

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, CRIMINAL DIVISION
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 2017CF008722AMB DIVISION: "X"

STATE OF FLORIDA

vs.

SHEILA KEENWARREN,

Defendant.

**STATE'S RESPONSE TO DEFENDANT'S MOTION TO EXCLUDE
IDENTIFICATION TESTIMONY AND OTHER EVIDENCE RELATED
TO THE SPOTLIGHT CLOWN COSTUME**

COMES NOW, Dave Aronberg on behalf of the State of Florida, by and through the undersigned Assistant State Attorney, Reid Scott, and files this State's Response to Defendant's Motion to Exclude Identification Testimony and Other Evidence Related to the Spotlight Clown Costume and asks this Honorable Court to **DENY** the Defendant's Motion because the eyewitnesses to the crime will testify that the killer of Marlene Warren was wearing a clown costume; the two primary witnesses from the Spotlight Capezio were witnesses to the "event" of the purchase of the clown costume and can therefore testify to the identity of the purchaser; the identification procedure employed was not unnecessarily suggestive and did not give rise to a likelihood of misidentification; and the probative value of the identification greatly outweighs any danger of possible prejudicial effect. The Court should permit

the testimony of both [REDACTED] the trial State of Florida v. Sheila Keen Warren and in support would state the following:

I. STATEMENT OF THE CASE

At approximately 10:45 AM on Saturday May 26th, 1990 Sheila Keen (“Defendant”) walked up to the front door of 15470 Take-Off Place in Wellington, Florida dressed as a clown carrying a red and white flower arrangement, two balloons, and a handgun. The Defendant knocked on the door; Mrs. Marlene Warren (“Victim”) opened the front door and was handed the flowers and the balloons by the Defendant. Witnesses in the home stated that they observed the clown hand the flowers and the balloons to Warren, and then they heard gun shots. After shooting the Victim, witnesses observed the clown walk calmly back to a late model white, full-top, Chrysler LeBaron parked in the driveway and flee the scene. Law enforcement and emergency medical professionals responded and found the Victim just inside the front door of her home. She died two days later at Palms West Hospital from a gunshot wound to the head.

At the time of her murder, Marlene Warren was married to Michael Warren and together they owned multiple residential properties and a car dealership/rental company titled “A Bargain Motors.”¹ A repossession agent named Sheila Keen (“Defendant”) also worked for “A Bargain Motors.” The Defendant was also a very

¹ State’s Exhibit “A”: Yellow Paper Ad “A Bargain Motors”

close “friend” of Michael by her own admission.² At the time, Keen was a taller, thin, white female with long brown hair and was described to have masculine features. Several witnesses who were associates of the victim’s husband Michael Warren provided statements that he was having an extramarital affair with the Defendant. The Defendant herself acknowledged the rumors and allegations that they were intimately involved, however stated that they were just “good friends.”³ Further, witnesses described seeing the two kiss, hug and possibly engage in sexual activities. Warren and Keen married in 2002, and from 1993 to 2016 owned a restaurant in Tennessee named “The Purple Cow.” During her time living in Abington, Virginia, the Defendant went by the alias name of “Debbie.” Friends and neighbors in the area did not know her by her real name of “Sheila.” The Defendant’s husband, Michael, is himself a convicted felon for charges relating to fraud and is also a private pilot.

Detectives interviewed several witnesses who were inside of the home at the time of the murder. All describe the shooter to be dressed in a clown costume, wearing an orange or red wig, red nose, and a white face. Although the specifics of the color scheme of the costume vary from witness to witness, all of the four witnesses inside the home stated that the shooter donned a clown costume.⁴ Inside

² State’s Exhibit “B”: State. Sheila Keen: May 27, 1990 p. 13 ln 2-12.

³ State’s Exhibit “B”: State. Sheila Keen: May 27, 1990 p. 12 ln. 3 – p. 13 ln. 10

⁴ Joseph Ahrens, the son of the Victim, initially recalled that the clown was wearing a grey suit with black lace up boots.

of the home, detectives located a flower arrangement composed of red carnations and white mums as well as two Mylar balloons. One of the balloons was heart shaped and read “You’re the Greatest”, and the other displayed an image of Snow White and the Seven Dwarves.

1. Descriptions of the Witnesses Inside the Warren Home

Warren’s [REDACTED] stated that he recalled the clown wearing an orange wig, grey clown costume, red nose, red lips, and black lace up boots.⁵ [REDACTED] described the clown as having brown eyes, being skinny, and not being able to see any part of the clown’s body due to the costume.⁶ After watching the Defendant kill the Victim, [REDACTED] observed the Defendant walk calmly out to a late model, all white Chrysler LeBaron, with no license tag and drive away from the scene.⁷

Detectives also spoke with several friends that were present at the Warren home during the murder. [REDACTED] was present and stated that just prior to the murder, a white car pulled up to the house. On May 26, 1990, she told the detectives that the white car was a new two-door Chrysler LeBaron with a white top.⁸ She described that a person dressed in a clown suit carrying flowers and a

⁵ State’s Exhibit “C”: State. J. [REDACTED] May 26, 1990 p. 9 ln. 23 - p. 12 ln. 21

⁶ State’s Exhibit “C”: State. [REDACTED] : May 26, 1990 p. 6 ln. 19 – p. 7 ln. 8

⁷ State’s Exhibit “C”: State. [REDACTED] May 26, 1990 p. 4 ln. 2 – p. 5 ln. 9

⁸ State’s Exhibit “D”: State. [REDACTED] May 26, 1990 p. 6 ln. 10-19

bunch of balloons approached the front door of the home. She described the clown as being like a regular person, skinny and flat.⁹ [REDACTED] described the costume as having “bright colors.”¹⁰ In a statement approximately a year later, [REDACTED] again reiterated that the clown was dressed in “bright colors,” and being flat without breasts.¹¹ She stated that a wig identical to the one worn by the clown, purchased from Spotlight, looked similar to what the clown wore.¹² [REDACTED] also reiterated that the LeBaron was a newer model full top white LeBaron with a thin red pin stripe down the sidewall.¹³

Detectives also spoke with [REDACTED] of [REDACTED] who was also present at the Warren home at the time of the murder. Wendel also described the car driven by the clown as being a “brand new,” two-door, white LeBaron.¹⁴ Wendel also described the clown wearing a colorful costume, with a red nose and red wig.¹⁵ Like the other witnesses Pratt stated that the clown’s face was covered with paint and a clown nose, concealing the person’s identity.

[REDACTED] made similar observations as the other members in the

⁹ State’s Exhibit “D”: State. [REDACTED] May 26, 1990 p. 4 ln. 2-11

¹⁰ State’s Exhibit “D”: State. [REDACTED] May 26, 1990 p. 7 ln. 2-6

¹¹ State’s Exhibit “E”: State. [REDACTED] June 27, 1991 p. 13 ln. 21-22; p. 17 ln. 15-20; p. 19 ln. 6-7

¹² State’s Exhibit “E”: State. [REDACTED] June 27, 1991 p. 25 ln. 1 – p. 26 ln. 1.

¹³ State’s Exhibit “E”: State. [REDACTED] June 27, 1991 p. 19 ln. 25 – p. 21 ln. 3.

¹⁴ State’s Exhibit “F”: State. [REDACTED] May 26, 1990 p. 6 ln. 4 – p. 7 ln. 2.

¹⁵ State’s Exhibit “F”: State. [REDACTED] May 26, 1990 p. 5 ln. 1-12.

house at the time of the murder. ██████ stated she observed the Victim answer the door to a person standing in the doorway covered in a clown outfit from “head to toe.”¹⁶ ██████ said she believed the clown’s face was painted and that it was wearing a red wig.¹⁷ ██████ said that she couldn’t recall specifics about the design of the clown costume, but that it was “multiple colors.”¹⁸

So, while the specific description of the clown costume, color scheme, and design varied widely from witness to witness, all were consistent in that the shooter wore a clown costume, a clown wig, had a white face make-up or mask that completely concealed her identity, and drove a white Chrysler LeBaron. The four interviewed witness from inside the Warren home were the only people there, aside from the Victim, so no other accounts of the shooting, shooter and costume exist. Further, the Warren home was not equipped with surveillance video so there is no recorded video of the clown or the shooting.

2. The Testimony of Employees from Spotlight Capezio

¹⁶ State’s Exhibit “G”: State. ██████ May 26, 1990 p.3 ln. 19 – p. 4 ln. 24.

¹⁷ State’s Exhibit “G”: State. ██████ May 26, 1990 p. 8 ln. 20 – p. 9 ln. 2.

¹⁸ State’s Exhibit “G”: State. ██████ May 26, 1990

In an attempt to identify the location where the costume was purchased, detectives conducted a thorough search of all costume shops in the area. One of the most popular costume shops in the area at that time was the Spotlight Capezio ("Spotlight"). The Spotlight was a costumer located at 5612 South Dixie Highway in West Palm Beach. Detectives initially spoke with the manager of the Spotlight, [REDACTED] who told them that two days prior to the murder she was working at the Spotlight with [REDACTED] and Ms. [REDACTED]. All three ladies worked at the Spotlight selling various types of costumes, make-up and dance wear for the community of Palm Beach County.

[REDACTED] stated that two days prior to the murder of Warren, she was working at the Spotlight and received a phone call from a woman who wanted to purchase a clown costume. [REDACTED] stated that this call came in around 5:30 PM and that the store was slated to close around 6:00 PM. [REDACTED] testified in her deposition that the woman stated that she would be right over and seemed to really want to purchase the clown costume that day. [REDACTED] did not stay at the Spotlight, but rather left Rosales and Small to close the shop and possibly assist the woman with the costume purchase if she show up prior to closing.

On May 27 & 28 detectives were able to speak with Rosales and Small separately regarding their interaction with the woman at the Spotlight two days

before the murder. ██████ told detectives that on May 24, 1990 (two days prior to the murder of the Victim) that she was working at the Spotlight with Small. Just as the shop closed for the day (around 6:00 PM), a woman drove up to the Spotlight and stated that she needed something “real quick.” Both ladies stated that the woman was very persistent about entering the store to make a purchase.

██████ permitted her to enter the store.¹⁹ Without any deliberation the woman purchased an orange clown wig and a pink and yellow clown costume.²⁰

██████ said that the woman wanted extra white make-up to “completely cover the face.”²¹ Based on her request, ██████ and Small provided an extra container of white clown face makeup to ensure complete coverage.²² ██████ stated that either she or Small completed the sales receipt for the Defendant.²³ The sales receipt was located the next day by the owner of the Spotlight Barbara Castricone and turned over to Detectives as evidence of the purchase. ██████ described the woman as having long brown hair in a ponytail, thin, and manlike features.²⁴ She also stated that the woman did not appear to be wearing makeup and wore blue jean pants.

¹⁹ State’s Exhibit “H”: State. ██████ : June 19, 1991 p. 11 ln. 11 – p. 12 ln. 17

²⁰ State’s Exhibit “H”: State. ██████ June 19, 1991 p. 17 ln. 20-25

²¹ State’s Exhibit “H”: State. ██████ June 19, 1991 p. 18 ln. 1-18

²² Complete white face coverage with extra makeup would have the appearance of being like a mask being work by the clown.

²³ State’s Exhibit “I”: Sales Receipt: Spotlight Capezio

²⁴ State’s Exhibit “H”: State. ██████ : June 19, 1991 p. 13 ln. 21 – p. 16 ln. 19

On May 27, 1990 (the day after the murder and three days after the purchase event) detectives showed [REDACTED] a photographic array containing the Defendant, and [REDACTED] elected the Defendant as the person who looked most like the woman who she observed at the Spotlight purchasing the clown costume.²⁵ [REDACTED] gave three consistent statements regarding her knowledge of the Defendant purchasing the clown costume and also testified consistently in deposition on July 28, 2020.²⁶

On Monday May 28, 1990 separate and apart from [REDACTED] detectives spoke with Small, who was also working at the Spotlight on May 24, 1990, when the Defendant came in to purchase the clown costume. Small stated that on that afternoon right as the shop was closing, a white female arrived at the costume shop. Small described her as 5'7" to 5'9" with long brown hair, described as "chocolate" in color.²⁷ Small stated the woman was dressed in "mannish" clothes and had a "mannish" gait and that her figure and frame were very masculine.²⁸ Small stated that the Defendant said that a woman would be wearing the costume, but purchased a costume approximately six feet in length. The Defendant also purchased an orange wig, extra white face makeup, and a clown nose. The Defendant did not inquire about nor purchase clown shoes. Detectives prepared a photographic lineup

²⁵ State's Exhibit "J": Photographic Array: Rosales (Composite)

²⁶ State's Exhibit "K": Depo. [REDACTED] Gill p. 8 – p. 48

²⁷ State's Exhibit "L": State. Deborah Small p. 12 ln. 14-17

²⁸ State's Exhibit "L": State. Deborah Small p. 11 ln. 15 – p. 12 ln. 2

containing the same photograph of the Defendant as was used in [REDACTED]' array, as well as the same filler pictures. The Defendant's photograph was placed in a different position in the array and [REDACTED] stated that she had not spoken with [REDACTED] about her array. Detectives showed the photo array containing the Defendant's photograph to [REDACTED] and [REDACTED] immediately selected the Defendant as the person who looked "most like the woman who purchased the clown costume."²⁹ [REDACTED] also stated that another filler photograph looked "somewhat like" the person who purchased the clown costume.

Detectives followed up with further investigation into the Defendant as the possible clown killer, but did not release a photograph for public consumption until November 11, 1990. On that day the Palm Beach Post ran an article entitled "Woman Couldn't be the Killer" accompanied by a picture of the Defendant Sheila Keen.³⁰ This article was not published until nearly six months after both [REDACTED] and [REDACTED] made their photographic identifications of the Defendant who they observed in person purchase the clown costume and accessories.

The following year, on June 19, 1991, both [REDACTED] again gave interviews regarding their observations of the clown costume purchase, in an attempt to help solve the case. Following their separate interviews, the ladies returned to the

²⁹ State's Exhibit "M": Photographic Array [REDACTED]

³⁰ State's Exhibit "N": Palm Beach Post Article: Nov. 11, 1990.

Spotlight with [REDACTED]. On that date, [REDACTED] showed [REDACTED] the article from the Palm Beach Post dated November 11, 1990 depicting the Defendant. [REDACTED] stated that she immediately recognized this person, the Defendant, as the person who purchased the clown costume a year earlier. [REDACTED] stated that the picture in the newspaper article was different and looked more like the person who purchased the clown costume than the picture in the photo array.

[REDACTED] also stated that after examining the newspaper article that she was nearly 100% positive that was the person who purchase the clown costume. Neither [REDACTED] nor Small stated they had previously seen that article.

LEGAL AUTHORITY AND ARGUMENT

- a) The Court should not exclude the identification of the purchaser of the clown costume as the Defendant, as the identifications are relevant and probative to the material issue of identity in the case before the court.**

All relevant evidence is admissible. Fla. Stat. 90.402. Relevant evidence is any evidence that has *any tendency* to prove or disprove a material facts at issue. Fla. Stat. 90.401. The burden of relevancy is a low hurdle to cross. Any nexus linking a piece of evidence or witness testimony to a material fact in a case will be sufficient to establish relevancy for admission. Once admitted, the trier of fact must decide the appropriate weight to be given. A trial court has broad discretion in the determination of relevancy. Silver v. State, 278 So. 3d 337 (Fla. 3d DCA 2019).

The facts in this case would show that four witnesses inside the Victim's home were present during the shooting. All four of the witnesses describe a similar scene, that of a clown that came to the door and shot Marlene Warren. All four witnesses however, describe the color scheme of the clown costume somewhat differently. The descriptions given by the eyewitnesses bear more points of similarity than difference. One would expect there to be some variance in observations between four witnesses to a murder, especially given the unique circumstances of the case at bar. Add to this array of distractions, the balloons were red and white as was the flower arrangement. Simply put, the Defendant was clad in panoply of colors and shapes. When one examines the testimony of the four witnesses critically with the known color scheme of the costume, it is clear that they are all describing the same event.

The Defendant neglects to point to the multiple points of similarity between the observations of the witnesses. All are consistent in that the clown drove in an all-white, late model, Chrysler LeBaron. All are consistent in that the clown wore a clown costume that covered the entire body. All, except for [REDACTED] are consistent in that the clown wore an orange or red colored wig. All are consistent in that the clown brought flowers and balloons to the door and handed them to Warren just prior to shooting her. All are consistent in that the clown didn't say anything to Warren prior to shooting her. All are consistent that the murder took place in a

matter of seconds. All are consistent in that the clown shot and killed Warren in the threshold of the front door.

So, the witness testimony as stated to multiple law enforcement officers over the years established one fact quite clearly. That became the centerpiece of this entire investigation, that the killer was camouflaged in a clown costume. The fact that the witnesses recited the color scheme of the costume is irrelevant. The various color schemes provided by the witnesses does not negate the fact that it was a clown costume. No witness provided a description of a different style of costume. Thus, any purchase of a clown costume in close proximity (in time, location and relationship) is potentially relevant because it could possibly lead to a suspect and to the identity of the killer. It is clear that is the reason why detectives immediately began searching costume shops for anyone that purchased a clown costume. So it is clear that investigations into any clown costume purchases are relevant, particularly when couple with additional circumstances.

b) The identifications made by [REDACTED] and [REDACTED] re admissible pursuant to Florida Statute Section 90.801(2)(c) as prior statements of

identification after perceiving the person pursuant to a plain textual reading of the statutory language.

Pursuant to Florida Statute Section 90.801(1), a “hearsay” statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. “Hearsay” is inadmissible unless there is a specific exception to the general rule. Florida Statute 90.801(2)(c) specifically provides that a statement is not “hearsay” if the declarant testifies at trial or hearing and is subject to cross examination concerning the statement and the statement is, “*one of identification of a person made after perceiving the person.*”³¹ The plain language of the statute does not include any requirement that the perception of the person by the declarant to be made at the time of the crime, but only after perceiving the person.

The Defendant cites to Ibar v. State, 938 So. 2d 451 (Fla. 2006), for her argument that Florida Statute Section 90.801(2)(c) only applies to a situation where the declarant perceives the person identified *at the time of the crime*. The Defendant’s reliance on Ibar for this proposition is misplaced.

1. The plain language of the Statute does not further qualify the parameter of the exception to the hearsay rule beyond what is written.

³¹ It is important to note that there is no additional language in Florida Statute Section 90.801(2)(c). In following the canons of statutory interpretation, courts should interpret statutes as they are written without injecting additional words that were not put there by the legislature.

First, the Court should always default to the plain language of the statute for statutory interpretation. When examining Florida Statute Section 90.801(2)(c) there is no ambiguity in the language. Section 90.801(2)(c) permits a statement of prior identification “*after perceiving the person*” period. There is no additional language in the statute that further qualifies the circumstance under which this perception must occur. Thus, the Court should not read language into the statute that the legislature did not draft. Had the legislature intended the exception to the hearsay rule to be limited to situations where the declarant is a witness to the actual crime, they would have certainly written that into the statute.

2. Prior cases have qualified the language of Section 90.801(2)(c) to include witnesses to the crime or event therefore not limiting the section to only witnesses to the actual crime.

Second, even arguing that Ibar adds qualifying conditions to the statutory language, it is clear from the language of the Florida Supreme Court that the qualification was not intended to limit this exception to the witness or victim of a crime, but as clearly stated in the opinion “or event.” Ibar, 938 So. 2d 460. Thus, even the language of the Court in Ibar provides for a broader qualification than just the witnesses and/or victims to a crime, but also to those who witness an event. This broader qualification makes sense in light of the language used by the legislature in drafting 90.801(2)(c). It is clear that the lack of additional qualification language in the statute was intended not to limit the application of the hearsay exception. It it

logical that the person who identifies one who purchased the murder weapon a week prior to a killing is as important as the witness who actually sees the murder. Interpretations of statutes should treat matters omitted as not covered.³² Further, permissible interpretation that furthers rather than obstructs the statute's purpose should always be favored. When taking these principals into considerations, it is clear that a prior statement of identification under the circumstances outlined should be permitted.

3. The Defendant misapplies the holding in Ibar in her analysis.

Third, although the Defendant cites Ibar for the argument that a declarant must be a witness or a victim of the crime for Section 90.801(2)(c) to apply, that is not the holding of the case. The discussion and holding in Ibar centers around the definition of the word "perception." In Ibar, the defendant was charged with three counts of first degree murder. Ibar, 938 So. 2d 457. In June 1994, law enforcement located one of the victim's vehicle burning outside of the city of South Bay. Id. When officers attempted to locate the victim and notify him that his car was located, they found the three victims deceased inside a residence. Id. The owner of the residence, one of the homicide victim, had installed surveillance videos that captured the events of the murder. Id. at 458. The surveillance video showed the defendant Ibar and his

³² To illustrate this even further, the legislature clearly did not use the words "witness to crime" in the drafting of Section 90.801(2)(c), to do so would effective prohibit the use of this hearsay exception to any situation that occurs outside of criminal law (i.e. civil litigation). Again, had the legislature intended this to be the result, they would have used language to reflect that.

co-defendant entering the victims' home armed with assault weapons. Id. The surveillance video also showed the co-defendants beat and shoot the three victims. Id. The surveillance video then showed the co-defendants ransacking the victims' home and taking multiple items including cash, jewelry and firearms. Id.

During the investigation of the murders Ibar's roommate, and several other witnesses, provided statements to the police in which they identified Ibar and his co-defendant on the surveillance video taken from the victim's home. Id. The crucial point is that the witnesses were neither present at the scene of the murder, nor at any other event in which they saw the co-defendants first hand. The witnesses made their statement of identification to law enforcement after viewing the surveillance video. Those statements were merely their opinions of who was depicted on the video.

The witnesses themselves testified at trial that when they were shown photos, they identified the person in the photo as Ibar. Id. at 459-60. The State then called the police officers to whom the witnesses made their out of court statement of identification to testify to what the witnesses told him after viewing the surveillance video. Id. The Court admitted the statements as substantive evidence pursuant to Section 90.801(2)(c). The Florida Supreme Court agreed with the defendant that the identification testimony should not have been admitted. The Court focused its discussion on the definition of "perceiving" as used in the statute.

In discussing, the Court cited to Stanford v. State, 576 So. 2d 737 (Fla. 4th DCA 1991). In Stanford, the trial court permitted the testimony of the victim's daughter and another witness to testify to statements made by the victim naming the defendant as her assailant. Id. The Court in Stanford, stated:

“We do not believe this code provision was intended to allow other out-of-court statements by a witness to others naming the person that the witness believed committed the crime. To extend the rule that far would permit countless repetitions by a witness to others, regardless of time and place, of the witnesses' belief as to the guilty party, a result we do not believe intended by the drafters of the rule.”

However, one must look to the facts of Stanford for a clear understanding of the holding. In Stanford, the victim was beaten and robbed without any other third party witnesses. Stanford, 576 So. 2d at 738. The victim was found by his wife who called their daughter to respond to the house. Id. When the daughter arrived, she asked the victim who assaulted him to which he replied the name of the defendant. Id. The daughter was permitted to testify to what her father said at trial pursuant to Section 90.801(2)(c). While holding that this was not the type of situation to which Section 90.801(2)(c) should apply, the Court affirmed the defendant's convictions.

In analyzing the facts and discussions in both Ibar and Stanford, it is clear that what the Courts have held is that a witness should not be permitted to testify in court to what another witness said or opined if they did not perceive the crime or some other event first hand. In Ibar, the witnesses did not witness any even first hand, but

rather reviewed surveillance video and opined as to the identity of the people in the video. While it is well settled that the witnesses could themselves testify in court as to what they observed on the surveillance video, the Court stated that in the absence of that testimony law enforcement could not testify as to what the witnesses said to them.³³ This is because they did not witness any event and the officer would merely be regurgitating the opinions of the witnesses made out of presence of the jury.

This is not the situation in the case at bar. First, the witnesses from the Spotlight, will testify to their own identifications in court. This was permitted in Ibar as it was not the witnesses testimony of their identifications that the Court found inadmissible, but rather the officer's testimony as to their prior statements. So because Mrs [REDACTED] and [REDACTED] will themselves be testifying, this situation is distinguishable from Ibar and the Defendant's argument is moot.

Second, even if law enforcement were to testify to prior statements of identification by [REDACTED] it would be permissible because the two women witnessed "an event." That event would be the purchasing of the clown costume. While the State is not conceding that the Court in Ibar was correct in adding language that the legislature omitted from Section 90.801(2)(c), even under Ibar's

³³ It is important to note there is no difference between a witness testifying to who they previously identified in a surveillance video (which the court in Stanford found permissible) and a witness testifying to who they witnessed firsthand.

interpretation, the purchase of the costume was “an event.”³⁴ It is no less an event to be witnesses than the clerk who would testify to the identity of a person who purchases a gun or vehicle later used in a murder. So while the State submits that the plain language of Section 90.801(2)(c) contains no such additional limiting clause, even if the words “made by a witness or victim to a crime or event” were improperly read into the statute, this purchase of an instrument of the murder is an event.

4. The purchase of an instrumentality for the express commission of a murder, is part of the conspiracy to commit that murder and therefore a criminal act.

Finally, even if one were to argue that the prior statement of identification would require the witnessing of a criminal act, this identification by Rosales and Small would still qualify. By definition, the purchasing of an instrument later used to commit a crime with the intent to do so, would qualify as part of a criminal conspiracy or the crime itself. Therefore, because the purchased clown costume was used in this case by the Defendant as camouflage during the murder of the Victim, the witnesses of said event would still qualify as a criminal act, if those words were to appear in the statute, but they do not.

³⁴ The definition of “event” is a “something that happens” and “a planned social or public occasion.”

For all the reasons argued above, the out of court statement or identification of the Defendant by [REDACTED] and [REDACTED] should be admissible in the Defendant's jury trial.

Two employees of the Spotlight costume shop positively identified the Defendant as the white female with long brown hair, and mannish features as the person who just two days before the murder purchased a multicolored clown costume, with an orange wig, white makeup and no shoes. These identifications were made on May 27, 1990 [REDACTED] and May 28, 1990 [REDACTED] respectively, just days after the homicide. Further the identifications were made separate and apart from one another. In fact, detectives instructed the witnesses not to speak with one another about the case.

The Defense argues that an identification of the Defendant was tainted because the two witnesses expressed, a year later, that they had spoken with one another about the case over the prior year and saw a picture of the Defendant in the newspaper. This argument has no merit because any conversation between [REDACTED] and [REDACTED] occurred after they had already made the photographic identification of the Defendant days after the murder. Likewise, [REDACTED] didn't see the Defendant's photograph in the newspaper until after they made their photographic identification. Therefore it is impossible for either of those two events that occurred

after the identification to have tainted [REDACTED] identification of the Defendant as the person who purchased the clown costume.

c). The identifications of [REDACTED] should be admitted because there is no evidence that the identifications were the result of any unnecessarily suggestive procedures that could in any way give rise to a likelihood of irreparable misidentification.

The primary evil to be avoided in the introduction of an out-of-court identification is a very substantial likelihood of misidentification. Grant v. State, 390 So. 2d 341, 343 (Fla. 1980) Citing Neil v. Biggers, 409 U.S. 188 (1972). The test for whether a suggestive identification procedure should be excluded has two prongs; first did the police employ an “unnecessarily suggestive” procedure in obtaining an out-of-court identification; and second considering all the circumstances did the suggestive procedure give rise to the substantial likelihood of irreparable misidentification. Mason v. Brathwaite, 432 U.S. 98 (1977); Simmons v. State, 934 So. 2d 1100 (Fla. 2006).

While the defense outlines a litany of possible variables that could affect an eye witness identification there is no per se rule which would exclude an identification if any of the conditions are present. There is no bright line rule of exclusion on this point where there is no evidence of influence to the degree of bad faith influence on the part of law enforcement. This point is clear when one considers the standard jury instruction 3.9(c), which tells the jury that they should

consider the totality of the circumstances in determining whether an eye witness identification should be relied upon.³⁵ This is to be judged on a case by case basis and absent egregious conduct by law enforcement it is up to the trier of fact to determine the weight of eye witness testimony. Further many of the factors argued by the Defendant as reasons to exclude the identification were not required practice in 1990.³⁶ Again, there are no bright lines rules of exclusion when it comes to eyewitness testimony, only factors for the jury's consideration.

II. CONCLUSION

The testimony of the employees from the Spotlight Costumers as to the person who purchased the clown costume should be ruled admissible. The employees can testify to what they themselves perceived as competent witnesses. Further, their prior statements of identification in the form of photo arrays should be admitted pursuant to Section 90.801(2)(c). The witnesses will testify at trial and did first hand perceive the Defendant when she purchased the clown costume from the Spotlight Capezio. There is no requirement that the declarants be witnesses to the actual crime in order to qualify under Section 90.801(2)(c). Further, the identification of the purchaser of the clown costume is relevant to the material issue of the identity to the

³⁵ Florida Standard Jury Instruction 3.9(c) provides a non-exhaustive list of factors for the jury to consider when weighing photographic lineup evidence.

³⁶ Florida Standard Jury Instruction 3.9(c) was only adopted in 2013 and modified to include the expansive language in 2018. This occurred only after the addition of Florida Statute Section 92.70 on October 1, 2017. No such language existed in the Florida Statute in 1990, and there were no such practices imposed upon law enforcement during this investigation.

person who shot and killed Marlene Warren. For all those reasons, the Court should deny the Defendant's motion.

WHEREFORE, the State prays this Honorable Court to **DENY** the Defendant's Motion to Exclude Identification Testimony from the Spotlight Employees.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY THAT a true and correct copy of the foregoing Motion has been furnished by E-SERVICE to AMY MORSE ESQ at AMY@MORSELEGAL.COM, this the 2nd day of March, 2023.

Respectfully submitted,

DAVID ARONBERG
STATE ATTORNEY

/s/



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