02077072

070

OBTS NUMBER 00122171149

COMPLAINT/ARREST AFFIDAVIT - CIRCUIT/COUNTY COURT - PINELLAS COUNTY, FLORIDA

Felony ☐ Misdemeanor ☒ Ordinance ☐ Non-Criminal ☐ Warrant ☐ Traffic ☐

Charge: Battery

Defendant's Name (Last, First, Middle)	CIS Code	Report No.	Court Case No.
Minton, Robert S		99-29775	9932857MMANO-E

Alias	DOB	Sex	Race	Ht.	Wt.	Hair	Eyes	Skin
	10-3-46	M	W	511	240	Brn	Hzl	Med

Driver's License No.	State	Residence Type
TOMNR46031	NH	☐ 1. City ☐ 2. County ☐ 3. Florida ☒ 4. Out-of-State

Local Address (Street, City, State) — Zip Code — Telephone — Place of Birth: Nashville TN — Citizenship: USA

Permanent Address (Street, City, State, Zip Code): 137 Fremont Rd Sandown NH 03873 — Telephone: 603-887-4145

Scars, Tattoos, Unique Physical Features: Left Knee — Employed by/School: Self employed

Weapon Seized/Type: 1. Yes ☒ 2. No ☐ Poster board sign — Indication of Drug Influence: Y ☐ N ☒ UNK ☐ — Indication of Alcohol Influence: Y ☐ N ☒ UNK ☐

Co-defendant's Name (Last, First, Middle)	DOB	Sex	Race	In Custody
N/A				Yes ☐ No ☐ Felony ☐ Misd. ☐
Co-defendant's Name (Last, First, Middle)	DOB	Sex	Race	In Custody
N/A				Yes ☐ No ☐ Felony ☐ Misd. ☐

The undersigned certifies and swears that he has just and reasonable grounds to believe, and does believe that the above named defendant on the 31 day of Oct, 19 99, at approximately 10:39 a.m. ☐ p.m. ☒ at 210 S. Ft Harrison Ave in Pinellas County did:

commit the offense of battery, to wit; Subject was walking on the sidewalk in front of 210 S. Ft Harrison Ave with a picket sign. Victim was following, and video taping Subject. Subject started to walk across the street, with victim following. Subject turned, and shouted at victim to stop following him. Subject, with his right hand, shoved the picket sign into the face of victim. Victim suffered small cut above left eye and slight abrasion under left eye.

List other traffic citations:

Contrary to Florida Statute ☒ 784.03

County ☐ City ☐ State ☐ Ordinance

Amount of Bond 250 | Aggravating Factors

Booking Officer | Bond out 10/31/99 (Mo./Da./Yr.) Time (a.m.) (p.m.) | By CB

Arrest Date 10-31-99 Time 11:30 a.m. ☐ p.m. ☒

STATE OF FLORIDA - County of Pinellas

The foregoing instrument was acknowledged before me this 01 day of Nov, 1999 by M. Beaudette, who is personally known to me or who has produced _____ as identification and who did/did not take an oath.

Signature of Person Taking Acknowledgement

T. SMITH

Name of Acknowledger (Typed, Printed or Stamped)

FS 117.3

Title or Rank — Serial # / Prov.

Affiant's Signature — Agency: CPD

Mark R. Beaudette 981848

Printed Name — SPN

REQUEST FOR INVESTIGATIVE COST RECOVERY

The Clwr PD (law enf. agency) requests and has documented investigative costs amounting to $ 117.00, which have been incurred as a direct result of investigating this case. The above referenced law enf. agency requests in accordance with Florida State Statute 939.01(1), "Judgment for Costs on Conviction" that this amount be included and entered in judgment rendered against the defendant(s).

Date	Officer	Hours	X	Pay Rate	or /	Cost
10-31-99	Beaudette	3.0		18.00		54.00
10-31-99	Heck	.5		18.00		9.00
10-31-99	J. Moore	3.0		18.00		54.00
Other - Describe:						
Continuation Sheets						
					Total	117.00

1999 OCT 31 AM 11:36

NOTICE TO APPEAR ONLY

☐ **MISDEMEANOR** — You **MUST** appear at Criminal Justice Center, Courtroom 17, Third Floor, 14250 49th Street North, Clearwater, Florida, on the ____ day of _____, 19 ____, at _____ a.m. ☐ p.m. ☐.

☐ **ORDINANCE VIOLATION** — You **MUST** comply with **EITHER** A or B:

A. Comply with the Waiver Information on the reverse side of this form and pay a fine in the amount of $ _____ for a Category _____ offense within **ten** (10) calendar days of this Notice.

B. Appear at Criminal Justice Center, 14250 49th Street, Courtroom 14, Third Floor, Clearwater, Florida, on the ____ day of _____, 19 ____, at _____ a.m. ☐ p.m. ☐.

☐ **NON-CRIMINAL VIOLATION** — You **MUST** pay a fine in the amount of $ _____ within **ten** (10) calendar days or comply with the non-criminal violation information on the bottom of the reverse side of this form.

I AGREE TO APPEAR AT THE TIME AND PLACE DESIGNATED ABOVE TO ANSWER THE OFFENSE CHARGED OR TO PAY THE FINE SUBSCRIBED. I UNDERSTAND THAT SHOULD I WILLFULLY FAIL TO APPEAR BEFORE THE COURT AS REQUIRED BY THIS NOTICE TO APPEAR, OR PAY THE FINE REQUIRED BY THE DATES SET OUT ON THIS FORM, THAT I MAY BE HELD IN CONTEMPT OF COURT AND THAT A WARRANT FOR MY ARREST WILL BE ISSUED. I HEREBY CERTIFY BY MY SIGNATURE THE BELOW LISTED ADDRESS IS MY CORRECT ADDRESS.

Defendant's Signature — Address — Date of Receipt of Notice

Co Cr 59 (Revised 03/97) Copies to: White - Court, Blue - State Attorney, Green - Jail, Pink - Police Dept., Goldenrod - Defendant

WD2/CoCr/(59A,b,c,d) 3/14/97

COURT COPY

CASH APPEARANCE BOND RECEIPT
PINELLAS COUNTY SHERIFF'S OFFICE

NO. 00438272

In the State of Florida, County of Pinellas
Rec'd the sum of Two Hundred Fifty 00 Date 11-1-99
Presented by Dep Dollars $ 250.-
Cash ✓ MO/CC#

DEFENDANT: SPN # 02077072

Minton, Robert A.
Last First MI

137 Fremont Rd.
Street Apt #

Sanford, NH 03873
City State Zip Code

DEFENDANT'S FULL SIGNATURE

DEPOSITOR: DOB 4/8/52

Brooks, Stacy Stewart
Last First MI

1702 Lakes Dr.
Street Apt #

Atlanta Ga 30339
City State Zip Code

DEPOSITOR'S FULL SIGNATURE

Defendant shall appear before the Circuit / (County) / Traffic Court in Pinellas County, Florida at — am / pm,
on the date of COC or at the Call of the Court (COC) to answer to the following charge(s):

Charge #1 Battery Case # 99 32857 MMANO $ 250.-
Charge #2 / Case # / $ /
Charge #3 / Case # / $ /

NOTE: Section 939.17, Florida Statutes, authorizes the Clerk, under the direction of the Court, to deduct any court fines and costs from the cash bond. Upon defendant's non-appearance, the monies could be estreated by order of the court.

This bond taken and approved
by: EVERETT S. RICE, SHERIFF
PINELLAS COUNTY, FLORIDA

By: B Braun
Payroll # 477
Location taken Jail

Form 691-760-57-10 (Rev 4/96)
WHITE - Fiscal Copy CANARY - Court Copy BLUE - Depositor Copy GREEN - Permanent Copy

IN THE COUNTY COURT FOR
PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION E

STATE OF FLORIDA

v.

CASE NO. CTC 99-32857-MMANO
BATTERY

ROBERT S. MINTON, JR.
SPN 02077072

NOTICE OF APPEARANCE

DENIS M. de VLAMING and DOUGLAS M. de VLAMING, co-counsel for defendant, enter their notice of appearance on behalf of the above defendant in the above cause.

PLEA OF NOT GUILTY

Defendant enters a plea of not guilty in the above cause.

FILED
CRIMINAL JUSTICE CENTER
99 NOV 18 AM 10:32
Kathleen F. DeBlaker
Clerk Circuit/County Court

REQUEST FOR JURY TRIAL

Defendant requests a trial by jury.

REQUEST FOR DISCOVERY

Defendant requests all discovery permitted or required under Florida Rules of Criminal Procedure 3.220.

REQUEST FOR STATEMENT OF PARTICULARS

Pursuant to Florida Rules of Criminal Procedure 3.140(n), the defendant requests that the State provide the date, time and place of the offense.

REQUEST FOR COPY OF INFORMATION

Defendant requests a copy of the information filed herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. Mail to the office of the State Attorney, Criminal Justice Center, 14250 49th Street North, Clearwater, Florida 33760, this 17 day of November, 1999.

Denis M. de Vlaming, P. A.
Attorney at Law
1101 Turner Street
Clearwater, Florida 33756
Telephone 813-461-0525
Fax 813-461-7950

DENIS M. de VLAMING, ESQ.
Co-Counsel for Defendant
SPN 2574/FBN 150058

DOUGLAS M. de VLAMING, ESQ.
Co-Counsel for Defendant
SPN 01256656/FBN 896268

IN THE COUNTY COURT FOR
PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION E

STATE OF FLORIDA

v.

CASE NO. CTC 99-32857-MMANO
BATTERY

ROBERT S. MINTON, JR.
SPN 02077072

WAIVER OF SPEEDY TRIAL

DEFENDANT, through the undersigned counsel, hereby waives the right to a speedy trial, as provided in Florida Rule of Criminal Procedure 3.191, in the above case.

I HEREBY CERTIFY that a copy of the foregoing was furnished by personal service to the State Attorneys Office, 14250 49th Street North, Clearwater, FL 34620, this 29 day of November, 1999.

DENIS M. de VLAMING, ESQ.
Co-Counsel for Defendant
SPN 2574/FBN 150058

DOUGLAS M. de VLAMING, ESQ.
Co-Counsel for Defendant
SPN 01256656/FBN 896268

Denis M. de Vlaming, P.A.
Attorney at Law
1101 Turner Street
Clearwater, Florida 33756
telephone (727) 461-0525

IN THE COUNTY COURT
FOR THE SIXTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR PINELLAS COUNTY

FALL TERM, 1999

MISDEMEANOR INFORMATION

CTC99-32857MMANO-E

STATE OF FLORIDA

VS.

ROBERT S. MINTON
SPN 02077072
W/M; DOB: 10/03/46
SSN: 409-80-4568

BATTERY, 1°M

IN THE NAME AND BY THE AUTHORITY FOR THE STATE OF FLORIDA:

BERNIE McCABE, State Attorney for the Sixth Judicial Circuit of Florida, in and for Pinellas County, prosecuting for the State of Florida, in the said County, under oath, Information makes that

ROBERT S. MINTON

in the County of Pinellas and State of Florida, on the 31st day of October, in the year of our Lord, one thousand nine hundred ninety-nine, in the County and State aforesaid, did then and there actually and intentionally touch or strike or cause bodily harm to Richard Howd against the will of Richard Howd; contrary to Chapter 784.03, Florida Statutes, and against the peace and dignity of the State of Florida. [1B]

STATE OF FLORIDA
PINELLAS COUNTY

Personally appeared before me BERNIE McCABE, the undersigned State Attorney for the Sixth Judicial Circuit of Florida, in and for Pinellas County, or his duly designated Assistant State Attorney, who being first duly sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which if true, would constitute the offense therein charged; hence this information is filed in good faith in instituting this prosecution.

Assistant State Attorney for the Sixth Judicial Circuit of the State of Florida, Prosecuting for said State

The foregoing instrument was acknowledged before me this _____ day of _____, 2000 by William Tyson, who is personally known to me and who did take an oath.

Jeanne M. Whitefield
NOTARY PUBLIC

CW99-029775 WT:0114GN21

Jeanne M. Whitefield

Jeanne M. Whitefield
MY COMMISSION # CC872033 EXPIRES
September 20, 2003
BONDED THRU TROY FAIN INSURANCE, INC.

MM0051

UNTY COURT, PINELLAS COUN , FLORIDA
MISDEMEANOR DIVISION

14250 49TH ST. NORTH
CLEARWATER, FL 34622
(727) 464-6800
01/18/2000
SPN NO: 02077072

STATE OF FLORIDA VS ROBERT S MINTON
DIVISION: E
CASE NUMBERS(S): CHARGES(S):
99-32857-MM BATTERY

NOTICE OF CRIMINAL MISDEMEANOR ARRAIGNMENT HEARING

***** PLEASE BRING THIS NOTICE WITH YOU *****
***** APPROPRIATE ATTIRE REQUIRED *****

THE ABOVE NUMBERED CASE(S) IS HEREBY SET AT 01:30 P.M. ON THURSDAY, FEBRUARY 3, 2000 COURTROOM 15, THIRD FLOOR, CRIMINAL JUSTICE CENTER, 14250 49TH STREET NORTH, CLEARWATER, FLORIDA.

ALL INTERESTED PARTIES LISTED BELOW ARE HEREBY NOTIFIED OF SAID ARRAIGNMENT DATE.

YOU ARE FURTHER NOTIFIED THAT COURT COSTS AND OTHER MANDATORY AND DISCRETIONARY COSTS MAY BE IMPOSED AGAINST YOU. IF YOU ARE REQUESTING APPOINTMENT OF A PUBLIC DEFENDER, YOU MUST BRING A $40.00 FEE TO THIS HEARING. IF YOU FAIL TO APPEAR, A WARRANT WILL BE ISSUED FOR YOUR ARREST.

ROBERT S MINTON
10200 N ARMENIA AV
TAMPA FL 33612

DENIS M DEVLAMING
ATTORNEY AT LAW
1101 TURNER STREET
CLEARWATER FL 33756

00438272
STACY S BROOKS

1702 LAKES DR
ATLANTA, GA 30339

IF YOU ARE A PERSON WITH A DISABILITY WHO NEEDS ANY ACCOMODATION IN ORDER TO PARTICIPATE IN THE PROCEEDING, YOU ARE ENTITLED, AT NO COST TO YOU, TO THE PROVISION OF CERTAIN ASSISTANCE. WITHIN TWO (2) WORKING DAYS OF YOUR RECEIPT OF THIS NOTICE OF ARRAIGNMENT, PLEASE CONTACT THE HUMAN RIGHTS OFFICE, 400 S. FT. HARRISON AVE., STE. 300, CLEARWATER, FL 33756, (727) 464-4062 (V/TDD).

Karleen F. De Blaker
KARLEEN F. De BLAKER
CLERK OF THE CIRCUIT COURT

CF 2-0

IN THE COUNTY COURT FOR
PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA

CRIMINAL DIVISION E

v.

CASE NO. CTC 99-32857-MMANO
BATTERY

ROBERT S. MINTON, JR.
SPN 02077072

MOTION TO WAIVE DEFENDANT'S PRESENCE AT PRE-TRIAL CONFERENCE

Defendant, by and through his undersigned counsel, moves this Honorable Court for an order allowing the defendant to waive his presence in writing at any pre-trial conference in the above matter for the following grounds:

1. The defendant is an out-of-state resident and his appearance at a pre-trial conference where a disposition would not be held would amount to a hardship.

2. The defense has checked with the Office of the State Attorney and they have no objection to this request.

3. The defendant has executed a Waiver of Appearance and understands its ramifications and is expressly requesting that counsel appear on his behalf.

Wherefore, defendant moves this Honorable Court for an order permitting the defendant to waive his presence at any pre-trial conference.

Denis M. de Vlaming, P.A.
Attorney at Law
1101 Turner Street
Clearwater, Florida 33756
telephone (727) 461-0525

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail to State Attorney's Office, Criminal Justice Center, 14250 49th Street North, Clearwater, Florida, 33760, this 19th day of January, 2000.

DENIS M. de VLAMING, ESQ.
ATTORNEY FOR DEFENDANT
SPN: 00002574
FLA. BAR: 150058

Denis M. de Vlaming, P.A.
Attorney at Law
1101 Turner Street
Clearwater, Florida 33756
telephone (727) 461-0525

IN THE COUNTY COURT FOR PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA

v.

ROBERT S. MINTON, JR.
SPN 02077072

CRIMINAL DIVISION E

CASE NO. CTC 99-32857-MMANO
BATTERY

NOTICE OF HEARING

PLEASE TAKE NOTICE that defendant's Motion To Waive defendant's Presence At Pre-Trial Conference in the above case has been set before the Honorable Robert J. Morris, Jr., Courtroom 15, Criminal Justice Center, Clearwater, Florida, on **Monday, January 31, 2000**, at 8:30 a.m., or as soon thereafter as counsel may be heard.

I HEREBY CERTIFY that a copy of the foregoing was furnished by personal service to the State Attorney's Office, 14250 49th Street N., Clearwater, FL 33760, this 24th day of January, 2000.

DENIS M. de VLAMING, ESQ.
ATTORNEY FOR DEFENDANT
SPN 00002574
FLA BAR ID NO. 150058

FILED
CRIMINAL JUSTICE CENTER
00 JAN 24 AM 9:19
Karleen F. DeBaker
Clerk Circuit/County Court

Denis M. de Vlaming, P.A.
Attorney at Law
1101 Turner Street
Clearwater, Florida 33756
telephone (727) 461-0525

GEGU IN THE COUNTY COURT FOR PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA CASE NO. CTC9932857MMANO SAX: WHITEFIELD,JEANNE RUPE

VS LIST OF WITNESSES : ANSWER TO DEMAND FOR DISCOVERY

MINTON,ROBERT S

NAME	RESIDENT	BUSINESS PAGE: 2
MOORE,JAMES H 00002138 WIR	NO RESIDENCE ADDRESS	645 PIERCE STREET CLEARWATER FL 33756
STEWART,MICHAEL 01229120 WIR	NO RESIDENCE ADDRESS	645 PIERCE STREET CLEARWATER FL 33756

I DO CERTIFY THAT COPY (COPIES) HEREOF HAVE BEEN FURNISHED TO ATTORNEY FOR DEFENDANT, DENIS DEVLAMING, ESQ , THIS 26 DAY OF JAN MAIL ,2000.

BERNIE McCABE
STATE ATTORNEY
SIXTH JUDICIAL CIRCUIT OF FLORIDA

BY
ASSISTANT STATE ATTORNEY

ALL WITNESSES ARE CATEGORY "A" WITNESSES UNLESS OTHERWISE NOTED

IN THE COUNTY COURT FOR PINELLAS COUNTY, FLORIDA

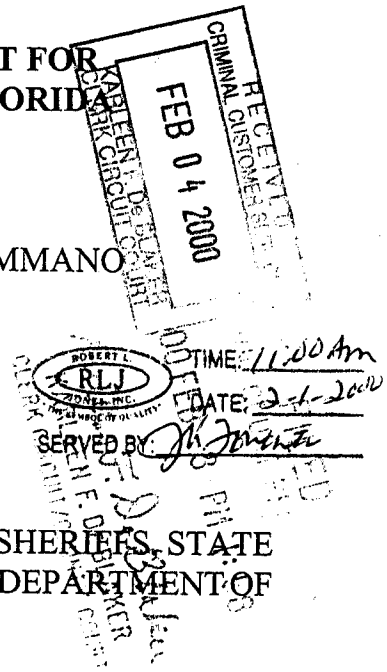
STATE OF FLORIDA :

v. :

ROBERT S. MINTON, JR.
SPN 02077072 :

CRIMINAL DIVISION E

CASE NO. CTC 99-32857-MMANO
BATTERY



WITNESS SUBPOENA FOR HEARING

THE STATE OF FLORIDA TO ALL AND SINGULAR THE SHERIFFS, STATE ATTORNEY INVESTIGATORS, AND AGENTS OF THE FLORIDA DEPARTMENT OF CRIMINAL LAW ENFORCEMENT OF SAID STATE:

YOU ARE HEREBY COMMANDED TO SUBPOENA

Lt. Donald Hall, Clearwater Police Dept., 645 Pierce Street, Clearwater, FL 33756

personally to be and appear before one of the Judges of our said Court, in chambers, 545 1st Avenue North, Room 300, St. Petersburg, Florida, on **Monday, February 7, 2000**, at 1:30 p.m, to testify in the above-styled cause. If you fail to appear, you may be in contempt of Court.

You are subpoenaed to appear by Denis M. de Vlaming, Esq., and unless excused from this subpoena by this attorney or the Court, you shall respond to this subpoena as directed.

January 31, 2000
DATE

By: _____
DENIS M. de VLAMING, ESQ.
FOR THE COURT

Denis M. de Vlaming, Esq.
1101 Turner Street
Clearwater, FL 33756
(727) 461-0525

MM0117

COUNTY COURT, PINELLAS COUNTY, FLORIDA
MISDEMEANOR DIVISI

14250 49TH ST. NORTH
CLEARWATER, FL 34622
PHONE: (727) 464-6800
01/13/2000
SPN NO: 02077072

STATE OF FLORIDA VS ROBERT S MINTON
DIVISION: E
CASE NUMBERS(S):
99-32357-MM

CHARGES(S):
BATTERY

NOTICE OF PRE-TRIAL HEARING

***** PLEASE BRING THIS NOTICE WITH YOU *****
***** APPROPRIATE ATTIRE REQUIRED *****

THE ABOVE NUMBERED CASE(S) IS HEREBY SET AT 08:30 A.M. ON THURSDAY, FEBRUARY 3, 2000 COURTROOM 15, THIRD FLOOR, CRIMINAL JUSTICE CENTER, 14250 49TH STREET NORTH, CLEARWATER, FLORIDA.

ALL INTERESTED PARTIES LISTED BELOW ARE HEREBY NOTIFIED OF SAID PRE-TRIAL DATE. DEFENDANT'S PERSONAL APPEARANCE IS MANDATORY.

YOU ARE FURTHER NOTIFIED THAT COURT COSTS AND OTHER MANDATORY AND DISCRETIONARY COSTS MAY BE IMPOSED AGAINST YOU. IF YOU ARE REQUESTING APPOINTMENT OF A PUBLIC DEFENDER, YOU MUST BRING $40.00 FEE TO THIS HEARING. IF YOU FAIL TO APPEAR, A WARRANT WILL BE ISSUED FOR YOUR ARREST.

** N O T I C E
IF DEFENDANT IS TO BE REPRESENTE BY AN ATTORNEY THE ATTORNEY MUST BE OBTAINED BY THE DATE OF THE PRE-TRIAL HEARING. NO CONTINUANC TO OBTAIN COUNSEL WILL BE GRANTED AFTER THE PRE-TRIAL DATE ALL DISCOVERY AND MOTIONS MUST BE COMPLETED BY THE DATE OF THE PRE-TRIAL HEARING OTHER THAN MOTIONS TO SUPPRESS OR OTHER EVIDENTIARY MOTIONS.

IF YOU ARE A PERSON WITH A DISABILITY WHO NEE ANY ACCOMMODATION IN ORDER TO PARTICIPATE IN THE PROCEEDING, YOU ARE ENTITLED, AT NO COST YOU, TO THE PROVISION OF CERTAIN ASSISTANCE. WITHIN TWO (2) WORKING DAYS OF YOUR RECEIPT THIS NOTICE OF PRE-TRIAL HEARING PLEASE CONTA THE HUMAN RIGHTS OFFICE, 400 S. FT. HARRISON STE. 300, CLEARWATER, FL 33756, (727) 464-4062(V/TDD).

ROBERT S MINTON
137 FREMONT RD
SANDOWN NH 03873

DENIS M DEVLAMING
ATTORNEY AT LAW
1101 TURNER STREET
CLEARWATER FL 33756

00438272
STACY S BROOKS

1702 LAKES DR
ATLANTA, GA 30339

Karleen F. De Blaker
KARLEEN F. De BLAKER
CLERK OF THE CIRCUIT COURT

CF 2-0

CTC 99-32857MMANO

GEGU IN THE COUNTY COURT FOR PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA CASE NO. CTC9932857MMANO SAX: WHITEFIELD,JEANNE RUPE

VS ROBERT S. MINTON SPN 02077072 : LIST OF WITNESSES : ANSWER TO DEMAND FOR DISCOVERY

MINTON,ROBERT S

NAME	RESIDENT	BUSINESS
BEAUDETTE,MARK K 00981848 ARO	NO RESIDENCE ADDRESS	645 PIERCE ST CLEARWATER FL 33756
BROOKS,STACY STEWARD 02077078 WIP	1702 LAKES DR ATLANTA GA 30339	NO BUSINESS ADDRESS
BYRNES,JESSICA 02097135 WIP	500 OSCEOLA AVE N #602 CLEARWATER FL 33755	NO BUSINESS ADDRESS
DELLER,PHILLIP J 02097133 WIP	551 SATURN AVE N CLEARWATER FL 33755	NO BUSINESS ADDRESS
HECK,RONALD L 00002114 WIR	NO RESIDENCE ADDRESS	645 PIERCE STREET CLEARWATER FL 33756
HOWD,RICHARD W 02077073 WIV	551 N SATURN AVE #L3 CLEARWATER FL 33755	NO BUSINESS ADDRESS
KRAMER,KEN L 02097134 WIP	15 TURNER ST APT 1 CLEARWATER FL 33755	NO BUSINESS ADDRESS

DENIS DEVLAMING, ESQ

I DO CERTIFY THAT COPY (COPIES) HEREOF HAVE BEEN FURNISHED TO ATTORNEY FOR DEFENDANT, , BY U.S. Mail, THIS 26 DAY OF JAN ,2000.

BERNIE McCABE
STATE ATTORNEY
SIXTH JUDICIAL CIRCUIT OF FLORIDA

BY
ASSISTANT STATE ATTORNEY

ALL WITNESSES ARE
CATEGORY "A" WITNESSES
UNLESS OTHERWISE NOTED

CTC 99-32857MMANO-

IN THE CIRCUIT/COUNTY COURT FOR PASCO/PINELLAS COUNTY, FLORIDA
ROBERT S. MINTON CASE NO. 077072

FILED
CRIMINAL JUSTICE CENTER
00 JAN 25 PM 2:56

STATE OF FLORIDA
VS #077072
Robert S. Minton

ANSWER TO DEMAND FOR DISCOVERY

The State of Florida, through the undersigned State Attorney of the Sixth Judicial Circuit, pursuant to defendant's Notice of Discovery and pursuant to Rule 3.220 RCrP, as amended, submits the following information:

1. The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto, are set forth in the attached list which by reference is incorporated herein as through set forth in haec verba.

2. The above list is not all-inclusive as there may be further names and addresses contained in witness statements which will be supplied as stated herein.

3. The following items as indicated are in the State's possession or control and are available for your inspection at the office of the undersigned upon timely and reasonable notice to the undersigned. If you desire to copy and/or photograph same, copies will be provided upon your signed receipt for same. The name(s) of confidential informant(s) will not be supplied unless the State intends to use same as witness(es) at the trial or unless required by court order after notice and hearing. Please give the undersigned 48 hours (excluding weekends and holidays) written notice of the time you will appear for inspection of the disclosures herein and set the time for same between 1:00 and 5:00 P.M. any regular business day:

	YES	NO
a. Statements given by persons listed in paragraph "1" above.	☑	☐
b. Written, recorded and/or oral statements of the accused.	☑	☐
c. Written, recorded and/or oral statements of co-defendants, if joint trial.	☐	☑
d. Recorded Grand Jury Testimony of accused.	☐	☑
e. Material or information provided by confidential informer.	☐	☑
f. Tangible papers not obtained from or belonging to accused which the State intends to use at hearing or trial.	☑	☐
g. Tangible papers obtained from or belonging to accused.	☐	☑
h. Electronic surveillance of premises of accused or of conversations to which accused was party. V/O Es	☑	☐
i. Search and seizure.	☑	☐
(1) Documents relating thereto.	☑	☐
j. Reports or statements of experts.	☐	☑

DENIS DEVLAMING,
ESQ.

4. All tangible objects as provided by RCrP 3.220, unless otherwise indicated below, may be inspected photographed and tested during the regular and ordinary business hours at:
a. CPD b. SPD c. NONE _____

This document will serve as authorization for the attorney for the defendant, _____, or his designated representative, to conduct the said discovery of tangible objects, in the above-styled cause, with reference to police departments' case numbers as follows:
a. # CPD b. # 99-29775

5. The State has herein submitted its witness list and expects the defense to submit its corresponding witness list within seven days as provided RCrP 3.220. It is requested that defense disclosures of witness statements, reports or experts and tangible papers and objects be made at the time you appear for inspection of items detailed in Paragraph "3" above, but in no case later than 15 days from the time you inspect the State's evidence.

6. At this time, the State is aware of the following evidence which falls within the purview of RCrP 3.220(b)(2), if any:

NONE

18.00 P

DENIS DEVLAMING

IN THE COUNTY COURT, PINELLAS COUNTY, FLORIDA
CASE# CTC-99-32857-MMANO

AFFIDAVIT OF SERVICE, STATE OF FLORIDA

STATE OF FLORIDA Plaintiff(s)

vs

ROBERT S. MINTON, JR. SPN: 02077072 Defendant(s)

Before me, the undersigned authority, personally appeared, JOHNNY V. TOUCHTON, being first duly sworn, deposes and says:

1. Is over the age of 18 years.
2. Is not a party to nor interested in the outcome of the above entitled suit.
3. Received the attached WITNESS SUBPOENA FOR HEARING FOR FEBRUARY 7, 2000 AT 1:30PM, PRAECIPE FOR WITNESS SUBPOENA FOR HEARING
   directed to LT. DONALD HALL
   CLEARWATER POLICE DEPARTMENT
   on 1/31/00 at 3:17:50 PM
4. Affiant personally **served** same upon the above who was then
   at 645 PIERCE STREET, CLEARWATER FL on 2-1-2000 at 11:00 AM
   — Alternate Address
5. Affiant is a SPECIAL PROCESS SERVER appointed by _____ to serve NON-ENFORCEABLE PROCESS for the Circuit and County Courts in and for _____ County, Florida
   WITNESS FEE PROVIDED: $ 8.60

— **INDIVIDUAL SERVICE:** By delivering to the within named person a true copy of this process, with the date and hour of service endorsed thereon by me. At the same time, I delivered to the within named person a copy of the complaint, petition, or other initial pleading or paper.
— Records Custodian: _____

— **SUBSTITUTE SERVICE:** By leaving a true copy of this process, with the date and hour of service endorsed thereon by me, and a copy of the complaint, petition, or other initial pleading or paper, at the within named person's place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents.
NAME _____ RELATIONSHIP _____

— **SUBSTITUTE AT P.O.E.** to authorized agent to accept. _____

— **CORPORATE SERVICE:** By leaving a true copy of this process, with the date and hour of service endorsed there on by me, and a copy of the complaint, petition, or other initial pleading or paper to: Na _____ as Title: _____
of CORPORATE NAME _____ ,per F.S. 48.081(1)(a).
F.S. 48.081(1)(b)(c)&(d) and 2: In the absence of the president, vice president, or other head of the corporation; served cashier, treasurer, secretary, general manager, director, officer or business agent in the state.
F.S. 48.081(3): Served on the agent designated by the corporation under F.S. 48.091; or on any employee at the corporation's place of business.

— **POSTED SERVICE:** After diligent search and at least 2 attempts have been made, by attaching a copy of this process, together with a copy of the complaint or petition to a conspicuous place on the property within. The above name tenant could not be found and there was no person of the tenant's family over fifteen (15) years of age at _____ COUNTY county, Florida, upon whom service could be made. Two attempts at least six hours apart:
Date _____ Time _____ ; Date _____ Time _____

— Notice/Letter (Posted on first attempt)

✓ — **GOVERNMENT AGENCY:** By delivering a true copy of this process, with the date and hour of service endorsed theron by me, and a copy of the complaint, petition, or other initial pleading or paper to: Stephanie Storey as (title) Lieutenant O'Brien of the within named to wit: GOVERNMENTAL AGENCY Clearwater Police Dept, public agencies, service on the president, mayor, chairman or other head thereof, and in his absence, on the vice president, vice mayor, or vice chairman, or in the absence of all of the above, on any member of the governing board, council or commission, as defined in F.S. 48.111.

— **SERVICE OF PROCESS GENERALLY** By delivering a true copy of this writ together with a copy of the initial pleading, if any, with the date and hour of service endorsed thereon by me to _____ spouse of the Defendant, _____ in accordance with the provisions of Chapter 48.031(2)(a), Florida Statutes.

— **SERVICE OF PROCESS GENERALLY ANY EMPLOYEE** By delivering a true copy of this writ together with a copy of the initial pleading, if any, with the date and hour of service endorsed thereon by me to _____ any employee of the Defendant's business _____ in accordance with the provisions of Chapter 48.031(2)(b), Florida Statutes.

— **SERVICE ON PARTNERSHIPS & LIMITED PARTNERSHIPS** By delivering a true copy of this writ together with a copy of the initial pleading, if any, with the date and hour of service endorsed thereon by me to _____ designated employee or person in charge of partnershi in accordance with the provisions of Chapter 48.061(1), Florida Statutes.

— **NON-SERVICE** For the reason that after diligent search and inquiry NAME: _____
could not be found in _____ County, Florida. mo/day/yr _____ Time: _____

— **MILITARY STATUS:** _____ **MARITAL STATUS:** _____ **TRUE NAME:** _____

— **OTHER RETURNS:** _____

Signature of Affiant Johnny V. Touchton Date 2-1-2000

Under penalty of perjury, I declare that I have read the foregoing and that the facts stated in it are true. F.S. 92.525

Robert L. Jones, Inc. Investigative and Subpoena Service
51 South Main Avenue, Suite 316, Clearwater, FL 33765 Paper Number 17457 DCF

PFWS

IN THE COUNTY COURT FOR
PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA :

v. :

ROBERT S. MINTON, JR.
SPN 02077072 :

CRIMINAL DIVISION E

CASE NO. CTC 99-32857-MMANO
BATTERY

PRAECIPE FOR WITNESS SUBPOENA FOR HEARING

The Clerk of the above-styled Court will please issue a Witness Subpoena to

Lt. Donald Hall, Clearwater Police Dept., 645 Pierce Street, Clearwater, FL 33756

personally to be and appear in chambers, 545 1st Avenue North, Room 300, St. Petersburg, Florida, on **Monday, February 7, 2000**, at 1:30 P.M. to testify in the above-styled cause. If you fail to appear, you may be in contempt of Court.

You are subpoenaed to appear by DENIS M. de VLAMING, ESQ, and unless excused from this subpoena by this attorney or the Court, you shall respond to this subpoena as directed.

January 31, 2000
DATE

ATTORNEY

Denis M. de Vlaming
1101 Turner Street
Clearwater, FL 33756
(727) 461-0525
SPN: 2574/
FBN : 150058

COUNTY COURT, PINELLAS COUNTY, FLORIDA
MISDEMEANOR DIVISION

ABC

14250 49TH ST. NORTH
CLEARWATER, FL 34622
(727) 464-6800
01/18/2000
SPN #: 02377077

STATE OF FLORIDA VS ROBERT S MINTON
DIVISION: E
CASE NUMBER(S): 99-32857-MM
CHARGES(S): BATTERY

RECEIVED
COUNTY COURT RECORDS
JAN 31
KARLEEN F. DeBLAKER
CLERK CIRCUIT COURT

NOTICE OF CRIMINAL MISDEMEANOR ARRAIGNMENT HEARING

***** PLEASE BRING THIS NOTICE WITH YOU *****
***** APPROPRIATE ATTIRE REQUIRED *****

THE ABOVE NUMBERED CASE(S) IS HEREBY SET AT 01:30 P.M. ON THURSDAY, FEBRUARY 3, 2000 COURTROOM 15, THIRD FLOOR, CRIMINAL JUSTICE CENTER, 14250 49TH STREET NORTH, CLEARWATER, FLORIDA.

ALL INTERESTED PARTIES LISTED BELOW ARE HEREBY NOTIFIED OF SAID ARRAIGNMENT DATE.

YOU ARE FURTHER NOTIFIED THAT COURT COSTS AND OTHER MANDATORY AND DISCRETIONARY COSTS MAY BE IMPOSED AGAINST YOU. IF YOU ARE REQUESTING APPOINTMENT OF A PUBLIC DEFENDER, YOU MUST BRING A $40.00 FEE TO THIS HEARING. IF YOU FAIL TO APPEAR, A WARRANT WILL BE ISSUED FOR YOUR ARREST.

ROBERT S MINTON
10200 N ARMENIA AV
TAMPA FL 33612

DENIS M DEVLAMING
ATTORNEY AT LAW
1101 TURNER STREET
CLEARWATER FL 33756

00438272
STACY S BROOKS

1702 LAMES DR
ATLANTA, GA 30334

IF YOU ARE A PERSON WITH A DISABILITY WHO NEEDS ANY ACCOMMODATION IN ORDER TO PARTICIPATE IN THE PROCEEDING, YOU ARE ENTITLED, AT NO COST TO YOU, TO THE PROVISION OF CERTAIN ASSISTANCE. WITHIN TWO (2) WORKING DAYS OF YOUR RECEIPT OF THIS NOTICE OF ARRAIGNMENT, PLEASE CONTACT THE HUMAN RIGHTS OFFICE, 400 S. FT. HARRISON AVE., STE. 300, CLEARWATER, FL 33756, (727) 464-4062 (V/TDD).

Karleen F. DeBlaker
KARLEEN F. De BLAKER
CLERK OF THE CIRCUIT COURT

CF 2-0

IN THE COUNTY COURT FOR PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA

v.

ROBERT S. MINTON
SPN 02077072

CRIMINAL DIVISION E

CASE NO. CTC 99-32857-MMANO
BATTERY

WAIVER OF APPEARANCE

Pursuant to Florida Rule of Criminal Procedure 3.180(a)(3), the defendant hereby waives the right to be present at any Pre-trial Conference scheduled by the Court and consents to have the undersigned attorney appear on defendant's behalf.

Dated: January 14, 2000.

FILED
CRIMINAL JUSTICE CENTER
00 JAN 31 PM 3:19
Karleen F. DeBlaker
Clerk Circuit Court

DENIS M. de VLAMING, ESQ.
ATTORNEY FOR DEFENDANT
SPN 2574/FBN 150058

ROBERT S. MINTON, Defendant

Denis M. de Vlaming, P.A.
Attorney at Law
1101 Turner Street
Clearwater, Florida 33756
telephone (727) 461-0525

IN THE COUNTY COURT FOR
PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA

CRIMINAL DIVISION E

v.

CASE NO. CTC 99-32857-MMANO
BATTERY

ROBERT S. MINTON, JR.
SPN 02077072

ORDER

THIS CAUSE coming on to be heard upon defendant's motion to waive his presence at any pre-trial conference, and the same having been considered by the Court, it is hereby

ORDERED that the defendant's motion be and the same is hereby GRANTED. It is further

ORDERED that the defendant be permitted to waive his presence at any pre-trial conference so long as a written waiver of appearance is executed and filed in the court file.

DONE AND ORDERED this 31st day of January, 2000.

COUNTY COURT JUDGE

Copies furnished to:
Denis M. de Vlaming, Esq.
State Attorney

FILED
00 JAN 31 PM 3:19
CRIMINAL JUSTICE CENTER

IN THE CIRCUIT/COUNTY COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

CTC9932857MMANO-E

STATE OF FLORIDA

vs.

ROBERT S. MINTON, JR.
SPN 02077072

ACKNOWLEDGEMENT OF ADDITIONAL TANGIBLE EVIDENCE

Pursuant to Rule 3.220, Florida Rules of Criminal Procedure, the following constitutes a list of additional tangible evidence which may be relevant to the offense charged or to any defense of the people charged with respect thereto:

VIDEO TAPES

FILED
CRIMINAL JUSTICE CENTER
00 FEB -8 PM 4:38
Katherine B. Hiller
Clerk Circuit Court

I DO HEREBY CERTIFY that a copy of the above has been furnished to DENIS M. DEVLAMING, ESQ. Attorney for the Defendant, at 1101 TURNER ST., CLEARWATER, FL 33756 by U.S. Mail, this 8th day of FEBRUARY, 2000.

BERNIE McCABE, State Attorney
Sixth Judicial Circuit of Florida

By _____
Assistant State Attorney

WT/jw
(ADEV/9420)

TRAP
CC
SAO

IN THE COUNTY COURT FOR PINELLAS COUNTY, FLORIDA
COUNTY CRIMINAL NO. 99-32857-MMANO-E

STATE OF FLORIDA

vs.

ROBERT MINTON, SPN 02079072

Defendant.

FILED
CRIMINAL DIVISION
00 FEB -1 AM 9:48
Kathleen F. DeBlaker
Clerk Circuit/County Court

PROCEEDINGS: MOTION TO WAIVE DEFENDANT'S PRESENCE AT PRE-TRIAL HEARING.

BEFORE: Honorable Radford Smith, Circuit Judge.

DATE: January 31, 2000.

PLACE: Courtroom 15, Criminal Justice Center, Clearwater, Florida 34620.

APPEARANCES: MS. KATHLEEN MEAGHER, Assistant State Attorney, 14250 49th Street, Clearwater, FL 34620.

MR. DENIS M. DEVLAMING, Attorney for Defendant, 1101 Turner Street, Clearwater, FL 34616.

P R O C E E D I N G S

THE COURT: Mr. DeVlaming, sir?

MR. DEVLAMING: Nice to see you.

THE COURT: Good to see you.

MR. DEVLAMING: This will be very brief. Mr. Minton's pre-trial is this Wednesday in front of Judge Morris. Mr. Minton resides in New Hampshire. He's out of town. I called Assistant State Attorney Bill Tyson. He has no objection to my motion to waive Mr. Minton's present at pre-trial. And I can represent that to the Court.

THE COURT: I have no problem with that. What do you want to do?

MR. DEVLAMING: Just want you to sign a notice saying he doesn't have to come.

THE COURT: You got it, and it will be me.

MR. DEVLAMING: On Wednesday?

THE COURT: Yes.

MR. DEVLAMING: That is all I have.

(WHEREUPON, THE HEARING WAS CONCLUDED)

IN THE COUNTY COURT FOR PINELLAS COUNTY, FLORIDA
COUNTY CRIMINAL NO. 99-32857-MMANO-E

STATE OF FLORIDA

vs.

ROBERT MINTON,

Defendant.

PROCEEDINGS:	MOTION TO WAIVE DEFENDANT'S PRESENCE AT PRE-TRIAL HEARING.
BEFORE:	Honorable Radford Smith, Circuit Judge.
DATE:	January 31, 2000.
PLACE:	Courtroom 15, Criminal Justice Center, Clearwater, Florida 34620.
APPEARANCES:	MS. KATHLEEN MEAGHER, Assistant State Attorney, 14250 49th Street, Clearwater, FL 34620.
	MR. DENIS M. DEVLAMING, Attorney for Defendant, 1101 Turner Street, Clearwater, FL 34616.

STATE OF FLORIDA

COUNTY OF PINELLAS

I, ROBIN S. MCCORMICK, Registered Professional Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true record.

Dated this _____ day of January, 2000.

ROBIN S. MCCORMICK
RPR

MM0163

COUNTY COURT, PINELLAS COUNTY, FLORIDA
MISDEMEANOR DIVISION

14250 49TH ST. NORTH
CLEARWATER, FL 34622
PHONE: (727) 464-7000
02/28/2000
SPN NO: 02077072

STATE OF FLORIDA VS ROBERT S MINTON
DIVISION: E
CASE NUMBERS(S):
99-32857-MM

CHARGES(S):
(1 CT) BATTERY

NOTICE OF PRE-TRIAL HEARING

***** PLEASE BRING THIS NOTICE WITH YOU *****
***** APPROPRIATE ATTIRE REQUIRED *****

THE ABOVE NUMBERED CASE(S) IS HEREBY SET AT 09:30 A.M. ON THURSDAY, MARCH 23, 2000 COURTROOM 15, THIRD FLOOR, CRIMINAL JUSTICE CENTER, 14250 49TH STREET NORTH, CLEARWATER, FLORIDA.

ALL INTERESTED PARTIES LISTED BELOW ARE HEREBY NOTIFIED OF SAID PRE-TRIAL DATE. DEFENDANT'S PERSONAL APPEARANCE IS MANDATORY.

YOU ARE FURTHER NOTIFIED THAT COURT COSTS AND OTHER MANDATORY AND DISCRETIONARY COSTS MAY BE IMPOSED AGAINST YOU. IF YOU ARE REQUESTING APPOINTMENT OF A PUBLIC DEFENDER, YOU MUST BRING $40.00 FEE TO THIS HEARING. IF YOU FAIL TO APPEAR, A WARRANT WILL BE ISSUED FOR YOUR ARREST.

** N O T I C E
IF DEFENDANT IS TO BE REPRESENTED BY AN ATTORNEY THE ATTORNEY MUST BE OBTAINED BY THE DATE OF THE PRE-TRIAL HEARING. NO CONTINUANCE TO OBTAIN COUNSEL WILL BE GRANTED AFTER THE PRE-TRIAL DATE. ALL DISCOVERY AND MOTIONS MUST BE COMPLETED BY THE DATE OF THE PRE-TRIAL HEARING OTHER THAN MOTIONS TO SUPPRESS OR OTHER EVIDENTIARY MOTIONS.

ROBERT S MINTON
10200 N ARMENIA AV
TAMPA FL 33612

DENIS M DEVLAMING
ATTORNEY AT LAW
1101 TURNER STREET
CLEARWATER FL 33756

00438272
STACY S BROOKS

1702 LAKES DR
ATLANTA, GA 30339

IF YOU ARE A PERSON WITH A DISABILITY WHO NEED ANY ACCOMMODATION IN ORDER TO PARTICIPATE IN THE PROCEEDING, YOU ARE ENTITLED, AT NO COST T YOU, TO THE PROVISION OF CERTAIN ASSISTANCE. WITHIN TWO (2) WORKING DAYS OF YOUR RECEIPT OF THIS NOTICE OF PRE-TRIAL HEARING PLEASE CONTAC THE HUMAN RIGHTS OFFICE, 400 S. FT. HARRISON A STE. 300, CLEARWATER, FL 33756, (727) 464-4062(V/TDD).

Karleen F. De Blaker
KARLEEN F. De BLAKER
CLERK OF THE CIRCUIT COURT

CF 2-0

COUNTY COURT, PINELLAS COUNTY FLORIDA
MISDEMEANOR DIVISION

14250 49TH ST. NORTH
CLEARWATER, FL 34622
PHONE: (727) 464-7000

STATE OF FLORIDA VS ROBERT S MINTON
DIVISION: E
CASE NUMBERS(S):
99-32857-MM

CHARGES(S):
(1 CT) BATTERY

02/29/2000
SPN #: 02077072

NOTICE OF PRE-TRIAL HEARING

***** PLEASE BRING THIS NOTICE WITH YOU *****
***** APPROPRIATE ATTIRE REQUIRED *****

THE ABOVE NUMBERED CASE(S) IS HEREBY SET AT 09:30 A.M. ON THURSDAY, MARCH 23, 2000 COURTROOM 15, THIRD FLOOR, CRIMINAL JUSTICE CENTER, 14250 49TH STREET NORTH, CLEARWATER, FLORIDA.

ALL INTERESTED PARTIES LISTED BELOW ARE HEREBY NOTIFIED OF SAID PRE-TRIAL DATE. DEFENDANT'S PERSONAL APPEARANCE IS MANDATORY.

YOU ARE FURTHER NOTIFIED THAT COURT COSTS AND OTHER MANDATORY AND DISCRETIONARY COSTS MAY BE IMPOSED AGAINST YOU. IF YOU ARE REQUESTING APPOINTMENT OF A PUBLIC DEFENDER, YOU MUST BRING $40.00 FEE TO THIS HEARING. IF YOU FAIL TO APPEAR, A WARRANT WILL BE ISSUED FOR YOUR ARREST.

** N O T I C E
IF DEFENDANT IS TO BE REPRESENTED BY AN ATTORNEY THE ATTORNEY MUST BE OBTAINED BY THE DATE OF THE PRE-TRIAL HEARING. NO CONTINUANCES TO OBTAIN COUNSEL WILL BE GRANTED AFTER THE PRE-TRIAL DATE. ALL DISCOVERY AND MOTIONS MUST BE COMPLETED BY THE DATE OF THE PRE-TRIAL HEARING OTHER THAN MOTIONS TO SUPPRESS OR OTHER EVIDENTIARY MOTIONS.

ROBERT S MINTON
10200 N ARMENIA AV
TAMPA FL 33612

DENIS M DEVLAMING
ATTORNEY AT LAW
1101 TURNER STREET
CLEARWATER FL 33756

00438472
STACY S BROOKS

1702 LAKES DR
ATLANTA, GA 30339

IF YOU ARE A PERSON WITH A DISABILITY WHO NEEDS ANY ACCOMMODATION IN ORDER TO PARTICIPATE IN THE PROCEEDING, YOU ARE ENTITLED, AT NO COST TO YOU, TO THE PROVISION OF CERTAIN ASSISTANCE. WITHIN TWO (2) WORKING DAYS OF YOUR RECEIPT OF THIS NOTICE OF PRE-TRIAL HEARING PLEASE CONTACT THE HUMAN RIGHTS OFFICE, 400 S. FT. HARRISON AVE STE. 300, CLEARWATER, FL 33756, (727) 464-4062(V/TDD).

Karleen F. De Blaker
KARLEEN F. De BLAKER
CLERK OF THE CIRCUIT COURT

C10

30.00

TO CLERK OF COURT:

The State of Florida processing fee on a worthless check charge ordered by the court on case CTC99 32957 MM has been paid on this date, 3-23-00, by Sophia Harvey (WILLIAMS). Copy of receipt 096699 is attached.

White Original: Court File
Yellow Copy: State Attorney File

BCDP12 (05/96)

FILED
CRIMINAL JUSTICE CENTER
00 MAR 24 PM 1:14
Karleen [illegible] Blaker
Clerk Circuit Court

OFFICE OF THE STATE ATTORNEY
Sixth Judicial Circuit
Bad Check Program

096699

DATE 3/23 19 00

RECEIVED FROM Sophia Harvey

THE SUM OF thirty ——— 00/100 DOLLARS $ 30.00

FOR St of Fl CTC9932957MM

AMOUNT OF ACCOUNT $ ______
AMOUNT PAID $ ______
BALANCE DUE $ ______

☐ CASH ☐ CHECK ☑ M.O. ☐ CREDIT CARD

Thank You!

BY [illegible]

50569 [illegible] 3100127

COUNTY COURT, PINELLAS COUNTY, FLORIDA
MISDEMEANOR DIVISION

14250 49TH ST. NORTH
CLEARWATER, FL 34622
PHONE: (727) 464-7000
03/27/2000
SPN NO: 02077072

STATE OF FLORIDA VS ROBERT S MINTON
DIVISION: E
CASE NUMBERS(S):
99-32857-MM

CHARGES(S):
(1 CT) BATTERY

NOTICE OF TRIAL

***** PLEASE BRING THIS NOTICE WITH YOU *****
***** APPROPRIATE ATTIRE REQUIRED *****

THE ABOVE NUMBERED CASE(S) IS HEREBY SET AT 08:30 A.M. ON MONDAY, MAY 22, 2000 COURTROOM 15, THIRD FLOOR, CRIMINAL JUSTICE CENTER, 14250 49TH STREET NORTH, CLEARWATER, FLORIDA.

ALL INTERESTED PARTIES LISTED BELOW ARE HEREBY NOTIFIED OF SAID TRIAL DATE.

YOU ARE FURTHER NOTIFIED THAT COURT COSTS AND OTHER MANDATORY AND DISCRETIONARY COSTS MAY BE IMPOSED AGAINST YOU. IF YOU FAIL TO APPEAR A WARRANT WILL BE ISSUED FOR YOUR ARREST.

CRIMINAL JUSTICE CENTER
00 APR 1 PM 2:2
KAREN E. RUSHING
CLERK OF CIRCUIT COURT

ROBERT S MINTON
10200 N ARMENIA AV
TAMPA FL 33612

DENIS M DEVLAMING
ATTORNEY AT LAW
1101 TURNER STREET
CLEARWATER FL 33756

IF YOU ARE A PERSON WITH A DISABILITY WHO NEEDS ANY ACCOMMODATION IN ORDER TO PARTICIPATE IN THE PROCEEDING, YOU ARE ENTITLED, AT NO COST TO YOU, TO THE PROVISION OF CERTAIN ASSISTANCE. WITHIN TWO (2) WORKING DAYS OF YOUR RECEIPT OF THIS NOTICE OF TRIAL, PLEASE CONTACT THE HUMAN RIGHTS OFFICE, 400 S. FT. HARRISON AVE., STE. 300, CLEARWATER, FL 33756, (727) 464-4062 (V/TDD).

00438272
STACY S BROOKS

1702 LAKES DR
ATLANTA, GA 30337

Karleen F. De Blaker
KARLEEN F. De BLAKER
CLERK OF THE CIRCUIT COURT

2-0

IN PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION

CRIMINAL DIV
STATE OF
VS
ROBERT S MIN

CASE NUMBER 99-32857-MM | LAB NO | EVD NO | OFFENSE NO CW99029775

FILED
CRIMINAL JUSTICE CENTER
00 APR 20 AM 8:46
Karleen F. DeBlaker
Karleen F. DeBlaker
Clerk Circuit Court

WITNESS SUBPOENA FOR TRIAL

***** PLEASE BRING THIS SUBPOENA WITH YOU *****

THE STATE OF FLORIDA TO ALL AND SINGULAR THE SHERIFFS, STATE ATTORNEY INVESTIGATORS, AND AGENTS OF THE FLORIDA DEPARTMENT OF CRIMINAL LAW ENFORCEMENT OF SAID STATE:

YOU ARE HEREBY COMMANDED TO SUBPOENA

MICHAEL STEWART 645 PIERCE STREET
08:00 A.M. MONDAY, MAY 22, 2000 BUSINESS CLEARWATER FL 33756

RECEIVED
APR 18 2000
CLEARWATER POLICE
COURT LIAISON

PERSONALLY TO BE AND APPEAR BEFORE ONE OF THE JUDGES OF OUR SAID COURT, AT STATE ATTORNEY ROOM 4000, CRIMINAL JUSTICE CENTER, 14250 49TH STREET NORTH, CLEARWATER, FLORIDA, ON MONDAY, MAY 22, 2000 TO TESTIFY IN THE ABOVE STYLED CAUSE. IF YOU FAIL TO APPEAR, YOU MAY BE IN CONTEMPT OF COURT.

YOU ARE SUBPOENAED TO APPEAR BY THE STATE OF FLORIDA AND UNLESS EXCUSED FROM THIS SUBPOENA BY THIS ATTORNEY OF THE COURT, YOU SHALL RESPOND TO THIS SUBPOENA AS DIRECTED.

*** APPROPRIATE ATTIRE REQUIRED ***

** UPON RECEIPT OF THIS SUBPOENA YOU ARE REQUIRED TO CALL THE VICTIM/WITNESS MANAGEMENT TEAM AT 464-6300 **

WITNESS, KARLEEN F DE BLAKER, AS THE CLERK OF THE CIRCUIT COURT, AND THE SEAL OF SAID COURT, AT THE COURTHOUSE AT CLEARWATER, FLORIDA.

BERNIE McCABE
STATE ATTORNEY
PD: NAME NOT AVAILABLE
SAX: JEANNE RUPE WHITEFIELD

APRIL 18, 2000

Karleen F. DeBlaker
KARLEEN F. De BLAKER
CLERK OF THE CIRCUIT COURT

IF YOU ARE A PERSON WITH A DISABILITY WHO NEEDS ANY ACCOMMODATION IN ORDER TO PARTICIPATE IN THIS PROCEEDING, YOU ARE ENTITLED, AT NO COST TO YOU, TO THE PROVISION OF CERTAIN ASSISTANCE. WITHIN TWO (2) WORKING DAYS OF YOUR RECEIPT OF THIS SUBPOENA FOR TRIAL, PLEASE CONTACT THE HUMAN RIGHTS OFFICE, 400 S. FT. HARRISON AVE., STE. 300, CLEARWATER FL 33756, (727) 464-4062 (V/TDD).

CIRCUIT COURT SEAL PINELLAS COUNTY, FLORIDA

CF18-2

IN THE COUNTY COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

CTC99-32857MMANO-E

STATE OF FLORIDA :

v. : BATTERY

ROBERT S. MINTON :
SPN 02077072

MOTION IN LIMINE

BERNIE McCABE, State Attorney for the Sixth Judicial Circuit of Florida, by and through the undersigned Assistant State Attorney, moves this Honorable Court, before trial and selection of a jury, in limine to limit the defense with regard to any discussion or mention of, or direct or indirect reference to the following:

1. The alleged "fair game policy" or any corporate policy of the Church of Scientology or agent thereof.

2. Incidents occurring in Massachusetts, California, Florida or any other location between ROBERT S. MINTON and any member of the Church of Scientology or agent thereof, other than the incident alleged in the State's charging document.

3. Allegations that members of the Church of Scientology or agent thereof visited or confronted ROBERT S. MINTON at his place of residence in New Hampshire.

4. Allegations that a member(s) of the Church of Scientology or agent thereof left a dead cat on ROBERT S. MINTON'S doorstep of his residence.

5. Charging decision by the State Attorney's Office to charge ROBERT S. MINTON with the crime of Battery and the failure to charge Richard Howd or any other person or entity with any alleged crime.

6. Allegations that members of the Church of Scientology surveilled ROBERT S. MINTON when he arrived in Clearwater on the date of the incident.

7. The Church of Scientology's practices, beliefs, or alleged doctrines.

8. The Lisa McPherson Trust or any person connected thereto.

9. Lisa McPherson's civil case pending in Hillsborough County.

10. Criminal charges pending against the Church of Scientology pertaining to the death of Lisa McPherson.

11. Incidents or persons alleged to have suffered physical or emotional harm from the Church of Scientology or any agents thereof.

12. Any attempt to place members of the jury "in the shoes of the Defendant."

WHEREFORE, the State of Florida respectfully requests the Court to instruct the attorney for the Defendant, and the Defendant, not to mention or refer, or interrogate concerning, or attempt to convey to the jury in any manner either direct or indirect, any of the above mentioned facts without first obtaining permission of the Court outside of the presence and hearing of the jury, and to further instruct the attorney for the Defendant not to make any references to the fact that this Motion has been filed and granted.

I HEREBY CERTIFY that a copy of the above has been furnished to Denis M. deVlaming, 1101 Turner Street, Clearwater, Florida 33756, by U.S. Mail, this 3RD day of May, 2000.

BERNIE McCABE, State Attorney
Sixth Judicial Circuit of Florida

W J T
Assistant State Attorney

BT/0503nh1

IN THE COUNTY COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

CTC99-32857MMANO-E

STATE OF FLORIDA :

v. :

ROBERT S. MINTON :
SPN 02077072

TO: DENIS M. de VLAMING

NOTICE OF HEARING

PLEASE TAKE NOTICE that the State's Motions in Limine in the above-styled cause has been set for hearing before the Honorable Robert J. Morris, Judge of the above-styled Court, in the Criminal Justice Center, Pinellas County, Florida, on Friday, the 12th day of May, 2000, at 2:00 o'clock P.M., or as soon thereafter as counsel may be heard.

I HEREBY CERTIFY that a copy of the above has been furnished to Denis M. de Vlaming, 1101 Turner Street, Clearwater, Florida 33756, Attorney for Defendant, by mail, this 3RD day of May, 2000.

BERNIE McCABE, State Attorney
Sixth Judicial Circuit of Florida

Assistant State Attorney

WJT/0503SS20

Objection to Paragraph 2

The State seeks to hide from the jury prior incidents which occurred between the defendant and the victim, as well as between the defendant and the victim's church members before the incident in question. These incidents, some of which are captured on video, clearly demonstrate the pattern of abuse and harassment aimed at the defendant while he engaged in the lawful activity of demonstrating against the Church of Scientology, the strikingly similar behavior carried out by the victim in this case.

Evidence necessary to describe the manner in which a criminal offense took place or how it came to light is generally admissible as relevant evidence even though it might otherwise be objectionable as prior bad act evidence because it is "inextricably intertwined" with the underlying crime. Shively v. State, 752 So. 2d 85 (Fla. 5th DCA 2000) (allowing the State to admit evidence showing that a third party witness saw the defendant french-kissing the victim and that another witness saw him naked in a molestation case because the State would have been unreasonably hampered in explaining to the jury how the charged crime came to light).

The Massachusetts and California videos, as well as other prior contacts, should be admissible to explain the course of events that led up to the charge in question. It would be error for this court to deny the defense the ability to reasonably explain the course of events that brought this case to light under the "inextricably intertwined" theory, just as the court afforded that same luxury to the State in Shively. Moreover, these prior incidents are admissible under several other theories of law, including relevancy, state of mind of the defendant, self-defense, Williams Rule and evidence of motive, bias and interest.

A. Relevancy

One Florida court has already ruled that it would be error to limine out prior incidents occurring between the defendant and the victim in a battery case. Livingston v. State, 678 So. 2d 895 (Fla. 4th DCA 1996). In Livingston, the State sought to present evidence that the defendant left notes on the victim's car and attempted to speak with her prior to the charged battery. Upon the defense's objection, the court held "that the evidence of defendant's prior contacts with [the victim] was admissible under section 90.402 as being relevant to and inseparable from the

battery. It was 'necessary to admit the evidence to adequately describe the deed.'" Id. at 897. Furthermore, the court noted that "[e]vidence of defendant's prior encounters with [the victim] place the incident in the context of his feelings for her and explain the strong emotions which may have ignited the battery." Id. If prior contacts are properly admitted against a defendant where there are strict prejudicial consideration, then they are certainly properly admitted against a victim.

B. State of Mind/ Self-Defense

The Massachusetts and California video tapes should be admissible as they are especially relevant to the defendant's theories of defense. As to self defense, the videos clearly show how the conduct of church members forces the defendant to act "defensively" during his lawful demonstrations and how their actions plausibly put him in fear for his personal safety. While the victim was not actually present at the Massachusetts and California demonstrations, the defendant can establish through the tapes his well-founded concern for the members of the group sent out to antagonize him and interrupt his picketing. See Arthur v. State, 717 So. 2d 193 (Fla. 5th DCA 1998) (allowing the defendant to testify in furtherance of his self-defense argument that he had no fear of the victim as an individual but that he was afraid of the crowd that was gathering around him).

The absence of the victim at those events does not diminish the relevance of the defendant's belief that the victim was acting in conformity with the church's pattern of behavior, creating a well-founded fear. In Smith v. State, 606 So. 2d 641 (Fla. 1st DCA 1992), the court held that prior instances of violent conduct was admissible because the defendant *believed* them to be true even though he was not present to witness them. The court pointed out that those instances were not introduced for the truth of the matter asserted, but to explain the defendant's grounds for fear. Id. Conversely, the defendant should be allowed to introduce the Massachusetts and California tapes, even though the victim was not present, because the defendant believed that the victim was a member of the same organization acting out against him. The defendant can support his theory of self-defense by asserting that his fear for the victim was the same fear he had for all of the members of the church organization sent out to harass him while he picketed, and it would be error to limit that evidence.

C. Williams Rule

The Florida Supreme Court has held that a defendant may introduce similar fact evidence, and it would be error to deny such evidence which "tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt." Rivera v. State, 561 So. 2d 536 (Fla. 1990). In this case, the similarity of the events on the video tapes speak for themselves. They all show how people who are believed by the defendant to be members of the Church of Scientology come out to antagonize him and essentially force a touching. The relevance of the similar events goes to the heart of the defendant's theories of defenses, self-defense and accident. In all three films it is evident that the church members get close enough to the defendant to force him into a touching, then pretend to be injured and threaten to call or actually do call the police for an alleged "battery." Under Williams v. State, 588 So. 2d 44 (Fla. 1st DCA 1991), when there is evidence that the accidental infliction of an injury and the defense of self-defense are so intertwined that the jury could find that the accident resulted from the justifiable use of non-deadly force, the defendant is entitled to introduce evidence to support those theories.

D. Motive, Bias and Interest

The State has moved in limine to exclude the Massachusetts and California tapes from trial, essentially asking this court to try this case in a vacuum. This case is not about a thirty-second incident of alleged battery during a demonstration. This case is about members of the Church of Scientology engaging the defendant in a course of conduct which would entitle them to a conviction, so they could further their interest in suppressing his conduct in the Lisa McPherson law suit. The victim's testimony is suspect based upon his involvement and affiliation with the church, and should be subject to cross examination regarding his motive, bias and interest in this case. The video tapes support the defendant's theory of defense that the victim acted in conformity with the organization by causing the incident to happen, and negates essential elements of the offense. The law in Florida is clear that "evidence tending to establish that a witness appearing before the State for any reason other than to tell the truth should not be kept from the jury," Carmichael v. State, 670 So. 2d 1178 (Fla. 3rd DCA 1996), and therefore, it would be error for this court to allow the State to hide from the jury the incidents occurring in Massachusetts, California, and other locations at times prior to the incident in question.

Objection to Paragraphs 3, 4 & 6

The defendant reiterates it argument as to the admissibility of prior contacts as outlined in Livingston v. State, 678 So. 2d 895 (Fla. 4th DCA 1996). Allegations of previous incidents between the defendant and the victim, by and through the organization the victim is affiliated with and was acting on behalf of at the time of the charged conduct, gives credence to all of the theories of defense in this case. Specifically, the defendant intends on offering evidence that the victim followed him on the day in question. This, coupled with the prior confrontations in New Hampshire by other members of the church, gave rise to the defendant's well-founded and reasonable fear for his safety. Similarly, the fact that the defendant found a dead cat on the doorstep of his residence and believed it to be the threatening acts of the church, is relevant to support his state of mind. It would be error for this court to limit the testimony and the evidence in this case with regards to the predicates for his defenses.

Objection to Paragraph 5

The State seeks to limit the defense's cross-examination of its principal witnesses as to the issue of whether the victim was charged with a crime as a result of this incident. It would be error for this court to limit such questioning. The Supreme Court has recognized the constitutional significance of permitting a full opportunity to cross-examine a witness to expose any bias or motive to testify untruthfully. See Fluellen v. State, 703 So. 2d 511 (Fla. 1st DCA 1997). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. . . . A more particular attack on the witness' credibility is effected by means of revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. . . The partiality of a witness is . . . always relevant as discrediting the witness and affecting the weight of his testimony. . . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Id. at 513. With no showing by the State that the probative value of this line of questioning would outweigh the danger of unfair prejudice, confuse the issues, mislead the jury, or present cumulative evidence, this court should follow the proposition that a wide-range of cross-examination is allowed of the state's witnesses. Auchmuty v. State, 594 So. 2d 859 (Fla. 4th

DCA 1992).

Objection to Paragraph 7

It would be error for this court to limit the defense from eliciting testimony and evidence regarding the practices, beliefs or alleged doctrines (dogma) of the Church of Scientology because it is relevant in this trial for several reasons. First, the dogma is relevant to the defendant's state of mind. The defendant has grounds to fear the members of the church's Office of Special Affairs (OSA) division, of which the victim is a member. The defendant's knowledge of how the OSA carries out its orders to suppress all critics is pertinent to why he reacted the way he did when the victim continued to follow him across the street while trying to get away. The dogma of the Church of Scientology is similarly relevant to the defense argument that the victim's motive to fabricate and create an offense where none existed was predicated on his need to be able to call the defendant a "criminal" in accordance with its belief that all critics of Scientology are criminals.

Second, the dogma is relevant to the theory of defense, similar to the line of cases involving religious practices in the treatment of ill children. See Hermanson v. State, 570 So. 2d 322 (Fla. 2d DCA 1990)(allowing the defense to describe the tenets of Christian Science which eschews conventional medical treatment in favor of spiritual healing through prayer even though following such religious beliefs does not give rise to a statutory defense). Finally, the dogma is relevant to motive, bias and interest on the part of the victim's testimony. As a member of OSA, the victim has the responsibility to carry out the church's directives to suppress the defendant. If the victim fails to successfully carry out his duties, he is subject to consequences within the church. These consequences can affect the truthfulness of his testimony.

This court is being asked to limit this line of questioning and commit the same error that was detected in Ferguson v. State, 596 So. 2d 1293 (Fla. 5th DCA 1992). The Ferguson court committed reversible error in restricting defense counsel's cross examination of the child victim's mother which cross examination was designed to elicit information as to whether the child feared its mother in a capital sexual battery case. The court held that the defense was entitled to lay a factual basis for its argument (that the child's fear of its mother was the child's reason or motive to falsify or fabricate a claim against the defendant, who was the mother's ex-

husband) to the jury which was directed to the child's credibility as a witness and to the weight the jury might give to the child's testimony. Id.

Objection to Paragraph 8

There is no basis in law to limit out the mention of the Lisa McPherson Trust or any person connected thereto. The facts surrounding the Lisa McPherson Trust are so "inextricably intertwined that it would place an unreasonable burden on the defense to limit out any mention. See Shively v. State, 752 So. 2d 84 (Fla. 5th DCA 2000). Additionally, the defendant was engaged in a demonstration outside the Church of Scientology property specifically for the purpose of picketing because of the Lisa McPherson situation. Her name becomes the center of discussion during the demonstration in question as well as during the prior incidents. Signs are carried bearing her name. The presence of the Lisa McPherson Trust is so inextricably intertwined, both factually and as the basis throughout the defendant's theories of defenses, that it would be impossible to conduct a defense without mentioning her name. It would only mislead and confuse the jury.

Objection to Paragraph 9

The State seeks to limine out any mention of the pending civil litigation. Florida follows the well established principle that a defendant in a criminal case has considerable latitude in cross-examination to elicit testimony showing the bias of a witness. Nelson v. State, 704 So. 2d 752 (Fla. 5th DCA 1998). "Inherent within this right is a defendant's right to expose a witness's motivation in testifying because it is 'the principal means by which the believability of a witness and the truth of his testimony are tested.'" Gibson v. State, 661 So. 2d 288 (Fla. 1995). For example, defense counsel properly began cross-examining the victim regarding a civil suit to show motive and reason to deviate from the truth about who began the altercation. See Smith v. State, 579 So. 2d 906 (Fla. 5th DCA 1991)(holding that the trial court erred in sustaining the state's objection to the line of questioning regarding pending civil litigation). It is similarly proper to cross examine a witness about filing petitions for injunctive relief when it arises out of the same conduct criminally charged. Nelson, 704 So. 2d 752 at 754.

Objection to Paragraph 10

This court should not preclude the defense from cross-examining state witnesses as to *any* motive they may have, including the fact that criminal charges are pending against the Church of Scientology for causing the death of Lisa McPherson. Denying a defendant's right to "explore on cross-examination possible bases for impeaching the credibility of the witness amounts to a denial of rights under the sixth amendment." Fluellen v. State, 703 So. 2d 511 (Fla. 1st DCA 1997). The court, quoting Kelly v. State, 425 So. 2d 81 (Fla. 2d DCA 1982), noted that as 'is almost always the case when cross-examination directed to its main objective - destruction of credibility - is unduly restricted, the record, of necessity, does not and cannot reflect what would have been developed; appropriate cross-examination, could only be accomplished by an adroit, penetrating, relentless cross-examination searching deeply into the motivation of the witness." Id. Therefore, it would deny the defendant his right to a fair trial to limit the defense's cross-examination as to other pending charges which may affect his role in this incident as well as his testimony in court.

Objection to Paragraph 11

The defendant relies upon the arguments made in its objection to paragraph 7 regarding the relevance of such testimony to expose the motive for why a member of the Church of Scientology would testify untruthfully for fear of retaliation. It is also relevant as to why a church member, i.e., the victim in this case, would engage in such action as to cause this incident to occur in the first place. Furthermore, such testimony and evidence would be relevant to show the defendant's state of mind at the time he acted in self defense. Because the defendant has the belief that the Church of Scientology engages in activities of violence, and the victim is closely associated with them and in fact works in its inner-sanctum, the defendant has a well-grounded fear of the victim. A defendant need not be present when the prior acts occur, as long as he or she has knowledge of the acts at the time of the incident in question. Hedges v. State, 667 So. 2d 420 (Fla. 1st DCA 1996). Thus, incidents of harm caused by Church of Scientology members is a relevant issue in this case and it would be error for this court to preclude the defendant from exploring the issue.

Objection to Paragraph 12

The State seeks to prohibit the defendant from making *any* attempt to place the members of the jury "in the shoes of the Defendant." It would be error for this court to prevent the defendant from making *any* reference to placing the jury in the defendant's shoes, as not every "golden rule *argument*" rises to the level of a "golden rule *violation*." Circuit Court Judge Demers pointed out in Campbell v. State, opinion of the Circuit Court on May 27, 1998, a "golden rule"argument is not improper simply because it asks the jurors to put themselves in the place of one of the parties. In Campbell, when the State argued its DUI case to the jury, it asked the jurors to "put [them]selves in the defendant's shoes . . . ." Id. Judge Demers cautioned that just because the words on their face sound like a "golden rule" violation, a closer examination was necessary to determine whether a violation actually occurred. He found in Campbell that there was no violation.

A "golden rule" argument is generally a prosecutor's argument to the jury that places the jury in the shoes of the victim, *not the defendant.*. Worden v. State, 603 So. 2d 581, 584 (Fla. 2d DCA 1992) (emphasis and citations omitted)(emphasis supplied). "Golden rule" arguments are only found to be impermissible when they strike at such a sensitive area that they would tend to influence the verdict. There must be a showing as to why the argument is impermissible, such as in Bertolotti v. State, 476 So. 2d 130 (Fla. 1985), where the court scolded the State for asking if the jury "can imagine more pain and any more anguish than this woman must have gone through in the last few minutes of her life, no lawyers to beg for her life." It is not enough to rely on the general proposition that the comments are improper. In both Worden and Campbell, the comments were reviewed by the court and deemed to be proper. It would therefore be error for this court to prohibit the defendant from making "golden rule"arguments without any showing that they would rise to the level of a violation.

Finally, Florida's Standard Jury Instructions for Justifiable Use of Nondeadly Force, i.e., self-defense, requires the jury to consider the facts from the defendant's point of view. Section 3.04(e) requires the jury to judge the defendant by the circumstances by which he was surrounded by at the time. It requires the jury to consider whether a reasonable person "under the same circumstances would have believed that the danger could be avoided only through the use of that force." Section 3.04(e) is telling each juror to put themselves in the defendant's

shoes. Therefore, it is not error for the defense to attempt to place the members of the jury "in the shoes of the defendant" during its closing argument when the court is going to be essentially making the same request, with the Florida Supreme Court's blessing, at the end of the trial.

WHEREFORE, the defendant respectfully requests the Court to enter an order denying the State's Motions in Limine for the foregoing reasons.

I HEREBY CERTIFY that a copy of the above has been furnished by hand/mail to the State Attorneys Office, 14250 49th Street North, Clearwater, FL 33760, this 10th day of May, 2000.

DENIS M. de VLAMING, ESQ.
Attorney for Defendant
SPN 2574/FBN 150058

TABLE OF CASES

*193 717 So.2d 193

23 Fla. L. Weekly D2162

Shawn ARTHUR, Appellant,
v.
STATE of Florida, Appellee.

No. 97-3390.

District Court of Appeal of Florida,

Fifth District.

Sept. 18, 1998.

Defendant was convicted in the Circuit Court, St. Johns County, Charles J. Tinlin, Acting Circuit Judge, of aggravated assault, and he appealed. The District Court of Appeal, Peterson, J., held that defendant was entitled to jury instruction on self-defense.

Reversed.

Harris, J., dissented with opinion.

1. ASSAULT AND BATTERY⚿ 96(3)

37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k93 Trial
37k96 Instructions
37k96(3) Self-defense.

Fla.App. 5 Dist. 1998.

In aggravated assault prosecution, defendant who introduced evidence that he only used non-deadly force in face of fear of imminent bodily harm was entitled to jury instruction that his actions were legal under circumstances. West's F.S.A. § 784.021(1)(a).

2. CRIMINAL LAW⚿ 772(6)

110 ----
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k772 Elements and Incidents of Offense, and Defenses in General
110k772(6) Defenses in general.

[See headnote text below]

2. CRIMINAL LAW⚿ 824(4)

110 ----
110XX Trial
110XX(H) Instructions: Requests
110k824 Necessity in General
110k824(4) Instructions as to special issues and defenses.

Fla.App. 5 Dist. 1998.

Where there is any evidence introduced at trial which supports the theory of the defense, a defendant is entitled to have the jury instructed on the law applicable to his theory of defense when he so requests.

3. CRIMINAL LAW⚿ 772(6)

110 ----
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k772 Elements and Incidents of Offense, and Defenses in General
110k772(6) Defenses in general.

Fla.App. 5 Dist. 1998.

Defendant is entitled to an instruction on his theory of defense however flimsy the evidence which supports that theory, or however weak or improbable his testimony may have been.

4. CRIMINAL LAW⚿ 741(1)

110 ----
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k741 Weight and Sufficiency of Evidence in General
110k741(1) In general.

Fla.App. 5 Dist. 1998.

It is for the jury, not the court, to determine what weight to give the defendant's evidence.

*194 J. Stephen Alexander, St. Augustine, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee,and Steven J. Guardiano, Assistant Attorney General, Daytona Beach, for Appellee.

PETERSON, Judge.

Shawn Arthur appeals his conviction and sentence for aggravated assault, section 784.021(1)(a), Florida Statutes (1995). He alleges that the trial court improperly denied his request for a standard jury instruction on self-defense, to wit: instruction 3.04(e), justifiable use of non-deadly force. We agree, vacate the conviction and sentence, and remand for a new trial.

Arthur and his girlfriend, Ericha Schmidtt, were in a pool hall with some friends, drinking beer, when an argument erupted between the two. The manager asked them to leave and in compliance Arthur grabbed Ericha by the arm and took her in tow. Some of the bar patrons thought that Arthur's treatment of Ericha was overly physical and began to make comments which in turn drew obscenities from Arthur.

One patron was particularly disturbed by Arthur's actions and unleashed a verbal assault on him indicating that she had been physically abused in the past and that he was not going to abuse Ericha. She followed him and Ericha from inside the hall to the parking lot where Arthur's pickup truck was parked. As the verbal exchange continued it drew spectators from inside the hall. Witnesses' descriptions of what happened next differs. Arthur claimed that the matter got out of hand because of the patron upset with Arthur and that the crowd in the bar, armed with cue sticks and bottles of beer, followed her outside into the parking lot. He testified that he was in fear that the crowd would attack him and his truck and that all he wanted to do was leave. He reached in his truck for a stick in order to protect himself and found an old loaded shotgun that he had forgotten about behind the seat. He claims he displayed the shotgun without pointing it at anyone, which caused the crowd to disperse. As he and Ericha were departing in the truck, the police arrived and arrested him. Ericha's testimony echoed Arthur's account.

The victim's account is different. The victim claimed that the crowd was few in number, that he did not notice any potential weapons in their hands and that they all stayed at the doorway of the pool hall. Only the patron mentioned by Arthur as provoking the confrontation, and himself, were next to Arthur's truck. The victim claimed that Arthur pointed the shotgun at him.

[1] Arthur's theory of defense was that he wanted to protect himself from the crowd that had formed against him and who were impeding his escape from the parking lot. Accordingly, he requested the self-defense instruction to be read to the jury, but the request was denied. The denial was error.

[2] [3] [4] The law regarding whether or not to instruct the jury on a particular defense theory is well settled. "Where there is any evidence introduced at trial which supports the theory of the defense, a defendant is entitled to have the jury instructed on the law applicable to his theory of defense when he so requests." *Bryant v. State,* 412 So.2d 347, 350 (Fla.1982) (citing *Motley v. State,* 155 Fla. 545, 20 So.2d 798 (1945)). A defendant is entitled to an instruction on his theory of defense "however flimsy" the evidence is which supports that theory, *Vazquez v. State,* 518 So.2d 1348, 1350 (Fla. 4th DCA 1987), or however "weak or improbable his testimony may have been" *Holley v. State,* 423 So.2d 562, 564 (Fla. 1st DCA 1982). It is for the jury, not the court, to determine what weight to give the defendant's evidence. *Vazquez, supra.*

***195** In the instant case, Arthur clearly introduced sufficient evidence to support the instruction on the justifiable use of non-deadly force. The state charged Arthur with aggravated assault, alleging that he had pointed his shotgun at the victim. Arthur and his girlfriend told a different story, however. Arthur denied ever having pointed the shotgun at the victim as an individual but admitted threatening a crowd with the gun. Arthur further testified that he had no fear of the victim as an individual but that he was afraid of the crowd that was gathering around him, his girlfriend, and his truck immediately prior to his display of the shotgun. Having introduced evidence that he only used non-deadly force in the face of a fear of imminent bodily harm, Arthur was entitled to a jury instruction that his actions were legal under those circumstances. By denying the requested instruction, the trial court essentially removed from the province of the jury the factual question of whether Arthur only used the gun to make the crowd disperse so that he and his girlfriend could leave the parking lot in his truck.

The state contends that this particular argument was not raised below and therefore is waived on appeal. Upon review of the record, it appears that defense counsel at least attempted to argue that the instruction

was appropriate based on the fact that the state had originally alleged that three individuals were around the defendant when he displayed the gun. The trial court seems to have understood defense counsel's admittedly vague argument that, because the state had originally included two other victims, at least a small crowd was present to sufficiently frighten Arthur into displaying a gun. This argument, therefore, was not waived and Arthur is entitled to raise it here on appeal. Additionally, it appears further argument on this issue would have been pointless. *State v. Heathcoat,* 442 So.2d 955, 957 (Fla.1983).

REVERSED.

DAUKSCH, J., concurs.

HARRIS, J., dissents, with opinion.

HARRIS, Judge, dissenting.

This record, in my view, does not justify an instruction on self defense, perhaps for two reasons. First, there was no real evidence of imminent peril, even from the crowd; second, even if brandishing the shotgun at the crowd was justified, Arthur denied that the specific aggravated assault charged in this action took place.

Arthur testified that after the dispute between himself and his girlfriend inside the bar generated some animosity with a woman patron, Monika, he and his girlfriend left. He further testified that a group of patrons of the bar, including Monika, followed him outside carrying beer mugs, beer bottles and cue sticks. Since they were exiting a bar/poolhall, the fact that the patrons retained their drinks and cue sticks, in and of itself, does not seem all that ominous. Arthur testified:

A. I was scared. I was scared for my life.

I put my girlfriend in the truck and said we are fixing to leave and they come around my truck, surrounded my truck. I was like, "You-all get away from my truck." I was going to leave. They kept coming to me, kept coming around my truck. I was going to get in my truck and leave. They were hollering, my friends, "Jump in the truck and run them all over and get out of there," and when they left I was stuck there by myself, me and Ericha.

I was afraid that they were going to hurt me or her or hit my truck or something. I was like, "Get away from my truck."

I looked for a stick, you know, to defend myself and in the back seat, I had forgot it was there. You know, it must have been there a week or two behind the seat.

Q. This is a beat up old shotgun. Is this the way you treat your guns?

A. No. That's an old raggedy thing I had--we was rabbit hunting with a week prior to that. I forgot it was behind my seat. Luckily I did find it to keep these people off of me. And--

***196.** Q. What did you do with it when you pulled it out?

A. I said, "Hey, you-all better get the 'f' away from me. I am trying to leave. I want to go home. Get away from me."

They just kept surrounding the truck and the little guy Barker, come through, he hobbled through all drunk and discombobulated. You could have blowed on him and knocked him down. He was the one that talked to me. There was no problem, you know, we don't want any problems. Put your gun away and I did, I was leaving. By that time the cops come in and I stopped right there. I mean, I let the cop come in, he went towards the parking lot through here. I am right here at the entrance all ready parked out there and ready to go, and the cops are coming in and they are all pointing at me, "That's the man, that's the man," so I turned the truck off right there and stepped out of the vehicle.

Q. You didn't try to get away?

A. No. I mean, I knew when I seen them there, I wasn't going to escape or run or nothing like that. I wasn't going to make matters worse.

Q. Did you ever point the gun at anybody?

A. No, sir, I didn't.

Q. Did you ever tell anybody you'd kill them?

A. No, sir.

What is missing from Arthur's testimony is any

indication that anyone in the crowd ever threatened him, his girlfriend, or even his truck. From his testimony, it appears that even though one woman was upset with him for abusing his girlfriend, the other patrons of the bar merely came out to look. He did not indicate that anyone verbally threatened him or prevented or attempted to prevent him from getting into his truck and driving away. According to his testimony, the only crowd spokesman, the little "drunk guy," Barker (the victim in this case), told him they wanted no problem and for him to put his gun away. He did so, according to him, and without any difficulty from the crowd, was on his way out of the area when the police arrived. Even his own testimony does not show a present danger at the time he brandished the shotgun.

Perhaps in his condition (he had had several drinks by then) the mere presence of the onlookers was threatening. This brings us to the second reason an instruction on self defense was unjustified. Arthur was not charged with brandishing the shotgun at the crowd. He was charged specifically with assaulting Barker with the shotgun.

Barker testified that when he approached Monika, who was arguing with Arthur, and attempted to get her to leave, Arthur pointed the shotgun at him and threatened him. Barker testified that he was praying that Arthur would not pull the trigger.

This is the aggravated assault charged in this action and Arthur's defense was that it never happened. He testified that he never pointed the shotgun at Barker and he never threatened Barker. It is settled law in this state that if the accused denies the commission of the charged offense he is not entitled to an instruction on self defense. *See Abbott v. State,* 589 So.2d 943 (Fla. 2d DCA 1991). The issue would be different had Arthur admitted the assault on Barker but claimed that he feared Barker because Barker was a part of the crowd that was threatening him and thus self defense should excuse such assault. Arthur should not be able to deny the charge and, at the same time, claim that he committed the act to defend himself.

To All County & Circuit ASA's

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

D. Pumphrey Copy to post

SCOTT CAMPBELL

Appellant,

v.

Appeal No. CRC 96-18304 CFANO

CTC95-108652XANC
95-097604PANC

STATE OF FLORIDA

Appellee.

Opinion filed May 27, 1998.

Appeal from a judgment and sentence entered by the Pinellas County Court County Judge Rushing

Walter L. Grantham, Jr., Esq.
Attorney for appellant

Donald Pumphrey, Esq.
Assistant State Attorney

ORDER AND OPINION

THIS MATTER is before the Court on Scott Campbell's appeal from a judgment and sentence entered by the Pinellas County Court following a jury verdict of guilty. After reviewing the briefs and record, this Court affirms the judgment and sentence.

The defendant claims that the trial court erred when it limited his voir dire of the jury regarding the issue of fairness of Florida's implied consent law's license revocation. This Court, however, finds no merit in the defendant's argument.

In his remaining ground for appeal, the defendant claims that the trial court erred in overruling his objection to part of the State's closing argument. The defendant claims the State used an improper "golden rule" argument during closing. The State, while arguing its DUI

case to the jury, asked the jurors to "put yourself in the defendant's shoes ... ." Although those words may on their face sound like a "golden rule" violation, upon closer examination this Court finds no violation. As the Second District Court stated "[a] 'golden rule' argument is generally a prosecutor's argument to the jury that places the jury in the shoes of the victim, not the defendant." Worden v. State, 603 So.2d 581, 584 (Fla. 2d DCA 1992).

Moreover, although the defendant cites civil cases that recite the general proposition that a "golden rule" argument is improper because it asks the jurors to put themselves in the place of one of the parties, the defendant fails to adequately demonstrate how that is applicable to the case at hand. The "golden rule" argument was impermissible in those cases because it struck at the sensitive area of financial responsibility and hypothetically requested the jury to think about how much they would want to receive if they were in a similar situation. See Goutis v. Express Transport, Inc., 699 So.2d 757 (Fla. 4th DCA 1997), Metropolitan Dade County v. Zapata, 601 So.2d 239 (Fla. 3d DCA 1992). Clearly, that does not apply to the instant case.

For the above-stated reasons this Court concludes the trial court did not err. Therefore, the judgment and sentence are affirmed.

DONE AND ORDERED in Chambers at St.Petersburg, Pinellas County, Florida this _____ day of May, 1998.

ORIGINAL SIGNED
TRUE COPY

MAY 27 1998

DAVID A. DEMERS
Circuit Judge

David A. Demers
Circuit Judge, Appellate Division

cc: State Attorney
Walter Grantham, Jr., Esq.
Judge Rushing

John AUCHMUTY, Appellant,

v.

STATE of Florida, Appellee.

No. 90–2007.

District Court of Appeal of Florida, Fourth District.

March 4, 1992.

Defendant was convicted of first-degree murder and related offenses following trial in Circuit Court, Palm Beach County, Thomas Johnson, J., and he appealed. The District Court of Appeal, Farmer, J., held that: (1) trial court erred in precluding evidence of personal relationship between deceased and accused to establish that shooting was heat of passion and thus not premeditated, and (2) trial court erred in precluding cross-examination of key state witness about pending criminal prosecution against the witness, to show bias or prejudice.

Reversed and remanded.

1. Criminal Law ⇐338(7)
Homicide ⇐165

Evidence of murder defendant's prior relationship with victim, including the fact that victim had a criminal past and that defendant had done a series of favors for him, including obtaining a job, and had grown to consider victim as father regards his own son was relevant to show that shooting was in heat of passion and thus not premeditated when defendant discovered victim in bed with defendant's estranged wife, and probative value of the evidence was not outweighed by danger of unfair prejudice, confusion of issues, misleading jury or needless presentation of cumulative evidence. West's F.S.A. § 90.403.

2. Homicide ⇐181, 339

Erroneous exclusion in murder prosecution of evidence of defendant's past relationship with the victim, offered to show that shooting was in heat of passion and thus not premeditated, was not harmless.

3. Witnesses ⇐372(1)

Murder defendant was entitled to cross-examine key state witness about pending criminal prosecution against the witness to show bias or prejudice.

Richard L. Jorandby, Public Defender, and Paul E. Petillo, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and John Tiedemann, Asst. Atty. Gen., West Palm Beach, for appellee.

FARMER, Judge.

[1] Appellant was convicted of first degree murder, attempted first degree murder, armed burglary and aggravated assault—all arising from the same incident. We reverse because of two errors. We conclude that the court erred in precluding the defense from offering evidence of a long-standing personal relationship between the deceased and the accused to establish that the shooting was in the heat of passion and thus not premeditated. The trial court also erred in precluding the defense from cross-examining a key state witness about a pending criminal prosecution against the witness to show bias or prejudice.

Defendant did not contest the fact that he had shot and killed the victim, whom he had discovered unclothed and in bed with his estranged wife. Instead, his theory of defense was lack of premeditation and the heat of passion. Defendant had been estranged from his wife for nearly a year after a marriage of some 18 years. He wanted to show that the emotional trauma of the separation was intensified by unusual circumstances concerning his own personal relationship with the man he shot.

The deceased owed his job to the intercession of defendant, who at trial sought to introduce evidence that his relationship with the decedent was more than merely that he worked with him. He wanted to prove that there were strong emotional ties between them, arising from a series of favors he had done for decedent, a convicted felon.

He sought to prove that, as shown by his past conduct and favors for the man, he had grown to consider the deceased as a father regards his own son. His theory of defense was that, when he saw the decedent's car parked at his estranged wife's apartment, he quite literally "snapped". When a few moments later he discovered his wife in bed with this man, he was in a rage "of the highest degree."

The trial judge precluded this evidence on the grounds that it was irrelevant. In doing so, he seems to have focused solely on that part of the history which showed that the victim had served time in prison for conviction of a crime. Thus he accepted the state's argument that the reputation of the victim is not relevant in this kind of first degree murder case. We disagree with the judge and have no hesitancy in finding relevancy, including the fact of the victim's criminal past.

We see the evidence excluded in this case as little different from the evidence excluded in *Billeaud v. State*, 578 So.2d 343 (Fla. 1st DCA), *rev. denied*, 583 So.2d 1034 (Fla. 1991). Both cases involved the defense of *crime passionel*. In *Billeaud* the excluded evidence was of the past extramarital affairs of defendant's wife "to show the years of frustration that he experienced and that his rage may have been much greater than the jury could have expected." 578 So.2d at 344. The material fact which the excluded evidence in this case would have tended to prove was, as in *Billeaud*, central to the defense: that the unexpected discovery of the betrayal by a man he regarded as his son with his very own wife evoked a rage greater than the jury might have expected.

[2] The state has not shown why its probative value might have been outweighed by "the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla.Stat. (1991). Nor can we say beyond any reasonable doubt that the verdict would have been the same with it. *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986). Thus, unlike the court in *Billeaud*, we cannot find the exclusion harmless.

[3] While that ground alone might be sufficient for a new trial, there is still another. There was an eyewitness to the killing. He shared the apartment with the deceased and defendant's wife. He opened the door to defendant's knock at 1:00 a.m. and admitted defendant into the apartment. Defendant forced him at gunpoint to show him where his friend was. He saw defendant open the door to the master bedroom, only to discover the deceased and defendant's wife in bed together unclothed. He testified that the victim attempted to grab defendant's arm while yelling "What are you doing John", after which he saw defendant shoot him. The witness described defendant as loud but controlled. By any standard, he was an important witness for the state.

The problem arises from the fact that this witness was on probation at that time and had just had charges brought against him for violation of probation, seeking revocation and imprisonment. The trial judge barred the defense from questioning the witness about this pending prosecution and whether he and the state had any arrangements or understandings that might conceivably affect the credibility of the witness's evidence. His decision appears to have been based on his assumption that the probative value of this evidence would be outweighed by its "prejudicial" nature—presumably that it might influence the jury to disbelieve this eyewitness.

A wide range of cross-examination is usually allowed of the state's witnesses. *Morrell v. State*, 335 So.2d 836 (Fla. 1st DCA 1976), *disapproved on other grounds, Edward v. State*, 548 So.2d 656 (Fla.1989). A defendant has a strong interest in discrediting a crucial state's witness by showing bias, an interest in the outcome, or a possible ulterior motive for his in-court testimony. *Phillips v. State*, 572 So.2d 16 (Fla. 4th DCA 1990). As we did in *Phillips*, so we are unable to say here that the exclusion of this evidence to show bias was harmless.

We therefore reverse defendant's conviction and remand for a new trial.

REVERSED AND REMANDED.

HERSEY and GUNTHER, JJ., concur.

Myra BIANCO, Appellant,

v.

STATE of Florida, Appellee.

No. 90-2996.

District Court of Appeal of Florida, Fourth District.

March 4, 1992.

Defendant pled guilty to multiple counts of grand theft involving claims of fraud and misappropriation of funds arising out of contracts for construction and sale of homes. Order of probation containing restitution provisions was entered by the Circuit Court, St. Lucie County, Marc A. Cianca, J., and defendant appealed. The District Court of Appeal, Stone, J., held that restitution orders were erroneous as to two of the victims.

Remanded for modification in part and otherwise affirmed.

1. Criminal Law ⇐982.5(2)

Restitution provisions in order of probation imposed on defendant who pled guilty to multiple counts of grand theft involving claims of fraud and misappropriation of funds arising out of contracts for construction and sale of homes by defendant's company were erroneous as to two of the numerous victims; evidence did not show that the two victims' additional mortgage and rental expense were caused by defendant's crime, nor should restitution be required as to items which contract did not require defendant to provide or which did not result in additional expense to homeowner.

2. Criminal Law ⇐1208.4(2)

In establishing restitution payable, State had burden of demonstrating by preponderance of the evidence that victims' claims were directly or indirectly caused by commission of the offense in question.

Richard L. Jorandby, Public Defender, and Tanja Ostapoff, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Patricia G. Lampert, Asst. Atty. Gen., West Palm Beach, for appellee.

STONE, Judge.

We reverse appellant's sentence and remand for modification of the restitution provisions in the order of probation as to the amount of the payment due to two of the numerous victims.

The appellant pled guilty to multiple counts of grand theft involving claims of fraud and misappropriation of funds arising out of contracts for the construction and sale of homes by appellant's company. The trial court held an evidentiary hearing prior to sentencing at which it determined the amount of restitution appellant owed each victim.

[1] We appreciate the difficulty encountered by the trial court in sorting through the sometimes ambiguous, duplicative, and questionable admissions, claims, and figures in this evidence. We also recognize that the degree of proof normally introduced in a restitution hearing will not be as extensive as in a civil trial. Nevertheless, error does appear upon the face of this record as to the amounts appellant owed victims Jill Harrison and Mr. and Mrs. Tulloch. There is no error as to the amounts deemed payable to the other victims.

[2] The state had the burden of demonstrating, by a preponderance of the evidence, that the victims' claims were directly or indirectly caused by the commission of the offense in question. *State v.*

*1293 596 So.2d 1293

17 Fla. L. Weekly D1111

David A. FERGUSON, Appellant,
v.
STATE of Florida, Appellee.

No. 91-1237.
District Court of Appeal of Florida,
Fifth District.

May 1, 1992.

Defendant was convicted and sentenced for capital sexual battery after trial in the Circuit Court, Orange County, Richard F. Conrad, J. Defendant appealed. The District Court of Appeal held that trial court committed reversible error in restricting defense counsel's cross-examination of child victim's mother which was designed to elicit information as to whether child feared its mother so as to establish child's motive to falsify claim against defendant who was mother's ex-husband.

Reversed and remanded.

W. Sharp, J., dissented.

CRIMINAL LAW ⇐1170.5(5)
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1170.5 Examination of Witnesses
110k1170.5(5) Cross-examination.

Formerly 110k11701/2(5)

[See headnote text below]

WITNESSES ⇐372(2)
410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k372 Cross-Examination to Show Interest or Bias
410k372(2) Inquiry as to particular acts or facts tending to show interest or bias.

Fla.App. 5 Dist. 1992.

Trial court committed reversible error in restricting defense counsel's cross-examination of child victim's mother in sexual battery case, where cross-examination was designed to elicit information as to whether the child feared its mother in order to lay factual basis for argument that child's fear of mother was child's reason or motive to falsify or fabricate claim of sexual battery against defendant, who was mother's ex-husband.

*1294. Chandler R. Muller and David A. Henson of Muller, Kirkconnell, Lindsey and Snure, P.A., Winter Park, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Anthony J. Golden, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

We reverse the defendant's convictions and sentences for capital sexual battery and remand for a new trial on the ground that the trial court committed reversible error in restricting defense counsel's cross examination of the child victim's mother which cross examination was designed to elicit information as to whether the child feared its mother. This information was relevant to the defense argument that the child's fear of its mother was the child's reason or motive to falsify or fabricate a claim against the defendant, who was the mother's ex-husband. The defense was entitled to lay a factual basis for this argument to the jury which was directed to the child's credibility as a witness and to the weight the jury might give to the child's testimony. See generally, Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988); Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

REVERSED and REMANDED FOR NEW TRIAL.

GOSHORN, C.J., and COWART, J., concur.

W. SHARP, J., dissents without opinion.

*1178 670 So.2d 1178

21 Fla. L. Weekly D797

Mildred Jean CARMICHAEL, Appellant,
v.
STATE of Florida, Appellee.

No. 95-2304.

District Court of Appeal of Florida,
Third District.

April 3, 1996.

Defendant was convicted in the Circuit Court, Dade County, Michael B. Chavies, J., and he appealed. The District Court of Appeal held that trial court's refusal to allow cross-examination of prosecution's chief witness concerning pending civil action between witness and defendant was reversible error.

Reversed.

1. CRIMINAL LAW⚖ 1170.5(1)

110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1170.5 Examination of Witnesses
110k1170.5(1) Rulings in general.

[See headnote text below]

1. WITNESSES⚖ 370(3)

410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k370 Friendly or Unfriendly Relations with or Feeling Toward Party
410k370(3) Instigation or maintenance of prosecution or litigation.

Fla.App. 3 Dist. 1996.

Trial court's refusal to allow cross-examination of prosecution's chief witness concerning pending civil action between that witness and defendant was reversible error.

2. WITNESSES⚖ 363(1)

410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k363 Interest as Ground of Impeachment in General
410k363(1) In general.

Fla.App. 3 Dist. 1996.

Evidence tending to establish that witness appearing before state for any reason other than to tell truth should not be kept from jury.

An Appeal from the Circuit Court for Dade County, Michael B. Chavies, Judge.

*1179. Samek & Besser and Lawrence E. Besser, for appellant.

Robert A. Butterworth, Attorney General, and Wanda Raiford, Assistant Attorney General, for appellee.

Before LEVY, GERSTEN, and FLETCHER, JJ.

PER CURIAM.

[1] [2] The record reflects that the trial court committed reversible error in curtailing the defendant's cross-examination of the prosecution's chief witness as to her possible motive, bias, or self-interest. The law in Florida is clear that evidence tending to establish that a witness appearing before the State for any reason other than to tell the truth should not be kept from the jury. A trial court's refusal, in a criminal prosecution, to allow cross-examination of a witness concerning a pending civil action between that witness and the defendant is error. *See Wooten v. State,* 464 So.2d 640 (Fla. 3d DCA), *review denied,* 475 So.2d 696 (Fla.1985).

Reversed.

to prove bad character or propensity. Similar fact evidence is admissible "when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Such similar fact evidence is commonly referred to as " *Williams* rule" evidence because the statutory language tracks the language in *Williams v. State,* 110 So.2d 654, 662 (Fla.), *cert. denied,* 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). Where the State wishes to introduce *Williams* rule evidence in a criminal action, it must provide the defendant notice, at least ten days prior to trial, of the offenses or acts it intends to offer. § 90.404(2)(b)1., Fla. Stat. (1993). No such notice was given in the instant case.

*744_ FN4. Section 90.403, Florida Statutes (1993), provides that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."

FN5. Second-degree murder is defined as the "unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual." § 782.04(2), Fla. Stat. (1995).

*738 696 So.2d 738

22 Fla. L. Weekly S292

Michael Thomas COOLEN, Appellant,
v.
STATE of Florida, Appellee.

No. 84018.

Supreme Court of Florida.

May 22, 1997.

Rehearing Denied July 8, 1997.

Defendant was convicted in the Circuit Court, Pinellas County, W. Douglas Baird, J., of first-degree murder, and was sentenced to death. Defendant appealed. The Supreme Court held that: (1) evidence was insufficient to establish defendant acted with premeditation, but (2) evidence was sufficient to support second-degree murder conviction.

Reversed and remanded with directions.

Grimes, J., filed dissenting opinion in which Shaw and Wells, JJ., joined.

1. HOMICIDE⚖ 253(3)

203 ----
203VII Evidence
203VII(E) Weight and Sufficiency
203k251 Degree of Murder
203k253 First Degree
203k253(3) Circumstances of cool blood, deliberation, and premeditation.

Fla. 1997.

Evidence that defendant attacked victim after fighting with victim over a can of beer, that victim tried to fend off defendant during attack and that victim suffered deep stab wounds to his chest and back and defensive wounds to his forearm and hand was insufficient to establish that victim's killing was premeditated, as required to support first-degree murder conviction.

2. HOMICIDE⚖ 253(3)

203 ----
203VII Evidence
203VII(E) Weight and Sufficiency
203k251 Degree of Murder
203k253 First Degree
203k253(3) Circumstances of cool blood, deliberation, and premeditation.

Fla. 1997.

Premeditation is essential element which distinguishes first-degree murder from second-degree murder.

3. HOMICIDE⚖ 253(3)

203 ----
203VII Evidence
203VII(E) Weight and Sufficiency
203k251 Degree of Murder
203k253 First Degree
203k253(3) Circumstances of cool blood, deliberation, and premeditation.

Fla. 1997.

While premeditation may be proven by circumstantial evidence in first-degree murder case, evidence relied on by State must be inconsistent with every other reasonable inference.

4. HOMICIDE⚖ 253(3)

203 ----
203VII Evidence
203VII(E) Weight and Sufficiency
203k251 Degree of Murder
203k253 First Degree
203k253(3) Circumstances of cool blood, deliberation, and premeditation.

Fla. 1997.

Where State's proof fails to exclude reasonable hypothesis that homicide occurred other than by premeditated design, verdict of first-degree murder cannot be sustained.

5. CRIMINAL LAW⚖ 371(4)

110 ----
110XVII Evidence
110XVII(F) Other Offenses
110k371 Acts Showing Intent or Malice or Motive
110k371(4) In prosecutions for homicide.

Fla. 1997.

Defendant's taped statement regarding his criminal record was relevant in first-degree murder case to show defendant's state of mind at time he attacked victim; defendant stated that victim had "something silver in his hand" and that defendant reacted quickly by stabbing victim because his previous eight years of imprisonment had taught him not to take chances and to react quickly.

6. HOMICIDE⚿ 169(5)

203 ----
203VII Evidence
203VII(B) Admissibility in General
203k169 Circumstances Preceding Act
203k169(5) Substantive offense part of or connected with same transaction.

Fla. 1997.

Evidence that defendant had threatened victim's son with a knife on night be fatally stabbed victim was relevant in first-degree murder case to establish context out of which crime arose, and was not inadmissible similar fact evidence or evidence of bad character. West's F.S.A. § 90.404.

7. CRIMINAL LAW⚿ 369.2(1)

110 ----
110XVII Evidence
110XVII(F) Other Offenses
110k369 Other Offenses as Evidence of Offense Charged in General
110k369.2 Evidence Relevant to Offense, Also Relating to Other Offenses in General
110k369.2(1) In general.

Fla. 1997.

Similar fact evidence is commonly referred to as "*Williams* rule evidence." West's F.S.A. § 90.404.

See publication Words and Phrases for other judicial constructions and definitions.

8. CRIMINAL LAW⚿ 662.7

110 ----
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.7 Cross-examination and impeachment.

Fla. 1997.

Limiting defendant's cross-examination of prosecution witness during guilt phase of capital murder case by not allowing defendant to question witness about nature of criminal charges pending against her did not violate defendant's Confrontation Clause rights; through cross-examination, jury learned that witness had been criminally charged in another incident that occurred after victim's death, that she was currently in pretrial intervention program, and that charges against her would be dismissed if she successfully completed that program. U.S.C.A. Const.Amend. 6; West's F.S.A. § 90.403.

9. WITNESSES⚿ 374(1)

410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k374 Competency of Impeaching Evidence
410k374(1) In general.

Fla. 1997.

Evidence of bias is subject to balancing under statute requiring probative value of evidence to be weighed against its prejudicial effect, and may be inadmissible if its unfair prejudice to witness or party substantially outweighs its probative value; how far inquiry can proceed into details of matter is within court's discretion. West's F.S.A. § 90.403.

10. HOMICIDE⚿ 254

203 ----
203VII Evidence
203VII(E) Weight and Sufficiency
203k251 Degree of Murder
203k254 Second and lesser degrees.

Fla. 1997.

Evidence that defendant fatally stabbed victim after arguing with victim over can of beer was sufficient to support second-degree murder conviction. West's F.S.A. § 924.34.

*739 James Marion Moorman, Public Defender and Douglas S. Connor, Assistant Public Defender, *740

Tenth Judicial Circuit, Bartow, for Appellant.

Robert A. Butterworth, Attorney General and Candance M. Sabella, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

We have on appeal the judgment and sentence of the trial court imposing the death penalty upon Michael Thomas Coolen. We have jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution. We reverse the first-degree murder conviction and vacate the death sentence because the evidence was insufficient to prove premeditation.

Coolen was charged with first-degree murder for the stabbing death of John Kellar on November 7, 1992. The evidence introduced at trial revealed the following facts. Kellar and his wife, Barbara Caughman Kellar, went to a pub in Clearwater at approximately 4:30 p.m. and struck up a conversation with Coolen and his girlfriend Deborah Morabito. The two couples drank beer and talked for three or four hours and then went back to the Kellars' home where they continued to party and drink beer in the backyard. According to nine-year-old Jamie Caughman, Barbara's son, the two men fought over a can of beer during the evening.

Coolen and Jamie walked down a nearby dirt road to shoot off fireworks that Coolen had in his van. Coolen then played tag with Jamie in the yard. During the game of tag, Coolen pulled Jamie away from the van door, put him on the ground, took a knife out of his pocket, and warned Jamie not to step on the door again. Jamie told no one about the incident and went into the house to play Nintendo.

John Kellar escorted Morabito into the house so that she could use the bathroom. During their absence, Coolen put his hand down Barbara Kellar's shirt. She pushed Coolen away and did not know where he went. When John Kellar and Morabito returned from the house a few minutes later, they joined Barbara Kellar at the van and the three continued their conversation. Suddenly Coolen pulled John Kellar away and backed him up to the house. John Kellar began to holler and moan as Coolen stabbed him. Barbara Kellar ran to assist her husband when he fell to the ground. She threw her body over his as protection and Coolen struck her several times with a knife. Jamie came outside in time to see John Kellar and Coolen fighting. He saw Coolen stabbing his stepfather and his stepfather trying to push Coolen away. While Coolen was driving away from the scene, he hit a tree and the Kellars' truck.

In response to Barbara Kellar's 911 call, deputies and emergency medical personnel were dispatched to the scene. John Kellar was transported by helicopter to the hospital and died from his stab wounds. The medical examiner testified that Kellar had six stab wounds, including two defensive wounds to his forearm and hand, a deep stab wound to the right chest, and one to his right back. Kellar's blood alcohol level was .22.

Based upon the description given by Barbara Kellar and Jamie Caughman, deputies stopped Coolen's van on an adjacent street shortly after the stabbing. Coolen and Morabito were transported to the Kellar residence where they were identified by Barbara Kellar. Coolen was read his rights, expressed his understanding of those rights, and responded to questioning. According to the deputy, Coolen appeared to be intoxicated but had no trouble understanding the deputy or responding to questions. Coolen admitted that a knife found in Morabito's coat pocket was his and that he had used the knife to stab John Kellar.

Coolen was also interviewed at the sheriff's office several hours after the stabbing. In that taped interview, which was played to the jury, Coolen admitted stabbing Kellar with the knife found in Morabito's coat. He stated that he had been "playing word games" with Barbara Kellar when John Kellar "copped an attitude." He saw "something silver" in Kellar's hand, thought it was a small handgun that Kellar said he owned, and attacked Kellar to protect himself.

At the close of the State's evidence, defense counsel moved for a judgment of acquittal on the basis that the State had failed to adduce any evidence of premeditation. *741 Defense counsel renewed the motion on the same grounds at the close of all evidence. The court denied the motion both times. The jury returned a verdict of guilty of murder in the first degree as charged.

During the penalty phase, the State presented evidence of Coolen's prior violent felony convictions. Coolen presented the testimony of his aunt, cousin, and sister regarding his family background, testimony of his girlfriend Morabito regarding his drinking problem, and the testimony of two friends with whom he had previously worked.

The jury recommended the death sentence by a vote of eight to four. The judge followed that recommendation and imposed the death sentence. The judge found one aggravating circumstance (prior violent felony), no statutory mitigating circumstances, and three nonstatutory mitigating circumstances (employment background, participation in self-help programs while in jail, and being a caring relative). The judge gave no weight to the first two mitigating factors and only slight weight to the caring relative mitigating factor.

[1] Coolen raises ten issues on appeal; four involve the guilt phase of his trial and six relate to the penalty phase. (FN1) We find the first issue to be dispositive as to Coolen's appeal of the first-degree murder conviction and death sentence. For the reasons discussed below, we find the evidence to be insufficient to support Coolen's conviction for first-degree murder.

[2] [3] [4] Premeditation is the essential element which distinguishes first-degree murder from second-degree murder. *Wilson v. State,* 493 So.2d 1019 (Fla.1986). Premeditation is defined as

> more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Id. at 1021. While premeditation may be proven by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference. *Hoefert v. State,* 617 So.2d 1046 (Fla.1993). Where the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. *Hall v. State,* 403 So.2d 1319 (Fla.1981).

The State asserts that the following evidence establishes premeditation in the instant case. Barbara Kellar testified that Coolen suddenly attacked Kellar without warning or provocation. Jamie Caughman testified that Coolen had threatened him with the knife earlier in the evening, that he had seen Kellar and Coolen fight over a beer, and that Kellar tried to fend off Coolen during the attack. The State also contends that the deep stab wounds to Kellar's chest and back and the defensive wounds on his forearm and hand are indicative of the premeditated nature of the attack and inconsistent with Coolen's claim of self-defense.

Although this evidence is consistent with an unlawful killing, we do not find sufficient evidence to prove premeditation. Barbara Kellar testified that the two men had not been arguing and that Coolen simply "came out of nowhere" and starting stabbing her husband. Jamie Caughman described an ongoing pattern of hostility between two intoxicated men that culminated in a fight over a ***742** beer can. The testimony of these eyewitnesses is contradictory and neither provides sufficient evidence of premeditation. While the nature and manner of the wounds inflicted may be circumstantial evidence of premeditation, *Holton v. State,* 573 So.2d 284, 289 (Fla.1990), the stab wounds inflicted here are also consistent with an escalating fight over a beer (Jamie Caughman's account) or a "preemptive" attack in the paranoid belief that the victim was going to attack first (Coolen's version). Because the evidence was insufficient to prove premeditation, we reverse the conviction for first-degree murder and vacate the death sentence.

Having reversed the first-degree murder conviction, we need not reach any of the claims relating to the penalty phase. We reject Coolen's other guilt-phase claims as being without merit. Claims 2 and 3 relate to the court's denial of two defense motions: to excise portions of Coolen's taped statement that referred to his prior criminal convictions and prison sentences; and to bar testimony about Coolen's knife threat to Jamie Caughman.

[5] During a taped interview at the sheriff's office, Coolen made several references to his previous criminal convictions and prison sentences. Defense counsel filed a motion to redact Coolen's taped statement so that the jury would not hear about his criminal record. While the court recognized that evidence of a prior criminal record is inadmissible to show bad character or propensity to commit crimes, the court determined that the statements were relevant here to show Coolen's state of mind during the attack. Thus, the court denied the motion to excise the tape and admitted the confession in its entirety.

We agree with the trial court that these statements were properly admitted to explain Coolen's state of mind at the time of the offense. Coolen stated that Kellar had "something silver in his hand." Coolen reacted quickly by stabbing Kellar because his previous "eight years in maximum prisons up in Massachusetts" had taught him not to take chances, to

"react very quickly," and that it's better to "be safe than sorry." Thus, these statements were relevant to explain Coolen's actions and state of mind at the time of the stabbing. (FN2)

[6] [7] In his third claim, Coolen contends that the knife threat to Jamie Caughman constituted "collateral crimes" evidence that was being introduced to show his propensity to confront people with a knife. Thus, he argues, testimony relating to this incident was inadmissible under section 90.404, Florida Statutes (1993). (FN3) However, subsections 90.404(1) and 90.404(2) do not govern the admissibility of this evidence. As this Court explained in *Griffin v. State,*

> evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not *Williams* rule evidence. It is admissible under section 90.402 because "it is a relevant and inseparable part of the act which is in *743 issue.... [I]t is necessary to admit the evidence to adequately describe the deed."

639 So.2d 966, 968 (Fla.1994) (quoting Charles W. Ehrhardt, *Florida Evidence* § 404.17 (1993 ed.)), *cert. denied,* 514 U.S. 1005, 115 S.Ct. 1317, 131 L.Ed.2d 198 (1995).

In the instant case, Jamie Caughman's testimony does not fall within the *Williams* rule and was not introduced by the State as similar fact evidence. Nor was this testimony's sole relevance to prove Coolen's bad character. Instead, the testimony was necessary to establish the entire context out of which the crime arose. Jamie Caughman's testimony was relevant and was not unduly prejudicial. Therefore, we find no error in the admission of this testimony.

[8] In claim 4, Coolen argues that the court impermissibly limited his cross-examination of Barbara Kellar by not allowing questioning about the nature of criminal charges pending against her. Kellar was charged with sexual battery for engaging in sexual conduct with her fourteen-year-old stepson on the night of her husband's funeral. The charge was later reduced to solicitation of sexual activity and Kellar entered a pretrial intervention program (PTI). The court permitted defense counsel to bring out the fact that Kellar was charged with a felony subsequent to her husband's stabbing and that she was currently on PTI, but did not allow counsel to reach the nature of the felony or the facts involved. Coolen claims that this limitation on his cross-examination of Kellar violated his Confrontation Clause rights. We find no such violation here.

[9] "When charges are pending against a prosecution witness at the time he [or she] testifies, the defense is entitled to bring this fact to the jury's attention to show bias, motive, or self-interest." *Torres-Arboledo v. State,* 524 So.2d 403, 408 (Fla.), *cert. denied,* 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988). However, evidence of bias is subject to a section 90.403, Florida Statutes (1993), (FN4) balancing and may be inadmissible if its unfair prejudice to a witness or a party substantially outweighs its probative value. Charles W. Ehrhardt, *Florida Evidence* § 608.5 (1996 ed.). How far the inquiry can proceed into the details of the matter is within the court's discretion. *See Dufour v. State,* 495 So.2d 154, 159-60 (Fla.1986) (finding that court did not abuse its discretion by limiting inquiry into details of pending criminal charge after witness had been examined about fact of charge), *cert. denied,* 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987).

In this case, we find no abuse of discretion in limiting inquiry into the details of the pending criminal charge against Barbara Kellar. Through cross-examination, the jury learned that Kellar had been criminally charged in another incident that occurred after her husband's death, that she was currently in a pretrial intervention program, and that the charges against her would be dismissed if she successfully completed that program. Thus, Kellar's bias was established and the court did not err by limiting cross-examination into the details of the charge against her.

[10] As discussed above, we reverse Coolen's conviction for first-degree murder and vacate his death sentence. However, we find sufficient evidence in the record to sustain a conviction of second-degree murder. (FN5) Thus, in accordance with section 924.34, Florida Statutes (1995), this case is remanded to the trial court with instructions to enter a judgment for second-degree murder and to sentence Coolen accordingly.

It is so ordered.

OVERTON and HARDING, JJ., concur.

KOGAN, C.J. and ANSTEAD, J., concur in result only.

GRIMES, J., dissents with an opinion, in which

SHAW and WELLS, JJ., concur.

*744. GRIMES, Justice, dissenting.

I cannot agree that the evidence was insufficient to convict Coolen of premeditated first-degree murder.

In *Sireci v. State,* 399 So.2d 964 (Fla.1981), this Court said:

> Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. *Weaver v. State,* 220 So.2d 53 (Fla. 2d DCA), *cert. denied,* 225 So.2d 913 (1969). Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. *Hernandez v. State,* 273 So.2d 130 (Fla. 1st DCA) *cert. denied,* 277 So.2d 287 (1973). Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned. *Larry v. State,* 104 So.2d 352 (Fla.1958).

Sireci, 399 So.2d at 967.

Thereafter, in *Penn v. State,* 574 So.2d 1079 (Fla.1991), we explained:

> Premeditation can be shown by circumstantial evidence. Whether or not the evidence shows a premeditated design to commit a murder is a question of fact for the jury.

Id. at 1081. *See Middleton v. State,* 426 So.2d 548 (Fla.1982) (confession that shooting was a "snap decision" sufficient to sustain premeditation); *Mackiewicz v. State,* 114 So.2d 684 (Fla.1959) (fact that only an instant elapsed between defendant's discovery of police officer and fatal shot did not negate premeditation).

Without apparent provocation, Coolen rushed over to the victim and stabbed him six times. Two of the stab wounds were defensive and one was in the back. When the victim's wife threw her body over his in order to protect him, Coolen also stabbed her several times.

Cool and calculated--no; but clearly premeditated. How can it be said that the jury could not reasonably conclude that Coolen intended to kill his victim?

I respectfully dissent.

SHAW and WELLS, JJ., concur.

FN1. Coolen argues that the trial court erred in the following matters: 1) evidence was insufficient to support his conviction for first-degree premeditated murder; 2) failure to excise portions of the taped statement referring to his previous criminal record and prison sentences; 3) admitting Jamie Caughman's testimony about a threat that Coolen made toward him on the night of the murder; 4) limiting cross-examination of Barbara Caughman Kellar; 5) excluding hearsay testimony regarding failure of Coolen's mother to get him counseling as a child; 6) admitting evidence about his prior violent felonies; 7) denying requested penalty phase instruction on "lack of intent to kill the victim" as a mitigating factor; 8) rejecting the statutory mitigating circumstance of substantially impaired capacity or, in the alternative, rejecting intoxication as a nonstatutory mitigating factor; 9) failure to find family background as a nonstatutory mitigating circumstance and failure to give weight to two of the nonstatutory mitigators found; and 10) the death sentence is disproportionate.

FN2. In a footnote in his brief, Coolen notes two other statements that he contends should have been deleted from the tape. However, Coolen's failure to fully brief and argue these points constitutes a waiver of these claims. *See Duest v. Dugger,* 555 So.2d 849, 852 (Fla.1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

FN3. Section 90.404(1), Florida Statutes (1993), provides that character evidence is generally inadmissible to prove that a person acted in conformity with his or her character on a particular occasion. Section 90.404(2), Florida Statutes (1993) , provides that similar fact evidence of other crimes, wrongs, or acts is inadmissible when relevant solely

The way I understand the controlling cases on the issue presented here is that a defendant has no constitutional right to combine self-representation and the assistance of counsel. *See McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). Thus, there is no constitutional right for an accused represented by counsel to participate in his own defense as co-counsel. Whether such a request is granted or denied is of no constitutional moment. Granting this hybrid representation arrangement does not suddenly entitle an accused to constitutional protections to which he was not entitled in the first instance.

In truth, this is not a *Faretta* case at all. Whether and to what extent a defendant represented by counsel is permitted to address the jury at trial is a matter committed to the "sound discretion of the [trial] court." *State v. Tait*, 387 So.2d 338, 339 (Fla.1980). *See McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); *U.S. v. Mills*, 704 F.2d 1553 (11th Cir.1983), *cert. denied*, 467 U.S. 1243, 104 S.Ct. 3517, 82 L.Ed.2d 825 (1984). Appellant does not argue here that the trial court abused its discretion in permitting him to participate in his defense. Consequently, this non-issue cannot support a reversal and remand.

When this case is reduced to its essence, the simple fact is that the jury below did not buy into Brooks' "*mea culpa*, but—" defense. He now asks this court to let him off the proverbial hook and give him another shot, hopefully, for him, before a more understanding and sympathetic jury. For the reasons set out above, I can find no reasonable basis for doing so and would decline Brooks' invitation.

To my mind the Supreme Court's holding in *Bell* and the holding of the majority herein cannot be reconciled. Accordingly, as a service to the bench and bar I would certify the following as a question of great public importance:

WHETHER THE TRIAL COURT MUST CONDUCT A *FARETTA* INQUIRY, INCLUDING GIVING THE WARNINGS REGARDING THE DANGERS OF SELF-REPRESENTATION, WHEN THE COURT GRANTS A MOTION TO ALLOW A DEFENDANT REPRESENTED BY COUNSEL TO PARTICIPATE IN HIS OWN DEFENSE AS CO-COUNSEL.

Cory Montreiel FLUELLEN, Appellant,

v.

STATE of Florida, Appellee.

No. 96-1844.

District Court of Appeal of Florida, First District.

Dec. 23, 1997.

Defendant was convicted in the Circuit Court, Columbia County, James Bean, J., of possession of cocaine with intent to sell or deliver and possession of drug paraphernalia, and he appealed. The Court of Appeal, Allen, J., held that: (1) anonymous tip testimony was inadmissible hearsay; (2) officer's testimony regarding defendant's intent to sell drugs was inadmissible; (3) limiting cross-examination of witness who asserted his Fifth Amendment privilege against self-incrimination violated defendant's constitutional right to fully cross-examine witness for bias and motive; and (4) errors committed were not harmless.

Reversed and remanded.

Miner, J., concurred and dissented with written opinion.

1. Criminal Law ⇐419(1.5)

Anonymous tip that described individual was selling drugs, and that defendant matched description, was inadmissible hearsay.

2. Criminal Law ⇐470(2)

Officer's testimony that quantity of cocaine possessed by defendant indicated that

he possessed drug with intent to sell exceeded limitations of expert testimony and invaded province of jury.

3. Witnesses ⇐372(2)

Limiting defendant's cross-examination of state's witness who asserted his Fifth Amendment privilege not to testify with regard to felony charge pending against him, by allowing defendant to elicit only that witness had been convicted of felony or crime involving dishonesty or false statements, that witness was on probation, that witness had case pending against him, and that defendant was witness against him in that case, was improper limitation of defendant's constitutional right to fully cross-examine witness for bias and motive. U.S.C.A. Const.Amend. 5.

4. Criminal Law ⇐1169.1(9)

Error in admitting anonymous tip information that defendant matched description of individual selling drugs clearly could have affected verdict with respect to charges of possession of cocaine with intent to sell or deliver and possession of drug paraphernalia and, thus, was not harmless.

5. Criminal Law ⇐1169.1(2.1), 1170.5(5)

Error in admitting testimony of one witness and in limiting cross-examination of another witness was not harmless with respect to charge of possession of cocaine with intent to sell or deliver, where state relied solely on those two witnesses to prove intent to sell or deliver.

6. Criminal Law ⇐1144.13(6)

When reviewing sufficiency of evidence to support conviction, appellate court must consider all evidence at trial, including evidence it determines to have been wrongfully admitted.

Nancy A. Daniels, Public Defender, and Jean R. Wilson, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and J. Ray Poole, Assistant Attorney General, Tallahassee, for Appellee.

ALLEN, Judge.

In this direct criminal appeal the appellant challenges his convictions for possession of cocaine with intent to sell or deliver and possession of drug paraphernalia. Concluding that the trial court erred in permitting prosecution witnesses to testify about the contents of a tip that led to the appellant's arrest, in permitting one of the arresting officers to testify that the quantity of cocaine possessed by the appellant indicated that he had the intent to sell, and in permitting another state witness to testify in violation of the appellant's right to conduct a full and fair cross-examination of that witness, we reverse the convictions.

The appellant was charged with possession of cocaine with intent to sell or deliver and possession of drug paraphernalia after he abandoned a small bottle containing crack cocaine while fleeing from police officers. The state relied upon testimony of the arresting officers and a witness named Sheppard.

[1] The trial court erred in permitting the arresting officers to testify that they were acting pursuant to an anonymous tip that a described individual was selling drugs, as this testimony constituted inadmissible hearsay. In *State v. Baird*, 572 So.2d 904 (Fla.1990), the supreme court addressed the purposes for which the substance of an informant's tip may be used against an accused. The court held that such information may be admissible when it is offered for a purpose other than to prove the truth of the matter asserted, and when the purpose for which the statement is being offered is a material issue in the case. The court rejected the use of such testimony to show a logical sequence of events, reasoning that the need for such evidence is slight and the likelihood of misuse is great. The court accordingly stated that the better practice is to allow the officer to state that he acted upon a "tip" or "information received" without going into the details of the accusatory information.

The appellee does not suggest that the tip information in the present case was admissible for a nonhearsay purpose, but rather contends that it was properly admitted to show that the officers acted in response to the tip. In making this ar
lee contends that the offic
as to the details of the in
by the anonymous inform
ord reveals that the offic
substance of the tip over
tions of the appellant. Th
ny informed the jury that
the drug tactical unit had
mous tip that a man we
and a white shirt was s
specified location and mig
down if approached, and
matched the description g
mant. Admission of this t
constituted error. *See, e.g*
674 So.2d 114 (Fla.1996);
502 So.2d 507 (Fla. 1st DC
State, 398 So.2d 851 (Fl

[2] The trial court als
ting one of the arrestin
Paul, to testify that the
possessed by the appellan
appellant possessed the d
to sell, rather than for p
testimony was improper b
the limitations of expert te
ed the province of the ju
State, 644 So.2d 1376 (F

[3] Additional error
trial court admitted the
pard. Prior to Sheppar
appellant made a motion
his testimony because Sh
assert his Fifth Amendm
testify with regard to a f
ing against him in which t
be a key witness for the
appellant contended tha
right to fully cross-exam
bias and motive would be
court denied the motion.
called as a witness. H
damaging testimony re
lant's intent to sell or dis
The trial court then limit
nation of Sheppard, allo
only to elicit that Sheppa
ed of a felony or crime
or false statements, that
that he had a case pend

the tip. In making this argument the appellee contends that the officers did not testify as to the details of the information provided by the anonymous informant. But the record reveals that the officers did relate the substance of the tip over the specific objections of the appellant. The officers' testimony informed the jury that the supervisor of the drug tactical unit had received an anonymous tip that a man wearing green shorts and a white shirt was selling drugs at a specified location and might throw the drugs down if approached, and that the appellant matched the description given by the informant. Admission of this testimony therefore constituted error. *See, e.g., Wilding v. State*, 674 So.2d 114 (Fla.1996); *Haynes v. State*, 502 So.2d 507 (Fla. 1st DCA 1987); *Postell v. State*, 398 So.2d 851 (Fla. 3d DCA 1981).

[2] The trial court also erred in permitting one of the arresting officers, Officer Paul, to testify that the quantity of cocaine possessed by the appellant indicated that the appellant possessed the drug with the intent to sell, rather than for personal use. This testimony was improper because it exceeded the limitations of expert testimony and invaded the province of the jury. *See Gamble v. State*, 644 So.2d 1376 (Fla. 5th DCA 1994).

[3] Additional error occurred when the trial court admitted the testimony of Sheppard. Prior to Sheppard's testimony, the appellant made a motion in limine to exclude his testimony because Sheppard planned to assert his Fifth Amendment privilege not to testify with regard to a felony charge pending against him in which the appellant was to be a key witness for the prosecution. The appellant contended that his constitutional right to fully cross-examine the witness for bias and motive would be violated. The trial court denied the motion. Sheppard was then called as a witness. He gave potentially damaging testimony regarding the appellant's intent to sell or distribute the cocaine. The trial court then limited the cross-examination of Sheppard, allowing the appellant only to elicit that Sheppard had been convicted of a felony or crime involving dishonesty or false statements, that he was on probation, that he had a case pending against him, and that the appellant was a witness against him in that case.

The Supreme Court has recognized the constitutional significance of permitting a full opportunity to cross-examine a witness to expose any bias or motive to testify untruthfully:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness.... A more particular attack on the witness' credibility is effected by means of revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

Davis v. Alaska, 415 U.S. 308, 316–17, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) (citations omitted); *see also Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *accord Gibson v. State*, 661 So.2d 288 (Fla. 1995); *Lewis v. State*, 591 So.2d 922 (Fla. 1991).

The Supreme Court has not yet dealt with a situation where a defendant has been restricted in his cross-examination of a witness by virtue of the witness asserting his Fifth Amendment privilege against self-incrimination on a matter materially relevant to the witness's credibility, but at least one Florida court has. In *Kelly v. State*, 425 So.2d 81 (Fla. 2d DCA 1982), *rev. denied*, 434 So.2d 889 (Fla.1983), a prosecution witness testified on direct examination that he had been arrested on charges of soliciting a bribe but he

denied that he had offered to change his testimony for money. On cross-examination, the witness invoked his Fifth Amendment privilege regarding the charge of soliciting a bribe as to any facts not of public record. Kelly was therefore unable to demonstrate through cross-examination that the solicitation charge grew out of the witness's telephone calls to an attorney for one of Kelly's codefendants during which the witness allegedly offered to change his testimony in exchange for a large cash payment. Nevertheless, the trial court refused to strike the witness's testimony.

The appellate court reversed, holding that "denial of the right to explore on cross-examination possible bases for impeaching the credibility of the witness amounts to a denial of rights under the sixth amendment." *Id.* at 84. The court noted that as

> is almost always the case when cross-examination directed to its main objective—destruction of credibility—is unduly restricted, the record, of necessity, does not and cannot reflect what would have been developed; appropriate cross-examination could only be accomplished by an adroit, penetrating, relentless cross-examination searching deeply into the motivation of the witness.

Id. Although Kelly was able to get most of the incriminating evidence of the bribe before the jury through other witnesses, the court determined that to be no substitute for cross-examination.

In the present case, the appellant's constitutional right to fully cross-examine Sheppard was denied. Although the appellant was permitted to elicit the fact of the pending charge and his role as a witness, such was a poor substitute for "an adroit, penetrating, relentless cross-examination searching deeply into the motivation of the witness." *See id.*

[4, 5] The errors committed in this case cannot be considered harmless. As to the improper admission of the tip information, the supreme court has stated:

> Placing information before the jury that a non-testifying witness gave police reliable information implicating the defendant in the very crime charged clearly could affect the verdict.

Wilding, 674 So.2d at 119. And the admission of Paul's testimony regarding the appellant's intent and the Sheppard testimony cannot be considered harmless because the state was relying solely on these two witnesses to prove intent to sell or deliver.

[6] Finally, we reject the appellant's assertion that there was an insufficient evidentiary basis for his conviction on the charge of possession with intent to sell or deliver cocaine because the only substantial evidence at trial to demonstrate the intent element of that crime was the erroneously admitted testimony of Paul and Sheppard. As we recently clarified in *Barton v. State*, 22 Fla. L. Weekly D1831 (Fla. 1st DCA 1997), when reviewing the sufficiency of the evidence, the appellate court must consider all the evidence at trial, including the evidence the appellate court determines to have been wrongfully admitted.

The appellant's convictions are reversed and the case is remanded.

WEBSTER, J., concurs.

MINER, J., concurs and dissents with written opinion.

MINER, Judge, concurring and dissenting.

Although I agree that the case at bar must be reversed and remanded for a new trial on two of the grounds raised by appellant, i.e., the error in permitting the testimony relative to the anonymous tip and restricting the appellant's cross-examination of the witness, Sheppard, I would find the issue related to Officer Paul's testimony to be unpreserved for appellate review. I concur that appellant's contention relating to the sufficiency of the evidence to support his convictions is without merit.

COCONU

Willie James JACKS

v.

The STATE of Flor

No. 97-3

District Court of Ap
Third Dis

Dec. 24, 1

Defendant was convi
Court, Dade County, Pa
tempted burglary, and
The District Court of Ap
was sufficient evidence t
ment required for attemp
tion.

Affirmed.

1. Burglary ⇐41(10)

There was sufficient
intent element required
glary conviction; jury co
concluded that defendan
unannounced entry into
pled with his immediat
without explanation, w
constituted stealthy entr

2. Criminal Law ⇐726

Prosecutor's comm
argument regarding tru
victim's testimony were
ments were made in re
attack on victim's cred
properly instructed by
state's burden of proof.

Bennett H. Brumm
and Maria E. Lauredo,
fender, for appellant.

Robert A. Butterwor
and Erin E. Dardis, a
sistant Attorneys Gene
Certified Legal Intern,

Before NESBITT, (

Statutes, (1993), and this Court's substantial case law precedent. Christopher v. State, 583 So.2d 642, 646 (Fla.1991); Stewart v. State, 549 So.2d 171, 176 (Fla.1989), cert. denied, 497 U.S. 1032, 110 S.Ct. 3294, 111 L.Ed.2d 802 (1990); Grossman v. State, 525 So.2d 833, 841 (Fla.1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). This is a clear and gross violation of established law, and has the effect of invalidating *293 the death sentence. (FN3) With admirable candor, on appeal, the State concedes that the trial court did not file the required written order setting forth its findings. Further, the record contains a certification from the clerk of the court that no written order was ever prepared or filed.

Recently, we were presented with a similar, although less egregious, situation and held:

> At the sentencing, instead of preparing a written order prior to the oral pronouncement and filing it concurrently with the oral pronouncement, the judge directed the court reporter to transcribe his oral findings and submit them for inclusion into the court file. We find that the trial court's action in this respect violated the procedural rule for written orders imposing a death sentence set forth by this Court in Grossman v. State, 525 So.2d 833, 841 (Fla.1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989).
>
> In Grossman, we mandated that "all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement." The purpose of this requirement is to reinforce the court's obligation to think through its sentencing decision and to ensure that written reasons are not merely an after-the-fact rationalization for a hastily reasoned initial decision imposing death. Further, this Court held in Stewart v. State, 549 So.2d 171, 176 (Fla.1989), cert. denied, 497 U.S. 1032, 110 S.Ct. 3294, 111 L.Ed.2d 802 (1990), that "[s]hould a trial court fail to provide timely written findings in a sentencing proceeding taking place after our decision in Grossman, we are compelled to remand for imposition of a life sentence."

Perez v. State, 648 So.2d 715 (Fla.1995) (citation omitted). In Perez, unlike here, the trial court made some, albeit inadequate, attempt to comply with the statutory mandate of written findings in support of a sentence of death by ordering a transcription of the oral sentencing. As this record reflects, the trial judge here made absolutely no effort to submit a written order, either before his oral pronouncement of sentence or after the sentence was rendered.

We explained in Christopher v. State, 583 So.2d 642, 646 (Fla.1991), that our holding in Grossman regarding this matter "is more than a mere technicality. The statute itself requires the imposition of a life sentence if the written findings are not made." See also Bouie v. State, 559 So.2d 1113 (Fla.1990) (affirming conviction but vacating death sentence and remanding with directions to trial court to reduce sentence to life imprisonment where court order did not indicate which aggravating and mitigating circumstances were applicable in sentence of death).

Thus, we find the trial court's failure to make the requisite written findings as required by section 921.141(3) constitutes error. As a result, Gibson's sentence of death must be vacated. The trial court's failure to provide the required written findings bars the imposition of the death penalty and mandates the imposition of a life sentence. Christopher, 583 So.2d at 646.

SENTENCING GUIDELINES

[7] In addition, the trial court failed to enter a written order justifying his departure from the sentencing guidelines in sentencing Gibson to life on his burglary conviction. The trial court's error requires that we remand with directions for resentencing within the guidelines. Owens v. State, 598 So.2d 64 (Fla.1992).

*294 Accordingly, we affirm Gibson's convictions but vacate his sentences and remand for further proceedings consistent herewith.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING and ANSTEAD, JJ., concur.

WELLS, J., concurs in part and dissents in part with an opinion.

WELLS, Justice, concurring in part and dissenting in part.

I concur in the affirmance of the convictions and as to the reversal for failure to file written reasons for the guidelines departure with respect to the burglary

*288 661 So.2d 288

20 Fla. L. Weekly S512

Brian Keith GIBSON, Appellant,
v.
STATE of Florida, Appellee.

No. 81769.
Supreme Court of Florida.
Oct. 5, 1995.

Defendant was convicted in the Circuit Court, Hendry County, Jay B. Rosman, J., of first-degree murder and sentence of death was imposed. Defendant appealed. The Supreme Court held that: (1) defendant failed to show error or prejudice by denial of counsel's request to consult with defendant before exercising peremptory challenges; (2) limitation of cross-examination of defendant's wife regarding bias was harmless error; (3) admission of testimony of defendant's wife and girlfriend regarding defendant's request for anal intercourse with them was harmless error; (4) failure to provide written findings barred imposition of death penalty and mandated imposition of life sentence; and (5) failure to enter written order justifying departure from sentencing guidelines required resentencing within the guidelines for burglary conviction.

Convictions affirmed, but sentences vacated and remanded.

Wells, J., concurred in part and dissented in part and filed an opinion.

1. CRIMINAL LAW ⚖641.12(2)
   110 ----
   110XX Trial
   110XX(B) Course and Conduct of Trial in General
   110k641 Counsel for Accused
   110k641.12 Deprivation or Allowance of Counsel
   110k641.12(2) Presence of counsel and consultation.

   [See headnote text below]

1. CRIMINAL LAW ⚖1166.10(1)
   110 ----
   110XXIV Review
   110XXIV(Q) Harmless and Reversible Error
   110k1166.5 Conduct of Trial in General
   110k1166.10 Counsel for Accused
   110k1166.10(1) In general.

Fla. 1995.

Defendant failed to demonstrate either error or prejudice when trial court denied defense counsel's request to consult with defendant before exercising peremptory challenges of jurors where counsel did not raise issue at trial, but only asked for recess for general purpose of meeting with his client, defendant was not prevented or limited in any way with consulting with his counsel concerning exercise of juror challenges, and no objection to court's procedure was ever made.

2. CRIMINAL LAW ⚖1170.5(5)
   110 ----
   110XXIV Review
   110XXIV(Q) Harmless and Reversible Error
   110k1170.5 Examination of Witnesses
   110k1170.5(5) Cross-examination.

   Formerly 110k11701/2(5)

   [See headnote text below]

2. WITNESSES ⚖372(2)
   410 ----
   410IV Credibility and Impeachment
   410IV(C) Interest and Bias of Witness
   410k372 Cross-Examination to Show Interest or Bias
   410k372(2) Inquiry as to particular acts or facts tending to show interest or bias.

Fla. 1995.

Limitation on defendant's cross-examination of his wife as to whether she had heard he was having an affair with murder victim was error; however, such error was harmless where defendant was given opportunity to expose his wife's potential bias through another line of questioning, and it was also disclosed that his wife had an affair and a child with another man. U.S.C.A. Const.Amend. 6; West's F.S.A. Const. Art. 1, Sec. 16; West's F.S.A. Sec. 90.608(2).

3. WITNESSES ⚖363(1)
   410 ----
   410IV Credibility and Impeachment
   410IV(C) Interest and Bias of Witness
   410k363 Interest as Ground of Impeachment in General
   410k363(1) In general.

Fla. 1995.

Evidence code liberally permits introduction of

evidence to show bias or motive of witness. West's F.S.A. Sec. 90.608(2).

4. WITNESSES ⚿372(1)
410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k372 Cross-Examination to Show Interest or Bias
410k372(1) In general.
Fla. 1995.
Inherent within defendant's right to cross-examine witnesses is a right to expose witness' motivation in testifying as such cross-examination is principal means by which believability of a witness and the truth of his testimony are tested. U.S.C.A. Const.Amend. 6; West's F.S.A. Const. Art. 1, Sec. 16.

5. HOMICIDE ⚿163(1)
203 ----
203VII Evidence
203VII(B) Admissibility in General
203k163 Character and Habits of Parties
203k163(1) Character and habits of accused.

[See headnote text below]

5. HOMICIDE ⚿338(2)
203 ----
203X Appeal and Error
203k333 Harmless Error
203k338 Admission of Evidence
203k338(2) Immaterial or irrelevant evidence.
Fla. 1995.
Defendant's conversation with his wife and girlfriend about anal intercourse did not constitute materially relevant evidence to establish that he was the person who violently abused murder victim, although medical examiner had found slight tear in victim's anal area; however, error in allowing presentation of this testimony showing defendant's bad character was harmless where both wife and girlfriend testified that he did not press request with them, matter was not emphasized or made a feature of the trial, and evidence against defendant was overwhelming.

6. HOMICIDE ⚿358(3)
203 ----
203XI Sentence and Punishment
203k358 Sentencing Procedure
203k358(3) Findings; statement of reasons.
Fla. 1995.
Failure to provide required written findings in support of sentence of death for first-degree murder conviction barred imposition of death penalty and mandated imposition of life sentence. West's F.S.A. Sec. 921.141(3).

7. CRIMINAL LAW ⚿1181.5(8)
110 ----
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
110k1181.5(8) Sentence.

[See headnote text below]

7. CRIMINAL LAW ⚿1321(1)
110 ----
110XXIX Sentencing Guidelines
110XXIX(D) Proceedings
110k1318 Findings; Reasons
110k1321 Departures, Reasons for
110k1321(1) Necessity.
Fla. 1995.
Defendant convicted of burglary in connection with first-degree murder was entitled to be resentenced within sentencing guidelines where trial court failed to enter written order justifying departure from sentencing guidelines in sentencing defendant to life on burglary conviction.

James Marion Moorman, Public Defender and Paul C. Helm, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General and Robert J. Landry, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

This is an appeal by Brian Keith Gibson from his criminal convictions and sentences, including a conviction for first-degree murder and a sentence of death. We have jurisdiction. Art. V, Sec. 3(b)(1), Fla. Const. We affirm appellant's convictions but remand for resentencing, and, because the trial judge failed to enter written sentencing orders in accord with statutory and case law, we vacate Gibson's sentence of death.

FACTS

The following facts are based on the evidence presented at trial. In the morning hours of September 30, 1991, Lupita Luevano was murdered in her home. Richard Murrish, her live-in boyfriend, found her nearly nude body lying face down on the bed of the master bedroom. The room was in disarray and the contents of her purse were scattered on the floor, although nothing of value was missing. Murrish also observed that the bed *288 was twisted sideways, and the dresser had been moved. Blood was splattered on the walls, floor, dresser, and ceiling. Next to Luevano's body was a barbell with a three-pound weight attached, and a three-pound weight was also found at the foot of the bed. An autopsy showed that Luevano had likely died of blunt injuries to the face and skull, although, based on bruising on the back of her neck, the medical examiner could not rule out strangulation as a contributing factor.

The police found an Indianhead charm underneath the master bedroom bed and a gold chain on the bed. A shirt was tied around part of Luevano's face and neck. Her underwear was ripped and pulled up around her waist, and a pair of white shorts was found next to her body. In the back bedroom, they discovered an open jalousie with a cut screen and fingerprint smudges on the wall below the window. Inside the room, a green towel was found on the bed that appeared to have blood on it. Outside, beneath the open window, the police found a ladder, cement block, bucket, and an unopened bottle of a soft drink, Sprite. The officers also observed a shoe print with a triangular, diamond, or round dimple pattern; however, a pattern cast was never taken. A portion of the back fence was pressed down and it looked like someone had been standing there in the grass.

Gibson had reported to work at approximately 4 a.m. on September 30 at the Clewiston Fertilizer Plant, located across a canal from Luevano's home. That morning, Gibson was working alongside three other men: Jay Odum, Kenneth Bryant, and Matthew Street. At approximately 4:43 a.m., Gibson weighed in a truckload of fertilizer. At 6:30 a.m., when Odum received an order to mix another load of fertilizer, Gibson could not be located and the load was made without him. All three of his co-workers testified that they did not see Gibson for the hour and a half preceding that second load. Sometime between 7:15 and 7:30 a.m., when Gibson returned to the plant, Odum noticed Gibson had fresh scratches on his face and a bruise under his eye, injuries that were not present earlier that morning. Bryant testified that Gibson looked like he had been in a fight. Several other co-workers also testified that Gibson looked like he had been fighting because of the scratches on his face on the morning of the murder. When asked how he sustained the scratches, Gibson gave contradictory stories to various individuals.

Randy Perryman, an employee at Super Stop, a convenience store near the plant, testified that Gibson entered his store about 5:30 a.m. on September 30 and purchased a bottle of Sprite. Kimberly Murphy, a dispatcher/bookkeeper at Gibson's workplace, testified that on the morning of the murder, between 7:10 a.m. and 7:15 a.m., she saw Gibson off plant property walking along the *290 canal. She noticed he was wearing a white T-shirt and work pants or blue jeans, but she did not notice any stains on his clothing.

The police received an anonymous call on the morning of the murder that a Mexican male was seen running towards the Cuban market, but no witnesses verified this report. Several of his co-workers testified that Gibson told them that he had seen a Mexican male running towards the market.

A few days after the murder, and after Gibson was given Miranda warnings, he gave police a taped statement. He told police that on the morning of the murder he had seen a Hispanic male running from the direction of Luevano's home holding his stomach. During this interview, Detective Cassells noticed scratches under Gibson's eye and chin. Gibson stated that his dog had injured him. Approximately eleven days after his initial statement, Gibson was asked to come to the police station to discuss the chain and charm found at the murder scene. At this time, Gibson told police that his jewelry was at home, and they could verify its identity with his wife Roxanne. Numerous witnesses, including Gibson's wife and girlfriend, identified the Indianhead charm and gold chain found at the murder scene as Gibson's. In addition, DNA evidence matching Gibson's was found in Luevano's vaginal area and at the scene, and Gibson's fingerprints were found outside the window of the Luevano residence.

The jury found Gibson guilty of all counts. As to the murder charge, the jury recommended death by a vote of seven to five. The trial court orally approved the jury's recommendation and orally sentenced Gibson to death. No written sentencing order was ever entered. As to the burglary count, the trial court departed from the sentencing guidelines and imposed a life sentence consecutive to the death sentence, but

also failed to provide written reasons for the departure sentence.

GUILT PHASE CLAIMS

Gibson raises three claims (FN1) relating to the guilt phase of the trial: (1) The trial court violated Gibson's right to be present and to the assistance of counsel by denying his counsel's request to consult with Gibson before exercising peremptory challenges. (2) The trial court violated Gibson's right to confront adverse witnesses by limiting his cross-examination of his wife. (3) The trial court erred by admitting the testimony of his wife and his girlfriend concerning his requests to have anal intercourse with them.

JURY SELECTION

[1] During a small portion of a long jury selection process, Gibson's lawyer asked the trial court whether he could take a ten-minute recess to permit him to consult with his client:

> Mr. Rinard: Your Honor, if I may have--if we may take an afternoon recess so I may have ten minutes or so to speak with Mr. Gibson to advise him of some things and see how he would like for me to proceed.
>
> The Court: Let's proceed with this round. Are there any additional challenges for cause?

By this exchange, it is apparent the trial court implicitly denied counsel's request for a recess, and directed counsel to proceed with his challenges for cause. The record reflects that immediately thereafter, without further comment or objection, Gibson's counsel began making challenges for cause to the jury panel.

Based on this brief exchange, Gibson claims error in two respects. First, he argues that the trial court violated his right to be present with counsel during the challenging of jurors by conducting the challenges in a bench conference. Second, he argues that the trial court violated his right to the assistance of counsel by denying defense counsel's request to consult with Gibson before exercising peremptory challenges.

In Steinhorst v. State, 412 So.2d 332 (Fla.1982), we said that, "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal *291 ground for the objection, exception, or motion below." In this case, we find that Gibson's lawyer did not raise the issue that is now being asserted on appeal. If counsel wanted to consult with his client over which jurors to exclude and to admit, he did not convey this to the trial court. On the record, he asked for an afternoon recess for the general purpose of meeting with his client. Further, there is no indication in this record that Gibson was prevented or limited in any way from consulting with his counsel concerning the exercise of juror challenges. On this record, no objection to the court's procedure was ever made. In short, Gibson has demonstrated neither error nor prejudice on the record before this Court. Cf. Coney v. State, 653 So.2d 1009, 1013 (Fla.1995) (holding trial court's error in conducting pretrial conference where juror challenges were exercised in absence of defendant was harmless beyond reasonable doubt).

CROSS-EXAMINATION

[2] Gibson's second challenge to the guilt phase of his trial concerns the trial court's alleged error in limiting his cross-examination of his wife, Roxanne, as to whether she had heard he was having an affair with the victim. Gibson claims this question was critical to demonstrate her motive and bias in testifying against him.

[3][4] Initially, we agree with Gibson that Roxanne's state of mind and possible motive for testifying were permissible subjects for inquiry. Our evidence code liberally permits the introduction of evidence to show the bias or motive of a witness. In relevant part, section 90.608(2) states:

> Any party, including the party calling the witness, may attack the credibility of a witness by:
>
> (2) Showing that the witness is biased.

Sec. 90.608(2), Fla.Stat. (1993). We further recognize that a defendant's right to cross-examine witnesses is secured by the Sixth Amendment to the United States Constitution and article I, section 16 of the Florida Constitution. Inherent within this right is a defendant's right to expose a witness's motivation in testifying because it is "the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347, 353 (1974); Steinhorst v. State, 412 So.2d 332, 337 (Fla.1982). Accordingly, we find it was error to prohibit this inquiry of Roxanne.

However, we conclude this error is harmless. Through another line of questioning, Gibson was given an opportunity to expose Roxanne's potential bias. For example, Roxanne acknowledged that she knew Gibson was having an affair with Tracy Grass, another State witness, and it was also disclosed that Roxanne was having an affair with another man. Indeed, it was established that she had a child with another man. In light of this testimony and evidence, and the substantial evidence of Gibson's guilt, we conclude that the trial court's error in limiting Gibson's cross-examination of Roxanne was harmless beyond a reasonable doubt because there is no reasonable possibility that the error could have affected the verdict.

SEXUAL PROPENSITIES

[5] We reach the same conclusion with regard to Gibson's last claim of error during the guilt phase. During the trial, the prosecutor was permitted, over the objections of defense counsel, to question both Gibson's wife, Roxanne, and his girlfriend, Tracy Grass, about Gibson's requests to have anal intercourse with them. In response to defense counsel's objection, the prosecution argued that inquiry about Gibson's sexual habits was relevant because the medical examiner had found a slight tear in Luevano's anal area, and hence this evidence would establish Gibson's identity as the perpetrator of the crime. Both the wife and the girlfriend testified over objection that Gibson had asked to have anal intercourse with them. However, on cross-examination they both testified that they had declined his invitation, and that he in no way attempted to have anal intercourse with them. This case is similar to our recent decision in Hayes v. State, 660 So.2d 257 (Fla.1995), where we held that a defendant's altercation with a prior girlfriend was not admissible to prove a subsequent violent attack on another woman. In Hayes we stated:

> ***292** In the instant case, the State sought to prove the identity of the murderer by showing a pattern of allegedly similar behavior by Hayes on a prior occasion. We conclude that, consistent with Drake [v. State], [400 So.2d 1217 (Fla.1981)], there are insufficient points of similarity to the instant offense to warrant admitting evidence of the previous attack. We note that the victim in the prior offense had voluntarily gone out with Hayes before she and Hayes returned to her room, that the victim did not testify that Hayes had sexually assaulted her, that Hayes was charged with only a simple assault (a charge that was later dropped), and that Hayes released the victim and allowed her to leave the room. We also find that any marginal relevance the prior attack may have had to the instant case was substantially outweighed by its prejudicial effect. See Sec. 90.403, Fla.Stat. (1993). In fact, the differences in this case are considerably greater than the differences in Drake. Accordingly, we find that the trial judge erroneously admitted the evidence of the previous attack.
>
> Id. at 261-62.

As in Hayes, we find that Gibson's conversations with his wife and girlfriend about anal intercourse do not constitute materially relevant evidence to establish that he was the person that violently abused the victim here. This evidence has no more relevance, for example, than a defendant's consensual sexual activities would go to prove the same defendant's commission of a violent sexual battery. Rather, it appears this evidence was used exclusively for the improper purpose of showing Gibson's bad character and sexual propensities. Further, in view of the overwhelming evidence against the defendant, this appears to be a classic case of prosecutorial overkill.

However, like the error concerning the cross-examination of Gibson's wife, we conclude beyond a reasonable doubt that the error in allowing presentation of this testimony was harmless. See State v. DiGuilio, 491 So.2d 1129, 1139 (Fla.1986). We have already noted that both the wife and the girlfriend testified that Gibson did not press his request for anal intercourse with them. Fortunately, also, this matter was not emphasized or made a feature of the trial. More importantly, the evidence against Gibson, as outlined above in great detail, was overwhelming. Absent eyewitness identification and a confession, it is difficult to imagine a case in which the State could assemble a more compelling body of evidence. Considering the entire record, we conclude that the error was harmless because it is not reasonably possible that the error could have affected the verdict.

PENALTY PHASE

[6] Gibson raises four issues in the capital penalty phase. (FN2) We need only address one of these, albeit the most serious. Inexplicably, the record reflects that the trial court failed to file a written order of any kind in support of the death sentence as explicitly required by section 921.141(3), Florida

conviction. I dissent as to setting aside the death sentence.

I agree with the majority that the trial judge did not apply the clear decisions of this Court. This trial judge apparently did not know of this Court's decisions in Stewart v. State, 549 So.2d 171 (Fla.1989), cert. denied, 497 U.S. 1032, 110 S.Ct. 3294, 111 L.Ed.2d 802 (1990), Grossman v. State, 525 So.2d 833 (Fla.1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989), and the other decisions of this Court which followed them. Those decisions have only to be read to be understood to require the preparation of a written sentencing order before a death sentence is pronounced. The error is simply inexplicable. Before pronouncing sentence the following occurred:

THE COURT: Anything further by the defense?

MR. RINARD: No, Your Honor.

THE COURT: Anything the state would like to present in response?

MS. POLSTER: Nothing further, Your Honor.

THE COURT: If there is nothing further, I'll proceed with Mr. Gibson and counsel alone before the bench. Everyone else may be seated, as far as any other witnesses.

After approximately three weeks of trial, two days of consideration of penalty phase by the jury, having ordered the presentence investigation report, reviewed it, and given great reflection to the sentence in this case, I'm prepared to pronounce sentence in this matter.

The trial judge and all counsel are responsible for the error in failing to follow those cases.

Though I recognize and do not approve of the trial judge's error, I again dissent from what I believe to be a misplaced sanction. See Layman v. State, 652 So.2d 373, 376 (Fla.1995) (Wells, J., concurring in part and dissenting in part). I cannot follow the reasoning of setting aside the death penalty as a sanction for the trial court's failure to follow the rules of those cases in respect to the preparation and timing of the sentencing order. It is obvious that this trial judge was oblivious to this sanction, which was in decisions of this Court more than three years before this trial. I am concerned that the greatest effect of this sanction is to thwart the legislative intent that the courts of this state enforce the capital punishment statute and to exacerbate the public's lack of confidence in their courts' capability to competently administer justice.

I believe this case is illustrative of why we should recede from this sanction, first mandated by this Court's decision in Stewart. I do not agree that section 921.141(3), Florida Statutes (1993), requires this sanction for failure of the trial judge to set forth the findings in writing. The statute only requires that a death sentence be set aside if the court "does not make the findings requiring the death sentence." In this case, the trial judge made "the findings" by dictating the findings to the court reporter. It appears to me that what is being enforced here is not a requirement of the statute but rather a rule developed by this Court.

If rules developed by this Court are ignored intentionally or repeatedly because of incompetence, it would be better to deal with the problem through judicial and professional discipline than through a sanction which prevents sentencing based upon the facts of a particular case. In this way we do not allow sentencing in a particular case to become the victim of the misfeasance of the trial judge and counsel. We also do not make a convicted ***295.** murderer the beneficiary of a trial judge's error.

FN1. Although not raised as an issue, we find the evidence sufficient to sustain Gibson's convictions, including his conviction for first-degree murder.

FN2. Gibson raises several other issues:

1. The trial court erred by admitting gruesome crime scene and autopsy photographs of the victim of the prior murder because their prejudicial effect outweighed their probative value;

2. The trial court violated Gibson's right to due process of law by admitting irrelevant victim impact evidence and by finding nonstatutory aggravating circumstances based upon such evidence;

3. The trial court erred by instructing the jury on and orally finding aggravating circumstances which were not proven beyond a reasonable doubt;

4. The trial court violated the Eighth and Fourteenth Amendments by giving vague and overbroad jury instructions on the heinous, atrocious, or cruel and cold, calculated, and

premeditated aggravating circumstances; and

5. The trial court erred by failing to find and weigh proven mitigating circumstances.

FN3. The legislature passed a bill in the 1995 session that would have provided trial judges an extra 30 days to enter written findings:

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial court and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days of the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

Fla. HB 1319, Sec. 3 (1995) (emphasis added). However, this bill, along with other amendments to the capital sentencing statute, was vetoed and did not become law. Of course, the bill would not have applied here, and, in any case, the trial court here never entered a written sentencing order in any time frame, much less within 30 days.

*420 667 So.2d 420

21 Fla. L. Weekly D235

Debra Faye HEDGES, Appellant,
v.
STATE of Florida, Appellee.

No. 94-1470.

District Court of Appeal of Florida,
First District.

Jan. 19, 1996.

Rehearing Denied Feb. 20, 1996.

Defendant was convicted in the Circuit Court, Columbia County, John Peach, J., of battery, and she appealed from exclusion of evidence of specific acts of violence committed by victim. The District Court of Appeal held that in prosecution for battery, evidence of specific acts of violence committed by victim was relevant to, and therefore admissible to prove, defendant's claim that she hit victim in defense of herself and her son, in light of defendant's testimony that victim threatened to beat her up and then struck her.

Reversed and remanded.

Lawrence, J., dissented and filed opinion.

1. ASSAULT AND BATTERY⊜ 86

37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k81 Evidence
37k86 Provocation or justification.

Fla.App. 1 Dist. 1996.

In prosecution for battery, evidence of specific acts of violence committed by victim and known to defendant at time of alleged offense was relevant to, and therefore admissible to prove, defendant's claim that she hit victim in defense of herself and her son, in light of defendant's testimony that victim threatened to beat her up and then struck her. West's F.S.A. § 90.404..

2. CRIMINAL LAW⊜ 1170(1)

110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1170 Exclusion of Evidence
110k1170(1) In general.

Fla.App. 1 Dist. 1996.

It was not harmless error, in prosecution for battery in which defendant claimed self-defense, to exclude testimony regarding defendant's knowledge of prior violent acts committed by victim, even though defendant was allowed to testify about one such act, where person allegedly beaten by victim during that incident denied that she had altercation with victim that day. West's F.S.A. § 90.404.

3. CRIMINAL LAW⊜ 1036.1(9)

110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1036 Evidence
110k1036.1 In General
110k1036.1(9) Exclusion of evidence.

Fla.App. 1 Dist. 1996.

Error in excluding evidence of victim's prior violence in prosecution for battery was preserved for appellate review, where defense counsel sought three times to elicit testimony about victim's prior violent behavior and three times trial court disallowed it. West's F.S.A. § 90.404.

4. ASSAULT AND BATTERY⊜ 85

37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k81 Evidence
37k85 Character and physical condition of parties.

[See headnote text below]

4. HOMICIDE⊜ 188(1)

203 ----
203VII Evidence
203VII(B) Admissibility in General
203k186 Self-Defense

203k188 Character and Habits of Person Killed or Assaulted
203k188(1) In general.

Fla.App. 1 Dist. 1996.

Character evidence generally is inadmissible to prove what action a person took; however, exception for evidence of pertinent trait of character of victim allows defendant to use character evidence to show that victim of the crime was the aggressor and that defendant acted in self-defense. West's F.S.A. § 90.404.

5. ASSAULT AND BATTERY⚿ 85

37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k81 Evidence
37k85 Character and physical condition of parties.

[See headnote text below]

5. HOMICIDE⚿ 188(2)

203 ----
203VII Evidence
203VII(B) Admissibility in General
203k186 Self-Defense
203k188 Character and Habits of Person Killed or Assaulted
203k188(2) Knowledge of defendant as to deceased's character.

Fla.App. 1 Dist. 1996.

Evidence of victim's prior specific acts of violence or reputation for violence is relevant to defendant's claim of self-defense, in that it reveals reasonableness of defendant's apprehension at time of the incident, provided that defendant knew of victim's violent acts or violent reputation at time of the alleged offense. West's F.S.A. § 90.404.

6. ASSAULT AND BATTERY⚿ 85

37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k81 Evidence
37k85 Character and physical condition of parties.

[See headnote text below]

6. HOMICIDE⚿ 188(3)

203 ----
203VII Evidence
203VII(B) Admissibility in General
203k186 Self-Defense
203k188 Character and Habits of Person Killed or Assaulted
203k188(3) Necessity of claim or showing of self-defense.

Fla.App. 1 Dist. 1996.

Defendant must present evidence of some overt act by victim at or about time of the incident which act reasonably indicted to defendant need to act in self-defense in order to lay predicate for offering evidence of victim's prior violent acts or reputation for violence. West's F.S.A. § 90.404.

7. ASSAULT AND BATTERY⚿ 85

37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k81 Evidence
37k85 Character and physical condition of parties.

[See headnote text below]

7. HOMICIDE⚿ 188(4)

203 ----
203VII Evidence
203VII(B) Admissibility in General
203k186 Self-Defense
203k188 Character and Habits of Person Killed or Assaulted
203k188(4) Sufficiency of showing of self-defense.

Fla.App. 1 Dist. 1996.

Where there is even slightest evidence of overt act by victim which may be reasonably regarded as placing accused apparently in imminent danger of losing his life or sustaining great bodily harm, all doubts as to the admissibility of evidence bearing on his theory of self-defense must be resolved in favor of the accused. West's F.S.A. § 90.404.

8. ASSAULT AND BATTERY⊜ 85

37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k81 Evidence
37k85 Character and physical condition of parties.

[See headnote text below]

8. HOMICIDE⊜ 188(4)

203 ----
203VII Evidence
203VII(B) Admissibility in General
203k186 Self-Defense
203k188 Character and Habits of Person Killed or Assaulted
203k188(4) Sufficiency of showing of self-defense.

Fla.App. 1 Dist. 1996.

For purposes of determining admissibility of evidence on victim's prior violent acts or reputation for violence, defendant need not have been present when prior acts occurred as long as defendant knew of the acts at the time of the alleged offense. West's F.S.A. § 90.404.

*421 An appeal from the Circuit Court for Columbia County. John Peach, Judge.

Nancy A. Daniels, Public Defender; Kathleen Stover, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Richard Parker, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

[1] Convicted of battering one William Adams, Debra Faye Hedges argues that the trial court erred in excluding evidence she proffered of specific acts of violence Mr. Adams had committed, acts that Ms. Hedges testified she was aware of when she struck him. She testified that when she saw Mr. Adams on the day of the crime, he told her, *422 "I'll beat you up," and hit her before she hit him. Ms. Hedges maintained that she only hit Mr. Adams in defense of herself and her son. We reverse.

[2] [3] At a pre-trial hearing on the state's motion in limine, defense counsel proffered Ms. Hedges' testimony regarding her knowledge of prior violent acts Mr. Adams had been guilty of:

Q Was there something in your experiences from living there in the past that caused you to believe what she was telling you?

A [Adams] is always going around--he's beaten on Kathryn quite a few times. He beat up her sister. He beat up Frankie Boyles, which is a retarded guy that lives up the hill. And he's been going around just being a big bully to these old people around here, I mean, just slapping them around, hitting them.

....

Q Had you had confrontations with him in the past when he was intoxicated and appeared to be intoxicated?

A Not me, but like my boyfriend and him had little words and stuff, and my boyfriend kicked him out of the trailer. His own nephew who lived next door to him they have gotten into it. And a few other nephews of [Adams], you know, they get drinking out there and they're ready to fight out in the yard and stuff.

Reserving ruling till trial, the trial judge decided that this evidence of prior specific acts was inadmissible. (FN1) Three times defense counsel sought to elicit testimony about Mr. Adams' violent behavior before May 20, 1993, the day of the offense. Three times the trial court disallowed it. (FN2)

[4] Character evidence is generally inadmissible to prove what action a person took. The Legislature has, however, codified statutory exceptions to the general rule excluding such evidence:

(1) CHARACTER EVIDENCE GENERALLY.--Evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion, except:

....

(b) Character of victim.--

1. Except as provided in s. 794.022 [the rape

shield law], evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the trait....

§ 90.404, Fla.Stat. (1993). This exception permits an accused to use character evidence to show that the victim of a crime was the aggressor and that the accused acted in self-defense.

[5] To prove the victim's dangerous character, evidence either of the victim's reputation for violence or of specific prior acts of violence is admissible, when the defendant knew of the victim's violent acts or of his violent reputation at the time of the alleged offense. Such evidence (FN3) tends to show that the defendant acted in self-defense. *Smith v. State,* 606 So.2d 641 (Fla. 1st DCA 1992). Evidence of prior specific acts of violence by the victim is admissible because it is relevant "to reveal the reasonableness of the defendant's apprehension at the time of the incident." *Id.* at 642-43, *citing Quintana v. State,* 452 So.2d 98, 100 (Fla. 1st DCA 1984).

[6] [7] Before a defendant may offer this type of character evidence, a proper predicate must be laid by evidence of some overt ***423** act on the victim's part at or about the time of the incident which reasonably indicated to the defendant a need to act in self defense . *Smith,* 606 So.2d at 643; *see also, Quintana,* 452 So.2d at 100. *Quintana* clarified this threshold requirement.

> [W]here there is even the "slightest evidence" of an overt act by the victim "which may be reasonably regarded as placing the accused apparently in imminent danger of losing his life or sustaining great bodily harm" all doubts as to the admissibility of evidence bearing on his theory of self-defense must be resolved in favor of the accused.

Id., citing Hawthorne v. State, 377 So.2d 780, 787 (Fla. 1st DCA 1979). In the instant case, appellant met *Quintana* 's threshold requirement with her testimony that Mr. Adams threatened to "beat [her] up," then struck her. This testimony "may be reasonably regarded as placing the accused in imminent danger of ... sustaining great bodily harm." 452 So.2d at 100; *Sanchez v. State,* 445 So.2d 1, 2 (Fla. 3d DCA 1984).

[8] A defendant need not be present when the prior acts occur, as long as he or she has knowledge of the acts at the time of the incident in question. *Smith,* 606 So.2d at 643, *citing Smith v. State,* 410 So.2d 579 (Fla. 4th DCA), *review denied,* 419 So.2d 1200 (Fla.1982). Ms. Hedges's pre-trial proffer in the instant case established such knowledge. After a proper predicate has been laid, "all doubts as to the admissibility of evidence bearing on his theory of self-defense must be resolved in favor of the accused." *Warren v. State,* 577 So.2d 682, 684 (Fla. 1st DCA 1991). The trial court should not have excluded the proffered evidence.

Reversed and remanded.

WOLF and BENTON, JJ., concur.

LAWRENCE, J., dissents with opinion.

LAWRENCE, Judge, dissenting.

I respectfully dissent. In my view, Hedges did not preserve the error which she claims was committed by the trial judge. The State filed a pretrial motion in limine to exclude certain testimony relating to prior specific acts of violence. The trial judge reserved ruling on the issue. At trial, during the testimony of Ms. Eaton, the following colloquy took place:

Q Did you see things that made you further believe what she was telling you?

A Yes, sir.

Q And what was that?

[PROSECUTOR]: Your Honor, that's already been asked and answered.

[THE COURT]: Sustained if it's the same things answered before.

BY DEFENSE COUNSEL:

Q From prior experiences living there, did you have reason to believe her?

[PROSECUTOR]: Your Honor, I'm going to object. And the Court has already made a ruling on that.

THE COURT: Sustained. You've already asked her that and she answered it.

[DEFENSE COUNSEL]: Experiences prior to May the 20th, I didn't ask that.

THE COURT: I've already ruled on that previously, though, and sustained the objection.

No proffer was made by defense counsel of the answers of the witness. Nor was the testimony presented at the pretrial motion in limine proffered. A proffer of excluded evidence must be made in order to preserve the issue for review. The Florida Supreme Court tells us:

The defense did not proffer what the witness would have said if allowed to answer the question. A proffer is necessary to preserve a claim such as this because an appellate court will not otherwise speculate about the admissibility of such evidence. We therefore find this claim has not been preserved for review.

Lucas v. State, 568 So.2d 18, 22 (Fla.1990) (citations omitted).

The fact that testimony was presented at the pretrial motion in limine was also inadequate to preserve the issue for review because the record fails to reflect that a ruling was ever obtained from the court, and for the further reason that such testimony is not a substitute for proffering same at trial. *State* *424. *v. Kelley,* 588 So.2d 595 (Fla. 1st DCA 1991); *Jackson v. State,* 456 So.2d 916 (Fla. 1st DCA 1984); *see also Phillips v. State,* 476 So.2d 194 (Fla.1985).

I would affirm the judgment and sentence.

FN1. The trial court did allow Ms. Hedges to testify that Mr. Adams had beaten Ms. Eaton earlier on the day of the encounter with Ms. Hedges that eventuated in her prosecution.

The state maintains that the excluded evidence would have been cumulative to Ms. Hedges' testimony that Mr. Adams beat Ms. Eaton on May 20, 1993. At trial, however, Ms. Eaton denied that she had had an altercation with Mr. Adams that day. We reject the state's harmless error argument. *See Smith v. State,* 606 So.2d 641, 644 (Fla. 1st DCA 1992), *citing Ciccarelli v. State,* 531 So.2d 129, 131 (Fla.1988).

FN2. The state contends that, even if these rulings were incorrect, the issue was not preserved for appellate review. This contention lacks merit.

FN3. In the present case, there was no attempt to introduce testimony of Mr. Adams' violent reputation apart from appellant's recounting the various violent episodes of which she was aware.

*322 570 So.2d 322

15 Fla. L. Weekly D2429, 15 Fla. L. Weekly D2848

William HERMANSON and Christine Hermanson, Appellants,
v.
STATE of Florida, Appellee.

No. 89-02076.

District Court of Appeal of Florida, Second District.

Sept. 28, 1990.

On Motion for Rehearing and Clarification Nov. 21, 1990.

Parents were convicted in the Circuit Court, Sarasota County, Stephen L. Dakan, J., of felony child abuse and third-degree murder for choosing to forego conventional medical treatment and providing spiritual treatment instead for child who died after lingering illness of juvenile diabetes. Parents appealed. The District Court of Appeal held that: (1) definition within statutory scheme designed to provide protective services to abused or neglected children, providing that parent responsible for child's welfare who by reason of religious beliefs does not provide specified medical treatment for child may not be considered abusive or neglectful for that reason alone, did not provide statutory defense or immunity or exemption from prosecution for felony child abuse, third-degree murder, or manslaughter based on failure of parent to provide medical treatment for child; (2) neither First Amendment of Federal Constitution nor Florida constitutional section providing for religious freedom preclude prosecution for felony child abuse, third-degree murder, or manslaughter for failure of parents to provide necessary medical care to child based on sincerely held religious beliefs; and (3) felony child abuse and manslaughter statutes did not deny due process to parents charged under those statutes for failing to provide medical treatment to child and relying on spiritual treatment.

Affirmed.

1. HOMICIDE⊜ 75
203 ----
203III Manslaughter
203k75 Neglect to perform act required by law.

Fla.App. 2 Dist. 1990.
Under proper circumstances, prosecution for manslaughter will lie based upon failure of parent to provide medical treatment for child. West's F.S.A. § 782.07.

2. CRIMINAL LAW⊜ 29(14)
110 ----
110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(5) Particular Offenses
110k29(14) Homicide.

Fla.App. 2 Dist. 1990.
Although under proper circumstances prosecution for manslaughter would lie for failure of parent to provide medical treatment for child, dismissal of manslaughter count would be sustained where convictions for felony child abuse and third-degree murder were being sustained and Supreme Court had previously expressed concern with double jeopardy problems. West's F.S.A. § 782.07; U.S.C.A. Const.Amend. 5.

3. HOMICIDE⊜ 75
203 ----
203III Manslaughter
203k75 Neglect to perform act required by law.

[See headnote text below]

3. INFANTS⊜ 13
211 ----
211II Custody and Protection
211k13 Protection of health and morals.

Fla.App. 2 Dist. 1990.
Definition within statutory scheme designed to provide protective services to abused or neglected children, providing that parent responsible for child's welfare who by reason of religious beliefs does not provide specified medical treatment for child may not be considered abusive or neglectful for that reason alone, did not provide statutory defense or immunity or exemption from prosecution for felony child abuse, third-degree murder, or manslaughter based on failure of parent to provide medical treatment for child. West's F.S.A. § 415.511; F.S. 1985, § 415.503(7)(f).

4. CONSTITUTIONAL LAW⊜ 84.5(17)
92 ----
92V Personal, Civil and Political Rights
92k84 Religious Liberty and Freedom of

Conscience
92k84.5 Particular Matters and Applications
92k84.5(17) Health care.

[See headnote text below]

4. HOMICIDE⚖ 75
203 ----
203III Manslaughter
203k75 Neglect to perform act required by law.

[See headnote text below]

4. INFANTS⚖ 13
211 ----
211II Custody and Protection
211k13 Protection of health and morals.

Fla.App. 2 Dist. 1990.
Neither First Amendment of Federal Constitution nor Florida constitutional section providing for religious freedom preclude prosecution for felony child abuse, third-degree murder, or manslaughter for failure of parents to provide necessary medical care to child based on sincerely held religious beliefs. West's F.S.A. Const. Art. 1, § 3; U.S.C.A. Const.Amend. 1.

5. HOMICIDE⚖ 75
203 ----
203III Manslaughter
203k75 Neglect to perform act required by law.

Fla.App. 2 Dist. 1990.
Prosecution for murder based on death of child because of failure to provide necessary medical treatment is proper function of state.

6. INFANTS⚖ 159
211 ----
211VIII Dependent, Neglected, and Delinquent Children
211VIII(B) Subjects and Grounds
211k159 Deprivation of education or medical services.

Fla.App. 2 Dist. 1990.
State, as parens patriae, has responsibility to intervene between parent and child when there is demonstrated physical harm occurring to child that puts reasonable person on notice that medical intervention is necessary for sake of child's life.

7. HOMICIDE⚖ 269
203 ----
203VIII Trial
203VIII(B) Questions for Jury
203k269 Elements of offense.

[See headnote text below]

7. INFANTS⚖ 20
211 ----
211II Custody and Protection
211k20 Criminal prosecutions under laws for protection of children.

Fla.App. 2 Dist. 1990.
Factual issues remained on seriousness of child's condition and whether parents were culpably negligent in not obtaining medical treatment and in relying upon spiritual treatment, so as to withstand motion to dismiss criminal charges of felony child abuse and third-degree murder; the day before child died, child's grandfather suggested to father the possibility that diabetes was cause of child's deteriorating condition.

8. CONSTITUTIONAL LAW⚖ 258(3.1)
92 ----
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(3) Particular Statutes and Ordinances
92k258(3.1) In general.

Formerly 92k258(3)

[See headnote text below]

8. HOMICIDE⚖ 32
203 ----
203III Manslaughter
203k32 Statutory provisions.

[See headnote text below]

8. INFANTS⚖ 12
211 ----
211II Custody and Protection
211k12 Constitutional and statutory provisions.

Fla.App. 2 Dist. 1990.
Felony child abuse and manslaughter statutes did not deny due process to parents charged under those statutes for failing to provide medical treatment to child and relying on spiritual treatment on theory that parent who relied on spiritual instead of medical

treatment would never know when the line was crossed and parent should stop relying on spiritual treatment alone and seek medical treatment as term "culpable negligence" did not provide sufficient notice of what behavior constituted criminal act and when that behavior occurred. West's F.S.A. § § 782.07, 827.04; U.S.C.A. Const.Amends. 5, 14.

9. HOMICIDE⚭ 75
203 ----
203III Manslaughter
203k75 Neglect to perform act required by law.

[See headnote text below]

9. INFANTS⚭ 13
211 ----
211II Custody and Protection
211k13 Protection of health and morals.

Fla.App. 2 Dist. *322 1990.
Fact that exclusion of spiritual treatment from abuse contained in statutory scheme for providing protective services to abused or neglected children was not statutory defense to criminal charges of felony child abuse, third-degree murder, or manslaughter based upon parents' failure to provide medical treatment to child did not preclude defendant from presenting any theory of defense, including that of sincerely held religious belief, to excuse, explain, mitigate, or justify defendant's behavior under the circumstances. West's F.S.A. § 415.503.

10. CRIMINAL LAW⚭ 864
110 ----
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k864 Communications between judge and jury.

Fla.App. 2 Dist. 1990.
Jury's inquiries regarding when and under what circumstances medical treatment was allowed by Christian Science Church did not indicate that jury was impermissibly questioning reasonableness or legitimacy of Christian Science beliefs held by parents who were defendants in action for felony child abuse and third-degree murder based on failure to provide medical treatment to child, but rather, constituted inquiries into factual matters surrounding tenets of church in light of conflicting evidence presented on when conventional medical intervention was approved by church and provided no reason for reversal of convictions when freedom of religion defense was before jury and rejected as excuse for parents' conduct.

11. CRIMINAL LAW⚭ 739(1)
110 ----
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k739 Defenses in General
110k739(1) In general.

Fla.App. 2 Dist. 1990.
In criminal prosecution, deciding reasonableness of accused's actions is proper function of jury, even when those actions are based on sincerely held religious beliefs.

12. CRIMINAL LAW⚭ 720(7.1)
110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k712 Statements as to Facts, Comments, and Arguments
110k720 Comments on Evidence or Witnesses
110k720(7) Inferences from and Effect of Evidence in Particular Prosecutions
110k720(7.1) In general.

Formerly 110k720(7)

[See headnote text below]

12. CRIMINAL LAW⚭ 720(9)
110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k712 Statements as to Facts, Comments, and Arguments
110k720 Comments on Evidence or Witnesses
110k720(7) Inferences from and Effect of Evidence in Particular Prosecutions
110k720(9) Homicide.

Fla.App. 2 Dist. 1990.
Prosecutor's closing argument in prosecution for felony child abuse and third-degree murder based on failure of parents to provide medical treatment for child due to their religious beliefs, in which prosecutor attempted to point out culpability of parents on theory that Christian-Science doctrine which they followed allowed medical treatment at some point in time, but parents failed to follow that

doctrine and provide medical care, constituted fair comment on evidence and inferences from evidence that church-licensed professionals allowed conventional medical treatment to be given to child, although too late to save her life.

13. HOMICIDE ⚖ 74
203 ----
203III Manslaughter
203k74 Negligence in performance of lawful act.

[See headnote text below]

13. INFANTS ⚖ 13
211 ----
211II Custody and Protection
211k13 Protection of health and morals.

Fla.App. 2 Dist. 1990.
Culpable negligence will be shown by gross or flagrant conduct evincing reckless disregard for human life, in context of felony child abuse and third-degree murder. West's F.S.A. § § 782.04(4), 827.04(1).

14. HOMICIDE ⚖ 254
203 ----
203VII Evidence
203VII(E) Weight and Sufficiency
203k251 Degree of Murder
203k254 Second and lesser degrees.

[See headnote text below]

14. INFANTS ⚖ 20
211 ----
211II Custody and Protection
211k20 Criminal prosecutions under laws for protection of children.

Fla.App. 2 Dist. 1990.
Evidence permitted finding that parents acted in reckless disregard of child's health, and ultimately, her life, by choosing to forego conventional medical treatment and providing spiritual treatment instead, and thus supported convictions for felony child abuse and third-degree murder of child who died after lingering illness of juvenile diabetes. West's F.S.A. § § 782.04(4), 827.04(1).

*324 Thomas H. Dart of Dart, Ford, Strelec & Spivey, Sarasota, and Larry Klein of Klein, Beranek & Walsh, P.A., West Palm Beach, for appellants.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Peggy A. Quince and Carol M. Dittmar, Asst. Attys. Gen., Tampa, for appellee.

PER CURIAM.

William and Christine Hermanson seek reversal of their convictions for felony child abuse and third degree murder in the death of their seven-year-old daughter, Amy. Amy died after a lingering illness of juvenile diabetes. During her illness, in lieu of conventional medical treatment, the Hermansons, who are members of the First Church of Christ, Scientist, in Sarasota, provided Amy with a course of spiritual treatment with the assistance of two Christian Science practitioners. Mr. and Mrs. Hermanson's four-year prison sentences, entered on their murder convictions, were suspended, and they were ordered to serve fifteen years' probation on condition that they provide regular medical examinations and treatment for their surviving children. *325 The Hermansons do not challenge their sentences. We affirm the convictions.

The fundamental argument underlying each of the Hermansons' several contentions is that by their prosecution and conviction the state violated their right to freely practice their religion. There is no dispute that they were sincerely practicing the tenets of Christian Science which eschews conventional medical treatment in favor of spiritual healing through prayer. (FN1) Specifically, the Hermansons argue that (1) their motion to dismiss all charges should have been granted; (2) their motion for judgment of acquittal should have been granted; (3) Florida's child abuse statutes authorized the course of action they took; (4) the jury impermissibly decided whether they were reasonable in following their religious beliefs; and (5) the state, in closing argument, misrepresented a tenet of their church. In its cross-appeal the state (1) urges error in the dismissal of the manslaughter count and (2) claims that the trial court erred in allowing the jury to consider section 415.503(7)(f), Florida Statutes (1985), (FN2) as a statutory defense. We have considered each of the issues raised by the parties and comment on those pertinent to our disposition.

We agree with the state that an error occurred at the outset of this case which caused an unnecessary legal tangle throughout the entire proceedings: The trial court ruled, at the Hermansons' request in pretrial proceedings, that a portion of section 415.503, which we shall refer to in this opinion as the "spiritual

treatment proviso," was available to the Hermansons as a *statutory* defense to the crimes committed. The erroneous ruling worked to the appellants' advantage but underlies most of the issues raised by them on appeal. Once the context of this case is understood (i.e., that the spiritual treatment proviso is *not* available as a statutory defense to child abuse and homicide charges although a broader freedom of religion defense could be, and was, presented), then it will be seen that despite this initial error, which is not reversible error, the Hermansons received an eminently fair trial which presents us no occasion to reverse. As the jury could and did determine, the Hermansons' acknowledged absolute right to hold their religious beliefs did not permit them to exercise that right at the price of Amy's life.

Amy died on September 30, 1986, from what was determined by the medical examiner to have been diabetic ketoacidosis due to juvenile-onset diabetes mellitus, a medically treatable condition. According to expert testimony at trial, her death could have been avoided, to a reasonable degree of medical certainty, by medical treatment up to shortly before her death. The state attorney filed an information against each of her parents charging them in three counts with (1) manslaughter in violation of section 782.07, (2) felony child abuse in violation of section 827.04(1), and (3) third degree murder in violation of section 782.04(4). Pursuant to Florida Rule of Criminal Procedure 3.190(c)(4), the Hermansons filed a motion to dismiss the information and, joined by the state, provided the following stipulation for the trial court's use at the hearing on their motion:

1. The Defendant, William F. Hermanson, is 39 years of age. Mr. Hermanson is married to the Defendant, Christine Hermanson, who is 36 years of age. Since June of 1973, Mr. and Mrs. Hermanson have resided in Sarasota, ***326** Florida. At all times material to this case, they resided at.... Mr. Hermanson is a bank vice president, and Mrs. Hermanson is the director of the Sarasota Fine Arts Academy. Mr. and Mrs. Hermanson have graduate degrees from Grand Valley State College and the University of Michigan, respectively. Neither Mr. nor Mrs. Hermanson has ever been arrested for, or convicted of, a crime.

2. Mr. and Mrs. Hermanson were married on May 30, 1970. There have been two children born of this marriage: Eric Thomas Hermanson, date of birth 8/26/77 and Amy Kathleen Hermanson (deceased) date of birth 7/16/79. There are no facts indicating that Mr. or Mrs. Hermanson ever deprived their children of necessary food, clothing or shelter as those terms are used in section 827.04, Florida Statutes.

3. According to the autopsy report of the Medical Examiner, James C. Wilson, M.D., on September 30, 1986, at approximately 1:55 p.m., Amy Hermanson died. Dr. Wilson found the cause of death to be diabetic ketoacidosis due to juvenile onset diabetes mellitus. Additional autopsy findings of dehydration and weight loss were consistent with the disease process. Dr. Wilson believes that the disease could have been diagnosed by a physician prior to death and, within the bounds of medical probability, Amy's death could have been prevented even up to several hours before her death with proper medical treatment.

4. At the time of Amy's death, the Hermanson family, including William, Christine, Eric and Amy, were regular attenders of the First Church of Christ, Scientist in Sarasota. William Hermanson has been a member of the Christian Science Church since childhood, and Christine Hermanson has been a member of the Church of Christ, Scientist since 1969. The Church of Christ, Scientist is a well-recognized church or religious organization, as that term is used in Section 415.503, Florida Statutes.

5. Christian Scientists believe in healing by spiritual means in accordance with the tenets and practices of the Christian Science Church. William and Christine Hermanson, at all times material to the facts in this case, followed the religious teachings of their church and relied upon Christian Science healing in the care and treatment of Amy Hermanson.

6. On or about September 22, 1986, the Hermansons became aware that something was particularly wrong with Amy Hermanson which they believed to be of an emotional nature. They contacted Thomas Keller, a duly-accredited practitioner of the First Church of Christ, Scientist for consultation and treatment in accordance with the religious tenets and beliefs of the Christian Science Religion. Thomas Keller treated Amy from September 22, 1986 until September 30, 1986.

7. On or about September 25, 1986, the Hermansons traveled to Indianapolis, Indiana to attend an annual Christian Science conference on healing and left their children in the care of one

Marie Beth Ackerman, age 24, a Christian Scientist employed by the Christian Science Committee on Publications and who was residing with the Hermanson family in Sarasota County, Florida and assisting Mrs. Hermanson as an administrator at the Sarasota Fine Arts Academy. The Hermansons returned to their home in Sarasota County, Florida at approximately 2 a.m. on September 29, 1986.

8. After their arrival, the Hermansons noticed a worsening of Amy's condition. They decided to seek the assistance of a local Christian Science practitioner and at approximately 9 a.m. on September 29, 1986, the Hermansons contacted one Frederick Hillier, a duly-accredited Christian Science practitioner of the First Church of Christ, Scientist whom they secured as a practitioner for Amy. Thereafter, until Amy's death, Hillier provided treatment for Amy relying solely on spiritual means for healing in accordance with the tenets and practices of the First Church of Christ, Scientist.

9. On Monday, September 29, 1986, William Hermanson had a discussion *327 with Jack Morton, the father of Christine Hermanson, wherein Mr. Morton expressed his concern for the health of Amy and suggested the possibility that Amy had diabetes.

10. At approximately 9:30 a.m. on September 30, 1986, Hillier went to the Hermanson home to continue treatment and, due to the fact the Hermansons had been up all night with Amy, suggested that a Christian Science nurse be called to help care for Amy.

11. At approximately 10 a.m. on Tuesday, September 30, 1986, one Molly Jane Sellers was called to the Hermanson residence to assist in the care of Amy Hermanson. Molly Jane Sellers is recognized as a Christian Science nurse by the First Church of Christ, Scientist and has been so recognized for twenty years. In preparation for such accreditation by the Church, Sellers completed a three and one-half year training course. Her area of care primarily relates to the physical needs of the patients and, would be closely related to the duties performed by a licensed practical nurse.

12. On September 30, 1986 at approximately 11 a.m., William Hermanson was contacted by a counselor from the Department of Health and Rehabilitative Services (Willy Torres) who informed him that they had received a complaint alleging child abuse of his daughter, Amy Hermanson and that a hearing pursuant to said allegation had been set before the Juvenile Court for 1:30 p.m. Torres further informed Mr. Hermanson that the purpose of the hearing was to determine if medical treatment would be court ordered or if treatment as prescribed by the Christian Science practitioner would be ordered at that time.

13. At approximately 12:30 p.m., Mr. Hermanson left his home and traveled to the Sarasota County Courthouse for the hearing pursuant to the notification from Willy Torres. While at the hearing, at approximately 1:27 p.m., Mr. Hermanson received a telephone call from an individual at the Hermanson home who reported that Amy had "taken a turn for the worse and an ambulance had been called." Such information was related to the Court and an order was entered which required that Amy Hermanson be examined by a licensed medical doctor. When paramedics arrived they found that Amy had died.

14. Prior to her death, Amy Hermanson continued under the care and treatment of Frederick Hillier with the assistance of Molly Jane Sellers until approximately 1:27 p.m. September 30, 1986 at which time Amy had died.

15. On or about October 7, 1986, the Department of Health and Rehabilitative Services notified Mr. and Mrs. William Hermanson that it had completed its investigation and had classified the report as unfounded.

[1] [2] At the hearing on their motion, the Hermansons claimed that they had available to them a statutory affirmative defense to or exemption from culpability by virtue of section 415.503(7)(f). Since the stipulation evidenced no dispute regarding the sincerity of their religious convictions, nor any dispute over the legitimacy of their practicing this religion, they further claimed that this legal defense or exemption was established, thus entitling them to dismissal of all counts of the information. The trial court denied the motion to dismiss insofar as the counts alleging violations of sections 827.04(1) (felony child abuse) and 782.04(4) (third degree murder) were concerned (finding that there remained factual issues to be resolved by the jury). The court also granted the motion to dismiss the count based on section 782.07 (FN3) (manslaughter) and ruled that section 415.503(7)(f) *328 was available to the

Hermansons as a statutory defense. (FN4)

[3] The statutory section at the heart of the appellants' contentions, section 415.503, is the definitions section of a comprehensive statutory scheme to provide protective services to abused or neglected children. This comprehensive scheme is encompassed in sections 415.502 through 415.514. The legislative intent of this scheme is outlined in section 415.502:

415.502 Comprehensive protective services for abused or neglected children; legislative intent.-- The intent of ss. 415.502-415.514 is to provide for comprehensive protective services for abused or neglected children found in the state *by requiring that reports of each abused or neglected child be made* to the Department of Health and Rehabilitative Services *in an effort to prevent further harm* to the child or any other children living in the home and to preserve the family life of the parents and children, to the maximum extent possible, by enhancing the parental capacity for adequate child care. [Emphasis added.]

The Hermansons claim here, as they did in the trial court, that the legislature has exempted them from what otherwise would be criminal culpability for their crimes by the underscored provision of the following section:

415.503 Definitions of terms used in ss. 415.502-415.514.--As used in ss. 415.502-415.514:

(1) "Abused or neglected child" means a child whose physical or mental health or welfare is harmed, or threatened with harm, by the acts or omissions of the parent or other person responsible for the child's welfare.

....

(7) "Harm" to a child's health or welfare can occur when the parent or other person responsible for the child's welfare:

(f) Fails to supply the child with adequate food, clothing, shelter, or health care, although financially able to do so or although offered financial or other means to do so; *however, a parent or other person responsible for the child's welfare legitimately practicing his religious beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone,* (FN5) but such an exception does not:

1. Eliminate the requirement that such a case be reported to the department;

2. Prevent the department from investigating such a case; or

3. Preclude a court from ordering, when the health of the child requires it, the provision of medical services by a physician, as defined herein, or treatment by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well-recognized church or religious organization.

The Hermansons also claim that since they were specifically performing an act authorized by the spiritual treatment proviso, that is, treating their daughter through spiritual rather than medical means, section 415.511 provides them further immunity. Section 415.511 states that:

Any person, official, or institution participating in good faith in any act authorized or required by ss. 415.502-415.514 shall be immune from any civil or criminal liability which might otherwise result by reason of such action.

We disagree with the Hermansons' view of the effect of both section 415.503(7)(f) and section 415.511. We find that there is no authorization in any of the sections of this statutory scheme for a parent to permit the death of a child by the failure of *329 the parent to provide readily available medical treatment. Moreover, any immunity provided in section 415.511 attaches only to those acts which we find are specifically authorized in this chapter as we will explain.

The statutory scheme contained in sections 415.502-415.514 provides the mechanism for reporting suspected child abuse or neglect so that this may be investigated and stopped if substantiated. *See* § 415.502. The focus of the entire chapter is on the reporting, investigation and prevention of child abuse. Any "authorization" contained in this scheme is directed to *all* citizens; any person who becomes aware of or in good faith suspects child abuse or neglect *must* report such information to the Department of Health and Rehabilitative Services [hereinafter HRS]. Section 415.504(1). HRS is also authorized to perform many functions pursuant to this

chapter, such as keeping a Central Abuse Registry, investigating complaints of child abuse or neglect, and formulating the necessary regulations to implement the legislative directives. Indeed, if a death is involved, different responsibilities come into play since the directives of chapter 415 do not provide the means for handling such a situation. "Any person required to report or investigate cases of suspected child abuse or neglect who has reasonable cause to suspect that a child died as a result of child abuse or neglect shall report his suspicion to the appropriate medical examiner" who shall make his own investigation and report to the state attorney, local law enforcement, and HRS. Section 415.504(3). This section emphasizes the legislative intent that HRS's involvement is in an effort to preclude the occurrence of such harm; when a death occurs, this ultimate harm has not been avoided and actions by other state agencies are triggered. The spiritual treatment proviso is not a defense provided by statute, nor "an authorized act," as the appellants claim, but rather it directs HRS that, *for HRS's purposes of reporting and investigating,* HRS shall not consider parents who fail to provide necessary medical treatment because of religious beliefs as abusive or neglectful *for that reason alone.* For an excellent analysis of a similar spiritual treatment proviso appearing in the California statutes, see *Walker v. Superior Court,* 47 Cal.3d 112, 253 Cal.Rptr. 1, 763 P.2d 852, *cert. denied,* 491 U.S. 905, 109 S.Ct. 3186, 105 L.Ed.2d 695 (1988).

Further, the primarily administrative aspect of the scheme is apparent because nowhere does it provide for criminal penalties for actual child abuse or neglect. Instead, criminal penalties for child abuse or neglect are established by the legislature separately in chapters 782 and 827. Importantly, the only criminal penalties provided in chapter 415 are contained in section 415.513:

> **415.513 Penalties for failing to report or preventing another person from reporting, or disclosing confidential information relating to, a case of child abuse or neglect.--**
>
> (1) Any person required by s. 415.504 to report known or suspected child abuse or neglect who knowingly and willfully fails to do so, or who knowingly and willfully prevents another person from doing so, is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (2) Any person who knowingly and willfully makes public or discloses any confidential information contained in the abuse registry or in the records of any child abuse or neglect case, except as provided in ss. 415.502-415.514, is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Thus, the only crimes defined under this scheme are misdemeanor offenses which occur when one fails to report something which one has a statutory duty to report or when one divulges information which the statute makes confidential.

The emphasis on reporting and investigating allegations of child abuse and neglect is further underscored by the requirement in section 415.505(1)(g) that HRS report to the state attorney and the appropriate law enforcement agency any physical injuries that have been substantiated *330 through its investigative efforts. When such report is made to the state attorney and law enforcement, criminal investigations may be initiated. Up to this point of handing over the case to agencies with *prosecutorial* power, the whole focus of the statutory scheme has been an *administrative* effort to eradicate the abuse or neglect and to preclude further abuse or neglect. When section 415.505(1)(g) comes into play, the administrative duties of HRS continue, since HRS must cooperate with law enforcement, but the criminal investigation and prosecution are triggered and proceed under other chapters of our statutes.

The Hermansons correctly note that the statutory scheme contained in sections 415.502-415.514 was originally located by the legislature as part of chapter 827, the chapter providing criminal sanctions for child abuse. They argue that such initial placement in chapter 827 reveals a legislative intent that the spiritual treatment proviso be available as a legal defense to parents such as they, accused of felony child abuse under chapter 827, and third degree murder and manslaughter under chapter 782. We are not persuaded.

It is true that the spiritual treatment proviso was first enacted in chapter 75-185, Laws of Florida, and made a part of section 827.07(2). It thus became part of the 1975 statutory scheme for reporting and investigating child abuse. By the specific terms of section 827.07(2), the spiritual treatment proviso was limited to the stated purposes of section 827.07, reporting, investigating and prevention of child abuse, and did *not* form part of section 827.04(1), the section which defines the crime of felony child abuse. That entire

reporting and investigative scheme, now including the spiritual treatment proviso, was later moved, enlarged and renumbered sections 415.502-415.514, where it continues to be found today. Like the original spiritual treatment proviso when it was contained in section 827.07, the same spiritual treatment proviso, appearing today in section 415.503, is still limited to those same reporting, investigative and prevention purposes of sections 415.502-415.514. In contrast to its inclusion of the spiritual treatment proviso for purposes of sections 415.502-415.414, the legislature chose *not* to include the spiritual treatment proviso in the statutes creating the crime of child abuse, section 827.04(1), the crime of third degree murder, section 782.04, and the crime of manslaughter, section 782.07. (FN6) The specifically limited application of section 415.503 is also in contrast to the recognized statutory affirmative *331 defenses the legislature has chosen to include in, for example, chapters 776 and 782. (FN7) In sum, the spiritual treatment proviso in the statutory scheme for protecting children and preventing child abuse by way of reporting and investigating allegations of child abuse is *not* a *statutory* defense to, or an immunity or exemption from, prosecution for felony child abuse, third degree murder or manslaughter. (FN8)

[4] [5] [6] We turn now from the arguments based on the interpretation of our statutes to the Hermansons' constitutional argument, i.e., that their prosecution is barred by the Free Exercise of Religion clauses of the United States and the State of Florida Constitutions. After careful consideration of the Hermansons' arguments, and our study of the cases, we find that there is no constitutional impediment, in the First Amendment to the United States Constitution or in article I, section 3 of the Florida Constitution, to a prosecution for felony child abuse, third degree murder or manslaughter for failure to provide necessary medical care when based on sincerely held religious beliefs. *Employment Div., Dep't of Human Resources v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (state cannot ban performance of or abstention from physical acts solely because of their religious motivation, but Free Exercise Clause does not relieve individual of obligation to comply with law that incidentally forbids or requires performance of an act that his religious belief requires, or forbids, if law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the act for nonreligious reasons); *Prince v. Massachusetts,* 321 U.S. 158, 166-70, 64 S.Ct. 438, 442-44, 88 L.Ed. 645, 653-54 (1944) ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.... Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and logical discretion when they can make that choice for themselves."). The state may intervene when it appears that the parents' decision "will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Wisconsin v. Yoder,* 406 U.S. 205, 234, 92 S.Ct. 1526, 1542, 32 L.Ed.2d 15 (1972). A prosecution for murder based on the death of a child because of a failure to provide necessary medical treatment is a proper function of the state. *Hall v. State,* 493 N.E.2d 433 (Ind.1986); *Commonwealth v. Barnhart,* 345 Pa.Super. 10, 497 A.2d 616 (1985); see *People v. Pierson,* 176 N.Y. 201, 68 N.E. 243 (1903), for an especially cogent statement of the underlying rationale of the parent's duty to provide necessary medical care to minors. Based on *Wisconsin v. Yoder,* several states have held that a parental decision against medical treatment is not an absolute right in life-endangering circumstances. *Muhlenberg Hospital v. Patterson,* 128 N.J.Super. 498, 320 A.2d 518 (1974) (courts are the guardian of religious rights of individuals and will "see that this power of the State is not exercised beyond the area where treatment is necessary for the sustaining of life or the prevention of grievous bodily injury"); *see also, In re Green,* 448 Pa. 338, 292 A.2d 387 (1972); *see generally People ex rel. Wallace v. Labrenz,* 411 Ill. 618, 104 N.E.2d 769 (1952); *Mitchell v. Davis,* 205 S.W.2d 812 *332 (Tex.Civ.App.1947). The state, as *parens patriae,* has the responsibility to intervene between parent and child when there is demonstrated physical harm occurring to the child that puts a reasonable person on notice that medical intervention is necessary *for the sake of the child's life. Compare Public Health Trust v. Wons,* 541 So.2d 96 (Fla.1989) (competent adult may decide to forego life-saving medical treatment for herself based on religious reasons without state intervention despite fact that her expected death will leave minors motherless).

[7] Having laid aside any statutory religious defense based on the spiritual treatment proviso, and having found no constitutional impediment to the appellants' prosecution, our task now is to examine the Hermansons' further contention that their Florida Rule of Criminal Procedure 3.190(c)(4) motion to dismiss should have been granted because the undisputed facts

of the stipulation did not present a case that they acted willfully or with culpable negligence in failing to provide medical treatment for their daughter. The stipulation showed that Amy's concerned grandfather, the day before Amy's death, suggested to Mr. Hermanson the possibility that diabetes was the cause of her deteriorating condition. The stipulation also states that on approximately September 22, 1986, eight days before Amy's death, the parents became aware that something was wrong, although they believed it to be of an emotional nature. When they returned from a Christian Science assembly in Indiana approximately thirty-six hours before Amy's death, they noted that her condition had worsened. The court found that these statements, and the inferences arising from them, showed material facts at issue, namely, just how serious was the condition that Amy presented so that her parents were put on notice that their attempts at spiritual treatment were unavailing and it was time to call in medical help. We agree that material facts remained for the jury on the questions of the seriousness of Amy's condition and whether the Hermansons were culpably negligent in the circumstances. Thus the trial court was correct in denying the motion to dismiss.

[8] Regardless of the correctness of the trial court's ruling on the motion to dismiss, the Hermansons argue that a parent who relies on spiritual rather than medical treatment will never know beforehand when the line is crossed where they should stop relying on spiritual treatment alone and seek medical intervention. This contention forms the basis of their claim that their due process rights have been violated because the statutes containing the term "culpable negligence" do not give them sufficient notice of what behavior constitutes a criminal act and when that behavior occurs. This argument has been satisfactorily answered for us by a statement by Justice Oliver Wendell Holmes as cited and amplified in *Walker v. Superior Court,* the case which recently construed California statutes similar to our own:

> [Defendant] frames her argument in the form of a rhetorical question: "Is it lawful for a parent to rely solely on treatment by spiritual means through prayer for the care of his/her ill child during the first few days of sickness but not for the fourth or fifth day?" Justice Holmes correctly answers: "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.... 'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor." (*Nash v. United States* (1913) 229 U.S. 373, 377, 33 S.Ct. 780, 781, 57 L.Ed. 1232; see also *Coates v. City of Cincinnati* (1971) 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214.) The "matter of degree" that persons relying on prayer treatment must estimate rightly is the point at which their course of conduct becomes criminally negligent. In terms of notice, due process requires no more. (*Burg v. Municipal Court,* supra, 35 Cal.3d at p. 270, 198 Cal.Rptr. 145, 673 P.2d 732.)

**333 Walker v. Superior Court,* 763 P.2d at 872. Similar to the court in *Walker,* we conclude that sections 827.04 and 782.07 comply with the requirements of due process.

[9] We have, to this point, dealt with the issue of why the spiritual treatment proviso of section 415.503 and the United States and Florida Constitutions do not provide a bar to the prosecution and conviction of the Hermansons. We focus now on alleged errors occurring at trial. The remaining issues deal with improper inquiry by the jury, prosecutorial misconduct, and sufficiency of the evidence. The Hermansons present these issues, understandably, on the basis of the trial court's erroneous pretrial ruling in their favor that the spiritual treatment proviso of 415.503(7)(f) was available to them to put forth at trial as a statutory affirmative defense; therefore, their arguments are posed in such a manner as to indicate that they believed there existed an inviolate right to practice their religion to the detriment of their daughter's life. As we have explained above, this argument has no merit. *Prince v. Massachusetts.* Our holding that the spiritual treatment proviso is not a *statutory* defense does not, however, preclude a defendant from presenting to the jury any theory of defense, including that of a sincerely-held religious belief, to excuse, explain, mitigate or justify the defendant's behavior under the circumstances. Indeed, that is exactly what happened in this case. The Hermansons were allowed wide latitude in arguing that they should be excused or that their behavior was justified as based on a bona fide religious belief. This theory of defense was vigorously presented in opening and closing argument, cross-examination of the state's witnesses, and jury instructions. The initial pretrial error, concerning the spiritual treatment proviso, permeated the ensuing trial and afforded the Hermansons at trial an opportunity they should not have had--an opportunity to argue that the reasons for their actions

were sanctioned by the state.

[10] Focusing, then, on the trial itself, the first of the issues is the appellants' contention that the jury impermissibly questioned the reasonableness of the Hermansons in following their religious beliefs. To demonstrate this alleged error, they point to three questions the jury directed to the trial court during their deliberations, questions concerning what and when medical treatment is allowed by the Christian Science Church:

1. As a Christian Scientist do they have a choice to go to a medical doctor if they want to?

2. Or if not, can they call a doctor at a certain point?

3. Do they need permission first?

Prior to these jury questions, the Hermansons' defense counsel in closing argument had placed great weight on the statutory language of section 415.503:

The Court is going to tell you that you should determine--it's up to you--you should determine if the Defendants, in declining to provide medical treatment for their daughter, were relying on their religious beliefs by providing spiritual care through Christian Science.

Have you ladies and gentlemen any doubt in your mind that that's what they were doing? I submit to you that you couldn't have.

Listen to this: In determining whether the evidence shows the Defendants--that's the Defendants now--were following their religious beliefs in caring for their daughter--and listen carefully to this, ladies and gentlemen--you are not to decide--you are not to decide--if the Defendants--that's Chris and Bill Hermanson--correctly interpreted the teachings of their religion, only whether the Defendants held a sincere belief--only whether the Defendants held a sincere belief--that the teachings of their religion authorized them to take a particular course of action.

The Court is going to go further and tell you that you may not question--that you may not question--the wisdom or the sincerity of the Defendants' belief and nor the wisdom or effectiveness of spiritual healing of the Christian Science *334 Church, or the basic tenets of their religion.

What that is saying--and if you think back, you may recall when we were selecting you for jury duty, that I tried to tell every one of you--that under our law, if selected to serve as a juror in this case, no matter what your personal beliefs, no matter what your own church or religious denomination, that the law does not permit you to question the religious beliefs of someone else. You can question whether they're sincere beliefs, but you cannot question the merits of it; you cannot question the wisdom of it; you cannot question the effectiveness of it. Only if they sincerely believed--only if they sincerely believed.

That's the law of this land. That's not a law just made in Florida. That's the law of the United States that has been hammered out in the crucibles of these courtrooms and in the legislative halls of this country since Plymouth Rock--maybe not all the way back to Plymouth Rock, but close to it--when we were given a Republican form of government to guide our lives.

The Court is going to also tell you this, that the State of Florida--and please remember this--that the State of Florida authorizes--authorizes--a parent, parents' use of a duly accredited practitioner who relies--who relies--solely on spiritual means--who relies solely on spiritual means--for healing, in accordance with the tenets and practices of a well-recognized church, or religious organization, in caring for the health of a child.

The court, having granted the Hermansons' request for instructions, then explained to the jury the availability of the statutory defense (which, as we have said, was the only error) but went on correctly to admonish the jury about what they could not decide:

An issue in this case is whether the killing of Amy Hermanson was excusable. The killing of a human being is excusable if committed by accident and misfortune. In order to find the killing was committed by accident or misfortune, you must find that each Defendant was doing a lawful act by lawful means and with usual care, and acting without any unlawful intent.

It is a defense to child abuse and third degree murder if parents failed to provide medical treatment for their child because they were legitimately practicing their religious beliefs. An issue in this case is whether the Defendants, in declining to seek

conventional medical treatment for Amy Hermanson, were following their religious beliefs.

Section 415.503 of the Florida Statute provides in part as follows: A parent, or other person responsible for the child's welfare, legitimately practicing his religious beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone.

You should determine if the Defendants, in declining to provide conventional medical treatment for Amy Hermanson, were relying on their religious beliefs by providing spiritual care through Christian Science.

I instruct you that The Church of Christ, Scientist, is a well-recognized religion under the law of Florida.

In determining if the evidence shows that the Defendants were following their religious beliefs in caring for their daughter, you are not to decide if the Defendants correctly interpreted the teachings of their religion, only whether the Defendants held a sincere belief that the teachings of their religion authorized them to take a particular course of action.

As is evident, the jury did not impermissibly question the reasonableness or legitimacy of Christian Science *beliefs* as the Hermansons contend. Indeed, they may not do so. *See Thomas v. Review Board of Indiana Employment Security Div.,* 450 U.S. 707, 714, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"). The appellants misperceive the import of the jury's three questions. The jury was not deciding *335 whether the beliefs were reasonable, but rather whether the appellants' behavior was reasonable.

[11] In a criminal prosecution, deciding the reasonableness of an accused's actions is a proper function of the jury, even when those actions are based on sincerely-held religious beliefs.

We [the United States Supreme Court] have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Educ. v. Gobitis,* 310 U.S. 586, 594-595, 60 S.Ct. 1010, 1012-1013, 84 L.Ed. 1375 (1940): "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted)." We first had occasion to assert that principle in *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.,* at 166-167.

Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 110 S.Ct. at 1600, 108 L.Ed.2d 876 (1990).

The trial judge, upon receiving the jury's questions and after consulting with the prosecution and defense counsel, properly declined to further instruct the jury since the questions inquired of factual matters surrounding what were the tenets of the Christian Science faith, and not whether these were valid beliefs to hold. (FN9) It is true that there was little dispute as to the sincerity (FN10) of the Hermansons' religiously-held beliefs. The questions propounded to the court by the jury clearly show that the jury was merely doing exactly what the Hermansons had asked of them--deciding whether the appellants were sincerely practicing their religion. But the Hermansons' sincerity is not the issue in this case. The controlling issue here is whether the Hermansons could present a defense to their crimes based on religion. They could and they did. The fact that they should not have been allowed to frame the defense in terms of the statute did not vitiate the overall fairness of the proceedings nor did it prevent them from presenting a theory of defense based on religious practices. The Hermansons cannot now be heard to complain of jury questions which they clearly invited

and which are tangential in any event. (FN11)

*336 [12] The next alleged trial error the Hermansons raise occurred in the state's closing argument when the prosecutor attempted to point out the culpability of the Hermansons because, as he explained it, the evidence showed that Christian Science doctrine does at some point in time allow medical treatment and, thus, the Hermansons failed to follow this doctrine and provide such care. According to the state, this was an example that the Hermansons were not sincerely following their religious beliefs, and, therefore, could not partake of the statutory language of section 415.503(7)(f). This argument was prompted by testimony from Molly Sellers, the Christian Science nurse accredited by the Church, who had been called in to look after Amy and take care of her physical needs the last morning of her life. Ms. Sellers testified to the effect that she needed to call an ambulance for Amy. She requested use of the phone from Frederick Hillier, the Christian Science practitioner who was in the home to help Amy with the spiritual healing. He delayed her until he could call Boston (the Church's headquarters) after which he allowed her to call the ambulance. The prosecutor was forced to argue the misleading non-issue of sincerity as framed by the Hermansons when they presented the "legitimately practicing" language of section 415.503(7)(f), (i.e., that *if* they were sincerely or legitimately praticing their religious beliefs, then the laws of Florida provided them a *statutory defense*). We can only interpret the prosecutor's remarks as fair comment on the evidence and the inferences from that evidence, that these two people, Church licensed professionals whom the jury could reasonably conclude represented the Church, allowed conventional medical treatment to be given to Amy. We find no error in this issue.

[13] On the appellants' last issue, the sufficiency of the evidence supporting the jury's verdict, we have examined the evidence presented to the jury as contained in the trial record before us to determine if such evidence was legally sufficient for the jury to find them guilty of culpable negligence. Culpable negligence will be shown by gross or flagrant conduct evincing a reckless disregard for human life. *State v. Greene,* 348 So.2d 3 (Fla.1977).

[14] Several witnesses who had observed Amy's condition and behavior testified for the state. We summarize this testimony in a light most favorable to the jury verdict. In the month or so before her death Amy was having a marked and dramatic weight loss, that she was almost skeletal in her thinness and this was a big change in her appearance. There were great dark circles under her eyes that had never been there before. Her behavior was very different from the usual; she was lethargic and complaining whereas previously she had been bubbly, vivacious, and outgoing. She was seen lying down on the floor to sleep during the day when accompanying her mother to visit music students and lying down on the floor after school at her mother's fine arts academy. She often complained of not feeling well, that her stomach hurt and that she wasn't sleeping well. She was too tired during the day to participate in gym class at school. There was a bluish tint to her skin. Her breath smelled funny, one observer called it a "fruity" odor.

The pathologist who performed the autopsy testified to Amy's skeletal appearance, that her vertebrae and shoulder *337. blades were prominent and her abdomen distended as if she were undernourished. Her eyes were quite sunken, due to the dehydration, although her parents had told the pathologist that on the day before her death she was drinking a lot of fluids but urinating frequently too. They also told him that they had noticed changes in Amy starting about a month previously. Amy had complained of constipation during the last week of her life but at no time seemed feverish although there was intermittent vomiting. The pathologist opined that the illness was chronic, not acute. According to her parents' talk with the pathologist, Amy seemed incoherent on the evening before her death although the next morning she seemed better. The pathologist also testified that vomiting and dehydration are compatible with flu-like symptoms but these, added to a four-week-long history of weight loss with the more severe conditions reported, would not be indicative of flu.

Finally, the jury was shown photographs of Amy taken shortly after she died before her body was removed from the home by the paramedics as well as some taken before the autopsy was performed. These provided a very graphic illustration of her deteriorated condition.

In the face of their daughter's deteriorating condition, the Hermansons chose to forego conventional medical treatment and, in lieu thereof, they provided spiritual treatment through a Christian Science practitioner.

After reviewing this record we hold that the trial judge was correct in denying the Hermansons' motion

for judgment of acquittal; the evidence presented was sufficient for the jury to find that they had acted in reckless disregard of Amy's health, and ultimately, her life.

In sum, having examined each issue presented to us on appeal, we find only that an error occurred when the Hermansons were allowed to present a theory of defense framed in such a manner as to suggest that the state, by statute, sanctioned their conduct. This error in no way prejudiced the Hermansons--indeed, it benefitted them. The record shows that a viable, if ultimately unsuccessful, theory of defense was presented in an eminently fair trial.

Finding no reversible error, we affirm.

SCHOONOVER, C.J., and DANAHY and THREADGILL, JJ., concur.

ON MOTION FOR REHEARING AND CLARIFICATION

The motion of the appellants is denied, except for that portion requesting that we certify a question of great public importance to our supreme court, which we grant. Therefore, we certify the following question to the Supreme Court of Florida:

IS THE SPIRITUAL TREATMENT PROVISO CONTAINED IN SECTION 415.503(7)(f), FLORIDA STATUTES (1985), A STATUTORY DEFENSE TO A CRIMINAL PROSECUTION UNDER SECTION 827.04(1), FLORIDA STATUTES (1985)?

SCHOONOVER, C.J., and DANAHY and THREADGILL, JJ., concur.

FN1. The Hermansons cite the following explanation for a fuller understanding of this belief:

The cure of disease through prayer is seen as a necessary element in a full redemption from the flesh. Church historian Karl Holl summarizes the concept of treatment, or prayer, in Christian Science as "a silent yielding of self to God, an ever closer relationship to God, until his omnipresence and love are felt effectively by man," and he distinguishes this decisively from willpower or mental suggestion.

Baumgartner v. First Church of Christ, Scientist, 96 Ill.Dec. 114, 141 Ill.App.3d 898, 490 N.E.2d 1319, 1321, *cert. denied,* 479 U.S. 915, 107 S.Ct. 317, 93 L.Ed.2d 290 (1986), *quoting Encyclopedia Britannica,* Macropaedia, vol. 4, pp. 562-64 (15th ed. 1984).

FN2. All statutory references in this opinion are to the 1985 statutes unless specifically stated otherwise.

FN3. We comment briefly on the state's issue concerning the dismissal of the manslaughter count. We do not agree with the trial court that *Bradley v. State,* 84 So. 677 (Fla.1920) mandated the dismissal. Because of changes in our child abuse statutes since *Bradley* was decided, we think, under proper circumstances, a prosecution for manslaughter will lie. Nevertheless, because of our disposition of this case and the double jeopardy concerns expressed by our supreme court in *Carawan v. State,* 515 So.2d 161 (Fla.1987), and *State v. Smith,* 547 So.2d 613 (Fla.1989), we affirm this issue.

FN4. In its order, the trial court also ruled that section 415.503(7)(f) was not an unconstitutional establishment of religion as the state had argued. This issue has not been presented to us in this appeal and we make no comment on it.

FN5. This underscored language is what we refer to in this opinion as the "spiritual treatment proviso."

FN6. 827.04(1) Child abuse.--

(1) Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, permits physical or mental injury to the child, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

782.04 Murder.--

*337_ ....

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any:

(a) Trafficking offense prohibited by s. 893.135(1),

(b) Arson,

(c) Sexual battery,

(d) Robbery,

(e) Burglary,

(f) Kidnapping,

(g) Escape,

(h) Aggravated child abuse,

(i) Aircraft piracy,

(j) Unlawful throwing, placing, or discharging of a destructive device or bomb, or

(k) Unlawful distribution of opium or any synthethic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,

is murder in the third degree and constitutes a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

782.07 Manslaughter.-- The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

FN7. In these chapters the legislature has enumerated the following statutory affirmative defenses: self-defense and defense of another (776.012); avoiding a trespass, defense of property or to avoid the commission of a forcible felony (776.031); preventing an escape (776.07); justifiable use of deadly force to resist murder or commission of a felony upon a person or in a dwelling (782.02); and excusable homicide because of accident or misfortune by lawful means with usual care, heat of passion, sudden and sufficient provocation, and sudden combat (782.03).

FN8. Because the Hermansons were not charged with any misdemeanor violation of chapter 415, we make no comment on the effect of the spiritual treatment proviso on a proceeding under that chapter. Our holding is limited to the effect of the absence of the spiritual treatment proviso in the crimes defined in chapters 782 and 827, the chapters under which the Hermansons were charged.

FN9. Furthermore, pursuant to Florida Rule of Criminal Procedure 3.390(d), when the trial judge failed to give an instruction, defense counsel made no objection nor complaint to the judge, as they do to us, that the jury was thereby invading impermissible constitutional territory in questioning the legitimacy of the Hermansons' beliefs. There was no motion made by the appellants for mistrial nor for an admonishment or clarification by the judge. This is understandable considering the instructions submitted by the Hermansons and given by the judge. The jury's questions were only prompted by the posture of the case (the mistaken *statutory* defense) and the role they were placed in to decide the sincerity of the religious beliefs as held by the Hermansons.

FN10. While section 415.503(7)(f) uses the term "legitimately practicing," the arguments of counsel and the jury instructions equate this with "sincerely practicing." We, too, equate these terms for purposes of this opinion.

FN11. The questions propounded by the jury to the court showed that they wished to know more about the practices of the Christian Science religion--clearly a factual matter. Before one can decide if a defendant is sincerely practicing his or her religion, one must know the practices of that religion. While the Hermansons argue in this appeal that, in fact, Church doctrine under no circumstances approves conventional medical intervention, there is nothing in the record which irrefutably establishes such a fact. The jury had before it conflicting evidence of what Christian Scientists do; on one hand, several witnesses testified they knew that precisely because the Hermansons were Christian Scientists, a doctor would never be called in for Amy; on the other hand, the Christian Science nurse wanted to call an ambulance. It is not the function of this court to reweigh the credibility of the witnesses after the jury has done its duty. Because this issue is framed in the context of sincerity in practicing a religion within the definition of section 415.503(7)(f), a non-issue that should never have been placed before the jury, these jury questions provide no reason to reverse when the broader freedom of religion defense was before the jury who rejected it as an

excuse for the Hermansons' conduct.

*895 678 So.2d 895

21 Fla. L. Weekly D1887

George C. LIVINGSTON, Appellant,
v.
STATE of Florida, Appellee.

No. 94-1052.

District Court of Appeal of Florida,

Fourth District.

Aug. 21, 1996.

Defendant was convicted of aggravated battery by the Circuit Court, Palm Beach County, Edward Rodgers, J., and he appealed. The District Court of Appeal, Gross, J., held that: (1) evidence of defendant's prior contacts with woman was admissible as relevant to and inseparable from battery of woman's male friend; but (2) restriction of defendant's cross-examination of prosecution witness regarding connection between disposition of witness' criminal case and his statement and testimony in prosecution of defendant was reversible error.

Reversed and remanded.

1. CRIMINAL LAW⊜ 369.2(4)

110 ----
110XVII Evidence
110XVII(F) Other Offenses
110k369 Other Offenses as Evidence of Offense Charged in General
110k369.2 Evidence Relevant to Offense, Also Relating to Other Offenses in General
110k369.2(3) Particular Offenses, Prosecutions for
110k369.2(4) Assault, homicide, abortion and kidnapping.

Fla.App. 4 Dist. 1996.

Evidence of defendant's prior contacts with woman was admissible in aggravated battery prosecution as relevant to and inseparable from battery of woman's male friend; evidence of defendant's prior encounters with woman placed incident in context of his feelings for her and explained strong emotions which could have ignited battery. West's F.S.A. § 90.402.

2. CRIMINAL LAW⊜ 1170.5(1)

110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1170.5 Examination of Witnesses
110k1170.5(1) Rulings in general.

[See headnote text below]

2. WITNESSES⊜ 372(2)

410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k372 Cross-Examination to Show Interest or Bias
410k372(2) Inquiry as to particular acts or facts tending to show interest or bias.

Fla.App. 4 Dist. 1996.

Restriction of defendant's cross-examination of prosecution witness in aggravated assault prosecution regarding connection, if any, between disposition of witness' criminal case and his statement and testimony in prosecution of defendant was reversible error; as witness was only objective eyewitness to the beating, court could not say beyond reasonable doubt that error did not contribute to verdict. West's F.S.A. § 90.608(2).

3. WITNESSES⊜ 372(1)

410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k372 Cross-Examination to Show Interest or Bias
410k372(1) In general.

Fla.App. 4 Dist. 1996.

All witnesses are subject to cross-examination for purpose of discrediting them by showing bias, prejudice or interest. West's F.S.A. § 90.608(2).

4. WITNESSES⊜ 363(1)

410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k363 Interest as Ground of Impeachment in General

410k363(1) In general.

[See headnote text below]

4. WITNESSES⚖ 369

410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k369 Employment by or other contractual relation with party.

Fla.App. 4 Dist. 1996.

Defendant is afforded wide latitude in criminal prosecution to develop motive behind witness' testimony, to show that witness has colored his testimony to suit plea agreement or other considerations from state, because defendant's liberty is at risk. West's F.S.A. § 90.608(2).

5. WITNESSES⚖ 363(1)

410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k363 Interest as Ground of Impeachment in General
410k363(1) In general.

Fla.App. 4 Dist. 1996.

Defendant has strong interest in discrediting crucial state witness by showing bias, interest in the outcome, or possible ulterior motive for his in-court testimony. West's F.S.A. § 90.608(2).

6. WITNESSES⚖ 367(1)

410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k367 Interest in Event of Witness Not Party to Record
410k367(1) In general.

Fla.App. 4 Dist. 1996.

Defendant may cross-examine state's witnesses regarding how pending criminal charges may have influenced witness' cooperation with the state and the content of in-court statements. West's F.S.A. § 90.608(2).

7. WITNESSES⚖ 369

410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k369 Employment by or other contractual relation with party.

Fla.App. 4 Dist. 1996.

Defendant may cross examine witness regarding any continuing relationship between witness and the state, where a witness has already been sentenced. West's F.S.A. § 90.608(2).

8. WITNESSES⚖ 414(2)

410 ----
410IV Credibility and Impeachment
410IV(F) Corroboration
410k414 Competency of Corroborative Evidence
410k414(2) Former statements corresponding with testimony.

Fla.App. 4 Dist. 1996.

State improperly rehabilitated witness' testimony in aggravated assault prosecution by establishing that his prior statement to police was consistent with his in-court testimony; contents of prior statement were hearsay, subject to none of exceptions to hearsay rule. West's F.S.A. § 90.801(2)(b).

***896** Evelyn A. Ziegler, West Palm Beach, for appellant.

Robert Butterworth, Attorney General, Tallahassee; and Aubin Wade Robinson, Assistant Attorney General, West Palm Beach, for appellee.

GROSS, Judge.

Defendant George Livingston appeals his conviction of aggravated battery against victim Michael Piccone.

The state's theory of the case was that the crime grew out of defendant's obsession with Joni Martin. Defendant lived next door to Martin's townhouse. Martin testified that she twice observed defendant standing or sitting outside her property. He had once left a yellow sticky note on her gate. Another time, he asked Martin for jumper cables. Martin felt that defendant was interested in her, although she had

done nothing to encourage him.

On November 19, 1992, the night of the incident, defendant appeared at Martin's door and asked to come in so they could get acquainted. Speaking through the closed door, Martin refused and said she was expecting male company. She believed that defendant then became agitated. About an hour later, Martin looked out her window and saw defendant sitting on a utility box in front of her gate. Feeling apprehensive, Martin called her friend Michael Piccone and asked him to come by and say something to defendant. She was not aware that Piccone had arrived until she heard him tell her to call the police. Piccone did not come into the house with Martin; he walked back to defendant. While she was on the phone with the police, Martin heard slaps. She went outside when the police arrived. Defendant was gone and Piccone was badly hurt. (FN1) Martin saw nothing of the altercation.

At trial, defendant and Piccone each blamed the other for the incident. Piccone characterized defendant as an unreasonable, excitable aggressor, who approached him in a threatening manner from the beginning and who attacked him without provocation. Defendant depicted Piccone as a jealous boyfriend who initiated the fight by rushing him, ***897** fists up, with the words, "I am going to teach you a lesson." On cross examination, defendant admitted that he loved Martin, that he had left notes on her car, and that she had rebuffed him the times he had gone to her home the week before the battery.

An independent witness, Pedro Romero, corroborated Piccone's version of the facts. Romero saw the two men arguing. He heard Piccone trying to calm defendant down and get him to return to his apartment. According to Romero, Piccone asked, "Why don't we just talk this out?" and as he started to walk away defendant pushed him and called him a "m___f___ wimp." Romero heard Piccone yell, "Call the police!" Romero then went into his girlfriend's apartment for five minutes. When he went back outside, Romero saw defendant punching Piccone, who was not fighting back.

Defense counsel sought to impeach Romero by establishing that in November 1992, when he first gave a statement to the police, Romero was facing felony charges which were resolved a month later by a sentence of probation with adjudication of guilt withheld. The prosecutor objected that such impeachment was improper under section 90.610, Florida Statutes (1995), since adjudication had been withheld. The trial court refused to allow any cross examination into these matters.

[1] Defendant first claims that the trial court erred by allowing the state to present evidence that defendant left notes on Martin's car and attempted to speak with her several times prior to the night of the incident. Classifying this as evidence of "stalking," defendant argues that its admission violated section 90.404(2), Florida Statutes (1995). Setting aside the "stalking" label as legal hyperbole, we hold that the evidence of defendant's prior contacts with Martin was admissible under section 90.402 as being relevant to and inseparable from the battery. It was "necessary to admit the evidence to adequately describe the deed." *Tumulty v. State,* 489 So.2d 150, 153 (Fla. 4th DCA), *review denied,* 496 So.2d 144 (Fla.1986) (quoting Ehrhardt, Florida Evidence, § 404.16 at 138 (2d ed.1984)). Evidence of defendant's prior encounters with Martin place the incident in the context of his feelings for her and explain the strong emotions which may have ignited the battery.

[2] Defendant next argues that the trial court improperly restricted his cross examination of witness Romero concerning his prior criminal charges. The state concedes error, but argues that it was harmless. We hold that the limitation on the cross examination of this important state witness was reversible error.

[3] [4] [5] [6] [7] The proposed cross examination of Romero was proper not under section 90.610 cited by the state at trial, but as evidence of bias or interest pursuant to section 90.608(2), Florida Statutes (1995). All witnesses are subject to cross examination for the purpose of discrediting them by showing bias, prejudice or interest. *Cox v. State,* 441 So.2d 1169 (Fla. 4th DCA 1983). Because liberty is at risk in a criminal case, a defendant is afforded wide latitude to develop the motive behind a witness' testimony, "to show that the witness has colored his testimony to suit a plea agreement or other considerations from the state." *Pomeranz v. State,* 634 So.2d 1145, 1146 (Fla. 4th DCA 1994); *Harmon v. State,* 394 So.2d 121, 123 (Fla. 1st DCA 1980). Obviously, a defendant has a strong interest in discrediting a crucial state witness by showing bias, an interest in the outcome, or a possible ulterior motive for his in-court testimony. *Phillips v. State,* 572 So.2d 16 (Fla. 4th DCA 1990). A well recognized area of cross examination is how pending criminal charges may have influenced a witness' cooperation with the state and the content of in-court statements. *Blanco v.*

State, 353 So.2d 602, 604 (Fla. 3d DCA 1977); *Garey v. State,* 432 So.2d 796, 797 (Fla. 4th DCA 1983). To explore even more subtle motivations, where a witness has already been sentenced, a defendant may cross examine concerning any continuing relationship between the witness and the state. For example, in *Watts v. State,* 450 So.2d 265, 268 (Fla. 2d DCA 1984), the second district held that a key state witness on probation may properly be questioned about whether he "has a desire to testify so as to please the authorities who ***898.** have some discretion over his probationary status."

Romero was facing felony charges in 1992 when he first gave a statement to the police. A month later, he plea bargained for a favorable result--probation and adjudication withheld. The trial court should have permitted cross examination of Romero on the connection, if any, between the disposition of his criminal case and his statement and testimony in this case. Because Romero was the only objective eyewitness to the beating, we cannot say beyond a reasonable doubt that this error did not contribute to the verdict. *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986).

[8] Finally, the state improperly rehabilitated Romero by establishing that his November, 1992 statement to the police was consistent with his in-court testimony. The contents of the prior statement were hearsay, subject to none of the exceptions contained within section 90.801(2)(b), Florida Statutes (1995).

REVERSED AND REMANDED.

KLEIN and PARIENTE, JJ., concur.

FN1. At the hospital, Piccone was diagnosed with a fractured cheek and nose and a crushed septum. He sustained three wounds which required stitches.

90.608(2), Fla. Stat. (1995); *Breedlove v. State,* 580 So.2d 605, 608-609 (Fla.1991). *See also* Ehrhardt, Florida Evidence, § 608.5 at 414-422 (1997 ed.). Thus, where a witness has filed a civil suit against the defendant or a third party (arising out of the criminal incident), inquiry into this is relevant to the witness' motivation in testifying at the criminal trial. *See, e.g., Payne v. State,* 541 So.2d 699 (Fla. 1st DCA 1989); *Wooten v. State,* 464 So.2d 640 (Fla. 3d DCA 1985); *Cox v. State,* 441 So.2d 1169 (Fla. 4th DCA 1983); *Bessman v. State,* 259 So.2d 776 (Fla. 3d DCA 1972). Likewise, questioning a witness/victim about a civil suit brought by the defendant against the witness/victim prior to being charged with the crime is proper impeachment. *See Webb v. State,* 336 So.2d 416 (Fla. 2d DCA 1976). *See also Davis v. State,* 527 So.2d 962 (Fla. 5th DCA 1988)(criminal complaint filed by defendant's wife against their daughter's boyfriend prior to daughter making charges of lewd and lascivious assault against defendant/father admissible on issue of daughter's credibility). *Chadwick* holds that a complaint filed after arrest, brought by the defendant against deputies involved in his arrest, alleging excessive force, as well as the possibility of a resultant civil action, is relevant to the bias of the deputies who testified at trial. *Carmichael v. State,* 670 So.2d 1178 (Fla. 3d DCA 1996), relied upon by the defendant here does not indicate the timing of the filing of the civil action between the witness and the defendant.

[4] [5] The defendant's right to cross examine on the question of bias is not unlimited:

> "Bias on the part of a prosecution witness is a valid point of inquiry in cross-examination, but the prospect of bias does not open the door to every question that might possibly develop the subject." ... Evidence of bias may be inadmissible if it unfairly prejudices the trier of fact against the ***754.** witness or misleads the trier of fact. Therefore, inquiry into collateral matters, if such matters will not promote the ends of justice, should not be permitted if it is unjust to the witness and uncalled for by the circumstances.

Breedlove, 580 So.2d at 609. *See also Mosley v. State,* 616 So.2d 1129 (Fla. 3d DCA 1993); *Lee v. State,* 422 So.2d 928 (Fla. 3d DCA 1982).

[6] [7] [8] In this case, the record establishes that the defendant filed petitions for domestic violence against the victim twice after the criminal incident, first shortly after being told by the victim that he had filed criminal charges against her and second on the eve of trial. It was undisputed at trial, however, that it was the *defendant* who had gone to the victim/witness' home on the evening in question and initiated the encounter giving rise to the criminal charge. Under these circumstances, the probative value of this evidence was outweighed by the danger of confusion of the issues or misleading the jury. *See* §§ 90.402, 90.403, Fla. Stat. The trial court did not abuse its discretion in refusing to allow this line of inquiry. (FN1)

AFFIRMED.

DAUKSCH and GOSHORN, JJ., concur.

FN1. Note too that error in excluding such evidence is subject to the harmless error rule. *See Bessman v. State,* 259 So.2d 776 (Fla. 3d DCA 1972). Even if the evidence should have been admitted to impeach the victim/witness, the relevance of such evidence was so tenuous that its exclusion was harmless error.

*752 704 So.2d 752

23 Fla. L. Weekly D362

Janice Lynette NELSON, Appellant,
v.
STATE of Florida, Appellee.

No. 96-3157.

District Court of Appeal of Florida,

Fifth District.

Jan. 30, 1998.

Defendant was convicted, following trial in the Circuit Court for Orange County, Michael F. Cycmanick, J., of battery and criminal mischief. Defendant appealed. The District Court of Appeal, Cobb, J., held that: (1) probative value of evidence that defendant had filed domestic violence petitions against victim was outweighed by danger of confusion of issues or misleading jury which would result from permitting defendant to cross-examine victim concerning such petitions, and (2) any error in trial court's exclusion of such cross-examination testimony was harmless.

Affirmed.

1. WITNESSES⇐ 372(1)

410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k372 Cross-Examination to Show Interest or Bias
410k372(1) In general.

Fla.App. 5 Dist. 1998.

Defendant in criminal case has considerable latitude in cross-examination to elicit testimony showing bias of witness. West's F.S.A. § 90.608(2).

2. WITNESSES⇐ 370(3)

410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k370 Friendly or Unfriendly Relations with or Feeling Toward Party
410k370(3) Instigation or maintenance of prosecution or litigation.

Fla.App. 5 Dist. 1998.

Inquiry into witness' filing of civil suit against defendant or third party arising out of criminal incident is relevant to witness' motivation in testifying at criminal trial, and is therefore proper subject for cross-examination. West's F.S.A. § 90.608(2).

3. WITNESSES⇐ 370(3)

410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k370 Friendly or Unfriendly Relations with or Feeling Toward Party
410k370(3) Instigation or maintenance of prosecution or litigation.

Fla.App. 5 Dist. 1998.

Questioning witness/victim about civil suit brought by defendant against witness/victim prior to being charged with crime is proper impeachment. West's F.S.A. § 90.608(2).

4. WITNESSES⇐ 372(1)

410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k372 Cross-Examination to Show Interest or Bias
410k372(1) In general.

Fla.App. 5 Dist. 1998.

Bias on part of prosecution witness is valid point of inquiry in cross-examination, but prospect of bias does not open door to every question that might possibly develop subject; evidence of bias may be inadmissible if it unfairly prejudices trier of fact against witness or misleads trier of fact. West's F.S.A. § 90.608(2).

5. WITNESSES⇐ 270(1)

410 ----
410III Examination
410III(B) Cross-Examination
410k270 Cross-Examination as to Irrelevant, Collateral, or Immaterial Matters
410k270(1) In general.

Fla.App. 5 Dist. 1998.

Inquiry upon cross-examination into collateral matters which do not promote ends of justice should not be permitted if inquiry is unjust to witness and uncalled for by circumstances. West's F.S.A. § 90.608(2).

6. WITNESSES⚿ 370(3)

410 ----
410IV Credibility and Impeachment
410IV(C) Interest and Bias of Witness
410k370 Friendly or Unfriendly Relations with or Feeling Toward Party
410k370(3) Instigation or maintenance of prosecution or litigation.

Fla.App. 5 Dist. 1998.

Probative value of evidence that defendant charged with battery and criminal mischief had filed domestic violence petitions against victim was outweighed by danger of confusion of issues or misleading jury which would result from permitting defendant to cross-examine victim concerning such petitions; defendant had filed petitions after being informed of filing of criminal complaint against her, and criminal charges arose out of encounter initiated by defendant after she went to victim's home. West's F.S.A. §§ 90.402, 90.403.

7. CRIMINAL LAW⚿ 1170.5(1)

110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1170.5 Examination of Witnesses
110k1170.5(1) Rulings in general.

Fla.App. 5 Dist. 1998.

Error in excluding evidence sought to be admitted on cross-examination for purpose of impeachment is subject to harmless error rule.

8. CRIMINAL LAW⚿ 1170.5(1)

110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1170.5 Examination of Witnesses
110k1170.5(1) Rulings in general.

Fla.App. 5 Dist. 1998.

Any error in trial court's exclusion from trial on charges of battery and criminal mischief of cross-examination of victim concerning domestic violence petitions filed against him by defendant was harmless, in light of tenuous relevance of such evidence.

*753 James B. Gibson, Public Defender, and Thomas J. Lukashow, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Jennifer Meek, Assistant Attorney General, Daytona Beach, for Appellee.

COBB, Judge.

In this case Janice Nelson was convicted of battery and criminal mischief as the result of an incident that occurred at the home of her then boyfriend, Bonnell, shortly after midnight. She came to his home at that time after each had been out with other partners earlier in the evening. A physical encounter ensued and ultimately Bonnell was struck with a bottle. Nelson then left the house, backed her truck into and damaged Bonnell's garage door, and drove away. Bonnell reported the incident to the police around 2:00 a.m.

Subsequent to this incident, and prior to her criminal trial, Nelson filed two civil petitions for domestic violence injunctions against Bonnell. The criminal trial court granted the state's motion in limine precluding the defense from attempting to impeach the credibility of Bonnell's trial testimony based upon the fact of the civil actions filed against him by Nelson. This trial court ruling is the basis of the instant appeal.

Nelson argues that it was improper for the trial court to deny her cross-examination concerning the impact of the pending civil actions on the credibility at trial of Bonnell. She cites to *Chadwick v. State,* 680 So.2d 567, 568 (Fla. 1st DCA 1996) for the proposition that "when there is a pending civil suit or criminal charge against the witness arising out of the incident, those matters may be inquired into on cross-examination or developed in the defense case."

[1] [2] [3] *Chadwick* relies on the well established principle that a defendant in a criminal case has considerable latitude in cross-examination to elicit testimony showing the bias of a witness. *See* §

Michael T. RIVERA, Appellant,

v.

STATE of Florida, Appellee.

No. 70563.

Supreme Court of Florida.

April 19, 1990.

Rehearing Denied June 22, 1990.

Defendant was convicted of first-degree murder and was sentenced to death in the Circuit Court, Broward County, John G. Ferris, J., (Retired), and defendant appealed. The Supreme Court, Barkett, J., held that: (1) evidence of defendant's sexual assault of another victim was properly admitted; (2) defendant was not entitled to introduce evidence of another crime committed while defendant was in custody; and (3) death penalty was not disproportionate.

Affirmed.

1. Criminal Law ⇐369.15

Evidence of sexual assault of another victim was properly admitted in trial of defendant for first-degree murder as similarities between two crimes established sufficiently unique pattern of criminal activity to justify admission of collateral crime evidence on disputed, material issue of identity; numerous similarities existed between crimes including age, race and stature of victims, and method of abduction.

2. Criminal Law ⇐338(1)

Where evidence tends in any way, even indirectly, to establish reasonable doubt of defendant's guilt, it is error to deny its admission; however, admissibility of evidence must be gauged by same principles of relevancy as any other evidence offered by defendant. West's F.S.A. § 90.404(2)(a).

3. Homicide ⇐178(1)

Defendant was not entitled to introduce evidence, in first-degree capital murder trial, of crime of "similar nature" which was committed while defendant was in custody; dissimilarity in ages and appearances of victims, and causes of death rendered evidence irrelevant.

4. Homicide ⇐357(11)

Evidence was sufficient to support aggravating factor, for purposes of sentencing in capital murder trial, that murder was especially heinous, atrocious or cruel; defendant abducted child, took her to field where he sexually assaulted her, and child screamed and resisted until defendant was able to kill her by asphyxiation.

5. Homicide ⇐357(3)

Record did not support finding of heightened premeditation necessary to prove aggravating factor, for purposes of sentencing in capital murder trial, that murder was cold, calculated, and premeditated; although testimony revealed that defendant had admitted fantasizing about raping young girls and prowled neighborhoods in search of victims, there was no evidence of any prior intent to kill.

6. Homicide ⇐357(4)

Trial court acted within parameters of its discretion in rejecting mitigating circumstances presented in capital murder case that defendant was under substantial domination of another, or that his capacity to appreciate criminality of his conduct or conform his conduct to requirements of law was substantially impaired; trial court did find that defendant was under influence of extreme mental or emotional disturbance.

7. Homicide ⇐357(4, 5, 11)

Three aggravating circumstances presented in capital murder trial, which included previous convictions of violent crimes and finding that this murder was heinous, atrocious and cruel, weighed against one mitigating factor, supported imposition of death penalty.

H. Dohn William, Jr., Sp. Public Defender, Fort Lauderdale, for appellant.

Robert A. Butterworth, Atty. Gen., and Joan Fowler, Asst. Atty. Gen., West Palm Beach, for appellee.

BARKETT, Justice.

Michael T. Rivera appe
for first-degree murder an
death.[1] We affirm both t
sentence.

Eleven-year-old Staci I
her Lauderdale Lakes ho
about 5:30 p.m. on Janu
purchase poster board at
ping center. A cashier re
her a poster board betwe
p.m. When Staci failed t
her mother began to searc
p.m. the mother encount
County Deputy Sheriff,
bicycle in the trunk of his
found the bicycle aband
alongside the shopping c
investigation ensued.

Police first connected
Staci's murder through a
Starr Peck, a Pompano
She testified that she had
mately thirty telephone
tember 1985 from a ma
himself as "Tony." He
sexual fantasies and desc
clothing he wore, such a
one-piece body suit. She
telephone call from "To
murder. Ms. Peck testifi
had "done something
I'm sure you've heard a
ci.... I killed her ar
to.... I had a notion to
myself. I saw this girl g
and I went up behind h
that he had admitted p
Staci and dragging her i
van where he sexually a
era had been employed
she identified him as "T

On February 13, D
Scheff and Phillip Amab
County Sheriff's Depar
into custody on unrelate
rants and transported hi
where they told him th
speak to him. Detecti
that Rivera responded,

1. Our jurisdiction is
§ 3(b)(1), Fla. Const.

BARKETT, Justice.

Michael T. Rivera appeals his conviction for first-degree murder and the sentence of death.[1] We affirm both the conviction and sentence.

Eleven-year-old Staci Lynn Jazvac left her Lauderdale Lakes home on bicycle at about 5:30 p.m. on January 30, 1986, to purchase poster board at a nearby shopping center. A cashier recalled having sold her a poster board between 6:30 and 7:00 p.m. When Staci failed to return by dusk, her mother began to search. At about 7:30 p.m. the mother encountered a Broward County Deputy Sheriff, who had Staci's bicycle in the trunk of his car. The deputy found the bicycle abandoned in a field alongside the shopping center. A police investigation ensued.

Police first connected Michael Rivera to Staci's murder through a complaint filed by Starr Peck, a Pompano Beach resident. She testified that she had received approximately thirty telephone calls during September 1985 from a man who identified himself as "Tony." He would discuss his sexual fantasies and describe the women's clothing he wore, such as pantyhose and one-piece body suit. She received the last telephone call from "Tony" after Staci's murder. Ms. Peck testified that he said he had "done something very terrible.... I'm sure you've heard about the girl Staci.... I killed her and I didn't mean to.... I had a notion to go out and expose myself. I saw this girl getting off her bike and I went up behind her." She testified that he had admitted putting ether over Staci and dragging her into the back of the van where he sexually assaulted her. Rivera had been employed by Starr Peck, and she identified him as "Tony."

On February 13, Detectives Richard Scheff and Phillip Amabile of the Broward County Sheriff's Department took Rivera into custody on unrelated outstanding warrants and transported him to headquarters where they told him that they wanted to speak to him. Detective Scheff testified that Rivera responded, "If I talk to you guys, I'll spend the next 20 years in jail." After reading Rivera his *Miranda* rights,[2] Detective Scheff told Rivera that someone had advised them that Rivera had information about the disappearance of Staci Jazvac. The detective testified that Rivera admitted making the obscene phone calls to Starr Peck but denied having abducted or murdered Staci.

In subsequent interviews, Rivera admitted that he liked exposing himself to girls between ten and twenty years of age. He preferred the Coral Springs area because its open fields reduced the likelihood of getting caught. He would often borrow a friend's van and commented that "every time I get in a vehicle, I do something terrible." Rivera then admitted to two incidents. In one, he said he had exposed himself to a girl pushing a bike. When asked what he did with her, Rivera replied: "Tom, I can't tell you. I don't want to go to jail. They'll kill me for what I've done." In the other, he said he had grabbed another young girl and pulled her into some bushes near a Coral Springs apartment complex.

Staci's body was discovered on February 14 in an open field in the city of Coral Springs, several miles from the site of the abduction. Dr. Ronald Keith Wright, a forensic pathologist, testified that most of the upper part of the body had decomposed and that the body was undergoing early skeletonization. The doctor concluded that death was a homicide caused by asphyxiation, which he attributed to ether or choking.

Dr. Wright observed that the body was completely clothed, although the jeans were unzipped and partially pulled down about the hips, and the panties were partially torn. Dr. Wright opined that this could be the result of the expansion of gasses during decomposition and not sexual molestation. He was unable to determine whether she was sexually assaulted. He discovered a bruise on the middle of the forehead that occurred before death, but he

1. Our jurisdiction is mandatory. Art. V, § 3(b)(1), Fla. Const.

2. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

could not testify with certainty as to the cause. He also observed a broken fingernail on her right hand index finger, which he could not interpret as evidence of a struggle. Dr. Wright believed that the body was carried to the field and dumped, and at that time Staci was either dead or unconscious.

The jury heard testimony from several of Rivera's fellow inmates. Frank Zuccarello testified that Rivera admitted that he had choked another child, Jennifer Goetz, in the same way he had choked Staci; that Rivera said he had tried to kill Jennifer but was frightened away; and that Rivera said he had taken Staci to the field where she screamed and resisted, and he choked her to death after things got out of hand. Rivera also admitted that he told Starr Peck that he had murdered Staci, saying that confiding in her was the biggest mistake of his life. William Moyer testified that Rivera had stated to him: "You know, Bill, I didn't do it, but Tony did it." He later overheard Rivera call Starr Peck and identify himself as "Tony." Peter Salerno testified that Rivera told him: "I didn't mean to kill the little Staci girl. I just wanted to look at her and play with her."

A manager of a Plantation restaurant testified that he had received over two hundred telephone calls during a two-year period from an anonymous male caller. On February 7, the Friday before Staci's body was discovered, the caller identified himself as "Tony" and said that he "had that Staci girl" while wearing pantyhose, and that he had put an ether rag over her face.

The jury returned a verdict of guilty as charged.

During the penalty phase, the state introduced evidence of prior convictions.[3] Rivera introduced the testimony of his sisters, Elisa and Miriam, through whom the jury learned that Rivera was himself the victim of child molestation. Rivera's present girlfriend testified that she had no concerns about leaving him with her children. Rivera's former girlfriend was allowed to testify under an alias. She expressed the opinion that Rivera had two personalities. Through Michael he demonstrated a good side and through "Tony" he exposed his dark side which compelled him to do terrible things.

Dr. Patsy Ceros-Livingston, a clinical psychologist, interviewed Rivera in jail. She diagnosed Rivera as having a borderline personality disorder, which is characterized by impulsivity, a pattern of unstable and intense interpersonal relationships, lack of control of anger, identity disturbance, affective instability, intolerance of being alone, and physically self-damaging acts. The doctor also diagnosed exhibitionism, voyeurism, and transvestism.

Dr. Ceros-Livingston opined that Rivera acted under extreme duress and that he had some special compulsive characteristics that substantially impaired his capacity to appreciate the criminality of his conduct or to conform this conduct to the requirement of the law.

The jury unanimously recommended the death penalty. The trial judge found four aggravating circumstances,[4] one statutory mitigating circumstance,[5] and no nonstatutory mitigating circumstances.

[1] Rivera claims that two trial court errors in the guilt phase of his trial mandate reversal. First, Rivera contends that the introduction of evidence in the state's case-in-chief regarding the sexual assault upon Jennifer Goetz vio *Williams v. State*, 110 *cert. denied*, 361 U.S. 84 L.Ed.2d 86 (1959), and the Code.[6]

In this case, the mat resolved by the similar identity. Rivera relies *State*, 400 So.2d 1217 (gues that the similarities crimes were not of a "sp "so unusual" as to point that argument and find able. There the only s the two crimes was tha had their hands tied behi left a bar with the defen

Here, there were nur between the two crim were eleven years of ag blond hair. Both were small and petite. Both approached from behind occurred during dayligh miles of Rivera's home. individuals received phon who identified himself a stated that he was wear leotards and had fanta young girls.[7]

We find that the simil two crimes establish "a pattern of criminal acti admission of collateral the disputed, material *Chandler v. State*, 442 1983). Moreover, we d evidence of this crime t ture of the trial. *Burr* 1051, 1053 (Fla.), *cert. d* 106 S.Ct. 201, 88 L.Ed

Second, Rivera cont court improperly e *Williams* rule eviden fered testimony, Rivera

3. On November 6, 1986, Rivera was convicted of attempted first-degree murder, kidnapping, aggravated child abuse, and aggravated battery. The state conceded that those crimes were on appeal. However, there were other felonies involving the use or threat of violence of which Rivera stood convicted and which were not on appeal. They include the October 1980 crimes of burglary with intent to commit battery and of indecent assault on a female child under the age of fourteen.

4. § 921.141(5)(b), (d), (h), (i), Fla.Stat. (1985) (previous conviction of felony involving the threat or use of violence; murder committed during the commission of an enumerated felony; murder especially heinous, atrocious, or cruel; and murder committed in a cold, calculated, and premeditated manner).

5. § 921.141(6)(b), Fla.Stat. (1985) (defendant under the influence of extreme mental or emotional disturbance).

6. Rivera asserts that the Code was violated:

Similar fact evidence c or acts is admissible w material fact in issue, opportunity, intent, p edge, identity, or abse

upon Jennifer Goetz violated the rule of *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959), and the Florida Evidence Code.[6]

In this case, the material issue to be resolved by the similar fact evidence was identity. Rivera relies upon *Drake v. State*, 400 So.2d 1217 (Fla.1981), and argues that the similarities between the two crimes were not of a "special character" or "so unusual" as to point to him. We reject that argument and find *Drake* distinguishable. There the only similarity between the two crimes was that the two victims had their hands tied behind their backs and left a bar with the defendant. *Id.* at 1219.

Here, there were numerous similarities between the two crimes. Both victims were eleven years of age, caucasian, with blond hair. Both were similar in stature, small and petite. Both were alone and approached from behind. Both abductions occurred during daylight, and within four miles of Rivera's home. After each crime, individuals received phone calls from a man who identified himself as "Tony" and who stated that he was wearing pantyhose and leotards and had fantasized about raping young girls.[7]

We find that the similarities between the two crimes establish "a sufficiently unique pattern of criminal activity" to justify the admission of collateral crime evidence on the disputed, material issue of identity. *Chandler v. State*, 442 So.2d 171, 173 (Fla. 1983). Moreover, we do not find that the evidence of this crime became a major feature of the trial. *Burr v. State*, 466 So.2d 1051, 1053 (Fla.), *cert. denied*, 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985).

Second, Rivera contends that the trial court improperly excluded "reverse" *Williams* rule evidence. Through proffered testimony, Rivera attempted to establish that a crime of a similar nature had been committed by another person.

Although the question of the admissibility of "reverse *Williams* Rule" evidence by a defendant appears to be one of first impression for this Court, the Third District in *Moreno v. State*, 418 So.2d 1223, 1225 (Fla. 3d DCA 1982), has permitted it on the basis that an accused may show his or her innocence by proof of the guilt of another. That view has been adopted by the First District in *Brown v. State*, 513 So.2d 213, 215 (Fla. 1st DCA 1987), *dismissed*, 520 So.2d 583 (Fla.1988):

> While most cases generally involve the offer of similar fact evidence by the prosecution against a defendant in a criminal case, there is nothing in the language of [section 90.404(2)(a), Florida Statutes (1985)] which precludes the use of evidence offered by a defendant in a criminal case, or by a party in a civil action. *See* C. Ehrhardt, *Florida Evidence* § 404.9 (2d ed. 1984).

(Footnote omitted.)

Other jurisdictions also have held that defendants may introduce similar fact evidence. *See, e.g., Commonwealth v. Keizer*, 377 Mass. 264, 385 N.E.2d 1001 (1979) (reaffirming *Commonwealth v. Murphy*, 282 Mass. 593, 185 N.E. 486 (1933)); *State v. Bock*, 229 Minn. 449, 39 N.W.2d 887 (1949); *State v. Garfole*, 76 N.J. 445, 388 A.2d 587 (1978).

[2] We agree with the Third District Court in *Moreno* that where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission. § 90.404(2)(a), Fla.Stat. (1985). However, the admissibility of this evidence must be gauged by the same principle of relevancy as any other evidence offered by the defendant.

6. Rivera asserts that the following section of the Code was violated:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but is inadmissible when the evidence is relevant solely to prove bad character or propensity.

§ 90.404(2)(a), Fla.Stat. (1985).

7. A search of Rivera's residence produced items of female clothing from under Rivera's bed and between the mattress, including pantyhose.

[3] In this case, Rivera sought to introduce evidence pertaining to the February 20 abduction and murder of Linda Kalitan, which occurred while Rivera was in custody. We find the dissimilarity of this crime to Staci Jazvac's murder sufficient to preclude its admissibility as relevant evidence. Linda Kalitan was twenty-nine years of age, whereas Staci was eleven. Her body was fully developed, whereas Staci's body was childlike. Linda's body was totally nude except for a pair of socks, whereas Staci was clothed. Linda's body was found in a canal and her clothing was weighted down by rocks. Although both bodies were found in the same general location, Staci was found in the vacant field. In Linda's case, there was evidence of anal sex prior to her death, unlike Staci's case. Staci was abducted in northern Broward County, and Linda was abducted in southwest Broward County.

The only alleged similarities were that both Staci and Linda were riding bicycles when they were abducted; they were both asphyxiated;[8] their bodies were found in the same general area; and pantyhose was discovered in the vicinity of their bodies.[9] Under these circumstances, we find that the trial court did not abuse its discretion in excluding the proffered evidence.

[4] Finally, Rivera contends that the death penalty is disproportionate. Rivera concedes that there is a basis in the record for finding the existence of two aggravating factors,[10] but contends that the two other factors found by the trial court were unsupported by the record. First, Rivera disputes the finding that the murder was especially heinous, atrocious, or cruel. We find that the record conclusively supports the trial court's finding of this factor beyond a reasonable doubt. Testimony established that Rivera abducted Staci and took her to a field where he sexually assaulted her. The testimony indicated that Staci screamed and resisted Rivera until he was able to kill her by asphyxiation. We have found that "fear and emotional strain preceding a victim's almost instantaneous death may be considered as contributing to the heinous nature of the capital felony." *Adams v. State*, 412 So.2d 850, 857 (Fla.), *cert. denied*, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). We find sufficient evidence to support the finding that this murder was especially heinous, atrocious, or cruel.

[5] Second, Rivera argues that the murder was not cold, calculated, and premeditated. Although Deputy Scheff testified that Rivera had admitted fantasizing about raping young girls and prowled neighborhoods in search of a victim, there was no evidence of any prior intent to *kill*. Indeed, the only evidence on that question was to the contrary. For instance, witnesses testified that Rivera stated that he "didn't mean to kill the Staci girl," he "just wanted to look at her and play with her"; he "had a notion to go out and expose [himself]"; and he choked her to death only after things got out of hand. The murder resulted only after the crime had escalated beyond its intended purpose. The record does not support the finding of the heightened premeditation necessary to prove this aggravating factor beyond a reasonable doubt.

[6] Finally, we find no merit to Rivera's claim that the trial court erred in failing to find that Rivera acted under extreme duress or under substantial domination of another, or that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. The trial court *did* find that Rivera was under the influence of an extreme mental or emotional disturbance. We conclude on this record that the trial court was acting within ters of its discretion in reject tional mitigating factors. The findings with regard to the nonexistence of mitigating c are supported by substantial c dence. *Bryan v. State*, 533 S (Fla.1988), *cert. denied*, — U S.Ct. 1765, 104 L.Ed.2d 200

[7] We are left with three circumstances, which include victions of violent crimes and this murder was heinous, a cruel. On this record, we a that the one mitigating fa against the magnitude of the factors would render the sam trial court below, absent the dated aggravating circumsta

For these reasons, we affi tion and imposition of the

It is so ordered.

EHRLICH, C.J., and OVE McDONALD, SHAW, GRIM KOGAN, JJ., concur.

Thomas H. PROVENZAN

v.

Richard L. DUGGER, etc

Thomas H. PROVENZAN

v.

STATE of Florida,

Nos. 73981, 74

Supreme Court of

April 26, 199

Rehearing Denied Jur

Defendant moved for relief, after his first-deg attempted first-degree mu

8. Although it was clear in Linda Kalitan's case that she was choked, in Staci's case the medical examiner was not able to tell if the asphyxiation was caused by ether or strangulation.

9. A pair of soiled and weathered pantyhose was found approximately 300 yards from the location where Linda's body was discovered. Among the items collected in the area where Staci's body was discovered were eight pair of pantyhose and thirteen packages of pantyhose.

10. Those circumstances are conviction for a previous felony and murder committed while engaged in an enumerated felony.

trial court was acting within the parameters of its discretion in rejecting the additional mitigating factors. The trial court's findings with regard to the existence or nonexistence of mitigating circumstances are supported by substantial competent evidence. *Bryan v. State*, 533 So.2d 744, 749 (Fla.1988), *cert. denied*, — U.S. —, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989).

[7] We are left with three aggravating circumstances, which include previous convictions of violent crimes and a finding that this murder was heinous, atrocious, and cruel. On this record, we are persuaded that the one mitigating factor weighed against the magnitude of the aggravating factors would render the same result in the trial court below, absent the single invalidated aggravating circumstance.

For these reasons, we affirm the conviction and imposition of the death penalty.

It is so ordered.

EHRLICH, C.J., and OVERTON, McDONALD, SHAW, GRIMES and KOGAN, JJ., concur.

Thomas H. PROVENZANO, Petitioner,

v.

Richard L. DUGGER, etc., Respondent.

Thomas H. PROVENZANO, Appellant,

v.

STATE of Florida, Appellee.

Nos. 73981, 74101.

Supreme Court of Florida.

April 26, 1990.

Rehearing Denied June 26, 1990.

Defendant moved for a postconviction relief, after his first-degree murder and attempted first-degree murder convictions were upheld on direct appeal, 497 So.2d 1177. The Circuit Court, Orange County, Clifford B. Shepard, J., denied the motion without holding an evidentiary hearing. Defendant appealed order of denial and also filed petition for habeas corpus. The Supreme Court held that: (1) trial counsel was not ineffective during guilt phase; (2) trial counsel was not ineffective during penalty phase; and (3) appellate counsel was not ineffective.

Affirmed; petition denied.

1. Criminal Law ⇐494

Evidence supported finding that defendant was competent to stand trial; several doctors were appointed to examine defendant, and each of them concluded he was competent to stand trial; moreover, three psychiatrists testified at competency hearing that defendant was competent.

2. Criminal Law ⇐641.13(2)

Defense counsel, who made an oral motion for change of venue, subject to court's determination of whether a fair and impartial jury could be selected, was not ineffective for failing to formally renew motion after jury was selected; decision not to renew motion was a tactical one and it was unlikely that change of venue would have been granted because there were no undue difficulties in selecting an impartial jury. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐641.13(2)

Defense counsel was not ineffective for failing to object to standard jury instruction on insanity, which was later determined to be erroneous, where there was no constitutional infirmity in the instruction, and it was not so flawed as to deprive defendant claiming insanity of a fair trial. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐641.13(2, 6)

Defense counsel was not ineffective for failing to object to comments by prosecutor during opening statement and testimony by witness concerning gunshot injuries suffered by victims who were not killed, as some evidence concerning injuries was appropriate to prove charges of at-

*906 579 So.2d 906

Aurelian SMITH, Jr., Appellant,
v.
STATE of Florida, Appellee.

No. 90-165.

579 So.2d 906, 16 Fla. L. Week. D1481
District Court of Appeal of Florida,
Fifth District.

May 30, 1991.

Defendant appealed order entered in the Circuit Court for Volusia County, Gayle S. Graziano, J., denying his motion for new trial on grounds of ineffective assistance of counsel. The District Court of Appeal, Peterson, J., held that defendant was entitled to new trial due to trial counsel's errors in agreeing to cautionary instruction about what was in fact proper line of cross-examination and in ineptly asking police officer to repeat victim's statements.

Judgment and sentence vacated; case remanded.

Cowart, J., dissented and filed opinion.

1. WITNESSES ⚖370(3)
   410 ----
   410IV Credibility and Impeachment
   410IV(C) Interest and Bias of Witness
   410k370 Friendly or Unfriendly Relations with or Feeling Toward Party
   410k370(3) Instigation or maintenance of prosecution or litigation.

Fla.App. 5 Dist. 1991.

Defense counsel should have been permitted to cross-examine alleged victim regarding victim's civil suit against defendant to show motive and reason to deviate from truth about who began altercation.

2. CRIMINAL LAW ⚖920
   110 ----
   110XXI Motions for New Trial
   110k920 Incompetency or neglect of counsel for defense.

Fla.App. 5 Dist. 1991.

Defense counsel's errors, in agreeing to State's requested cautionary instruction about defense cross-examination that in fact should have been allowed and in ineptly asking police officer to repeat victim's statements, were sufficient to warrant new trial where neither defendant's nor alleged victim's version of altercation could be corroborated and errors may have tipped scale for jury in favor of victim's version. U.S.C.A. Const.Amend. 6.

3. CRIMINAL LAW ⚖1134(3)
   110 ----
   110XXIV Review
   110XXIV(L) Scope of Review in General
   110k1134 Scope and Extent in General
   110k1134(3) Questions considered in general.

Fla.App. 5 Dist. 1991.

Where trial court previously heard testimony on issue of ineffectiveness of trial counsel, review of such issue was allowable on direct appeal. U.S.C.A. Const.Amend. 6.

4. CRIMINAL LAW ⚖920
   110 ----
   110XXI Motions for New Trial
   110k920 Incompetency or neglect of counsel for defense.

Fla.App. 5 Dist. 1991.

Defendant is entitled to new trial when conduct of defense counsel produces outcome that cannot be relied upon as fair. U.S.C.A. Const.Amend. 6.

5. CRIMINAL LAW ⚖366(6)
   110 ----
   110XVII Evidence
   110XVII(E) Res Gestae
   110k362 Res Gestae
   110k366 Acts and Statements of Person Injured
   110k366(6) Length of time elapsed as affecting admissibility.

Fla.App. 5 Dist. 1991.

Roommate's account of victim's description of altercation was not admissible under excited utterance exception to hearsay rule where description was heard by roommate during conversation taking place as much as hour after altercation. West's F.S.A. Sec. 90.803(2).

Horace Smith, Jr., of Horace Smith, Jr., P.A., Monaco, Smith, Hood, Perkins, Orfinger & Stout, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and David S. Morgan, Asst. Atty. Gen., Daytona Beach, for appellee.

PETERSON, Judge.

Aurelian Smith, Jr., appeals the denial of his motion

for new trial, alleging that he received ineffective assistance of counsel. The trial court heard testimony on the allegations of ineffective assistance and found that defense counsel's conduct "was measurably below the standard of conduct this court has become accustomed to from attorneys who normally appear before it." The trial court also found that defense counsel's errors identified by expert witnesses were not likely to have affected the outcome of the trial. We disagree, vacate the judgment and sentence, and remand for a new trial.

Neither the defendant's nor the alleged victim's version of the physical altercation that took place at night on the side of a road could be corroborated because of the absence of witnesses at the scene. It appears to us that at least two of the many errors of defense counsel tipped the scale for the jury in favor of the alleged victim's version.

[1][2] First, defense counsel properly began cross-examining the victim regarding *907. the victim's civil suit against the defendant to show motive and reason to deviate from the truth about who began the altercation. The trial court erred in sustaining the state's objection to the line of questioning. Wooten v. State, 464 So.2d 640 (Fla. 3d DCA 1985), rev. denied, 475 So.2d 696 (Fla.1985). The state then requested a cautionary instruction, and defense counsel agreed to it. Defense counsel further apologized for raising the issue of the civil suit, indicating that he did not mean to bring error into the proceedings.

Second, defense counsel ineptly asked a police officer to repeat the victim's statements which initiated the case.

[3][4] Since the trial court previously heard the testimony on the issue of ineffectiveness of trial counsel, a review of this issue is allowable on direct appeal. State v. Barber, 301 So.2d 7 (Fla.1974); Frazier v. State, 453 So.2d 95 (Fla. 5th DCA 1984); Pinder v. State, 421 So.2d 778 (Fla. 5th DCA 1982). A defendant is entitled to a new trial when the conduct of defense counsel produces an outcome which cannot be relied upon as fair. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); see State v. District Court of Appeal of Fla. First Dist., 569 So.2d 439 (Fla.1990) (Ineffective assistance of either publicly-appointed or privately-retained counsel is grounds for collateral relief.).

[5] Defense counsel did perform well on one issue; he made an objection to the hearsay testimony by the victim's roommate that gave an account of the victim's description of the altercation. The description was heard by the roommate during a conversation in their apartment, possibly as much as an hour after the altercation. The hour was in excess of any time allowable as an "excited utterance" exception to the hearsay rule. State v. Jano, 524 So.2d 660 (Fla.1988); Sec. 90.803(2), Fla.Stat.(1987). The court erred in allowing the testimony.

Judgment and sentence VACATED; REMANDED.

W. SHARP, J., concurs.

COWART, J., dissents with opinion.

COWART, Judge, dissenting.

The defendant, Aurelian Smith, Jr., hired private counsel to defend him in this criminal case in which he was charged with aggravated battery as a result of a one punch fight. It is a simple case. The victim testified that he and the defendant were acquaintances travelling from bar to bar in an automobile when they had an argument and the defendant slugged him. The defendant, a large professional wrestler, testified that he acted in self defense. The jury issue was: "Who was the aggressor?" and that determination was dependent upon the credibility of the victim and the defendant who were the only eye witnesses to the ultimate issue. Certainly the defendant's privately-retained counsel was not effective in that the defendant was convicted. Certainly, also, there is no way of knowing why Mr. Smith's privately-retained counsel at trial handled the defense the way he did.

Reversing judgments and sentences based on jury verdicts in criminal cases because of the determination of an appellate court that personally-retained defense counsel was ineffective or inept opens the gate to a road that has no end. As professionals, trial counsel are important mainly because they, like doctors, have but one chance to do their work. If defendants charged with crime are entitled to new trials until they are either acquitted or have "effective" counsel there will not be much incentive to hire "effective" counsel. As long as a lawyer is considered sufficiently competent to be authorized to practice law and a defendant has the unrestricted right to select his lawyer, the defendant should bear the risk involved in his selection because criminal trials are adversarial events and the State has nothing to do with selection

of counsel.

*641 606 So.2d 641

17 Fla. L. Week. D2077

Jimmy Milton SMITH, Appellant,
v.
STATE of Florida, Appellee.

No. 91-1287.
District Court of Appeal of Florida,
First
District.

Sept. 4, 1992.
Rehearing Denied Oct. 13, 1992.

Defendant was convicted in the Circuit Court, Bay County, Dedee S. Costello, J., of aggravated battery, and he appealed. The District Court of Appeal, Ervin, J., held that court erred in excluding proffered testimony relating to specific instances of violence by victim.

Reversed and remanded.

1. ASSAULT AND BATTERY ⚿85
37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k81 Evidence
37k85 Character and physical condition of parties.
Fla.App. 1 Dist. 1992.
Evidence of dangerous character of victim is admissible to show, or as tending to show, that defendant acted in self-defense; thus, when self-defense is raised, evidence of victim's reputation is admissible to disclose propensity for violence and likelihood that victim was the aggressor, and evidence of victim's prior specific acts of violence is admissible to reveal reasonableness of defendant's apprehension. West's F.S.A. Secs. 90.404, 90.405.

2. ASSAULT AND BATTERY ⚿85
37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k81 Evidence
37k85 Character and physical condition of parties.
Fla.App. 1 Dist. 1992.
On claim of self-defense, if reputation evidence is offered to show victim's conduct, defendant's prior knowledge of victim's reputation for violence is not necessary; if, however, character evidence is offered to prove reasonableness of defendant's apprehension, prior knowledge of specific acts of violence is necessary. West's F.S.A. Secs. 90.404, 90.405.

3. ASSAULT AND BATTERY ⚿85
37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k81 Evidence
37k85 Character and physical condition of parties.
Fla.App. 1 Dist. 1992.
Before defendant may offer evidence of victim's violent character in support of self-defense claim, defendant must lay proper predicate demonstrating some overt act by the victim at or about time of incident which reasonably indicated to defendant a need to act in self-defense; however, if there is slightest evidence of overt act by victim which may reasonably be regarded as placing defendant in imminent danger, all doubts as to admission of self-defense evidence must be resolved in defendant's favor. West's F.S.A. Secs. 90.404, 90.405.

4. ASSAULT AND BATTERY ⚿85
37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k81 Evidence
37k85 Character and physical condition of parties.
Fla.App. 1 Dist. 1992.
Defendant claiming self-defense laid proper predicate for admission of evidence of victim's character by disclosing that victim approached defendant in a threatening manner, that victim pushed against defendant, and that victim held a knife; under the circumstances, defendant was properly allowed to introduce evidence of victim's reputation for violence to establish that victim was the aggressor. West's F.S.A. Sec. 90.405(1).

5. ASSAULT AND BATTERY ⚿85
37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k81 Evidence
37k85 Character and physical condition of parties.

[See headnote text below]

5. ASSAULT AND BATTERY ⚿86

37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k81 Evidence
37k86 Provocation or justification.
Fla.App. 1 Dist. 1992.

Reasonableness of defendant's apprehension of bodily harm or death threatened by victim was an essential element of his defense to prosecution for aggravated battery, and therefore, defendant should have been permitted to testify regarding specific instances of violent conduct by victim that were known or communicated to defendant before the altercation. West's F.S.A. Sec. 90.405(2).

6. ASSAULT AND BATTERY ⚖85
37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k81 Evidence
37k85 Character and physical condition of parties.

[See headnote text below]

6. CRIMINAL LAW ⚖419(2.20)
110 ----
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in general
110k419(2.20) Then-existing state of mind or body.
Fla.App. 1 Dist. 1992.

Defendant claiming self-defense need not be present during occurrence of victim's specific acts of violence to render them admissible so long as defendant has heard of them before altercation between victim and defendant; further, such evidence of victim's past violent acts is offered to show only that defendant believed those incidents had occurred and, thus, not subject to hearsay rule. West's F.S.A. Sec. 90.405(2).

7. CRIMINAL LAW ⚖1170(1)
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1170 Exclusion of evidence
110k1170(1) In general.
Fla.App. 1 Dist. 1992.

Erroneous exclusion of evidence concerning victim's past violent acts was not harmless in prosecution of defendant for aggravated battery; erroneously excluded evidence went to defendant's only defense.

8. CRIMINAL LAW ⚖1163(3)
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1163 Presumption as to effect of error
110k1163(3) Rulings as to evidence.
Fla.App. 1 Dist. 1992.

State has burden to prove that erroneous exclusion of evidence was harmless.

9. CRIMINAL LAW ⚖627.2
110 ----
110XX Trial
110XX(A) Preliminary Proceedings
110k627.2 Depositions.
Fla.App. 1 Dist. 1992.

Although deposition testimony of absent witness would have been admissible in civil action, trial court properly excluded deposition on ground that defendant had not followed procedure for perpetuating testimony. West's F.S.A. RCrP Rule 3.190(j); West's F.S.A. Sec. 90.804.

*642 Nancy A. Daniels, Public Defender, Nada M. Carey, Assistant Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., Marilyn McFadden, Asst. Atty. Gen., for appellee.

ERVIN, Judge.

Appellant, Jimmy Milton Smith, seeks review of his conviction for aggravated battery and his habitual violent felony offender sentence of 30 years. Appellant contends that the trial court erred in excluding proffered testimony relating to specific instances of violence by the victim, in refusing to admit a discovery deposition into evidence, and in sentencing appellant as a habitual violent felony offender pursuant to a statute that violated the single-subject rule provided in Article III, Section 6 of the Florida Constitution. We agree with appellant as to the first issue and reverse and remand for new trial. Because of our disposition of the first issue, we do not reach the sentencing error, but, for the reasons hereafter stated, discuss the asserted error raised in point II.

As a result of an altercation outside a bar between appellant and his son-in-law, Marshall Newton, Newton suffered a spinal cord injury that left him paralyzed from the neck down. Appellant asserted the defense of self-defense. Both sides presented

eyewitness testimony at the trial. The state submitted evidence inferring that appellant was the aggressor and that he used a knife to stab Newton, while the defense, on the other hand, introduced evidence implicating Newton as the aggressor wielding the knife. In addition, appellant sought to introduce evidence relating to Newton's character for violence consisting of both reputation evidence and specific act evidence. Appellant proffered evidence both as to Newton's reputation for violence and as to specific instances of violence, which would disclose, among other things that Newton attacked him with a butcher knife in July 1988, threatened his son with a knife, stabbed his daughter in the neck with a knife, threatened Doug Katt with a shotgun, told Joey Porter that if appellant did not "butt out" of his relationship with appellant's daughter, he would do something to appellant, and pulled a knife on Bobby Claghorn in May 1989, at the same bar where the fight between appellant and Newton occurred in October 1990. Appellant clearly testified during the proffer that all of the above incidents were known to him before the alteration. Although the trial court allowed the reputation evidence, it excluded the evidence relating to specific instances of violence.

[1][2] We cannot agree that the trial court's denial of such evidence was consistent with established case law. In Florida, evidence of the dangerous character of the victim is admissible to show, or as tending to show, that the defendant acted in self-defense. Garner v. State, 28 Fla. 113, 136, 9 So. 835, 841 (1891). Thus, when self-defense is raised, evidence of the victim's reputation is admissible to disclose his or her propensity for violence and the likelihood *643 that the victim was the aggressor, while evidence of prior specific acts of violence by the victim is admissible to reveal the reasonableness of the defendant's apprehension at the time of the incident. Quintana v. State, 452 So.2d 98, 100 (Fla. 1st DCA 1984) (reversing first-degree murder conviction, because defendant erroneously precluded from offering reputation and specific-act evidence relative to self-defense claim). See also Hager v. State, 439 So.2d 996, 997 (Fla. 4th DCA 1983); Banks v. State, 351 So.2d 1071, 1072 (Fla. 4th DCA), cert. denied, 354 So.2d 986 (Fla.1977); Williams v. State, 252 So.2d 243 (Fla. 4th DCA), cert. denied, 255 So.2d 682 (Fla.1971); Secs. 90.404 & .405, Fla.Stat. (Supp.1990 & 1989); Charles W. Ehrhardt, Florida Evidence Sec. 404.6 (1992 ed.). If reputation evidence is offered to show the victim's conduct, the defendant's prior knowledge of the victim's reputation is not necessary. Banks, 351 So.2d at 1072. If, however, character evidence is offered to prove the reasonableness of the defendant's apprehension, prior knowledge of the specific-act violence is necessary. Id.

[3] Before a defendant may offer either type of character evidence, he or she must lay a proper predicate demonstrating some overt act by the victim at or about the time of the incident which reasonably indicated to the defendant a need for action in self-defense. Quintana, 452 So.2d at 100; Williams, 252 So.2d at 247. Consequently, if there is the slightest evidence of an overt act by the victim which may be reasonably regarded as placing the defendant in imminent danger, all doubts as to the admission of self-defense evidence must be resolved in favor of the accused. Quintana, 452 So.2d at 101; Warren v. State, 577 So.2d 682, 684 (Fla. 1st DCA 1991) (reversing second degree murder conviction because defendant was erroneously precluded from introducing evidence of deceased's character that was relevant to a self-defense theory).

[4] In the instant case, appellant, as stated, claimed self-defense and laid a proper predicate for the admission of character evidence in that his evidence disclosed that Newton approached him in a threatening manner, that Newton pushed against him, and that Newton held a knife. Warren; Quintana. Under the circumstances, appellant was properly allowed to introduce evidence of Newton's reputation for violence under Section 90.405(1), Florida Statutes (1989), to establish that Newton was the aggressor.

[5][6] Appellant was erroneously prohibited, however, from introducing evidence of specific acts of violence by Newton for the reason that appellant's apprehension of bodily harm or death threatened by Newton was an essential element of his defense. Therefore, appellant should have been permitted to testify under Section 90.405(2), Florida Statutes (1989), regarding specific instances of violent conduct by Newton that were known or communicated to him before the altercation. Case law clearly establishes that a defendant need not be present during the occurrence of the specific acts so long as he or she has heard of them prior to the time of the incident. Smith v. State, 410 So.2d 579 (Fla. 4th DCA) (defendant erroneously precluded from introducing evidence of past specific violent acts by the deceased where it was shown that defendant, although not present during such occurrences, knew of them through others prior to the incident), review denied, 419 So.2d 1200 (Fla.1982). This result does not

offend the hearsay rule, because the evidence is not offered to prove the truth of the matter asserted, but is offered to show only that the defendant believed those incidents had occurred. Id. at 581. Under the circumstances, the trial court erred in excluding the proffered evidence relating to specific instances of violent conduct by Newton that had occurred in appellant's presence or had been communicated to him prior to the stabbing. (FN1)

[7][8] Considering the nature of the evidence in this case, especially the conflicts between the theories offered by the two *644 sides and the fact that the erroneously excluded evidence went to appellant's only defense, the error must be considered harmful. In so saying, we note that the state did not argue that the error was harmless, which is its burden. Ciccarelli v. State, 531 So.2d 129, 131 (Fla.1988); Brooks v. State, 555 So.2d 929, 931 (Fla. 3d DCA 1990).

[9] Although our disposition of point I, requiring reversal and remand of the case for new trial, makes it unnecessary for us to address point II, relating to the propriety of the trial court's refusal to admit into evidence the deposition testimony of an absent witness, we consider that discussion of this issue would be helpful to the parties on remand. During the trial below, appellant attempted to introduce into evidence the deposition of Bradford Blackwell, in which he testified as to certain threatening statements made by Newton about appellant approximately two hours before the occurrence of the altercation. The state objected on the ground that appellant had not followed the procedure for perpetuating testimony, as provided in Florida Rule of Criminal Procedure 3.190(j), and that appellant made no showing that Blackwell was unavailable as a witness under the former-testimony hearsay statute, Section 90.804(2)(a), Florida Statutes (1989). The court sustained the state's objection, noting that defense counsel had not, as required by the rule, requested an order perpetuating the testimony.

Appellant argues that the trial court's ruling excluding such testimony was erroneous in that deposition testimony is admissible under Florida's long-standing rule allowing the admission of former testimony, codified in section 90.804, and that in civil cases Florida's Evidence Code and the rules of civil procedure are considered in pari materia and, if the evidence would be considered admissible pursuant to the provisions of either the statute or the rule, the deposition may be admitted. See Johns- Manville Sales Corp. v. Janssen's, 463 So.2d 242, 259 (Fla. 1st DCA 1984), review denied, 467 So.2d 999 (Fla.1985); Dinter v. Brewer, 420 So.2d 932, 934 (Fla. 3d DCA 1982).

Persuasive as the above cases are permitting the admissibility of deposition testimony under such circumstances in the civil sector, the rule applied in civil cases is not applied in this jurisdiction in criminal cases. This court has held that the substantive use of a deposition taken solely for the purpose of discovery is improper under the Florida Rules of Criminal Procedure. Terrell v. State, 407 So.2d 1039 (Fla. 1st DCA 1981) (discovery deposition erroneously admitted at trial when court determined witness was unavailable). See also State v. James, 402 So.2d 1169, 1171 (Fla.1981) (holding that discovery depositions may not be used as substantive evidence in criminal trials). And see Barnett v. State, 444 So.2d 967 (Fla. 1st DCA 1983); Clark v. State, 572 So.2d 929 (Fla. 5th DCA 1990); Campos v. State, 489 So.2d 1238 (Fla. 3d DCA 1986). We acknowledge that the above decisions are at variance with the interpretation placed on section 90.804(2)(a) by a respected commentator in the field of evidence, who states:

> [T]here is some Florida authority that in a criminal case a deposition must be admissible under the Rules of Criminal Procedure. If those rules do not provide for its admission, the deposition cannot be admitted under section 90.804(2)(a). There appears to be no logical reason to draw this distinction. Depositions should be admissible under section 90.804(2)(a) in both criminal and civil cases. In addition, when the Florida Supreme Court adopted that part of the Evidence Code which was procedural as a rule of court, it stated: "all present rules of evidence established by case law or express rules of court are hereby superseded to the extent they are in conflict with the code." Thus, if procedural rules limiting the use of depositions as evidence are "rules of *645. evidence," as it would appear they would be, the Florida Supreme Court has already ruled that section 90.804(2)(a) controls and the deposition would be admissible.

Charles W. Ehrhardt, Florida Evidence Sec. 804.2, at 670-71 (1992 ed.) (footnotes omitted).

Although Professor Ehrhardt makes an extremely logical argument, paralleling appellant's position that the criminal rules, like the civil rules, should be read in conjunction with section 90.804(2)(a), this court is

required to follow our established case law. Consequently we cannot accept appellant's argument that the lower court erred in denying the admission into evidence of the deposition testimony of Bradford Blackwell.

Our disposition of Point I moots consideration of the sentencing error raised in Point III.

REVERSED and REMANDED.

MINER and WEBSTER, JJ., concur.

FN1. Although the state argued on appeal that this issue was not properly preserved for appellate review, we find no merit in such argument. The trial judge was clearly aware that appellant sought to introduce the specific-act evidence for the purpose of demonstrating that appellant's apprehension as to the harm threatened by the victim was reasonable. We also reject the state's argument that this evidentiary rule should be limited to homicide cases. Compare Woodson v. State, 483 So.2d 858 (Fla. 5th DCA 1986) (although issue not preserved by proffer, evidence of reputation of officer would have been admissible to establish he was the aggressor in resisting-an-officer charge); Pino v. Koelber, 389 So.2d 1191 (Fla. 2d DCA 1980) (discussing use of character evidence in civil action for assault and battery).

*865 672 So.2d 865

21 Fla. L. Weekly D894

Mark STEWART, Appellant,
v.
STATE of Florida, Appellee.

No. 95-01141.

District Court of Appeal of Florida,
Second District.

April 10, 1996.

Rehearing Denied May 3, 1996.

Defendant was convicted in the Circuit Court, Sarasota County, Peter A. Dubensky, J., of aggravated assault while armed with firearm. Defendant appealed. The District Court of Appeal, Schoonover, Acting C.J., held that: (1) instruction on justifiable use of force should have been given, and (2) defendant was entitled to instruction on justifiable use of nondeadly force, rather than instruction on justifiable use of deadly force.

Reversed and remanded with instructions.

1. ASSAULT AND BATTERY⚿ 96(3)

37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k93 Trial
37k96 Instructions
37k96(3) Self-defense.

Fla.App. 2 Dist. 1996.

Evidence presented was sufficient to support defendant's theory of self-defense, and therefore instruction on use of justifiable use of force should have been given, in prosecution for aggravated assault while armed with firearm, where there was evidence that victim drove towards defendant at high rate of speed, that defendant felt he had to swerve to avoid collision, that victim got out of his car and approached defendant and his girlfriend angrily and in threatening manner, that defendant was afraid of being attacked, and that he waved his unloaded, holstered pistol in effort to scare victim away. West's F.S.A. § § 776.012, 776.08.

2. CRIMINAL LAW⚿ 1159.2(9)

110 ----
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(9) Weighing evidence.

Fla.App. 2 Dist. 1996.

Appellate court is not permitted to weigh evidence to determine propriety of a defense.

3. ASSAULT AND BATTERY⚿ 95

37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k93 Trial
37k95 Questions for jury.

Fla.App. 2 Dist. 1996.

If evidence of self-defense is adduced, self-defense becomes issue for jury to determine. West's F.S.A. § 776.012.

4. ASSAULT AND BATTERY⚿ 96(3)

37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k93 Trial
37k96 Instructions
37k96(3) Self-defense.

Fla.App. 2 Dist. 1996.

Defendant was entitled to instruction on justifiable use of nondeadly force, but not on justifiable use of deadly force, in aggravated assault prosecution, where defendant allegedly waived his holstered, unloaded pistol to scare off victim who approached defendant angrily, defendant presented no evidence that deadly force was required to prevent imminent death or great bodily harm, and defendant admitted that he could have retreated. West's F.S.A. §§ 776.012, 776.08.

5. ASSAULT AND BATTERY⚿ 95

37 ----
37II Criminal Responsibility
37II(B) Prosecution

37k93 Trial
37k95 Questions for jury.

Fla.App. 2 Dist. 1996.

When evidence does not establish that force used by defendant claiming right to use force in defense of unlawful force is deadly or nondeadly as matter of law, jury should be allowed to decide the question.

6. ASSAULT AND BATTERY⚿ 96(3)

37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k93 Trial
37k96 Instructions
37k96(3) Self-defense.

Fla.App. 2 Dist. 1996.

If type of force used by defendant claiming right to use force in defense of unlawful force is clearly deadly or nondeadly, only applicable instruction should be given.

7. ASSAULT AND BATTERY⚿ 96(3)

37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k93 Trial
37k96 Instructions
37k96(3) Self-defense.

Fla.App. 2 Dist. 1996.

In order to be entitled to instruction on justifiable use of deadly force, defendant must present evidence that he reasonably believed that deadly force was necessary to prevent imminent death or great bodily harm to himself or another. West's F.S.A. § 776.012

.

8. ASSAULT AND BATTERY⚿ 67

37 ----
37II Criminal Responsibility
37II(A) Offenses
37k62 Defenses
37k67 Self-defense.

Fla.App. 2 Dist. 1996.

Justifiable use of deadly force is only proper if person cannot retreat. West's F.S.A. § 776.012.

9. ASSAULT AND BATTERY⚿ 67

37 ----
37II Criminal Responsibility
37II(A) Offenses
37k62 Defenses
37k67 Self-defense.

Fla.App. 2 Dist. 1996.

"Deadly force" occurs when natural, probable, and foreseeable consequences of defendant's acts are death. West's F.S.A. § 776.012.

See publication Words and Phrases for other judicial constructions and definitions.

10. ASSAULT AND BATTERY⚿ 67

37 ----
37II Criminal Responsibility
37II(A) Offenses
37k62 Defenses
37k67 Self-defense.

Fla.App. 2 Dist. 1996.

It is nature of force that must be evaluated to determine whether force is "deadly force," which is justified only if defendant reasonably believes such force is necessary to prevent death or great bodily harm. West's F.S.A. § 776.012.

11. ASSAULT AND BATTERY⚿ 67

37 ----
37II Criminal Responsibility
37II(A) Offenses
37k62 Defenses
37k67 Self-defense.

Fla.App. 2 Dist. 1996.

Mere display of gun without more does not constitute "deadly force," for purposes of determining whether display of gun is justified. West's F.S.A. § 776.012.

***866** Appeal from the Circuit Court for Sarasota County; Peter A. Dubensky, Judge.

Charlie Ann Scott of Scott & Williams, P.A., Sarasota, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Wendy Buffington, Assistant Attorney General, Tampa, for Appellee.

SCHOONOVER, Acting Chief Judge.

The appellant, Mark Stewart, challenges the judgment and sentence imposed upon him after a jury found him guilty of aggravated assault while armed with a firearm. We find that the trial court erred by refusing to instruct the jury on self-defense and, accordingly, reverse and remand for a new trial.

The appellant was charged with aggravated assault while armed with a firearm as the result of an incident which occurred in a shopping center parking lot. The appellant was driving his vehicle in a southerly direction when the victim, who was attempting *867 to secure a particular parking space for his van, drove very close to him in a westerly direction. After the appellant stopped his vehicle at a stop sign located near the incident, the parties let each other know, both verbally and by gesture, that they did not appreciate the other's conduct. There was evidence that the conduct escalated to the point where the appellant waved an unloaded, holstered pistol in the air for the victim to see and then drove off.

During the appellant's jury trial, the evidence concerning the events leading up to the waving of the pistol was conflicting. The victim testified that the appellant stopped for an unusually long period of time at the stop sign and that both parties exchanged angry gestures. According to the victim, the appellant then began exiting his car and pointed a gun at him. The gun remained in the car at all times. The victim's testimony was corroborated by the victim's wife and daughter who were passengers in the van. The appellant, on the other hand, testified that when he stopped at the stop sign the victim became very angry, exited his van, and proceeded toward him while yelling and swearing. He testified further that because he was in fear that the victim was going to attack him, he reached down and waved the unloaded, holstered pistol in the air in self-defense with the purpose of scaring the victim and halting his aggressive approach. The appellant's version of the incident was corroborated by his passenger, his girlfriend, who also testified that she felt threatened. Even though the appellant could have safely retreated from the situation by driving away from it, he admitted that his first reaction was to get his gun.

At the conclusion of the trial, the appellant requested an instruction on the justifiable use of nondeadly force. After this requested instruction was refused, he requested an instruction, which was also refused, on the justifiable use of deadly force. After the jury found the appellant guilty of aggravated assault while armed with a firearm, the court adjudicated him guilty and sentenced him to serve a mandatory term of three years in prison. This timely appeal followed.

[1] On appeal the appellant contends that the evidence established that his conduct was justified and that he was therefore entitled to an instruction on self-defense. Section 776.012, Florida Statutes (1993), provides as follows:

> Use of force in defense of person. A person is justified in the use of force, except deadly force, against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of deadly force only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another or to prevent the imminent commission of a forcible felony.

[2] [3] In this case, the appellant advanced the theory of self-defense and presented evidence to support that theory. The appellant testified that the victim approached him at a high rate of speed and that he felt he had to swerve to avoid a collision. The appellant and his girlfriend testified that the victim got out of his car and approached them angrily and in a threatening manner. The appellant testified that he was afraid of being attacked and, therefore, that he was justified in waving his unloaded, holstered pistol in an effort to scare the victim away. Because this evidence supported his theory that his conduct was justified under section 776.012, a jury instruction on justifiable use of force should have been given. *See Wenzel v. State,* 459 So.2d 1086 (Fla. 2d DCA 1984). We realize that conflicting evidence was presented to the jury. However, we are not permitted to weigh the evidence to determine the propriety of the appellant's defense. If evidence of self-defense is adduced, as it was in this case, self-defense becomes an issue for the jury to determine. *Garramone v. State,* 636 So.2d 869 (Fla. 4th DCA 1994).

[4] Although we have concluded that the jury should

have been instructed on the justifiable use of force, it is still necessary to decide whether they should have been instructed on the justifiable use of nondeadly force, deadly force, or both. Under the facts of this case we find that the trial court ***868** properly denied the appellant's alternate request that the jury be instructed on the justifiable use of deadly force and agree with his contention that an instruction on the use of nondeadly force should have been given.

[5] [6] When the evidence does not establish that the force used by a defendant claiming the right to use force in the defense of unlawful force is deadly or nondeadly as a matter of law, the jury should be allowed to decide the question. *See Garramone,* 636 So.2d at 871 (jury, not judge, should decide if pushing or throwing a fully clothed individual over the railing of a sixteen foot bridge into the intracoastal waterway at night constituted deadly or nondeadly force and also to weigh the reasonableness of such force against the acts of the victim). *See also Cooper v. State,* 573 So.2d 74 (Fla. 4th DCA 1990) (question of whether the driving of a vehicle in a manner that it hits someone is deadly force should be submitted to jury). If, however, the type of force used is clearly deadly or nondeadly, only the applicable instruction should be given. *See Miller v. State,* 613 So.2d 530 (Fla. 3d DCA 1993) (the firing of a firearm into the air, even as a so called warning shot, constitutes the use of deadly force as a matter of law). *See also Deveaugh v. State,* 575 So.2d 1373 (Fla. 4th DCA 1991) (defendant claiming he had a fistfight in self-defense was entitled to an instruction on the justifiable use of nondeadly force).

[7] [8] Even if we were to assume that the waving of the gun in the air was the use of deadly force, or that the jury should have been allowed to decide that question, the appellant would not have been entitled to an instruction concerning the justifiable use of deadly force. In order to be entitled to that instruction, the appellant was required to present evidence that he reasonably believed that deadly force was necessary to prevent imminent death or great bodily harm to himself or another. § 776.012. This evidence was not presented. Furthermore, justifiable use of deadly force is only proper if a person cannot retreat, *Keith v. State,* 614 So.2d 560 (Fla. 1st DCA 1993), and the appellant admitted that he could have left the area.

[9] [10] [11] Contrary to the assumption made above, however, the appellant's actions did not amount to the use of deadly force and he was entitled to an instruction concerning the use of nondeadly force. The appellant's conduct in waving the firearm resulted in him being charged with aggravated assault while armed with a firearm, a forcible felony. § 776.08, Fla.Stat. (1993). Although this conduct amounts to a forcible felony it does not in this case amount to the use of deadly force. Deadly force occurs when the natural, probable, and foreseeable consequences of the defendant's acts are death. *Garramone,* 636 So.2d at 871. If the appellant had fired the weapon, or was stopped as he attempted to, he would have been using deadly force even if the gun was not pointed at the victim. *Crider v. State,* 632 So.2d 1058 (Fla. 5th DCA 1994). Discharge of a firearm has been held as a matter of law to constitute deadly force because a firearm is by definition a deadly weapon which fires projectiles likely to cause death or great bodily harm. *Miller,* 613 So.2d at 531. The appellant's evidence indicates that he did not, however, fire the pistol but only waved it. When a weapon is fired it is likely to cause death or great bodily harm but that is not the case when a gun is waved. It is the nature of the force that must be evaluated and the mere display of a gun without more does not constitute deadly force. *See Toledo v. State,* 452 So.2d 661 (Fla. 3d DCA 1984). (FN1)

Since the trial court did not instruct the jury on the theory of the appellant's defense we must reverse and remand for a new trial where the proper instruction is given and the jury is allowed to determine the reasonableness ***869.** of the force used by the appellant. *See State v. Smith,* 348 So.2d 637 (Fla. 2d DCA 1977).

Reversed and remanded with instructions.

FRANK and PARKER, JJ., concur.

FN1. The Model Penal Code section 3.11 (1962), states in part that "[a] threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force...." Although Florida has not adopted the Model Penal Code, *Rodgers v. State,* 537 So.2d 583 (Fla. 4th DCA 1987), other states look to it for guidance and have similar statutes that provide that deadly force does not include the threatened use of deadly force. *State v. Williams,* 433 A.2d 765 (Me.1981); *Mattox v. State,* 874 S.W.2d 929 (Tex. 1st DCA 1994).

violated. *See Roberson v. State*, 633 So.2d 1134 (Fla. 2d DCA 1994).

Affirmed and remanded with directions.

ALTENBERND, A.C.J., and FULMER and NORTHCUTT, JJ., Concur.

Mark SHIVELY, Appellant,

v.

STATE of Florida, Appellee.

No. 5D98–2697.

District Court of Appeal of Florida, Fifth District.

Feb. 25, 2000.

Defendant was convicted in the Circuit Court, St. Johns County, John M. Alexander, J., of first-degree sexual battery upon a child by person with familial or custodial authority. Defendant appealed. The District Court of Appeal held that evidence that third party saw defendant french-kissing victim and that another witness saw defendant standing naked talking with victim in her home was admissible.

Affirmed.

1. Criminal Law ⇐369.2(2)

Evidence necessary to describe manner in which a criminal offense took place or how it came to light is generally admissible as relevant evidence even though it might otherwise be objectionable as prior bad act evidence because it is inextricably intertwined with the underlying crime.

2. Criminal Law ⇐369.2(5)

Evidence that third party observed defendant french-kissing minor victim, which observation led to victim's disclosure to her mother and step-father that she had been sexually molested by defendant, was admissible as relevant evidence showing how the offense of sexual battery upon a child came to light; State would have been unreasonably hampered in explaining to jury how the charged crime came to light without step-father's testimony describing events that led to victim's disclosure of molestation.

3. Criminal Law ⇐722.5

Prosecutor did not improperly use incident in which witness saw defendant standing naked talking to minor victim in her home as "prior bad act evidence" by suggesting in closing argument that the nude encounter corroborated fact that defendant was engaged in unconsensual sexual acts with victim; prosecutor recounted testimony in closing argument primarily to fortify theory that defendant, as part of his plan of being sexually involved with victim, had set up circumstances where he and victim would be alone in family home.

4. Assault and Battery ⇐83

Disclosure, by minor victim's brother, of his observation of defendant standing naked talking to victim in her home was one of events which led to discovery of crime of sexual battery upon a child and defendant's arrest, and was therefore admissible as relevant evidence.

James B. Gibson, Public Defender, and Thomas J. Lukashow, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and David H. Foxman, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

In this appeal, Mark Shively argues that the trial court erred by admitting evidence showing that a third party witness saw him french-kissing the victim and that another witness saw him standing naked, talking with the minor victim in her home. He asserts that but for the admission of this testimony, the jury may not have reached a verdict of guilty of the first degree felony of sexual battery upon a child by a person with familial or custodial authority. We disagree and affirm the conviction and sentence.

[1, 2] The french-kissing incident led to the victim's disclosure to her mother and step-father that she had been sexually molested by Shively. Evidence necessary to describe the manner in which a criminal offense took place or how it came to light is generally admissible as relevant evidence even though it might otherwise be objectionable as prior bad act evidence because it is "inextricably intertwined" with the underlying crime. *Griffin v. State*, 639 So.2d 966 (Fla.1994), *cert. denied*, 514 U.S. 1005, 115 S.Ct. 1317, 131 L.Ed.2d 198 (1995); *Platt v. State*, 551 So.2d 1277 (Fla. 4th DCA 1989); *Tumulty v. State*, 489 So.2d 150 (Fla. 4th DCA 1986), *rev. denied*, 496 So.2d 144 (1986). The state would have been unreasonably hampered in explaining to the jury how the charged crime came to light without the step-father's testimony describing the events that led to the victim's disclosure of molestation.

Shively also asserts that the testimony of the victim's brother that he saw Shively naked in the presence of the victim was unfairly prejudicial and improperly introduced because the defense was not given advance notice of the state's plan to introduce evidence of this prior bad act. However, it appears that this incident was known to Shively's counsel before trial, and, like the french-kissing incident, it could have been the subject of a motion in limine. We note further that a minor, in a familial setting, observing an adult relative nude, without more, does not necessarily constitute either a bad, perverse or illegal act.

[3, 4] Shively alternatively argues that even if the naked incident evidence was not a prior bad act, the prosecutor improperly used the incident as "prior bad act evidence" by suggesting in closing argument that the nude encounter "corroborates the fact that the defendant was engaged in unconsensual sexual acts with the victim." We disagree with that characterization of the argument. The prosecutor recounted this testimony in closing argument primarily to fortify the theory that Shively, as part of his plan of being sexually involved with the victim, had set up circumstances where he and the victim would be alone in the family home. In addition, the brother's disclosure of the nudity incident was also one of the events which led to the discovery of the crime and Shively's arrest, and was therefore admissible as relevant evidence. *See, Griffin v. State*, 639 So.2d 966, 968 (Fla.1994), *cert. denied*, 514 U.S. 1005, 115 S.Ct. 1317, 131 L.Ed.2d 198 (1995).

The conviction and sentence are affirmed.

AFFIRMED.

W. SHARP, PETERSON and THOMPSON, JJ., concur.

Zelle TAYLOR, Appellant,

v.

STATE of Florida, Appellee.

No. 1D99–2392.

District Court of Appeal of Florida, First District.

Feb. 28, 2000.

State brought petition for revocation of community control. The Circuit Court, Duval County, Peter J. Fryefield, J., found

*44 588 So.2d 44

Tony Anthony WILLIAMS, Appellant,
v.
STATE of Florida, Appellee.

No. 90-2744.

588 So.2d 44, 16 Fla. L. Week. D2742
District Court of Appeal of Florida,
First District.

Oct. 24, 1991.
Rehearing Denied Nov. 14, 1991.

Defendant was convicted in the Circuit Court, Escambia County, Frank Bell, J., of aggravated battery, and he appealed. The District Court of Appeal, Allen, J., held that the defendant's testimony that the victim's cutting had been accidental did not disprove the defendant's claim that he was acting in self-defense or to defend the victim's girlfriend and, therefore, the jury should have been instructed on self-defense and defense of another.

Reversed and remanded.

1. CRIMINAL LAW ⚖770(2)
110 ----
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k770 Issues and Theories of Case in General
110k770(2) Necessity of instructions.
Fla.App. 1 Dist. 1991.
Defendant is entitled to instruction as to his theory of defense if there is any evidence to support it, even if the only evidence is provided by defendant's testimony and even if that testimony is weak or improbable.

2. ASSAULT AND BATTERY ⚖96(2)
37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k93 Trial
37k96 Instructions
37k96(2) Provocation or justification.

[See headnote text below]

2. ASSAULT AND BATTERY ⚖96(3)
37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k93 Trial
37k96 Instructions
37k96(3) Self-defense.

[See headnote text below]

2. CRIMINAL LAW ⚖814(8)
110 ----
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k814 Application of Instructions to Case
110k814(8) Matters of defense in general.
Fla.App. 1 Dist. 1991.
Defendant's assertion that his injury of another was accidental will generally preclude instruction on self-defense or defense of another; defenses ordinarily involve admission and avoidance.

3. ASSAULT AND BATTERY ⚖96(2)
37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k93 Trial
37k96 Instructions
37k96(2) Provocation or justification.

[See headnote text below]

3. ASSAULT AND BATTERY ⚖96(3)
37 ----
37II Criminal Responsibility
37II(B) Prosecution
37k93 Trial
37k96 Instructions
37k96(3) Self-defense.
Fla.App. 1 Dist. 1991.
Defendant's testimony that cutting of victim was accidental did not preclude instructions on self-defense and defense of another where there was evidence from which jury could reasonably find that accident resulted from justifiable use of force; assertion that injury was accidental did not disprove defendant's claim that he was acting to defend himself or another.

Nancy A. Daniels, Public Defender, and Glen P. Gifford, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and Charlie McCoy, Asst. Atty. Gen., Tallahassee, for appellee.

ALLEN, Judge.

Tony Anthony Williams raises several points in appealing his conviction and sentence for the aggravated battery of Hodges Lamar Minor. We hold that the trial court erred in refusing to instruct the jury on the use of force in defense of another and therefore reverse.

*45 Williams gave the following testimony at trial. On March 29, 1990, he was sharing a mobile home with Minor and Minor's girlfriend, Ethel Barnes. Williams came home from work to find Minor and Barnes talking and drinking from a half-empty liquor bottle. Williams went into his room in the mobile home and began to cut molding strips with a carpenter's knife, described as "an aluminum-type knife with a slide top." Minor and Barnes began to argue and curse in their room. When Williams heard a window break, he went to their room, out of concern for Barnes's safety. (Williams knew that the couple had had violent fights before and that Minor had recently kicked Barnes in the mouth. He still had the carpenter's knife in his hand as he went to the couple's bedroom.) Williams found Minor and Barnes holding each other's arms, so he stepped between them to separate them. When they separated, Minor grabbed Williams and they started "to tussle." Both tripped on a vent in the floor and fell. During the fall, the knife slipped open and struck Minor in the shoulder. Williams specifically denied intentionally stabbing Minor.

Williams's counsel requested instructions on the use of force in self defense and in defense of another. He now argues that the court's denial of those requests was error. The state responds that Williams was not entitled to an instruction on self defense or defense of another because Williams's testimony that the cutting was accidental was inconsistent with both defenses.

[1] A defendant is entitled to an instruction as to his theory of defense if there is any evidence to support it. Brown v. State, 431 So.2d 247 (Fla. 1st DCA 1983). This is true even if the only evidence of the defense is provided by the defendant's own testimony, and even if that testimony is weak or improbable. Holley v. State, 423 So.2d 562 (Fla. 1st DCA 1982); Taylor v. State, 410 So.2d 1358 (Fla. 1st DCA), rev. denied, 418 So.2d 1281 (Fla.1982).

[2] A defendant's assertion that his injury of another was accidental will generally preclude an instruction on self defense or defense of another. See Pimentel v. State, 442 So.2d 228 (Fla. 3d DCA 1983), rev. denied, 450 So.2d 488 (Fla.1984). This is so because these defenses involve an admission and avoidance. Normally, a claim that injuries were inflicted accidentally will be so inconsistent with a claim of self defense or defense of another as to logically preclude an instruction on either defense.

[3] However, where there is evidence indicating that the accidental infliction of an injury and the defense of self defense or defense of another are so intertwined that the jury could reasonably find that the accident resulted from the justifiable use of force, an instruction on self defense or defense of another is not logically precluded. Under such circumstances, the assertion that the injury was unintended or accidental does not disprove the defendant's claim that he was acting in self defense or in defense of another. Accordingly, under these circumstances, the appropriate defensive instruction should be given. See Mills v. State, 490 So.2d 204 (Fla. 3d DCA), rev. denied, 494 So.2d 1153 (Fla.1986); and Hunter v. State, 378 So.2d 845 (Fla. 1st DCA 1979). Cf. Foreman v. State, 47 So.2d 308 (Fla.1950); and Pinder v. State, 27 Fla. 370, 8 So. 837, 841 (1891) (a defendant is entitled to an instruction on self defense where his accidental injuring or killing of a person grows out of his exercise of self defense against a third person).

In the case before us, Williams's assertion that Minor was accidentally injured was not inconsistent with his testimony that the injury grew out of his efforts to defend Ethel Barnes from being further injured by Minor. He was therefore entitled to an instruction on the use of force in defense of another.

Williams's claim that he was entitled to an instruction on self defense presents a closer question because his testimony suggests that his intervention and the ensuing "tussle" were motivated by a perceived need to defend Barnes rather than to defend himself. The determination of whether to give a self defense instruction upon *46. retrial should, of course, depend upon the evidence presented at the trial.

Because of our determination that this case must be retried, we do not address Williams's other points, all of which relate to his sentence. The judgment and sentence are reversed and this cause is remanded for a new trial.

WIGGINTON and WOLF, JJ., concur.

ing by the parties. To that extent I dissent from the majority opinion in this case.

William WORDEN, Appellant,

v.

STATE of Florida, Appellee.

No. 91-00228.

District Court of Appeal of Florida, Second District.

July 17, 1992.

Defendant was convicted of first-degree murder and aggravated child abuse for beating his nine-month-old son to death by the Circuit Court for Pasco County, Stanley R. Mills, J., and defendant appealed. The District Court of Appeal, Campbell, J., held that: (1) competent, substantial evidence supported jury verdict that defendant struck fatal blow; (2) defendant had intent to commit aggravated battery, as underlying felony used to find defendant guilty of felony-murder; (3) evidence of defendant's prior abuse of child was properly admitted; and (4) prosecutorial misconduct in opening and closing statements was harmless.

Affirmed.

Altenbernd, J., filed concurring opinion.

1. Criminal Law ⇐1159.2(5)

Once jury has made its determination regarding defendant's guilt, it will not be reversed on appeal if there is competent, substantial evidence to support it.

2. Infants ⇐20

Competent, substantial evidence supported jury verdict that defendant was guilty of first-degree and aggravated child abuse for beating his nine-month-old son to death, where son died as result of rapid cerebral edema, fatal blow or blows were estimated to have occurred no more than two hours before death, and child died three hours after mother went to work, leaving defendant home alone with child.

3. Homicide ⇐235

Defendant possessed requisite intent for felony-murder conviction for beating nine-month-old son to death based on intent to commit aggravated battery, though defendant denied intent to do serious bodily harm, where injuries were comparable to force and impact of serious car crash.

4. Criminal Law ⇐330

The state is not required to rebut every possible variation of events, but only to introduce competent evidence that is inconsistent with defendant's theory of case.

5. Criminal Law ⇐419(2)

Trial court properly allowed state protective investigator to testify about her interview of defendant by allowing her to read notes of interview to jury; questions propounded and statements of detectives who participated in interview were not offered for their truth, but to place defendant's answers in context.

6. Criminal Law ⇐371(1, 4)

Evidence of defendant's prior abusive acts towards child were properly admitted to establish defendant's intent and absence of mistake for first-degree murder and aggravated child abuse.

7. Criminal Law ⇐1171.2

Prosecutor's opening statement, referring to defendant's indictment by grand jury and arrest warrant in first-degree murder and aggravated child abuse case, was not so prejudicial as to vitiate entire trial and was thus harmless.

8. Criminal Law ⇐1171.1(6)

Prosecutor's reference to "your child" during closing of trial for first-degree murder and aggravated child abuse did not influence verdict, and thus, did not warrant reversal, especially since defense counsel specifically declined trial court's offer of curative instruction after objecting to prosecutor's remarks.

9. Criminal Law ⇐723(1)

Prosecutor's reference to "your child . . . unconscious lying in the tub" during his closing argument in first-degree murder and aggravated child abuse trial was not "golden rule" argument; "golden rule" argument is generally a prosecutor's argument to the jury that places the jury in the shoes of the victim, not the defendant.

James Marion Moorman, Public Defender, and Deborah K. Brueckheimer, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Katherine V. Blanco, Asst. Atty. Gen., Tampa, for appellee.

CAMPBELL, Judge.

Appellant was convicted of first degree murder and aggravated child abuse for beating his nine-month-old son, Jonathan, to death. He argues in this appeal that the court should have either acquitted him because of the lack of evidence against him or should have granted a mistrial based on the prosecutor's misconduct. He also raises two evidentiary issues. We affirm.

In July of 1988, appellant was living with his wife, Amy, and his nine-month-old son, Jonathan. Since he was not working, he took care of Jonathan while his wife worked. On July 25, 1988, Amy fed Jonathan a bottle in the morning and went to work at about 1:00 or 1:30 p.m. Jonathan seemed normal. At 4:00 p.m. that afternoon, paramedics responded to appellant's call. Appellant said he had left the child alone in the bathtub while he hung out clothes in the backyard and that the child had drowned.

Medical experts testified at trial that the child died from rapid cerebral edema, a swelling of the brain that occurs rapidly and causes death within a few hours of the initial injury. Further medical examinations revealed healing fractures to the child's tibia, radius and clavicle, in addition to severe facial bruising. A number of witnesses testified to specific instances of appellant's hostility and violent behavior toward the child.

In moving for a judgment of acquittal, appellant admitted all the above facts adduced and every conclusion favorable to the state that was reasonably inferable from them. *Lynch v. State*, 293 So.2d 44 (Fla.1974). Unless there was no view that the jury could lawfully take of the evidence that was favorable to the state, the trial court had to deny appellant's motion. *Lynch*. That was simply not the case here.

[1, 2] Since there was no direct evidence that appellant hit Jonathan during the two hours prior to his death, the state had to rely upon circumstantial evidence to prove its case against him. Although a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence, this is a question for the jury to determine. Once the jury has made its determination, it will not be reversed on appeal if there is competent, substantial evidence to support it. *State v. Law*, 559 So.2d 187 (Fla.1989). We find that the record contains competent, substantial evidence that supports the jury verdict.

Appellant's hypothesis of innocence was that either a combination of blows killed Jonathan or Jonathan's mother struck the final fatal blow. Based on the evidence presented, the jury could lawfully find that appellant struck the final blow that killed Jonathan. The experts agreed that Jonathan died as the result of rapid cerebral edema. The majority of expert witnesses estimated that the fatal blow or blows occurred no more than two hours before death and that Jonathan would have begun exhibiting observable effects soon after the fatal blow or blows. Yet, Jonathan acted normally on the day before his death and during the morning of the day he died when his mother was with him.

[3] Appellant also argued that the evidence failed to prove that he possessed the requisite intent. Although we agree with appellant that the evidence did not show that he had the required intent to be found guilty of premeditated murder, we believe that the evidence supported a finding of intent to commit aggravated battery, the

underlying felony used here to find appellant guilty of felony murder. Given the extensive evidence of recent abuse, there was no possibility that appellant intended only to strike Jonathan and not hurt him seriously. *See Morris v. State*, 557 So.2d 27 (Fla.1990). Jonathan sustained injuries comparable to the force and impact of a serious car crash. Appellant cannot credibly argue that he did not intend to do serious bodily harm.

[4] On the facts and inferences presented at trial, we believe that the jury could and properly did find that appellant not only struck the final blow or blows, but also had the required intent. The state is not required to rebut every possible variation of events, but only to introduce competent evidence that is inconsistent with appellant's theory of the case. *Law.* We believe that the state met its burden here.

[5] Appellant also argues that the court improperly allowed the HRS protective investigator, Dorothy Corrigan, to testify about her interview of appellant. On July 29, 1988, Corrigan and Detectives Phyllis Davis and Charles Calhoun interviewed appellant. Corrigan took notes of the interview and tried to take down everything verbatim. Since she could not remember everything she had written down, she was allowed to read her notes to the jury. Appellant maintains that this was hearsay that did not fall under any exception and that, in light of the insufficiency of the evidence against him, the error was not harmless. We disagree.

Hearsay, as observed by the trial court, is an out-of-court statement offered for its truth. The questions propounded and statements of the detectives were not offered for their truth, but were offered to place appellant's answers in context. For that reason, the questions were relevant. The only question is whether the probative value of the testimony is outweighed by the harm or prejudice to appellant. Since the questions were set forth in their proper context, interrogation of a suspected child abuser, we conclude that a rational jury would understand that law enforcement officers use many techniques to secure confessions and that the methods used here were indicative of that.

Thus, we conclude first that the questions were not hearsay and, second, that any error in admitting them is harmless.

[6] Appellant argues next that the court should not have admitted evidence of his prior abuse of Jonathan because it was not relevant and was extremely prejudicial. We disagree.

The trial court allowed the evidence under *Heuring v. State*, 513 So.2d 122 (Fla. 1987), finding that the "familial context" exception created by *Heuring* for child sexual battery cases should apply to child abuse cases as well. *See State v. Everette*, 532 So.2d 1124 (Fla. 3d DCA 1988); *Mayberry v. State*, 430 So.2d 908 (Fla. 3d DCA 1982).

Everette and *Mayberry* held that evidence of the prior bad acts is admissible to show criminal intent, motive, common scheme or absence of mistake. The *Everette* court stated: "We believe in a child abuse case that reference to prior injuries to the child should be permitted, particularly when compared to the appropriateness of similar evidence in sexual child abuse cases." 532 So.2d at 1125.

Although appellant argues that the evidence of his prior abuse of Jonathan is not probative because in none of those instances did he hit Jonathan in the head, the fact that appellant had abused Jonathan is proof in itself of appellant's criminal intent and the absence of mistake. The absence of mistake was particularly important here because appellant argued that Jonathan's injuries were the result of an accidental fall that had occurred several days before Jonathan's death. Appellant's intent was also critical, as discussed above. In view of the fact that the prior abuse involved the same child that appellant was charged with killing, we believe that evidence of appellant's prior abusive acts towards Jonathan were properly admitted. *See also Wooten v. State*, 398 So.2d 963 (Fla. 4th DCA 1981), *rev. dismissed*, 407 So.2d 1107 (Fla.1981).

[7, 8] Appellant next argues that the prosecutor's reference during his opening statement to the fact that appellant had been indicted by a grand jury and that an arrest warrant had been issued by a judge was so prejudicial that the court should have granted him a mistrial. Appellant also argues that the prosecutor's statement during closing referring to "your child ... unconscious lying in the tub" was also grounds for a mistrial. We disagree.

Although appellant maintains that the prosecutor's opening statement is similar to those in *Harris v. State*, 570 So.2d 397 (Fla. 3d DCA 1990) and *Ryan v. State*, 457 So.2d 1084 (Fla. 4th DCA 1984), *rev. denied*, 462 So.2d 1108 (Fla.1985), we disagree. In *Ryan*, the prosecutor's statements went far beyond what the prosecutor said here. In addition to arguing that the state would not have wasted its time on the charges if they were not valid, the prosecutor in *Ryan* repeatedly referred to the defendant's wealth, derided appellant's attorney and commented on appellant's failure to testify. The *Ryan* court quoted the Florida Supreme Court's opinion in *State v. Murray*, 443 So.2d 955, 956 (Fla. 1984):

> [P]rosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." *Cobb*, [v. State], 376 So.2d [230] at 232 [(Fla.1979)]. The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and its progeny. We agree with the recent analysis of the Court in *United States v. Hasting*, 461 U.S. 499, 103 S.Ct.1974, 76 L.Ed.2d 96 (1983). The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless; prosecutorial misconduct or indifference to judicial admonitions is the proper subject of bar disciplinary action. Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.

457 So.2d at 1086–1087

We believe that the opening statement error here was not so prejudicial as to vitiate the entire trial and was, therefore, harmless.

[9] Although appellant argues that the prosecutor's reference to "your child" is a "golden rule" argument, we disagree. A "golden rule" argument is generally a prosecutor's argument to the jury that places the jury in the shoes of the *victim*, not the defendant. *Bertolotti v. State*, 476 So.2d 130 (Fla.1985); *Clark v. State*, 553 So.2d 240 (Fla. 3d DCA 1989); *Peterson v. State*, 376 So.2d 1230 (Fla. 4th DCA 1979), *cert. denied*, 386 So.2d 642 (Fla.1980); *Lucas v. State*, 335 So.2d 566 (Fla. 1st DCA 1976). Although a prosecutor's argument placing jurors in the vicinity of the murder was found in *Rhodes v. State*, 547 So.2d 1201 (Fla.1989) to be similar to a "golden rule" argument, the court there found that the comment alone would not warrant a new sentencing proceeding. It was only when it was combined with several other improper prosecutorial comments that the court considered it egregious enough to have influenced the verdict, requiring a new sentencing hearing.

In view of the limited nature of the prosecutor's statements here, we conclude that they did not influence the verdict and that appellant's convictions should be affirmed. In this regard, it must be observed that although appellant objected to these remarks, defense counsel specifically declined the trial court's offer of a curative instruction.

Appellant's convictions and sentences are affirmed.

DANAHY, A.C.J., concurs.

ALTENBERND, J., concurs specially.

ALTENBERND, Judge, concurring.

I concur in the result in this case and fully recognize the state's need to vigorously prosecute cases
theless, I am troubl
tice of introducing
prove that a defenc
degree murder of a
bad or unfit parent
child's death. Ev
falls short of becc
"feature" of the tri
that the prejudicial
will outweigh its
generally Turtle v
(Fla. 1st DCA 1992
dards for admissil
acts). This risk se
the state's case is
circumstantial evi
courts have discret
evidence, justice r
that discretion is s

It is noteworthy
513 So.2d 122 (Fla.
of very similar se
child by the defend
the charged offens
other child abuse c
somewhat dissimila
same child by the
or years precedin
risks of confusio
greater concernin
abuse of the same

In this case, the
father had bruised
spanking, that he
arm and thrown h
had put a shirt int
the child was cryin
child's walker fou
while the child wa
he had cursed at
827.04, Florida
events could have
lesser felony char
did not charge th
lesser crimes. I
dence of these eve
dant of a capital
modest probative
the state's desire
dence when a ca
primarily by
Nevertheless, I v

ly prosecute cases of child abuse. Nevertheless, I am troubled by the growing practice of introducing extensive evidence to prove that a defendant, charged with first-degree murder of a child, was sometimes a bad or unfit parent prior to the time of the child's death. Even when this evidence falls short of becoming an impermissible "feature" of the trial, the risk seems great that the prejudicial effect of such evidence will outweigh its probative effect. *See generally Turtle v. State*, 600 So.2d 1214 (Fla. 1st DCA 1992) (discussing strict standards for admissibility of collateral bad acts). This risk seems even greater when the state's case is primarily supported by circumstantial evidence. Although trial courts have discretion to admit this type of evidence, justice may be better served if that discretion is sparingly exercised.

It is noteworthy that *Heuring v. State*, 513 So.2d 122 (Fla.1987), involved evidence of very similar sexual abuse of *another* child by the defendant twenty years before the charged offense. This case and many other child abuse cases involve evidence of somewhat dissimilar physical abuse of the same child by the defendant in the months or years preceding the fatal event. The risks of confusion and prejudice seem greater concerning evidence of dissimilar abuse of the same child.

In this case, there was evidence that the father had bruised his child's buttocks by spanking, that he had grabbed him by the arm and thrown him into the crib, that he had put a shirt into the child's mouth when the child was crying, that he had kicked the child's walker four feet across the room while the child was in the walker, and that he had cursed at the child. Under section 827.04, Florida Statutes (1987), these events could have justified misdemeanor or lesser felony charges. The state, however, did not charge the defendant with these lesser crimes. Instead, it used the evidence of these events to convict the defendant of a capital offense. I recognize the modest probative value of this evidence and the state's desire to introduce such evidence when a capital offense is supported primarily by circumstantial evidence. Nevertheless, I would feel more confident about the jury's verdict if it had been reached without the influence of at least some of this evidence.

I hope that every jury has sufficient objectivity to overlook the great emotional impact of such evidence and to determine, beyond a reasonable doubt, whether the defendant is guilty of first-degree murder arising out of a specific event. I believe the jury in this case had such objectivity. I fear, however, that on rare occasion a jury may convict a defendant of the nonexistent "capital offense" of chronic bad parenting if we continue to permit the extensive use of this type of evidence.

Lakethan Warren BOZEMAN, Appellant,

v.

STATE of Florida, Appellee.

No. 91–02701.

District Court of Appeal of Florida, Second District.

July 17, 1992.

Defendant was convicted of possession of cocaine after his motion to suppress cocaine found during warrantless search was suppressed by the Circuit Court, Polk County, Dennis P. Maloney, J. Defendant appealed. The District Court of Appeal, Patterson, J., held that once police officer determined that defendant was fit to drive, defendant's continued detention and warrantless search were illegal.

Reversed.

1. Automobiles ⇐349(17)

Absent well-founded suspicion of criminal activity, continued detention is illegal once officer accomplishes purpose of traffic stop.

IN THE COUNTY COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA

v.

Case No. 99-32857MMANO

ROBERT S. MINTON
SPN 02077072

02677072

_____/

ORDER ON STATE'S MOTION IN LIMINE

THIS CAUSE came on to be heard pursuant to the Motion in Limine of the State of Florida. After hearing argument by counsel for the respective parties, who were present pursuant to proper notice, and being otherwise duly advised in the premises, it is hereby ORDERED and ADJUDGED as follows:

The State's Motion in Limine raises twelve separate evidentiary issues and requests this court to find that certain evidence is not admissible because it is either not relevant or that its relevance is outweighed by unfair prejudice.

All relevant evidence is admissible, except as provided by law. Section 90.402, Florida Statutes (1999). Relevant evidence is inadmissible when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. Section 90.403, Florida Statutes (1999), See Also State v. McClain, 525 So.2d 420, 422 (Fla. 1988). Whether to exclude otherwise relevant evidence rests in the sound discretion of the trial judge who must determine whether the probative value of the evidence is substantially outweighed by the exclusionary reasons set forth above. Lewis v. State, 570 So.2d 412, 415, (Fla. 1st DCA

1990). In balancing these factors, the trial judge may consider the need for the particular evidence, the availability of alternative means of proof and whether a limiting instruction will ameliorate any unfair prejudice. Walker v. State, 707 So.2d 300, 310 (Fla. 1997). Almost all evidence sought 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, 531 So.2d 1256, 1259 (Fla. 1988).

Similarly, evidence which is inextricably intertwined with the crime charged is admissible under Section 90.402, where it is necessary to adequately describe the deed because it is a relevant and inseparable part of the act which is in issue. Coolen v. State, 696 So.2d 738, 742-743 (Fla. 1997).

Moreover, it is not the province of the court to weigh the evidence to determine the propriety of the defendant's defense. Instead, upon the establishment of his theory of defense, a defendant is permitted to present evidence to support that theory. Stewart v. State, 672 So.2d 865 (Fla. 2d DCA 1996).

In addition, it is well settled that a defendant in a criminal case must be afforded a full opportunity to cross-examine a witness to expose motives or biases to testify untruthfully. Fluellen v. State, 703 So.2d 511 (Fla. 1st DCA 1997), See Also Auchmutz v. State, 594 So.2d 594 (Fla. 4th DCA 1992).

Against this backdrop, this court hereby rules on the State of Florida's Motion in Limine as to each correspondingly numbered paragraph as follows:

1. & 7. The State of Florida seeks to limit the defense from any discussion or mention of the alleged "fair game policy" or any corporate policy, practice, belief, doctrine or dogma

of the Church of Scientology or agents thereof as not being relevant, or if relevant, that it is outweighed by unfair prejudice and/or possible jury confusion.

This court cannot rule on any unnamed and yet to be described corporate policy, practice, belief, doctrine or dogma of the Church of Scientology and, therefore limits this ruling only to the alleged "fair game policy". As to all other policies of the Church of Scientology, unless and until any such other policy is identified, described and shown to be relevant and not unfairly prejudicial, any ruling by this court on such policy is hereby reserved.

Robert Minton (hereinafter the "Defendant") asserts that the "fair game policy" is a policy promulgated by the Church of Scientology for dealing with critics of the church and addresses consequences for church members who are unsuccessful in implementing the policy. Defendant contends that according to this alleged policy, church members, when confronted by church critics, attempt to have them labeled as criminals by provoking a battery. The State asserts that Richard Howd (hereinafter the "Victim") has no knowledge of such a policy.

The Defendant contends that evidence demonstrating this policy, the Victim's knowledge of this policy, as well as the Defendant's knowledge and belief that this policy exists, and that the Victim, on the day in question, was either acting in conformity with this policy, or was believed by Defendant to be acting in conformity with it, or both, is material to his theories of self-defense and/or accident. In addition, Defendant asserts that he is entitled to cross-examine State's witnesses on this policy and should be given wide latitude to develop the motives behind any witness' testimony in this regard.

Instruction 3.04(e), the Florida Standard Jury Instructions in Criminal Cases, entitled Justifiable Use of Non-Deadly Force, provides in pertinent part:

> Defendant would be justified in using force not likely to cause death or great bodily harm against the victim if the following two facts are proved:
>
> 1. Defendant must have reasonably believed that such conduct was necessary to defend himself against the victim's imminent use of unlawful force against the defendant.
>
> 2. The use of unlawful force by the victim must have appeared to defendant ready to take place.
>
> In deciding whether the defendant was justified in the use of force not likely to cause death or great bodily harm, you must judge him by the circumstances by which he was surrounded at the time the force was used. The danger facing the defendant need not have been actual; however, to justify the use of force not likely to cause death or great bodily harm, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, the defendant must have actually believed the danger was real. (emphasis supplied)

This instruction, commonly known as the self-defense instruction, contemplates the state of mind of the defendant, the appearance of danger and what a reasonably cautious and prudent person would believe under the same circumstances.

Defendant contends that his belief that the Victim was acting in conformity with what he believed was the Church of Scientology's "fair game policy" on the day in question, explains his actions on that day and goes to the very heart of his theory of self-defense and/or accident.

In addition, Defendant contends that whether the Victim has knowledge of, and is acting in conformity with, the alleged "fair game policy" of the Church of Scientology goes to

the very heart of Defendant's theory that the alleged touching, which constitutes the battery herein, was not unconsented to, but instead, the desired result by the Victim.

Upon establishing his theory of defense, a defendant is permitted to present evidence to support it. Stewart v. State, Id. Testimony regarding both the defendant's and the victim's state of mind is relevant to explain their actions on the day in question. See Coolen v. State, Id. Moreover, the defendant must be afforded wide latitude to develop the motive behind a witness' testimony. Livingston v. State, 678 So.2d 895 (Fla. 4th DCA 1996).

Accordingly, assuming the proper predicate can be laid, testimony and other evidence of the alleged "fair game policy" of the Church of Scientology will be admissible as relevant evidence.

2. The State seeks to limit the Defendant from introducing into evidence prior incidents between Defendant, or others, and any other member of the Church of Scientology or agents thereof.

The State's motion, on this point, is principally directed to video tapes of incidents similar to the incident in question. These videos were reviewed by the court, in the presence of counsel at the hearing on this motion. These videos are summarized as follows:

a) Defendant's video taken 10/31/99; depicts two separate incidents on the same day:
i) Defendant in front of the Largo, Florida home of David and Vinetta Slaughter;
ii) Victim and Defendant engaged in the incident in question.

b) Defendant's video depicts three separate incidents:
i) Incident in Boston, Massachusetts in 1998, similar to the one in question. However, the alleged Victim in the instant case is not depicted. Instead, other members of the Church

of Scientology are depicted in a role similar to the role of the Victim herein;
ii) Incident in Los Angeles, California in March of 1999. While the incident is similar in nature to the one in question, neither Defendant nor Victim are depicted.
iii) Incident in Clearwater on 7/11/99 between Defendant and a member of the Church of Scientology, who is not this Victim.

c) Victim's video of incident in question. (Version #1)

d) Victim's video of incident in question. (Version #2)

e) Victim's video of incident in question. (Version #3)

f) Video entitled "Yo Mamma".

These videos break down into the following categories:

a) The incident in question. Both Defendant and Victim, and/or others acting in concert with them, took separate videos. There are a total of four.

b) Prior incidents between Defendant and church members. However, none of these depict this Victim.

c) Prior incidents between church members and others. Neither the Victim nor the Defendant are depicted.

Clearly, all videos of the incident are relevant and, therefore, admissible in evidence upon the proper predicate being laid.

In addition, videos of the 1998 Boston, Massachusetts incident and the July, 1999 Clearwater, Florida incident depicting the Defendant and other members of the Church of Scientology are also admissible as being relevant to: 1) Defendant's state of mind at the time of the incident; 2) Defendant's theories of self-defense and lack of intent; and 3) Defendant's theory that, because of the Church of Scientology's alleged "fair game policy", the subject

battery was not unconsented to but was, instead the desired result. See Smith v. State, 606 So.2d 641 (Fla.1st DCA 1992).

The State has argued forcefully that the videos which do not depict the Victim are inadmissible under Section 90.404, Florida Statutes (1999), as similar fact evidence and has cited State v. Savino, 567 So.2d 892 (Fla. 1990) and Smith v. State, 700 So.2d 446 (Fla. 1st DCA 1997) in support of this argument. However, neither of these decisions bear on the novel issue at hand. The issue is, whether evidence of collateral occurrences by members of an organization are admissible to show that the behavior of another member of that organization, in a similar situation, was consistent with the policies of that organization for handling certain situations, and therefore, explain his behavior on the day in question. Counsel for both parties acknowledged that they could find no cases directly bearing on this issue.

Indeed, the timeless wisdom of Supreme Court Justice Oliver Wendell Holmes, as set forth in the sometimes quoted passage below, is instructive here:

> The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism (sic), that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal ... It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. O.W. Holmes, *The Path of the Law*, 10 Harv.L.Rev. 457, 469 (1897).

Section 90.402(2)(a) lists proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident as illustrative of some of the issues to which the evidence of collateral occurrences may be relevant. Certainly many of these issues have been raised in this case. It is well settled that this rule is equally applicable to evidence offered by a criminal defendant. See State v. Savino, Id. Moreover, it is error to deny evidence which "tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt". Rivera v. State, 561 So.2d 536 (Fla. 1990).

Because the videos do not depict this Victim, the predicate that must be laid, as a condition precedent to the admissibility of these videos, will be significant and, at a minimum, will require a showing that the Church of Scientology has a policy for dealing with critics of the church, that there are penalties for failing to carry out the policy, and that Victim knew of the policy.

However, neither the California video, wherein neither the Defendant nor the Victim are depicted, nor the inflammatory video entitled "Yo Mamma" wherein the Defendant, but not the Victim, is depicted, are admissible even though tenuously relevant because, in addition to their probative value being outweighed by unfair prejudice, they are cumulative and therefore lack any serious probative value.

3. & 6. For the same reasons set forth in No. 2 above, allegations of previous incidents of conflict between the Defendant and the Victim and other members of the Church of Scientology, in addition to those depicted in the videos, upon laying the proper predicate, may be relevant to show the state of mind of both the Defendant and the Victim on the date in question and may be in furtherance of Defendant's theories of defense in this case. See

Livingston v. State, Id. However, because these incidents are as yet unidentified they must be first proffered out of the presence of the jury so that this court may rule on them.

4. Allegations that members of the Church of Scientology left a dead cat on the doorstep of Defendant are admissible only if Defendant can produce evidence of such fact. Defendant's mere statement of belief as to who may have done this, without more, is not admissible.

5. Defendant may not, in either direct or cross-examination, inquire into the State of Florida's decision making process as to whether the Victim should have been charged with a crime in connection with this incident. Such inquiry is not relevant, and, therefore, not admissible evidence. However, the Defendant may cross-examine State witnesses as to whether the Victim was, in fact, charged with a crime as a result of this incident. See Fluellen v. State, Id.

8., 9., & 10. The State seeks to limit the Defendant from any mention of the Lisa McPherson Trust, the pending civil suit in Hillsborough County involving Lisa McPherson and the criminal investigation into the death of Lisa McPherson pending in Pinellas County. Given, at the time of the incident, and in other similar incidents which have been herein ruled admissible in evidence, that Defendant was engaged in a demonstration outside the Church of Scientology for the purpose of protesting the Lisa McPherson matter, these matters are so inextricably intertwined with this incident that it would be unduly burdensome to limit any mention of them. See Shivley v. State, 752 So.2d 84 (Fla. 5th DCA 2000).

However, any discussion of the Lisa McPherson Trust , the civil suit or the criminal investigation should only be that which is absolutely necessary to place them in the context of the incident in question and to elicit such testimony from witnesses who might be biased by

such proceedings. Nelson v. State, 704 So.2d 752 (Fla. 5th DCA 1998); See also Kelly v. State, 425 So.2d 81 (Fla. 2nd DCA 1982). In no way will these matters become a feature of this trial.

11. The State seeks to limit out evidence or testimony concerning incidents or persons alleged to have suffered physical or emotional harm from the Church of Scientology or any agents thereof.

Defendant argues that such evidence would be relevant to show both the Victim's and Defendant's state of mind at the time of the incident and is consistent with his theories of self-defense, accident, and that the alleged touching was not unconsented to.

Moreover, Defendant argues that such testimony would be relevant to expose reasons why a member of the Church of Scientology might testify untruthfully for fear of retaliation and would also be relevant to explain the Victim's actions on the day in question.

At the hearing on this motion, no witnesses were identified or were facts proffered so that this court might review and consider whether such evidence would be relevant and, if so, not so unduly prejudicial so as to outweigh its probative value.

Accordingly, this court reserves ruling on this issue. In the event the Defendant seeks to introduce such evidence, it should first be proffered out of the presence of the jury so that the court can rule on it.

12. The State has conceded that the instruction on justifiable use of non-deadly force would require the court, in effect, to instruct the jury to place themselves "in the shoes of the defendant" and has, therefore, withdrawn this point in its motion.

Accordingly, for the reasons set forth herein, the State's Motion in Limine is DENIED in part, GRANTED in part, and RULING IS, in part, RESERVED.

DONE and ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 17th day of May, 2000.

Honorable Robert J. Morris, Jr.
County Judge

Copies furnished:

William Tyson, Asst. State Attorney
Denis DeVlaming and Kym Rivellini
Counsel for Defense

99-3285TMM

KARLEEN F. DE BLAKER, CLERK OF COURT
PINELLAS COUNTY, FLORIDA
2V072310 05-18-2000 09:25:36 #SW
05 000000000 9932857MMAND
MINTON,ROBERT S
COURT FILE COPY 4 $11.00

TOTAL: $11.00
CASH AMT TENDERED: $11.00
CHANGE: $.00

IN THE COUNTY COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY
CASE NO. 99 - 32857 MMANO-E

STATE OF FLORIDA
Plaintiff,

vs

Robert S. Minton, #2077072
Defendant.
_____/

PROCEEDINGS:	Motion in Limine
BEFORE:	The Hon. Robert J. Morris, County Court Judge
DATE:	May 12, 1999
REPORTED BY:	Patricia Edwards, Notary Public
PLACE:	Criminal Justice Center 14250 49th Street North Clearwater, Florida 33762
APPEARANCES:	WILLIAM JOSEPH TYSON, ESQUIRE Assistant State Attorney Criminal Justice Center Clearwater, Florida 33762 DENIS M. DEVLAMING, ESQUIRE 1101 Turner Street Clearwater, Florida 33756 Attorney for Defendant

ORIGINAL

KANABAY COURT REPORTERS
TAMPA AIRPORT MARRIOTT HOTEL (813) 224-9500
ST. PETERSBURG - CLEARWATER (727) 821-3320

Copy: SAO

MR. LOMBILLO: Judge, we just tried to play this tape in this machine and it actually snagged the tape. We were able to get it out, but on the day of trial, if someone is entertaining putting something in this VCR, there might be a problem. We have our backup, but for the future, this VCR might have a problem.

THE COURT: I'm ready to go. Where is everybody?

MR. LOMBILLO: Mr. Tyson is talking to the victim.

THE COURT: Well, I haven't seen Mr. DeVlaming.

MR. TYSON: I apologize, your Honor. I didn't realize you didn't have anything else this afternoon. Mr. DeVlaming had a meeting he had to go to, and he may be a little late.

THE COURT: Good afternoon, Mr. DeVlaming.

MR. DEVLAMING: Good afternoon, Judge. Thank you for being patient. We were a bit late.

THE COURT: That's no problem. We have State of Florida versus Robert Minton, motion in limine.

MR. TYSON: That's correct, Judge.

THE COURT: Mr. Tyson, it's your motion. Do you want to argue first?

MR. TYSON: Judge, we filed it and they filed

an objection, so I would believe it is defense's burden.

MR. DEVLAMING: That's probably not correct. But I'll tell you what, I think his motion speaks for itself. But I think the Court looked at it, so we'll take the ball.

THE COURT: All right.

MR. DEVLAMING: Judge, Ms. Rivellini and I are going to be both arguing. You'll see very quickly what my role is and what her role is.

THE COURT: Okay.

MR. DEVLAMING: She's going to be mostly going over the case law in support of the argument that is going to be presented.

I'd say to the Court that we begin with Florida Statute 90.402, and that is the admissibility of relevant evidence. All relevant evidence is admissible except provided by law.

So that's where we begin, and the question for the Court is whether or not the information contained within his motion in limine that he seeks to prohibit is relevant testimony.

I understand that the Court has a general working knowledge of the facts in this case; am I accurate?

THE COURT: No. You should summarize the facts.

MR. TYSON: Judge, also -- not to interrupt -- one thing I should ask -- and I'm not sure you would agree with this, Denis. I called you this week, Judge, with Mr. DeVlaming's agreement to let you look at the video.

THE COURT: Correct.

MR. TYSON: If you looked at those, it will make deciding this a whole lot easier because it puts the whole thing in perspective as to what happened.

There are four videotapes from different angles, then you may be able to consider that, compared with the other evidence and what they want to bring in, and how that would be relevant to what you actually see before your eyes.

So I'd ask that before you even argue anything, maybe, to show at least one of the videos, and I'd like to show Mr. Minton's video for a reason.

In the motions in limine I filed, I said we shouldn't even mention anything that happened before the battery. Mr. Minton is alleging that he was followed by -- before the battery -- by members of the Church of Scientology.

Well, in Mr. Minton's video, before he goes to the Church of Scientology that night, he is at an executive of the Church of Scientology's residence outside filming them, or filming their house late at night, then he goes to the Church of Scientology.

I guess my argument is that what's good for the goose is what's good for the gander. So if you would see that, that would put it in perspective as to what would be admissible and what wouldn't.

My point being, not only to believe what happened at the airport -- or on his way from the airport should be inadmissible, but I believe my section should be inadmissible too, and we should rely on just what is visible at the scene.

Now, there are four videos. Mr. Minton's is about 15 minutes long; and not only does it include what he does beforehand, but it includes a fair and accurate representation of what happened then. So I would ask to at least watch that one.

And Mr. DeVlaming has a video of Boston and California, and I think it's only fair that you watch that too. And then we would start the arguments and put a lot of this in perspective as to what we actually want in. And I think it will be easier to render an opinion one way or the other on this.

THE COURT: It sounds like Mr. Tyson has changed his mind about going first.

MR. TYSON: Well, we can argue these before you start the video and then argue from there, but I think at least --

THE COURT: We'll watch the videos before you start your argument.

MR. DEVLAMING: I had thought that you provided the Court with --

THE COURT: He made them available to me.

MR. DEVLAMING: Oh, okay.

THE COURT: It was unclear to me the context in which I would view them, and I declined to do that and suggested I'd rather do it in the presence of both parties.

MR. DEVLAMING: I got you. I'm sorry, Judge.

MR. TYSON: I'm sorry, Judge. I called your JA while you were on the bench and tried to explain why I wanted you to see them.

THE COURT: I'd rather watch them with everybody here.

MR. TYSON: I understand.

MR. DEVLAMING: I would agree with that. Let's go ahead and show whichever video you choose about the incident. That's okay with me.

MR. TYSON: I'd rather do Minton's because it shows what happens beforehand.

MR. DEVLAMING: That's fine. And then do you have copies of Boston?

THE COURT: Should the reporter take down the substance of the videos?

MR. TYSON: No, Judge.

MR. DEVLAMING: No, Judge. I agree.

THE COURT: Then you are released of taking that down.

This, again, is Mr. Minton's video, and it depicts him going to Benetta Slaughter's house prior to him protesting at the Church of Scientology.

(WHEREUPON, THE VIDEO WAS DISPLAYED FOR THE COURT.)

MR. TYSON: Judge, this is Mr. DeVlaming's tape I'll put in now. It has the incidents in Boston and Clearwater. Also, is California on here too?

MR. DEVLAMING: They both should be. Mr. Minton is in the black shirt, Judge.

THE COURT: Thank you.

THE COURT: What year is this?

MR. DEVLAMING: A member of the Church is in the white shirt.

THE COURT: What year is this? Tell me later.

(WHEREUPON, THE SECOND VIDEO WAS DISPLAYED FOR THE COURT.)

THE COURT: The first part was one, and then there was a second part?

MR. TYSON: The first part is Boston. What you just saw was Clearwater. The third was Clearwater.

MR. DEVLAMING: We'll tell you the significance when we argue.

THE COURT: That's fine. The last scene was where?

MR. DEVLAMING: California.

THE COURT: There are two separate scenes?

MR. DEVLAMING: That's correct. Same individual, but a different location.

MR. TYSON: It says Boston is 1998. I'm not sure when California is.

THE COURT: Did we at least know if it was before or after?

MR. TYSON: I believe that Boston was before.

MR. DEVLAMING: The first part is California in March '99. The second part, where they saw each other at the very last scene, was July '99.

THE COURT: How about Clearwater, the Clearwater shot? We have got Boston '98. We have California in March of '99, and California July '99?

MR. DEVLAMING: Clearwater was July 11th of '99.

MR. TYSON: This incident occurred October 31st of '99.

THE COURT: The incident we are talking about?

MR. DEVLAMING: Yes, subject to this prosecution.

THE COURT: All right. As long as we are in

the tape mode, is that all the tapes?

MR. TYSON: No, there are three more tapes. These show different angles at the church.

MR. DEVLAMING: You are welcome to see it, but basically there is a still camera from an eaves -- kind of like that -- that will only show the incident where he was walking across the street and the --

THE COURT: So it's more of the same?

MR. DEVLAMING: Oh, it's all the same, just different angles.

THE COURT: That's fine.

MR. TYSON: Just like Monday night football, reverse angles and lots of the same thing from different angles.

THE COURT: Okay. We have seen the tapes, so back to my first question: Who wants to go first?

MR. TYSON: Can we take these one at a time?

THE COURT: That sounds like a good idea.

MR. TYSON: One, two, three, four, right down the line.

THE COURT: That would be all right. Mr. DeVlaming, are you all right with that?

MR. DEVLAMING: I'm all right with that. Ms. Rivellini is the one-two-three person, and then I'll wait to give this at the end.

THE COURT: Okay, great.

MS. RIVELLINI: Judge, have you had a chance to look over our response?

THE COURT: I have read everything that everyone has furnished me in great detail.

MS. RIVELLINI: I'm going to rely heavily on that response, follow through number by number, and recite the key law.

THE COURT: That's fine.

MS. RIVELLINI: The first motion in limine is to keep out the "fair game policy" or any corporate policy of the Church of Scientology or agent thereof.

First, I think they do have to establish that there is a reason not to let us get into it, Judge. We feel that it is very relevant in this case; and, Judge, I think I want to get into telling you -- you have seen a little bit of the tapes, and you have seen the essence and the tone and what the signs have to say.

We are not here to try the Lisa McPherson case, and hopefully that's a good ring to your ears. That is a case that two counties have not been able to get to court. It's very complex, very controversial, and we are not here to prove anything about how Lisa McPherson died.

However, we cannot try this case without talking about Scientology, and that has to be a big part of this

case because that is everything about what this alleged battery that took place is about.

So the "fair game policy" is a policy that Scientologists have, and it's a way they run their system, a way they run what they call the church and dictate certain tenets along the way. It goes to Mr. Minton's state of mind because he knows about that policy.

And I think you know some of the background about what part he plays in this. He is someone who has gotten involved and formed the Lisa McPherson Trust to come out to show what he feels are the bad things about Scientology. And you will hear a lot of testimony about this.

His job is to expose the bad things about Scientology, and one of the things is the "fair game policy." That is the Scientology policy that dictates to the people that you have seen and the players in the videotape to do exactly what they are doing. Everything from what they are positioned, what they are supposed to say, and what kind of sanctions they will be faced with if they don't follow them.

By Mr. Minton knowing about that, it goes to his state of mind while he is involved in this picketing. He knows what they are trying to lure him into doing. He knows what it is that they want to egg him on to do, and he knows why. And what it gets down to the bottom of, Judge, is to

expose him, Mr. Minton, as a criminal.

That is the basis for Scientology, which is that anybody who is against Scientology is a criminal. And the higher-ups -- and there is a special agency of OSA, O-S-A, the Office of Special Affairs. Their job is to turn critics, which they feel Mr. Minton is their biggest and probably the one with the most money, show him to be a criminal, so they can turn back to their people and say, See, look at him. He is a criminal. That's why he's against us, he didn't know any better.

So they have to keep creating situations so they can egg him on into doing something they can then call criminal. That's the essence of their "fair game policy."

Now, it is much more detailed, much more intricate than what I can explain to you here, and we have people who can testify to that. In fact, we have listed a witness and noticed the State about it.

MR. TYSON: Jesse Prince?

MS. RIVELLINI: Jesse Prince and/or Stacy Brooks and/or Mr. Minton, himself, and Frank Oliver.

MR. TYSON: I'm sorry, your Honor.

MS. RIVELLINI: And they can tell the exact details the way it's handed down. Obviously, he spent a lot of time learning these policies, and I wouldn't be the first one to sum them up for you, but that's the essence, to make

him a criminal.

So it not only goes to Mr. Minton's state of mind as to what is going on, creating fear in him as to what these people's actions are going to be against him, but it also shows a lack of intent on his part.

And, in fact, it's not so much -- it's an incorporation of lack of intent and accident. You can see on the videotape where they get in his way. They get in very close to him. They bump into him, and call it a battery.

And all of those things negate the alleged crime of battery and that becomes a relevant part of this trial.

We are not here to see whether it's good, bad, or indifferent, but it is a big part of where this case comes from. It is our main theory of defense, and for you to close us down on that issue would be error, it would be reversible.

And as much as nobody wants to turn a battery case into a two- or three-day ordeal, the only thing worse would be to do it twice. And by shutting us down on our theory of defense, we would be back here.

I have cited Coolen v State, 696 So.2nd 738, Florida Supreme Court from 1997. What it says is normally some of these things would be irrelevant in a case like this, but when it is necessary to explain the deed at hand,

which is that clip on the video where the alleged battery takes place, it becomes relevant and it becomes admissible.

It would be impossible for us to go into this case, show them that clip of just the bumping and say, Make a decision; Have you seen a touching? That would be impossible because of the background. It would completely shut down our line of defense, and we wouldn't be able to go forward, we'd be back.

I don't know if Mr. Tyson wants to respond.

THE COURT: Are we through? Is that what you want to talk about on point one?

MS. RIVELLINI: Yes, unless you have any questions about the policy.

THE COURT: I think you have given me the information I need to have. Mr. Tyson, do you want to respond to that?

MR. TYSON: Yes, sir, and I apologize for interrupting, I won't do it again.

Judge, as far as the "fair game policy," number one, the possibility of appeal didn't mean they have unfettered discretion to do whatever they want to do during the trial.

There is a harmless error analysis by the appellate court in which you decide what is relevant and irrelevant. And, quite frankly, from reading the defense's memorandum

which is replete throughout it, with what I agree with; and that is that the Florida Supreme Court has ruled that evidence which is inextricably intertwined with the crime charged is admissible under section 94.02 because it is a relevant and inseparable part of the act which is at issue.

My argument is: This is totally separable, everything we have here. The "fair game policy", it is alleged that, for lack of a better way to say it, it's fair game to do anything you want against your critics.

Now, during an injunction hearing a few months ago, Mr. DeVlaming had an opportunity to cross-examine Mr. Howd about that. Mr. Howd denied any knowledge of it, and didn't know what it was about.

Now, unless there was some poof that Mr. Howd was involved in that or had knowledge of it, I don't see how it's relevant. And they did not have any witness step forward, and I don't think they are going to represent that they will have any witness that will step forward and say that Mr. Howd knew what it was and was doing that intentionally.

Quite frankly, Judge, it is obvious that Mr. Howd is, for lack of a better term, invading Mr. Minton's comfort zone. I understand that, and that's relevant at trial, but I don't think they can bring in extraneous matters. And what they want to do is put Scientology on trial here.

Now, we have four videos of this incident, and inextricably intertwined would be more about something that happened right before the video, but we have that. We have Mr. Minton walking up and we have the entire incident from four different angles.

And I don't see how anything else should be relevant, especially the "fair game policy," and especially since they doesn't have anybody that says Mr. Howd knew about it and was practicing it. And whatever Mr. Minton thought what was happening really is irrelevant at that point in time, as far as the "fair game policy."

THE COURT: Do you want to respond to the knowledge?

MS. RIVELLINI: I would, Judge, because the test isn't what Mr. Howd knew, it's what Mr. Minton knew at the time, what his state of mind was.

This is a case of self-defense, where there will be adequate evidence for you to instruct the jury on self-defense. And what is at issue is Mr. Minton's state of mind, and what he believes the victim knows and is doing based on that knowledge.

I will differ with the state on this one issue, we do have witnesses who can testify that Mr. Howd could not be in the position he is in Scientology without knowledge of this "fair game policy," and we will actually have some

documentation to that.

We have someone who has been in Scientology for long enough, who is now not with it, who has enough recorded documentation, memorandums and expertise in the particular area Mr. Howd was involved in. And he will testify that Mr. Howd could not have been in the OSA Division without having knowledge of this policy.

Furthermore, it goes to the bias, motive, and interest on the part of Mr. Howd, and why he would not be honest to the jury about that "fair game policy."

You have just watched a video of three separate incidents, and I would ask you to consider whether it's a coincidence that the exact same kind of action on the part of the Scientologists took place in all three different areas of the country when Mr. Minton was out there picketing.

So it goes to the credibility of Mr. Howd on the stand. He is the State's chief witness, and we have wide latitude in cross-examining him as to that, and it goes to Mr. Minton's state of mind, which is at issue, not Mr. Howd's.

I remind you that stated in Livingston, 678 So. 2nd 895, 4th DCA opinion from 1996: Because liberty is at risk in a criminal case, the defendant is afforded wide latitude to develope a motive behind a witness's testimony. When a

defendant has established his theory of defense, he is permitted to bring in evidence to support that theory.

We have to look at Mr. Minton's rights as to what would be shut down if the full story were not to be told, not Mr. Howd's.

THE COURT: Okay.

MR. TYSON: Judge, if I may briefly respond?

THE COURT: Yes, you may.

MR. TYSON: I'll be brief.

THE COURT: That's all right.

MR. TYSON: Judge, they are entitled to an inconsistent defense, and I think when you watch that tape, out of mouth of Ms. Brooks and out of Mr. Minton's mouth was not self-defense; I meant to do it, but I had to do it. Their statements were: It was an accident. He walked right into it.

So I understand they can have some inconsistent defenses, and I know they are allowed to do that, and, obviously, I can bring that up to the jury, but they don't get unfettered discretion to go into whatever they want. That's not exactly true as far as self-defense.

They are painting it as a self-defense case, which is contrary to the evidence that you just saw right in front of you. That's my point. They want to change it to whatever they want to change it to bring in everything, and

they don't have that wide a latitude.

Quite frankly, the standard for admissibility is the same for the State as for the defense, and I give you the State of Florida versus Sovino, 562 So.2nd 892.

THE COURT: 567?

MR. TYSON: 567 So.2nd 892 Supreme Court, 1990. Judge, that case states that the standard for admissibility is the same for the defense as well as the State.

Now, the district court below the Supreme Court that had that case said that it's a lesser burden for the defense. It went up to the Supreme Court and they said no, it's the same standard.

So I'd ask you when you are considering this to ask yourself this question: Would you allow us to get into this kind of information based on what we have because that is the standard?

THE COURT: Address her point that it's not what Howd knew, but it's what Minton believed.

MR. TYSON: Under self-defense, Judge, it's imminent action -- bear with me. Under justifiable use of non-deadly force, Judge, the standard jury instruction, 3.04 (e), defendant would be justified in using force not likely to cause death or great bodily harm against the victim if the following to acts were proved:

He must reasonably believe that such contact was necessary to defend himself against the imminent use of unlawful force, and the use of unlawful force must have appeared to the defendant ready to take place.

Number one, we don't have that on the video because on the video he's got the camera right up against his eye.

THE COURT: But if the defendant must have reasonably believed, isn't that what it says?

MR. TYSON: Yes. And, Judge, if you allow that, it's a watershed of anything he wants to say bad about the Church of Scientology. He can paint a broad brush on everyone.

That would be like me saying, you know, Judge, there is a Catholic priest in Boston that sodomized a child, I want to bring that in Pinellas County for another priest, another date, another time.

THE COURT: But the word "reasonably" is here, right?

MR. TYSON: I understand that, Judge, but I'm not sure how that is reasonable in that circumstance.

THE COURT: Okay.

MR. TYSON: If he already knows that before he goes there -- and, quite frankly, when you see him, he's rather bold, rather brash on the video, and, initially, he is very aggressive. If he already knows that, then I'm not

sure how that squares with his demeanor at the scene.

THE COURT: Does anybody else want to say anything on point one? We have covered it, let's move onto point two.

MS. RIVELLINI: Judge, these are referring specifically to the tapes in Massachusetts, California, Florida or any other location at any other time involving Mr. Minton and the Church of Scientology, other than the actual incident captured on video.

I went into a little bit more depth on this issue in my response, citing that there are many reasons that you should allow us to include those videotapes, specifically pointing out our theories of the case; relevancy, state of mind of Mr. Minton, self-defense, Williams Rule, and under the headings of motive, bias, and interest.

First, relevancy. Judge, I cited to Livingston, which I have already put the cite on the record. Livingston talks about prior contact between the defendant and the victim, and in that case what they do is they look at what happened before. There were some situations where the victim and the defendant had contact; the defendant had left notes on the victim's car.

And the State may have gone a little overboard trying to characterize it into a stalking incident, but what the court said was that that might have gone a little far,

and I understand that might have been a little prejudicial to the defendant.

But let's look at what they are saying here. Something gave rise to this incident and we need to know what it is. You don't have to call it stalking or call it something that it might not be, but the jury needs to know about it in order to get a fair view, and that's what we have here.

I think it's clear once you see the videotapes why, in fact, we want it in. We have three similar episodes --

THE COURT: Was Mr. Howd involved in any of those?

MS. RIVELLINI: Mr. Howd was only involved in the Clearwater episode, not the others.

THE COURT: Okay.

MS. RIVELLINI: And it's a reasonable argument to say that if Mr. Howd is representing the Church of Scientology, which he clearly is out on the street in Clearwater, then you can see the similarity between his behavior and that of the Scientology members out in California and Boston.

At all times Mr. Minton is lawfully up and down a public sidewalk merely carrying a sign and chanting. He's not screaming, he's not causing a scene or doing anything unlawful.

In each of those instances, the members of Scientology come out, they get in his face, they put the camera to his face, and walk up and down alongside of him.

They get their feet in his way, almost causing him to trip, and they egg him on into situations where they move the camera around and cause friction, and it's what Judge Penick coined "picket chicken."

They cause the touching, and then what they do is they immediately call the police and say we need you here, Mr. Minton has now touched us. And they are trying to have him labeled a criminal and have him taken in by the police.

First of all, it's relevant because it's identical. It's relevance is clear as to why we want it in. What does it do for us? It goes to Mr. Minton's state of mind.

In Clearwater he is out there trying to conduct a lawful picket, and people come upon him. He knows what's coming. How does he know what's coming? Because of Boston and California.

So he keeps trying to stay calm and he's going up and down and chanting. And then what do they do? They move closer in on him. They get closer to him.

He knows they are going to try to create the scene, so he's real careful how he walks. He has a friend videotaping it, so that hopefully his point will be proven when they do what they normally do.

All of this goes to his state of mind to understand what's about to happen to him, that he is about to be converges upon and forced into an inadvertent touching.

You can hear on several occasions where he asks to get away and call the police, and he does that in Clearwater. He sees the two women that had been walking up and down turn quickly and walk toward the doors of the Fort Harrison Hotel. The first thing he does is he grabs the phone and tries to call the police.

He knows what's coming. How do we explain to the jury that he knows what's coming? They need to see Boston and California. Then he starts to walk away, and Mr. Howd converged upon him. That's when he is forced to use defensive actions to keep from having Mr. Howd come upon him causing this alleged battery.

The only way the jury can make any sense of that and understand what's going on in his head, why he calls the police, why he starts to walk away, and he is forced to use the defensive action and know what's coming, we have to have Boston and California.

So it's relevant towards Mr. Minton's state of mind and goes strictly to the area of self-defense. Otherwise, the jury would ask themselves why didn't he just keep on walking. Mr. Minton knows why he can't just keep on walking because that wouldn't be the end of it.

Another reason it's relevant, Judge, is under Williams Rule. If Mr. Minton had been the one out there causing the batteries on several occasions with such strikingly similar factual situations, you know the State would be moving to enter that in as Williams rule.

Well, we get to do the same thing. It's relevant not only toward the state of mind, but toward the lack of element's in this case. It goes toward mistake and lack of intent.

In California and Boston you can see can where Mr. Minton had no intention of committing a battery. In both situations they converge upon him, they bump into him, they try to even stage the whole injury as though his foot is injured or, oh, I just bumped into a crash landing, I think the statement was.

You can see where that plays into this case. Mr. Howd takes a dive, flails on the ground, and looks like he just has been beaten. You can see the similarities, and how it's not Mr. Minton who causes that, it is the Scientologists themselves that brings this on and goes down and tries to make it look like something happened.

The only way that can be exposed is through those two video tapes. It also goes, again, to show lack of intent. He didn't intend to cause any battery, it was brought upon him.

Motive bias and interest. If you look at California and you look at Boston, you can see where it is the Scientology members that come upon Minton to create this.

They have motive to do this, and, again, motive goes back to the "fair game policy", which is to expose the critics for criminals. We have got to make them criminals, and we can do anything we want to make that happen. Our actions, our -- you know, we don't have to answer to anybody but our own, so we can do whatever we want, and they have got at that make that happen.

That gives Mr. Howd his motive to make that battery happen. It goes to his interest, which is getting Mr. Minton labeled a criminal, and it goes toward his bias, which is totally for Scientology and against Mr. Minton.

If the State had been seeking to include these two videotapes, they certainly could.

Now, I tried to find direct case law that goes to your question: Was Mr. Howd there?

THE COURT: I was hoping you'd get to that.

MS. BIVELLINI: I didn't find any, frankly.

THE COURT: Neither did I.

MS. RIVELLINI: I tried to use every analogy I possibly could, and Mr. DeVlaming will probably embellish on that a little bit more, but I'll just run a few scenarios by

you.

If Scientology were a known gang that wore known colors, and Mr. Minton was a target of that gang and saw them out there, like he had in Massachusetts, like he had in Boston, comes to Clearwater and walks the street and has them converge upon him with whatever; red bandannas, tattoos, certain T-shirts, and they started converging upon him, he would be reasonable in having fear of these people, knowing what their policies are and knowing their gang laws are and knowing what's coming.

It's analogous to that. If they had been a biker gang, if they had been a militant organization like the KKK; you see the white sheets and you know how you are going to be treated.

Now, I don't mean to analogize Scientology to what we know to be bad groups of people, so I'll make another analogy for you guys, and that's law enforcement.

If someone in a neighborhood had had numerous encounters with law enforcement and feels, whether they deserved it or not, that he had been mistreated by them. And then he is walking down the street and they come upon him, maybe they want to check his pockets. Maybe he has done something that makes it deserved upon him. But he knows the uniform.

He hasn't dealt with this police officer, but he

knows the agency. He knows his name is out there. He knows he is going to get cuffed and thrown down to the ground.

He has got a reasonable fear in that situation; and that's what Mr. Minton has, based on Boston, California and the tapes you have seen. And that is what makes they relevant.

Mr. Howd is Boston. He is California. And the facts speak for themselves in the videotapes, and we'll have testimony to shore that up through people who can talk specifically about the directives about the "fair game policy" in Scientology.

I don't know if we wouldn't to get into every other thing that supposedly happened between Mr. Minton and the Church of Scientology, or if we want to attack those big ones, the videos, first.

There were things in that same day, where Mr. Minton was followed from the time he landed in Clearwater, followed to the Biltmore. He had to call a security guard.

MR. TYSON: Yeah, that's number six.

MS. RIVELLINI: Okay.

THE COURT: Yeah, I thought we were just talking about the tapes and that situation.

MR. TYSON: Right now, that's what I'm talking about.

THE COURT: Mr. Tyson, go ahead and respond.

MR. TYSON: Judge, this sort of begs the question, this fear and they are coming after him. Why he is going to do this? I understand he wants to picket, and I understand that, but that should factor into your consideration of what's going on in his mind. He is there looking for trouble, number one.

Number two, if you want, I'll leave the videotapes and you can review them again. It's my recollection that as he is walking up to the Church of Scientology he yells out, Okay, cockroaches, scramble inside. That is what Mr. Minton is saying, and it sure doesn't sound like he is afraid to me.

So when you are talking about the state of mind of the defendant in the case, that should be included because all these actions that he took you can see right into the state of mind and read them from there. I think you need to consider that also.

As far as the incident, I believe Ms. Rivellini is right, this is analogous to reverse Williams Rule. And I haven't found a case about Mr. Howd not being there, but I'll tell you what I did find is a Williams Rule case saying you have to have idea of the defendant.

Let me explain it to you. It's Germane Smith, common spelling, versus State, and that's 700 So.2nd 446 and

that is the First District Court of Appeal in Florida October 21st of '97.

Judge, in that case the state uses Williams Rule evidence that a child had been abused before in a child abuse trial of Mr. Smith. The court said the omission of collateral crime evidence of prior abuse was error, assuming the relevancy of the evidence to prove the issue other than about bad character propensity, which is exactly what they are doing in this case. There is no doubt about that.

What all this is for is bad character and propensity, which you know is inadmissible. It can't be used for that. That the condition precedent to admission of the evidence at trial, the court was required to determine that there was clear and convincing proof that the appellant committed the prior abuse.

By analogy, to use that reverse Williams Rule, they have to show that Mr. Howd is involved in that.

Now, when we talk about the videotape, clearly, the Boston videotape has been edited. Unlike what we have here in Clearwater, where Mr. Minton -- bless his heart -- is actually shown walking up so we get the whole flavor for everything. And we have a Scientology surveillance tape, and the tapes of other Scientologists. We have everything on one tape there.

The Boston tape is clearly edited. It's narrated.

We don't know what went before that.

I have seen you in court, you are pretty reasonable man, but I can guarantee you that if I get up in your face I can get you riled up. So we don't know if that happened either. We don't know that, Judge. And Mr. Howd is not there. What relevant issue does this address?

Talk about State of mind, we see him rolling the video. We can use that argument to put in anything. There are limits. There are common sense limits to what state of mind is about. It doesn't show what happens before the tape. Mr. Howd is not there.

The conduct, Judge, is vastly different. It sure wasn't a gang of hooligans. There were two women and a man that I saw standing outside of the Church of Scientology on Fort Harrison. They are just telling him to go home.

And, in fact, if you watch that tape, judge, Ms. Brooks in her statement to the Scientologists even said -- and I thought that it was actually inciting them and we can argue that later -- "is that best you can do is, go home? Is that all you can come up with?"

That's relevant, too, in considering state of mind. Also, there is more than one there. There is more than one there because two of them went there.

Also, for state of the mind, which I think is irrelevant -- and we'll get to number six, when we do get to

number six about what happened before, earlier in the day. I also agree that if you strike that out, which is what Mr. Minton is doing at Ms. Slaughter's house, which is sort of the same thing they do or were doing or alleged to a have done, which I think is irrelevant, too, but we'll get to that point later.

But that goes to his state of mind. Late at night, alone with Ms. Brooks, he has no problem going to their house.

The Clearwater tape is a different date, different time, different people. Boston is 1,500 miles away, a year before. The California tape -- I might be mistaken, but I don't think Mr. Minton was even there. Was Mr. Minton there? I believe this gentleman was there, and some Australian or English person, but I don't think Mr. Minton was even there.

MR. DEVLAMING: I have seen the tapes, but --

MR. TYSON: You have seen the tapes. Do you understand, Judge, that it looks like, How far can we stretch this now?

That's now a state of mind; okay? A little birdie from outer space can whisper in his ear. That's what they are doing. That's state of mind. There really has to be some common sense control over what state of mind is. It's not unfair discretion to allow anything in.

Bear with me a second, Judge. Judge, additionally you were not aware of it because you were not at the injunction hearing, they've got those tapes. Also, I'm going to be receiving tapes to play that were played at the injunction hearing where one of the witnesses, and I believe it was Jesse Prince, is goading them on at another location.

I think that's irrelevant as much as I think these other ones are irrelevant. So we can take this thing to a circus atmosphere and spin off on a tangent in every direction, or we can keep it confined.

It's one of the few cases I have ever seen where we have four different videos from all different angles as to what happened before he even gets there, walking up to it.

So everything is covered. That's why I think this stuff is totally irrelevant. It's going to bias the jury. It's going to make them hate Scientology. That's the whole defense here is to trash Scientology and make them hate them. It's the actions of Mr. Howd and Mr. Minton clearly on tape.

THE COURT: Explain to me these other statements that are not here. Do I understand that there are other tapes that may be part and parcel of this?

MR. TYSON: Judge, at the injunction hearing theY played another tape. I think it was Boston, California and Clearwater on another date and at another time,

involving Mr. Prince talking about a sodomizing somebody, saying, I'm big, I'm black and that means I've got a big penis. He's talking about sodomizing somebody who is a Scientologist.

So there is a little bit of game playing on everyone's side here. This isn't a one-way street that we are talking about. That's why I think to keep this case clean and to a misdemeanor battery, we show them exactly what happened.

We have got all the tapes. I have got the entire incident on tape, as opposed to all these other extraneous matters. If need be, I can start bringing those in rebuttal, and then we'll really spin off, Judge.

I'm not saying this to make you think it's going to be weeks and weeks here, so that you won't want to do it. What I'm saying is --

THE COURT: I'm here to serve, if it takes a day or a year.

MR. TYSON: And I have got long time until I retire still. But what I'm trying to tell you, though, he is entitled to a fair trial, he is not entitled to anything he wants to put in. And the trial is the issues at hand, and we have them all right there on video.

THE COURT: Okay. Anything else on two?

MS. RIVELLINI: Yes, Judge, briefly. When you

have to decide whether to let the trial get too big or confined, you do have to consider the fairness to the defendant. If there is a risk involved to either side, you have to err on the side of letting in too much rather than too little, or we are going to be back again.

He does deserve a fair trial, and a trial in which he can present his defenses. Self-defense is a recognized defense, there is a jury instruction on it. In order to get that jury instruction, we have to put on evidence for it. You have to allow us to make our theory and put on that evidence.

So we are not trying to just throw in the kitchen sink, these are legitimate theories that we are tossing.

As far as Mr. Howd not being there, I think you realize in this kind of situation, where self-defense is an issue, we are allowed to get into the character of the "victim" in this case, and not just his propensity for violence or aggression, but what the defendant knew about it and use both of those.

And the defendant doesn't have to have been there in those prior instances, he just has to have heard about it. And in the same respect, there can be instances out there that we can prove up that he didn't really have to know, and they are both relevant to self-defense.

THE COURT: Well, on these videos, though, he

was in every one of these scenarios.

MS. RIVELLINI: Mr. Minton was in almost everyone of them.

THE COURT: I thought he was in every one of them.

MS. RIVELLINI: He was not in California.

THE COURT: Oh. He was not in California? Okay.

MS. RIVELLINI: No, but he was aware of all of that.

THE COURT: Okay.

MS. RIVELLINI: But if Mr. Minton, himself, doesn't have to be there, and it's not what Mr. Minton admits, it's what Florida case law follows which is:

You have a victim and the defendant, and the defendant is claiming self-defense. He knows the victim to be violent. We get that in and we get to show that those are instances that he knew about.

And in this case he we have got a defendant who knows the victim, through his affiliation with Scientology, to do certain violent acts or aggressive acts, and that is in these picketing situations.

On the flip side, if the defendant doesn't have to even be there or even be aware of them, then why should this particular victim have to be there or be aware of them if

the defendant himself knows it to be true, and if we have such a close intertwining of Mr. Howd with Scientology.

Mr. Howd can be anybody, but when he is out there on the street doing an anti-picket then he is the Church of Scientology, and Mr. Minton has just a right to be afraid of him as any member that they replace him in. That's what makes it relevant. That's what does work, whether you want to call it reverse Williams Rule or state of mind.

We also can't forget motive bias and interest. Those tapes clearly show that Mr. Howd, through his affiliation with Scientology, has a motive to make that situation happen, has an interest in the outcome, and has a bias on how he testifies here in court.

Clearly there is one side and the other here. And Scientology and Mr. Minton do not mix well. You are either on one side or the other, and that line is clearly drawn.

It goes to all three of those. It's not just to show aggressiveness or violent behavior, those kind of things which we still get in on self-defense, but also Mr. Minton's point of view.

And though the impeachment cross-examination we have to be able to get into those instances.

MR. TYSON: Brief response?

THE COURT: Okay.

MR. TYSON: It's another harmless error

standard, Judge, and the State as well as the defense are entitled to a fair trial. Fair trial doesn't mean they get everything they want.

Also, because somebody is 1,500 miles away, that process doesn't continue on Mr. Howd. It's ludicrous. Mr. Minton doesn't know anything about him when he goes there, so I'm not sure how that works on the state of mind unless he is comparing him with everybody.

If the bailiffs here, they are sheriffs, and I have a problem with them in Florida, I can't go out to California and claim self-defense just because one walked up to me and I popped him in the mouth, and say, You know what, before in Florida I had a problem with a sheriff. And you all know what the sheriffs are like, so I hit him first.

And that's sort of what they want to do here, Judge.

THE COURT: Okay.

MS. RIVELLINI: Briefly on this?

THE COURT: Okay.

MS. RIVELLINI: Again, I think the more that Mr. Tyson wants to keep out, the more it is apparent that it is all relevant because you have different bailiff agencies. I'm sure Florida bailiffs don't talk to California bailiffs. But we are certainly going to prove that Florida Scientologists know what the California Scientologists are

doing, and they all have the one motive, which is keep Mr. Minton away, deem him a critic, deem him a criminal. So we can back up everything we are trying to prove here.

And we are not trying to show that Scientology is bad, we are just trying to show that they don't like Mr. Minton and they will do certain things to get him deemed a criminal. And there is a difference, and there are limitations, but this should not be one of them.

The only other thing that I want to address is something that should be factored into your decision -- and I don't know if it really should be here -- is something Mr. Tyson pointed out, which is:

You have to look at Mr. Minton's actions and compare them what a reasonable person would do if they are in fear.

And I don't believe that is for you to consider for purposes of this motion. If Mr. Minton is still picketing and still going out there and standing up for what he believes in, it doesn't mean that he was not afraid while he is doing it. It means that he willing to take a stand and he is willing to come out, just like I'm sure antiabortionists are nervous and afraid when they are out there. But they still stand up, they still demonstrate, or whatever it is.

The racial issues that have been going on. If you

don't think both sides are afraid of each other, it doesn't mean they run home and hide their signs. They stand up for what they believe in, but they have a reasonable fear.

And that's what the jury should decide. I don't think it should factor into whether you allow in this testimony or not.

THE COURT: Is fear the issue, or is knowledge the issue?

MS. RIVELLINI: It's both.

THE COURT: You both have talked about fear.

MR. TYSON: Quite frankly, I don't think Mr. Minton is afraid of anybody, Judge. I think it's pertinent to compare him by the video. I don't think he's afraid of anybody.

MS. RIVELLINI: But, see, that's his position as an Assistant State Attorney, and it's for the jury to decide whether they agree with it. It goes toward the issue of self-defense.

MR. TYSON: Judge, I don't think -- I'm sorry.

MS. RIVELLINI: It goes to the reasonableness of his actions.

MR. TYSON: Also, Judge, like I said, it's on the video. Rarely do we have circumstances with so many different videos from so many different angles as to exactly what happened, so the jury should be the judge of it.

THE COURT: Okay. Can we move on to three?

MS. RIVELLINI: Judge, it's a little bit more of the same. Prior contacts, as outlined by Livingston, where Mr. Minton certainly knows that members of Scientology have come out to his home and have taken certain actions.

I also related this to -- let's see -- coming to his place in New Hampshire, allegedly leaving a dead cat on his door step, and following him when he comes Clearwater.

Now, whether or not we can prove that it was Scientology that left the dead cat, I'm not going to lead you to believe that we can or want to try that issue. But if it's one of those things that Mr. Minton knows about and feels it was part of the actions that was against him, then it certainly could be relevant.

And under Livingston, you don't look at whether it was prejudicial to the State, you look at whether or not it was necessary to explain that case. And in this situation it could very well be necessary to explain.

THE COURT: Break these incidents down in New Hampshire so I can understand. It sounds like there is more than one. It sounds like one may involve a dead cat that he may or may not have actual knowledge was left there by somebody or not.

MS. RIVELLINI: Correct. He has actual

knowledge that the dead was definitely left at his door step, and we actually have pictures of the dead cat.

THE COURT: All right.

MS. RIVELLINI: Because of the situation, he believes it was done as an act of threat by members of Scientology. That is something that goes to his state of mind in this situation.

Now, we are not here to try the dead cat case, nor are we going to make that a feature or perhaps even mention it. But should the time come to explain why Mr. Minton has a reasonable fear, that certainly is one of the characteristics that went into it, one of the situations that we can prove happened to show why he had a reasonable fear.

And coming to his home in New Hampshire, and showing up at an airport where no one knows he's there but him. These are things that can't be explained, except Scientology is certainly taking an extra interest in Mr. Minton.

That's more than a coincidence that every time he shows up somewhere or turned around, or his daughter goes to stay somewhere and doesn't know let anybody know and they show up there, it gives a reasonable expectation of fear and a well grounded fear on the part of Mr. Minton.

MR. TYSON: May I respond?

THE COURT: Yes, sir.

MR. TYSON: Judge, as to the number three allegation: Members of the Church of Scientology or agents thereof visited him at this place of residence in New Hampshire.

One, Mr. Howd wasn't there. Number two, I think that was two years ago or three years ago, and I think the evidence is going show that it was about two years before this incident even occurred. Mr. Howd was not there.

And quite frankly, Judge, you saw with Mr. Minton's own video what he is doing. He is going to someone's residence at night, he is doing the same thing.

You start talking about state of mind, knowledge, and fear; there doesn't appear to be any there. I don't believe theirs is relevant as much as I don't believe that's relevant. But, obviously, I will change course in that theory.

But, Judge, if they put the other stuff in, then I think I will rebut fear and knowledge. But I don't think either of them is relevant.

As far as the dead cat, I don't think there is going to be any evidence. If there is, I might have to change course as to whether somebody from Scientology did it or whether they believe that he did it.

THE COURT: That's what I understood from what

they said, that there is no direct evidence.

MR. TYSON: I know they said they are not certain they are going to use it or not. There is that line in that memorandum, the fact the defendant found a dead cat on the doorstep of his residence and believed that to be a threatening act of the Church, is relevant.

Obviously, they want if in, I don't think it's relevant at all. There is nothing to indicate who put it there.

Judge, also Ms. Rivellini was talking about anti-abortion protesters, they don't have to be afraid to walk. One thing is different. Anti-abortion protesters and I believe there are Supreme Court cases, and I'll even bring them to you at a later date, that you can't go to people's houses and picket.

That's what Mr. Minton is doing when he gets out with a sign in his hand at Ms. Slaughter's house. He's there to take this to a whole new level.

The right to picket is not absolute. Just because I have a sign in my hand doesn't mean I can do whatever I want. And I believe that's what Mr. Minton thinks he can do, but that's not the law.

THE COURT: Well, time, place, and manner are well known.

MR. TYSON: Absolutely. Judge, as far as the

residence, Mr. Howd is not there. It is a year or two beforehand. I'm not sure how it's relevant.

Ms. Slaughter's house I believe is relevant, and the dead cat is way out in left field. Whatever animal rights people are out there, it will play on their sympathy.

MS. RIVELLINI: Very quickly, Judge.

THE COURT: Okay.

MS. RIVELLINI: Two very quick things I want to point out.

One, this is not our motion of things we want to get in. I think the way it's being presented here, it almost sounds like we are arguing to get all this information in and being unreasonable and trying to turn this into something it's not.

This is something that the State has lined out in 12 paragraphs of things they'd like to not hear about at trial, and it forces us to have to respond to why they might be relevant.

It makes us look unreasonable, like we are going to try to get in the fact that a dead cat was left at their door and that we don't even know that they did it. We may very well not even want to mention that --

THE COURT: I understand that.

MS. RIVELLINI: -- but we are forced to respond to his motion.

The second thing I'd like to point out along those lines is: At this point it may not be relevant, but it may. And you can reserve your ruling on some of these issues where if you can't see the relevance now, you can leave that door open for if it does become relevant for us to use.

I don't want you to think that we are arguing to get this stuff in, but we certainly don't want to be precluded from doing a thorough cross-examination or a thorough direct examination or having a way to expose motive, bias or interest.

So we are being forced to respond to that and to use these arguments. They may become important to our case and we need to be able to prove them.

The other issue I want to be able to point out just based on what Mr. Tyson just said, I think we are mixing some of these issues here as far as the legality of picketing.

We are not here to look at time, place or manner. Mr. Minton has two roles -- actually one role. It is to expose what he feels is wrong and the "evils", as he calls it, of Scientology.

He does that in several ways. One is through lawful picket, which you have seen examples of. Another is by spreading information, passing information to the rest of society on what he feels is going on in Scientology.

He does that through videotapes, by going to people's homes, filming, showing the wealth they have. The fact that Lisa McPherson had been at a Halloween party right before her death made Halloween an important time, so they are doing some background about the Halloween party that occurred at the Slaughter residence.

They did some filming. They are putting together, which whether it is documentary evidence or things they want to spread around to get people involved on their behalf -- I don't think we should sit here and argue about whether what he did was legal on that night. That's not even an issue for you to decide.

THE COURT: Okay. I understand.

MS. RIVELLINI: And I don't want to make that a feature on what you are ruling on, like, well, if he was wrong, then I'm not going to let that in.

THE COURT: It won't be.

MR. TYSON: If, I can, I guess. That's not my purpose. It is just to show that we talk about state of mind, knowledge, and fear, that's part of state of mind. He is going to them and going to their private residence.

Judge, the reason I filed them was I was at the injunction hearing, and all this stuff came up.

THE COURT: Okay. Are we ready for the next one?

MR. TYSON: Yes. I believe it's number five or six.

THE COURT: Well, we have talked about number three, actually.

MR. TYSON: And four, we did four, the dead cat.

THE COURT: Okay. Four was the dead cat, so we are at five?

MR. TYSON: Yes, Judge.

THE COURT: Let's talk about five.

MR. DEVLAMING: Judge, let me handle this. Is this the one about whether or not we can go into the charging decision of the State?

THE COURT: Well, that's part of it, but it looks like you go beyond that, so it look like there is more than one issue here.

MR. DEVLAMING: Are you reading our response or his request?

THE COURT: I'm initially looking at his motion where he goes into the charging decision, and I notice you don't really address that.

MR. DEVLAMING: Right. And the reason we don't, we are not going to go into that. That didn't come up in the injunction hearing. Mr. Tyson probably just did a preemptive strike on that.

MR. TYSON: Yes.

MR. DEVLAMING: However, what I do intend to go into is -- when we finish this I'm going to ask for a five minute break. I need to show you about 20 seconds of another tape, and it has to do with another angle.

And what you are going to see in that angle is that Mr. Minton was assaulted about 15 seconds before. Then you saw where he says, I'm calling the police. He starts to walk across the street and doesn't.

You didn't see what happened around the corner, but luckily we have that. It's when Mr. Howd was following him around that corner. That's the part I need you take a look at.

And you are going to see Minton scream out, Oh, now you are hitting me. You're hitting me. That's when he grabs his cell phone and says, Now, I'm going to call the police.

Mr. Howd was not charged with assault. I have a right, I believe, under the case law that's been presented in our memorandum to cross-examine him as to whether or not he was charged with an offense. And I think the case law is replete that I get to cross-examine on any kind of motive and bias.

Am I going ask him about the charging decision of the prosecutor office or point my finger at Mr. Tyson?

Absolutely not. But I think once they see that video -- the jury -- it's fair game for me to cross-examine on the fact that he wasn't charged. And it could affect his credibility on the stand.

THE COURT: Response?

MR. TYSON: Judge, while we are at this, we can eliminate that part. It's number 12. We can eliminate that from the State's motion. The case law indicates that Mr. Devlaming can do that, so we can take care of that one right now.

MS. RIVELLINI: So are you conceding that?

MR. TYSON: Yes, sir. You can do that.

THE COURT: So you are conceding that.

MR. TYSON: We aren't conceding number five, that was number 12. I'm conceding that.

Judge, also, if you want to see the tape, we have it. And I want to you watch it because you'll see, also, that Mr. Minton says something like, give me that strap, like off the camera.

And he's grabbing for Mr. Howd and Mr. Howd's hand goes up. So that's a little more than Mr. Howd just attacking him. And Mr. Minton is very aggressive and Mr. Minton is on the aggressive and backs Mr. Howd against the wall.

Again, we are talking about fear and knowledge.

You need to consider that. The kind of fear he was in at that point. I'm not sure he was in any fear.

THE COURT: But the issue is that they want to cross-examine Mr. Howd about whether or not he was charged with anything arising out of this incident.

MR. TYSON: I'm not sure how they can do it other than say, You were not charged, and he'll say, no. I don't understand anything else that is relevant beyond that.

What are they going say? Didn't you commit a crime? I don't know what their defense is, but I'm not sure any of that is relevant. All he can say is No, I didn't commit a crime and I wasn't charged.

MR. DEVLAMING: I'm going to do it quite as unartfully as he is indicating.

MR. TYSON: I know you are not, but that's generally what you are going to do. You are going to lead the jury to believe that, that he did commit a crime.

MR. DEVLAMING: I'm not going to go into the charging decision of State, Judge. However, I do intend to ask him whether or not, based on the video that I will play segments of during this trial, whether the assault that is clear on this video resulted in any charges being brought, and he can give his answer.

THE COURT: Okay. And you still continue to object to him doing that?

MR. TYSON: Yes, Judge.

THE COURT: Okay. Just so we are clear. Shall we move on to six?

MS. RIVELLINI: Yes, Judge.

MR. TYSON: Yes judge.

MS. RIVELLINI: These are the allegations that the Church surveilled Mr. Minton when he arrived in Clearwater on the date of the incident.

If this was just about the October 31st incident, then it might be hard to explain why all that happened in the first place. But to get there, you have to understand from the minute Mr. Minton arrived in Clearwater he was followed, and he was followed by members of Scientology, including Mr. Howd himself.

THE COURT: Help me to understand when he arrived in Clearwater in juxtaposition to this incident.

MS. RIVELLINI: It was earlier on that same day.

THE COURT: So he arrived on the 31st and the incident occurred on the 31st?

MS. RIVELLINI: Later on that night. They arrived at the airport with other people, they get the feeling that they are being followed, so they start looking for signs of that. And, in fact, they see a certain car behind them. They start to pay attention to that.

By the time they arrive over to the Biltmore, which I believe was for lunch, they actually took a turn they had not intended on taking, to see clear and once and for all if they are being followed. In fact, they are, somebody makes the same turn.

Meanwhile, they had gone over or sent someone over to the guard at the gate to say, Look we think we are being followed by this type of car, this type people, a heavy set woman, et cetera, and give a clear description.

Well, the guy at the gate says, Well, as a matter of fact that lady has already gotten here ahead of you and is waiting inside. I remember seeing her. I haven't seen the car. They give a description of the car as well as a license tag number.

Well, who does that turn out to be? Mr. Howd. He is following Mr. Minton hours before this incident. That is very important as to not only giving us our state of mind and motive, bias and interest on the part of victim, but how can we assume this is just a one-time incident late at night, when he has followed him all day long? It also goes toward Mr. Minton's state of mind as far as fear.

Now, Mr. Tyson wants to argue that because Mr. Minton acts anyway that he can't be in fear. And Scientology would like for nothing more than for Mr. Minton to get scared and go away. But the reason they hate him so

much, and the reason they want to expose him is because he comes back. He is not going to be scared off.

So is he scared, and does he show that reasonably? Yes, he does. He goes to the guard and says, I think I'm being followed, can you help me out. Does he go home and hide? No, he goes about his business.

But Mr. Howd is right behind him and is following him there. It's later that evening, and it's no coincidence that Mr. Howd is back outside following him while he was picketing.

This also interrelated to the other episodes and to their policy in general, which we have witnesses that can testify that is the way that they do their business, this is what they are told to do, and this is how they are told to complete their plan.

So this one incident of being followed all day long intertwines with several other theories of our defense.

THE COURT: Mr. Tyson?

MR. TYSON: Thank you. Judge, Mr. Minton's interpretation is what they gave. The Scientology interpretation is harassment. They know he's coming. They are going keep an eye on him.

I would ask you to find it's irrelevant. Or in the alternative, I would ask you to find it relevant, that Mr. Minton is at their house watching them at night, doing

the same thing.

So I'm not sure what the relevance is of all of it. I think it's all irrelevant, but if you find that it is, just leave it in.

THE COURT: He's not at Mr. Howd's house?

MR. TYSON: No, he's not, but Mr. Minton goes to one of the executive's of Scientology house late at night, filming. As you saw, he was bumping up against the gate, and went around to different parts of the house.

I don't think any of it is relevant, but I would ask that if you believe that the fact that they surveilled him earlier is relevant -- he considers it picketing and they consider it harassment -- that that be relevant too, to offset what he is alleging that they have done

THE COURT: Your position, basically, is that if I find that these other corporate, for lack of a better term, events which did not involve Mr. Howd, in some way the knowledge of which is attributed to Mr. Minton; that I should do the same thing with regard to this tape.

MR. TYSON: In a limited capacity, on the day of the incident. If you say that that should be allowed as surveillance -- the Boston and California I have already said is way out there -- but the incidents in Clearwater and the date of

the incident where they're following him, if you allow that

in -- I believe it's relevant on the date of the incident, right before the incident at night he is at a member of the church's house not following him. This is an executive of the Church. I think that's relevant too.

THE COURT: Let me make sure I'm clear. The surveilling, if you will, was done, in fact, by Howd, if I understood this. And the house that he is standing at in Largo is not Mr. Howd's house.

MR. TYSON: That's correct. It's another member of the Church. And Howd only had a very limited role. He only went to the Biltmore, and that was it. He never got passed the gate and that was it.

As far as the tag, the tag was registered to a rental company, it wasn't registered to Mr. Howd. But I'm not going dispute he wasn't there.

THE COURT: Okay.

MR. TYSON: But I believe that part -- just that part on that day is relevant. I would ask that it be relevant what Mr. Minton did on that day also, as far as he as going to -- well, he's doing the same thing they are doing.

THE COURT: Anything more on this?

MS. RIVELLINI: Just so we don't mix apples and oranges, which I think we are, it's clear that by Mr. Howd following Mr. Minton all day long that it goes

toward the state of mind, and, again, the theory of self-defense and motive, bias, and interest. And it becomes a very relevant part of this trial.

Mr. Tyson wants to make this a fairness, equal test, and it's not equal. The defendant has greater rights than anybody else in this case.

And if he can prove it to be relevant for anything, then your Honor may very well let it in. But just by saying if you let something in on the defendant's side, you have to then let something in on the victim's side, it doesn't really work in this argument.

And I don't think he has met any kind of test to show why that videotape at Slaughter's house is relevant. And, in fact, a lawful picket is different than just going out and filming someone just for documentary evidence.

I don't think you saw Mr. Minton out there picketing, causing a scene, or demonstrating, or doing anything along those lines.

He does just go out and you hear him talking to the camera, which we'll assume will be his audience, this is her house and this is why it is important because it relates to Halloween party which Lisa McPherson was at last year. And this is where it is, and you can see how expensive it is. He is just talking to the camera.

It doesn't go to the picketing situation or any

heated situation. There is no proof that anybody except for Mr. Minton knew about it.

So if you find it is relevant, that's great, Judge, but I don't think they have made a showing as to how it is. And I don't think we have to have if you give us one, you give them one. It doesn't work that way.

MR. TYSON: Judge, I'm not asking for it that it way. I'm just saying the Boston, and California, if you want me to quantify it, they are extremely irrelevant.

The date of Clearwater incident I also believe is irrelevant. Mr. Howd and Mr. Minton are doing the same thing.

It's a picket when he wants to be a picket. It's a documentary when he wants it to be a documentary to suit his purposes. But, Judge, if you look at the video, I believe it's Ms. Brooks or Mr. Minton is holding up the sign up along the road to Ms. Slaughter's. I'm not sure what the difference is; okay?

I'm not saying that for the sake of argument. That's not my argument. My argument is relevancy. If they want to show it for one purpose, it's the exact same thing I have got. They do mirror each other.

THE COURT: Number seven. Didn't we really cover that in number one?

MR. TYSON: Basically. Judge I can't

anticipate if they are going to use anything else, like, three key witnesses or doctors or anything. I don't know.

We'd ask maybe before we do that at trial, maybe we could proffer it.

THE COURT: Well, how is this different than number one?

MS. RIVELLINI: Judge, I didn't take it to be that much different. I thought maybe he was trying to broaden the scope. Where "fair game policy" is actually -- I don't know what the analogy would be in another religion. I don't think there is such a thing.

THE COURT: I don't think that is necessary, but is there anything other than the "fair game policy" that you wanted to get into, and if so, please be specific.

MS. RIVELLINI: Judge, I don't think we can limit it to just the "fair game policy" for someone to understand why Scientologists have to act a certain way.

"Fair game" is a specific directive on how to -- really how to treat critics and it's limit within their security department. It's just more limited.

That may not fully explain to the jury why a Scientologist would be afraid to testify in court, why a Scientologist would be afraid to deal with law enforcement, why they would testify to the truth -- or to something other than the truth, without understanding the mind bending that

goes on in an organization like that.

Again, we are not here to teach them what Scientology is, but there may be things outside the "fair game policy" that go into this.

The only distinction I made in my argument against it because I felt was similar to the "fair game" is the Hermanson case.

And since we are calling Scientology a religion, and religion is given greater protection in court than what we are allowed to get into, I just cited that for the purpose of when religion is the basis for the defense it is not error to for you to allow us to go into it, even though we are touching on some things that are supposed to be sacred.

And the only cases that deals with criminal situations that I could find was where somebody was a member of Christian Science and they don't treat their children, and the State charges them with a crime and their religious following goes to their line of defense. So you can't say it deals with religion, we can't get into that.

THE COURT: Well, it doesn't sound like I can rule on this until it actually presents itself.

MR. TYSON: It appears that way, Judge. At trial if you going to get into something that goes into their practices or beliefs, at that point I would proffer it

and see.

THE COURT: Right. Other than the "fair game policy," which has been defined, it would be difficult for me to rule on something that has not yet presented itself.

Okay. Number eight.

MR. TYSON: Judge, number eight, I am conceding that anything on the video or anything about the Lisa McPherson Trust or anything on the video, I can't edit that out. Just leave that in there.

Anything on the video he says, everything comes in there, I'm not going to try to limit that. I just don't want it to be the focus of the case.

THE COURT: And you have indicated that you don't intend to try that case here, which, of course, wasn't going occur anyway, but I'm glad to know that that's how you feel.

Tell me what it is, though, beyond the video that you all feel should go come in.

MS. RIVELLINI: Sure, Judge. You heard a lot of exchanges, Go home, Go home Bob, I am home now. I think you have to put that into context of what Stacy and Bob Minton mean by that.

What they mean by that, I am home now, is that I have moved to Clearwater, and I have established the Lisa McPherson Trust here in Clearwater.

Now, again, we don't intend to try that case, but, again, it's important for the jury to understand why the Scientologists fear and loathe Mr. Minton more so than any other person who just doesn't agree with Scientology.

He is the money behind the Lisa McPherson case. He has established the Lisa McPherson Trust, which is an organization spreading the word against Scientology and show the evil that could happen, like what happened in the Lisa McPherson case, to the rest of world, not just here in the State, but elsewhere.

So do we plan on getting into all the details? No. But without understanding what the Lisa McPherson Trust is and why that would give rise to their actions against them, I think we would be misleading the jury and confusing them.

So I think they have to understand why Mr. Minton's presence in Clearwater is such a threat. Not an aggressive threat, but a threat to their sustenance here in Clearwater, and for that limited purpose.

THE COURT: Response?

MR. TYSON: Judge, as long as it's not a feature at the trial. I understand that certain things have to be asked to put things in perspective. I just don't want that to be a feature in the trial.

To be quite frank, I'm not sure how Mr. Minton will be -- obviously, I'll be asking whoever they put up on the

witness stand about the Lisa McPherson Trust and when they came into existence if that becomes an issue, and whether it was before all this stuff happened.

Because if it was before the Boston incident and these other incidents, I'm not so sure it's really relevant at all. I think it's just popped up recently, so I'm not sure how it even reflects back to the other things. I'm not sure how it's really relevant.

Obviously, what is on the tapes I believe is relevant. In good faith, I can't try to limit that out -- what he is saying or that Scientology killed Lisa McPherson. That, Judge, in the State's opinion is inextricably intertwined with what's on the tape. I don't think you can really go too far beyond that in explaining it, other than so it's not in a vacuum. That I can understand.

THE COURT: Okay. Let me just see if I understand it. Basically, you concede that what's on those signs that he is picketing is relevant, and therefore admissible.

MR. TYSON: I have no reason to have that sheltered out, or his words, turn the video off on what he is saying because I believe that is inextricably intertwined.

THE COURT: Therefore, an explanation as to why he was there with those signs has to be relevant.

MR. TYSON: As long as that's not a feature, your belief, why are you there, because I want to pass the word of this. I don't see bringing it all out and the flood gates to everything that's happened in their civil suit.

Yes, he has already said his piece in there that Scientology killed her.

THE COURT: How far do you-all intend to go with the Trust?

MR. DEVLAMING: Judge, I think can agree with Mr. Tyson. We do not intend to make it a feature at the trial. We wouldn't do it. We know you would shut us down if he we tried to do it. So I can tell you right now, we are not going to do that.

The furthest it's going to go is to put in context the statements they hear on the tape. We might ask three or four questions of Mr. Minton, should he take the stand, about that, or Ms. Brooks, if she takes the stand, about that, but then I'm going to end it.

You know, it depends, of course, on how much you cross, but if it doesn't, Judge, I can tell the Court it's going to be instructional, to put it in context, but nothing further.

THE COURT: Okay.

MR. TYSON: We'll play it by ear at trial.

THE COURT: I understand where everybody is coming from. Let's go on to nine.

MR. TYSON: I believe nine goes along with eight, but nine doesn't mention the civil suite at all on the video. I'm not sure how that's even relevant at all.

The Trust is because he's talking about it. The civil suit which is pending over in Hillsborough County, I'm not sure how that's relevant.

THE COURT: How is it relevant?

MS. RIVELLINI: As to my argument, that went back to eight. They link back together. The Lisa McPherson Trust is something Mr. Minton has established that is helping fund the civil case.

So we are not here to try the civil case, but the fact that he's backing that case which is moving forward is relevant. It's what causes Mr. Howd and all the other people to come out and try to get rid of him because they don't want at that civil suit to happen.

So they are interlocked. I don't think we plan on going further than that or discussing what the issues are in the civil case or the content of the civil case, but the fact that there is a civil case, it's important to them, and Mr. Minton helping along with that is a relevant part of this trial.

It also is relevant for when Mr. Howd testifies or

any potential witness that he has get up on the stand in furtherance of the Scientology side of this, view of this, the victim's side of this. They have the motive in how the outcome of this goes and how this case is played out.

Again, it lends credence to their view that Mr. Minton is a criminal, he's a bad person, and they want to knock him out as a player as it relates to the civil suit. So we don't plan on going into the content.

THE COURT: So you would anticipate getting into this on a cross-examination of Mr. Howd?

MS. RIVELLINI: Correct, impeachment purposes.

MR. TYSON: I'm not agreeing to relevance in that, Judge. I think that the Trust -- he talks about it, but the pending civil case, I'm not sure how that's really relevant to this case.

And I'm not sure when it popped up in relation to when Mr. Minton starting having altercations with the Scientologists. I'm not sure if it's from the get go, if that's when he backed the civil suit. I don't really know. But they really don't talk about it on the video.

And whenever they mention about Lisa McPherson, I think he has made his point. If they want to get a little background out, I guess I don't have any problem with that as long as it's not a feature of the case.

But then we are starting to go off into another

thing. When you start talking about something that is a not on even on there, it's unrelated. I think they can make their point of why he is there from just talking about the Lisa McPherson Trust because he talks about it.

THE COURT: But wouldn't that be relative to the bias a witness might have?

MR. TYSON: I'm not sure, Judge. I think they would have to show that. How do they show that? If I have to show the bias of their witnesses, I have to bring out articulable facts to show the bias. I'm not sure how they are going to do that with Mr. Howd, unless they just ask him.

THE COURT: Is there anything else anybody wants to say on this issue?

MS. RIVELLINI: Just to point out one of the cases in here from Smith v State 579 So.2nd 906, 5th DCA 1991, where the court said defense counsel was properly cross-examining the victim regarding civil suit to show motive and reason to deviate from the truth about who began the altercation.

It doesn't just go to the big picture, but it goes to how this incident even happened, why Howd would give an untruthful account.

This is on page seven of my memorandum, the defense memorandum. Why this incident would even have happened, and

why the victim would lie about how it started. So in that respect, it goes to motive, bias, and interest.

Again, we are not here to talk about did they kill her, or why did they kill, or how did they kill her.

THE COURT: Right. I understand. Just the existence of a civil suit, and why it may have an impact.

MS. RIVELLINI: Correct.

THE COURT: Okay. Ten.

MR. TYSON: Judge, as you are aware, the State Attorney's Office now has a case against the Church of Scientology. I'm not sure how that's relevant to any of this. I can understand the Trust, but I'm not sure about the criminal charges pending.

THE COURT: How is it relevant, Ms. Rivellini?

MS. RIVELLINI: Again, Judge, it goes to the credibility of a witness on cross-examination. We are given wide latitude to go into an area such as that as to any pending charges.

THE COURT: So it would only be on cross that you would anticipate it, and it would be of Mr. Howd, but the charges are not against him.

MS. RIVELLINI: Correct, but obviously he has a big interest in any Scientology case.

THE COURT: Because of his role?

MS. RIVELLINI: Correct.

MR. TYSON: I still don't believe he has a big interest. The most the Church could get, as you are aware, is a $15,000 fine and probation. I'm not sure what his role would be. $5,000 or whatever the penalty is for a second degree felony is about it.

I'm not sure what his role would be in that. He's not involved in that. He is not a witness in that. Again, that would be painting any church member in any church if another member is charged as being part of that if they are sued or prosecuted.

So I'm not sure how that is related. It is well beyond and above where we are at the other things as far as putting things in perspective.

THE COURT: Respond to his point. It's a good point.

MS. RIVELLINI: It goes to our point that the witness is going to testify as to what OSA is and how the directives are made.

THE COURT: So any Southern Baptist should be concerned about any lawsuit pending against the Baptist Church.

MS. RIVELLINI: Incorrect, Judge, unless any Southern Baptist has an OSA Division, where somebody from higher up gives directives on how each and every move they make is carried out physically, and that there are huge

penalties to pay.

And I don't mean just in theory, like if you ever die, I mean at the hands of them. And we are going show that policy exists and that Mr. Howd was carrying them out.

MR. TYSON: Again, Judge, he is not involved in a criminal case. He is not a witness, he is nothing. I'm not sure how this is relevant at all, Judge. He is not involved in it.

THE COURT: Okay. Eleven.

MR. TYSON: Judge, that is, quite frankly, so the Church of Scientology, as opposed to Mr. Minton and Mr. Howd and the facts isn't put on trial. So they don't parade people in here and say how bad it is, other than how it's relevant to the case.

Quite frankly, I don't know what they are going to do, so I can't guess what it is. I can only go by the tenor of the injunction hearing and the tapes that you have seen, that type of thing.

MS. RIVELLINI: Mr. Tyson has our witness list. I gave him one additional person that we have listed, and told him he would be happy to have a phone conference, if Mr. Tyson wanted to question him ahead of time. So I don't think there is any fear that we are going to walk in every anti-Scientologist.

THE COURT: Well, but shouldn't we identify

the incidents or the persons you are talking about, and see if we can identify some connection between them and this incident?

MS. RIVELLINI: If there is going to be any, Judge. But I think it goes to two issues. One to --

THE COURT: So you are asking me to reserve unless and until the issue presents itself?

MS. RIVELLINI: I do. And, again, I'm responding to things he is throwing out, and I'm trying to think, well, where can we possibly do that.

THE COURT: I do understand that. So I can't really rule on it until an incident or a person presents, and I can analyze what they are going to say.

MR. TYSON: And, Judge, quite frankly, if I talk to them, which I plan on talking to them on the phone, I don't know what to ask them unless just broad based, What do you plan on doing?

I don't know about the Church of Scientology, Judge. I don't know all the workings and what they may pop up from 20 years ago when they were a member. I don't know what Ms. Brooks did for 20 years. I don't know what is going to come out of her mouth.

THE COURT: I understand, but on the other hand, I can't rule on it until I know who it is, what it is, when it was, and how, if at all, it may be relevant.

MR. TYSON: Maybe during the trial if we start getting into that type of incident, maybe at worst we can proffer.

THE COURT: So I'm going to reserve, and we are going to agree that if we want to explore that area, it's proffered out the jury's presence so that I can rule on it.

MS. RIVELLINI: There are two areas where I can anticipate something like that because I certainly don't want to get up here and violate any of your rulings where you say you should have proffered it.

Here are two things I can anticipate that he might be or maybe is leaving something out. One is if Mr. Minton knows of certain things that the Church does and he describes them to go towards his fear.

Okay. So if he is being crossed, Well, what makes you be afraid of this, or why do you think this, or why were you doing that, and he says because I know this is what happened to so and so.

I mean, I don't know. I'm just trying to anticipate that area.

Then on the flip side, if Mr. Howd is in fear of retaliation and his testimony is based on that, he has got to testify a certain way because something will happen to him if he comes back a failure.

Or when he was out there on the street picketing and he didn't make this battery happen and he didn't get Mr. Minton arrested, then he was going to face some retaliation from within the Church, then that's relevant and goes to his truth.

THE COURT: So how would you get that out, through him in cross-examination?

MS. RIVELLINI: Either through him in cross-examination or through this witness that we have listed, Frank Oliver. And, again, I'm just anticipating where it might become an issue so we don't violate any rules.

THE COURT: Okay. Mr. Tyson, have you had a chance to talk to Mr. Oliver yet?

MR. TYSON: No. I haven't even got the form. She told me about him today.

THE COURT: I would anticipate that once you talk to Mr. Oliver, you may have a clearer position on this point and can let the Court know.

MR. TYSON: He was just listed, I believe. It was after I filed the motion that he was listed, I believe.

THE COURT: Okay. Anything else only this point?

MR. TYSON: I don't think so, Judge.

THE COURT: Twelve I think you have conceded,

right?

MR. DEVLAMING: You have withdrawn twelve?

MR. TYSON: Right.

THE COURT: Should I look at the other part of the movie?

MR. DEVLAMING: Yeah, Judge. If you can either take a short recess or give me a couple minutes.

THE COURT: I'm ready.

MR. DEVLAMING: Okay.

MR. TYSON: Judge, the court reporter doesn't need to take this down.

THE COURT: Okay. She appreciates that.

MR. DEVLAMING: You don't have to take down my voice either. This is Mr. Howd's video.

(WHEREUPON, THE VIDEO WAS DISPLAYED.)

MR. TYSON: As stated earlier, Mr. DeVlaming says he pushes him. My contention is he grabbed that from him, so he started the altercation. I was going battle that out at trial.

THE COURT: That's why we have juries.

MR. DEVLAMING: Your Honor, just a couple of clean up points. I think Ms. Rivellini has represented Mr. Minton's position very well, so I'm not going to go over that same area.

I do have some additional cases to give to the

Court, so you doesn't have to take down, with the exception of one.

MR. TYSON: Judge, I have copies of cases I cited you. I'll bring them up.

THE COURT: Thank you. I appreciate that.

MR. DEVLAMING: Judge, in case it comes up, there was a statute, 90.611, that says evidence of the beliefs or opinions of the witness on matters of religion is inadmissible to show the witness's credibility is impaired or enhanced thereby.

There is a civil case that was decided, coincidently, nine days before the incident in question. The cite is Colbert, C-O-L-B-E-R-T versus Rolls, R-O-L-L-S at 746 So.2nd, page 1134 -- that's not contained within the memorandum.

That holds that the evidentiary statute I just cited, making evidence of a witness's beliefs inadmissible to enhance or impeach testimony, does not bar inquiry into religious matters when such matters were are relevant to the issues of this case.

Your Honor, there was a case a couple years ago in Tampa on the motorcycle gang called the Outlaws. And what the government was charged with having to do was to educate the jury on the practices and procedures and dogma of the motorcycle gang the Outlaws.

And they called women to the stand to testify as to that particular aspect of the motorcycle gang, and went into such matters as what they were required to do with the other male members of the organization, what happens if they try to leave the organization, things of this nature.

The federal court judge -- and of course you know our evidentiary code is almost identical to that of the federal code -- was that it was admissible and the jury could be instructed on the dogma of the particular organization.

And in a sense, that's what we need to do. However, I can't stress enough that I do not plan to turn this into an anti-Scientology trial and so forth.

I will tell you that there were certain matters -- and this is probably why Mr. Tyson brought this motion -- that came out in the injunction. Such matters as -- I don't remember if Xenu came up. That is the intergalactic overlord of the Church of Scientology.

Things of this nature that have nothing do with the elements in this case. Nothing to do with what was in Mr. Minton's mind.

However, the "fair game policy", as we talked about, which possibly needs to be brought out, is what went through Mr. Minton's mind at the time of the incident.

He was assaulted around the corner when they knew

that Ms. Brooks was not in a position to be filming. And if you watched some of the other -- and I didn't talk a lot during the time. You are taking notes during the course of some of the videos.

But you will see in the other one, where you said, Where is this, and I said, Clearwater. And you asked whether it was the same day and it wasn't. The relevance of that particular video is that you will see members of the church who, when Mr. Minton's video was being done, would do this, and keep them from coming by, keep them from being in vantage point of filming.

What happened when Mr. Howd went around that corner is exactly what was intended. Again, I have watched this video a number of times, the Court has seem it once. You will see the women in this photograph that were saying, Go home Bob, moments before, they all went into the church.

They all decided to leave just before Mr. Howd went around that corner, committed that assault, knew that the only video was the one that he held in his hand, and they knew what was going to happen, which is exactly what did happen.

He continued to follow him as our client retreated. We have the, Quit following me. And the placard went out, and the Cecil B. De Mille fall went down, and he stayed on the ground in a very dramatic fashion.

The state of mind of Mr. Minton can only be shown -- if we are able -- in a limited sense, to be able to establish to this jury what the doctrine is of the church to be able to allow this to happen, to be able to provoke it.

And I know why Mr. Tyson is so vehement against that Boston video coming in. What it does is it shows that pattern.

That is what Williams Rule is all about. It shows a pattern of why things happen, common scheme or plan or pattern.

In fact, in the California video you may recall a statement where the police were present. And the man says I want you to take a report on this because I'm going to get an injunction.

Okay. That's exactly what happened after the incident in this situation, your Honor, which I think is fair to cross-examine on. They immediately went out and got an injunction. They got Mr. Minton away from all church property. Not just the ones that Mr. Howd was necessarily known to have frequented, all church property throughout the county, which is exactly the pattern we need, in a limited aspect, to establish to the jury why this particular thing happened.

And you know, it might sound strange, but part of the defense in this case, your Honor, is not only

self-defense, because Mr. Howd is coming up on him after he was assaulted. But in a strange way this is not a case where -- I know this is going to sound funny -- but where Mr. Howd didn't expect this to happen, didn't encourage it to happen, didn't want it to happen.

And I know one of the elements in this case is that it was done against his will. I'm not so sure that the jury is going to make that decision that it was against his will.

I think, like the Komikaze pilot that decides to go into that ship, I think that's what he was, in essence, with this particular church in this incident. And I think if you allow us to go into that to be able to explain why it occurred, that jury will be able to be treated to the full picture.

Now, Mr. Tyson has made no secret. What he wants is, of course, for none of this to come in so he can ask the jury one of two things -- and I can see it right now.

He's going to put a placard there right in front of the jury, and he's going to say that there are two boxes to check in this case. Did he touch Mr. Howd, yes or no. You either check yes or no. Did he touch Mr. Howd against his will, check it yes or no. If there is two checks on that board, everybody goes home. And that's exactly what he wants.

If you do not allow us to go into the theory of

defense in this case, we might as well get up and put the checks on the board ourselves because he touched him. And Mr. Howd is going to take the stand and say, I didn't want to get touched, look at this photograph.

But I'm asking the Court to be able to allow us to go into that limited aspect of the dogma of that Church, of the operation of special affairs, the Office of Special Affairs. And I think if you do, our theory of defense will be allowed.

And the case law, Judge, that I have in addition to what Ms. Rivellini gave you and what you have read -- and again, I have it, so you don't have to take down the citations. And, Bill I think I just gave you copies.

THE COURT: Mr. DeVlaming, before you do that, going back to the middle district case involving the outlaws --

MR. DEVLAMING: Yes, sir.

THE COURT: I realize that was a trial court written decision about the things that you have addressed. You obviously have knowledge of that in some way, can you tell me when it was, where the trial was, who the judge was?

MR. DEVLAMING: Yes. And, Judge, I agree with you when you made a side comment to Ms. Rivellini, when she said I don't find any cases and you said, I couldn't either. I have looked too. Probably Mr. Tyson has looked. I don't

know why we can't find any case law on that.

MR. TYSON: I can think of some reasons. I can address that when we are done.

MR. DEVLAMING: Well, any way, I will tell the Court that it was the middle district court. It was tried in Tampa. It was tried either three years ago or three years and change there abouts. I believe that the judge was Bucklew, Judge Susan Bucklew.

I can't -- I didn't try the case. I followed the case. I knew one of the lawyers that was involved in the case.

THE COURT: I generally remember the case as well. It was about the time frame you described, and I think I may have known one of the lawyers in the case.

MR. DEVLAMING: And that's what I heard, and he called me for some advice during the course of the trial. And that's all I know about that.

MR. TYSON: Judge, can I -- I'm sorry are you done?

MR. DEVLAMING: No. I'm just going to put some more case law on the record, Judge.

Again, as far as the videos are concerned, there is a case out of the Florida Supreme Court of Escobar, E-S-C-O-B-A-R versus State at 699 So.2nd page 988, decided July 10th of 1997. And that court said -- this was an

incident where a man was convicted of murdering a police officer.

And approximately a week to ten days after that he was in an incident in California and the State wanted to bring in the incident because he shot at a police officer in California and the defendant objected saying that it did not meet the Williams Rule, it was not to establish identity, identity was not at issue in that case.

And the Florida Supreme Court allowed it in and said:

In reviewing testimony about a collateral crime that is admitted over objection based on it's prejudicial effect, the trial judge must balance the import of the evidence with respect to the case of the party offering it against the danger of unfair prejudice.

The evidence should be excluded only when the unfair prejudice substantially outweighs the probative value of the evidence.

I have a couple cases relating to the state of mind aspect of what was the state of mind of the defendant, Mr. Minton, at the time; which again goes into what he knew and the videos and what he was privy to in Boston, and that is Armstrong versus State, another Supreme Court of Florida case found at 642 So.2nd page 730, August 11th 1994.

The witness's statement that the defendant had once

told a witness that he hated police officers was admissible in prosecution for attempted murder and murder of police officers.

The statement was not impermissible character evidence, but was relevant and properly admitted to show the defendant's state of mind to prove or explain his subsequent behavior.

Again, this was offered by the state in this particular prosecution. And the defense said, wait a minute, that's basically to show bad character, it's a prior statement that he made that showed that he hated police officers, it had nothing do with this particular police officer. And she said, yes, but it explained his subsequent behavior, which is what exactly what we need to do in this case.

There is another case basically holding the same. And the last case is E.B., which is a juvenile, versus State. It's a third district case found at 531 So.2nd page 1053, Florida Third DCA 1988.

The purpose of testimony that a school administrator advised a juvenile to leave the school on the day an aggravated battery occurred because the juvenile's live was in danger, was not to prove the truth of the matter asserted i.e., that the juvenile's life was in danger, but to show it's effect on the juvenile's state of mind, namely

that the juvenile had reason to fear.

Therefore, the statement was not hearsay, and was admissible to support the juvenile's claim of self-defense, and it's exclusion constituted reversible error in a delinquency proceeding.

So if I could supplement what you have, Judge.

THE COURT: Thank you.

MR. DEVLAMING: That's all, Judge.

THE COURT: Mr. Tyson?

MR. TYSON: Judge, I'll be very brief. As far as the video, we talked about the people walking away. Well, as you saw, and it's up to the jury to decide what they see, Mr. Minton grabs out and says, I've got to take that strap -- I'm not sure what he is saying -- then Mr. Howd pushes is him away, and that a reaction.

Then Mr. Minton pushes him against the wall. Then the other Scientologists -- not before that happens, but after that happens -- they go inside.

Okay. It's all on video. All of this is on video. Nobody interferes with Ms. Brooks while she is videotaping this incident. How are they going know what is going to happen next? Mr. Howd, as you saw, had the camera up to his face when he is struck.

The other thing I want to point out to you is the reason you are not going to find any case law. None of that

is relevant. None of it is admissible, so there is nothing to appeal. It's so irrelevant and far fetched, that's probably why you are not going to find anything.

The more research I did, the more I realized I could do an exhaustive search. It was in futility. There was not going to be anything on it. The closest thing by analogy is a very short, sweet case, saying that if it's not the defendant, we can't use Williams Rule.

Well, the reverse if it's not the victim, they can't use it. They can't use it. They can't make it relevant because the victim is not there on any of these things. That's why you are not going to find any case law there.

THE COURT: Okay. Is that it?

MR. TYSON: That's it. Nothing further.

THE COURT: All right. I'm going to think about this and give you all a decision. We are set for trial the 22nd of May, if I recall.

MR. DEVLAMING: Yes, sir.

THE COURT: If I recall we have one day set aside. Have we been realistic? Is it more than one day?

MR. TYSON: Two at least.

MR. DEVLAMING: I think two at least.

THE COURT: Do we know for sure we set aside two?

MR. TYSON: I'm not sure. I just know we set the trial that day. I am available. I can anticipate that even if a lot of stuff comes in that's allowed, two at the most.

THE COURT: Okay. I just want to make sure we have been realistic about it. I anticipate giving you all a decision before 5 p.m. next Wednesday. Is that all right?

MR. DEVLAMING: That's fine.

MR. TYSON: Okay.

THE COURT: Anything else I can do? If for some reason I'd like to see the tapes again, is that going to be a problem?

MR. TYSON: Just call me, and if it's okay with Denis, I'll bring one over.

THE COURT: Is everybody okay with that?

MR. DEVLAMING: That's fine. I'm okay with that.

Judge, one other housekeeping matter. We have had quite an audience -- I don't know how else to say it -- in the injunction matter, and probably supporters on both sides that would like to watch the trial. Is there any way we could get a bigger courtroom by any chance?

THE COURT: We'll check on that; okay? That probably isn't going to be a problem, but let me check on it.

MR. TYSON: That's fine. We can try it in here, but it's fine with me. There wasn't that many people there, and we have got the feeds here, which I didn't they had down in St. Pete.

THE COURT: If there is something available that's bigger, I'll see if we can get it and if not we'll just do it here.

MR. DEVLAMING: If we have to do it here, will that be fixed, Judge?

THE COURT: This, I'm told will be fixed by Monday. We were told it was fixed today, but we put a tape in and lost it. So we thought we'd be safe, and use the portable.

If there is nothing more to come before the Court, we'll be adjourned.

(WHEREUPON, THE PROCEEDINGS CONCLUDED.)

REPORTER'S CERTIFICATE

STATE OF FLORIDA)

COUNTY OF PINELLAS)

I, Patricia Edwards, certify that I was authorized to and did stenographically report the foregoing proceedings, and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 18th day of May, 1999.

Patricia Edwards

Patricia Edwards, Notary Public
Court Reporter

PATRICIA EDWARDS
MY COMMISSION # CC 903114
EXPIRES: Jan 18, 2004
1-800-3-NOTARY Fla. Notary Service & Bonding Co.

☐ Felony
☒ Misdemeanor
☐ Traffic
☐ Juvenile
☐ Civil

CIRCUIT/COUNTY COURT
PINELLAS COUNTY, FLORIDA

CASE NO. 99-32857MMAWD

State of Florida

vs.

Merton, Robert 02077072

Cutler BOX # 11

DRGS BOX #

SHELF #

SECTION # Pistol

☑ STATE/COUNTY ☐ DEFENDANT ☐ COURT ☐ PLAINTIFF

LIST OF EXHIBITS

FOR: Jury Trial

DATE	EXH. NO.	IDEN.	EVID.	DESCRIPTION
5-22-00	1.	✓	✓	Poster board double sided 1st side black & white with skeltons and wording (scientology/ spiritual death) 2nd side colored board with 2 prints of hands and the wording Fiasco blood on Scientology hands.
5-22-00	2.	✓	✓	Colored photograph of alleged victim laceration on left eye.
5-22-00	3.	✓	✓	VHS video tape (copy of Richard Howd video)
5-22-00	4.	✓	✓	VHS video tape (copy of Stacy Brooks video)
5-22-00	5.	✓	✓	VHS video tape (copy of Battery incident 10/31/99)
5-22-00	6.	✓	✓	VHS video tape (copy of CW 99-29775) Dell

Exhibits Verified by KARLEEN F. De BLAKER
Clerk of the Circuit Court

By: Shannyne Moore
Deputy Clerk

Date: 5-22-00

By: Teresa M Croft
Evidence Person

Date: 5-25-2000

☐ Felony
☒ Misdemeanor
☐ Traffic
☐ Juvenile
☐ Civil

CIRCUIT/COUNTY COURT
PINELLAS COUNTY, FLORIDA

CASE NO. 99-32857MMANO

State of Florida

VS.

Robert S. Minton
02077072

City BOX # 11
DRGS BOX #
SHELF #
SECTION #

☒ STATE/COUNTY ☐ DEFENDANT ☐ COURT ☐ PLAINTIFF

LIST OF EXHIBITS

FOR: Jury Trial

DATE	EXH. NO.	IDEN.	EVID.	DESCRIPTION
5-23-00	7	X	X	1-page Photo Copy on 8½x11" Paper of Evidences of Supp by L. Ron Hubbard
5-23-00	8	X	X	1 Maxwell videotape of Frank Oliver Picket Video Clips

FILED
CRIMINAL JUSTICE CENTER
00 MAY 23 PM 3:40
Karleen F. DeBlaker
Clerk Circuit/County Courts

Exhibits Verified by **KARLEEN F. De BLAKER**
Clerk of the Circuit Court

By: _____ Deputy Clerk

Date: 5-23-00

By: Teressa M Croft Evidence Person

Date: 5-25-2000

☐ Felony
☑ Misdemeanor
☐ Traffic
☐ Juvenile
☐ Civil

CIRCUIT/COUNTY COURT
PINELLAS COUNTY, FLORIDA

CASE NO. 99-32857MMAWD

State of Florida

vs.

Minton, Robert 0207072

Cuteg BOX # 11

DRGS BOX #

SHELF #

SECTION #

☐ STATE/COUNTY ☑ DEFENDANT ☐ COURT ☐ PLAINTIFF

LIST OF EXHIBITS

FOR: Jury Trial

DATE	EXH. NO.	IDEN.	EVID.	DESCRIPTION
5-22-00	1A	✓	✓	Black & White photograph picture Copy of front of Vehicle.
5-22-00	1B	✓	✓	Copy of Black & White photograph picture of a Brake license plate # DK6124
5-22-00	1C	✓	✓	Copy of Black & white photograph picture of a Woman with long Black curly hair.
5-23-00	2A	✓		Photocopy of Frank Oliver Id - Expires 14/7/91 on 8½"x
5-23-00	2B	✓		Photocopy of Temporary Access Card #20317 on 8½"x11
5-23-00	2C	✓		Photocopy of front of International Association of Scientologists Card on
5-23-00	2D	✓		Photocopy of back of International Association of Scientologists Card
5-23-00	2E	✓		Photocopy of Frank Oliver Staff Award Card #23707-047-0003-8849 8½ on 8½x11"
5-23-00	2F	✓		Photocopy of Frank Oliver's Signature on back of Card on

FILED
00 MAY 22 PM 5:45
KAREN E. DeBLAKER
Pinellas County

ON MAY 23 PM 3:42
FILED
CRIMINAL JUSTICE CENTER

Exhibits Verified by **KARLEEN F. De BLAKER**
Clerk of the Circuit Court

By: Shannon Moore
Deputy Clerk

Date: 5-22-00

By: Teressa M Croft
Evidence Person

Date: 5-25-2000

☐ Felony
☒ Misdemeanor
☐ Traffic
☐ Juvenile
☐ Civil

CIRCUIT/COUNTY COURT
PINELLAS COUNTY, FLORIDA

CASE NO. 99-32857MMANO

State of Florida

VS.

Robert Minton #02077072

Cnty BOX # 11

DRGS BOX #

SHELF #

SECTION #

☐ STATE/COUNTY ☒ DEFENDANT ☐ COURT ☐ PLAINTIFF

LIST OF EXHIBITS

FOR: Jury Trial

DATE	EXH. NO.	IDEN.	EVID.	DESCRIPTION
5-23-00	Composite 3.	✓		12-8½" X 11" pages of Awards for Frank Oliver from the Church of Scientology. - Dated: 8/21/1987 - 9/1/1987 - 10/24/1987 - 6/8/88 - 7/28/88 - 12/19/88 - 8/23/88 - 10/25/88 - 11/1/88 - 3/12/89 - 8/10/89 - 4/18/91 - Photocop.
5-23-00	4.	✓		4-Pages Photo Copied "The Scientologist - a manual on the Dissemination of Material" by L. Ron Hubbard. Numbered 6, 7,
5-23-00	5.	✓	✓	1-Page photocopy "Penalties for Lower Conditions" copyright 1967 by L. Ron Hubbard.
5-23-00	6.	✓	✓	1-Page photocopy "Cancellation of Fair Game" copyright 1968 by L. Ron Hubbard.
5-23-00	7	✓		2-Pages Photocopy of "attacks on Scientology"
5-23-00	8	✓		3-Pages Photocopy of Critics of Scientology numbered 782, 783 & 784

Exhibits Verified by **KARLEEN F. De BLAKER**
Clerk of the Circuit Court

By: _____ Deputy Clerk

Date: 5-23-00

By: Teressa M Croft Evidence Person

Date: 5-25-2000

CT/CO CR 28A (Rev. 6/98)

WD2/CirCriminal/D9/CtCoCr28 8/17/98

☐ Felony
☒ Misdemeanor
☐ Traffic
☐ Juvenile
☐ Civil

CIRCUIT/COUNTY COURT
PINELLAS COUNTY, FLORIDA

CASE NO. 99-32857 MMANO

State of Florida

VS.

Robert Minton #02077072

Orig BOX # 11

DRGS BOX #

SHELF #

SECTION #

☐ STATE/COUNTY ☒ DEFENDANT ☐ COURT ☐ PLAINTIFF

LIST OF EXHIBITS

FOR: Jury Trial

DATE	EXH. NO.	IDEN.	EVID.	DESCRIPTION
5-23-00	9.	✓	✓	1 page photocopy Page 883 from Suppressive Acts on 8½" x 11"
5-23-00	10.	✓	✓	1 Sony VHS Videotape of "Boston Incident" - September 10, 1998
5-23-00	11.	✓	✓	1 Colored photograph of ① defendant holding video camera and ② white male in striped shirt - rear view
5-23-00	12.	✓	✓	1 Colored photograph of ① defendant - close up side view ② white male holding camera
5-23-00	13.	✓	✓	1 colored photograph of front view of white male holding a video camera.

Exhibits Verified by **KARLEEN F. De BLAKER**
Clerk of the Circuit Court

By: _____ Deputy Clerk

Date: 5-23-00

FILED
ON MAY 23 PM 3:42
CRIMINAL JUSTICE CENTER

By: Teresa M Croft Evidence Person

Date: 5-25-2000

IN THE CIRCUIT/COUNTY COURT, PINELLAS COUNTY, FLORIDA
_____DIVISION

CASE NO. 99-32857MMANO

State of Florida

vs.

Robert S. Meriton

RECEIPT

☐ I have received from KARLEEN F. DE BLAKER, Clerk of the Circuit Court, the following exhibits which were moved into evidence on_____, in accordance with Order of Court dated_____signed by the Honorable _____in the above captioned case.

☒ I have received from KARLEEN F. DE BLAKER, Clerk of the Circuit Court, the following exhibits, which were marked for identification on 5/22/00 & 5/23/00 but which were not moved into evidence and did not require an Order of Court.
Def. Exhibit #3, 4, 7, 8, 2A, 2B, 2C, 2D, 2E and 2F)

KARLEEN F. DE BLAKER
CLERK OF THE CIRCUIT COURT

Recipient's Signature

Deputy Clerk Signature

5/23/00
Date

FILED
CRIMINAL JUSTICE CENTER
00 MAY 25 PM 5

☐ I have received from_____the following exhibits.

KARLEEN F. DE BLAKER
CLERK OF THE CIRCUIT COURT

Date

Deputy Clerk Signature

(Receipt-4/11/95)

VICTIM/WITNESS
ADULT

OENA - CRIMINAL

CIRCUIT/COUNTY COURT, PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

ROBERT S. MINTON

SPN: 02077072

CASE NO. CTC9932857MMANO-E

OFFENSE NO. CW99-29775

SUBPOENA TO APPEAR FOR TRIAL

THE STATE OF FLORIDA, TO ALL AND SINGULAR THE SHERIFFS, STATE ATTORNEY INVESTIGATORS, AND AGENTS OF THE FLORIDA DEPARTMENT OF CRIMINAL LAW ENFORCEMENT.

YOU ARE HEREBY COMMANDED TO SUBPOENA:

STACY BROOKS

SERVED
LH PERSON
5 22 00
Month Day Year
Time 0830 AM PM
By
State Attorney Investigator

UPON RECEIPT OF THIS SUBPOENA, YOU ARE REQUIRED TO CALL THE **VICTIM WITNESS MANAGEMENT TEAM AT** 464-6090

to be and appear before the Court, Criminal Justice Center, 14250 49th St., Clearwater, FL, on MONDAY, MAY 22, 2000 at 8:00 A.M.
ROOM 1000

to testify in the above-styled cause. APPROPRIATE ATTIRE REQUIRED.

NOTE: You are subpoenaed to appear by BERNIE McCABE, STATE ATTORNEY, and unless excused from this subpoena by this attorney or the Court, you shall respond to this subpoena as directed. If you fail to appear, you may be held in contempt of Court.

FILED
CRIMINAL JUSTICE CENTER
COUNTY 23 AM 8:00
KARLEEN F. De BLAKER
CLERK CIRCUIT COURT

WITNESS, KARLEEN F. De BLAKER, as Clerk of the Circuit Court, and the seal of said Court, at the Courthouse, Clearwater, Florida.

05-22-00 BT/jw

Date

KARLEEN F. De BLAKER
Clerk of the Circuit Court

BY: Carla J. Farris D
Deputy Clerk

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you to the provision of certain assistance. Within two (2) working days of your receipt of this subpoena please contact the Office of Human Rights, 400 S. Ft. Harrison Ave., Ste. 300, Clearwater, FL 33756. (727) 464-4062 (V/TDD).

IN THE COUNTY COURT FOR PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA	:	CRIMINAL DIVISION E
v.	:	CASE NO. CTC 99-32857-MMANO BATTERY
ROBERT S. MINTON, JR. SPN 02077072	:	

PRAECIPE FOR WITNESS SUBPOENA AT TRIAL

The Clerk of the above styled Court will please issue a Witness Subpoena to

John Lenz, 205 Dolphin Point Drive, Clearwater

personally to be and appear before one of the Judges of our said Court, at Courtroom 15 , 14250 49th Street North. Clearwater, Florida, on May 23, 2000, at 8 :30 a.m. to testify in the above-styled cause. If you fail to appear, you may be in contempt of Court.

You are subpoenaed to appear by Denis M. de Vlaming, Esq., and unless excused from this subpoena by this attorney or the Court, you shall respond to this subpoena as directed.

5/22/00
DATE

Attorney
for Denis DeVlaming

Denis M. de Vlaming, Esq.
1101 Turner Street
Clearwater, FL 33756
(727) 461-0525

MM0145

COUNT COURT, PINELLAS COUNTY, FLORIDA (2)
CRIMINAL DIVISION

14

CRIMINAL DIV: E
STATE OF FLORIDA
VS
ROBERT S MINTON

SPN NUM	CASE NUMBER	LAB NO	EVD NO	OFFENSE NO
02077072	99-32857-MM			CW99029775

FILED
CRIMINAL JUSTICE CENTER
00 MAY 23 AM 11:51
Karleen F. DeBlaker
Karleen F. DeBlaker
Clerk Circuit Court

WITNESS SUBPOENA FOR TRIAL
***** PLEASE BRING THIS SUBPOENA WITH YOU *****

THE STATE OF FLORIDA TO ALL AND SINGULAR THE SHERIFFS, STATE ATTORNEY INVESTIGATORS, AND AGENTS OF THE FLORIDA DEPARTMENT OF CRIMINAL LAW ENFORCEMENT OF SAID STATE:

YOU ARE HEREBY COMMANDED TO SUBPOENA

KEN L KRAMER — 15 TURNER ST APT 1
08:00 A.M. MONDAY, MAY 22, 2000 — RESIDENTIAL CLEARWATER FL 33755

SERVED
Pinellas
Co. Sheriff's office Civil Div
4-26-00
Month Day Year
Time 12 AM PM
By

PERSONALLY TO BE AND APPEAR BEFORE ONE OF THE JUDGES OF OUR SAID COURT, AT STATE ATTORNEY ROOM 1000, CRIMINAL JUSTICE CENTER, 14250 49TH STREET NORTH, CLEARWATER, FLORIDA, ON MONDAY, MAY 22, 2000 TO TESTIFY IN THE ABOVE STYLED CAUSE. IF YOU FAIL TO APPEAR, YOU MAY BE IN CONTEMPT OF COURT.

YOU ARE SUBPOENAED TO APPEAR BY THE STATE OF FLORIDA AND UNLESS EXCUSED FROM THIS SUBPOENA BY THIS ATTORNEY OF THE COURT, YOU SHALL RESPOND TO THIS SUBPOENA AS DIRECTED.

*** APPROPRIATE ATTIRE REQUIRED ***

** UPON RECEIPT OF THIS SUBPOENA YOU ARE REQUIRED TO CALL THE VICTIM/WITNESS MANAGEMENT TEAM AT 464-6300 **

WITNESS, KARLEEN F DE BLAKER, AS THE CLERK OF THE CIRCUIT COURT, AND THE SEAL OF SAID COURT, AT THE COURTHOUSE AT CLEARWATER, FLORIDA.

BERNIE McCABE
STATE ATTORNEY
PD: NAME NOT AVAILABLE
SAX: JEANNE RUPE WHITEFIELD

APRIL 18, 2000

Karleen F. DeBlaker
KARLEEN F. De BLAKER
CLERK OF THE CIRCUIT COURT

IF YOU ARE A PERSON WITH A DISABILITY WHO NEEDS ANY ACCOMMODATION IN ORDER TO PARTICIPATE IN THIS PROCEEDING, YOU ARE ENTITLED, AT NO COST TO YOU, TO THE PROVISION OF CERTAIN ASSISTANCE. WITHIN TWO (2) WORKING DAYS OF YOUR RECEIPT OF THIS SUBPOENA FOR TRIAL, PLEASE CONTACT THE HUMAN RIGHTS OFFICE, 400 S. FT. HARRISON AVE., STE. 300, CLEARWATER FL 33756, (727) 464-4062 (V/TDD).

CIRCUIT COURT SEAL PINELLAS COUNTY, FLORIDA

CF18-2

MM0144

COUNT COURT, PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION

15

CRIMINAL DIV: E
STATE OF FLORIDA
VS
ROBERT S MINTON

SPN NUM	CASE NUMBER	LAB NO	EVD NO	OFFENSE NO
02077072	99-32857-MM			CW99029775

FILED
CRIMINAL JUSTICE CENTER
00 MAY 23 AM 11:51
Karleen F. DeBlaker
Karleen F. DeBlaker
Clerk Circuit & County Court

PLEASE CHANGE COMPUTER

PLEASE CHANGE COMPUTER

WITNESS SUBPOENA FOR TRIAL
***** PLEASE BRING THIS SUBPOENA WITH YOU *****

THE STATE OF FLORIDA TO ALL AND SINGULAR THE SHERIFFS, STATE ATTORNEY INVESTIGATORS, AND AGENTS OF THE FLORIDA DEPARTMENT OF CRIMINAL LAW ENFORCEMENT OF SAID STATE:

YOU ARE HEREBY COMMANDED TO SUBPOENA

PHILLIP J DELLER — 551 SATURN AVE N

08:00 A.M. MONDAY, MAY 22, 2000 — RESIDENTIAL CLEARWATER FL 33755

P&E: Church of Scientology
210 S. Ft. Harrison
Clearwater

SERVED
Hand @ P&E
4-25-a
Month Day 6 Year
Time PM
Deputy Sheriff

PERSONALLY TO BE AND APPEAR BEFORE ONE OF THE JUDGES OF OUR SAID COURT AT THE STATE ATTORNEY ROOM 1000, CRIMINAL JUSTICE CENTER, 14250 49TH STREET NORTH, CLEARWATER, FLORIDA, ON MONDAY, MAY 22, 2000 TO TESTIFY IN THE ABOVE STYLED CAUSE. IF YOU FAIL TO APPEAR, YOU MAY BE IN CONTEMPT OF COURT.

YOU ARE SUBPOENAED TO APPEAR BY THE STATE OF FLORIDA AND UNLESS EXCUSED FROM THIS SUBPOENA BY THIS ATTORNEY OF THE COURT, YOU SHALL RESPOND TO THIS SUBPOENA AS DIRECTED.

*** APPROPRIATE ATTIRE REQUIRED ***

** UPON RECEIPT OF THIS SUBPOENA YOU ARE REQUIRED TO CALL THE VICTIM/WITNESS MANAGEMENT TEAM AT 464-6300 **

WITNESS, KARLEEN F DE BLAKER, AS THE CLERK OF THE CIRCUIT COURT, AND THE SEAL OF SAID COURT, AT THE COURTHOUSE AT CLEARWATER, FLORIDA.

BERNIE McCABE
STATE ATTORNEY
PD: NAME NOT AVAILABLE
SAX: JEANNE RUPE WHITEFIELD

APRIL 18, 2000

Karleen F. DeBlaker
KARLEEN F. De BLAKER
CLERK OF THE CIRCUIT COURT

IF YOU ARE A PERSON WITH A DISABILITY WHO NEEDS ANY ACCOMMODATION IN ORDER TO PARTICIPATE IN THIS PROCEEDING, YOU ARE ENTITLED, AT NO COST TO YOU, TO THE PROVISION OF CERTAIN ASSISTANCE. WITHIN TWO (2) WORKING DAYS OF YOUR RECEIPT OF THIS SUBPOENA FOR TRIAL, PLEASE CONTACT THE HUMAN RIGHTS OFFICE, 400 S. FT. HARRISON AVE., STE. 300, CLEARWATER FL 33756, (727) 464-4062 (V/TDD).

CIRCUIT COURT SEAL PINELLAS COUNTY FLORIDA

CF18-2

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT, IN AND
FOR PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA,

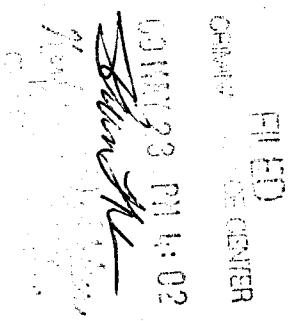
Plaintiff,

v.

CASE NO. 99-32857MMANO

ROBERT S. MINTON,
SPN 02077072

Defendant.
_____/



JURY INSTRUCTIONS

INTRODUCTION TO FINAL INSTRUCTIONS

Members of the jury, I thank you for your attention during this trial. Please pay attention to the instructions I am about to give you.

STATEMENT OF CHARGE

ROBERT S. MINTON, the defendant in this case, has been accused of the crime of BATTERY.

BATTERY
F.S. 784.03

Before you can find the defendant guilty of Battery, the State must prove the following element beyond a reasonable doubt:

Robert S. Minton intentionally touched or struck Richard W. Howd against his will.

JUSTIFIABLE USE OF NONDEADLY FORCE

An issue in this case is whether the defendant acted in self-defense. It is a defense to the offense with which the Defendant is charged if the injury to the victim resulted from the justifiable use of force not likely to cause death or great bodily harm.

The Defendant would be justified in using force not likely to cause death or great bodily harm against the victim if the following two facts are proved:

1. The Defendant must have reasonably believed that such conduct was necessary to defend himself against the victim's imminent use of unlawful force against defendant.

2. The use of unlawful force by victim must have appeared to defendant ready to take place.

In deciding whether the defendant was justified in the use of force not likely to cause death or great bodily harm, you must judge him by the circumstances by which he was surrounded at the time the force was used. The danger facing the defendant need not have been actual; however, to justify the use of force not likely to cause death or great bodily harm, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, the defendant must have actually believed that the danger was real.

If you find that victim had a reputation of being a violent and dangerous person and that his reputation was known to the defendant, you may consider this fact in determining whether the actions of the defendant were those of a reasonable person in dealing with an individual of that reputation.

In considering the issue of self-defense, you may take into account the relative physical abilities and capacities of the defendant and victim.

If in your consideration of the issue of self-defense you have a reasonable doubt on the question of whether or not the defendant was justified in the use of force not likely to cause death or great bodily harm, you should find the defendant not guilty.

However, if from the evidence you are convinced that the defendant was not justified in the use of force not likely to cause death or great bodily harm, then you should find him guilty if all the elements of the charge have been proved.

PLEA OF NOT GUILTY; REASONABLE DOUBT; AND BURDEN OF PROOF

The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the information through each stage of the trial unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome the defendant's presumption of innocence the State has the burden of proving the following: The crime with which the defendant is charged was committed and the defendant is the person who committed the crime.

The defendant is not required to present evidence or prove anything.

Whenever the words "reasonable doubt" are used you must consider the following:

A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.

It is to the evidence introduced in this trial, and to it alone, that you are to look for that proof.

A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence or the lack of evidence.

If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.

WEIGHING THE EVIDENCE

It is up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?

2. Did the witness seem to have an accurate memory?

3. Was the witness honest and straightforward in answering the attorneys' questions?

4. Did the witness have some interest in how the case should be decided?

5. Does the witness' testimony agree with the other testimony and other evidence in the case?

6. Has the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?

7. Had any pressure or threat been used against the witness that affected the truth of the witness' testimony?

You may rely upon your own conclusion about the witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

DEFENDANT TESTIFYING

The defendant in this case has become a witness. You should apply the same rules to consideration of the defendant's testimony that you apply to the testimony of the other witnesses.

RULES FOR DELIBERATION

These are some general rules that apply to your discussion. You must follow these rules in order to return a lawful verdict:

1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.

2. This case must be decided only upon the evidence that you have heard from the testimony of the witnesses [and have seen in the form of the exhibits in evidence] and these instructions.

3. This case must not be decided for or against anyone because you feel sorry for anyone, or are angry at anyone.

4. Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case.

5. Your duty is to determine if the defendant has been proven guilty or not, in accord with the law. It is the judge's job to determine a proper sentence if the defendant is guilty.

6. Whatever verdict you render must be unanimous, that is, each juror must agree to the same verdict.

7. It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about his or her testimony.

8. Your verdict should not be influenced by feelings of prejudice, bias or sympathy. Your verdict must be based on the evidence, and on the law contained in these instructions.

CAUTIONARY INSTRUCTION

Deciding a verdict is exclusively your job. I cannot participate in that decision in any way. Please disregard anything I may have said or done that made you think I preferred one verdict over another.

SUBMITTING CASE TO JURY

In just a few moments you will be taken to the jury room by the court deputy. The first thing you should do is elect a foreperson. The foreperson presides over your deliberations like a chairperson of a meeting. It is the foreperson's job to sign and date the verdict form when all of you have agreed on a verdict in this case. The foreperson will bring the verdict back to the courtroom when you return.

Your verdict finding the defendant either guilty or not guilty must be unanimous. The verdict must be the verdict of each juror, as well as of the jury as a whole.

In closing, let me remind you that it is important that you follow the law spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For two centuries we have agreed to a constitution and to live by the law. No one of us has the right to violate rules we all share.

CIRCUIT/COUNTY COURT, PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO. CTC 99-32857MMANO

STATE OF FLORIDA
vs
ROBERT S MINTON

BATTERY

We, the Jury, find, as follows, as to the defendant in this case: (check only one)

( ) A. The defendant is guilty of Battery, as charged.

(X) B. The defendant is not guilty.

SO SAY WE ALL.

FILED
CRIMINAL DIVISION CENTER
00 MAY 23 PM 3:39
Kenneth F. DeBaker
Clerk Circuit/County Court

Tina Pellegrino
FOREPERSON OF JURY

TINA PELLEGRINO
PRINT NAME OF FOREPERSON OF JURY

5-23-00
DATE

(BAT.ver)

MM0150

COUNT COURT, PINELLAS COUNTY, FL IDA
CRIMINAL DIVISION

15

CRIMINAL DIV: E
STATE OF FLORIDA
VS
ROBERT S MINTON

SPN NUM	CASE NUMBER	LAB NO	EVD NO	OFFENSE NO
02077072	99-32857-MM			CW99029775

WITNESS SUBPOENA FOR TRIAL
***** PLEASE BRING THIS SUBPOENA WITH YOU *****

THE STATE OF FLORIDA TO ALL AND SINGULAR THE SHERIFFS, STATE ATTORNEY INVESTIGATORS, AND AGENTS OF THE FLORIDA DEPARTMENT OF CRIMINAL LAW ENFORCEMENT OF SAID STATE:

YOU ARE HEREBY COMMANDED TO SUBPOENA

RICHARD W HOWD — 551 N SATURN AVE #L3
08:00 A.M. MONDAY, MAY 22, 2000 — RESIDENTIAL CLEARWATER — FL 33755

PoE - Church of Scientology
210 S. Ft. Harrison
Clearwater

SERVED
Richard@PoE
4-25-a
Month Da 25 Year
Time PM
Ever S. Sheriff
Pinellas County, Florida

PERSONALLY TO BE AND APPEAR BEFORE ONE OF THE JUDGES OF OUR SAID COURT, AT STATE ATTORNEY ROOM 1000, CRIMINAL JUSTICE CENTER, 14250 49TH STREET NORTH, CLEARWATER, FLORIDA, ON MONDAY, MAY 22, 2000 TO TESTIFY IN THE CF ABOVE STYLED CAUSE. IF YOU FAIL TO APPEAR, YOU MAY BE IN CONTEMPT OF COURT.

YOU ARE SUBPOENAED TO APPEAR BY THE STATE OF FLORIDA AND UNLESS EXCUSED FROM THIS SUBPOENA BY THIS ATTORNEY OF THE COURT, YOU SHALL RESPOND TO THIS SUBPOENA AS DIRECTED.

*** APPROPRIATE ATTIRE REQUIRED ***

** UPON RECEIPT OF THIS SUBPOENA YOU ARE REQUIRED TO CALL THE VICTIM/WITNESS MANAGEMENT TEAM AT 464-6300 **

WITNESS, KARLEEN F DE BLAKER, AS THE CLERK OF THE CIRCUIT COURT, AND THE SEAL OF SAID COURT, AT THE COURTHOUSE AT CLEARWATER, FLORIDA.

BERNIE McCABE
STATE ATTORNEY
PD: NAME NOT AVAILABLE
SAX: JEANNE RUPE WHITEFIELD

APRIL 18, 2000

Karleen F. DeBlaker
KARLEEN F. De BLAKER
CLERK OF THE CIRCUIT COURT

IF YOU ARE A PERSON WITH A DISABILITY WHO NEEDS ANY ACCOMMODATION IN ORDER TO PARTICIPATE IN THIS PROCEEDING, YOU ARE ENTITLED, AT NO COST TO YOU, TO THE PROVISION OF CERTAIN ASSISTANCE. WITHIN TWO (2) WORKING DAYS OF YOUR RECEIPT OF THIS SUBPOENA FOR TRIAL, PLEASE CONTACT THE HUMAN RIGHTS OFFICE, 400 S. FT. HARRISON AVE., STE. 300, CLEARWATER FL 33756, (727) 464-4062 (V/TDD).

CIRCUIT COURT PINELLAS COUNTY, FLORIDA

CF18-2

MM0146

COUNTY COURT, PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION

15

CRIMINAL DIV: E
STATE OF FLORIDA
VS
ROBERT S MINTON

SPN NUM	CASE NUMBER	LAB NO	EVD NO	OFFENSE NO
02077072	99-32857-MM			CW99029775

WITNESS SUBPOENA FOR TRIAL
***** PLEASE BRING THIS SUBPOENA WITH YOU *****

THE STATE OF FLORIDA TO ALL AND SINGULAR THE SHERIFFS, STATE ATTORNEY INVESTIGATORS, AND AGENTS OF THE FLORIDA DEPARTMENT OF CRIMINAL LAW ENFORCEMENT OF SAID STATE:

YOU ARE HEREBY COMMANDED TO SUBPOENA

JESSICA BYRNES — 500 OSCEOLA AVE N #602
08:00 A.M. MONDAY, MAY 22, 2000 — RESIDENTIAL CLEARWATER — FL 33755

Came to hand on the 17 day of April, 00, and the same is herewith returned, not served, as to the within named Byrnes unable to contact who after diligent search and inquiry could not be located within the limits of Pinellas County, Florida.

EVERETT S. RICE, SHERIFF
Pinellas County, Florida
By Deputy Sheriff

Postage 5-16-00 805 pm AEO

PERSONALLY TO BE AND APPEAR BEFORE ONE ~~OF THE JUDGES OF OUR SAID COURT~~, AT STATE ATTORNEY ROOM 1000, CRIMINAL JUSTICE CENTER, 14250 49TH STREET NORTH, CLEARWATER, FLORIDA, ON MONDAY, MAY 22, 2000 TO TESTIFY IN THE ABOVE STYLED CAUSE. IF YOU FAIL TO APPEAR, YOU MAY BE IN CONTEMPT OF COURT.

YOU ARE SUBPOENAED TO APPEAR BY THE STATE OF FLORIDA AND UNLESS EXCUSED FROM THIS SUBPOENA BY THIS ATTORNEY OF THE COURT, YOU SHALL RESPOND TO THIS SUBPOENA AS DIRECTED.

*** APPROPRIATE ATTIRE REQUIRED ***

** UPON RECEIPT OF THIS SUBPOENA YOU ARE REQUIRED TO CALL THE VICTIM/WITNESS MANAGEMENT TEAM AT 464-6300 **

FILED
2000 MAY 16 PM 3:09
CRIMINAL COURT RECORDS CENTER

WITNESS, KARLEEN F DE BLAKER, AS THE CLERK OF THE CIRCUIT COURT AND THE SEAL OF SAID COURT, AT THE COURTHOUSE AT CLEARWATER, FLORIDA.

BERNIE McCABE
STATE ATTORNEY
PD: NAME NOT AVAILABLE
SAX: JEANNE RUPE WHITEFIELD

APRIL 18, 2000

Karleen F. De Blaker
KARLEEN F. De BLAKER
CLERK OF THE CIRCUIT COURT

IF YOU ARE A PERSON WITH A DISABILITY WHO NEEDS ANY ACCOMMODATION IN ORDER TO PARTICIPATE IN THIS PROCEEDING, YOU ARE ENTITLED, AT NO COST TO YOU, TO THE PROVISION OF CERTAIN ASSISTANCE. WITHIN TWO (2) WORKING DAYS OF YOUR RECEIPT OF THIS SUBPOENA FOR TRIAL, PLEASE CONTACT THE HUMAN RIGHTS OFFICE, 400 S. FT. HARRISON AVE., STE. 300, CLEARWATER FL 33756, (727) 464-4062 (V/TDD).

CF18-2

PRAECIPE FOR WITNESS SUBPOENA - CRIMINAL

CIRCUIT/COUNTY COURT, PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

ROBERT J. MINTON

SPN: 02372072

SUBPOENA TO APPEAR FOR TRIAL

CASE NO. [illegible]

OFFENSE NO. CS99-29725

FILED
CRIMINAL JUSTICE CENTER
00 MAY 22 AM 8:48
Karleen F. DeBlaker
Clerk Circuit/County Court

The Clerk of the above-styled Court will please issue a Witness Subpoena to:

STACY BROOKS

to be and appear before the Court, 464-6000
Criminal Justice Center, 14250 49th St. N.
Clearwater, FL on MONDAY MAY 22, 2000 at [illegible]
ROOM 100C

to testify in the above-styled cause. APPROPRIATE ATTIRE REQUIRED.

NOTE: You are subpoenaed to appear by BERNIE McCABE, STATE ATTORNEY, and unless excused from this subpoena by this attorney or the Court, you shall respond to this subpoena as directed. If you fail to appear, you may be held in contempt of Court.

[illegible]

Date

BERNIE McCABE
State Attorney

BY: Jeanne M Whitefield

CT CO CR 104B (Rev. 01/97)

WD/cs/CirCriminal/CTCOCR104(a,B) 9/15/97

WSRT

IN THE COUNTY COURT FOR PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA : CRIMINAL DIVISION E

v. : CASE NO. CTC 99-32857-MMANO
BATTERY

ROBERT S. MINTON, JR.
SPN 02077072 :

WITNESS SUBPOENA AT TRIAL

THE STATE OF FLORIDA TO ALL AND SINGULAR THE SHERIFFS, STATE ATTORNEY INVESTIGATORS, AND AGENTS OF THE FLORIDA DEPARTMENT OF CRIMINAL LAW ENFORCEMENT OF SAID STATE:

YOU ARE HEREBY COMMANDED TO SUBPOENA

RLJ

TIME: 2:05 PM
DATE: 5/22/00
SERVED BY: MP

John Lenz, 205 Dolphin Point Drive, Clearwater, FL

personally to be and appear before one of the Judges of our said Court, at Courtroom 15, 14250 49th Street North, Clearwater, Florida, on May 23, 2000 at 8:30 a.m., to testify in the above-styled cause. If you fail to appear, you may be in contempt of Court.

You are subpoenaed to appear by Denis M. de Vlaming, Esq., and unless excused from this subpoena by this attorney or the Court, you shall respond to this subpoena as directed.

WITNESS, KARLEEN F. De BLAKER, as Clerk of the Circuit Court, and the seal of said Court, at the Courthouse at Clearwater, Florida.

May 22, 2000
DATE

KARLEEN F. De BLAKER
Clerk of the Circuit Court

By: Sally Masters
Deputy Clerk

(SEAL)

Denis M. de Vlaming, Esq.
1101 Turner Street
Clearwater, FL 33756
(727) 461-0525

54.00 P

DENIS DEVLAMING

IN THE COUNTY COURT, PINELLAS COUNTY, FLORIDA
CASE# CTC99-32857-MMANO

AFFIDAVIT OF SERVICE, STATE OF FLORIDA

STATE OF FLORIDA Plaintiff(s)

vs

ROBERT S. MINTON, JR.; SPN 02077072 Defendant(s)

Before me, the undersigned authority, personally appeared, JOHN PETER PAPPAS, being first duly sworn, deposes and says:

1. Is over the age of 18 years.
2. Is not a party to nor interested in the outcome of the above entitled suit.
3. Received the attached WITNESS_SUBPOENA AT TRIAL FOR MAY 23, 2000 AT 8:30AM directed to JOHN LENZ on 5/22/00 at 1:14:04 PM
4. Affiant personally **served** same upon the above who was then at 205 DOLPHIN POINT DRIVE APT.#8, CLEARWATER FL on 05/22/00 at 02:05 PM

__ Alternate Address _____

5. Affiant is a SPECIAL PROCESS SERVER appointed by _____ to serve NON-ENFORCEABLE PROCESS for the Circuit and County Courts in and for _____ County, Florida

WITNESS FEE PROVIDED: $ 6.08

__ **INDIVIDUAL SERVICE:** By delivering to the within named person a true copy of this process, with the date and hour of service endorsed thereon by me. At the same time, I delivered to the within named person a copy of the complaint, petition, or other initial pleading or paper.
__ Records Custodian: _____

X **SUBSTITUTE SERVICE:** By leaving a true copy of this process, with the date and hour of service endorsed thereon by me, and a copy of the complaint, petition, or other initial pleading or paper, at the within named person's place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents.
NAME MARGARET LENZ RELATIONSHIP SPOUSE

__ **SUBSTITUTE AT P.O.E.** to authorized agent to accept. _____

__ **CORPORATE SERVICE:** By leaving a true copy of this process, with the date and hour of service endorsed there on by me, and a copy of the complaint, petition, or other initial pleading or paper to: Na _____ as Title: _____ of CORPORATE NAME _____ ,per F.S. 48.081(1)(a).
F.S. 48.081(1)(b)(c)&(d) and 2: In the absence of the president, vice president, or other head of the corporation; served cashier, treasurer, secretary, general manager, director, officer or business agent in the state.
F.S. 48.081(3): Served on the agent designated by the corporation under F.S. 48.091; or on any employee at the corporation's place of business.

__ **POSTED SERVICE:** After diligent search and at least 2 attempts have been made, by attaching a copy of this process, together with a copy of the complaint or petition to a conspicuous place on the property within. The above name tenant could not be found and there was no person of the tenant's family over fifteen (15) years of age at _____ COUNTY county, Florida, upon whom service could be made. Two attempts at least six hours apart:
Date _____ Time _____ ; Date _____ Time _____

__ Notice/Letter (Posted on first attempt)

__ **GOVERNMENT AGENCY:** By delivering a true copy of this process, with the date and hour of service endorsed theron by me, and a copy of the complaint, petition, or other initial pleading or paper to: _____ as (title) _____ of the within named to wit: GOVERNMENTAL AGENCY _____, public agencies, service on the president, mayor, chairman or other head thereof, and in his absence, on the vice president, vice mayor, or vice chairman, or in the absence of all of the above, on any member of the governing board, council or commission, as defined in F.S. 48.111.

__ **SERVICE OF PROCESS GENERALLY** By delivering a true copy of this writ together with a copy of the initial pleading, if any, with the date and hour the date and hour of service endorsed thereon by me to _____ spouse of the Defendant, _____ in accordance with the provisions of Chapter 48.031(2)(a), Florida Statutes.

__ **SERVICE OF PROCESS GENERALLY ANY EMPLOYEE** By delivering a true copy of this writ together with a copy of the initial pleading, if any, with the date and hour of service endorsed thereon by me to _____ any employee of the Defendant's business _____ in accordance with the provisions of Chapter 48.031(2)(b), Florida Statutes.

__ **SERVICE ON PARTNERSHIPS & LIMITED PARTNERSHIPS** By delivering a true copy of this writ together with a copy of the initial pleading, if any, with the date and hour of service endorsed thereon by me to _____ designated employee or person in charge of partnershi in accordance with the provisions of Chapter 48.061(1), Florida Statutes.

__ **NON-SERVICE** For the reason that after diligent search and inquiry NAME: _____ could not be found in _____ County, Florida. mo/day/yr _____ Time: _____

__ **MILITARY STATUS:** _____ **MARITAL STATUS:** _____ **TRUE NAME:** _____

__ **OTHER RETURNS:** _____

Signature of Affiant John P Pappas Date 5/22/00

Under penalty of perjury, I declare that I have read the foregoing and that the facts stated in it are true. F.S. 92.525

Robert L. Jones, Inc. Investigative and Subpoena Service
51 South Main Avenue, Suite 316, Clearwater, FL 33765 Paper Number 26165 PMB

CIRCUIT/COUNTY COURT, PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION
CASE NO.: CTC 99-32857MMANO

STATE OF FLORIDA
VS.
ROBERT S MINTON
SPN: 02077072

BATTERY

PAMELA JENKINS
Court Reporter

JURY TRIAL

Comes now each of the respective parties to the foregoing entitled cause into open court, the STATE OF FLORIDA, being represented by William Tyson, and the defendant, ROBERT S MINTON being represented by, Douglas DeVlamming and Kym Rivellini, and it appearing to the Court that the above styled case(s) heretofore been duly and regularly set for trial at this time, and the parties having announced ready; thereupon comes a jury of six good and lawful persons, to wit:

FILED
CRIMINAL JUSTICE CENTER
MAY 25 AM 8:32

1) Deborah Kolba #01047
2) Tina Pellegrino #01154
3) Donald Lovegrove #01244
4) Leroy Joiner #01318
5) Joyce Green #01143
6) Josefine Grover #01011

Alternate: Peter Palmieri #01100,

all of whom were properly selected, duly empaneled and sworn to try the issues herein joined.

Comes now counsel for the defendant into open court at the conclusion of testimony on behalf of the State, and in the absence of the jury, moves the Court to enter a Judgment of Acquittal. After hearing argument of counsel, and the Court being fully advised in the premises, the motion was denied.

Jurors excused for the evening 5:35 PM.
Court to continue May 23, 2000.
Court adjourned.

Dated this 22nd day of May, 2000, in Clearwater, Florida.

Judge

SLA
(JUTRP2-99)

CIRCUIT/COUNTY COURT
CASE NO. CTC 99-32857MMANO

Day TWO

STATE OF FLORIDA
VS.
ROBERT S MINTON
SPN: 02077072

Continued

Comes now each of the respective parties to the foregoing entitled cause into open court, the State of Florida by William Tyson, Assistant State Attorney; and the defendant, ROBERT S MINTON, being present in person and with counsel, Dennis DeVlamming and Kym Rivellini, and the jury heretofore empaneled and sworn to try the issues being present in the jury box, the trial of the cause proceeded with Defense Sworn testimony.

Comes now counsel for the defendant into open court at the conclusion of all the testimony, and in the absence of the jury renews his motion for a Judgment of Acquittal, previously made at the conclusion of testimony on behalf of the State. After hearing argument of counsel, and the Court being fully advised in the premises, the motion was denied.

After hearing all of the testimony, argument of counsel, and the charge of the Court, the Judge discharged the alternate juror, Peter Palmieri, and excused him from further attendance; the jury retired to consider its verdict and later on the same day reported into open court a verdict of not guilty.

Defendant adjudicated not guilty and discharged as to this case.

Jurors excused from further service.

Court adjourned.

DATED this 23rd day of May, 2000, in Clearwater, Florida.

Judge

SLA
(JUTRP2-99)