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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

JAMES ROBERT WARD,

Appellant,

v. CASE NO. 5D12-49

STATE OF FLORIDA,

Appellee.

_________________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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# TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . . . . . . . . . . . . . . . . . . ii

STATEMENT OF THE CASE AND FACTS . . . . . . . . . . . . . . . . 1

SUMMARY OF ARGUMENT . . . . . . . . . . . . . . . . . . . . . . . 24

ARGUMENTS . . . . . . . . . . . . . . . . . . . . . . . . . . . . 26

POINT I

THE TRIAL COURT CORRECTLY DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL AFTER THE STATE PRESENTED SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD FIND THE EXISTENCE OF THE ELEMENTS OF SECOND DEGREE MURDER BEYOND A REASONABLE DOUBT . . . . . . . . . . . 26

POINT II

THE DEFENDANT RECEIVED A FAIR TRIAL; THE DEFENDANT FAILED TO PRESERVE CLAIMS OF PROSECUTORIAL MISCONDUCT . . . . . 32

POINT III

THE TRIAL COURT CORRECTLY ADMITTED RELEVANT EVIDENCE; CLAIMS OF EVIDENTIARY ERRORS WERE NOT PROPERLY PRESERVED FOR APPELLATE REVIEW . . . . . . . . 40

POINT IV

THE TRIAL COURT CORRECTLY DENIED THE REQUESTED JURY INSTRUCTION . . . . . . . . . . 46

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . . . 49

DESIGNATION OF EMAIL ADDRESS . . . . . . . . . . . . . . . . . . 50

CERTIFICATE OF SERVICE AND COMPLIANCE . . . . . . . . . . . . . 50

## TABLE OF AUTHORITIES

CASES:

*Anderson v. State*,
48 So. 3d 1015 (Fla. 5th DCA 2010) . . . . . . . . . . . . 29

*Bauer v. State*,
609 So. 2d 608 (Fla. 4th DCA 1992) . . . . . . . . . . . . 42

*Beasley v. State*,
774 So. 2d 649 (Fla. 2000) . . . . . . . . . . . . . . . . 26

*Brickley v. State*,
12 So. 3d 311 (Fla. 4th DCA 2009) . . . . . . . . . . . . . 47

*Buchanan v. State*,
927 So. 2d 209 (Fla. 5th DCA 2006) . . . . . . . . . . . . 47

*Capron v. State*,
948 So. 2d 954 (Fla. 5th DCA 2007) . . . . . . . . . . 33, 35

*Carpenter v. State*,
785 So. 2d 1182 (Fla. 2001) . . . . . . . . . . . . . . . . 47

*Chance v. State*,
100 So. 3d 1253 (Fla. 5th DCA 2012) . . . . . . . . . . . . 32

*Delgado v. State*,
948 So. 2d 681 (Fla. 2006) . . . . . . . . . . . . . . . . 40

*Dessaure v.* State,
891 So. 2d 455 (Fla. 2004) . . . . . . . . . . . . . . . . 39

*Fike v. State*,
4 So. 3d 734 (Fla. 5th DCA 2009) . . . . . . . . . . . . . 32

*Fisher v. State*,
924 So. 2d 914 (Fla. 5th DCA 2006) . . . . . . . . . . 39, 40

*Fitzpatrick v. State*,
900 So. 2d 495 (Fla. 2005) . . . . . . . . . . . . . . . . 26

*Frances v. State*,
970 So. 2d 806 (Fla. 2007) . . . . . . . . . . . . . . 40, 41

*Freeman v. State*,
1 So. 3d 373 (Fla. 5th DCA 2009) . . . . . . . . . . . . . 39

*Galavis v. State*,
28 So. 3d 176 (Fla. 4th DCA 2010) . . . . . . . . . . . . . 42

*Harrell v. State*,
894 So. 2d 935 (Fla. 2005) . . . . . . . . . . . . . . . . 32

*Hooper v. State*,
476 So. 2d 1253 (Fla. 1985) . . . . . . . . . . . . . . . 38

*Huck v. State*,
881 So. 2d 1137 (Fla. 5th DCA 2004) . . . . . . . . . 39, 40

*Jones v. State*,
192 So. 2d 285 (Fla. 3d DCA 1966) . . . . . . . . . . . . 29

*Jorge v. State*,
861 So. 2d 1279 (Fla. 3d DCA 2003) . . . . . . . . . . . 27

*Knight v. State*,
2013 WL 183946 (Fla. App. 5 Dist.) . . 27, 28, 29, 31, 42

*Knight v. State*,
796 So. 2d 1236 (Fla. 4th DCA 2001) . . . . . . . . . . . 33

*LaMarca v. State*,
785 So. 2d 1209 (Fla. 2001) . . . . . . . . . . . . . . . 38

*Lundy v. State*,
51 So. 3d 1171 (Fla. 5th DCA 2011) . . . . . . . . . . . 39

*McArthur v. State*,
801 So. 2d 1037 (Fla. 5th DCA 2001) . . . . . . . . . . . 38

*McWatters v. State*,
36 So. 3d 613 ( Fla. 2010 ) . . . . . . . . . . . . . . . 40

*Nowell v. State*,
998 So. 2d 597 (Fla. 2008) . . . . . . . . . . . . . . . . 38

*Oliver* v. State,
977 So. 2d 673 (Fla. 5th DCA 2008) . . . . . . . . . . . 40

*Orme v. State*,
677 So. 2d 258 (Fla. 1996) . . . . . . . . . . . . . . . . 27

*Pagan v. State*,
830 So. 2d 792 (Fla. 2002) . . . . . . . . . . . . . . 26, 28

*Pogar v. State*,
91 So. 3d 904 (Fla. 5th DCA 2012) . . . . . . . . . . . . 33

*Ray v. State*,
755 So. 2d 604 (Fla. 2000) . . . . . . . . . . . . . . . . 39

*Rodgers v. State*,
934 So. 2d 1207 (Fla. 2006) . . . . . . . . . . . . . . 40, 41

*Sabawi v. Carpentier*,
767 So. 2d 585 (Fla. 5th DCA 2000) . . . . . . . . . . . 1

*Salas v. State*,
972 So. 2d 941 (Fla. 5th DCA 2007) . . . . . . . . . . . 42

*Sanchez v. State*,
81 So. 3d 604 (Fla. 3d DCA 2012) . . . . . . . . . . . . 33

*Simmons v. State*,
934 So. 2d 1100 (Fla. 2006) . . . . . . . . . . . . . . . 27

*State v. Castillo*,
877 So. 2d 690 (Fla. 2004) . . . . . . . . . . . . . . . 29

*State v. DiGuilio*,
491 So. 2d 1129 (Fla. 1986) . . . . . . . . . . . . . . . 41

*State v. Law*,
559 So. 2d 187 (Fla. 1989). . . . . . . . . . . . . . . . 31

*Stephens v. State*,
787 So. 2d 747 (Fla. 2001) . . . . . . . . . . . . . . . 47

*Troy v. State*,
948 So. 2d 635 (Fla. 2006) . . . . . . . . . . . . . . . 40

STATEMENT OF THE CASE AND FACTS

The State objects to and rejects the Statement of Facts as presented in Appellant's Initial Brief due to the overwhelming argument that is improperly intertwined throughout the entire Statement of Facts. *See Sabawi v. Carpentier*, 767 So. 2d 585 (Fla. 5th DCA 2000)*("The purpose of providing a statement of the case and of the facts is not to color the facts in one's favor or to malign the opposing party or its counsel but to inform the appellate court of the case's procedural history and the pertinent record facts underlying the parties' dispute").* In its place, the State offers the following facts which are relevant and important to the issues raised by the Defendant, and are needed in order to provide a full and fair account of the case.

The Defendant and Diane Ward married and had two daughters, Mallory and Sarah. (T.1218). In September 2009, Sarah Ward was a freshman attending college in South Carolina. (T.2004). When she was not in school, she stayed with her mother at their Atlanta home. (T.2004-2005). Sarah's passion was horses, and the Ward family owned 10 horses in 2009. (T.2005). Out of those ten horses, six were show horses. (T.2005). The horses were kept with Sarah's show trainer in Camden, South Carolina and at the Ward farm in Conyers, Georgia. (T.2005). Sarah Ward performed in horse shows two weekends a month, and her mother attended "every one". (T.2006). Sarah would talk to her mother on the phone "at least two or three times a day". (T.2006).

In September 2009, Mallory Ward was also in college,

attending George Washington University in Washington, D.C. (T.1277). Mallory lived on campus and did not work. (T.1278). Mallory talked to her mother "probably twice a day". (T.1279-1280). When Mallory was about 16 years old, the family's financial circumstances greatly improved. (T.1280). The Defendant was able to provide "nice things" for the family, like nice cars and jewelry. (T.1293).

On September 21, 2009, Mallory Ward talked to her mother three times that day. (T.1285, 2007). Mallory's last call with her mother was at about 3 or 4 p.m. (T.1291). Their conversation was nothing out of the ordinary. (T.1285). The victim sounded "good". (T.1285).

On September 21, 2009, Sarah also talked to her mother three times. (T.2007). Sarah had the flu, and Diane wanted to travel to see her at school out of concern. (T.2007). Sarah had a horse show coming up which Diane was planning to attend. (T.1290). Sarah's last talk with her mother was about 5:30 p.m. (T.2007).

Earlier in the day, Diane had e-mailed an acquaintance and said that she was "waiting to hear from the doctor for Sarah . . . possibly (sic) of swine flu. If that is the case, I will need to go and get her ASAP." (T.1919).

Also on September 21, 2009, one of Diane's old high school friends, Georgia Spearman, called Diane and spoke with her. (T.1444-1445). The women talked about Facebook, and Ms. Spearman suggested that Diane set up a Facebook account. (T.1445). The two women talked more than once that day, and the last call ended at

about 6:30 p.m. (T.1446). Diane seemed fine, and told Ms. Spearman that the Defendant was in a new business and "things were looking up". (T.1448-1449). At the end of the all, Diane told Ms. Spearman that she had to hang up and "get Bob dinner". (T.1449).

About an hour and twenty minutes, at about 7:50 p.m., the Defendant called 9-1-1 and stated, "I shot my wife." (T.1072). When the 9-1-1 operator asked him what he did, he repeated, "I just shot my wife." (T.1072). The operator asked the Defendant where his wife was, and he stated, "She's right here on the floor". (T.1073). While still on the phone with 9-1-1, the Defendant repeated again "I just shot my wife" and "I shot my wife", then stated a fifth time, "I just shot my wife". (T.1073-1074). The 9-1-1 call proceeded:

OPERATOR: I'm sorry? Where - is she breathing?

DEFENDANT: No, she's dead.

OPERATOR: You know that for sure?

DEFENDANT: I'm pretty sure, yes.

OPERATOR: Okay. Sir, where - where is the weapon?

DEFENDANT: It's in the nightstand next (inaudible), and I'll be glad to meet the officer (inaudible).

OPERATOR: Where is your wife right now, sir?

DEFENDANT: Floor, master bedroom.

OPERATOR: How old is she?
You're sure she's not breathing or -

DEFENDANT: She's dead. She's done. I'm sorry.

OPERATOR: Okay. Sheriff's Office, you're on the way?

(T.1072-1074). After someone verified that the Sheriff's Office was on the way, the 9-1-1 call continued:

OPERATOR: Sir -

DEFENDANT: I'll be at the front door. (Inaudible).

OPERATOR: Okay, sir, we're on our way.

DEFENDANT: Thank you so much.

OPERATOR: Sir, you need to stay - (multiple speakers) just a second.

DEFENDANT: I'm sorry? Say again.

OPERATOR: Sir, did you purposely do this?

DEFENDANT: No.

OPERATOR: Or was it an accident?

DEFENDANT: It was an accident.

OPERATOR: Stay on the phone. Don't hang up. (Dial tone). Sir?

DEFENDANT: I'm sorry, say again.

OPERATOR: You do have the gun here secured, correct?

DEFENDANT: Yeah. It's next to - the - in the nightstand. The gun is secured. Yes. (Inaudible) show up (inaudible).

OPERATOR: (Inaudible) sir?

DEFENDANT: I'm on the front step.

OPERATOR: You're out on the front step?

DEFENDANT: Yeah, I'm on the front step. Front gate (inaudible) front step (unintelligible) upstairs you'll find Diane.

OPERATOR: How old is your wife?

DEFENDANT: 1954. So - whatever - 55.

OPERATOR: (Inaudible) sir? Sir?

DEFENDANT: Okay.

(Multiple speakers).

OPERATOR: What happened? What exactly happened?

DEFENDANT: The gun just went off.

OPERATOR: Where was she shot at, where is her wound?

DEFENDANT: I don't know where it is.

OPERATOR: Okay.

DEFENDANT: It's just awful. (Inaudible) on the floor.

OPERATOR: Where is she at in the house?

DEFENDANT: She's in the master bedroom upstairs.

OPERATOR: She's in the master bedroom also?

DEFENDANT: Yes. I'm downstairs.

(T.1074-1076).

When officers arrived at the Ward home, they knew that a shooting had occurred, but did not know if there was still a shooter on the premises. (T.1090-1091, 1100, 1131). Because the officers did not know whether there was someone still armed in the house or how many victims there were, the officers initially entered the house to make a safety sweep. (T.1107, 1131, 1135). The entry team was made up of many officers, based on the size of the home, which was very large. (T.1107, 1132, 1135).

When the officers encountered the Defendant in front of the house, they had the Defendant lie down on the ground and an officer put handcuffs on him. (T.1103). The officer who handcuffed the Defendant detected the smell of alcohol on the Defendant, and noticed that his eyes were glassy and watery. (T.1104-1105). He

also noted that the Defendant's speech was slurred. (T.1106). The officer believed that the Defendant was under the influence of alcohol. (T.1106).

After the Defendant was handcuffed, he was eventually seated in Dep. Alleyne's car. (T.1144). About an 1½ hours later, Dep. Alleyne drove the Defendant to the police station. (T.1145, 1148). During the drive, Dep. Alleyne and the Defendant talked about football. (T.1148). The only family matters the Defendant discussed were his daughters. (T.1148-1149). He did not talk about Diane. (T.1149). During the time Dep. Alleyne spent with the Defendant, the Defendant was very calm and very polite. (T.1149). The Defendant never appeared to be upset. (T.1149).

At the jail, the Defendant e-mailed several people and informed them that he was in jail. (T.1927-1928). In one message, he stated, "I have some very sad news, Diane is dead, and I'm in Orange County Jail. Someone please [] get moving and get me the heck out of here." (T.1928). He also sent an e-mail to the bankruptcy trustee involved in the Defendant's business bankruptcy, and stated "You bastards. I hope you're happy, Diane killed herself this evening. Go to hell. Bob Ward." (T.1928).

Regarding the bankruptcy, the Defendant's company, Land Resources, was in bankruptcy. (T.1933-1934). The company was owned by the Defendant and "two trusts for the benefit of [his] daughters," making three owners. (T.1935). Diane was not an owner of the business. (T.1937). However, the company transferred money for Diane and the girls to go to the Cayman Islands, to go to

Europe, and to go to South America. (T.1963). The company also paid for a wrecked BMW automobile and tuition for the girls, as well as insurance policies on Diane. (T.1963).

Based on the payments made by the company for Diane and the Wards' daughters, the bankruptcy trustee and the Wards' lawyers had scheduled a deposition of Diane to take place on September 24, 2009. (T.1963-1964). However, the Friday before the scheduled deposition, on September 18, the trustee's lawyer (Roy Kobert) got a call from the Defendant, Diane, and the two lawyers representing the Wards individually. (T.1965). During the call, the Defendant told Mr. Kobert that Diane didn't know anything about the business operations, and he questioned why Mr. Kobert was taking Diane's deposition before his own. (T.1966).

In the phonecall, Diane indicated that the deposition would be inconvenient because she "wanted to attend equestrian jumping events with her children and had plans to be at their school or their competition". (T.1966-1967). Despite the Wards' request to postpone the deposition, Mr. Kobert refused, and sent an e-mail to the lawyers confirming that decision. (T.1968). As far as Mr. Kobert knew, the deposition was still scheduled for September 24. (T.1968).

On September 21 or the early hours of September 22, Mr. Kobert received the e-mail from the Defendant stating that "Diane had killed herself this evening". (T.1970-1971).

In addition to the e-mails the Defendant sent from the jail, he also made some phonecalls. One call the Defendant made was to

Glenn Saare, who was married to Diane’s sister. (T.1217). Even though Diane’s sister, Paula, answered the phone, the Defendant asked to speak to Glenn. (T.1233). The Defendant told Glenn, “I am in the Orange County Sheriff’s Office, and Diane is dead.” (T.1233). When Glenn asked the Defendant what happened, he told Glenn:

> DEFENDANT: Let me get the speaker phone off.
>
> Hey. I probably can’t tell you anything right now, other than that she’s dead, and it was an accident, and - and I will tell you more about it later.
>
> But, you know, it was a very tragic accident, and other than that, all I wish I could do was go fucking shoot myself in the goddamn head and go on, but right now I have two kids that we have to somehow keep sane, and I don’t know what to do until in the morning. But I think what you need to do is just sit tight and speak to [Detective] Cross in the morning, and I’ll try and get ahold of Beth and let her know that, you know, something is up.

(T.2066). During the phonecall, the Defendant never told Glenn what happened to Diane. (T.1235).

Another phonecall the Defendant made that night was to a woman who sometimes housesat for the Wards, to see if she could take care of the Wards’ dogs. (T.2038-2039). When he spoke with her, the Defendant told her, “Listen, I’ve got a - a big emergency, and it’s not real pleasant to hear, but Diane was killed this evening. She’s dead.” (T.2039).

In other phone calls, the Defendant left messages that: “Diane is dead, and it’s a long story but she’s dead”; “Liz, hey, it’s Bob again. I’m in the Orange County Sheriff’s lockup and Diane is dead”; “Listen, Diane is dead. There’s been a bad accident and she’s dead”. (T.2067-2068).

Later, while the Defendant was talking to Detective Cross and giving him information, the Defendant took a phonecall and told the caller, "Diane killed herself tonight." (T.2071). The Defendant continued, telling the caller:

> DEFENDANT: Yep. And I'm sitting over here in Orange County Jail and, of course, (inaudible) you know, not going to say anything. I mean there's nothing to be worried about other than my wife is dead. But - yeah, she was just - you know, she talked today of [her attorney] Landis, but she was laughing, but she's - this Bond Safeguard shit has - I mean, pushed her over the edge. Pushed her over the fucking edge.
>
> . . .
>
> DEFENDANT: Well, whatever you think you need to do. I mean, I just - you know, I have nothing to be worried about other than I just tried to get the gun out of her hand. But I didn't - I haven't told them anything at all, but, I mean, you know I've got two kids in the morning I've got to deal with, and right now, of course, there's a murder investigation going on at my house, and I'm sitting here and just -
>
> Yeah, there's nothing over there I'm worried about but, you know, I got a dead wife that's just been hauled out of there, and now I've got to deal with two kids in the morning, and somehow life has to go on. I'm fine right now. I'm not talking to anybody. You know, bring me water. My cell phone is almost dead, but other than that, it's fine.

(T.2071-2072). The last thing the Defendant told the caller was, "No, I don't think I'm under arrest at all." (T.2072). The last phonecall occurred after the Defendant had been in the interview room for several hours. (T.2073).

While he remained in the interview room at the Sheriff's Office, the Defendant was observed talking on the phone, texting, and sleeping. (T.2041). He was never seen crying while in the interview room. (T.2041).

As part of their investigation, the police conducted a gunshot residue test on the Defendant's hands and on Diane's hands. (T.1521). The test results on Diane's hands showed a trace amount that was so small that it was not forensically significant. (T.1689-1690). The test conducted on the Defendant's hands showed no residue. (T.1153, 1690).

The police performed some tests on the gun also. The gun from which the shot was fired was a "double-action-only" revolver. (T.1557). In order to fire a double-action gun, the hammer is cocked by pulling the trigger, and the hammer is also released by pulling the trigger. (T.1558). In a double-action gun, pulling the trigger does two things - it cocks the hammer and releases the hammer. (T.1558). Therefore, in order to fire a double-action gun, you only need to pull the trigger in order to discharge it, without a separate action to cock the trigger before shooting. (T.1558).

A double-action gun cannot just "go off". (T.1559). A person cannot cock the hammer and the gun just fire during a struggle. (T.1561). Trigger action is the only way to fire the gun that killed Diane. (T.1561).

A trigger pull test was conducted on the gun in order to determine how much force was needed to pull the trigger. (T.1562). The test showed that the gun that killed Diane required 12¼ to 12½ pounds of force to release the hammer. (T.1562). That is a "fairly heavy" amount of trigger pull. (T.1563). The normal trigger pull on a double-action gun would be 8 to 10 pounds, and a

low trigger pull would be 6 pounds. (T.1563). Since trigger pull is the amount of force needed to pull the trigger and release the hammer, it is a consideration when determining the likelihood of a gun going off during a struggle. (T.1564).

The police also conducted a distance determination test to determine how far the gun was from Diane when it was fired. (T.1601). The test was done at 6 inch intervals - 6, 12, 18, 24, and 30 inches. (T.1784).

The Medical Examiner conducted an autopsy and determined that the cause of death was a gunshot to the head, and the manner of death was homicide. (T.1753, 1833). The fatal wound on the victim was not a contact wound, meaning that the gun was not touching the victim’s skin when it was fired. (T.1778-1779). When Dr. Stephany compared the distance determination tests, the shot fired at 18 inches showed the pattern that was most consistent with the marks on Diane’s face. (T.1789). The results of the test showed that the gun was between 12 and 18 inches away from Diane’s face when it was fired. (T.1790).

The autopsy further showed that the victim’s eyes were open when she was shot. (T.1759). The shot was “front to back”, “slightly upward and right to left a little bit”. (T.1761). The Associate Medical Examiner who conducted the autopsy, Dr. Stephany, ruled out suicide as a manner of death. (T.1753). In Dr. Stephany’s experience, most suicides involving gunshots to the head are temporal(to either the left or right temple), intraoral (inside the mouth), or under the chin. (T.1767). Dr. Stephany did not

find any bruising or marks on either of the victim's temples, inside her mouth, or on her chin. (T.1768).

Dr. Stephany's findings regarding the distance of the shot and its trajectory were not consistent with a "struggle" shot. (T.1838-1839). Since the cause of death was a gunshot to the head, fired at between 12 and 18 inches, there was no reason to test the victim's stomach contents. (T.1792). At the time of her death, the victim had more Citalopram pills than her prescription indicated should be left, based on the date of the most recent prescription. (T.1828).

On October 8, 2009, the Defendant was charged by Information with one count of second degree murder. (R.88). Prior to trial, the Defendant filed a motion to suppress, among other things, the statements the Defendant made to Dep. Alleyne during the ride to the police station. (R.570). After conducting an evidentiary hearing on the motion, and hearing testimony and argument of counsel, the trial court denied the motion to suppress the statements. (R.647-655). The court found that the officer's questions to the Defendant about football and the Defendant's daughters were not likely to elicit incriminating responses from the Defendant. (R.649). Therefore, no Miranda warnings were required, and the statements were admissible. (R.649). When Dep. Alleyne's testimony was offered at trial, there was no objection to the officer's testimony about what the Defendant talked about. (T.1148-1149). Defense counsel never objected that the testimony was a comment on the Defendant's right to remain silent. (T.1148-

1149).

Trial commenced on September 12, 2011. In the opening statement, the prosecutor talked about the Wards' lifestyle: "Diane Ward and Bob Ward lived, in 2009, somewhat of a privileged life. They lived on Isleworth Country Club Drive"; "a lot of the family's time and money and effort went into Sarah's horse shows"; "Diane did not work. She stayed home"; "you'll find that the dogs actually have their own playroom in the house". (T.1030, 1035). There were no objections to any of the statements.

During the Defendant's opening statement, defense counsel told the jury:

> DEFENSE COUNSEL: . . .
> You will hear that Mr. Ward, during the early and mid-2000s was involved in the development business and did - and his company did very well, Land Resourses. It was a multimillion-dollar company. It made a lot of money.
> It made money that allowed him to provide his family with a very nice living. It allowed him to have a multimillion-dollar home in Orlando, another home in Atlanta, a horse farm in Atlanta. It allowed him to buy - I don't know how many horses for his daughter, Sarah, to expend - it allowed them to spend a million dollars a year just on the horse business.

(T.1066-1067).

The prosecutor presented testimony by police officers regarding their initial arrival at the Ward home and their entry into the home. One officer testified that the entry team checks the house to determine if there are any "additional people, suspects, victims" inside, and that the size of the entry team depends on the size of the house. (T.1107). The officer testified that the entry team in this case required more people than usual

because “[y]ou can tell from the outside it’s a very large house”. (T.1107). When the prosecutor asked how large the house was, the officer stated, “At least 8,000 square feet, if not bigger.” (T.1107). There was no objection. (T.1107). Another officer described the house:

> WITNESS: . . . This is a very large house. At the time, probably one of the largest residences I’ve been in as a law enforcement officer. I did not go into each room of the house. So - I probably went into four bedroom of the house. It’s a multi-story dwelling. If I had to guess to date, I would say eight to 10,000 square feet.

(T.1132). There was no objection. (T.1132).

When Det. Alleyne testified at trial, the State asked about the Defendant’s demeanor, and defense counsel interrupted, arguing that the officer could only “say what he observed” but could not give an opinion. (T.1145). The court ruled, “You can ask him how he physically was acting”. (T.1146). The prosecutor then asked Det. Alleyne about the ride to the police station:

> PROSECUTOR: Did the two of you talk together along the way?
>
> WITNESS: Yes, ma’am.
>
> PROSECUTOR: And what type of things did you talk about?
>
> WITNESS: We basically talked about football.
>
> PROSECUTOR: Did he talk to you about any of his family members?
>
> WITNESS: The only family members he talked about were his two daughters and - that was (sic) away at college.
>
> PROSECUTOR: Did he ever mention his wife?
>
> WITNESS: No, ma’am.

(T.1148-1149). There was no objection. (T.1149). The State then

asked Det. Alleyne:

PROSECUTOR: Did you ever appear - appear or notice that he was upset, physically upset?

WITNESS: No. He was very polite to me, very calm.

PROSECUTOR: Ever see him crying?

WITNESS: No, ma'am.

PROSECUTOR: Did he talk, basically, the whole way down to headquarters?

WITNESS: We would talk like intermittently about football, that was about it. He would say he was a Florida State fan if I'm not mistaken. I told him I was a Hurricane fan.

(T.1149). There was no objection. (T.1149).

Glenn Saare testified at trial. (T.1217). During cross-examination, defense counsel asked Mr. Saare:

DEFENSE COUNSEL: Did Bob seem to begrudge her any money or material thing in the world?

WITNESS: No, not to the extent that he would do anything about it.

DEFENSE COUNSEL: Was he financially able to provide Sarah Ward with horses?

WITNESS: Absolutely.

DEFENSE COUNSEL: Was he financially able to provide his wife and children with nice homes in Orlando and Atlanta?

WITNESS: Absolutely.

DEFENSE COUNSEL: Did he provide those?

WITNESS: Yes, sir.

DEFENSE COUNSEL: Was he able to provide them all with nice cars?

WITNESS: Absolutely.

DEFENSE COUNSEL: And did he do that?

WITNESS: Yes, sir.

(T.1273-1274).

Mallory Ward testified about the day her mother was killed. (T.1276). During cross-examination, defense counsel asked Mallory:

> DEFENSE COUNSEL: How did your mom - how did your dad - did your dad provide - was your dad able to provide nice things for you, cars?
>
> WITNESS: Yes.
>
> DEFENSE COUNSEL: Did he?
>
> WITNESS: Yes.
>
> DEFENSE COUNSEL: Did he provide a nice car for your mom?
>
> WITNESS: Yes.
>
> DEFENSE COUNSEL: Did he provide her with nice jewelry?
>
> WITNESS: Yes.
>
> DEFENSE COUNSEL: Did he basically shower her with anything she wanted -
>
> WITNESS: Yes.
>
> DEFENSE COUNSEL: - financially? And could he afford it?
>
> WITNESS: Yes.

(T.1293).

After Mallory testified on cross-examination that her parents had a great relationship built on respect and love, the prosecutor asked Mallory on re-direct:

> PROSECUTOR: If you mother were to hear - you talked about your mother said he was a fine man. Did you have any knowledge that your father had had lunch and cocktails with Ms. Callahan in 2009?
>
> WITNESS: No.
>
> PROSECUTOR: Is that something your mother would have

appreciated?

DEFENSE COUNSEL: Your Honor, object.

COURT: Sustained.

PROSECUTOR: Nothing further.

(T.1295-1296). There was no request for a curative instruction or motion for mistrial. (T.1296).

During Ms. Callahan's testimony, when the State asked her what the Defendant said to her about his wife, defense counsel objected to part of the answer. (T.1745). The court sustained the objection and gave the jury a curative instruction. (T.1745). There was no request for a mistrial. (T.1745).

During Mr. Kobert's trial testimony, which dealt with the Defendant's business bankruptcy, the State asked Mr. Kobert to explain the difference between a secured creditor and an unsecured creditor. (T.1956). Mr. Kobert described the difference, then added:

> WITNESS: But the vast majority of claims in this case were unsecured creditors, those of lot owners, other individuals who never got their development built or never got their infrastructures or utilities put into the ground.
>
> DEFENSE COUNSEL: Object, Your Honor, nonresponsive.
>
> COURT: Sustained.

(T.1956). There was no request for a curative instruction or motion for a mistrial. (T.1956).

Sarah Ward testified about her family, her mother, and her horses, without any objection. (T.2004-2005). Sarah also testified about her phone conversations with her mother the day her

mother was killed. (T.2008-2010). There were no objections during Sarah's direct testimony. (T.2004-2019).

When Det. Cross testified, the prosecutor asked about the Defendant's demeanor. (T.2050). Defense counsel objected regarding any "editorializing and opinion", and the court sustained for lack of a predicate. (T.2050). After the State asked predicate questions, Det. Cross was asked to describe the Defendant's demeanor and answered, "His demeanor was very - to me, was odd. He was very calm." (T.2050-2051). Defense counsel objected, and the court sustained the objection. (T.2051). Defense counsel asked for a curative instruction. (T.2051). The court gave the specific curative instruction requested by defense counsel. (T.2053). There was no request for a mistrial. (T.2054). Det. Cross then testified, without objection, that the Defendant's demeanor was "calm" and that the Defendant never appeared hysterical or to be crying. (T.2054).

During Dr. Garavaglia's testimony, defense counsel objected several times. (T.2090, 2097, 2101). The court sustained the objections, and struck the answer when defense counsel requested it. (T.2097, 2101). There was no request for curative instructions or motions for mistrial. (T.2090, 2095, 2101).

Although the Defendant did not testify, defense counsel called seven expert witnesses. One such witness was a pathologist, Dr. William Anderson, who conducted an independent autopsy for the defense 18 days after the shooting. (T.2227, 2237). Dr. Anderson looked at the stippling on the victim's face and stated that the

victim's wound was "an intermediate wound". (T.2241). Dr. Anderson also reviewed the results of the distance testing conducted by the State, and based on his review testified:

> WITNESS: . . . But it looks like it's around midway and intermediate range. We didn't see any soot, the stippling wasn't really dense, it also wasn't really spread out. I'd say probably in the area of 14, 16, 18 inches.

(T.2241).

Another witness called by the Defendant was a law professor from the University of Florida law school, Jeffrey Davis. (T.2399). Prof. Davis testified about various bankruptcy matters, and the financial matter of the Defendant and his wife based on material he was provided by defense counsel. (T.2417-2418). Prof. Davis stated that life insurance proceeds are exempt from creditors in a bankruptcy, and that Diane had three insurance policies amounting to $1,175,000.00 at the time of her killing. (T.2419). He also testified that at the time of Diane's death, the Wards had $3,416,000.00 in two bank accounts held together. (T.2421).

On cross-examination, the State asked Prof. Davis:

> PROSECUTOR: Some of the documents you reviewed, you knew that the Isleworth home was in foreclosure?
>
> WITNESS: I saw that, yeah.
>
> PROSECUTOR: Were you aware of the fact that a mortgage payment at the time of Ms. Ward's death had not been paid in over a year?
>
> WITNESS: No, I didn't know that. I mean, the fact of the foreclosure suggests that there's missing payments.
>
> PROSECUTOR: And you also saw some litigation. The suit by Bond Safeguard was actually filed the 1st of September of 2009, was it not?

WITNESS: I believe so.

PROSECUTOR: The second mortgage on the Isleworth home, the foreclosure was done actually September 17th of 2009?

WITNESS: That's - that's correct. I believe.

(T.2427). There was no objection to any of the prosecutor's questions. (T.2427).

The State also asked Prof. Davis whether the Defendant was able to generate any money from his companies once they went into bankruptcy. (T.2436). Prof. Davis testified that the creditors get any money owed, and a company owner gets nothing until all of the creditors are paid 100 per cent. (T.2436-2437). The State then asked:

PROSECUTOR: But in September of 2009, based on your review of the information provided to you by Ms. Green, the Defendant's bankruptcy lawyer, he was being sued in several different ways in September of 2009?

WITNESS: Uh-huh.

PROSECUTOR: Along with the business in bankruptcy that was generating no income?

WITNESS: No income to him, that's right.

PROSECUTOR: He had over 3 million in the bank?

WITNESS: (Nod head) Correct.

PROSECUTOR: But wasn't making his mortgage payment on the Isleworth home?

WITNESS: I believe that to be correct.

PROSECUTOR: 'Cause it went into foreclosure and actually was foreclosed upon?

WITNESS: I find it totally credible that he was missing some mortgage payments.

(T.2437). There was no objection to any of those questions. (T.2437). On re-direct examination, defense counsel asked Prof. Davis to tell the jury "what a strategic default is". (T.2439). Prof. Davis answered:

> WITNESS: Well, it's getting to be pretty common. People who, in this economy, discover that the house isn't worth as much as the mortgage, decide that they - it's just not worth paying off the mortgage 'cause the house isn't worth what it will cost to pay it off, and so for business reasons or emotional reasons, or whatever reasons, they choose - they decide to stop - paying their mortgage. Very common today.

(T.2439).

After the defense rested, the State called rebuttal witnesses to address the defense experts' testimony. Defense counsel objected several times, and the court sustained the objections. (T.2551, 25598, 2560). There was no request for a curative instruction or motion for mistrial except as to one instance. When the State asked Dr. Garavaglia if any tests were done to determine if there were any metabolites for Citalopram, defense counsel objected. (T.2551). The trial court initially overruled the objection, but then sustained as to lack of predicate. (T.2552). After the State tried to lay a sufficient predicate for the testimony, defense counsel again objected. (T.2553). The court allowed defense counsel to voir dire the witness. (T.2553-2555). The court then sustained the objection and agreed to give a curative instruction. (T.2556). The court gave the instruction as requested. (T.2557). There was no motion for mistrial. (T.2557).

During closing arguments, the prosecutor pointed out that the

Defendant gave at least two different explanations for the killing - "I shot my wife" and "Diane killed herself". (T.2580-2581). The prosecutor then argued "There's no way that one of those - that both of those can [] be true." (2581). When defense counsel objected that the argument was "burden shifting", the court sustained the objection. (T.2581-2585). The court gave a curative instruction, as requested by defense counsel. (T.2586). There was no motion for mistrial. (T.2586).

During the State's rebuttal closing argument, the prosecutor argued:

> PROSECUTOR: These are the type of things that are put before you, that we didn't prove exactly the position of the bodies. And we told Stuart James, well, this is one scenario. But remember, look at the jury instructions. Let me take you back to the jury instructions. It will never say that there's this requirement that we have to tell you exactly how it happened. Would we ever - would we ever, ever, at that point, be able to get a conviction if that was the standard?

(T.2653). Defense counsel objected and argued that the State's argument was burden shifting. (T.2653). The court overruled the objection. (T.2653). At one point, defense counsel objected that the State was denigrating defense counsel. (T.2658). The court sustained, and gave the curative instruction requested by defense counsel. (T.2658-2661). There was no motion for mistrial. (T.2661).

Later, defense counsel again objected based on a claim that the State was denigrating the defense, and defense counsel moved for a mistrial. (T.2673). When the trial court denied the motion for mistrial, defense counsel asked the court to give a curative

instruction. (T.2674). The court gave the requested curative instruction. (T.2674). There were no other objections during the closing arguments.

During the charge conference, defense counsel asked for a special jury instruction regarding the State's failure to test the victim's stomach contents. (R.1145; T.2535-2537). The requested instruction stated:

> **FAILURE TO TEST**
> 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.

(R.1145). The court denied the requested instruction. (T.2538).

After the jury instructions, the jury retired to deliberate. (T.2705). About 1½ hours into deliberations, the jury requested to "have access to the unloaded firearm". (R.1158; T.2716). The parties agreed to send the unloaded gun back to the jury room and the gun was sent back. (T.2717-2719). The jury continued deliberating from mid-morning until mid-afternoon, then sent out a question asking for a yardstick. (R.1157; T.2719). Defense counsel objected to sending a ruler to the jury room. (T.2719-2731). The court denied the jury's request, stating that no ruler was admitted in evidence. (T.2732).

About 1½ hours later, the jury requested to have the testimony of two witnesses read back - the State's DNA analyst and the defense's DNA analyst. (R.1159; T.2734). The court complied with

the request. (T.2736-2828). About an hour later, the jury asked to stop for the night. (T.2828). The court dismissed the jury to return the next day. (T.2829).

The next morning, after deliberating for about an hour and twenty minutes, the jury returned a verdict of guilty as charged and a special finding that the Defendant used a firearm during the murder. (T.2837-2839). On December 16, 2011, the Court sentenced the Defendant to 30 years in prison, with 25 as a mandatory minimum. (T.1840).

## SUMMARY OF ARGUMENT

POINT I: The trial court correctly denied the motion for judgment of acquittal after the State presented sufficient evidence from which a rational trier of fact could find the existence of the elements of second degree murder beyond a reasonable doubt. The State presented both direct and circumstantial evidence to prove guilt. The evidence showed that the Defendant admitted shooting the victim, and his DNA was found on the gun. The markings on the victim showed that the gun was fired at a range of 12 to 18 inches. The shot was directly at the face, and the victim's eyes were open at the time the gun fired. There were no marks on the victim at her temple, chin, or in her mouth. The victim was happy and in a good mood when she talked to a friend a little more than an hour before she was killed. The Defendant's conduct after the shooting was calm and polite, talking about football at one point. He did not cry or otherwise act upset. The Defendant's intent was a factual matter to be determined by the jury. The trial court

correctly denied the motion for judgment of acquittal.

<u>POINT II</u>: The Defendant received a fair trial; the Defendant failed to preserve claims of prosecutorial misconduct. The Defendant failed to properly preserved claims for appellate review each time the objections were sustained but the Defendant failed to ask for a curative instruction or move for a mistrial. In those instances when a curative instruction was requested and given, any error was cured. Therefore, those claims are not properly preserved for appellate review and are not properly before the court. Further, the record shows that there was no prosecutorial misconduct, and the Defendant received a full and fair trial.

<u>POINT III</u>: The trial court correctly admitted relevant evidence; claims of evidentiary errors were not properly preserved for appellate review. As pointed out previously, the Defendant failed to properly preserve arguments when the court sustained objections, but no curative instruction was requested and no motion for mistrial was made. In those instances where the Defendant's objections were overruled, the court properly admitted relevant evidence. There was no error.

<u>POINT IV</u>: The trial court correctly denied the requested jury instruction. The requested instruction sought to instruct the jury that when the State failed to test evidence, they could presume that the testing would have been favorable to the Defendant if it had been done. That instruction would be tantamount to telling the jury that any time the State failed to test evidence, the State is intentionally hiding exculpatory evidence. There is no basis for

such a conclusion or instruction, and it is an incorrect statement of the law. The trial court properly denied the requested instruction.

## ARGUMENTS

## POINT I

**THE TRIAL COURT CORRECTLY DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL AFTER THE STATE PRESENTED SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD FIND THE EXISTENCE OF THE ELEMENTS OF SECOND DEGREE MURDER BEYOND A REASONABLE DOUBT.**

An appellate court reviews a motion for judgment of acquittal *de novo*. *Pagan v. State*, 830 So. 2d 792 (Fla. 2002). A reviewing court generally will not reverse a conviction that is supported by competent, substantial evidence. *Id*. When a defendant moves for a judgment of acquittal, he admits all facts in evidence and all favorable conclusions which can be drawn from that evidence. *Beasley v. State*, 774 So. 2d 649 (Fla. 2000). If the trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the State, then the evidence is sufficient to sustain a conviction. *Fitzpatrick v. State*, 900 So. 2d 495 (Fla. 2005). A trial court should not grant a motion for judgment of acquittal unless no view which the jury may lawfully take of the evidence favorable to the opposing party can be sustained under the law. *Id*.

This Court has pointed out that, under Florida Supreme Court precedent, a "special standard of review of the sufficiency of the evidence [is required] where a conviction is wholly based on

circumstantial evidence." *Knight v. State,* 2013 WL 183946 (Fla. App. 5 Dist.)(quoting *Jaramillo v. State*, 417 So. 2d 257 (Fla. 1982)). However, when the evidence presented is both direct and circumstantial evidence, "courts do not apply the special standard of review applicable to circumstantial evidence cases." *Id.*, quoting *Mosley v. State*, 46 So. 3d 510 (Fla. 2009).

It is well-settled that admissions against interest are direct evidence. *Simmons v. State*, 934 So. 2d 1100 (Fla. 2006); *Jorge v. State*, 861 So. 2d 1279 (Fla. 3d DCA 2003)("At a minimum the defendant's inculpatory statement is direct, not circumstantial, evidence establishing guilty knowledge."); *See also Orme v. State*, 677 So. 2d 258 (Fla. 1996).

In the instant case, the evidence was both direct and circumstantial. Therefore, the special standard does not apply. The Defendant's own inculpatory admission that he shot his wife provided direct evidence of his participation in the killing. The circumstantial evidence included the physical evidence that tended to prove that the gun was 12 to 18 inches away from the victim at the time she was shot, and her eyes were open at the time. Additionally, the evidence showed that the trigger pull on the gun was "heavy", requiring more than 12 pounds to fire the gun, and the gun was a double action gun.

Since the evidence included both direct and circumstantial evidence, the regular standard applies to motions for judgment of acquittal. That is, a motion for judgment of acquittal should be denied if the State presented evidence from which "a rational trier

of fact could find the existence of the elements of the crime beyond a reasonable doubt". *Knight*; *Pagan v. State*, 830 So. 2d792 (Fla. 2002). In the instant case, the State presented sufficient evidence from which the jury could find the elements of the crime beyond a reasonable doubt.

The evidence showed that the victim was in a good mood the day she was killed, talking with an old friend up until 6:30 that evening. Diane's conversations with her daughters and others that day indicated that she was very concerned about Sarah's possible case of swine flu. Diane wanted to travel to Sarah's school "ASAP" to take care of her if she had the swine flu. Other conversations showed that Diane planned to attend Sarah's upcoming horse show, because she attended all of Sarah's horse events.

Less than two hours after Diane finished talking to her old friend on the phone, the Defendant called 9-1-1 and declared that he shot his wife. The autopsy showed that Diane's eyes were open when she was shot, and the shot was directly to the face. However, there were no marks on Diane's chin, inside her mouth, or on either of her temples. The shot clearly was not a contact wound. Distance testing further showed that the gun was at least 12 inches away, and possibly as far as 18 inches away, when the shot was fired. The gun was double action and required more than 12 pounds of pressure to fire it. The gun could not be cocked first and then fired when the trigger was pulled. It was a double-action-only gun.

Forensic testing showed that the Defendant's DNA was on the

gun, but Diane's DNA could not be detected. Even though there was some gunshot residue on Diane's hands, it was not enough to be forensically significant. There was **no** gunshot residue on the Defendant's hand, despite his theory of defense that the gun went off when he tried to stop Diane from killing herself and his statement that he shot her.

All of this evidence showed that the Defendant shot the victim from 12 to 18 inches away, directly to the face. The Defendant admitted that he shot Diane, and the evidence showed that she could not have held the gun on herself, pointing it directly at her own face, and still pulled the 12 pound trigger on the double action gun, shooting herself straight on in the face.

As for the Defendant's state of mind - the malice element - the Florida Supreme Court has clearly stated that the State may prove an essential element of a crime through circumstantial evidence. *State v. Castillo*, 877 So. 2d 690 (Fla. 2004). It is well-established that "state of mind elements . . . are usually established through circumstantial evidence." *Knight*; *Anderson v. State*, 48 So. 3d 1015 (Fla. 5th DCA 2010); *Jones v. State*, 192 So. 2d 285 (Fla. 3d DCA 1966).

The evidence that showed the Defendant's malice included testimony about the Defendant's demeanor after the killing. The testimony, as well as the video of the Defendant at the jail, showed that the Defendant was calm and polite. He failed to call his children to tell them of Diane's death. He also avoided telling Diane's sister of her death, asking to talk to her husband

instead.

The evidence, including the Defendant's own statements on the phone and in e-mails, showed that the Defendant changed his story of the events several times. First he stated that he shot Diane. Then he stated that it was an accident and that "the gun just went off". He even told some people that Diane killed herself. The Defendant's own changing story was evidence of culpability.

Additionally, the State presented evidence showing that the Defendant had severe financial problems. His business was in bankruptcy, but his home was also in foreclosure. The evidence showed that Diane had more than $1 million of insurance, and she was a joint account holder of almost $3.5 million in joint bank accounts. Furthermore, Diane was scheduled to testify in a deposition about questionable money transfers from the Defendant's business that involved the purchase of expensive personal items for Diane and their children. The Defendant made if very clear that he did not want Diane to testify about those matters.

Finally, there was evidence of a possible disturbance on the patio. The evidence showed that Diane drank red wine, but the Defendant drank Scotch. There was a broken wine glass on the patio, and red wine spilled on the ground. There was also a purple stain on the back of the Defendant's shirt. The evidence tended to show a possible argument between the Defendant and Diane shortly before the killing. The Defendant's demeanor, his statements, the evidence of financial problems all provided a basis for the jury's determination that the Defendant possessed the necessary malice to

convict him of second degree murder. Once the evidence was presented, it became a jury question as to whether the evidence showed malice.

It is clear, based on the caselaw, that the instant case included both direct and circumstantial evidence. Therefore, the standard for assessing the motion for judgment of acquittal is whether, after viewing the evidence in the light most favorable to the State, a rational jury could find the existence of the elements of the crime beyond a reasonable doubt. Since the State did present such evidence, the trial court correctly denied the motion for judgment of acquittal.

Even if the Court determines, despite its recent holding in *Knight*, that the case is purely circumstantial, the court's ruling was still correct and proper. The "special" standard for purely circumstantial evidence cases requires that the State present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. *State v. Law*, 559 So. 2d 187 (Fla. 1989).

The State clearly satisfied even the special standard here. The Defendant's theory of innocence was that Diane was trying to kill herself and that the gun went off when he was trying to stop her. However, the State's evidence showed that Diane had shown no signs of suicidal intention, and was actually happy and had plans for the near future. The shot was fired from at least 12 inches away. In fact, the Defendant's own expert witness opined that the gun was more like **14 to 16** inches away when it went off. The gun

had a heavy trigger pull and could only be fired by double action. Diane's DNA was not found on the gun, but the Defendant's DNA was on the gun. After the shooting, the Defendant was calm, polite, and changed his story several times.

From this evidence, the jury could have **excluded** the Defendant's theory that Diane was trying to kill herself and he tried to stop it. The jury could have determined that a woman of Diane's size could not have extended the gun at least 12 inches away and pointed it directly at her own face, then used sufficient force to pull the double action trigger of the gun, causing the bullet to enter her almost straight on.

It is clear that, under either standard, the State presented sufficient evidence from which the jury could find the Defendant guilty of each element beyond a reasonable doubt. Therefore, the trial court correctly denied the motion for judgment of acquittal.

## POINT II

### THE DEFENDANT RECEIVED A FAIR TRIAL; THE DEFENDANT FAILED TO PRESERVE CLAIMS OF PROSECUTORIAL MISCONDUCT.

In order to preserve an issue for appeal, a defendant must: 1) make a timely contemporaneous objection in the trial court; 2) present the legal grounds for that objection; and 3) raise the specific argument in the appellate court that was asserted as the legal ground for the objection or motion made in the trial court. *Harrell v. State*, 894 So. 2d 935 (Fla. 2005); *Chance v. State*, 100 So. 3d 1253 (Fla. 5th DCA 2012); *Fike v. State*, 4 So. 3d 734 (Fla. 5th DCA 2009).

Furthermore, when a defendant's timely objection is sustained, he must either request a curative instruction or move for a mistrial in order to preserve for appeal a claim of error. *Pogar v. State*, 91 So. 3d 904 (Fla. 5th DCA 2012); *Knight v. State*, 796 So. 2d 1236 (Fla. 4th DCA 2001). When counsel's objection is sustained and counsel agrees to the curative instruction given by the court, the alleged error is not preserved for appellate review. *Sanchez v. State*, 81 So. 3d 604 (Fla. 3d DCA 2012).

Finally, in order to preserve for appellate review statements made during closing arguments, a defendant must make a contemporaneous objection, which if sustained, must be followed by a request for a curative instruction or a motion for mistrial. *Capron v. State*, 948 So. 2d 954 (Fla. 5th DCA 2007).

In the instant case, the Defendant argues that there were numerous incidents of improper questions asked by or arguments made by the prosecutors. He has identified four specific categories of instances. Almost all of the specific instances identified by the Defendant were waived or were not properly preserved for appellate review. By category, those instances were:

TESTIMONY: The Defendant has specified 12 cites to the record, and argued that each was error: T.1295-1296, 1695, 1702-1704, 1745, 2050-2051, 2073-2075, 2090, 2097, 2101, 2430-2435, 2551-2557, 2559-2560. Of those 12 specific instances, none were preserved for appellate review. First, several instances involved objections based on lack of foundation. (T.1695, 1702-1704, 2090, 2558-2559). Because the objection was as to foundation, the State was able to

ask questions which were designed to lay a sufficient foundation to re-ask the initial question. Therefore, the follow-up questions which were intended to lay the foundation were procedurally proper. Additionally, although the court sustained objections each time, the Defendant failed to move for a mistrial. Therefore, he failed to preserve the argument for appellate review.

Of the 12 instances listed in the Defendant's Initial Brief, five involved objections which were sustained and the Defendant asked for a curative instruction. (T.1745, 2050-2051, 2097-2098, 2101, 2551-2557). Once the trial court agreed to give the curative instruction as asked by the Defendant, the situation was cured and the argument was waived for further review. The Defendant asked for the court to fix the problem by giving a curative instruction, and the court did as the Defendant asked. The Defendant never asked for anything more. Therefore, those arguments were not preserved for appellate review.

DEFENDANT'S DEMEANOR: The Defendant cites to three specific instances which he claims were improper comments on his right to remain silent: T.1148-1149, 2589, 2651. None of those instances were preserved for appellate review. The Defendant failed to object to any of the instances, thereby failing to preserve them. Therefore, they are not properly before the court.

CLASS PREJUDICE: The Defendant cites to 12 more instances which he alleges were improper attempts to use "class prejudice" against him. Six of those occurred during the evidentiary portions of the trial: T.1107, 1132, 1956, 2005-2006, 2427, 2437. The other

six occurred during the closing arguments: T.2568, 2571, 2574, 2591, 2648, 2652). None of the alleged errors were preserved for appellate review, since the Defendant failed to object to them.

Alleged errors during closing argument, like all other errors, can only be preserved by "a contemporaneous objection, which if sustained, must be followed by a request for a curative instruction or a motion for mistrial." *Capron*. Here, the Defendant failed to object to all of the alleged improper comments. Therefore, none are preserved and are not properly before the Court.

It is particularly interesting to observe that, despite his argument on appeal that the State tried to use "class prejudice" to turn the jury against him, the Defendant himself presented ample evidence and testimony concerning the Defendant's wealth, property, and business success-to-failure history. Defense counsel began with the opening statement identifying that the Defendant was a successful business man who provided lots of very expensive things for his family, from cars, to horses, to jewelry, to homes and property in several states. Defense counsel brought in expert witnesses to testify about the Defendant's business problems, including the bankruptcy and foreclosures.

The Defendant fails to acknowledge that he himself presented more evidence about the Defendant's wealth than the State did. Even some of the instances identified by the Defendant as error involved the State's cross-examination of the Defendant's own expert about the information provided to the expert for use formulating his opinions. Defense counsel failed to object to

those questions because they were fair and proper impeachment of the expert. The Defendant cannot have it two ways - his wealth is good when he presents the evidence, but is an improper attempt to sway the jury with "class prejudice" if the State presents it.

Regardless, the record clearly shows that the Defendant failed to preserve for appellate review any of the 12 cited instances. Therefore, they are not properly before the Court.

<u>CLOSING ARGUMENTS</u>: As noted above, in order to preserve alleged errors in closing argument, a defendant must make a timely objection, then if the objection is sustained he must ask for a curative instruction or mistrial. The Defendant identifies 5 instances of alleged improper closing argument: T.2580, 2651, 2653, 2656, 2671.

As to the first instance, the Defendant objected and the court sustained the objection. The court also gave a curative instruction. Therefore, any error was cured, since the Defendant failed to ask for any further remedy. By failing to move for a mistrial after the curative instruction, the Defendant either waived the claim of error after the court gave the requested instruction, or the issue was not properly preserved for appellate review. Either way, it is not properly before the court on appeal.

Three other instances - cited as appearing at T.2651, 2656, and 2671 - were not properly preserved because the Defendant never objected to those statements. Without an objection, they were not preserved for appellate review and are not properly before the court.

The instance that was cited at T.2653 was preserved by an objection which was overruled. The Prosecutor was on rebuttal closing and was addressing defense counsel's arguments that the State had failed to prove some details, such as the exact position of the victim's body. (T.2652-2653). The prosecutor reminded the jury about the instructions, and essentially argued that the State's burden of proof was not beyond every possible doubt. The prosecutor argued:

> PROSECUTOR: . . . Let me take you back to the jury instructions. It will never say that there's this requirement that we have to tell you exactly how it happened. Would we ever - would we ever, ever, at that point, be able to get a conviction if that was the standard?
>
> DEFENSE COUNSEL: We need to approach, Your Honor.

(T.2653). At the bench, defense counsel argued that the State's argument was shifting the burden of proof, and "I'd ask you to advise the jury to disregard the last comment." (T.2653). The court overruled the objection.

It is clear that the trial court's ruling was correct. The State was properly using the rebuttal argument to address the Defendant's closing argument. As to the details defense counsel argued were never proven, the State simply reminded the jury that the State's did not have to prove every single fact beyond every possible doubt. The argument had nothing to do with burden shifting, and only addressed the **level** of the State's burden.

It is well-established that a trial court has wide discretion in controlling the comments made in closing arguments, and "the

trial court's ruling on these matters will not be overturned unless clear abuse of discretion is shown." *Nowell v. State*, 998 so. 2d 597 (Fla. 2008); *Hooper v. State*, 476 So. 2d 1253 (Fla. 1985). Claims of "prosecutorial improprieties" are viewed in context of the entire record to determine whether there was error. *LaMarca v. State*, 785 So. 2d 1209 (Fla. 2001). Counsel are allowed wide latitude during closing arguments, and appellate courts apply an abuse of discretion standard when considering whether a trial court correctly overruled objections to comments made during closing arguments. *McArthur v. State*, 801 So. 2d 1037 (Fla. 5th DCA 2001).

Even if the argument was objectionable, any possible error was harmless. The court instructed the jury at the beginning of closing arguments that what the attorneys say is not their instruction on the law. (T.2567). The court also instructed the jury fully at the end of the trial that the State had the burden of proof, and that the State was required to prove each element beyond a reasonable doubt. (T.2695-2697). The court also instructed the jury that the Defendant does not have to disprove anything, nor is he required to prove his innocence. (T.2698). Based on the evidence presented at trial, closing arguments taken in their totality, and the trial court's instructions to the jury, there is no reasonable possibility that this statement contributed to the conviction. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

The final incident cited by the Defendant occurred when the State argued:

PROSECUTOR: . . . But, two things, your own common sense

> and judgment, carefully considering and weighing all of the evidence. What do these things really mean, the Citalopram, the stomach? Will you be diverted from what you are to decide here and what the evidence shows that (sic)?
>
> DEFENSE COUNSEL: Your Honor, may we approach?

(T.2672). At the bench, defense counsel claimed that the State's arguments were denigrating the defense, and moved for a mistrial. (T.2673). The court denied the motion for mistrial. (T.2674). Defense counsel then asked for a curative instruction, and the court agreed. (T.2674). The court then instructed the jury:

> COURT: Members of the jury, I remind you that at sometime - some point in time in the future I am going to be the one to instruct you on the law and it's only the law that I instruct you on that you are to consider, along with the evidence in this case.

(T.2674). It is clear that the Defendant waived this issue for appellate review when he asked for a curative instruction after the court denied the motion for mistrial.

A ruling on a motion for mistrial is within the trial court's discretion. *Dessaure v.* State, 891 So. 2d 455 (Fla. 2004); *Lundy v. State*, 51 So. 3d 1171 (Fla. 5th DCA 2011); *Freeman v. State*, 1 So. 3d 373 (Fla. 5th DCA 2009). A mistrial is only required when an error is so prejudicial that it vitiates the entire trial. *Dessaure*. Similarly, the admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. *Ray v. State*, 755 So. 2d 604 (Fla. 2000); *Fisher v. State*, 924 So. 2d 914 (Fla. 5th DCA 2006); *Huck v. State*, 881 So. 2d 1137 (Fla. 5th DCA 2004). Discretion is abused when the judicial

action taken is arbitrary, fanciful, unreasonable, or when no reasonable person would adopt the view taken by the trial court. *Frances v. State*, 970 So. 2d 806 (Fla. 2007); *Rodgers v. State*, 934 So. 2d 1207 (Fla. 2006).

Furthermore, as pointed out above, when a party asks the trial court to fix a problem and the court complies with that request, the issue is not preserved for appellate review. Here, the Defendant asked the court to give a curative instruction, and the court did exactly as the Defendant requested. Therefore, the issue was not preserved for appellate review.

Even if the argument was somehow preserved, the Defendant fails to show that the court's denial of the motion for mistrial was an abuse of discretion. The court's ruling was not arbitrary, fanciful, or unreasonable. The court's determination that the State's closing argument in its totality did not warrant a mistrial is not one which no reasonable person would adopt. There was no abuse of discretion.

## POINT III

**THE TRIAL COURT CORRECTLY ADMITTED RELEVANT EVIDENCE; CLAIMS OF EVIDENTIARY ERRORS WERE NOT PROPERLY PRESERVED FOR APPELLATE REVIEW.**

A trial court's ruling on the admissibility of evidence is reviewed under an abuse of discretion standard. *McWatters v. State*, 36 So. 3d 613 (Fla. 2010); *Troy v. State*, 948 So. 2d 635 (Fla. 2006); *Oliver v. State*, 977 So. 2d 673 (Fla. 5th DCA 2008); *Fisher*; *Huck*. The judge's decision to admit evidence will not be disturbed absent a showing of abuse of discretion. *Delgado v.*

*State*, 948 So. 2d 681 (Fla. 2006). Discretion is abused when the judicial action taken is arbitrary, fanciful, unreasonable, or when no reasonable person would adopt the view taken by the trial court. *Frances; Rodgers*.

The Defendant argues that the trial court made several errors in admitting evidence. First, one of the claims - that all of the Defendant's statements "should have been excluded under the corpus delecti (sic) doctrine" was never preserved for appellate review. In order to properly preserve an issue for appeal, it must be the same specific argument as the one raised at trial. Here, the only time corpus delicti was raised was during the motion for judgment of acquittal. The only argument made at that time was that the Defendant's statements cannot be used as the sole basis to convict him. Defense counsel argued that the only way to put the Defendant at the scene of the murder was only by his own statements, since he was already out of the house at the time the police arrived. Of course, that argument overlooked the presence of the victim's blood on the Defendant's shoes and other evidence, and the court properly denied the motion for judgment of acquittal on that ground.

It is clear that at trial, the Defendant never objected to the admission of the Defendant's statements based on failure to prove the corpus delicti. Therefore, that argument was never properly preserved for appellate review.

As to the Defendant's claim that his statements should have been excluded because they were made without Miranda warnings, the trial court issued an order pre-trial that denied the Defendant's

motion to suppress. (R.647). Regarding the discussion the Defendant had with Dep. Alleyne during the ride to the police station, the court found that the statements were not made during an interrogation and they were not the result of questioning intended to elicit incriminating responses. (R.649). The trial record clearly shows that when the Defendant discussed football and his daughters in the car with Dep. Alleyne, he was not being interrogated nor was there anything about the conversation that indicated an attempt by Dep. Alleyne to elicit anything incriminating from the Defendant. The record shows that the trial court's ruling as to the admission of the statements in the car was correct.

The substance of statements themselves were not used against the Defendant. In fact, the statements were only relevant to show the Defendant's demeanor, which was relevant to prove intent. It is well-established that the State can prove intent through circumstantial evidence. *Knight*. It is also clear that evidence of a defendant's demeanor can be used to prove intent circumstantially. *See Galavis v. State*, 28 So. 3d 176 (Fla. 4th DCA 2010); *Salas v. State*, 972 So. 2d 941 (Fla. 5th DCA 2007); *Bauer v. State*, 609 So. 2d 608 (Fla. 4th DCA 1992).

In the instant case, the Defendant admitted that he shot his wife. His theory of defense at trial was that the shooting occurred when the Defendant tried to prevent his wife from killing herself. The evidence of the Defendant's demeanor in the hours after he shot the victim was relevant to prove by circumstantial

evidence the Defendant's state of mind at the time of the killing.

The evidence showed that within the first couple of hours after he killed his wife, the Defendant was calm, polite, and that he discussed football with an officer. The evidence further showed that the Defendant was never seen crying or upset. The video of the Defendant and the electronic messages sent by the Defendant that night showed that he gave different versions of the shooting - the shooting was a "horrible accident" and "Diane killed herself" were among those versions. The evidence further showed that the Defendant avoided telling his daughters about their mother's killing, and he avoided telling Diane's sister.

All of that evidence, which reflected the Defendant's demeanor in the first few hours after the killing, was relevant to show the Defendant's state of mind. The evidence of the Defendant's demeanor was admissible as circumstantial evidence that the killing was done with malice. Because the statements were admissible and relevant, the court properly admitted them.

The Defendant cites to cases which hold that evidence of lack of remorse is improper. However, the cases cited are death penalty cases in which evidence of lack of remorse is improper as a basis for aggravation when the State is seeking the death penalty. The instant case is not a death penalty case and the evidence was not offered as aggravation. Therefore, those cases are inapposite.

The Defendant argues that the trial court erred when it allowed the State to present the testimony of Ms. Callahan. At trial, the theory of defense was that the victim was trying to kill

herself. The Defendant, through cross-examinations, elicited testimony that the Defendant and his wife had a very good marriage and relationship. The State presented the testimony of Ms. Callahan to show that the marriage relationship was not as solid as the Defendant was trying to assert. The evidence was relevant to counter the Defendant's theory of defense.

Ms. Callahan's testimony also included testimony that the Defendant thought his wife spent too much money. Because the Defendant's company was in bankruptcy and his home was in foreclosure, money problems and the Defendant's displeasure with his wife's spending could have triggered an argument which resulted in the killing. Therefore, the evidence was relevant to the State's theory of prosecution. The trial court properly admitted the evidence.

The Defendant argues that the trial court erred when it allowed the State's experts to testify about matters they were not qualified to address. The Defendant identifies 6 specific instances: T.1831, 2098, 2099, 2104, 2106, 2578. Again, the record shows that 4 of those instances were never preserved for appellate review, either because there was no objection or because the objection was sustained without any request for a curative instruction or motion for mistrial. Only two instances included timely objections which were overruled.

The first preserved objection was made when the State asked Dr. Stephany what factors he relied on when he decided that this was not a suicide and he stated that "people will not shoot

themselves straight on into the face." (T.1831). Defense counsel objected that there was no foundation for the statement. At a bench conference, defense counsel argued:

> DEFENSE COUNSEL: This is no different than women don't shoot themselves in the face. He's just not qualified. He sees them when they're dead. I don't think he's qualified to say what people do. He can say what he finds. But I think the way it was responded to is inappropriate.

(T.1831). The trial court overruled the objection. (T.1832).

The testimony by Dr. Stephany was clearly admissible. On cross-examination, defense counsel questioned a couple of the factors that Dr. Stephany based his determination that the victim's death was not a suicide. (T.1825-1826). When the State conducted re-direct examination, Dr. Stephany was asked to identify all of the factors he looked at when he ruled out suicide. The questions were relevant and within the scope of the cross-examination. Because defense counsel had asked Dr. Stephany about some of the factors he looked at, the court correctly allowed Dr. Stephany to identify the other factors he looked at. There was no error.

When the State re-called Dr. Garavaglia in rebuttal to the Defendant's experts, the State asked her whether she believed the killing occurred during an interrupted suicide attempt, and why. (T.2096). When Dr. Garavaglia answered, defense counsel objected that the testimony was not within the witness' expertise. (T.2097-2098). The court sustained. After the State asked the witness a more questions, to show the witness' experience in that area, the State asked the question again. (T.2099). When defense counsel

again objected, the court overruled the objection. (T.2099).

The trial court correctly admitted the testimony. When the State initially asked the question, the court found that there was no foundation to show that the witness had any expertise in the area. However, the State then asked several questions from which the court concluded that the witness was competent to answer the question. The witness stated that she had conducted numerous autopsies on bodies after a suicide was witnessed by another person. (T.2099). Without objection, she testified that approximately 15 percent of gunshot wound suicides are witnessed. (T.2099). When the State asked Dr. Garavaglia, "What about that experience leads you to the belief this was not an interrupted suicide?", defense counsel's objection was properly overruled. (T.2099). The testimony showed that the witness had a basis for the testimony, based on her education and training as a medical doctor and a medical examiner who had conducted numerous autopsies on victims of witnessed suicides.

The Defendant fails to show that the trial court's admission of the evidence was an abuse of discretion. Because the witness was qualified to testify about the matter, the trial court correctly allowed it. There was no error.

## POINT IV

**THE TRIAL COURT CORRECTLY DENIED THE REQUESTED JURY INSTRUCTION.**

This Court has held "A trial court has wide discretion in instructing the jury, and the court's decision regarding the charge

to the jury is reviewed with a presumption of correctness on appeal". *Buchanan v. State*, 927 So. 2d 209 (Fla. 5th DCA 2006); *See also Carpenter v. State*, 785 So. 2d 1182 (Fla. 2001). In order to be entitled to a special jury instruction, a defendant must prove three things: 1) the special instruction was supported by the evidence, 2) the standard instruction did not adequately cover the theory of defense, and 3) the special instruction was a correct statement of the law and not misleading or confusing. *Stephens v. State*, 787 So. 2d 747 (Fla. 2001). "When a trial court denies a defendant's request for a special instruction, the defendant has the burden of showing on appeal that the court abused its discretion". *Brickley v. State*, 12 So. 3d 311 (Fla. 4th DCA 2009).

In the instant case, the Defendant sought a special jury instruction. That instruction was based on the Defendant's arguments that the State should have tested the victim's stomach contents. The State's witnesses testified that the stomach contents were not tested because the cause of death was very clearly a single gunshot wound directly to the victim's face. Therefore, there was no reason to believe that the stomach contents had any significance whatsoever.

The instruction proposed by the Defendant was titled "Failure To Test" and stated:

> 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.

(R.1145). The court correctly denied the requested instruction. First, there was no evidence to support the instruction that "the testing results would have rendered results which would have been favorable to the defendant". At the time the instruction was requested, defense counsel argued that it should act as a sort of sanction against the State for failing to test the stomach contents. However, defense counsel provided no evidence that if the stomach contents had been tested, the results would have been favorable to the Defendant. In fact, the State presented evidence that indicated that the victim was **behind schedule** in taking her pills, since there were more pills found than the amount of her last prescription. The testimony that there was a pinkish substance in the stomach was consistent with red wine, which was found spilled on the victim's patio. There was no evidence to support the requested instruction.

Second, the standard instructions were adequate to cover the Defendant's theory of defense. The Defendant claimed the killing occurred when he tried to stop the victim from committing suicide. The judge agreed to give a circumstantial evidence instruction, and the judge gave the excusable and justifiable instructions. These instructions, as well as the other standard instructions given, were adequate to cover the Defendant's theory of the case.

Finally, the requested instruction was not a correct statement of the law and was misleading and confusing. The Defendant argued that the instruction was supported by caselaw. However, the cases

he argued involved the destruction or loss of evidence, whereas the instant case involved the lack of testing.

In this case, there was no accusation that the State intentionally avoided testing because it anticipated that the results would be exculpatory. The witnesses provided a perfectly valid reason for not testing the victim's stomach contents - she was shot in the head by the Defendant, and there was nothing wrong with her stomach at the time of the killing. The State had no reason whatsoever to test the victim's stomach contents.

There was no attempt to hide any favorable evidence. To instruct the jury as requested would convey to the jury they could find that the State intentionally acted in bad faith, or even criminally, when they chose not to test the victim's stomach contents. Such an instruction would confuse and mislead the jury. The trial court correctly denied the request to give it.

## CONCLUSION

Based on the arguments and authorities presented herein, the State asks this Court to affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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DESIGNATION OF E-MAIL ADDRESSES

Rebecca Roark Wall, Assistant Attorney General representing the State of Florida in the instant case, hereby designates the following email addresses for the purpose of service of all documents required to be served, pursuant to Fla.R.Jud.Admin. 2.516: Primary e-mail address: crimappdab@myfloridalegal.com; Secondary e-mail address: rebecca.wall@myfloridalegal.com.

CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that this brief is produced in COURIER NEW, 12 point font, and thereby fully complies with the font requirement of Fla.R.App.P. 9.210(a)(2), and that a true and correct copy of the above Answer Brief has been furnished by e-mail to **James E. Felman**, attorney for Appellant, at jfelman@kmf-law.com, this 12th day of March, 2013.

/s/ Rebecca Roark Wall
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