IN THE SUPREME COURT OF FLORIDA

KEVIN PURYEAR,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC01-183
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
______________________________	)	

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida. In this brief the parties will be referred to as they appear before this Court.

The record on appeal is not consecutively numbered. The record volume is numbered independently from the transcripts. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses. All references to the transcripts will be by the symbol "T" followed by the appropriate page number in parentheses.

ARGUMENT

THE DISTRICT'S COURT'S DECISION AND CERTIFIED QUESTION UNDERMINES THE PRINCIPLE OF STARE DECISIS AND FAILS TO FOLLOW THE COURT'S INTERPRETATION OF THE DEFINITION OF NON-HEARSAY STATEMENTS OF IDENTIFICATION UNDER SECTION 90.801(2)(C).

First, the State argues that "Respondent submits that this Court is free to make a ruling in a case, decided independent of a precedent case and, in so doing, decline to follow the precedent case without explanation." (Respondent's brief-6) The state argues that precedent carries absolutely no weight in deciding subsequent cases, and the court considers every issue de novo as if the issue had never before been addressed or decided, and may shift course from established caselaw "without explanation." The state's proposal that precedent has no binding force is indeed radical given the fact that stare decisis forms the very foundation upon which American jurisprudence is established. (See Petitioner's Initial Brief - p. 14.) Contrary to the state's assertion and in respect for the principle of stare decisis, Swafford v. State, 533 So. 2d 270 (Fla. 1988), clearly deciding that descriptions do not constitute identifications, should be held to have binding force on subsequent case law. Although encouraging this Court to entirely abandon the doctrine of stare decisis, the state nonetheless cites stare decisis as a reason the Fourth District was bound to

follow Power v State, 605 So. 2d 856 (Fla 1992)(respondent's brief-8). However, given the clear ruling on the matter in Swafford, and the dicta in Power, stare decisis would dictate that the Fourth District was bound to follow Swafford as opposed to finding that case to be overruled *sub silentio* by dicta in Power.

No where in its brief does respondent ever address the statutory language of the hearsay exception nor petitioner's argument that under the plain meaning of the statute, "descriptions" do not constitute "identifications." Rather, the state cites case law from other states, which interpret their hearsay exceptions for identifications to include descriptions or a composite sketch from a description, without any discussion of why case law from other states is relevant given unambiguous, contrary statutory language and a clear pronouncement on the issue by this Court in Swafford. Nor does respondent cite contrary authority from other jurisdictions. State v. Jenkins, 483 N.W.2d 262, 267-68 (Wis. Ct. App. 1992)(holding that "descriptions" do not constitute "identifications.").

The policy reasons cited by respondent from other state's case law are unpersuasive. The state argues that a description that is offered in conjunction with an identification is "probative evidence of the victim's ability to observe and remember her assailant, and, therefore, was relevant to the accuracy of the identification that the victim made."(Respondent's brief-13) The state seems to be arguing for a new rule

of admissibility where the description corroborates or substantiates the witness' identification. Yet, such a rule would be one which allows improper bolstering of a witness' testimony by allowing admission of a prior consistent statements to support an identification. Florida law already has a rule to cover that situation and it does not permit the admission of prior consistent statements except under section 90.801(2)(b) to rebut a claim of improper influence, motive or recent fabrication. McElveen v. State, 415 So. 2d 746 (Fla. 1st DCA 1982)("[T]he general rule is that the witness's testimony cannot be corroborated by a prior consistent statement..."); Davis v. State, 694 So. 2d 113 (Fla 4th DCA 1997)(Officer's testimony concerning the victim's description of the intruder was an inadmissible prior consistent statement);) Coluntino v. State, 620 So. 2d 244 (Fla. 3d DCA 1993)(Reversible error to admit during redirect-examination of the victim evidence of his prior consistent statement); McDonald v.State, 578 So. 2d 371 (Fla. 1st DCA 1991)(Error to admit the testimony of the victims's friend and the police officer as to her version of events as those statements were clearly inadmissible prior consistent statements); Jenkins v.State, 547 So. 2d 1017 (Fla. 1st DCA 1991)(Error to admit prior consistent statement where no explicit or implicit charge of recent fabrication, improper influence or motive to falsity. General attack on credibility is not enough). In Rodriguez v. State, 609 So. 2d 493, 500(Fla. 1992) this Court held that the detective's testimony concerning out of court

statements was inadmissible and advised:

> [W]e take this opportunity to caution trial courts to guard against allowing the jury to hear prior consistent statements which are not properly admissible. Particular care must be taken to avoid such testimony by law enforcement officers.

The state's proposal that out-of-court statements are admissible simply based on probative value or corroborative force (i.e."we really need it to prove our case") would radically alter the rule against hearsay, and disregard the requirements of section 90.801(2)(b) which severely limits the admissibility of prior consistent statements.

The state does not even address petitioner's arguments that out of court identifications carry an indicia of reliability, due to requisite safeguards to protect the rights of the accused, (PB-24), and due to the specificity of an identification, (PB-24-25) which is not shared by out of court descriptions. Respondent presents no persuasive arguments in favor of treating descriptions as identifications, consistnent with established Florida law or for deviating from clearly established precedent in Swafford, nor does the state address the clear language of the statute.

Finally, the state advances its fall back position that the statements of description could constitute excited utterances, which argument was unpersuasive in the district court. The state never even advanced this as a basis for the admissibility of Deese's hearsay statements of description in the trial court so the facts of record

were not developed to show that the excited utterance exception existed. Excited utterances are admissible only if "made while the declarant was under the stress of excitement caused by the [startling] event or condition." Section 90.803(2), Florida Statutes. The state argues that the statement to Officer Wardlaw fits the excited utterance exception, because Wardlaw, according to her own testimony, spoke to Deese about the robbery fifteen or twenty minutes after the crime occurred. Yet, much occurred between the robbery and Deese's report to Wardlaw, allowing the immediate stress of the robbery to subside.

After the robbery, Deese went home (T-196), told her mother what happened, had a disagreement with her mother about whether to fill out a police report, told her boyfriend Danny about the robbery when he later arrived at her house, convinced Danny that she was serious and not fabricating the story, and then went driving with Danny in his car looking for the robber. Only afterwards, did she go to the police station and speak with Wardlaw. During the course of these activities, Deese had time for the stress to subside and conscious reflection to return. Furthermore, Deese's testimony indicates that she was no longer under the stress of excitement caused by the robbery, when she arrived at the police station and spoke to Officer Wardlaw. The prosecutor asked her:

PROSECUTOR: "Okay. And you went to the police station with

[Danny]?"
DEESE: "Correct."
PROSECUTOR: "Did you want to go?"
DEESE: "Yeah, I was calmed down. I wanted to."

(T-198).

To say she was "calmed down" is just a colloquial way of saying she was no longer under the stress of excitement caused by the robbery.

The state argues that "Officer Wardlaw testified that when she approached the victim at the station, 'She [the victim] was distraught, upset, on the verge of tears, and actually crying at times during the whole time that we were talking.'" (Respondent's Brief-15). However, to constitute an excited utterance, the declarant must be in a continuous state of excitement that stretches uninterrupted from the startling event until the utterance sought to be admitted. If the state of excitement subsides or is broken, but then resurfaces, as is apt to occur when a person recounts the details of a traumatic event, even years later, the intervening period of deliberation, during which the details of the event may become consciously modified, undermines the reliability presumably justifying admission an excited utterance. See State v, Janio, 524 So.2d 660, 663 (Fla. 1988)("The fact that a declarant long after the occurrence of a startling event once again becomes excited in the course of telling about it would not permit the statement to be introduced as an excited utterance."); see also, State v. Skloar, 692 So.2d 309, 310 (Fla. 5th DCA 1997)("[A] hearsay statement made long after the

occurrence of the startling event is not admissible, even though the declarant once again becomes excited in the course of telling the event."). Simply because Deese was upset when recounting the robbery to Officer Wardlaw does not establish that she remained under the initial stress of excitement produced by the robbery. She testified that she had "calmed down," and the resurfaced stress was not caused by the initial trauma of the robbery, but rather by its memory, as Deese recounted the details to Officer Wardlaw.

The statement to her boyfriend Danny was closer in time to the robbery, apparently within the first half an hour. While an excited utterance need not be made contemporaneously with the startling event, a lapse of time is an important factor, and "courts have held statements made within minutes of the event not admissible." State v. Jano, 524 So.2d 660, 662 (Fla. 1988). Generally, courts have held that the statement must be made "while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance." Lyles v. State, 412 So.2d 458, 460 (Fla. 2d DCA 1982). "Perhaps an accurate rule of thumb might be that where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process." Jano, supra, 524 So.2d at 662. For instance, one court held that even during the "relatively short" interval, during which the rapist drove the victim home from the crime scene, was likely "sufficient to

permit reflective thought." Pacifico v. State, 642 So.2d 1178, 1186 (1st DCA 1994).

Here, after the robbery, Deese went home, told her mother, had a disagreement with her mother about whether to fill out a police report, and only then did Danny arrive at Deese's house, when she told him about the robbery. She told her mother first and Danny later. Respondent's contention that Deese's statements to her boyfriend were admissible under the "first complaint" exception cannot be correct as Deese made her first complain to her mother. (Respondent's brief-17-18) (Nor does petitioner agree that exception would be available any way as this is not a sexual battery case). The second telling of a story carries more deliberate reflection, conscious arrangement of details, and less spontaneity than the first report, and courts have recognized as a factor in evaluating whether an utterance was excited that it was not made at the declarant's "first opportunity to complain." Begley v. State, 483 So.2d 70, 72-73 (Fla. 4th DCA 1986). Also, when Deese first told Danny about the robbery, she said nothing about missing teeth. (T-257-58). Initially, Danny thought she fabricated the story, and she assured him "I'm serious." (T-197). After he realized she was serious, Danny asked Deese for a description of her assailant. Only then did Deese tell Danny the robber had missing teeth. (T-258). Deese did not spontaneously utter the missing teeth description, but deliberately responded in answer to Danny's request for a description, nor did the statement spring from the "excitement superseding the declarant's powers of reflection," Harmon v. Anderson,

495 F.Supp. 341 (E.D.Mich. 1980)(citing McCormick on Evidence (2nd Edition) West Publishing Co. (1972) section 297, p. 704), such as “oh, my God, he has a gun,” Willis v. State, 727 So.2d 952, 953 (Fla. 4th DCA 1998), but rather issued from Deese’s intention to prove to Danny that she was serious and provide him a description, so he could go find the man responsible.

The inadmissible hearsay was quite harmful due to the uncertainty of Deese’s identification testimony based only on a fleeting secods look at the side of the robber’s face, her lack of any real opportunity to observe the robber at the time of the robber itself. This case presents the very real danger of a conviction unjustly obtained by improper bolstering and supported by inadmissible hearsay from the mouth of a police officer. Reversal for a new and fair trial is now required.

CONCLUSION

Based upon the foregoing Argument and cited authorities, Petitioner urges this Court to affirm the authority of Swafford, to quash the decision of the Fourth District and to reverse petitioner's conviction for a new and fair trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Melynda L. Melear, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this _____ day of May, 2001.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in compliance with the font standards required by Fla. R. App. P. 9.210. The font is Times New Roman, 14 point.

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