IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

JAMES ROBERT WARD,

Appellant,

v. Case No. 5D12-49

STATE OF FLORIDA,

Appellee.
_____/

On Appeal from the Ninth Judicial Circuit of Florida,
In and for Orange County

INITIAL BRIEF OF APPELLANT JAMES ROBERT WARD

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STATEMENT OF THE CASE

This appeal arises from a jury trial on a single count information charging James Robert Ward ("Ward") with the second degree murder of his wife, Diane Ward ("Diane"). R88. Ward was found guilty as charged, R1161, and sentenced to a thirty year term of imprisonment. R1280. He filed a timely notice of appeal. R1291.

STATEMENT OF THE FACTS

I. Introduction

Diane died of a single gunshot wound to the head she sustained in the second story bedroom of the Wards' home. Because there were no witnesses to the incident other than Ward, the State's case rested entirely on circumstantial evidence. Ward appeals on the grounds that the evidence was insufficient, and that the jury nevertheless convicted as a result of a pervasive pattern of prosecutorial misconduct, a series of erroneous evidentiary rulings by the trial court, and a critical omission in the jury instructions regarding the State's failure to preserve evidence. The facts regarding these matters are set forth below.

II. Facts relating to the sufficiency of the evidence

The State's theory was that Ward shot Diane with malice, ill will, or spite sufficient to justify a verdict of second degree murder. The State, however, offered no specific theory regarding the manner in which the crime occurred.

Taken in the light most favorable to the State, the evidence showed that at the time

of the gun's discharge in their bedroom, Diane was standing next to Ward's side of their bed, facing the bed with her back to the bedroom door, and Ward was standing between the bed and Diane, facing her. T2484-86. The gun was 6-18 inches away from Diane's head when it went off, T1790, T2241, 2285, 2383, and the bullet's trajectory was essentially straight on at a slightly upward angle. T1761. Diane had gunshot residue ("GSR") on her hands, T1689, but Ward did not have any GSR on his hands. T1690. Although the gun belonged to Ward and Diane was never known to have handled it or any other firearm, T1219, 1500, Diane's DNA was found on the weapon's handle and trigger. T2313, 2315, 2334-35. Droplets of Diane's blood were found on Ward's shoes and shorts, T1499, although none of her blood was on either his shirt or his hands. T2049. The gun was kept in a nightstand on Ward's side of the bed, and the holster in which it was kept was found on the top of the nightstand next to where Diane was standing at the time of the shot. T1163. There was no sign of a struggle in the bedroom, T1362, and Diane suffered no defensive wounds. T1764.

There was a small stain on the back of Ward's shirt that appeared to be wine and a similarly colored stain on the sheets on Ward's side of the bed. T1112, 1173. On the home's first floor, a broken wine glass and what appeared to be a small wine stain were on the floor of the back patio. T1110, 1347. Also on the patio was an intact wine glass. T1347, 1377. There were several empty wine bottles found in the kitchen trash as well as a partially full wine bottle on the counter. T1348, 1406-07.

Diane had a post-mortem blood alcohol level of .113, T1769, 2192, 2243, and an extremely high level of Citalopram,[1] a medication used to treat depression and anxiety. T1820, 1850, 2186, 2244. Citalopram is known to cause increased risks of suicide, hostility, and aggressiveness, particularly when taken in new or increased dosages. T1858, 2194-95, 2205, 2265. The level of the drug found in Diane's body reflected that she had taken roughly four times as much of it as she had been prescribed, T2244, and that it was a significantly increased dosage from her normal usage. T2245-48. Diane had also taken a second anti-depressant, Trazodone. T2192. The combination of the alcohol and anti-depressants would have created a synergistic effect, amplifying the impairment and potential adverse side effects that would have resulted from the substances if taken in isolation. T2193-94, 2205, 2225. Diane had suffered from anxiety and depression for many years, T2187, and had complained to her treating physician that she was experiencing "constant negative ruminations and catastrophic thinking." T1795.

Ward called 911 immediately after the incident and reported it. Clearly upset and somewhat intoxicated, Ward stated to the operator that he had "just shot my wife" and that it was "an accident." T1072-75. Ward told the 911 operator that he had put the gun away (it was found by law enforcement in the nightstand by the bed, T1163) and

[1]The State and defense experts differed as to whether the high post-mortem level of Citalopram resulted from post-mortem redistribution of the substance. *Cf.* T2091 (Garavaglia) *with* T2191 (Valentine) *and* T2244-49, 2253 (Anderson).

then waited outside his home for law enforcement to arrive. T1075-77. When law enforcement arrived they saw Ward in front of the home directing them to his location. T1089, 1129. Ward gave multiple statements that evening in the presence of law enforcement in which he explained that Diane was attempting to commit suicide and that the gun had accidentally discharged as he was attempting to prevent her from doing so. T2066, 2068, 2071-72.

III. Facts relating to evidentiary errors and prosecutorial misconduct

Ward challenged the State's case both on the basis that the State had failed to prove its theory of second degree murder, and also on the basis that an equally or more reasonable hypothesis was that Diane was attempting to kill herself and that the gun accidentally discharged as Ward tried to stop her from doing so. As set forth below, the prosecutors resorted to a relentless pattern of misconduct in an effort to defeat the reasonable hypothesis of Ward's innocence, and to portray him in a false and misleading light through baseless attacks on his character, imputation of a supposed motive for murder and purportedly "odd" demeanor, and closing arguments that improperly ridiculed Ward's defense and attempted to shift the burden of proof to him. The trial court also committed a number of prejudicial evidentiary errors that compounded this pattern of prosecutorial misconduct and resulted in a trial that was fundamentally unfair and a verdict that is of dubious validity.

A. Prosecutorial misconduct and evidentiary errors regarding the reasonable hypothesis of attempted suicide

The State began its efforts to eliminate attempted suicide as a possibility through an FDLE GSR technician, Daniel Radcliffe. T1679. After Radcliffe explained that GSR was found on Diane's hands, the prosecutor attempted to elicit testimony that he would have expected to find more GSR had this been a suicide. T1695. Radcliffe had no basis to give such an opinion, and Ward's objection on this ground was sustained. *Id*. The State nonetheless asked the identical question again a short time later. T1702. Although Ward's objection was again sustained, the witness nevertheless simply continued testifying and stated that he would have expected more GSR had this been a suicide. T1702-03. This required the Court to again sustain the objection and to strike Radcliffe's response, but only after the jury had already heard it. T1703. Refusing to let the issue drop, the State then without warning asked the same question yet a third time, necessitating yet another defense objection. T1704.

The State returned to this theme during the testimony of the medical examiner who performed the autopsy, Dr. Joshua Stephany. The trial court permitted the State to elicit over objection that the trajectory of the bullet excluded the possibility of suicide because "people will not shoot themselves straight on into the face." T1831. No basis for Stephany's qualification to express such a view is evident in the record.

Next, the State attempted to elicit testimony from the lead detective, Brian Cross,

that in his opinion this could not have been an interrupted suicide. T2073-74. Ward's objection to this was sustained. T2074. Undeterred by this ruling, the prosecutor then asked the detective how many suicide cases he had worked, and then whether any of those cases involved "a pattern of stippling such as this." T2074. Ward's objection to this question was also sustained, T2074-75, but the jury would have been left with no doubt regarding the opinion the State was seeking to elicit. The prosecutor made no effort to defend the appropriateness of either of these efforts to obtain testimony from the detective that he was not qualified to give. T2074-75.

Although the trial court sustained Ward's objections as to the detective's ability to opine that this was not an interrupted suicide, the court made the opposite ruling regarding the testimony of a medical examiner who was not involved in the autopsy, Dr. Jan Garavaglia. The trial court permitted the State to elicit over defense objection from Garavaglia that this was not an interrupted suicide:

> because they're very difficult to interrupt because of how quick you can pull the trigger when the gun is in its – in its position. So if 15 percent of the time it's witnessed, we still have the vast majority of our gunshot wounds contact. It's very difficult to stop that trigger pull. Also, in this case, it goes straight in and it's 18 inches out.

T2099. Garavaglia's qualifications to express this view are not evident in the record.

As noted above, Diane's medical records reflected that in addition to depression and anxiety, she experienced "catastrophic thinking." T1795, 1855. The trial court permitted the State to elicit over objection testimony from Garavaglia that the phrase

"catastrophic thinking" does not include suicidal ideation, but means only that she felt "something horrible is going to happen" to her. T2106. This testimony formed a key component of the State's closing on this point: "You heard some questioning about catastrophic thinking. And that's worrying that terrible things are going to happen. And rather, ladies and gentlemen, there's a huge difference between catastrophic thinking and suicidal ideation and you don't get to, just 'cause the words sound bad, mix them up together and say they mean the same thing. 'Cause they don't." T2578.

Garavaglia also repeatedly volunteered testimony that both she and the State knew was inadmissible and was designed to improperly influence the jury to disregard and even ridicule the possibility that Diane was attempting suicide. For example, Garavaglia blurted out that in light of Diane's medical history, "this would have been a suicide out of the blue." T2090. Ward's objection to this was immediately sustained, but only after the jury heard it. *Id.* Garavaglia then went on to express the view, without warning, that "interrupted suicides are extremely rare, if nonexistent," then ridiculed the very notion by stating that interrupted suicides are "common in Hollywood." T2097. The defense objection to this testimony was sustained, but again only after the jury had heard it. *Id*. The doctor then continued speaking after the objection had been sustained, and despite the lack of any pending question, went on to tell the jury that only 15% of suicides are witnessed. T2097-98. Ward's objection to this "testimony" was immediately sustained, but again only after the jury had heard

it. T2098. Garavaglia returned to the same theme, however, claiming that this could not have been an interrupted suicide "[b]ecause the person struggling does not want the end of the barrel pointed to their face. That's the first thing that is pushed." T2101. Ward's objection to this testimony on the grounds that it "couldn't be more speculative" was sustained, but not before the jury heard it. *Id*.

In light of the evidence that Diane was taking anti-depressants and that these substances, particularly in an increased dosage as suggested by Diane's post-mortem blood level of Citalopram, present increased risks of suicide, the State also attempted to elicit from Garavaglia the percentage of the population using anti-depressants. T2558. The defense objection to this testimony was sustained, T2558, but this did not stop the doctor from volunteering in response to a question moments later that they are prescribed for 10% of the population. T2559. Ward's objection was sustained this time as well, but once again only after the jury had heard it. *Id*. The State then completed its examination of the doctor by posing as its final question why she believed this could not have been a struggle over the gun to prevent a suicide. T2560. This forced Ward to object once again. *Id*. The objection was sustained, but the import of the doctor's potential opinion testimony on the point was clear for the jury.

The State also resorted to impropriety with Garavaglia in its effort to cast doubt on the critical issue of Diane's high post-mortem Citalopram blood level. In its case in chief, the State attempted to show that the blood level was unreliable because it could

have resulted from post-mortem redistribution of the drug. T1770-71, 1851-55. Ward rebutted that suggestion with expert testimony explaining that post-mortem redistribution can be excluded because there was no similar redistribution of the metabolite – or byproduct – that would have been produced by Diane's body processing Citalopram. T2246-48. Indeed, virtually no Citalopram metabolite was found in Diane's post-mortem blood, which confirmed that her massive ingestion of the drug took place shortly before her death. T2247-48. The State called Garavaglia in rebuttal and elicited from her that the reason the lab failed to find Citalopram metabolite in Diane's blood was that the lab had not tested for it. T2551. The trial court sustained Ward's objection to this, T2551, and permitted the defense to voir dire the witness. T2553. The voir dire examination established that in truth Garavaglia had no idea whether the lab had tested for the Citalopram metabolite or not. T2555. This required the trial court to instruct the jury to disregard Garavaglia's testimony on the point, but only after they had already heard it. T2557.

B. Prosecutorial misconduct and evidentiary errors regarding Ward's character

In addition to a need to try to rebut the reasonable hypothesis that this was an unsuccessful attempt by Ward to prevent Diane from committing suicide, the State also needed to try to explain why Ward would have suddenly murdered his wife after decades of peaceful and loving co-habitation. T1273, 1293, 2002. The State thus

launched an all out effort to paint Ward as a bad man, which resulted in a combination of erroneous evidentiary rulings by the trial court and an array of instances of prosecutorial misconduct.

1. The baseless suggestion that Ward was unfaithful

The trial court permitted the State, over defense objection, to call a woman named Dianne Callahan, with whom Ward had had a romantic relationship roughly 30 years earlier, before he met Diane. T1742. Callahan testified that Ward emailed her in January 2009 and they met for lunch on February 2, 2009, T1744, more than seven months before Diane's death. Callahan stated that Ward had two drinks at the lunch, and that he complained about his wife spending too much money. T1745. Although it was in direct violation of a specific order in limine, the State then elicited from Callahan that Ward also complained about a time that Diane failed to pick him up at the airport. *Id*. The violation of the in limine order required Ward to object, which was sustained only after the jury had heard the testimony. *Id*. There is no evidence in the record to suggest Ward and Callahan ever saw each other again after this lunch.

The State then capitalized on this testimony to suggest that Ward was cheating on Diane, and thus had a reason to murder her. For example, the State called the Wards' eldest daughter Mallory as a witness, and although she knew nothing about the topic, the prosecutor concluded her redirect examination of Mallory with the following:

Q: If your mother were to hear – you talked about your mother said [Ward] was

a fine man. Did you have any knowledge that your father had had lunch and cocktails with Ms. Callahan in 2009?

A: No.

Q: Is that something your mother would have appreciated?

[Defense Counsel]: Your Honor, object.

THE COURT: Sustained.

[Prosecutor]: Nothing further.

T1295-96.[2] The State returned to this baseless suggestion of infidelity in its closing argument, telling the jury:

> . . . [T]here's nothing in the instruction of second degree murder or manslaughter that we have to prove to you the very subject that they fought over. But what we have given to you is information that this marriage was not quite as it seems. February 2009 the defendant is having lunch and cocktails with his old girlfriend and complaining his wife spends too much money. ... Ladies and gentlemen, we don't have to show they're on the verge of divorce.

T2601.

2. Ward's wealth and the baseless suggestion that he had a financial motive to murder Diane

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[2]The State concluded its examination of the Wards' other daughter, Sarah, in a similarly improper and inflammatory fashion. After establishing the obvious fact that Sarah was not home on the evening in question, the prosecutor concluded with:

Q: You were not there when your mother ended up shot in the face on the floor?

A: No. (Witness crying.)

T2018.

The State made much in its case in chief of the fact that Ward's business was in bankruptcy and he was under financial pressure at the time of Diane's death. Ward rebutted financial pressure as a motive by presenting the expert testimony of a bankruptcy law professor, Dr. Jeffrey Davis, who explained that much of the Wards' funds, including more than $10 million in various bank accounts, were held by tenancies by the entireties, thus protecting them from Ward's creditors so long as Diane was alive. T2421-25. Davis also reviewed the Wards' other assets and explained that although Ward's life was insured for $20 million, there was only $1 million in insurance on Diane's life. T2420. On cross-examination, the prosecutor first established that Davis' testimony regarding Diane's $1 million in life insurance coverage was based solely on what Ward's counsel had provided him. T2430. The prosecutor then began her next question with: "Were you aware that there was another larger policy –" at which point defense counsel was forced to object and request a bench conference. *Id*.

At sidebar the defense explained that there had previously been a $10 million policy on Diane, that it was no longer in effect at the time of her death, and that the State had no good faith basis for suggesting it was. T2431. The prosecutor did not dispute the representation of Ward's counsel that the policy was not in effect on the date of Diane's death. The prosecutor's only proffered basis for the question was that a reference to the policy had once appeared in a document prepared by the bankruptcy

trustee. T2431. The trial court sustained the objection after a proffer confirmed that Davis knew nothing about the supposed policy. T2432-35. Nevertheless, the prosecutor resumed her examination in a manner designed to suggest both that there was such a policy and that the defense had hidden it from the jury:

> Q: Sir, the information you were given on the life insurance policies of Diane Ward came from Liz Green, [Ward's] bankruptcy lawyer?
>
> A: That's correct.
>
> Q: And you've known Ms. Green for a period of time?
>
> A: A number of years, yes.
>
> Q: You did not personally go through and review the bankruptcy file?
>
> A: I had no connection to the bankruptcy case.

T2435-36.

The State also repeatedly and gratuitously injected Ward's wealth into the case, inviting the jury to convict out of distaste for his lifestyle. The State suggested in opening statement that the Wards' "dogs actually have their own playroom in the house." T1035. The State elicited from the officers who responded to the Ward home that it was "at least 8,000 square feet, if not bigger," T1107, and that it was "probably one of the largest residences I've been in as a law enforcement officer." T1132. The State even went so far as to suggest that Ward had obtained his wealth by conduct connected to the ongoing real estate crisis, eliciting utterly irrelevant but highly

prejudicial testimony without warning from the bankruptcy trustee's attorney that "the vast majority of claims in [Ward's] case were unsecured creditors, those of lot owners, other individuals who never got their development built or never got their infrastructure or utilities put into the ground." T1956. Ward's objection to this was promptly sustained, but not until after the jury had heard it. *Id*.

3. Ward's demeanor and the erroneous admission and mischaracterization of his pre-trial statements

The State also made numerous attempts to imply that Ward had acted out of ill will toward Diane based on his supposedly "odd" demeanor the night of the incident. Because Ward was not read his *Miranda* rights that evening, R1562-63, he moved pretrial to suppress any statements he made during his transportation by Deputy Alleyne from his home to the sheriff's office. R570-71, 1594-95. The State opposed the motion on the following grounds:

> The Defendant was transported in a patrol car and had a conversation with Deputy Alleyne about his daughters and football. This was not an interrogation. The State would concede that once the Defendant was placed in the patrol car he was in custody; however, it was a conversation between the deputy and the defendant not an interrogation. It is not an interrogation to have a conversation on football and the Defendant's daughters. ... The conversation between the deputy and the Defendant on the way to the sheriff's headquarters was not an interrogation about the crime and therefore are admissible since Miranda would not apply.

R602-03, 608; *see also* R1547-48, 1601. At an evidentiary hearing on the motion, Alleyne testified that he did not Mirandize Ward and therefore did not ask him

"anything about the shooting itself" because "protocol" was to simply transport the suspect to the homicide division for questioning. R1562-64. Alleyne instead asked Ward "about football," including "who was his favorite team and who was my favorite team." R1563, 1565-66. Ward also told Alleyne about his daughters, including their ages and where they went to school. R1563. The court denied the motion to suppress on the grounds that Alleyne's "questions about Defendant's favorite football team and his daughters were not likely to elicit incriminating responses from Defendant," and therefore *Miranda* warnings were not required. R649.

Ward then moved in limine to preclude the State from using the fact of his "small talk" with Alleyne during his transportation to the sheriff's office regarding football and his daughters to argue or offer testimony that Ward was guilty of second degree murder because he did not display "appropriate" grief regarding the situation. R1076-80. Although Alleyne admitted that it was he who asked Ward about football, by the time of the hearing on the motion in limine the State was arguing that it was Ward who chose to have a conversation with Alleyne about football and his daughters, R1732, and asserted that "what [Ward] chose to talk about . . . after this rebuts the theory that it's an accident, or some tragedy, or a suicide." R1733. The trial court deferred ruling on the matter until the context of the trial. R1734.

At trial the State called Alleyne for the sole purpose of eliciting testimony about his conversation with Ward during the drive to the sheriff's office. Although it was

the subject of a motion in limine as to which the trial court had reserved ruling, the State with no advance warning asked Alleyne: "How would you describe [Ward's] demeanor during the time he was sitting in your patrol car?" T1145. Ward's objection to this was immediately sustained. *Id*. The State then elicited from Alleyne that during the drive he and Ward "basically talked about football" and that "[t]he only family members he talked about were his two daughters." T1148-49. The State specifically elicited that Ward did not mention Diane during the drive. T1149.

The State took inappropriate advantage of this state of the record in both its initial and rebuttal closing arguments, making the exact misleading use of Alleyne's efforts to avoid interrogating Ward pre-*Miranda* that the defense moved in limine to prevent. In its initial closing, the State referred to Ward's behavior during his interaction with Alleyne as evidence of his ill will and malice toward Diane, stating: "Ladies and gentleman, the State submits to you the defendant was more concerned about the defendant at that point than Diane." T2589. After the trial court overruled a defense objection to the argument based on the motion in limine, the State continued: "[Ward] sits in Deputy Alle[y]n[e]'s patrol car. He's driven down to headquarters and he talks about his daughters and football." *Id*. By the time of rebuttal closing argument, Alleyne's attempt to avoid interrogating Ward by asking him about football had morphed into a description of the murder scene followed by: "But Bob Ward wants to talk about football and tell jokes." T2651.

In addition to twisting Alleyne's football conversation into "evidence" of Ward's lack of remorse, the State also elicited utterly improper opinion testimony from Detective Cross that Ward's demeanor that evening was "odd." The State asked Cross to describe Ward's "demeanor" when he arrived at the sheriff's office. T2050. A defense objection was immediately sustained. *Id*. Notwithstanding this ruling, the State without warning asked the identical question again four questions later. T2050. Before the defense could object, Cross answered that Ward's demeanor was "odd" because he was "very calm." T2050-51. Ward's objection was then sustained and the Court instructed the jury to disregard the answer, T2051-54, but it is doubtful that the jurors followed that instruction. Indeed, in a post-verdict interview of a juror, he explained that a partial basis for the guilty verdict was "Ward's behavior after the shooting," which the juror described with the identical word used by Cross before the objection to his testimony could be sustained – "odd." R1195.

C. Prosecutorial misconduct in closing arguments

In addition to the pervasive pattern of misconduct during the presentation of the evidence described above, the prosecutors repeatedly made improper arguments in both their initial and rebuttal closing arguments. In the initial closing, the State made the classic burden-shifting argument that the jury could convict on the sole basis that the defendant's own statements were said to be inconsistent with one another:

And let's just talk about the defendant's stories. For any decision you make,

> ladies and gentlemen, you have to decide one of his versions isn't true. I just shot my wife. Diane killed herself. I hope you're happy, go to hell, Bob Ward. There's no way that one of those – that both of those can both be true.

T2580-81. Although the Court sustained the objection, T2581, and gave a curative instruction, T2586, the State returned to this theme in its rebuttal closing, repeatedly making burden-shifting arguments and comments denigrating the defense.

For example, the State described the defense experts as "pay-to-say consultants, part of a checkbook defense." T2651. The State then argued that it need not prove "exactly" how the murder happened, then asked the jurors: "would we ever, ever, at that point, be able to get a conviction if that was the standard?" T2653. The defense objection to this argument was overruled, and a curative instruction refused. T2653-54. Referencing a defense argument regarding the failure of the State's DNA examiner to separately test the DNA on the gun's handle and trigger, the State argued: "If you think she made a mistake and you think she was wrong, is letting somebody get away with murder, under these facts and evidence, in any way have anything to do with what she did or didn't do here?" T2671. Responding to the defense argument regarding the level of Citalopram in Diane's blood, the prosecutor stated that if that were considered important by the jury then "I will hand out six cups of grape Kool-aid right now." T2650-51. In response to the defense argument that law enforcement had failed to test the purple stain on Ward's shirt to confirm that it was wine, the prosecutor argued:

> Really. I mean, are you – really? I mean, it sounds so wonderful to say, hey, you know what, they didn't test that wine, therefore let's forget about the 911 tape, forget about the bullet in this woman's head, let's all start a crusade and find those people that didn't test the wine. There again, the bad ones here. Really? Really? Is there any human being at all that could ever suggest to any of you under these circumstances that that's not wine? Is the regard for your own common sense and judgment that little?

T2656. When Ward objected that the State's argument was improper and denigrating of his defense, the prosecutor responded: "Judge, I've never seen the denigration of individuals like I've seen in the defense closing argument." T2658. The trial court noted that there is no "open door exception" to permit improper closing argument and sustained the objection, T2658, but denied the defense motion for mistrial. T2674.

IV. Facts relating to the requested jury instruction regarding the State's failure to preserve evidence

As noted above, the evidence that Diane ingested a massive dose of Citalopram just before her death went to the heart of the reasonable hypothesis that this was an interrupted suicide attempt by Diane. The State's attempt to rebut this evidence turned on the claim that Diane's highly-elevated Citalopram blood level was unreliable because it resulted from post-mortem redistribution of the substance.

The true level of Citalopram in Diane's ante-mortem body would have been conclusively established by an examination of her stomach contents. T2204, 2249-50, 2278. The State, however, elected not to either test or to preserve Diane's stomach contents. T2122. The defense requested the following jury instruction on this point:

> If you find from the evidence that law enforcement or other agents of the State of Florida had the equipment and ability to test evidence in their possession, but failed to conduct tests on that evidence, you may infer that the testing of the evidence would have rendered results which would have been favorable to the defendant.

T2535-37; R1145. The trial court refused to give the instruction. T2538.

SUMMARY OF THE ARGUMENT

The physical and circumstantial evidence did not permit any reasonable finder of fact to conclude beyond a reasonable doubt that Diane's death was a homicide, or that Ward acted with ill will, hatred, spite, or evil intent. Indeed, the most reasonable hypothesis is that of innocence – that the gun discharged accidentally as Ward was trying to prevent Diane from killing herself. For this reason, Ward's conviction should be reversed and the matter remanded with directions for his discharge.

In the alternative, Ward's conviction should be reversed and the matter remanded for a new trial on the reduced charge of manslaughter. Faced with a fatal lack of evidence of guilt, the prosecutors adopted a "just say anything" attitude designed to secure a conviction in the trial court at all costs. The prosecutors repeatedly asked questions designed to elicit highly prejudicial evidence they knew was either inadmissible or without basis in fact. The prosecutors repeatedly commented on Ward's silence, and then grossly mischaracterized law enforcement's intentional efforts to avoid a pre-*Miranda* interrogation of Ward as evidence of his lack of remorse. The prosecutors appealed to class bias at every turn, and repeatedly made

arguments that improperly shifted the burden of proof from themselves to Ward and then denigrated his defense with personal and sarcastic attacks.

Ward's conviction must also be reversed because the trial court committed a series of prejudicial evidentiary errors involving the admission of Ward's statements, testimony from a former girlfriend that lacked any probative value but served to smear him in the eyes of the jury, and so-called "expert" testimony from the State's medical examiners that they were not qualified to express. A final error requiring reversal was the trial court's refusal to instruct the jury regarding the significance of the State's failure to preserve critical physical evidence.

Each of the above errors requires relief in the context of a case where the evidence of guilt was insufficient or at best weak. In combination they paint an overwhelming picture of a trial simply run off the rails that has resulted in the wrongful conviction and effective life sentence for a man who may have committed no crime.

STANDARD OF REVIEW

I. The denial of a motion for judgment of acquittal is reviewed *de novo*. *Fowler v. State*, 921 So. 2d 708, 711 (Fla. 2d DCA 2006). "[W]here a conviction is based wholly upon circumstantial evidence, a special standard of review applies." *Lindsey v. State*, 14 So. 3d 211, 214 (Fla. 2009). "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction may not be sustained unless the evidence is

inconsistent with any reasonable hypothesis of innocence." *State v. Law*, 559 So. 2d 187, 188 (Fla. 1990). "Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence." *Lindsey*, 14 So. 3d at 215.

II. The trial court's "rulings concerning prosecutorial comments are subject to an abuse of discretion standard of review." *Taylor v. State*, 640 So. 2d 1127, 1133 (Fla. 1st DCA 1994). Reversal is required if "there is a reasonable possibility that the error affected the verdict." *Id.* at 1133.

III. While "[t]he standard of review for admissibility of evidence is abuse of discretion, ... a trial court's discretion is limited by the rules of evidence." *Nardone v. State*, 798 So. 2d 870, 874 (Fla. 4th DCA 2001).

IV. "[T]he standard of review for jury instructions is abuse of discretion, but that discretion, as with any issue of law is strictly limited by case law." *Krause v. State*, 2012 WL 2579529, *2 (Fla. 4th DCA July 5, 2012).

ARGUMENT

I. The evidence is insufficient to sustain Ward's second degree murder conviction.

A. The State failed to rebut the reasonable hypothesis of innocence that Diane's death was accidental.

To convict Ward of any degree of homicide, the State was required to prove, among other elements, that Diane's death "resulted from the criminal agency of another person rather than from an accident." *Golden v. State*, 629 So. 2d 109, 111 (Fla. 1993). That is, the State was required to establish the corpus delecti of homicide. *Id*. Where the State relies on circumstantial evidence to prove a death was a homicide, the evidence must "be sufficient to negate all reasonable defense hypotheses as to cause of death and show beyond a reasonable doubt that the death was caused by the criminal agency of another person." *Id.*

Diane had GSR on her hands and her DNA was on the gun's handle and trigger. T1689, 2315, 2334-35. She had a history of anxiety and depression. T2187. At the time of her death, she was intoxicated and under the influence of an unusually high dose of Citalopram, the potential combined side effects of which included increased risk of suicide. T1769-70, 2192-95, 2205, 2225, 2243-44. Immediately after Diane was shot, Ward called 911 and reported that he had accidentally shot his wife. T1072-75. In his multiple statements that night, Ward explained that Diane was attempting to commit suicide and that the gun went off accidentally when he tried to prevent her

suicide. T2066, 2068, 2071-72.

These facts give rise to the reasonable hypothesis of innocence that Diane's death was accidental. The critical question is therefore whether the State offered evidence sufficient to overcome this hypothesis. *See Golden*, 629 So. 2d at 111. It did not. To the contrary, the only reasonable hypothesis that accounts for all of the evidence here is the one that Ward described the night of Diane's death.

1. The State's circumstantial evidence

The State relied on the following to argue that Diane's death was not an accident: (1) Ward's statement to the 911 operator that he had shot his wife; (2) expert testimony regarding the force necessary to pull the gun's trigger, the distance from which the gun was fired, and the GSR results; and (3) what the State describes as "evidence of an ongoing argument." R1217. Taken together, this evidence fails to rebut the reasonable hypothesis that Diane's death was an accident that occurred while Ward was trying to prevent her from killing herself.

a. Ward's statements

Ward told the 911 operator that he had shot his wife. T1072-74. That statement may be considered in determining whether a judgment of acquittal should have been granted only if, independently of the statements, the State's evidence established that Diane's death was a homicide. *See Drysdale v. State*, 325 So. 2d 80, 82-83 (Fla. 4th DCA 1976). Because the other evidence fails to show that Diane's death was a

homicide, Ward's statements may not be considered in deciding the sufficiency of the evidence of guilt.

Even if Ward's statements could properly be considered, they are consistent with the reasonable hypothesis of innocence that Diane died accidentally while attempting to kill herself. Ward stated during the 911 call that the shooting was accidental, and later explained that the gun had accidentally discharged while he was trying to keep Diane from shooting herself. T1075, 2066, 2068, 2071-72.

b. Expert testimony

A State expert testified that the gun had a trigger pull of 12.25-12.5 pounds. T1562-63. According to the expert, this meant that the gun was not likely to fire unless the trigger was pulled. T1559. Expert testimony further established that the gun discharged at a distance of 6-18 inches from Diane's head in a fairly straight trajectory. T1757, 1790, 2241, 2285, 2383. A State expert concluded that the death was not a suicide because of this distance and trajectory, but acknowledged that the fatal wound could have been inflicted in a struggle over the gun. T1826. Finally, Diane had GSR on her hands, T1689, from which the State's expert was unable to conclude whether Diane's death was a homicide, suicide, or accident. T1724.

The State's expert testimony did not rebut the possibility that this was an accident. It is reasonable to infer that two people struggling over a gun, with one of them trying to shoot herself, could result in at least 12.5 pounds of pressure being exerted on the

gun's trigger. The remaining expert testimony either supported or did not contradict the reasonable hypothesis that Diane was trying to shoot herself and Ward was trying to prevent her from doing so when the gun went off.

c. Evidence of a disagreement

Finally, the State suggests that Ward and Diane had a disagreement the night she died. The entirety of the evidence for this proposition is that there was a broken wine glass and a wine stain on the patio floor and a similar stain on the back of Ward's shirt. T1110, 1112, 1347. The State inferred from these pieces of evidence that Diane threw a glass of wine at her husband's back. T2577. If true, that inference might lead to a further inference that Diane was agitated or angry. It implies nothing about Ward's emotional state. Indeed, the remaining physical evidence tends to rebut the notion that Ward was in a heightened emotional state. Along with the stain on Ward's shirt, there was a second small stain on the sheets on Ward's side of the bed. T1173. The natural inference from this evidence, as asserted by the State itself, T1328, is that after the interaction with Diane on the patio that the State suggests led to a fatal confrontation, Ward went upstairs and laid down in his bed. That seems an unlikely response if Ward were in an emotional state that would have resulted in him killing his wife. Common sense dictates that a person whipped into a homicidal frenzy does not initiate his onslaught by getting into bed.

2. The State's failure to identify a reasonable hypothesis of guilt consistent with the evidence

Not only does the State's evidence fail to rebut Ward's reasonable hypothesis of innocence, the State has never articulated any reasonable hypothesis of guilt that accounts for the physical evidence here. As noted, it appears that Ward was lying in his bed immediately before the incident that led to Diane's death. At the time of the shooting, Diane was standing next to the nightstand where the gun was ordinarily kept. T1163. The holster the gun was kept in was found on top of that nightstand. T1163. Ward was between Diane and his side of the bed. T2485-86. Taken together, this evidence suggests Ward was in bed when Diane came upstairs and retrieved the gun from the nightstand, and that Ward then got out of bed and tried to take the gun away from her or stop her from shooting herself.

The State points to evidence a confrontation took place on the patio, but has never laid out a plausible chain of events following that confrontation that is consistent with both the physical evidence and the premise that this was a homicide. To account for the remainder of the evidence, the State would have to explain how Ward, presumably fatally enraged by that confrontation, persuaded Diane to follow him to the location in the house where the gun was kept. The State would also have to explain why Ward then got into bed, before standing up in a position where he was pinned between the bed and Diane, while she was in a position from which she could freely escape. The

State would further have to explain how – if Diane's death was something other than an accidental shooting that took place while Diane tried to shoot herself – Diane's DNA came to be on a gun she was never otherwise known to have touched and GSR came to be on Diane's hands. No credible explanation of these facts points to Diane's death being a homicide. Because the State failed to rebut the reasonable hypothesis of innocence that Diane's death was accidental, Ward's second degree homicide conviction should be vacated.

B. The State failed to establish the malice necessary for a second degree murder conviction.

Even if the evidence were sufficient to show that Diane's death was a homicide, the evidence was insufficient to show that Ward acted with the depraved mind necessary for second degree murder. An act demonstrates such a depraved mind if it is "done from ill will, hatred, spite, or evil intent." *Dorsey v. State,* 74 So. 3d 521, 524 (Fla. 4th DCA 2011). As *Dorsey* explained, Florida courts have in several cases recognized that "an impulsive overreaction to an attack or injury is itself insufficient to prove ill will, hatred, spite, or an evil intent." *Id.* Where the circumstantial evidence regarding a defendant's intent "is equally supportive of a theory" that the defendant acted impulsively as that he acted with a depraved mind, a judgment of acquittal should be granted on a second degree murder charge and the charge reduced to manslaughter. *Light v. State*, 841 So. 2d 623, 626 (Fla. 2d DCA 2003).

Putting aside the implausibility of the State's theory that Ward and Diane had an altercation that culminated with him intentionally shooting her, there is no evidence that such an action was taken with ill will or evil intent rather than being an impulsive overreaction to provocation. In response to this argument in the trial court, the State asserted that the act of pointing a gun at a person and firing "can only be the result of hatred, ill will or spite." R1220. The State further suggested the jury could find "enmity" because "the parties clearly knew each other and additional evidence of an altercation existed." R1221.

The State's first argument begs the very question at issue – it rests on the premise that Ward deliberately aimed and fired the gun at his wife. Even if there were a basis on which to reject the reasonable hypothesis that Diane's death was accidental, there is literally no evidence in the record that Ward pointed the gun at his wife and intentionally shot her. Instead, the fact that Diane's DNA was on the gun and GSR was on her hands suggests at least that the gun went off during a struggle.

The State's contention that Ward shot Diane during an argument is likewise unsupported by the evidence. The only basis to believe there was any ill feeling between the couple that night was the inference that Diane may have thrown a glass of wine at Ward's back. As discussed above, the only further inferences that can be drawn from that action are about Diane's emotional state, not Ward's. To the extent the physical evidence gives rise to any inferences about Ward's emotional state that

night, it suggests that shortly after a glass of wine was thrown at him, and before the incident that ended with Diane's shooting, Ward went upstairs and laid down in his bed – not the actions of a man inflamed with "enmity."

The State is thus left with the fact that Ward and Diane were not strangers. While courts have noted that "second-degree murder is normally committed by a person who knows . . . and has had time to develop a level of enmity toward the victim," *Light*, 841 So. 2d at 626, no case has ever held that the fact that the parties know one another alone is a sufficient reason to infer ill will. To the contrary, it has been noted that the fact the parties were "friendly with one another" weighs against a finding that the defendant acted with a depraved mind. *Wiley v. State*, 60 So. 3d 588, 591 (Fla. 4th DCA 2011). The Wards had been together for 24 years, and those who were close to them described a happy marriage. T1273, 1293, 2020, 2028.

In short, even if there were sufficient evidence to establish that Diane's death was a homicide, the evidence regarding Ward's state of mind does not exclude the reasonable hypothesis that he acted without the depraved mind necessary for second degree murder. Accordingly, if the Court does not enter a judgment of acquittal, it should reduce the judgment to the lesser included offense of manslaughter.

II. The pervasive pattern of prosecutorial misconduct violated Ward's right to a fair and impartial trial.

Assuming for the sake of argument that the evidence is sufficient to sustain a

conviction of Ward for any degree of homicide, a new trial must nevertheless be ordered in light of the repeated and highly prejudicial instances of prosecutorial misconduct that fatally infected the fairness of the proceedings below.

A. The prosecutors asked questions designed to elicit inadmissible testimony or with no basis in fact.

The prosecutors asked numerous improper questions designed to bring unfounded, inadmissible, and highly prejudicial matters before the jury. Prosecutors "should avoid innuendos or insinuations and, instead, should rely on the testimony of the witnesses and the facts established in evidence." *Gonzalez v. State*, 572 So. 2d 999, 1000 (Fla. 3d DCA 1990). "It is axiomatic that counsel cannot ask questions of a witness that have no basis in fact and are merely intended to insinuate the existence of facts to a jury." *Corrao v. State*, 79 So. 3d 940, 944 (Fla. 1st DCA 2012). The courts likewise condemn the use of questions designed to elicit inadmissible testimony for the purpose of prejudicing the defendant. *Sosa v. State*, 435 So. 2d 968, 969 (Fla. 3d DCA 1983). The prosecutors here engaged in at least four types of improper questioning.

First, the prosecutors asked questions designed to elicit "expert" testimony from unqualified witnesses regarding critical issues, including that: there would have been more GSR on Diane's hands if her death were a suicide (asked 3 times; objection sustained each time), T1695, 1702-04, and this was not an interrupted suicide, T2073-

75, or a struggle over a gun to prevent a suicide, T2560. The jury heard further inadmissible testimony as a result of the State's failure to control Garavaglia. She repeatedly volunteered testimony regarding inadmissible and prejudicial matters, including that Diane's suicide would have been "out of the blue;" that "interrupted suicides are extremely rare, if nonexistent," and are common only "in Hollywood;" that only 15% of suicides are witnessed;[3] that this could not have been a struggle because a person struggling over a gun does not want a gun pointed at their face; and that 10% of the population are prescribed anti-depressants. T2090, 2097, 2101, 2559.

Second, the prosecutors asked questions with no good-faith basis. This included questions implying that the defense had hidden from the jury "another larger" life insurance policy on Diane, despite the lack of any evidence such a policy was in effect when she died. T2430-36. The State further elicited testimony from Garavaglia that the reason no Citalopram metabolite was found in Diane's blood was that it had not been tested for – a matter Garavaglia did not in fact know. T2551-57.

Third, the prosecutors asked inflammatory questions designed to express their own personal opinions. For example, one of the Wards' daughters was asked whether her mother "would have appreciated" Ward dining with Callahan. T1295-96.

Fourth, the prosecutors deliberately elicited testimony that violated the trial court's rulings and orders in limine. This included eliciting testimony regarding complaints

[3]The State relied on this inadmissible testimony in closing. T2590.

Ward supposedly made about his wife to Callahan, T1745, and Cross's testimony that Ward's "demeanor" the night of the incident was "odd" and "very calm." T2050-51.

Even where an objection is sustained, the jury's exposure to improper questions "can be highly prejudicial." *Corrao*, 79 So. 3d at 944. *Corrao* held that where the "facts" implied by the prosecutor's question "had no support in any evidence at trial" and "went directly to the heart of [the defendant's] defense," the error is harmful and reversal is required. *Id.* at 944-45. Here the prosecutors repeatedly put before the jury matters that were inadmissible and unsupported by the evidence.

B. The State commented on Ward's silence.

The facts surrounding Ward's "football" conversation while being transported by Deputy Alleyne, and the manner in which that conversation was distorted and misused by the State, presents a textbook example of prosecutorial misconduct. As is discussed below, Ward's entire exchange with Alleyne should have been excluded. Even if it had been properly admissible, however, the prosecutors could not have believed in good faith that they could use the evidence as they did: to comment on Ward's silence.

Knowing that Ward had not received *Miranda* warnings at the time of his conversation with Alleyne, R1562-63, the State specifically elicited Alleyne's testimony that Ward did not speak about his wife to Alleyne, but that they talked about Ward's daughters and football. T1148-49. The State relied on Alleyne's

testimony in closing to argue Ward's guilt. T2589, 2651. In doing so, the State also mischaracterized the conversation, suggesting without any foundation in the evidence that immediately after his wife's death "Bob Ward want[ed] to talk about football and tell jokes." T2651.

The State's argument was an improper comment on Ward's silence. Florida has "adopted a very liberal rule for determining whether a comment constitutes a comment on silence: any comment which is 'fairly susceptible' of being interpreted as a comment on silence will be treated as such." *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). "If the comment is fairly susceptible of being construed by the jury as a comment on the defendant's exercise of his or her right to remain silent, it violates the defendant's right to silence." *State v. Hoggins*, 718 So. 2d 761, 769 (Fla. 1998); *see also Robbins v. State*, 891 So. 2d 1102, 1105-07 (Fla. 5th DCA 2004). Here, there can be little question that the State's argument is fairly susceptible of being construed as a comment on Ward's silence. The State deliberately and specifically elicited testimony that while speaking to a law enforcement officer immediately after his wife's death, having not received *Miranda* warnings, Ward did not talk about his wife. T1149. The State then argued in closing that what Ward did and did not talk about during his ride with Alleyne was evidence of his guilt. T2589, 2651.

This misconduct was again harmful error. "When the evidence against the defendant is not clearly conclusive, comment on postarrest silence is not harmless."

Hoggins, 718 So. 2d at 772. Here, the evidence is not only inconclusive, but insufficient. Reversal is required on this basis as well.

C. The State appealed to class prejudice.

The State injected Ward's wealth into this matter at virtually every stage of the trial in a manner designed to prejudice the jury. The prosecutor began her opening statement by explaining that the Wards had a "privileged life" in which they lived in a home "on Isleworth Country Club Drive" and "also had a home in Atlanta," that Diane "did not work," and that one of the couple's daughters participated in horse shows that the family spent "a lot of ... time and money and effort" on. T1030-31. The prosecutor further saw fit to mention in opening argument that the Wards' "dogs actually have their own playroom in the house." T1035. This theme continued through the State's case in chief, where the prosecutor specifically elicited testimony about the size of the Wards' house, the number of horses their daughter owned, and the fact that the family spent "a lot" of money on them. T1107, 1132, 2005-06.

The State also insinuated that Ward had failed to live up to his financial responsibilities. It elicited testimony that at the time Diane died, Ward had over $3 million in the bank, but that his home was in foreclosure, T2437, and the prosecutor herself suggested that Ward had not paid his mortgage in over a year. T2427. The State further elicited testimony that the bankruptcy of Ward's company had left lot owners whose homes were never built without a means of recovery. T1956.

The State continued this theme in closing argument, beginning by alluding to the Wards' homes in Atlanta and Isleworth and their "comfortable, lavish lifestyle." T2568. The prosecutor then described Ward as a man who was able to "amass a fortune" and create "a real estate development empire." T2571, and later as "a land developer [who] has closed multi-million dollar deals." T2648. The State also commented on the bankruptcy of Ward's business, and the foreclosure of the Wards' home. T2591. Indeed, the prosecutor injected the Wards' wealth into the closing argument at every opportunity, going so far as to describe the Wards' home as an "8800-square-foot compound" and the shirt Ward was wearing when Diane died as a "white Isleworth shirt." T2574, 2652. Further, the State's insinuations regarding Ward's wealth spilled over into denigration of the defense experts, whom the prosecutor called "pay-to-say consultants, part of a checkbook defense." T2561.

Tactics such as these have long been recognized as improper. A prosecutor's use of "a rich versus poor theme" is "inflammatory" and "highly prejudicial." *Ryan v. State*, 457 So. 2d 1084, 1087-89 (Fla. 4th DCA 1984). The prosecutor's references to Ward's wealth here are similar to the tactics condemned in *United States v. Stahl*, 616 F.2d 30, 32-33 (2d Cir. 1980), as an "appeal to class prejudice" that was "improper" and required reversal. They require reversal here as well.

D. The prosecutors made improper closing arguments.

Along with the misconduct described above, the State's closing argument was

marred by improper burden-shifting, minimization of the State's burden, and denigration of the defense. Taken together, these improper arguments were harmful, particularly in light of the other prosecutorial misconduct.

The State referred to Ward's defense as "stories," and stated that for any decision it made the jury would "have to decide one of his versions isn't true," T2580, thereby both burden-shifting and inviting the jury to convict Ward if they believed he had lied. Asking the jury to convict a defendant if they believe he is a liar "cross[es] the line of acceptable advocacy by a wide margin." *Ruiz v. State*, 743 So. 2d 1, 6 (Fla. 1999). The Florida Supreme Court held in *Gore v. State*, 719 So. 2d 1197, 1200-01 (Fla. 1998), that this type of argument is "clearly impermissible," stating that "[t]he standard for a criminal conviction is not which side is more believable, but whether, taking all the evidence into consideration, the State has proven every essential element of the crime beyond a reasonable doubt." It is thus "error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt." *Id*. at 1200. The State engaged in further burden-shifting and minimizing of its obligation when it argued in rebuttal closing[4] that it did not have to show "exactly

[4]Other than the burden-shifting comment at transcript pages 2580-81, each of the improper arguments described here was made in rebuttal closing. As the court stated in *United States v. Holmes*, 413 F.3d 770, 776 (8th Cir. 2005), improper rebuttal is "particularly disturbing" because the defense is "left with no opportunity to rebut the allegations and the jury heard the remark immediately before deliberations."

how it happened," asking whether the State would "ever, ever ... be able to get a conviction if that was the standard." T2653. "When arguing to the jury, the State may not make comments that mislead the jury as to the burden of proof." *Paul v. State*, 980 So. 2d 1282, 1283 (Fla. 4th DCA 2008).

Further, denigration of the defense pervaded the State's closing argument. "The law is clear that attacks on defense counsel are highly improper and impermissible." *Lewis v. State*, 780 So. 2d 125, 130 (Fla. 3d DCA 2001) (collecting cases). Here, the State described the defense experts as "pay-to-say consultants" who were "part of a checkbook defense." T2651. Addressing a similar example of denigration of the defense, the court in *Barnes v. State*, 743 So. 2d 1105 (Fla. 4th DCA 1999), held that the prosecutor's description of a defense witness's testimony as "the mercenary actions of ... a hired gun" was reversible error. *Id.* at 1106, 1109.

Having improperly undermined the defense experts, the State argued that the defense argument that the State's forensic testing was inadequate suggested "little" regard for the jury's "own common sense and judgment." T2656. The State then compounded this error by equating a decision that the testing the State's forensic expert performed was inadequate with "letting somebody get away with murder." T2671. The State further implied that the jury would have to be gullible to consider the defense argument regarding the level of Citalopram in Diane's blood to be important, stating that if that was the case, he would "hand out six cups of grape Kool-

aid right now." T2651. In numerous cases, Florida courts have held that arguments similar to these require reversal. *See., e.g., Brooks v. State*, 762 So. 2d 879, 904 (Fla. 2000); *D'Ambrosio v. State*, 736 So. 2d 44, 48 (Fla. 5th DCA 1999); *Redish v. State*, 525 So. 2d 928, 931 (Fla. 1st DCA 1988).

The prosecutor's multiple improper comments require reversal. A reviewing court "must look at the entire trial record when considering whether" improper comments by the prosecutor "are of such a nature as to destroy the fairness of the proceeding." *Johns v. State*, 832 So. 2d 959, 963 (Fla. 2d DCA 2002). Although some of the improper comments were not objected to, "[w]hen the properly preserved comments are combined with additional acts of prosecutorial overreaching" that were unpreserved, reversal is required where "the integrity of the judicial process has been compromised." *Ruiz*, 743 So. 2d at 7; *see also Lewis*, 780 So. 2d at 128-29. In a close case, "inappropriate prosecutorial comment which might be considered harmless in another context, can become prejudicially harmful." *Pacifico v. State*, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994). Here, not only was this at best a close case, but the State's improper arguments also went to the heart of Ward's defense – that this was an accidental death that took place when Ward attempted to keep his wife from shooting herself.

III. Evidentiary errors deprived Ward of a fair and impartial trial.

The jury's fair and impartial consideration of this case was further undermined by

three significant evidentiary errors. First, the court admitted testimony regarding Ward's conversation with the deputy before *Miranda* warnings were given. Second, the State was allowed to introduce testimony from one of Ward's former girlfriends regarding a lunch she had with Ward seven months before Diane's death. Third, the State's medical examiners were permitted to provide expert testimony regarding matters they were not qualified to opine on.

A. The admission of Ward's statements was error.

1. Pre-*Miranda* statements

Ward was not given *Miranda* warnings before he was transported to the sheriff's office the evening of his wife's death. R1562-63. The deputy who transported Ward, Deputy Alleyne, engaged him in conversation regarding subjects such as football and his daughters. R1563, 1565-66. The trial court admitted evidence regarding this conversation on the theory that Alleyne's questions about football and Ward's daughters were "not likely to elicit incriminating responses." R649. This was error, as the precise purpose for which the State introduced Ward's statements was to incriminate Ward. Moreover, the "incriminating" purpose for which the State used the statements Alleyne elicited from Ward – as evidence of Ward's "demeanor" following his wife's death, R1732-33 – was improper for at least two reasons.

First, it is "impermissibl[e]" for the State to argue that a defendant's lack of remorse is evidence of guilt. *Jones v. State*, 569 So. 2d 1234, 1240 (Fla. 1990); *see*

also Cruse v. State, 588 So. 2d 983, 991 (Fla. 1991) ("Evidence of lack of remorse is generally irrelevant and, therefore, inadmissible."). The State used – and mischaracterized – Ward's statements to describe Ward's "demeanor" as lacking in remorse. T2589, 2651. The Supreme Court of South Carolina has explained the reason for the prohibition of "lack of remorse" evidence in a case that is directly on point here, *State v. Reid*, 476 S.E.2d 695 (S.C. 1996), *overruled on other grounds by State v. Watson*, 563 S.E.2d 336 (S.C. 2002). *Reid* held that the admission of evidence that a defendant whose passengers were killed or injured in a high speed chase did not ask about the condition of his passengers violated the "defendant's Fifth, Eighth, and Fourteenth Amendment rights." *Id.* at 695-96. The court further stated that the error was "exacerbated by the fact that the trial court specifically admitted it to prove the crucial issue in the case," whether the defendant acted with malice, *id.* at 697 – precisely the same purpose for which such evidence was admitted here. In words that are equally true here, the *Reid* court stated that "[c]learly, if the trial court erroneously admitted testimony concerning [the defendants's] lack of remorse to demonstrate malice, the jury may have used it for the same purpose," making the error harmful. *Id.*

Second, "demeanor" evidence is inadmissible where the defendant's demeanor is "testimonial." *United States v. Clark*, 69 M.J. 438, 444-45 (C.A.A.F. 2011). "Testimonial demeanor, like other testimonial evidence in response to police

questioning, implicates an accused's right to silence and against self-incrimination, thus triggering the application of the Fifth Amendment and its statutory and regulatory safeguards." *Id.* Evidence relating to the "quality or content" of a defendant's "communication is testimonial and protected by Fifth Amendment privileges." *State v. Decker*, 744 N.W.2d 346, 355 (Iowa 2008) (citing *Pennsylvania v. Muniz*, 496 U.S. 582, 593 (1990)). Alleyne's testimony related entirely to the "quality" and "content" of Ward's statements. Indeed, it was precisely those characteristics of the statements that the State commented on and used against him. For that reason, the admission of this evidence was error.

2. Application of the corpus delecti doctrine

Further, all of Ward's statements should have been excluded under the corpus delecti doctrine. Under this principle, the State may only introduce evidence of admissions by the defendant if it has shown "that a crime occurred" and presented "evidence establishing each element of the crime." *Corona v. State*, 64 So. 3d 1232, 1244 (Fla. 2011). In the absence of such a showing, admission of the defendant's statements is error. *State v. Colorado*, 890 So. 2d 468, 470-72 (Fla. 2d DCA 2004); *Drysdale*, 325 So. 2d at 83. As discussed above, the evidence here was insufficient to establish that a homicide occurred even taking Ward's statements into account, much less without them.

The State took full advantage of the erroneous admission of Ward's statements.

The prosecutor played the recording of Ward's 911 call during both the State's initial and rebuttal closing arguments, T2571, 2677, and referred to the 911 call and Ward's other statements the night of Diane's death repeatedly in closing. T2571-72, 2575, 2580-81, 2586-90, 2593, 2599, 2602-03, 2648-50, 2654-56, 2658, 2664-65, 2668-69, 2676.

B. The admission of irrelevant and prejudicial evidence regarding Ward's lunch with Callahan was error.

In a case that turned on what happened in the Wards' bedroom in the few minutes before Diane died, the State was permitted to introduce evidence that *seven months earlier*, Ward had reconnected with a former girlfriend, Callahan, via LinkedIn, and had lunch with her. T1744. Admission of this evidence was error.

The evidence of Ward's lunch with Callahan had literally no probative value. Ward's romantic relationship with Callahan had ended decades earlier, T1742, before he met Diane. T2020. Callahan testified that her husband knew about the lunch. T1744-45. And although the State insinuated in its questioning of the Wards' older daughter that the lunch was a rendezvous arranged behind Diane's back, T1295-96, there was no evidence to support the State's innuendo.[5] Callahan's testimony regarding her lunch with Ward should therefore have been excluded as irrelevant.

[5]In fact, it came out at sentencing that had the State asked the Wards' younger daughter, she could have explained that she was present when her father told her mother that he was having lunch with Callahan "to catch up" and that her mother "had no problem with it." R1824.

Evidence is relevant, and therefore may be admissible, only if it has "a logical tendency to prove or disprove a fact which is of consequence to the outcome of the action." *Shaw v. Jain*, 914 So. 2d 458, 460 (Fla. 1st DCA 2005). Evidence that is too remote in time to be probative of any issue in the case is irrelevant and should be excluded. *Edwards v. Orkin Exterminating Co., Inc.*, 718 So. 2d 881, 883 (Fla. 3d DCA 1998). The State argued that Ward's lunch with Callahan showed that "this is not this happy marriage." T1739. Even if there were a basis on which to suggest that there were romantic overtones to a lunch that took about an hour and did not result in any further meetings, T1746 – which there was not – the meeting was far too remote to be probative regarding the state of the Wards' marriage seven months later.

Callahan's testimony should also have been excluded because any slight probative value it could have had was substantially outweighed by the danger of unfair prejudice, *see* Fla. Stat. § 90.403, particularly in light of the manner in which the State capitalized on the evidence. Along with the State's blatantly improper question of the Wards' daughter, T1295-96, the State argued in closing that the Wards' "marriage was not what it seems" because Ward had "lunch and cocktails with his old girlfriend and complain[ed] that his wife spends too much money." T2601. Where prejudicial evidence of little relevance becomes "a feature of the trial," "any marginal probative value it might have had was clearly outweighed by the danger of unfair prejudice, confusion of issues and misleading the jury." *Shaw*, 914 So. 2d at 460.

C. The admission of expert testimony the witnesses were not qualified to provide was error.

The trial court further erred by allowing both medical examiners to testify to opinions they were not qualified to provide. Dr. Stephany was permitted to testify over objection that he ruled Diane's death was a homicide because "people will not shoot themselves straight on into the face." T1831. Although defense counsel objected that Stephany was not qualified to render this opinion, T1831, and there is no basis in the record to suggest that Stephany had such qualifications, the objection was overruled. T1832. Similarly, Ward objected to Garavaglia's opinion testimony that this was not an interrupted suicide, explaining that Garavaglia had testified in her deposition that she had never heard of an interrupted suicide. T2098. The trial court initially sustained the objection because this topic was outside Garavaglia's expertise. T2098. A page later, after Garavaglia testified that she had conducted "multiple" autopsies where a suicide had been witnessed, the Court overruled the same objection and permitted Garavaglia to opine that this was not an interrupted suicide. T2099.

Allowing Stephany and Garavaglia to testify to these critical issues was error because they were unqualified to give such opinions. Before an expert may give opinion testimony, the court must make a preliminary determination regarding "whether the witness is adequately qualified to express an opinion on the matter." *Chavez v. State*, 12 So. 3d 199, 205 (Fla. 2009). "A witness may not testify to matters

that fall outside her area of expertise." *Jordan v. State*, 694 So. 2d 708, 715 (Fla. 1997); *see also Chavez*, 12 So. 3d at 205 (expert "witness must possess specialized knowledge concerning the discrete subject related to the expert opinion to be presented"). "[I]f an expert's opinion is based on speculation and conjecture, not supported by the facts, or not arrived at by a recognized methodology, it should not be admitted into evidence." *Daniels v. State*, 4 So. 3d 745, 748 (Fla. 2d DCA 2009).

The record reveals no basis to evaluate whether Stephany was qualified to comment on whether people ever shoot themselves in the face. Moreover, it affirmatively appears from the record that Garavaglia was not qualified to render any opinions regarding the characteristics of interrupted suicides. As defense counsel explained, Garavaglia had admitted in her deposition that she had no knowledge regarding interrupted suicides. T2098. The fact that she had conducted autopsies in some unspecified number of witnessed suicide cases, T2099, did not imbue in her the expertise necessary to opine that this was not an interrupted suicide. Her testimony in this regard was precisely the type of speculation that the courts have condemned. *See Daniels*, 4 So. 3d at 748.

Garavaglia was also permitted to provide her interpretation of what the term "catastrophic thinking" meant in Diane's medical records. T2106. This testimony was admitted even though Garavaglia acknowledged that the term was one used "in the psychiatric field," T2104, and there was no basis in the record to treat her as an expert

in psychiatry. Again, the State took full advantage of this testimony in closing argument. T2578.

The trial court thus erred by admitting opinion testimony the State's expert witnesses were unqualified to provide. Moreover, the error was harmful because the improper testimony went directly to the heart of the critical issue here: whether Diane's death had occurred while she was trying to kill herself.

IV. The refusal to instruct the jury regarding the State's failure to preserve material evidence was harmful error.

Ward's conviction should be reversed for the additional reason that the trial court denied him a jury instruction regarding the State's failure to preserve critical evidence – the contents of Diane's stomach. The significance of the amount of Citalopram in Diane's blood after her death was hotly disputed at trial. A defense expert in clinical pharmacology and forensic toxicology, T2180, testified that the level of Citalopram in Diane's blood shortly after her death indicated she had taken at least twice and perhaps four times the prescribed dosage. T2195, 2244. The State contended that the post-mortem levels of Citalopram were misleading due to redistribution of the drug after death. T1853-54. The defense expert disagreed with this conclusion. T2189-90, 2201, 2207. Had the State analyzed the contents of Diane's stomach, or a least preserved the stomach contents so that the defense could have done so, the dispute over the significance of the Citalopram levels in Diane's blood could have been

definitively resolved. T2204, 2249-50, 2252, 2278-79. The State, however, did not test the contents of Diane's stomach and failed to preserve them. T2122, 2282.

The State violates a defendant's constitutional right to due process by losing or failing to preserve "material exculpatory evidence" regardless of the State's good or bad faith. *State v. Davis*, 14 So. 3d 1130, 1132 (Fla. 4th DCA 2009). "Lost or unpreserved evidence is material in this sense if the omitted evidence creates a reasonable doubt that did not otherwise exist." *Id.* Put another way, due process requires the state to preserve "evidence that might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488 (1984). "To meet this standard of constitutional materiality ... evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.*

The degree of attention devoted at trial to the levels of Citalopram in Diane's blood and the lengths the State went to in closing argument to discredit the defense evidence regarding the amount of Citalopram in Diane's blood leave no question that the evidence the State failed to preserve was material and potentially exculpatory. Further, the State knew immediately after Diane's death that Ward claimed she had tried to kill herself, T2072, and on that same night an investigator from the medical examiner's office collected a bottle of Citalopram from the Wards' home. T1430. The

State therefore knew or had reason to know at the time it discarded Diane's stomach contents that this evidence could "be expected to play a significant role in [Ward's] defense." *Trombetta*, 467 U.S. at 488.

Where the loss of material exculpatory evidence does not require dismissal of the charges, an appropriate lesser sanction is "instructing the jury that they may infer that the lost evidence is exculpatory." *Davis*, 14 So. 3d at 1133. The giving of such an instruction is required where necessary to protect the defendant's right to a fair trial. *See, e.g. People v. Joseph*, 86 N.Y.2d 565, 572 (1995); *Sanborn v. State*, 812 P.2d 1279, 1286 (Nev. 1991); *State v. Maniccia*, 355 N.W.2d 256, 258-259 (Iowa App. Ct. 1984). This was a remarkably close case, in which the evidence the State destroyed would have resolved a critical disputed issue. Ward was entitled to a jury instruction regarding the State's failure to preserve this evidence, and the denial of that instruction deprived him of a fair trial.

CONCLUSION

Because the State failed to rebut the reasonable hypothesis of innocence that Diane's death was an accident, Ward's conviction should be vacated for insufficiency of the evidence and the case should be remanded with instructions to discharge Ward. Alternatively, the Court should reduce the judgment to the lesser included offense of manslaughter.

Moreover, a new trial is required if Ward's conviction is not vacated for

insufficiency of the evidence because the prosecutorial misconduct, evidentiary errors, and jury instruction errors laid out in Issues II-IV were not harmless, either individually or cumulatively. "Harmless error analysis places the burden upon the State, as beneficiary of the errors, to prove there is 'no reasonable possibility that the error contributed to'" the defendant's conviction. *McDuffie v. State*, 970 So. 2d 312, 328 (Fla. 2007) (quoting *DiGuilio*, 491 So. 2d at 1138). Further, where a trial is marred by "multiple errors," the court should review "the cumulative effect of those errors" and order a new trial if their cumulative effect denied the defendant a "fair and impartial trial." *Id.* In this close case, the pervasive prosecutorial misconduct, multiple evidentiary errors, and denial of a jury instruction Ward was entitled to regarding a critical issue in the case were each harmful, in that there is a reasonable probability that the verdict would have been different but for any one of these errors. Examining the cumulative effect of these errors shows they denied Ward a fair and impartial trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished by United States Mail on November 2, 2012, to:

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARDS

I certify that this Initial Brief of Appellant James Robert Ward complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l). The brief has been prepared using Times New Roman, 14-point font.

/s/ James E. Felman
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