IN THE SUPREME COURT OF FLORIDA

TERANCE VALENTINE,

Appellant,

v.

Case No. 75,985

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

FLORIDA STATUTES:

SUMMARY OF THE ARGUMENT

As to Issue I - Appellant contends that the trial court erred by admitting into evidence the tape recording of his telephone conversation with his daughter Giovanna. Appellant alleges that this evidence was irrelevant to any fact at issue and was inadmissible because Giovanna did not specifically consent to the taping. The record shows Giovanna did consent to the taping of her telephone conversation and that the portions of the tape recording where Giovanna was speaking to her father were relevant and admissible.

As to Issue II - Appellant also contends that portions of the tape recording should have been excluded in that the recordings contain evidence of collateral crimes and bad acts of the defendant. A review of the statements does not present any evidence of collateral crimes or prior bad acts of the defendant, with the exception of the murder in the instant case.

Even if this evidence did constitute evidence of collateral crimes and bad acts, it is well settled that evidence of a defendant's collateral crimes or wrongful acts is admissible when relevant to prove a material fact in issue unless such evidence is solely relevant to prove bad character or propensity of the accused. The phone conversation contained evidence that was relevant to prove the defendant's identity as the perpetrator of this crime, as well as his intent and motive. As such, all of this evidence was relevant and admissible and it was not an abuse of discretion for the trial court to admit same.

As to Issue III - Appellant contends that the prosecutor's use of two peremptory challenges to exclude prospective black jurors Aldridge and Glymph, violated State v. Neil, 457 So.2d 481 (Fla. 1984) and its progeny. As the court noted below, the defendant's allegation of racial discrimination was insufficient to satisfy his initial burden of demonstrating a strong likelihood that the state challenged the jurors solely because of race where the record shows that there several other blacks were left in the venire. Consequently, the trial court's determination that a Neil inquiry was not required was within the court's discretion and appellant has failed to show an abuse of that discretion.

As to Issue IV - Appellant challenges the trial court's admission of John's statements to Valentine as to what he wanted him to do with the Bronco. Appellant claims that this was inadmissible hearsay that does not fall within the exceptions to the hearsay rule and that it was inadmissible under the coconspirator's statements rule as the state failed to prove a conspiracy.

First, the state does not agree that this statement was hearsay. Further, even if this statement did constitute hearsay it was admissible under the res gestae exception to the hearsay rule as either a spontaneous statement or an excited utterance. This statement was also admissible as a statement of a coconspirator. Finally, even if this statement was erroneously admitted, such error was clearly harmless as it is beyond a

reasonable doubt that this statement did not contribute to the conviction in the instant case.

As to Issue V - Appellant contends that the trial court erred by allowing the state to introduce Giovanna Valentine's prior trial testimony because the prosecutor failed to lay a proper predicate for admission of Giovanna's statement. It is the state's position that since this testimony was admitted as substantive evidence under §90.801(2)(a), *Fla. Stat. 1989*, that it was unnecessary for the prosecutor to first give Giovanna Valentine the opportunity to explain the prior statement.

As to Issue VI - Appellant contends that the trial court applied the improper standard in sentencing appellant to death and that had the proper standard been used, the trial court would not have imposed death because this murder was motivated by passion. The state contends that the trial court applied the appropriate standard of review and that the sentence of death was properly imposed in the instant case.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE TAPED TELEPHONE CONVERSATIONS BETWEEN APPELLANT AND HIS DAUGHTER GIOVANNA.

Appellant contends that the trial court erred by admitting into evidence the tape recording of his telephone conversation with his daughter Giovanna., Appellant alleges that this evidence was irrelevant to any fact at issue and was inadmissible because Giovanna did not specifically consent to the taping. The state contends, however, that the record shows Giovanna did consent to the taping of her telephone conversation and that the portions of the tape recording where Giovanna was speaking to her father were relevant and admissible.

In general t is lawful for an investigative or law enforcement officer or a person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral or electronic communication when such person is a party to the communication, or one of the parties to the communications has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act. *Florida Statute* §*934.03(2)(c)* (1989). The evidence presented at trial supports the trial court's finding that the recording was consensual,

Livia Romero testified that shortly after the murder in question, she received a note from appellant, Terance Valentine telling her to reconnect her telephone. (R 876) At that time

she advised the Sheriff's Office about the note and they arranged to have the phone reconnected and recording devices were set up. She then contacted several people who knew Terance to tell him that he could get in touch with her. (R 877) Ms. Romero testified that she then received several phone calls from the defendant which she tape-recorded. During most of the phone conversations with the defendant, a detective from the Sheriff's Office was present. She noted that the tape recorder was connected to the phone and that whenever the phone rang she turned on the tape recorder. (R 878) She also testified that her daughter Giovanna was aware that the phone conversations were being taped and that Giovanna could plainly see the recording device used to tape the telephone conversations. When asked specifically about the recording in question, Ms. Romero testified that when the defendant called on November 7, *1988,* Giovanna was present and that the entire conversation was recorded with her permission. During Ms. Romero's phone conversation with Valentine, Giovanna asked to speak to her father. The recording device was in plain view and Giovanna was aware she was being recorded. (R 879) Giovanna never at any time during the recording indicated that she did not want it to be recorded. To the contrary, Giovanna said she wanted to talk to the defendant. (R 880) Likewise, Detective Fernandez testified that Livia gave her consent to set up the recording devices and that Giovanna was involved from the very beginning. He testified that she went along with it to assist her mother.

(R 1624 - 1625) The detective also noted that while he did not get verbal consent from Giovanna, she was staying with her mother at the time and Giovanna did not seem to have any objection to talking to her father while the conversations were being taped. (R 1625)

Appellant contends, however, that since the officer did not specifically asked Giovanna if she would consent to the recording, that the recording was unlawful. As the record shows, however, Giovanna's consent was implicit if not explicit, and there is absolutely no evidence that Ciovanna was coerced into speaking to her father with the recording device on. This clearly distinguishes this case from State v. Jones, 562 So.2d 740 (Fla. 3d DCA 1990), as relied upon by appellant, wherein the court held that the trial court did not abuse its discretion in finding that the consenting party to a taped telephone conversation was coerced into calling the defendant and therefore her consent was not voluntary. Accordingly, the court upheld the trial court's granting of the motion to suppress the telephone conversation. Id. at 741. As the court noted in State v. Jones, supra, this is a matter that is within the discretion of the trial court. The trial court in the instant case heard the taped telephone conversation and heard the testimony of the witnesses in question. Based on the foregoing, it was within the trial court's discretion to find that Giovanna had implicitly consented to the taping of the conversation with her father, (R 794 - 796)

Appellant also contends that the conversation with Giovanna should have been excluded as it had no relevance to the charged offense and only tended to prove bad character on the appellant's part. As the court below held, this telephone conversation was necessary to be played to the jury in its entirety in order that the statements be considered in context. The jury needed to hear the entire conversation in order to assess the statements made by the defendant as well as the tone of voice that he used. Having heard the tape in its entirety, the court below determined that the conversation had to be taken as a whole.

> "The court is of the opinion that you must read the tape in context and you cannot just take out certain portions of statements made on the tape and claim that they are irrelevant and scandalous." (R 807 - 808)

This finding was within the trial court's discretion and is well supported by the law. This Court has consistently held that although evidence may not be directly relevant to a specific element of the crime, it is admissible where it is relevant to clarify the facts for the jury. For example, in Gillian v. State, 573 So.2d 810 (Fla. 1991), this Court held that a police officer may testify as to his observations while driving through a neighborhood where such testimony, although not directly relevant to a specific element of the crimes for which Gillian stood accused, was relevant to clarify for the jury why the area was selected for this police operation and why this is where a drug buy would be made. This Court further noted:

> "That information is relevant for the jury to place in context testimony bearing directly on the legal issues of the case. To compel the state to put on its case in a fashionable vacuum, devoid of such necessary background information, would be a disservice to the fact finder.
>
> '[C]onsiderable leeway is allowed even on direct examination for proof of facts that do not bear directly on the purely legal issues, but merely fill in the background of the narrative and give it interest, color, and life likeness.' *McCormick on Evidence* §185, at 541 (3d Edition, 1984)." Id. at 811.

The evidence presented in the instant case was relevant for the jury to put the defendant's statements, as well as his tone of voice, in context. It was necessary background for the fact finder to determine the purely legal issues at hand,

Similarly, in Eberhardt v. State, 550 So.2d 102 (Fla. 1st DCA 1989), the court upheld the admission of the balance of a conversation as well as other related conversations. The court held that the entire conversation was admissible because it was necessary for the jury to accurately perceive the whole context of what transpired in order to accurately assess the evidence. And, in Amoros v. State, 531 So.2d 1256 (Fla. 1988), this Court rejected Amoros' argument that evidence about events surrounding a prior shooting was broader than necessary to link the gun to Amoros. Quoting Ehrhardt, Florida Evidence, §401.1 (2d Edition 1984), this Court stated:

> "Instead, we find that evidence of the possession of the gun and its firing on a

> prior occasion was clearly admissible to link Amoros to the murder weapon. 'In order for evidence to be relevant, it must have a logical tendency to prove or disprove a fact which is of consequence to the outcome of *the* action.' C. Ehrhardt, *Florida* ***Evidence*** §401.1 (2d ed. 1984). The facts that Amoros was seen in possession of a gun on a prior occasion and that the bullet fired from that gun on the previous occasion identified it as the same weapon used to kill the victim in the instant offense rendered the evidence relevant whether the circumstances constituted a crime or not. Simply allowing testimony that Amoros had possession of a gun does not serve to identify it as the same murder weapon. The possession of a weapon, the firing of the weapon, the retrieval of the bullet fired from the weapon, the retrieval of the bullet fired from the weapon from Coney's body, and the comparison of the two bullets are all essential factors in linking the murder weapon to Amoros. These factors meet the test of relevancy contained in section 90.401, Florida Statutes (1987).

Id. at 1259 - 60

In the instant case, the entire conversation was necessary for the jury to put the Valentine's statements and demeanor in context. As such, the entire conversation was relevant and admissible. Further, while the state does not agree that this evidence was prejudicial, prejudice alone does not exclude otherwise relevant evidence.

> [2] We recognize relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. **However,** almost all evidence to be introduced by the state in a criminal prosecution will be prejudicial to a defendant. Only where the unfair prejudice

substantially outweighs the probative value of the evidence should it be excluded,"

Amoros at 1260

The trial court did not abuse its discretion in admitting this evidence.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO EXCISE PREJUDICIAL PORTIONS OF THE TAPED TELEPHONE CONVERSATION BETWEEN LIVIA ROMERO AND APPELLANT.

Appellant also contends that portions of the tape recording should have been excluded in that the recordings contain evidence of collateral crimes and bad acts of the defendant. A review of the statements presented during the phone conversation does not present any evidence of collateral crimes or prior bad acts of the defendant, with the exception of the murder in the instant case. (R 888 - 907) The conversation consisted of Appellant making several threats to Livia Romero and her family because she refused to allow him to see Giovanna and because she refused to send papers to the state attorney relieving him of responsibility for Porche's murder. (R 890) During the course of this conversation Valentine made several references to the murder and laughed at Romero's despair over Porche's death. For example Valentine told Romero, "Okay, I'm going to give it to you this way, and this is plain and straight. Either you keep me in contact with my daughter, or I keep burying your people," He also told her that the next time it wouldn't be a shooting and that he had already proved ,to her that he wasn't playing around. He further admitted that he had given her a scare. (R 890 - 892) In addition to showing Valentine's anger toward Romero, the recording showed that throughout the conversation Valentine laughed whenever Romero mentioned the murder. (R 891, 897) None

of this evidence was presented to show the defendant's bad character, but rather was introduced to show the context within which the statements were made to the victim as well as appellant's anger at Romero and his attitude about Porche's death. Each of the portions of the recording that appellant is now challenging was essential to the jury's ability to understand and assess in context. As this Court has consistently stated:

> "We recognize evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. However, almost all evidence to be introduced by the state in a criminal prosecution will be prejudicial to a defendant. Only where the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded."
>
> Amoros v. State, supra., at 1258

Even if this evidence did constitute evidence of collateral crimes and bad acts, it is well settled that evidence of a defendant's collateral crimes or wrongful acts is admissible when relevant to prove a material fact in issue unless such evidence is solely relevant to prove bad character or propensity of the accused. Fulton v. State, 523 So.2d 1196 (Fla. 2 DCA 1988); Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959). Appellant presented an alibi defense at trial trial, thus, claiming that he was not the perpetrator of this crime. The phone conversation contained evidence that was relevant to prove the defendant's identity as the perpetrator of this crime, as well as the intent and motive. As such, all of this evidence was relevant and admissible and it was not an abuse of discretion for the trial court to admit same.

Assuming, arguendo, that the challenged portions of the tape were erroneously admitted, the error was harmless beyond a reasonable doubt, as much of the recording was unquestionably admissible and the evidence of guilt was overwhelming.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DECLINING TO CONDUCT A NEIL INQUIRY DURING JURY SELECTION WHERE THE DEFENSE FAILED TO DEMONSTRATE A STRONG LIKELIHOOD THAT THE JURORS WERE CHALLENGED SOLELY BECAUSE OF RACE.

Appellant contends that the prosecutor's use of two peremptory challenges to exclude prospective black jurors Aldridge and Glymph, violated State v. Neil, 457 So.2d 481 (Fla. 1984) and its progeny. As the court noted below, the defendant's bare allegation of racial discrimination was insufficient to satisfy his initial burden of demonstrating a strong likelihood that the state challenged the jurors solely because of race where the record shows that there several other blacks were left in the venire.[1] (R 757-758) Consequently, the trial court's determination that a Neil inquiry was not required was within the court's discretion and appellant has failed to show an abuse of that discretion.

In State v. Neil, 457 So.2d 481, 486 (Fla. 1984), *clarified sub nom*, State v. Castillo, 486 So.2d 565 (Fla. 1986), and State v. Slappy, 522 So.2d 18, 22 (Fla.), *cert. denied*, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988), this Court established the procedure to be followed when a party seeks to challenge the opposing party's peremptory excusals:

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[1] The trial court reviewed the panel for the purposes of the record and found that there were seven black prospective jurors. (R.757-8) Of these, one was struck for cause, one became a juror and two were peremptorily challenged. (R. 755, 761, 765)

A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a

> strong likelihood that they have been challenged solely because of their race.
> **486** So.2d **481, 486** (Fla. **1984).**

Therefore, under Neil, the objecting party must establish a *prima facie* showing of discrimination and demonstrate that there is a strong likelihood that the jurors were challenged solely because of their race. If the trial court determines that there is such a substantial like ihood, then the other party must show that the challenges were not exercised solely because of the juror's race. If the court determines no such likelihood exists, no inquiry into the challenges is required. Neil, 457 So.2d at **486-87.**

The defendant relies, in part, upon this Court's decision in State v. Slappy, 522 So.2d **18** (Fla. 1988), providing that the racially discriminatory excusal of even one prospective juror taints the jury selection process. Id. at 21. The above reference in Slappy assumes that the objecting party first satisfied the initial burden of demonstrating on the record a strong likelihood that the state struck the subject juror solely because of race. If such demonstration is made, then Slappy indicates that the discriminatory excusal of even a single prospective juror taints the selection process.

In Adams v. State, 559 So.2d 1293 (Fla. 3d **DCA),** *review* ***dismissed,*** **564** So.2d **488** (Fla. 1990), the Third District Court found no error on the part of the trial court in failing to conduct a Neil inquiry into the state's reasons for peremptorily

excluding the first black juror on the panel where the defense failed to show a strong likelihood that the juror was rejected on racial grounds. In Adams, the court stated:

> The trial judge is in the best position to determine whether there is a need for an explanation of challenges on the basis that they are racially motivated. Thomas v. State, 502 So.2d 994, 996 (Fla. 4th DCA), review denied, 509 So.2d 1119 (Fla. 1987), See Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In the present case, by the time Ms. Arlington was challenged, the trial judge had already heard the answers she had given during questioning. He had heard the tone of her voice. The judge was satisfied that the questioned challenges where not exercised solely because of the juror's race. Adams failed to demonstrate that there was a strong likelihood that black prospective jurors were challenged solely on the basis of their race. See Woods v. State, 490 So.2d 24 (Fla.), cert. denied, 479 U.S. 954, 107 S.Ct. 446, 93 L.Ed.2d 394 (1986). The record does not reveal the requisite likelihood of discrimination to require an inquiry by the trial court. In fact, we find, just as the court did in Parker v. State, 476 So.2d 134 (Fla. 1985), that this record reflects nothing more than a normal jury selection process. For these reasons, the trial court did not err in failing to inquire into the state's motives for excluding Ms. Arlington.

In the instant case, the basis for the defense objection was that the challenged prospective jurors were the first two black jurors on the panel. In a factually similar case, Green v. State, 572 So.2d 543 (Fla. 2d DCA 1990), the court held that the defense did not carry its initial burden of showing a strong likelihood that the first black juror on the panel was challenged solely because of race. *See also,* Verdeletti v. State, 560 So.2d

1328 (Fla. 2d DCA 1990) [State peremptorily challenged one out of three prospective black jurors; defendant did not carry his burden of showing that the prospective juror was challenged solely because of race.]; State v. Williams, 566 So.2d 1348 (Fla. 1st DCA 1990) [State's peremptory challenges to three out of six black prospective jurors did not overcome the presumption that the peremptory challenges were exercised in a nondiscriminatory manner.]; Dinkins v. State, 566 So.2d 859 (Fla. 1st DCA 1990) [State's challenge to first black person on jury panel insufficient to require state to show lack of racial motivation.] Williams v. State, 567 So.2d 1062 (Fla. 2d DCA 1990) [Trial counsel's perfunctory objection was insufficient to demonstrate a likelihood of discriminatory motivation.]

In Taylor v. State, 583 So.2d 323 (Fla. 1991), this Court found no error in the trial court's refusal to require the state to provide its reasons for challenging a juror. In Taylor, the juror was the first and, as a result of the withdrawal of a prior challenge, the only black challenged by the state. In rejecting the defendant's claim, this Court stated:

> . . . We realize that under *State v. Slappy*, 522 So.2d 18, 22 (Fla.), *cert. denied*, the striking of even a single black juror for racial reasons is imperqissible. *See also Reynolds v. State*, 576 So.2d 1300 (Fla. 1991) (striking of only black venire member shifts burden to require justification fox challenge. However, on this record, the mere fact that the state challenged one of four black venire members does not show a substantial likelihood that the state was exercising peremptory challenges discriminatorily, particularly since the effect of the

> challenge was to place another **black** on the jury. ***See*** Woods *v.* ***State,*** 490 So.2d 24, 26 (Fla.) (three peremptories exercised by state against blacks did not rise to level needed to require trial court to inquire into state's motives for challenges), *cert.* ***denied,*** **479 U.S. 954 (19186).** The record **does** not reveal the requisite likelihood of discrimination to necessitate an inquiry into the state's reasons for challenging juror Farragut. **16** F.L.W. **S470**

This Court, in Taylor, also distinguished the case of Thompson v. State, **548** So.2d **198** (Fla. 1989), **noting** that it is only once a sufficient doubt is raised that a prospective juror may have been eliminated because of race that "the trial court must require the state to explain ***each*** one of the allegedly discriminatory challenges." Id. In the instant **case**, unlike Thompson, the trial court was not faced with a real and substantial doubt sufficient to trigger a Neil inquiry. Here, the state did not challenge the only minority venire member or all minority venire members. In the instant case, as in Green, Taylor, Verdeletti, Adams, and Williams, the defense did not demonstrate a strong likelihood that the juror was challenged solely because of race; therefore, a Neil inquiry was not required.

In Reed v. State, 560 So.2d 203 (Fla. 1990), this Court specifically noted "[In] trying to achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges, we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the

scene and who themselves get a 'feel' for what is going on in the jury selection process." *See also,* Casimiro v. State, **557** So.2d 223 (Fla. 3rd DCA **1990)** ["**. . .** Moreover, the challenge of the four black jurors, by itself, was insufficient to require an inquiry where the record clearly established why the challenged persons were unacceptable state jurors,"] Woods v. State, 490 So.2d 24 (Fla.), cert. denied, 479 U.S. **954, 107** S.Ct. **446 (1986);** Thomas v. State **502** So.2d 994 (Fla. 4th DCA), review denied, 509 **So.2d 1119** (Fla. **1987).**

Here, the trial court, acting as an on-the-scene observer, determined that there was no threshold showing of discriminatory motive. This Court should defer to the trial judge's determination in the instant case and affirm the conviction as the record reflects the existence of reasonable and racially neutral reasons for the prosecutor's use of peremptory challenges to **excuse** Glymph and Aldridge. Prospective juror Aldridge expressed considerable reluctance to imposing the death penalty and prospective juror Glymph admitted that she had been a victim of a burglary. **(R.742-43,** 604) Glymph also appeared to have reservations about the death penalty. Because the death penalty and burglary were central issues in the instant case, the prospective jurors response; were sufficient to support a peremptory challenge. Holton v. State, **573** So.2d 284, 287 (Fla. 1990) These were not challenges for cause and there is no requirement that they rise to level to support such a challenge. It is apparent from the record that the trial court felt the

prosecutor had race-neutral reasons for excluding these two jurors. Such determinations are within the trial court's discretion and appellant has failed to show an abuse of that discretion.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY ALLOWING LIVIA ROMERO TO TESTIFY TO STATEMENTS MADE DURING THE COMMISSION OF THE INSTANT CRIME BY THE CO-PERPETRATOR "JOHN".

Livia Romero testified that on September 9, 1998, she was in the family room of her home in Brandon around 2:30 p.m. when appellant entered her back parch and kicked down the sliding glass door leading to the house. (R 841 - 842) Appellant then took her into her baby's room where he cut off her clothes with a knife and tied her up. (R 847, 842) She testified that Valentine told her from the beginning that there were two men helping him , but that she only saw the one man, John. (R 852) She first saw John when he walked into the baby's room and brought the defendant a bag. She testified that she heard John ask appellant, "Man, what do you want me to do with the Bronco? What do you want me to do with the Bronco?" Terance never answered. (R 854) After Ferdinand Porche had been shot and tied up with a wire, she heard Terance tell John that he was supposed to go and stay with Giovanna when she got home. (R 856 - 857) After he took Giovanna to the front bedroom, John said, "Whatever you're going to do, you better do it now because we can't stay here all weekend long." Terance had previously told her that they had planned to stay there all weekend long and at the end he was going to kill them and cut them up into pieces. (R 858) Livia and her husband were put in the back of her Chevy Blazer.

(R 858) She testified that John held her by the shoulders and Terance held her by the legs when they put her in the vehicle. Terance drove and John was in the passenger seat. (R 863) They then drove to the gas station where John filled up the tank with gas. (R 864) After the defendant shot Porche in the face he ran out of bullets. He then asked John for more bullets and came back and shot Porche in the eye. (R 867) He and John then went to the front of the car to lock the doors. Valentine came back, checked her over and said, "Two shots did it." He then locked the door and they left. (R 868 - 869)

Now on appeal, appellant challenges the trial court's admission of John's statements to Valentine as to what he wanted him to do with the Bronco. Appellant claims that this was inadmissible hearsay that does not fall within the exceptions to the hearsay rule and that it was inadmissible under the coconspirator's statements rule as the state failed to prove a conspiracy.

First, the state contends that this statement did not constitute hearsay. The statement was not offered to prove the truth of the matter asserted. The issue was not what Valentine wanted John to do with the Bronco, but was presented to establish that the Bronco existed. This evidence was relevant because two weeks after the murder in question, Valentine went into the travel agency of Nancy Cioll. (R 959) He was driving a maroon, grey and black Ford Bronco. (R 960) Cioll testified that she and appellant went to the restaurant next door where Valentine

confessed to the shootings and demonstrated how he had shot Livia. (R 960 - 961) Valentine told her that he made a mistake by leaving Livia alive. (R 961) Further, a neighbor who lived four houses away from the Porche residence testified that on September 9, 1988, he saw a Ford Bronco parked opposite his house between one and three o'clock. (R 974 - 976) He described the color as faded red and white or faded red and grey. (R 976)

Further, even if this statement did constitute hearsay it was admissible under the res gestae exception to the hearsay rule as either a spontaneous statement or an excited utterance. *Section 90.803(1)* and (2) *Florida Statutes* (1989). As this Court noted in State v. Jano, 524 So.2d 660 (1988), if the statement occurs while an exciting event is still in progress, courts have little difficulty finding that the excitement prompted the statement. Id. at 662, quoting McCormick, Evidence §297 at 856 (3d Edition 1984).

Similarly, in State v. Johnson, 382 So.2d 765 (Fla. 2d DCA 1980), the court held, in a prosecution for sexual battery, that a similar statement was admissible under the res gestae exception. During the course of the sexual battery, Johnson allegedly struck the victim causing a separately charged codefendant to say, "Don't hurt her, Sam." The court stated:

> "We do not necessarily agree that the statement constituted hearsay, but even if it was hearsay we hold the trial court departed fro the essential arequirements of law in failing to find that this statement was admissible under the *res gestae* or excited utterance exception to the hearsay rule."

Under the circumstances of this case, the statement was clearly trustworthy as during the course of the excitement of the crime there would be no reason for John to make up a statement concerning a Bronco. Therefore, the concerns normally surrounding a hearsay statement are alleviated.

Additionally, this statement is afforded further trustworthiness by appellant's failure to challenge the comment at the time it was made.

> In some areas of Florida there is an unwritten evidentiary rule that a statement is not hearsay when it is made in the presence of a party to the action. This "rule" has no support in Florida appellate decisions which have expressly held to the contrary. Under section 90.801, a statement is hearsay if it is made out-of-court and offered to prove the truth of its contents, regardless of the persons present at the time the statement was made. The only time that a statement which would otherwise be hearsay is admissible because it was made in the presence of a party is when the statement was made under circumstances which would reasonably call for a denial of truth of the statement by the party in whose presence it was made. In that situation, the silence of the party is treated under section 90.803(13)(b) as an admission of the truth of the statement made in his presence.

Ehrhardt, Evidence 9801.2 at p. 520 (1992 Ed.); See, also, Daughtery v. State, 269 So.2d 424 (Fla. 1st DCA 1972); Lawrence v. State, 294 So.2d 371 (Fla. 1st DCA 1974); Proffitt v. State, 315 So.2d 461 (Fla. 1975). Clearly, if Valentine did not know he had a Bronco waiting for him outside, he would have questioned John about the statement.

This statement was also admissible as a statement of a coconspirator. Appellant claims, however, that the statement was inadmissible as such because there was not independent evidence of a conspiracy. This argument completely overlooks the facts of this case and the evidence presented to the jury. As previously outlined, the victim testified concerning John's participation in the crime. There was substantial evidence of John's participation absent any hearsay statements. As John's statements were clearly made in furtherance of this conspiracy and the commission of this crime, they were admissible against appellant. Tresvant v. State, 396 So.2d 733 (Fla. 3d DCA 1981).

Finally, even if this statement was erroneously admitted, such error was clearly harmless as it is beyond a reasonable doubt that this statement did not contribute to the conviction in the instant case. Even if this statement had not been presented to the jury, there was unchallenged evidence before them that the defendant owned a gray, black and maroon Bronco and that this Bronco was seen near Porche's house at the time of the kidnapping/murder. (R 959-60, 974-76) Thus, the evidence was merely cumulative. Further, the evidence in the instant case was overwhelming. Based on the foregoing, error, if any, was harmless.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO INTRODUCE AS REBUTTAL, EVIDENCE THE PRIOR INCONSISTENT STATEMENT OF GIOVANNA VALENTINE.

Appellant contends that the trial court erred by allowing the state to introduce Giovanna Valentine's prior trial testimony wherein she testified that her father, Terance Valentine, had never been to the house where she lived with Ferdinand Porche and her mother. (R 1150 - 1151) Appellant contends that this testimony was erroneously admitted because the prosecutor failed to lay a proper predicate for admission of Giovanna's statement in that she was never given an opportunity to explain the prior inconsistent statement. It is the state's position that since this testimony was admitted as substantive evidence under §*90.801(2)(a), Fla. Stat.* 1989, that it was unnecessary for the prosecutor to first give Giovanna Valentine the opportunity to explain the prior statement.

Section 90.801(2) changes the traditional rule that prior statements of witnesses who testify during a trial are admissible to attack the credibility of a witness, but are inadmissible as substantive evidence of the truth of the facts contained in the prior Statements. Ehrhardt, Florida Evidence, 8801.7 (1992 Edition). Under §*90.801(2)* "When a declarant testifies at the trial and is subject to cross examination, a prior inconsistent statement is admissible as substantive evidence of the facts contained in the statement if it was given under oath, subject to

the penalty of perjury at a trial, hearing, or other proceeding or deposition. The admissibility for a substantive purpose ~~is in~~ addition ~~to its~~ traditional use for impeaching the credibility ~~of~~ the declarant." Id. (emphasis added).

The rule specifically provides that a statement ~~is not~~ hearsay if the declarant testifies at the trial or hearing and is subject to crass examination concerning the statement, the statement is inconsistent with his testimony and was given under oath subject to penalty of perjury at a trial, hearing, or other proceeding or in a deposition. *Section 90.801(2)(a).* Nowhere in the rules does it require that this statement be submitted to the declarant for explanation prior to admission. The statement is not hearsay and is therefore admissible. It is not being introduced for impeachment, but rather as substantive evidence. Thus, this evidence may be introduced in the same manner as any other direct evidence the state would present in rebuttal. The rules do not require substantive evidence to be presented to the party far explanation prior to its admission. In order to introduce the prior statement, the state only needs to establish that the statement is inconsistent and that the statement was previously given at a trial or hearing where the declarant was subject to cross examination. Appellant does not challenge the court's finding on either prong of this requirement, Accordingly, the evidence was properly admitted.

Further, even if the trial court erred by allowing the prosecutor to admit the evidence, the error was harmless. As

previously noted, the evidence in the instant case was overwhelming and it is beyond a reasonable doubt that the admission of this statement by Giovanna Valentine was harmless.

Appellant asserts, nevertheless, that the admission of this evidence was not harmless because the state sought to prove that Valentine's statements concerning the contents of Romero's home could only have been gained during the commission of the crime. After the jury heard the tape where Valentine harassed Romero concerning her possessions, she testified that he had only been to her house the one time. (R 908) Thus, appellant contends that Giovanna's testimony that Valentine had been there once before completely undermined the connection the state made from Valentine's statements.

First, even if this was true, the evidence is so overwhelming that proof of this single fact is of little import, Second, what Valentine actually stated was, "...all you had was my furniture...[a]nd all you had was about a half pint of booze...[a]nd the clothes you had were the same fucking clothes I bought you...[a]nd you never had a ring...[n]o chains...[y]ou're driving the truck you stole from me." (R 905-6) Except for the furniture and the booze, Valentine could only have known what tyep jewelry, clothing and car she had by his presence at the scene of the crime. Romero testified that she had taken her jewelry off when she got home on the day off the crime. Thus, she owned jewelry, but was not wearing it at the time of the attack. (R 907-8) Further, it is only logical to assume that if

Valentine had visited her home when she was not there that he would not know what car she was driving on the day of the murder and that he would not have gone through her private belongings in the presence of Giovanna. Based on the foregoing, the state's introduction of Giovanna Valentine's prior trial testimony that her father had not been to the house before was clearly harmless beyond a reasonable doubt.

ISSUE VI

WHETHER THE TRIAL COURT IMPROPERLY IMPOSED DEATH IN THE INSTANT CASE.

Appellant contends that the trial court applied the improper standard in sentencing appellant to death and that had the proper standard been used, the trial court would not have imposed death because this murder was motivated by passion. The state contends that the trial court applied the appropriate standard of review and that the sentence of death was properly imposed in the instant case.

The trial court's written order imposing the death sentence states: "The Court is bound to follow the reasonably returned jury recommendation under the same reasoning applied by the Florida Supreme Court in its Tedder decision.: (R 1536) Based on this statement, appellant contends that the trial court failed to independently weigh the aggravating and mitigating circumstances before imposing the death penalty. To support this position appellant relies on Ross v. State, 386 So.2d 1191 (Fla. 1980). In Ross, this Court remanded for a resentencing where the record showed that the trial court gave undue weight to the jury's recommendation of death and did not make an independent judgment of whether or not,the death penalty should be imposed. This Court based its decision on the trial court's express statement that, "This Court finds no compelling reason to override the recommendation of the jury. Therefore, the advisory sentence of the jury should be followed." In reviewing the court's order, this Court stated:

> "Although this Court in Tedder v. State, supra, and Thompson, supra, stated that the jury recommendations under our trifurcated death penalty statute should be given great weight and serious consideration, this does not mean that if the jury recommends a death penalty, the trial court must impose the death penalty. The trial court must still exercise its reasoned judgment in deciding whether the death penalty should be imposed.
>
> Id. at 1197.

The record in the instant case clearly shows that the trial court exercised its reasoned judgment in deciding whether the death penalty should be imposed. The order thoroughly sets out the aggravating circumstances and the mitigating circumstances considered by the court. (R 1534 - 1536) Further, the written order shows that in making this independent judgment, the trial court considered mitigating facts not presented to the jury. (R 1536) This Court has consistently held, even where a trial court has acknowledged that he jury recommendation must be given great weight, that where the record shows the trial court independently weighed the aggravating factors and mitigating factors that a sentence of death will be upheld. See, Grossman v. State, 525 So.2d 833 (Fla. 1988); Tompkins v. State, 502 So.2d 415, 421 (Fla. 1987). As the record in the instant case shows the trial court independently reviewed the aggravating and mitigating circumstances no error was committed,

Appellant further contends that there was a reasonable likelihood that the sentencing judge at bar might have imposed the life sentence if he did not believe himself "bound" by the

jury recommendation in light of the facts of this case. Appellant contends that defendants who, like appellant, are convicted of murders motivated by passion, usually receive sentences of life imprisonment. Cf. Farinas v. State, 569 So.2d 425 (Fla. 1990); Irizarry v. State, 496 So.2d 822 (Fla. 1986); Amoros v. State, 531 So.2d 1256 (Fla. 1988). Your appellee contends that the sentence of death was properly imposed in the instant case as the aggravating factors established below sat Valentine and this killing apart from the average capital defendant. The imposition of the death sentence was proportionate to other capital cases where the sentence has been upheld. Cf. Brown v. State, 473 So.2d 1260 (Fla. 1985).

In addition to the jury's recommendation of death in the instant case, the trial court found four aggravating factors; (1) the defendant was previously convicted of a prior violent felony, (2) the capital crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of kidnapping, (3) the crime was cold, calculated and premeditated and (4) was also especially wicked, evil atrocious or cruel.[2] In support of the cold, calculated and premeditated and the wicked, evil, atrocious or cruel factors, the trial court found:

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[2] The trial court combined the aggravating factors of cold, calculated and premeditated with the factor of wicked, evil, atrocious or cruel. (R 1534)

> "The defendant armed himself with a firearm, forced his way into the home of his ex-wife, grabbed her by the hair, forced her into a bedroom, cut off her clothes, threatened to cut out her reproductive organs, applied a mouth gag and bound her hands and feet with wire. When her husband arrived home, the defendant shot him in the elbow and back, stabbed him in the buttocks, forced him to drag himself to the bedroom where his wife lay, and pistol whipped him to such an extent that hi3 jaw was broken and hi5 teeth were knocked out. The defendant then placed both bound, gagged and conscious victims in the back of their Chevy Blazer, drove to a remote area and, in the presence of his ex-wife, murdered her husband by shooting him in the jaw and, after reloading in the eye. The defendant then shot his ex-wife twice in the back of the head after telling her that he could not allow her to stay alive and that he was going to kill her. When his ex-wife pretended to be dead, the defendant left the scene thinking both victims were dead and two weeks later admitted to a witness that he had not only shot both victims but had made a mistake since it was his understanding that his ex-wife was still alive." (R 1534 - 1535)

In addition to these facts as found by the trial court the evidence presented at trial showed that Valentine and his ex-wife had been separated for a considerable time and that she had already remarried and had a new child. The evidence also showed that Valentine thoroughly planned these killings before arriving at the victim's home. Livia Romero testified that the defendant told her that the plan was to keep them at the house all weekend, torture them and then to kill them. (R 858) The record also shows that he had planned this to the extent that he was assisted

by at least one other person in the commission of the crimes.[3] This murder was carried out in a calculated fashion. Additionally, Livia Romero testified after having been beaten in the jaw with a gun, and prior to being shot, her husband asked God to let him pass out because the pain was so much that he needed to pass out. (R 857)

In mitigation, the court found that the defendant had no significant history of prior criminal activity, that he was forty-one at the time of the crime, and that he had been a good father, nonviolent and close family man. (R 1535 - 1536) When considered in the context of the facts of this case, the aggravating circumstances clearly outweighed the existing mitigating circumstances.

The sentence of death was properly imposed even though the victim in the instant case was married to the defendant's ex-wife. Appellant's reliance on Irizarry, Amoros and Farinas is misplaced. In each of those cases, this Honorable Court found that the killings were the result of heated, domestic confrontations and, although premeditated, were most likely committed upon reflection of a short duration. The murders in the instant case were not the result of a sudden reflection, but rather the result of a cold, calculated and premeditated plan formulated over a period of time sufficient to accord reflection

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[3] Romero testified that although she only saw Valentine and John, Valentine told her there as a third person involved, (R852)

and contemplation of the defendant's actions. The instant case was more akin to cases such as Porter v. State, 564 So.2d 1060, 1064 - 1065 (Fla. 1990), and Brown v. State, 565 So.2d 304, 309 (Fla. 1990), wherein this Court upheld "domestic" style cases on the grounds of proportionality. Thus, there is absolutely no support for appellant's contention that the trial court applied the incorrect standard and that if he had had the correct standard, he would have imposed the life sentence. The record clearly supports the imposition of a death sentence in the instant case and no error was committed.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, appellee would pray that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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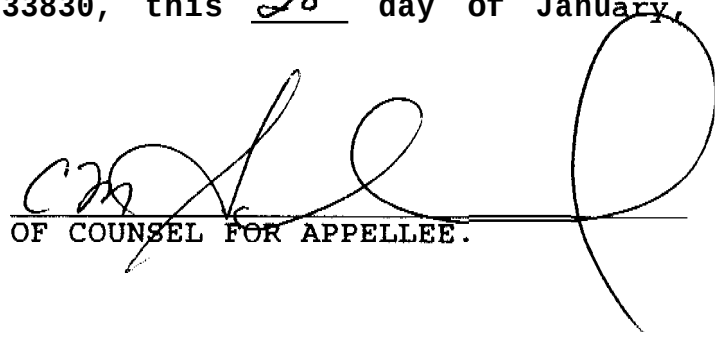
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 28 day of January, 1992.



OF COUNSEL FOR APPELLEE.