to be any animosity between Angel and Evans at that time. (R 1109).

However, earlier on the day of the murder, Sammy, Evans, and Kendra Terry "was riding," and Evans was saying that Angel "was cheating on his brother," and "he gonna take care of his brother['s] work for his brother, he know she was cheating on his brother." (R 1109). Sammy told him that Angel was "not cheating on your brother," and Evans made some reply that he "couldn't tell you exactly what Wydell said." (R 1109). However, Evans "started getting very upset then." (R 1110).

Jerry Davis, also known as "Big Dick," testified that Evans

came to his home on October 21, 1998 in the late evening hours. (R 1136, 1145). Evans knocked on his screen door in which he was standing "and said he wanted to talk to me." (R 1138, 1139). He stepped out onto the porch to talk to Evans. (R 1140). Big Dick showed the jury how far his porch was from the car Evans arrived in.[5] (R 1140).

Evans told him "Man, I just shot the girl. And he said, Do you got any money you can loan me?" (R 1141). Big Dick offered him forty dollars which Evans took from him then. (R 1141, 1148).

Evans "asked me to take him to Cocoa." (R 1144). Big Dick refused. (R 1144).

"After I gave him the forty dollars he was standing there and some little bright skin dude got out of the car and he said, Just get in the car. Dude got back in the car." (R 1141). Big Dick thought the "bright skin dude's" name was "Nino or Lino or something." (R 1142). Lino approached Evans, "and Wydell told him, said, Didn't I tell you not to get out of the car?" (R 1142). Lino "turned around and went back inside the car." (R

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[5] On cross, Defense Counsel tried to get Big Dick to say that the distance was "maybe twenty feet," but Big Dick indicated the distance for the jury using a "table" in the courtroom. (R 1149).

1142). Evans "got back in the car and he left." (R 1142).

Big Dick saw the car go a short distance and stop in the parking lot of some apartments. (R 1143). He saw Evans and Lino exit, and saw the car head back the way it had originally come. (R 1143). Within "ten or fifteen minutes," Big Dick loaned his car to "19." (R 1143, 1144). He saw 19 go in the "same direction" as Evans and Lino had when they exited Sammy's car. (R 1145).

The first officer to arrive at the hospital, Johnny Rodriguez, testified that he took a statement from Sammy Hogan and Erica Foster, apparently together. (R 1151, 1158). Sammy told the officer that "the victim, was shot by this white male in . . . a cream-colored vehicle . . .." (R 1158). "They gave very little description of what happened. . . . I was getting the sense that the description they were giving was being made up as they went along . . .." (R 1158-59). He separated the two witnesses. (R 1159).

The officer "stayed with Sammy Hogan." (R 1159). Sammy, "when he spoke he mostly cried. He was very scared. He didn't really want to speak about the incident. He pretty much maintained to the first story . . .." (R 1159). As the officer "talked to him you could see that he was changing his mind . . .." (R 1159). However, he did not tell the truth about what

happened until Erica Foster "broke down and gave specifics to the incident . . .." (R 1160).

Dennis Nickles reported to the hospital in reference to the shooting. (R 1163-64). Erica first indicated that a white man had shot Angel, but later, she said "she couldn't tell who it was because it was a relative, . . . and she was afraid to disclose who it was out of fear of that person killing her." (R 1171). "[S]he was very upset and everything." (R 1171).

Twenty year old Lino Odenat, "[a] good friend" of Evans, testified to the events at issue. (R 1217, 1218). He did not know Sammy until he picked him and Evans up from Darryl Little's residence to take them to Cocoa on the night of the murder. (R 1221). In the car, he heard conversation between Evans and Sammy and recalled conversations he had overheard earlier in the day indicating that the purpose of the trip to Cocoa was to look for Angel. (R 1223-24).

Lino said that Angel "was a close friend of mine." (R 1224). Angel had been going with Evans' brother, O.J., and had been "a serious girlfriend" for a long time. (R 1225).

Lino said that the statement he gave law enforcement the day after Angel's murder, to the effect that Evans was accusing Angel of "[f]ucking over my brother" and calling her a "bitch," was "not true." (R 1228-29). He claimed that he told the police

what he did because “they told me [what]. . . to say” and “[t]hey was messin’ with my mind.” (R 1230). He added the police “was forcing me to say the words that I said . . ..” (R 1230). Lino claimed that everything in his statement was based on facts suggested to him by the police, and he just agreed to them. (R 1232). Some of it was true, and some was not.[6] (R 1232).

When the three men came upon Erica and Angel, “Wydell got out of the car and talked to Angel . . ..” (R 1234). Angel and Erica got into their car. (R 1234).

Lino thought Evans had a gun earlier in the day when they were at Darryl’s house. (R 1235). Lino knew him to carry a gun, but did not actually see one at that point. (R 1235). However, later he agreed that he had seen “a gun on Wydell” earlier in the day at Darryl’s house. (R 1238).

Lino admitted telling the police in his statement that Evans had given him a gun to hold prior to Angel getting into the car, but he said that statement was not true. (R 1237-38). At his deposition in “June of this year,” given to Defense Counsel, Lino said that the gun he saw on Evans at Darryl’s the evening of the murder was the same one that he used to kill Angel. (R

[6] Later, however, Lino admitted that due to his level of intoxication he could not remember clearly, and there may have been some conversations earlier in the day. (R 1247).

1241). However, at trial, Lino insisted that he "wasn't sure or positive, A-plus sure that it was a gun" he saw Evans with at Darryl's. (R 1242).

Lino said that Evans waived Sammy off of the 7-Eleven: "He said, Because I don't even go to 7-Elevens because too much police be out there. . . . That's what Wydell says." (R 1245). They got gas at a Mobil, and Angel got food. (R 1245, 1246, 1247).

Lino said he did not hear any conversations going on in the car because the "[m]usic was up." (R 1249). However, later he said he heard Evans and Erica arguing in the car. (R 1251). He claimed the transcriber of his deposition "must have put it down wrong" because he did not recall Evans calling Angel a bitch, although he recalled him calling Erica one. (R 1252-53). Lino said his deposition was not true in so far as he reported that Wydell called Angel a bitch. (R 1254).

Lino also said he remembered no conversations about Angel cheating on O.J. (R 1249-50). However, later, he said they "weren't really arguing." (R 1254).

Regarding his deposition statement that Wydell was accusing Angel of cheating on O.J. in the car before the murder, Lino said that Wydell was arguing with Erica, not Angel. (R 1255). Upon further questioning, he admitted that Angel **and** Erica were

arguing with Evans,[7] but subsequently, he claimed, again, that "Angel wasn't arguing." (R 1256). Still later, he amended that although Angel and Evans never argued about Angel cheating on O.J., "[t]hey talked about it." (R 1257). He said: "Wydell asked her . . . I know you cheating on O.J. And then Angel was talking about she didn't do it."[8] (R 1257). Lino said that this conversation occurred in the car before they arrived at the Mobil station, and when they resumed traveling, he "was laying back and then Wydell's . . . I heard Wydell passing Angel the gun and she -- she patted it and she hit it and it went off."[9] (R 1258-59). Lino opened his eyes. (R 1259-61). He "was intoxicated heavy." (R 1306).

Evans pointed the gun toward Angel, and "it surprised Angel . . . ." (R 1310). She was not laughing at this point, "[s]he

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In his deposition given to Defense Counsel, Lino said that Angel was "just the one that was arguing with Wydell." (R 1256).

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Lino said that approximately 15 minutes before the shooting, he heard Evans tell Sammy "[g]et this gun out of here, or something like that." (R 1319-20). Angel, Erica, and Evans began arguing about 5 minutes before the shooting. (R 1320).

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At some unspecified point, Lino had heard Angel and Erica arguing with Evans. (R 1308).

was more like surprised, . . . or . . . shocked." (R 1310). Angel slapped at the gun (an automatic), and "[t]he gun fired. Angel . . . leans on Erica and . . . she was holding on to her arm, . . . so . . . I'm thinking she got shot in the arm." (R 1267, 1311). Angel was "saying she got shot." (R 1267). Lino said he "was traumatized, . . . seeing something like that." (R 1268). He heard Evans direct them "about going on, drop me off the alley, take Angel to the hospital." (R 1269).

Lino denied that Evans handed the gun to him, and claimed to never have seen it again. (R 1270). He claimed that he got out at Big Dick's house to tell Evans to "hurry it up."[10] (R 1270). He told "Erica to feel for Angel['s] pulse and make sure Angel all right." (R 1271). After he and Evans got back inside the car, they "[g]ot dropped off," but "before I got out of the car I felt Angel pulse again and she's still living and then I told them go to the hospital and they went." (R 1271).

Lino admitted that he told the police that Evans threatened to kill Sammy and Erica if they told he had shot Angel. (R 1274-75). Likewise, he admitted telling them that Evans told

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10 Lino claimed he did not know why Sammy went to Big Dick's place before going to the hospital. (R 1321). He also claimed he told Erica to put the window "down so Angel could breathe better." (R 1322). He said Evans did not tell him to keep the window up, and Erica put it down. (R 1322).

Sammy and Erica to lie when they got to the hospital. (R 1275). He claimed though that he only said these things because the officers told him what Sammy and Erica said and "badgered" him into going along with it. (R 1275-76).

Lino said that after the others dropped him and Evans off, they caught a ride with Darryl Little. (R 1276). Little drove them to a motel and rented a room for Evans. (R 1276). Lino walked home. (R 1276).

The State called Edward Rogers, then a resident of the Brevard County Jail, who knew Evans. (R 1385, 1396). He testified that in October, 1998, he and Evans were residing together in the jail. (R 1386). During that time, Evans was "pissed off about this girl and he said, If I could get my hands on her I'll kill that bitch." (R 1386). The "girl" was "Angel Johnson," Evans "said her name." (R 1386, 1397). Before telling Mr. Rogers this, Evans had argued on the phone with Angel; he talked to Angel on the phone only once to Mr. Edwards' knowledge. (R 1388). Evans did not threaten to kill Angel during that conversation with her, but made the threat immediately after "he got off the telephone." (R 1391).

Mr. Edwards wrote the authorities when he "heard about this murder." (R 1389, 1392). Law enforcement did not become aware of Mr. Edwards as a potential witness until after he had already

been sentenced for his own crime(s). (R 1389-90). He was given no deals or made any promises for his cooperation in this matter. (R 1390, 1416). Mr. Edwards acknowledged “nine or ten” prior felonies. (R 1390).

After Mr. Edwards testified, the court gave an agreed-upon jury instruction. (R 1383). It was:

> The Jury should not infer the Defendant is guilty of any other crimes merely because he was in jail when Edward Rogers heard him on the phone and heard the conversation -- excuse me -- and had the conversation with the Defendant he has testified to.

(R 1417).

Medical Examiner, Paul Vasallo, testified that he performed an autopsy on the murder victim, and Evans stipulated that the victim was Angel Johnson. (R 1327, 1330). He said the bullet entered “the middle of the chest” and “exit[ed] in the back.”[11] (R 1332). “[T]he gun was near her when it was discharged.” (R 1339). Angel’s “body was against something when the bullet came out,” producing “an abrasion, and . . . a short exit wound.” (R 1340). Dr. Vasallo demonstrated the angle and placement of the gun. (R 1341-42). “[T]he gun was not completely perpendicular.

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[11] Other injuries on Angel’s body were associated with attempts to resuscitate or provide medical treatment at the hospital. (R 1332).

It was at an angle (indicating).” (R 1342).

Dr. Vasallo testified that the bullet entered Angel’s body, causing “a cavity inside” made by the “explosion inside.” (R 1344). It then entered and “went through the arch of the aorta,” causing severance of the artery and making “a big hole.” (R 1344). The bullet entered “[r]ight to left, downward and continue[d] to [the] posterior.” (R 1345). It entered “[f]ront to back.” (R 1345). Not much blood exited Angel’s body because the blood collected in the cavity. (R 1345). Dr. Vasallo then described the manner in which Angel bled to death internally, including the eventual starving of her lungs and brain for oxygen. (R 1345-48). The doctor estimated that it took “ten minutes or less” for Angel to die, although she may have been unconscious sooner than that. (R 1348).

Angel “died because she lost all of the blood and the body was deprived of blood and . . . died from exsanguination from the gunshot wound.” (R 1348-49). With the exception of the gunshot wound, Angel “was a normal, healthy seventeen year old.” (R 1349).

The state rested. (R 1866).

In the Defense case, Evans called Sammy Hogan. (R 1759). He asked Sammy if he ever told Evans he would shoot him. (R 1769). Sammy said that he did not. (R 1769). Sammy reiterated

that in the car:

> Wydell was still arguing with her [Angel] that she was cheating on his brother. She said, Wydell, I'm not cheating. She said something real funny. She said something really smart. He asked her what was funny, You think it's funny, and turned around and shot her.

(R 1771). He said that when Evans punched his windshield, he asked him: "What the fuck wrong with you . . .," and asked him if he was "gonna pay for it?" (R 1772). Right "after he punched the windshield she said something funny and laughed and he turned around and shot her." (R 1772). Sammy repeatedly denied having said that he would shoot Evans right after Evans broke the windshield. (R 1775-78).

Sammy "guess[ed] he [Evans] was mad, because I kept cutting in every time he said something" about Angel cheating on his brother. (R 1769, 1779). His opinion that Evans was mad was based on Evans' "expression." (R 1779).

Sammy related a conversation the day before the murder in which Evans told Kendra in Sammy's presence that Angel and Kendra "was 'hos', sluts and they was mudded out."[12] (R 1779. See R 1767). Sammy told Evans: "No, she's not." (R 1769).

Thereafter, twenty-nine year old Wydell Evans testified in

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[12] Sammy said that "mudded out" meant "fucking a person, fucking that person." (R 1779-80).

the defense case. (R 1813, 1814). He said he had been out of jail for "a day and a half" when he shot Angel. (R 1814). He had seen Angel earlier in the day when he, Angel, and Sammy went to visit Evans' brother, Angel's boyfriend, in jail in Viera. (R 1829-30). Later that evening, he met with friends and drank and talked. (R 1823, 1824). Despite the alcohol, however, Evans "was focused on everything I was doing." (R 1824).

Evans wanted to go to Cocoa to visit someone he had met in jail, and so, he asked Sammy for a ride there. (R 1826). He, Lino, and Sammy were on their way when they saw a car in which Angel, Erica, and a friend were seated. (R 1830). They talked to the girls a few minutes, and Angel and Erica got into the car with the men. (R 1831).

They did not stop at the 7-Eleven for gas because "there be a lot of, you know, polices there, law enforcement there." (R 1832-33). They "got gas" at the Mobil station. (R 1833). While there, Evans gave Angel "a dollar for the potato chips," as well as some money for the gas. (R 1833). After driving away, they began talking about his "brother and Angel and all of that." (R 1834-35).

Evans described himself as "the type of person to Angel that, you know, I always counsel her, tell her she need to do this here and this here." (R 1835). He "was speaking on that

topic there, . . . and Erica was speaking back, . . . and it was in general conversation." (R 1835). At some point, he told Angel, "you really don't need to be around Erica anyway." (R 1835).

Shortly after this conversation Evans "[i]n the process of sticking the tape in the cassette deck . . . felt a hard object under a pink towel." (R 1836). Under that towel "was a gun and a razor." (R 1836). It was "a black semiautomatic." (R 1836, 1851, 1852). He said he asked Sammy why he had it, and said: "[L]ook here, I don't want this around. I don't want it around me. I said I just got out of jail." (R 1837). He "picked it up." (R 1853). He then demonstrated for the jury precisely how he picked up the gun and had it "in the palm of my hand" as he spoke to Sammy about it. (R 1853). He continued to hold it until he "went in the process of handing it back to Angel." (R 1853-54).

According to Evans, then "we start speaking on another conversation." (R 1837). Evans "eventually . . . told him [Sammy], I said, Look here, Get it away from me . . . Look here, Put this in the backseat." (R 1837). He added:

> During that time there I start trying to hand it to a certain person in the backseat, but during that time the music was up loud, everybody was just talking, laughing, you know, because they was high, I was drunk, you know, and on and on.

(R 1837). Evans denied that he ever hit the windshield, but reiterated that he "was drunk, yes." (R 1837). He then changed his story and said he was "[n]ot drunk but just, you know, slightly intoxicated." (R 1837). He added that he had a clear recollection of what happened at the time. (R 1837-38). On cross, he said he was "perfectly aware of everything and" was "functioning fine." (R 1850).

Evans claimed that "when I was trying to hand the gun to the back Angel was, like, laughing. She was laughing, right? But she knows exactly what I was doing." (R 1838). He said he

> hand[ed] it to her and I said, Angel, Look here, Put this in the backseat somewhere. Angel all Huh-uh, Huh-uh (indicating).
>
> I said, Come on, Stop bullshitting, Just lay it back there. We on U.S. 1. And she all Huh-uh, Huh-uh (indicating) and she push it and when she pushed it it went off.

(R 1838).

On cross, Evans demonstrated to the jury how he held the gun with his finger "by" the trigger and how he handed it back to Angel. (R 1855-56). His hand was extended past the back of the front seats. (R 1856). He had his right hand over his left shoulder. (R 1857). He said the gun was "in a tilt position, going down," and it was "[t]owards Angel." (R 1857). Again, he demonstrated for the jury. (R 1857). He said that upon his handing it back, Angel "noticed it" and "leaned like this here

(indicating)" in an attempt to get away from it. (R 1858).

Evans said that upon the gun's firing, he "really didn't do nothing. I just turned around and put the gun back down on the seat and I looked back down." (R 1838).

Evans admitted that it was his idea to go to Big Dick's after shooting Angel. (R 1938-39). He claimed that he "just -- I panicked. I didn't know what to do." (R 1839). So, he said:

> Just drop me off here. . . . I'm like, Just drop me off here, man, because I don't know what to do. I was nervous. I didn't know what to do. I told him, Just drop me off here and take Angel to the hospital.

(R 1839).

Evans admitted to having "been convicted of a felony six times . . .." (R 1839). Being lead by his attorney, he indicated that one reason he was "scared" after shooting Angel was because he "had just gotten out of the jailhouse." (R 1839). However, he insisted there were also "other reasons," and when his attorney pressed him for those, he said:

> Because it was her. It was someone who I was very close to, someone I was very, very close to and close to they (sic) family. . . . Man, I was out of it, man. I was hurt. I was scared. I was like just, saying in my head like, Damn, what's -- you know, God, what is going on? And I'm looking back at Angel and I'm just -- I don't know. I was just out of my mind. I was scared, man. I was scared and hurt at the same time.

(R 1840).

Evans denied ever pointing a gun at anyone, including Sammy. (R 1840-41). He was unable to explain why there was "no gun residue . . . on her hands or anything," but maintained that her hand was close to the gun when it fired. (R 1841). Again being lead by his attorney, he said he was "[u]pset and afraid" after the gun fired. (R 1842).

Evans claimed it took "a matter of seconds" to go from where he shot Angel to Big Dick's house. (R 1842). He said he left the car and went to the door of Big Dick's house, leaving everyone else in the car. (R 1842). He said he could not "be exact" about how long he talked to Big Dick because he "was so nervous and paranoid." (R 1842-43). He "kind of explained the situation to him and . . . why I needed the forty" dollars he borrowed from Big Dick. (R 1843). Evans first estimated he was at Big Dick's house for "probably ten minutes," but quickly changed it to "[f]ive minutes. Something like that." (R 1843).

Evans returned to the car and they drove "about sixty feet" before he and Lino exited the vehicle. (R 1843-44). He denied knowing where the gun was after putting it on the seat after shooting Angel and said he "never threatened them." (R 1844). He and Lino "went walking," and they were picked up by a man who had been at Big Dick's when Evans spoke with him, Elijah Fulton, also know as "19." (R 1844, 1863). Evans went to the home of

a cousin, Darryl Little, and Mr. Little took him to the Days Inn in Palm Bay. (R 1845).

Evans claimed that he "was planning" on calling the police "tomorrow morning early" to "explain to them what happened," but he did not call the evening of the shooting because he "was so paranoid and so scared." (R 1845). He admitted that he submitted himself to the authority of the police the next morning when they called him and he discovered that Lino was gone from the motel room. (R 1846). He eventually admitted to the police that he shot Angel, but claimed it was an accident. (R 1847, 1858-59). He also admitted that the first part of the statement he gave the police "was a complete lie." (R 1847, 1851).

Evans said he did not intentionally shoot Angel and did not intend to kill her. (R 1845). He also said he did nothing to make anyone in the car go somewhere they did not want to go. (R 1845). He opined that he is "[d]efinitely not" guilty of premeditated murder, kidnapping, or aggravated assault. (R 1845-46). He admitted telling the police that the charge should not be a first degree murder, but merely a manslaughter and described another incident he had heard of which had been so

designated.[13] (R 1862). Evans also admitted that he told Sammy and Erica to "come up with some story" because he was "afraid" and was "trying to cover" himself. (R 1863). Evans suggested they tell the police something "about shooting at the car." (R 1863).

The defense rested. (R 1866).

During the closing arguments at the guilt phase of the trial, the prosecutor commented in rebuttal argument that had the murder weapon been found, it could have been tested to determine how easily it would fire. (R 2089). She suggested that Evans knew that the "gun did not have a slight trigger pull, that it didn't have any problems, that the gun didn't misfire." (R 2089). She reminded the jurors "that a lot of the things that are missing in this case are from the Defendant intentionally avoiding you from knowing any of those things." (R 2089).

Later in her rebuttal argument, the prosecutor addressed Evans' defense that he ran after the killing "because of his bad record, because of his past he was so scared and so paramoid that people were going to blame him, . . . and look, they did."

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He later claimed that his "personal definition of manslaughter was accident," and he "didn't know the . . . true criminal definition of it." (R 1864).

(R 2098). She suggested that had Evans turned in the gun, "[w]e could've done the test right then and there had he gone to the police department. He could have explained it that night. Instead he knew exactly what he did and he needed time to formulate his plan . . .." (R 2098-99). Only after all of the foregoing argument was made did the defense make an objection. It was that "the Defendant doesn't have to prove anything." (R 2099). The trial judge overruled the objection and denied the mistrial because the argument went to motivation and "to explain the inconsistencies in his testimony." (R 2100).

The jury was instructed, and no specific objection(s) to the instructions was made. (R 2131-32). A question from the jury was announced. (R 2132). The jury wanted some gloves sent back, and neither the State, nor the Defense, objected to that request. (R 2133). After dealing with the jury question, the court invited Defense Counsel to renew his objections. (R 2133). Counsel responded: "The only objections that I would have to the instructions that were given by the Court, I previously argued those." (R 2133).

A second jury question was received. (R 2134). It asked for a rereading, or a copy, of Sammy Hogan's and Erica Foster's testimony. (R 2134). Neither the State, nor the Defense, objected to reading the testimony. (R 2135). Subsequently, the

jury made it clear that it wanted Mr. Hogan's testimony during the State's case only. (R 2138). The court reporter "read back to the Jury the testimony of Erica Foster." (R 2139). The jury asked to be permitted to discuss Ms. Foster's testimony, and the court agreed, instructing the jury to let the court know when it was ready to hear Mr. Hogan's testimony. (R 2139). Just over an hour later, the jury rendered its verdict. (R 2140).

The jury found Evans guilty of first degree premeditated murder, during which he possessed a firearm. (R 2143-44). It found him guilty of kidnapping with a firearm. (R 2144). It also found him guilty of aggravated assault, during which he possessed a firearm. (R 2144).

Following the verdict, while discussing proceeding to the penalty phase, Evans' counsel informed the court that Evans had indicated that he wanted to represent himself in the penalty phase. (R 2153). Evans disagreed, and said that what he had told his attorney was "you done already hung me." (R 2153). Evans clarified that he wanted his trial counsel to continue to represent him through the penalty phase, but he wanted a different attorney for his appeal. (R 2153).

Defense Counsel moved to have a different jury hear the penalty phase. (R 2187). The basis was that counsel felt he had little credibility with the jury because he asked them not to

find him guilty, but they did so. (R 2188). He offered a like argument regarding Evans having testified at the guilt phase and the verdict showing his testimony was rejected. (R 2188-89). He felt that it would be "fairer" to Evans to have a new jury. (R 2189). The judge denied the motion.

Evans indicated "[i]f I had a choice, . . . I wanted to get rid of him earlier," but he reiterated he "didn't want to represent myself." (R 2193). Evans complained that his trial attorney "only came to see me twice" and did not fully inform him on "the procedures." (R 2194, 2195). The judge suggested that Evans give the matter more thought. (R 2195).

At the penalty phase proceeding, the State presented one witness and Evans presented six, including himself. (R 2008). The State did not present any victim impact statement. (R 2197).

Evans and his attorney acknowledged that the certified copies of convictions and sentences offered by the State were his. (R 2213, 2214). The State wanted to include the 923's with the convictions, which contained a lot of detail about the charges and the disposition thereof. (R 2230). Defense Counsel objected to the hearsay nature of the documents, arguing that it "is not the kind of thing that would come in under a business record exception to the hearsay rule." (R 2225). He added that "[t]his is just plain hearsay," and "[i]f they want to establish

this sort of stuff they need to have somebody testify to it, which we would again object to . . ..” (R 2225).

The trial court ruled that the PSIs and the 923s were admissible. (R 2230, 2231). However, the prosecutor changed her mind and decided not to include the 923s. (R 2231). Rather, only a brief description of the basis for the conviction was attached to the convictions, and the defense was given an opportunity to have information therefrom redacted. (R 2231-2243).

The penalty phase proceeding proceeded to the taking of testimony. Ron Gray was the probation officer assigned to Evans’ prior cases. (R 2262). Evans was released from prison on October 19, 1998. (R 2263). Evans called Mr. Gray on October 20, 1998, and he was instructed to immediately report to Mr. Gray. (R 2263). Evans’ probation was active on October 21 and 22 of 1998. (R 2263). The State rested. (R 2265).

Evans called six witnesses. His mother, Lilly Evans, testified that Evans is her “oldest son” and was born on May 19, 1971 in Georgia. (R 2276). Evans and his family moved to Melbourne when he was three, at which age his father died. (R 2276-77). Mrs. Evans worked at Collins Avionic in Rockwell. (R 2277).

Mrs. Evans had one other child, a son, Orenja John Evans.[14] (R 2277). She and Evans lived with her mother for some period of time. (R 2277). However, when Evans was nine, his mother moved out of the grandmother's home for about three years. (R 2278). Until that point, Evans "was obedient . . . a normal child." (R 2279). "He was very good in school . . . was very artistic and . . . loves music, liked to write." (R 2279). He wrote "[m]usic and poems." (R 2279). He was always "a respectful child." (R 2292).

Mrs. Evans "became a crack addict," and as a result, she "saw a difference" in her children's behavior. (R 2280-81). Evans "began getting in a lot of trouble because I wasn't there for him." (R 2281). However, he finished tenth grade. (R 2285). He was involved in the 4H club and "played football too for school." (R 2284, 2286). Evans was never deprived physically of anything. (R 2284-85). She felt that he was without her care and comfort for several years of his life. (R 2285).

Evans "was a great inspiration in me stopping [taking drugs] . . . He prayed for me a lot . . .." (R 2281). Evans "had a

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[14] Evans' brother, O.J., was twenty-four at the time of the penalty phase proceeding, (R 2342), making him approximately five years junior to Evans.

child” when he was “sixteen.” (R 2281). The child was placed “into foster and he went and he found his child.” (R 2282). This caused Mrs. Evans to realise that she had to “make a change somewhere in my life." (R 2282). Mrs. Evans said that Evans asked her to take custody of his daughter “because he was too young to have custody of her.” (R 2282). Mrs. Evans has raised Evans’ child, Crystal, “ever since;” she was eleven at the time of the penalty phase proceeding. (R 2282, 2283).

Evans “loves kids, period,” and he has “a great relationship” with his children. (R 2283). Evans has “four girls and a boy.”[15] (R 2289). Evans counseled “kids in the area too before he went in” to prison and after he came out. (R 2290). Mrs. Evans also has custody of her son’s youngest daughter, who was two at the time of the testimony. (R 2296).

Evans worked in landscaping and construction. (R 2286). He helped his mother pay her bills and would give her money for his kids. (R 2287). Evans helped her care for his grandmother, who developed Alzeheimers. (R 2292). She described Evans as one with “a lot of love in his heart,” who was “a very sympathetic

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15 Evans’ children are ages 11, 7, 5, 5, and 2. (R 2297). “Precious” is seven, “Wydell Junior” is five, “Kwashewia Jessica Evans” is five, and “Wakweshia Evans” is two. (R 2297). Evans had no children with his wife. (R 2297). The five children all have separate mothers. (R 2298).

person.” (R 2292). She added that Evans “has a very soft heart,” and she feels that she “had a lot to do with some of his going wrong in his life.” (R 2292).

Evans was married “about four years ago,” and lived away from her then. (R 2294-95). He would often come back and stay with his mother, though, and he always knew he was welcome there. (R 2295-96).

Minnie Jarrett, Evan’s second cousin, testified that she saw Evans on a “daily basis.” (R 2300-01). She said Evans “was raised up with his grandmother, . . . he was Christian and he always obeyed.” (R 2302). He talked to her son and grandson about “staying out of trouble” frequently, “every time he see them.” (R 2302, 2304). He was respectful to people. (R 2302-03). Mrs. Jarrett also opined that Evans “just love kids, period.” (R 2305).

Mrs. Jarrett described Evans’ grandmother as a Christian who raised Evans in a Christian household. (R 2306). She was a loving and caring woman, who provided Evans with love and support as well as the material things he needed. (R 2306-07). She treated Evans as if he was her own son. (R 2307). Evans’ aunt also assisted in his upbringing. (R 2307). Evans had the support of his grandmother and his aunt at the time that his mother had her problems with drugs. (R 2307).

Evans' friend, Linda Key, testified that as a child Evans was "[a]verage." (R 2308, 2310). Ms. Key felt Evans "was a good father." (R 2310). Evans had a "[g]ood" relationship with his mother, and he had a loving family relationship with his mother, his aunt, and his grandmother. (R 2312, 2314). They provided him emotional and financial support during his life. (R 2314). He did "construction work." (R 2313). He tried to encourage her boys "to do the right thing." (R 2313).

Patty Walker, Evans' cousin, testified that during the "twelve to thirteen years" she has known Evans, she has considered him "a good person." (R 2316-17). She described him as "gentle, sweet, kind, loving," and "a family person." (R 2317). He "helped me out in my time of need" by paying $200 "on my wedding" (to Evans' cousin) and paid $85 dollars for her son to "play football." (R 2317-18, 2321). Evans did "a little bit of construction" work. (R 2318).

Mrs. Walker said Evans is "good with his kids. He loves them and "talks to them." (R 2319). He also "spends time with them" and will "read to them." (R 2319-20).

Evans' aunt, Sandra Evans, testified next. (R 2322). She, her mother, her sister, Evans' mother, and her sister's sons, Evans and O.J., lived together in her mother's home for "some years." (R 2324). The household was "a very religious

environment" in which Evans' grandmother "taught us the right way to do." (R 2325).

Evans "was always a good kid," and his mother "was a good mother." (R 2325). Evans' mother moved out when Evans "was about eleven years old," and she took Evans with her. (R 2326). She got on "crack cocaine," and she "started getting slack on her dressing, slack on taking care of the kids . . .." (R 2326).

Evans "didn't finish school." (R 2326). She believed it was "only because" Evans "didn't have . . . the proper school clothes" that he dropped out. (R 2326). Also, Evans' mother did not take him "down to get registered properly." (R 2326).

When Evans "went to jail he'd tell his brother, Man, you gotta stay out of there." (R 2327). He also talked "to a lot of other kids when he got out." (R 2328). When his mother was on the drugs, Evans "was always talking to his mother." (R 2329).

Evans' relationship with his five children was "[e]xcellent." (R 2329). He helped pay bills and buy clothes for his children. (R 2332). He taught them "his own stuff about the Bible." (R 2332). He told his children to "[k]eep with your schooling . . . shooting it at them." (R 2332).

Sandra Evans took care of her mother when Evans "was probably in his early twenties." (R 2329). Evans' grandmother

suffered “a stroke,” and when he got out of jail, he helped her take care of his grandmother, including helping his aunt change his grandmother’s diapers. (R 2330-31). He also “[]helped in money . . ..” (R 2331). He worked in lawn service and construction. (R 2331).

Evans’ aunt opined that “no matter how or whatever the consequences he will tell the truth.” (R 2334).

The defense’s final witness was Wydell Evans. (R 2339). Evans said that he has spent a total of “eight” years in prison on three different cases. (R 2339-40). He got into no serious disciplinary problems while incarcerated. (R 2340).

He made “A’s, B’s and C’s” in school. (R 2341). He quit school in the tenth grade “[b]ecause I was engaged in crime.” (R 2354).

He was about “twelve” when his mother moved out of his grandmother’s house. (R 2341). Evans moved out with his mother, but O.J. stayed with his grandmother. (R 2342). Evans began “skipping school a lot, getting suspended . . . like every other kid” when he was “fourteen, fifteen and up.” (R 2342).

Evans learned of his mother’s cocaine problem when he was “like fifteen, fourteen.” (R 2343). It affected him in that “[i]t hurted me . . ..” (R 2343). “[I]t affected me, but not to the point that I totally lost control of my identity.” (R 2344).

He counseled his mother, telling her she needed "to get off that . . .." (R 2344).

Evans learned he had a baby when he was seventeen. (R 2344). He referred to this child as "him," (R 2345), although the other witnesses said the child was a girl named Crystal.[16] He got custody of Crystal when he was released from prison. (R 2347). He retracted that statement, explaining that he "knew I wasn't really ready" for custody, "[s]o my mom got her and we did it like that." (R 2347).

Evans said he supported Crystal and his other children. (R 2347). He gave "[m]oney, love and all." (R 2347). He loves all kids and tries to turn them away from the wrong way. (R 2348). He always counsels anyone younger than him. (R 2350).

He helped take care of his grandmother. He helped "change the diapers, but . . . mainly be on the side, you know, grabbing, helping, lifting and stuff . . .." (R 2351). His mother "was slacking" and was not giving his grandmother her medicine regularly, and "that basically how my grandma started having strokes . . .." (R 2352). Then, he wound "up getting in trouble again and that's when she died." (R 2353).

His work was landscaping and painting. (R 2353). He was

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16 Later, Evans said the child was named Crystal. (R 2346).

"unemployed at times." (R 2354).

He contributed money to the care of his grandmother and "[o]ther people in the streets." (R 2354). He would "help out when people need help." (R 2363).

His prior convictions and sentences were introduced into evidence during his testimony. (R 2357-2362). He explained each of the incidents. (R 2357-2362).

According to Evans, he is "a very good person" and "a very level person." (R 2363). "But when I'm upset, when somebody hurt me, I'm gonna stand up as a man and defend what's mine." (R 2363). He has "a heart" and "shed[s] tears." (R 2363). He "feel[s] for people" and is "a very good person . . . [v]ery good." (R 2363). He opined that he "can be trusted." (R 2364).

The defense rested. (R 2365).

The jury returned with a question about half an hour into its deliberations. (R 2392). The question was: "Does life in prison without the possibility of parole mean the Defendant will not be released from prison under any circumstances?" (R 2392). The court proposed to answer it: "The words life imprisonment without the possibility of parole means no more and no less than what they say." (R 2400). Defense Counsel agreed to that answer, and the court gave it over the State's objection. (R 2400-14). The jury returned with a death recommendation by a

vote of 10 to 2. (R 2418).

Defense Counsel filed a motion for a new trial. (R 606). The trial judge denied same. (R 400).

A *Spencer* hearing was held on January 4, 2000 and continued on January 6, 2000. (R 338, 382). The sentencing proceeding was held on Feburary 15, 2000. (R 398). Judge Jere E. Lober sentenced Evans to death for the first degree murder of Angel Johnson. (R 446).

Judge Lober found two aggravators proven beyond a reasonable doubt. (R 428). They were: Prior violent felony and committed when on probation. (R 427). The judge discussed the mitigation extensively, and found no statutory mitigation. (R 429-445). In so doing, Judge Lober noted that Evans claim "that the victim moved forward and slapped the gun causing it to fire" was "rendered physically impossible by the testimony of the medical examiner and the location of the bullet in the car." (R 432). He noted that these two factors were "consistent with the other testimony that the victim did nothing to get herself shot." (R 432).

Judge Lober rejected each statutory mitigator. Regarding the mitigator that "[t]he victim was a participant in the Defendant's conduct or consented to the act," the judge stated:

> There was some testimony contradicted by other

> testimony that the victim moved forward and slapped the gun causing it to fire. This explanation is rendered physically impossible by the testimony of the medical examiner and the location of the bullet in the car, all of which is consistent with the other testimony that the victim did nothing to get herself shot.

(R 432). The judge firmly rejected this potential mitigator. (R 432).

Nonstatutory mitigation found included: abused or deprived childhood as a result of his mother's crack cocaine addiction, given little weight; contribution to society evidenced by exemplary work habits, little weight; charitable or humanitarian deeds, given some weight; counselled youth to avoid crime, given little weight; behavior in prison or jail, given little weight; and, remorse, not proved and rejected. (R 436-45). Judge Lober concluded that "the aggravating circumstances present in this case far outweigh the mitigating circumstances present." (R 446).

SUMMARY OF THE ARGUMENTS

POINT I: The trial court did not err in admitting the testimony of two police officers who testified to the excited utterances made by two eyewitnesses to the murder. This issue was not properly preserved for appellate review, and is, therefore, procedurally barred. Moreover, it is without merit in that the record clearly supports the trial court's determination that the evidence at issue was admissible under the excited utterance exception to the hearsay rule. Finally, any error was harmless.

POINT II: The trial court did not err in admitting the comments of the prosecutor during rebuttal closing argument at the guilt phase. The issue is not properly preserved for review by this Court; it is procedurally barred. Neither does the claim have merit. The prosecutor's complained-of comments were clearly relevant to and fair comments on the defense asserted at trial. In any event, any error was harmless.

POINT III: The trial court did not reversibly err in connection with the giving of the jury instructions on kidnapping. The failure to make a proper, timely objection on the specific basis urged on appeal procedurally bars this claim. Moreover, it is barred because no instruction was offered by the defense. In any event, any error was in the favor of the defense, and thus, was harmless. It was also harmless because the evidence

overwhelmingly established all of the elements of kidnapping with the intent to terrorize.

POINT IV: The trial court correctly denied the motion for judgment of acquittal based on the alleged lack of evidence of premeditation or kidnapping. Evidence well in excess of the substantial competent evidence standard was presented which conclusively established both premeditation and kidnapping with the intent to terrorize. Much of this evidence was direct eye witness evidence, and some of it came from the defendant's own mouth. Moreover, the trial judge concluded that the evidence of the medical examiner and the location of the bullet rendered the defense version of events physically impossible. Finally, even if there was insufficient evidence of premeditation, the first degree murder conviction should be sustained based on the felony murder rule. Moreover, kidnapping of the murder victim was supported by ovewhelming evidence which clearly refutes the defendant's appellate claim that the murder victim "was rendered virtually unconscious after the shot." The kidnapping conviction is also well supported by the evidence of intent to terrorize Sammy Hogan and/or Erica Foster. Evans' acquittal motions were properly denied.

POINT V: The trial court did not err in admitting the portions of the PSIs from the defendant's prior convictions which

summarized the details of the crimes. Contrary to his appellate claim, the defendant was given ample opportunity to rebut the information. Moreover, he availed himself of that opportunity, and rebutted the information in considerable detail. Under these circumstances, these summaries were admissible hearsay in a penalty phase proceeding. However, even were their admission error, the error was harmless because there is no reasonable possibility that the exclusion of the summaries would have produced a different result.

POINT VI: The defendant's death sentence is proportionate. The trial court went into great detail as to his reasoning and resolution of all sentencing issues. He weighed two strong aggravators against scant nonstatutory mitigation which paled in comparison. The defendant well meets the statutory criteria for imposition of the death penalty. In similar cases, this Court has consistently upheld the death sentence. Evans is entitled to no relief.

POINT I

THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF TWO POLICE OFFICERS AS TO EXCITED UTTERANCES MADE BY WITNESSES.

Whether evidence should be admitted at trial is a matter addressed to the sound discretion of the trial judge. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Jent v. State*, 408 So. 2d 1024, 1039 (Fla. 1981). A ruling on the admission of evidence will not be disturbed unless the appellant demonstrates a clear abuse of judicial discretion. *Id.* Evans has not met that standard.

Evans complains that two police officers were permitted to testify at trial to statements made by two of the primary witnesses against him. (IB 18). These witnesses, Sammy Hogan and Erica Foster, were present at the time of the crime, took the victim to the hospital, and reported the shooting to the police. (IB 18). During the reports to the officers at issue, Evans was identified as the shooter. Evans' tardy hearsay objections to the testimony of these officers were overruled and the statements were admitted as excited utterances. (R 1179, 1199).

To admit a hearsay statement as an excited utterance, three factors must be present: 1) "[A]n event startling enough to cause nervous excitement;" 2) "the statement must have been made before there was time to contrive or misrepresent;" and, 3) "the

statement must have been made while the person was under the stress of excitement caused by the startling event." *Stoll v. State*, 762 So. 2d 870, 873 (Fla. 2000). Where the trial judge did not specifically state his findings on each point at the time of his ruling, the ruling will still be upheld, if this Court can "make this determination independently based upon the record." *Id.*

Officer Yorkey's Testimony re Erica:

When Officer Yorkey spoke with Erica in the hospital hallway, "she was extremely upset." (R 1177). Erica "kept on saying that, He's going to kill me, He's going to kill me," and "[s]he was very hesitant" to talk about the incident. (R 1177). The officer "was trying to comfort her and trying . . . to calm her down," and she asked her about what happened, "who?" (R 1178). Erica "was afraid to say." (R 1178). The officer suggested that if she was afraid to say, perhaps she would write it down. (R 1178). Erica "wrote Wydell, W-Y-D . . .." (R 1178).

At this point, defense counsel objected "on the basis that this is hearsay." (R 1178-79). The trial judge overruled the objection on the basis of the excited utterance exception to the hearsay rule. (R 1179).

The State submits that this issue is not preserved for

appellate review because the objection was made too late. The record shows that Officer Yorkey was asked what Erica told her some five questions before the question whose answer was finally objected to. (R 1177-78). Moreover, that the subject of the testimony was Erica's identification of Evans as the shooter was made clear well before the objected-to testimony. (R 1178). Finally, the objection did not occur upon the officer first uttering Evans' name, but only after she began to spell it. (R 1178). Thus, the State submits that the issue is procedurally barred for the failure to make a timely objection. *See Steinhorst v. State*, 412 So. 2d 322 (Fla. 1982), *cert. denied*, 522 U.S. 1022 (1997).

Assuming *arguendo* that the issue is properly before this Court, it lacks merit. The evidence was properly admitted as an excited utterance.

Erica's testimony shows that after having shot Angel, Evans directed the car load of young people into a parking lot where he

> looked at Sammy and he said, If you tell anybody that I did this I'll kill you. And then he looked back at me [Erica] and he said, I'll kill you, If I go to jail I'm going to get out because I've done something like this before and I've got out before. He said, If I don't get out I have somebody to kill you and your family.

(R 1021). Erica believed Evans' threats and was afraid. (R

1022, 1023).

Immediately thereafter, Evans exited the car. Sammy got in the back with Angel, and Erica took over the driving. (R 1024). "Sammy said he felt her pulse and that she was getting cold, to, you know, speed up." (R 1024). Erica "started driving more fast and running red lights and everything, trying to get her to the hospital." (R 1024).

Upon arrival at the hospital, Erica talked to some police officers and "lied and said it was a bad drug deal because I was scared from when Wydell threatened me . . . Wydell said he was gonna kill me." (R 1025). She "just said that Angel sold a white man some bad stuff and that he shot her." (R 1025). One of the officers was Officer Yorkey whom Erica knew, and she told Erica that she could tell she was lying. (R 1025). At that point, Officer Yorkey "told me that Angel was dead, that's when I told her Wydell had shot her." (R 1025).

The State submits that Erica's statements to Officer Yorkey were excited utterances. Clearly, Erica had witnessed events startling enough to cause nervous excitement, i.e., Angel being shot as she sat beside Erica in a confined area, Angel falling into Erica's lap, Erica being personally threatened by the murderer, Erica learning that her close friend was dying as she sped through lights and stop signs to get her to the hospital,

and finally, Erica learning from Officer Yorkey that her close friend had died. The statement at issue - identifying Wydell as the shooter - was made immediately upon Erica learning from Officer Yorkey that Angel had died. The time interval between that startling event and the statement was not long enough for reflective thought. Moreover, the statement identifying Evans as the shooter was made while Erica was under the stress of excitement caused by being told Angel was dead. Thus, there is competent, substantial evidence in this record which supports the trial judge’s discretionary conclusion that Erica’s identification of Evans to Officer Yorkey was an excited utterance which was properly admitted.

The State further suggests that the statement that some white person had shot her over a bad drug deal was not one made after reflective thought, but was itself caused by the startling event of Evans threatening to kill Erica, Sammy, and their families, if they revealed that he was the shooter. Arguably, the time between Evans’ threat - which immediately preceded the mad dash to the hospital - and the statement to Officer Yorkey identifying Evans - made shortly after arrival at the hospital and immediately upon learning from the officer that Angel was dead - was made before there was time to contrive - other than to say whatever popped into her mind to avoid Evans’ threat.

Indeed, one of the officers testified that it appeared that

the first report of Erica and Sammy was being made up as they went along . . ..” (R 1158-59). **Evans** testified that he told Sammy and Erica to “come up with some story” because he was “afraid” and was “trying to cover” himself. (R 1863). In fact, **he suggested** they tell the police something “about shooting at the car.” (R 1863). That is percisely the story they first gave the police; thus it was not one made after reflective thought, but was what Evans instructed them to give.

Moreover, a story blurted out from intense fear of being killed does not qualify as one told after having time for **reflective** thought. Since Erica identified Evans as the shooter while still under the stress of the starting events causing her nervous excitement without time for reflective thought, it was an excited utterance.

As this Court said in Stoll, where there was time to contrive or misrepresent, “the statement will be excluded **in the absence of some proof that the declarant did not in fact engage in a reflective thought process.**” *Stoll*, 762 So. 2d at 873 (emphasis added). The evidence in this case clearly shows that Erica did not in fact engage in a reflective thought process before identifying Evans as Angel’s killer. Thus, the first

statement, made while still under the great excitement caused by the startling events, did not preclude the trial court's finding that the statement identifying Evans as the shooter was an excited utterance. Thus, competent substantial evidence exists which supports the trial judge's discretionary conclusion that Erica's identification of Evans to Officer Yorkey was an excited utterance which was properly admitted.

In *Rogers v. State*, 660 So. 2d 237, 240 (Fla. 1995), this Court noted that "[t]he test regarding the time elapsed is not a bright-line rule of hours or minutes." Where a long enough time has passed "to permit reflective thought, the statement will be excluded in the absence of some proof that the . . . reflective thought process" did not occur. *Id.* In *Rogers*, "there conceivably was time for Daniel to engage in reflective thought," but "the records indicates that Daniel did not engage in any reflection." *Id.* The evidence indicated that "Daniel was hysterical when she arrived at her apartment," and after calling the police, she collapsed. *Id.* She was given a soda and "paced and remained very excited as she recounted the events." *Id.* Noting that "[a]t no point, . . . did Daniel ever appear relaxed or calm as she recounted the evening's events," this Court affirmed the trial court's findings of excited utterance, explaining that the statements were made while the speaker "was

still under the effects of the evening’s events.” *Id.*

In the instant case, the record indicates that neither Erica, nor Sammy, engaged in reflective thought. Rather, Erica blurted out an identification of the shooter which would exclude Evans as he had instructed her to do. Evans, himself, testified that he told the two to “come up with some story” to cover him, and he suggested they tell the police something “about shooting at the car.” (R 1863). Terribly frightened, Erica did as Evans instructed them, and Sammy went along with it. There was no evidence of a plan or prior communication between Erica and Sammy regarding what they would say about the identity of the shooter. They did not reflect on the wisdom of offering the cover story Evans directed; they merely followed the directive of the man who had just shot their close friend and threatened to do the same to them. The record is clear that both Sammy and Erica were extremely upset and afraid for their own lives and those of their family members. Officer Yorkey’s testimony relating Erica’s excited utterance identifying Evans as Angel’s shooter was properly admitted. *Rogers*.

Since the record contains competent, substantial evidence supporting the trial court’s ruling that Erica’s identification of Evans as Angel’s shooter was an excited utterance, there was no error. Officer Yorkey’s testimony regarding that

identification was properly admitted under the hearsay exception.

<u>Officer Laderwarg's Testimony re Sammy</u>: Lt. Mark Laderwarg spoke with Sammy at the hospital. (R 1196, 1199). Sammy "was extremely upset." (R 1199). "He was shaking. He was sweating. He was talking extremely rapidly." (R 1199). When Lt. Laderwarg was asked what Sammy told him, defense counsel interposed a hearsay objection. (R 1199). The State responded that it was an "excited utterance," and the judge ruled that the exception applied. (R 1200).

Sammy told the officer that "he was in the car with . . . at least three other people, and said the passenger of the car had shot Angel Johnson . . . who was sitting in the backseat." (R 1200). However, Sammy refused to tell him "who did the shooting." (R 1200). Lt. Laderwarg, who knew Sammy, "tried to get his confidence" so he would "tell me who," but "he said, No, I'm scared he'll kill me, He'll kill me." (R 1213). Eventually, however, he told the officer that "Wydell Evans" was the shooter. (R 1214).

Officer Yorkey's testimony corroborates Lt. Laderwarg's in regard to Sammy's excited condition. She transported Sammy to the police department, and on the way, she "tried to talk to him and comfort him and let him calm down a little bit, got him a

cup of coffee, tried to get him to relax and calm down because he was pretty distraught and upset of what had occurred." (R 1180, 1193). Once they arrived at the station, she "sat him down and . . . tried to talk to him, calm him down, reassure him . . .." (R 1180). Sammy "was pretty shook up and asked me if I could write it down for him." (R 1181).

Sammy testified that Evans ordered him into a housing project parking lot where he "started threatening us. . . . He said if we tell he gonna do this, he gonna kill us." (R 1076). Evans said:

> . . . [H]e was gonna kill us if we tell, he was gonna get the whole family, he know where we stay at. And so I told him, I said Wydell, You can't do this, You can't do this because this is my niece. So he's saying, I'm trusting you all, I'm trusting you all, If you tell I swear to God I'll kill you, I'm not playin'. I'm dead-ass serious is what he said, swore on his grandma's grave.

(R 1077). He told them to "[m]ake up an excuse, Say something, I don't care what you say." (R 1077). Upon exiting the car, Evans "tried to wipe his fingerprints and stuff down from the car . . .." (R 1077).

As Erica drove to the hospital, she phoned someone "and told them that Angel had got shot." (R 1078). Sammy was in the back with Angel, and "[s]he was still breathing," but "was real weak and she say, Sammy, He shot me, Help me, Help me. I said, Don't worry, You're gonna be okay, You'll make it, Don't worry." (R

1078). They ran stop signs and red lights to get Angel to Holmes Regional Hospital. (R 1078).

When they were confronted by police at the hospital, he and Erica "was scared at first so we went ahead with the story that Erica went with. We said it was a guy in a two-door yellow Cougar that shot her at first." (R 1079). However, Sammy asked the police "to call my mother's old partner down," Mark Laderwarg, and he "told him what happened." (R 1079).

The same startling events that apply to Erica above, apply to Sammy, except that of being informed of Angel's death immediately before identifying Evans. The statement that some guy in a yellow Cougar had shot Angel was not one made after reflective thought, but was itself caused by the startling event of Evans threatening to kill Erica, Sammy, and their families, if they revealed that he was the shooter. Arguably, the time between Evans' threat - which immediately preceded the mad dash to the hospital - and the statement to Officer Laderwarg identifying Evans - was made before there was time to contrive - other than to say whatever popped into his mind to avoid Evans' threat. Moreover, he was parroting what Erica had blurted out (which was derived from Evans) and was not thinking, much less reflecting, on the matter. Such a statement blurted out under these circumstances does not qualify as one told after

having time for **reflective** thought. Since Sammy identified Evans as the shooter while still under the stress of the starting events causing his nervous excitement without time for reflective thought, it was an excited utterance.

The evidence in this case clearly shows that Sammy did not in fact engage in a reflective thought process before identifying Evans as Angel's killer. Thus, the statement about the man in a Cougar, made while Sammy was still under the great excitement caused by the startling events, did not preclude the trial court's finding that the statement identifying Evans as the shooter was an excited utterance. *Stoll*, 762 So. 2d at 873 (emphasis added). As with Erica, the record indicates that Sammy did not engage in reflective thought. Rather, he went along with the unrehearsed identification Erica blurted out based on the directive and storyline provided by Evans. There was no plan or prior communication between them regarding what they would say about the identity of the shooter. Clearly, both were extremely upset, worried about their friend, and afraid for their own lives and those of their loved ones. Officer Laderwarg's testimony relating Sammy's excited utterance identifying Evans as Angel's shooter was properly admitted. *Rogers*.

Since competent, substantial evidence supports the trial

court's conclusion that both Erica's and Sammy's identification of Evans to the officers were excited utterances, there was no error in their admission. In *Henyard v. State*, 689 So. 2d 239 (Fla. 1996), the statement of a surviving victim to a police officer, made quite some time after the crimes, was admitted into evidence as excited utterances. The victim, Mrs. Lewis, had managed to reach "the front porch of a home" some distance from where she had been shot, and her children killed, by the defendant. The home occupant called the police, and "[w]hen the officer arrived, he found Ms. Lewis, who was hysterical but coherent." 689 So. 2d at 251. She "told him she had been raped and shot, identified her assailants as two young black males who fit the description of Henyard and Smalls, and said they had taken her children." *Id.* This Court found "that Ms. Lewis was still experiencing the trauma of the events she had just survived when she spoke to the officer and her statements were properly admitted under the excited utterance exception to the hearsay rule." *Id.*

In the instant case, the victims, Erica and Sammy, experienced the startling and wholly unexpected shooting of their close friend and relative, Angel. They were both threatened with their lives and the lives of their loved ones should they identify the shooter. They were forced to ride

around the countryside as directed by the shooter rather than take the dying victim to the hospital. Indeed, Angel lay in Erica's lap, gasping for air that Evans denied her. After being threatened a second time and instructed to make up a story about who shot Angel, they were finally permitted to leave with Angel and took her directly to the hospital. Sammy listened to Angel's pleas for help on the frantic drive to the hospital. At the hospital, they were questioned by police before even learning that Angel was dead. The evidence is clear that both were extremely upset over what had happened, were afraid for their friend, and were in fear for their lives. The statements identifying Evans as the shooter were made while they were still experiencing the trauma of the events they had just survived. Their statements made to Officers Yorkey and Laderwarg were properly admitted as excited utterances. *Henyard*.

Finally, assuming *arguendo* that admission of either, or both of, Erica's or Sammy's statements through the testimony of the subject officers was error, any error was harmless beyond a reasonable doubt. In *Henyard*, this Court noted that even if admission of the officer's testimony regarding the statements Ms. Lewis made to him was error, the error was harmless. 689 So. 2d at 251. Ms. Lewis had testified at length at Henyard's trial, "identifying him as one of her assailants . . .." *Id.*

"Because the officer's testimony . . . was nothing more than a generalization of specific information which Ms. Lewis testified to at trial from her own personal knowledge," the error was harmless. *Id.*

The same is true of the instant case. The testimony of the officers at issue was brief, and the objected-to portion thereof concerned the identification of Evans as Angel's shooter. Both Erica and Sammy testified at length at Evans' trial, identifying him as Angel's shooter. Moreover, the other officers from the hospital testified and Lt. Laderwrag testified to the initial statements regarding a different shooter. Thus, any error in admission of the officer's statements relating the identification of Evans made by these two witnesses is harmless beyond a reasonable doubt. *Henyard*.

Moreover, Evans' complaint that the officers' testimony regarding the identification improperly bolstered the in-court testimony of Erica and Sammy is not preserved for appellate review because it was not raised below. *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982), *cert. denied*, 522 U.S. 1022 (1997). However, even if preserved, the claim is without merit because Erica and Sammy testified at trial and were subjected to extensive cross-examination. The jury had ample opportunity to assess the credibility of both of them. See *Kormondy v.*

State, 703 So. 2d 454, 458 (Fla. 1997). Thus, the brief hearsay statements of the subject officers cannot reasonably be said to have improperly bolstered the trial testimony of either Erica or Sammy. *See id.* Finally, admission of these officers' testimony regarding identification of Evans as the shooter is harmless because Evans took the stand and admitted shooting Angel. (R 1838). While it is true that he claimed the shot was an accident, and even blamed the accident on Angel, even his version of events identifies him as the shooter. He testified that he was trying to hand the gun to Angel in the backseat, and when she pushed it away, it went off, killing her. (R 1838). Moreover, he demonstrated how he shot her. (R 1855-56, 1857). Thus, even if the officers' testimony regarding the victims' identification of him as the shooter was improperly admitted under the excited utterance exception to the hearsay rule, the error was harmless due to Evans' admissions at trial and the cumulative nature of the officers' testimony regarding the identification. *See Chariot v. State*, 679 So. 2d 844 (Fla. 4th DCA 1996).

Any improper bolstering of testimony was harmless beyond a reasonable doubt. *Kormondy; Chariot*. Evans is entitled to no relief.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING EVANS' MISTRIAL MOTION BASED ON ALLEGATIONS THAT THE PROSECUTOR'S REBUTTAL CLOSING ARGUMENT IMPROPERLY SHIFTED THE BURDEN OF PROOF TO HIM.

Evans complains that during rebuttal closing argument, the State made comments which shifted the burden of proof from it to him. (IB 22). The standard of review is abuse of the trial court's discretion. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla 1982). "Wide latitude is permitted in arguing to a jury." *Thomas v. State*, 326 So. 2d 413 (Fla. 1975). Control of such comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of discretion is shown. Thomas; *Paramore v. State*, 229 So. 2d 855 (Fla. 1969), modified, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972).

Evans admits that he did not object to the first comments about which he complains on appeal. (IB 28). However, he claims that since he "promptly objected to" the "second offending remark" and referenced the prior comment in his argument, the failure to properly preserve the issue, much less bring it to the trial court's attention in a timely manner, should be overlooked. Citing *Ruiz v. State*, he argues that "when the properly preserved objectionable comment is considered in

conjunction with the arguably unpreserved objectionable comment," the result is an "error [that] cannot be deemed harmless." (IB 28).

In *Ruiz*, the defendant claimed that "the prosecutors engaged in egregious misconduct during closing argument in **both** the guilt and penalty phases of the trial." 743 So. 2d 1, 3 (Fla. 1999). Two prosecutors were involved, and there were three complained-of lines of improper comments during closing argument. *Id.* at 3-6. These lines of comments were not a couple of brief comments, as in the instant case, but were lengthy impassioned arguments which crossed the realm of acceptable comments by a wide margin. Moreover, the consideration of unobjected-to comments together with the objected-to ones in *Ruiz* was grounded in this Court having identified three significant and harmful errors and one error which under the circumstances of the *Ruiz* case was not harmful. *Id.* at 7-9. Such errors are not present in the instant case (neither has Evans argued any), and therefore, Evans is not entitled to have the unpreserved comments considered by this Court. Evans' failure to raise an objection to the first complained-of comment procedurally bars its consideration.

Assuming *arguendo* that the claim is properly before this Court, it is without merit. It has long been the rule that a

trial judge has broad discretion to permit closing argument. *See Breedlove v. State*, 413 So. 2d at 8 (Fla. 1982). Logical inferences from the evidence may be drawn by the prosecutor, and all legitimate arguments may be advanced. *Id.*

In *Parker v. State*, the prosecutor in commenting on the defense theory of events stated: "'Now in order to believe that theory or fantasy that Mr. Hitchcock told you about, about the Stans and this....'" 641 So. 2d 369, 375 (Fla. 1994). This Court upheld the trial court's ruling that the statement was a "'fair comment, perhaps invited by the closing argument by the defense.'" *Id.* There was no abuse of discretion. *Id.*

Likewise, in Evans case, the prosecutor was commenting on the defense theory of events. Evans consistently argued that his shooting of Angel was an accident and that he had planned to report the matter to the police the next morning. The prosecutor was merely pointing out that Evans' order to Lino to dispose of the gun with which he shot Angel militated against crediting that defense. In other words, if the gun went off without Evans firing it, why would he have ordered its disposal? It is a logical inference from the evidence that he told Lino to get rid of that the gun because it would not have supported his defense of a shooting being caused by Angel jarring or slapping the gun. Thus, the comment was a fair comment on the evidence,

invited by Evans. Evans has not carried his burden to show that the trial judge abused his discretion in permitting the subject argument. Finally, any error in permitting the comment was harmless. This is not a case where the prosecutor told the jury that the defendant had the burden to prove, or disprove, any element of the offense. The complained-of comment was directly specifically to the defense affirmatively offered by Evans. Moreover, the evidence of Evans' guilt was overwhelming, including the testimony of eyewitnesses. There is no reasonable possibility that the absence of these complained-of comments would have produced a different result. Evans is entitled to no relief.

POINT III

THE TRIAL COURT DID NOT GIVE INCOMPLETE AND CONFUSING JURY INSTRUCTIONS IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS.

Evans complains that the trial judge's jury instruction on kidnapping was incomplete and confusing. (IB 30). He says that the jury instructions on two of the theories under which kidnapping may be established were "improperly combined" and resulted in "totally eliminat[ing] an essential element." (IB 31). This, he claims, rendered "the instructions confusing and misleading." (IB 31).

Evans admits that his trial counsel did not object to the instruction below. (IB 32). However, he claims that the net result of the instruction as given was to eliminate an element of the offense and such an error "amounts to fundamental error which need not be preserved below." (IB 32).

The standard of review of claims of fundamental error is well-established. Fundamental error is that "which goes to the foundation of the case." *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970). It is "error which reaches down into the validity of the trial itself to the extent that a verdict . . . could not have been obtained without the . . . error." *Archer v. State*,

673 So. 2d 17, 20 (Fla. 1996),[17] *cert. denied*, 519 U.S. 876 (1996). "[J]ury instructions are subject to the contemporaneous objection rule, and absent an objection at trial, can be raised on appeal only if fundamental error occurred." *Id.*

In *Archer v. State*, this Court said that even unconstitutionally vague jury instructions on aggravating factors do not provide a basis for relief on appeal unless the defendant made "a specific objection or propose[d] an alternative instruction at trial . . .." 673 So. 2d at 19. Evans' counsel did not make an objection of any kind to the kidnapping instruction which the trial judge gave; neither did he propose a different instruction. Evans made no objection to that instruction at the charge conference, when it was given, or at the post instruction comment phase. Thus, the instant claim is not preserved for appellate review.

Moreover, it is without merit. Evans' claim is that "the jury is never told that kidnapping can be committed if the defendant had the intent to facilitate the commission of murder." (IB 33). He acknowledges, however, that the jury was "told that kidnapping was committed if the defendant intended to terrorize the victims." (IB 33). He then complains that "the

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[17] *Quoting Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960).

options as to the confinement requirement which is only applicable if . . . [there was] intent to commit or facilitate the commission of another felony" were given. (IB 33).

The record shows that the jury was fully instructed on kidnapping with the intent to terrorize. (R 2109, 2110). He was convicted of Kidnapping with a firearm. (R 2144). While the information regarding the confinement requirement may be applicable only if the type of kidnapping found is the intent to commit or facilitate another felony, that information was, at most, superfluous. If anything, it required the jury to make a greater finding of culpability, i.e., both intent to terrorize and confinement of a certain type and/or duration, than required under the law. Thus, any error was in Evans' favor and was harmless beyond a reasonable doubt.

Moreover, any ambiguity in the giving of the kidnapping instruction could have been clarified by the simple expedient of calling it to the judge's attention through a proper objection at the proper time. Having utterly failed to make any complaint whatsoever about this matter in the trial court, Evans' instant claim is procedurally barred. *See State v. Wilson,* 686 So. 2d 569, 570 (Fla. 1996).

Moreover, although the trial court's instruction on kidnapping may have been ambiguous or incomplete, it was not

fundamental error. Even assuming *arguendo* that the instruction at issue omitted an essential element of kidnapping to facilitate a felony, Evans is entitled to no relief. An error in failing to instruct a jury on an essential element of a crime is not fundamental where the element is not in genuine dispute. *Stewart v. State*, 420 So. 2d 862, 863 (Fla. 1982), *cert. denied*, 460 U.S. 1103 (1983). *See Morton v. State*, 459 So. 2d 322, 323 (Fla. 3d DCA 1984). Evans has not argued that there was a genuine dispute as to any essential element of the crime he claims was not instructed on. Certainly, such a position was not argued below. Since it is his burden to establish error, that failure forecloses any relief.

Further, any error is harmless because the standard of proof was higher under the instruction given than under the intent to terrorize instruction. It is also harmless because the evidence of Evans' guilt of intent-to-terrorize kidnapping is overwhelming. There is no reasonable possibility, much less probability, that the jury would not have found Evans guilty of kidnapping had the confinement instruction not been given.

Evans is entitled to no relief.

POINT IV

THE TRIAL COURT DID NOT ERR IN DENYING EVANS' MOTION FOR JUDGMENT OF ACQUITTAL AS TO PREMEDITATION AND/OR KIDNAPPING.

Premeditation

Evans complains that "the evidence failed to show any premeditation" and "there was no evidence of kidnapping" because the "victims were free to leave at any time." (IB 35). The standard of review of sufficiency of the evidence to support a verdict is substantial competent evidence. *Rogers v. State*, 26 Fla. L. Weekly S115, S116 (Fla. March 1, 2001); *Tibbs v. State*, 397 So. 2d 1120 (Fla. 1981). *See Crump v. State*, 622 So. 2d 963, 971 (Fla. 1993)[where there is substantial competent evidence to support jury verdict, it will not be reversed on appeal]. Evans has not carried his burden to show a lack of substantial competent evidence of either premeditation or kidnapping. Clearly, the record contains evidence sufficient to support the jury's verdicts.

When reviewing a trial court's denial of a motion for judgment of acquittal based on a claimed failure to prove premeditation, the facts must be viewed "in a light most favorable to the State." *Miller v. State*, 770 So. 2d 1144, 1148 (Fla. 2000). This is the same standard the trial judge is to use in evaluating the evidence for ruling on a motion for

judgment of acquittal. *See Rogers*, 26 Fla. L. Weekly at S116. Moreover, the State is entitled to all of the reasonable inferences from that evidence. *Miller*, 770 So. 2d at 1148. In addition to any direct evidence presented at trial, premeditation may be inferred from evidence such as:

> [1] the nature of the weapon used, [2] the presence or absence of adequate provocation, [3] previous difficulties between the parties, [4] the manner in which the homicide was committed and [5] the nature and manner of the wounds inflicted. [6] It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and [7] the probable result to flow from it insofar as the life of the victim is concerned.

Id. "[P]remeditation may occur a matter of moments before the murderous act . . .." *Larry v. State*, 104 So. 2d 352, 354 (Fla. 1958).

Evans claims that the State's proof did not show premeditation or criminal agency. (IB 36). Regarding premeditation, Evans says the only evidence presented was "the testimony of Edward Rogers" that while in jail, he overheard Evans having "an angry conversation" on the phone and immediately upon concluding the conversation, Evans said "if he got his hands on her, he'd kill the bitch." (IB 36). He discounts this testimony, claiming he "was in jail and did not act upon this statement." (IB 36).

The evidence shows that in October, 1998, Evans and Mr. Rogers, who knew each other, were residing together in the Brevard County Jail. (R 1386). During that time, Evans argued with Angel Johnson by phone, and immediately upon concluding that conversation, Evans told Mr. Rogers he was "pissed off about this girl." (R 1386, 1388, 1391). He added: "If I can get my hands on that bitch I'll kill her." (R 1391). Angel was shot and killed by Evans within two days of his being released from jail, (IB 36), rendering him able to get his hands on her.

However, contrary to Evans' complaint on appeal, there is much more record evidence which supports premeditation. It includes: Angel, Evans' brother's long-time girlfriend, had been accused of "cheating on him." (R 996). Evans complained about it on at least two separate occasions in the day and a-half following his release from jail. A third complaint occurred when Evans directly confronted Angel in the car and said: "You're not going to cheat on my brother like my girlfriend cheated on me." (R 996). Angel responded by asking Erica to "tell Wydell that I love O.J.;" Erica did. (R 996).

At that point, Angel smiled at Evans, but "he pulled out the gun." (R 996). The barrel of the gun was pointed "[e]xactly towards her [Angel]." (R 998). "Angel put up her hands," and said: "All right, Wydell, All right." (R 997). She also said:

"Stop, Wydell, Stop." (R 998). "[H]e shot the gun."[18] (R 998). There was no "tussling . . . over the gun. He meant to shoot her. She did not hit his hand so the gun could go off." (R 1032-33). Angel fell into Erica's lap. (R 998).

After she was shot, Angel was "gasping for breath," and she said: "Wydell, You shot me for real, You shot me for real." (R 999, 1016). Lino began "to roll the window down" to give Angel fresh air to breathe, but Evans commanded: "Don't roll the window down." (R 999).

Evans said: "That bitch is dead, she's dead." (R 1017). He then ordered Sammy "to take him to Eau Gallie." (R 1018). Evans "gave it [the gun] back to Lino and told Lino to dispose of the gun." (R 1018, 1020).

After Evans talked to Big Dick in Eau Gallie for "about three to four, five minutes," he "got back in the car and had us drive up into this parking lot," a short distance away. (R 1020, 1021, 1034). At the parking lot, Evans

> looked at Sammy and he said, If you tell anybody that I did this I'll kill you. And then he looked back at me and he said, I'll kill you, If I go to jail I'm going to get out because I've done something like this before and I've got out before. He said, If I don't get out I have

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[18] On cross, Erica indicated that Evans said something like "'You think this is funny.'" (R 1029-30).

> somebody to kill you and your family.

(R 1021). Erica believed Evans' threats and was afraid. (R 1022, 1023).

Thereafter, Evans and Lino exited with the gun. (R 1022). As they did, Evans said, "You all drive her to the hospital." (R 1022). Erica, who had taken over the driving, raced to the hospital, but Angel died. (R 1024).

Sammy testified that an argument between Angel and Evans broke out in the car. (R 1068). Evans charged Angel had cheated on his brother. (R 1068). Sammy spoke up for her and said: "No, she's not. So he got mad at me, told me to mind my own . . . goddam business, don't tell him how to run his brother's affairs." (R 1068). Evans punched Sammy's windshield, cracking it. (R 1069). "[T]hen, he says something, so she says something and then she laughed. . . . And then he turn[ed] around saying, You think it's funny, You think it's funny? And that's the part he shot her." (R 1069). As he pulled the gun on her, Angel said: "Wydell, I'm sorry, I'm sorry." (R 1072). Angel "did not touch the gun." (R 1072). The gun was "[t]he kind you pull back." (R 1092).

After shooting Angel, "he threatened me and my cousin that was in the car." (R 1071). He said:

> if we tell he'll kill us, if he don't kill us he'll get somebody else to kill us, he'll kill

> the whole family, he know where we stay. Then he started threatening us in the car. He said if I had a chance to go ahead and pull out and he said take him to Eau Gallie, so we went to Eau Gallie.

(R 1072-73). While saying this, Evans pointed the gun "towards me and Erica['s] head." (R 1073). He and Erica promised "Wydell, We promise we ain't gonna tell, We ain't gonna tell." (R 1073).

Evans ordered Sammy to take him to Eau Gallie to Big Dick's house. (R 1073). He did. (R 1073). Although Sammy wanted to go "get help for her," he did not because Evans "had a gun to our head and we couldn't at that time." (R 1073). He was afraid Evans would shoot him, if he did not follow his instructions. (R 1074).

After obtaining forty dollars from Big Dick, Evans ordered Sammy into a housing project parking lot and threatened them. Evans said:

> . . . [H]e was gonna kill us if we tell, he was gonna get the whole family, he know where we stay at. And so I told him, I said Wydell, You can't do this, You can't do this because this is my niece. So he's saying, I'm trusting you all, I'm trusting you all, If you tell I swear to God I'll kill you, I'm not playin'. I'm dead-ass serious is what he said, swore on his grandma's grave.

(R 1077). He told them to "[m]ake up an excuse, Say something, I don't care what you say." (R 1077). Upon exiting the car, Evans "tried to wipe his fingerprints and stuff down from the

car . . ..” (R 1077). He told Sammy and Erica to make up a story to cover him and suggested they tell the authorities something “about shooting at the car.” (R 1863). Lino exited with Evans. (R 1084). Evans was picked up by another person and was taken to a motel where he was arrested the next day. (R 1844, 1845).

This evidence in the light most favorable to upholding the jury’s verdict makes it clear that Evans premeditated Angel’s murder. The nature of the weapon, a gun, fired at extremely close range, and pointed exactly at the intended victim clearly indicates premeditation.

Although Evans may have believed that Angel had provoked him to murder her because he had heard she was cheating on his brother, Angel, Erica, and Sammy all tried to dispel that belief and repeatedly told him that Angel was not unfaithful to O.J. Thus, there was no adequate provocation. Moreover, the claim that because Angel “put a smile on her face” just before Evans shot her she provoked the murder is absurd. Angel and the others denied Angel’s unfaithfulness, and then she smiled at Evans. The reasonable inference is that she was attempting to reassure Evans that there was no basis for him to be angry with her, much less to hurt her. Certainly, the evidence and reasonable inferences therefrom are that Angel did not provoke

Evans to kill her.

Mr. Edwards' testimony made it clear that there were previous difficulties between Evans and Angel. On at least one occasion, they argued over the phone, and afterwards, Evans threatened to kill Angel, if he could get his hands on her. Shortly after leaving jail, Evans did just that.[19] Moreover, other evidence of previous difficulties was the conversation the night before the murder wherein he called Angel (and another girl) a whore, and other unsavory names, as well as the conversation at the gas pumps shortly before the confrontation, and murder, in the car.

The manner in which Angel was murdered also shows premeditation. After shooting Angel, Evans directed Lino to leave the window up so the gasping Angel would not get the air she so desperately craved. Then, knowing that his point-blank shot had hit Angel in the chest and that she was not dead, he

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[19] Evans made it clear that when he feels someone has hurt him, he "stands up like a man and defends" what is his. (R 2363). Clearly, Evans believed Angel had hurt him by cheating on his brother (as his own girlfriend had cheated on him), and he defended his brother by shooting a 17 year old girl at point blank range.

told Sammy to drive away and take him to Big Dick where he borrowed forty dollars. After repeatedly threatening to kill Sammy, Erica, and their families, he departed with Lino and the murder weapon, directing Lino to dispose of the gun, and, satisfied that Angel was dead, or would be before they could get medical help, he magnanimously agreed that they could take her to the hospital. However, before departing the vehicle, he instructed Erica and Sammy to tell the police that Angel was shot by someone shooting at the car. (R 1863). Then, he ran and holed up in a motel room where he was subsequently arrested. These facts clearly show premeditation.

Moreover, Evans' implied domestic or crime-of-passion claim does not defeat premeditation. In *Lusk v. State*, 498 So. 2d 902, 905 (Fla. 1986), this Court determined that a heat-of-passion defense was wholly unsupported by the evidence where the defendant had a "four hour period to reflect" on his future course of action. The four hour period and defendant's statement that he was not "gonna take it no more" was sufficient to establish premeditation so conclusively that this Court said there was "no evidence . . . which would have even warranted a jury instruction on this defense." *Id.* In the instant case, Evans threatened to kill Angel a couple of days before her murder. The night before the murder, he complained that she was

a whore and was cheating on his brother. Within minutes of the murder, he again complained about Angel's alleged unfaithfulness. Then immediately preceding bringing out the gun and firing a bullet into Angel's heart, Evans again accused her of unfaithfulness and told Sammy not to tell him how to take care of his brother's business. Thus, Evans had many more than 4 hours to reflect on his future course of action. He had at least two days and clearly did reflect on the motive for the murder in the days, hours, minutes, and seconds before firing the killing shot! Thus, not even a jury instruction -- had one been requested -- on this defense would have been appropriate. Certainly, Evans has utterly failed to carry his burden to allege, and prove, any kind of heat-of-passion defense to premeditation.

Clearly, there was competent, substantial evidence supporting the jury's verdict of first degree premeditated murder. However, even if there were not, Evans cannot show harm because he murdered Angel while committing the felony of kidnapping. That ground is an independent basis supporting the first degree murder conviction and death sentence. *See Gore v. State*, 26 Fla. Law Weekly S257, S259 (Fla. April 19, 2001). Evans is entitled to no relief.

Kidnapping

Evans also complains that he should not have been convicted of kidnapping. (IB 38). He claims that "it was legally impossible for her [Angel] to be kidnaped with the intent to terrorize since by all reports she was rendered virtually unconscious after the shot." (IB 38). Undersigned counsel does not know what trial transcripts Defense Counsel read, but they surely were not those of the instant case. The evidence is unquestionably clear that Angel was not "virtually unconscious after the shot." Erica testified that after being shot, Angel was "gasping for breath," and she said: "Wydell, You shot me for real, You shot me for real." (R 999, 1016). Sammy testified that quite some time after the shot, as Erica raced to the hospital, he sat in the back with Angel, and "[s]he was still breathing," but "was real weak and she say, Sammy, He shot me, Help me, Help me." (R 1078). Finally, even Evans' friend, Lino, testified that Angel was "saying she got shot." (R 1267). Thus, this record is crystal clear that Angel was not "rendered virtually unconscious after the shot."

Moreover, the intent to terrorize Angel is likewise clear. Evans ordered Lino not to lower the window to give the gasping Angel air after he shot her. (R 999, 1016-17). He described Angel as being dead to the others while she was obviously still alive. (R 1017). He insisted that they take him to Big Dick's

and did not let them take Angel to the hospital until after enough time had passed and he had thoroughly threatened his victims. (R 1021, 1024, 1071, 1077). Angel was alive and conscious as indicated by her speaking with Sammy on the way to the hospital. (R 1078).

Evans then claims that he could not have been convicted of kidnapping Erica or Sammy because the evidence "is uncontroverted, that appellant had given the gun to Lino" at the point when he instructed Sammy to drive to Big Dick's house. (IB 39). Again, Evans misrepresents the record. Sammy testified that Evans ordered him to drive to Eau Gallie to Big Dick's house, and he did so because although he wanted to go "get help for her," he did not because Evans "had a gun to our head and we couldn't at that time." (R 1073). He was afraid Evans would shoot him, if he did not follow his instructions. (R 1073-74).

Evans also claims there was "no evidence" that he "confined and attempted to terrorize Sammy and Erica." (IB 39). Sammy testified that right after shooting Angel, Evans "threatened me and my cousin that was in the car." (R 1071). He said:

> if we tell he'll kill us, if he don't kill us he'll get somebody else to kill us, he'll kill the whole family, he know where we stay. Then he started threatening us in the car. He said if I had a chance to go ahead and pull out and he said take him to Eau Gallie, so we went to Eau Gallie.

(R 1072-73). While saying this, Evans pointed the gun "towards

me and Erica[‘s] head.” (R 1073). He and Erica promised “Wydell, We promise we ain’t gonna tell, We ain’t gonna tell.” (R 1073). They proceeded to Big Dick’s house, and as Lino left the car, Evans ordered him back inside and ordered Sammy to drive a short distance to a parking area where he again threatened to kill Erica, Sammy, and their families. (R 1077).

Erica testified that while at the gas station, just prior to the shooting, Evans “was saying to me . . . what would I do if there was a gun to my head and I said, I don’t know, I would probably be scared if I had a gun to my head.” (R 995). As Sammy related, shortly thereafter, Evans put a gun to their heads and threatened to kill them, after having already shot Angel. As Lino commented, upon seeing Angel shot, he “was traumatized.” (R 1268). Clearly, the evidence well supports a conviction for kidnapping with the intent to terrorize. Evans’ appellate claim is without merit.

POINT V

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO PRESENT PORTIONS OF THE PSI DURING THE PENALTY PHASE.

Evans complains that the portions of the PSI which were attached to the judgments and sentences of his prior offenses should not have been admitted during the penalty phase. (IB 40). The information at issue is summaries of the facts underlying Evans' prior convictions. (IB 40). Trial counsel objected to the hearsay nature of the information, and he also complained that the summaries had not been given to him earlier. (R 2225).

On appeal, Evans argues only that since he could not cross examine the person who wrote the summaries, that information should not have gone to the jury. (IB 40-44). That specific argument was not made below, and therefore, it is procedurally barred in this Court. *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982). The only argument offered in support of his hearsay objection was that it "is not the kind of thing that would come in under a business record exception to the hearsay rule." (R 2225). He added that "[t]his is just plain hearsay," and "[i]f they want to establish this sort of stuff they need to have somebody testify to it, which we would again object to . . .." (R 2225). That they would object to "somebody" testifying to the information contained in the summaries indicates that the

nature of the objection below was not the inability to cross examine a witness. Thus, the claim raised on appeal, i.e., confrontation via cross-examination, was not raised below and is procedurally barred. *Steinhorst.*

Assuming *arguendo* that this issue is properly before this Court, it is without merit. The standard of appellate review is that a trial judge has broad discretion regarding the admissibility of evidence. *Cole v. State*, 701 So. 2d 845, 852 (Fla. 1997). The trial judge's ruling thereon will not be reversed unless the defendant demonstrates a clear abuse of judicial discretion. *Id.* Evans has not made that showing herein.

The objection at trial was to the hearsay nature of the summaries. (R 2225, 2243, 2260). Defense Counsel contended that "to establish this sort of stuff they need to have somebody testify to it, which we would again object to . . .." (R 2225). The prosecutor countered that "the case law allows the State to prove details of the prior violent felonies independent of the convictions and . . . instruction by the Court." (R 2227). In support of her contention that the summaries could be introduced together with the certified copies of the convictions, the

prosecutor cited *Koon v. State*, 513 So. 2d 1253 (Fla. 1987).[20] Relying on *Koon*, the trial court agreed that the summaries, though hearsay, were admissible. (R 2229-30).

In *Koon v. State*, this Court considered whether the trial court properly considered statements in a PSI which described the threat of violence made to a person of which Koon had been convicted. 513 So. 2d at 1256. This Court said:

> At the sentencing hearing, the court stated that it used the PSI report only for information pertaining to prior convictions for violent felonies. The sentencing order relies on the PSI report only to the extent that it detailed the violent acts which gave rise to these convictions. Moreover, practically all of the specific facts disputed by Koon had nothing to do with the recitations in the sentencing order. We reject Koon's argument on this point.

Id.

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[20] The State withdrew its request to include the 923s and asked only for the paragraph from the PSI which described the circumstances of the prior crimes. (R 2231). The State and Defense then proceeded to agree upon the portions of each PSI which would be attached to the convictions. (R 2232, 2234, 2235, 2236). In fact, in regard to the PSI for case #90-22119-CF-A, the defense represented: "[W]e don't see anything that needs to be excluded in there." (R 2232). Regarding the PSI for case #88-1716, Defense Counsel remarked: "[T]he first page looks like it's all right." (R 2235). The State then proposed "[t]o delete everything past the circumstances, the defendant's statement, the victim impact." (R 2238). However, the defense objected and wanted to leave in the defendant's statement and the victim impact information. (R 2238). The court ruled that the items would be omitted, however, the defense could explain any thing it wanted in regard to the circumstances in its case. (R 2239-40, 2242-43).

In this case, the summaries from the PSIs contained details of the crimes for which Evans had been previously convicted and to which he had stipulated. Evans has not disputed the accuracy of any of the factual details contained in the summaries. He merely complains - for the first time on appeal - that he had no opportunity to cross examine the author of the summaries. Even on appeal, he does **not** complain about an inability to cross examine the persons from whom the author of the summaries obtained the factual details contained therein. Based on *Koon*, it is clear that the details of the prior crimes of Evans which gave rise to the stipulated-to convictions were properly before the sentencer, which includes both the judge and the jury.

Moreover, in *Rodriguez v. State*, 753 So. 2d 29, 44-45 (Fla. 2000), this Court said:

> Details of prior felony convictions involving the use or threat of violence to the victim are admissible in the penalty phase of a capital trial, provided the defendant has a fair opportunity to rebut any hearsay testimony. . . . In the case of prior violent felony convictions, because those details are admissible, it is generally beneficial to the defendant for the jury to hear about those details from a neutral law enforcement official rather than from prior witnesses or victims. In fact, we have cautioned the State to ensure that the evidence of prior crimes does not become a feature of the penalty phase proceedings . . . Nonetheless, in many cases, any error in admitting the hearsay testimony has been considered harmless because the certified copy of the conviction itself conclusively establishes the aggravator. . . .

> In addition, the defendant's interest in cross-examining the witness is less compelling where the testimony concerns a prior felony conviction. The defendant previously had the opportunity to cross-examine fact witnesses during the trial for the prior felony. The transcripts of the prior trial are also available to rebut the hearsay testimony describing the prior conviction. This is analogous to cases allowing a penalty phase witness to summarize prior testimony because the defendant had the opportunity to cross-examine the declarant during the original proceeding. . . .

(citations omitted). It is clear from *Rodriguez* that the hearsay nature of the evidence of the details of the prior convictions is not a bar to its admission.

This Court has indicated a preference that "a neutral law enforcement official" instead of "witnesses or victims" give the information in order to avoid making the facts of the previous crimes a feature of the trial. The method of placing the details of Evans' prior crimes before his jury in the instant case was even less potentially prejudicial than presenting it through a law enforcement official. A brief written summary of the facts, especially when those details are not disputed by the defendant, is inherently less prejudicial than having a witness, victim, or law enforcement official testify before the capital jury.

Moreover, the State disputes Evans' unpreserved appellate claim (not made in the lower court) that he had no opportunity

to rebut the hearsay information. The PSIs contained the defendant's statements regarding those crimes and also included victim impact evidence, which Evans said he wanted placed before his capital jury. (R 2238, 2239, 2242). The trial judge agreed that he could place that information before the jury. (R 2240). If he later elected not to do so, he should not be heard to complain on appeal that he had no opportunity to rebut the information contained in the PSIs.

In fact, the record affirmatively shows that Evans "was given an opportunity to comment on or rebut the PSI" (R 422) at the penalty phase, *Spencer* hearing, and the sentencing hearing.[21] (R 368, 400-19, 2358-63). During the penalty phase proceeding, Evans took the stand to give evidence in support of his proffered mitigation. He discussed the cases underlying the prior violent felony aggravator, i.e., cases 88-1716, 90-22119, and 91-4708. (R 2358-63).

Regarding 88-1716, Evans denied that he had committed the battery for which he was charged and convicted.[22] (R 2358-59).

21

Victim impact evidence in the PSI was examined by the trial court "only . . . in an effort to discern any matters in mitigation . . . and has not in any way been considered in aggravation." (R 423).

22

According to Evans' testimony, the summary stated that Evans "jumped on some dude on a motorcycle," to which Evans responded

Regarding 90-22119, Evans acknowledged it was charged as a "[b]attery on a LEO." (R 2359). He went into considerable detail describing his version of the facts underlying that offense. (R 2360-61). He described the incident as "a case of police brutality."[23] (R 2360). Regarding 91-4708, he explained that he collided with a police officer while running away from the law when "the officer jumped out in front of me." (R 2362). Clearly, Evans had, and took full advantage of, his opportunity to rebut the information regarding the factual basis of his prior offenses.

Moreover, Evans' interest in cross-examining the author of the summary of the details of his prior crimes is less compelling because he previously had the opportunity to cross-examine the persons who provided the factual details during his trials for the prior crimes. Presumably, the transcripts of those proceedings were available to rebut the hearsay testimony describing the factual details of the prior conviction; certainly, Evans has not carried his burden to demonstrate otherwise. Summaries of facts proved in prior cases

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"[n]othing happened." (R 2358, 2359).

[23] The case went to trial, and Evans was convicted, based on Evans having "kicked the officer in his . . . private area." (R 2360).

should be permitted because the defendant had the opportunity to cross-examine the declarant during the original proceeding. *See Rodriguez*.

Finally, any error in admitting the hearsay information was harmless because the certified copy of the conviction, stipulated to by the Defense, conclusively establishes the aggravator. *Rodriguez*. It is also harmless in this case because there was no dispute as to the accuracy of the information contained in the summaries.[24] Clearly, the law permits the hearsay information in the instant case. *See Rodriguez; Jones v. State*, 748 So. 2d 1012, 1026 (Fla. 2000)[photos of body and coroner's report from prior crime admissible hearsay at penalty phase]; *Koon*. Evans is entitled to no relief.

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[24] Moreover, the court permitted Evans to place his statements contained in the PSIs and the victim's statements before the jury.

POINT VI

APPELLANT'S DEATH SENTENCE IS NOT DISPROPORTIONATE; THE TWO AGGRAVATORS FAR OUTWEIGH THE NONSTATUTORY MITIGATION.

Evans complains that the death penalty should not have been imposed because the two aggravating factors do not outweigh the established mitigators. (IB 47-48). The aggravators are conviction of a prior, violent felony and the murder was committed while Evans was on probation for his other violent crimes. (R 426).

Evans' quarrel with the weight the trial court assigned the aggravators is that in regard to the prior convictions for violent felonies, they were "an aggravated battery, and two batteries on a law enforcement officer." (IB 47-48). He considers it "[i]nteresting" that "the injuries suffered by the victims were minimal." (IB 48). He further quarrels with the weight assigned by the trial court, claiming that "there was no indication that the victim . . . knew beforehand that she was going to be killed or that she suffered . . .." (IB 48). Finally, he suggests that opposition to the death penalty by some members of the victim's family,[25] should replace the

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[25] He offers no record support for this claim, and the State does not concede that this representation is accurate.

decisions of the jury and the trial judge in regard to the appropriateness of the death penalty. (IB 48).

Evans' quarrel with the trial court's determination that the two aggravators "far" outweighed the mitigation is not properly before this Court. It is well-settled that the weight given to the aggravating and mitigating factors is within the exclusive province of the trial court. *Cole v. State*, 701 So. 2d 845, 852 (Fla. 1997), *cert. denied*, 523 U.S. 1051 (1998).

The trial judge found all of the specific mitigation proposed by Evans and assigned it the appropriate weight.[26] In his sentencing order, he detailed his analysis and explicated many of the factors which went into his determination of the weight to be given each matter. On appeal, Evans asks this Court to reweigh the mitigation and find that it outweighs the aggravators.

> Deciding the weight to be given a mitigating circumstance is within the trial court's discretion, and a trial court's decision is subject to the abuse-of-discretion standard. . . . In the sentencing order, the trial court detailed the evidence presented regarding each circumstance proposed, found

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He found: 1) Abused or deprived childhood - little weight; 2) contributions to society - little weight; 3) charitable or humanitarian deeds - some weight; 4) counselled youth to avoid crime - little weight; and, 5) behavior while incarcerated - little weight. (R 435-43).

> each of these nonstatutory mitigators to exist, and afforded them the weight which the court found was appropriate.

(citations omitted) *Cole v. State*, 701 So. 2d at 852. In the instant case, the trial judge's sentencing order states the evidence of each circumstance, found all mitigators proposed and afforded them the weight which he felt was appropriate, and carefully considered anything else on the record which might possibly mitigate the offense. Evans has utterly failed to establish that the trial judge abused his discretion in regard to the finding, and weighing, of the mitigating circumstances.

A comparison of the instant case to other similar cases compels the conclusion that the death sentence -- recommended by the jury by a vote of ten to two -- is proportionate. In *Mansfield v. State*, 728 So. 2d 636, 647 (Fla. 2000), a death sentence based on two aggravators -- HAC and committed during a sexual battery -- weighed against five nonstatutory mitigators was proportionate. In *Davis v. State*, 703 So. 2d 1055 (Fla. 1997), *cert. denied*, 524 U.S. 930 (1997), HAC and committed during a sexual battery weighed against several nonstatutory mitigating factors supported an eleven to one jury recommendation, and trial court imposition, of death and was proportionate. In *Shellito v. State*, 701 So. 2d 837 (Fla. 1997), two aggravating circumstances, prior violent felony and

committed during a robbery, and an eleven to one death recommendation weighed against age as mitigation and some background and character type nonstatutory mitigation supported a death sentence which this Court upheld as proportionate. In *Consalvo v. State*, 697 So. 2d 805 (Fla. 1996), *cert. denied*, 523 U.S. 1109 (1998), this Court found a death sentence proportionate where two aggravators -- avoid arrest and committed during a burglary -- were weighed against nonstatutory mitigation.

Evans explained to the jury in detail his version of the events underlying the three cases supporting the prior, violent felony aggravator. (R 2358-64). Having heard that testimony, the jury still recommended death by a 10 to 2 vote, and the trial judge, who also heard it, imposed the death sentence. Evans' argument to this Court that the prior violent felony was based on mere batteries with minimal injuries is based on evidence which was before, and rejected by, the statutory sentencer. This Court is not to substitute its judgment for that of the jury and judge.

Neither should the victim's family members - some of whom may have opposed the death penalty - be permitted to substitute their judgment for that of the statutory sentencer. Their views were clearly placed before the judge, and he, correctly, refused

to let them dictate the result. Rather, he did, as the law requires, and determined whether Evans met the statutory criteria for imposition of the death penalty. Having concluded that he did, the judge properly sentenced him to death. The wishes of some members of the victim's family - or those of any other citizens - are irrelevant to the determination of the appropriateness of the death penalty for the murder of Angel Johnson.

Finally, Evans' claim - made for the first time in this Court - that Angel did not suffer as a result of his shooting her is not a basis for relief on proportionality grounds. Indeed, it is not true. The evidence is clear that Angel was shot at point blank range in the heart. Thereafter, she was conscious, she spoke to her killer right after he shot her, and she spoke to Sammy quite some time later on the way to the hospital. Certainly, a reasonable inference from the evidence of a shot to the heart from which the conscious victim bled to death is that she suffered! Further, the fact that Evans announced "the bitch is dead" right after shooting her, and that he refused to permit the others to take her to the hospital for medical treatment until it was unquestionably too late, or even to roll down the window to give the gasping victim some fresh air as she suffered are factors which should be considered in

evaluating whether the death sentence is proportionate for this crime. It is; Evans is entitled to no relief.

CONCLUSION

For the reasons set out above, Evans conviction and sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: Michael S. Becker, Assistant Public Defender, 112 Orange Ave., Suite A, Daytona Beach, FL 32114, on this ____ day of June, 2001.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

JUDY TAYLOR RUSH

ASSISTANT ATTORNEY GENERAL