

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MIGUEL ANGEL SOLORZANO BARTOLO

APPELLANT

VS.

NO. 2008-KA-0773

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF MISSISSIPPI

MIGUEL ANGEL SOLORZANA BARTOLO

APPELLANT

VERSUS

NO. 2008-KA-0773-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

Miguel Angel Soloranzo Bartolo was convicted in the Second Judicial District of the Circuit Court of Harrison County on one count of theft of telecommunications services and one count of murder. He was sentenced to terms of imprisonment of ten years and life, respectively, to be served concurrently. (C.P.98-99) Aggrieved by the judgment rendered against him, Bartolo has perfected an appeal to this Court.

Substantive Facts

Officer Brad Smith of the Biloxi Police Department testified that in February 2006, he was dispatched to the Imperial Palace at Bayview in Biloxi to investigate a report of “a body floating in the water.” With two fellow officers, he went to this location, where “some workers

... pointed out where the body was.” Officer Smith observed “[t]he female floating in the water on her back. Looked like her head was all the way back in the water.” A jacket “was found kind of towards her feet, kind of wadded up.” No identification was found on the body. The officers “secured the scene and waited until investigators arrived.” (T.160-65)

Sadie Honguyen, a native and current resident of Wisconsin, testified that she “was working with FEMA” in Gulfport from October 2005 to June 2006. In January 2006, she met Christy Ayala, the victim in this case, “at a club called The Boulevard.” Ms. Honguyen described Ms. Ayala as “really like bubbly and just very nice. ... She was really easy to talk to ... Like she was just really friendly ... “ (T.169-70)

On February 17, 2006, Ms. Honguyen and Ms. Ayala agreed to meet for the grand opening of the Club IP at the Imperial Palace. According to the plan, Ms. Honguyen would drive there in her own car, and Ms. Ayala was going to have a friend drop her off. It was also agreed that Ms. Ayala would be returned home by either Ms. Honguyen or “a girlfriend of hers.” These plans had been discussed over their cell phones. When she arrived, Ms. Ayala was wearing “jeans, folded up, and just flat shoes, and like a white biker jacket.”¹ After they stood in line for 15 to 20 minutes, Ms. Honguyen and Ms. Ayala entered the nightclub, “got drinks, and ... just stood around like talking and dancing.” According to Ms. Honguyen, “It was really loud, so you couldn’t really, just socializing. And then I saw some people I knew, and then they came over and was [sic] talking to us, and we just, dancing and... kept on getting drinks.” (T.171-74)

¹Ms. Honguyen State’s Exhibit 3, which had been taken from the water near Ms. Ayala’s body, as the jacket that Ms. Ayala had been wearing that night. (T.173)

At some point, Ms. Honguyen realized that Ms. Ayala had disappeared. Ms. Honguyen, along with a friend and a new female acquaintance, went to the restroom to look for her. Ms. Honguyen also “tried calling her.” At approximately 2:00 or 2:30 a.m., Ms. Honguyen finally “got her on the phone” and asked her where she was. Ms. Ayala kept repeating, “Sadie, I’m outside.” Ultimately, “the phone got disconnected or it got taken away ... “ After the club closed at 3:00 or 3:30, Ms. Honguyen and her companions “still went around looking for her.” They went to the first floor of the building, “just looked around and stayed in that area until around 4:00, 4:30” before they finally left. (T.174-76)

This was the last conversation Ms. Honguyen had with Ms. Ayala. The next morning, she continued to try to reach Ms. Ayala on the phone, to no avail. While she was at work, Ms. Honguyen was notified that Ms. Ayala had died. (T.176-77)

Rosanna Chavez testified that at the time of this crime, she was working at the Imperial Palace “as a translator and supervisor for Spanish speaking people that work there, and he [the defendant] was one of the workers.”² On February 23, 2006, after Ms. Ayala’s death, Ms. Chavez accompanied her Aunt Rozio to a break room area in the Imperial Palace so that the aunt could wait for a job interview. The defendant was also in the break room at this time. When the aunt mentioned that she needed to use a phone to call her son’s school, Bartolo “let her use his phone.” Ms. Chavez had never known Bartolo to have a cell phone prior to this incident. (T.186-90)

²Ms. Chavez knew the defendant as Miguel Solorzano, “the name he had on his badge when he worked.” (T.187)

After Ms. Chavez notified the police about this occurrence, the authorities came to her house and drove her to the police station. She told the police that she remembered that the phone in question “had a flag ... [I]t was read, white and blue. It wasn’t the American flag. ... “ Ms. Chavez later “had some phone calls from that phone” to her cell phone. (T.190-91) She explained what happened next as follows:

Since he [Bartolo] got fired, and I was a supervisor, he tried to get his job back. So he— when I was in the police station they asked me how do I have phone calls from that phone number into my cell phone, and that’s what I answer [sic], that it might be one of the workers calling to get, you know, so information or just translate. And then they ask me if I get another phone call from him, if I could call them right away.

(T.191)

The next day, on February 24, Ms. Chavez received another call from Bartolo, who “was trying to get the job back.” Having been advised by the police to do so, she asked him where he was and what he was doing. He replied that he was in Texas with his girlfriend. According to a previously discussed plan with the police, Ms. Chavez told Bartolo that she “had a check from the company, that it was for him,” and that she would lobby with her boss to attempt to get his job back. Ms. Chavez talked to the defendant, whose voice she recognized, two or three more times, with the calls coming from the same phone. (T.191-92)

Investigator Susan Kimble of the Biloxi Police Department testified that she was the assigned investigator for this case. After the identity of the victim and the cause of death were established, Investigator Kimble “tried to locate several witnesses that possibly saw her [Ms. Ayala], were last seen with her.” Investigator Kimble and other officers “interviewed several individuals that were inside the club with her,” and they “subpoenaed her bank records and her cell phone records to determine the location of those items.” They determined that someone had

tried to use Ms. Ayala's ATM card "around 4:00 that morning. However incorrect pin [sic] number was entered both times." (T.199-201)

Investigator Kimble went on to testify that she and other officers had viewed the surveillance tapes made at the Imperial Palace during the relevant time frame and that they had been "able to locate the victim on the surveillance video with a Hispanic male in several different places. ... They were leaving the IP Club at 2:18 in the morning ... They were also videoed in front of the restrooms and in a corridor leading out to the parking garage" at approximately the same time. The investigation also revealed that "at one point" Ms. Ayala's cell phone was used to call Nativity Elementary School in Biloxi. They "were able to speak with the director and find out who placed the call," and that information led to an interview with Ms. Chavez, who identified Bartolo as the person who had offered her aunt the use of the cell phone in his possession. Ms. Chavez also advised Investigator Kimble of the other calls that she had received from Bartolo. Investigator Kimble ultimately confirmed all of those calls through the cell phone records. (T.202-07)

After ascertaining Bartolo's identity, the investigation turned to finding his location. With the assistance of the United States Marshal and Sprint, Ms. Ayala's cell phone carrier, Investigator Kimble and her fellow officers tracked Bartolo to Houston, Texas. Investigator

Kimble was present when Bartolo was arrested and observed him “holding the victim’s cell phone in his hand” at the time.³ (T.206-09)

Thereafter, a worker at the Imperial Palace notified Investigator Kimble that a wallet had been found “on the eighth floor” of the casino hotel where “there were renovations going on at the time. ... It [the wallet] was located hidden underneath some towels.” The wallet contained the badge and identification of Ms. Ayala. (T.209-10)

Officer Richard Moreno of the Houston, Texas, Police Department, testified that in February 2006, officials in Biloxi asked his department “to help located individual that was believed to be in Houston, Texas.” Biloxi officers told him “[t]hey had an outstanding warrant for this individual, and it was believed that he was staying in an apartment complex in southwest Houston.” Officer Moreno and fellow officers went to this complex and “obtained entry into the apartment.”⁴ They saw Bartolo lying on a couch, covered with a blanket.” When they “pulled the blanket down, he was literally holding a cell phone in his hand ... “ At first, Bartolo falsely identified himself. He was arrested at that point. When the officers asked him about the cell

³Investigator Kimble was able to identify this phone as Ms. Ayala’s because it had “a picture of the Puerto Rican flag on display,” and it also had “her number.” The voice mail message on the phone “was the victim’s.” (T.208-09)

⁴Officer Moreno testified on cross-examination that they knocked on the door and “a female” answered the knock. (T.251)

phone, "he said that the cell phone was his, and that he had been the owner of that cell phone for over a year."⁵ (T.247-49)

Officer Moreno continued to question Bartolo, in Spanish, about the phone. Bartolo "had no answer" for questions regarding "making payments and stuff." (T.250)

Officer Jesus Sosa of the Houston Police Department testified that he was certified as a "level four" Spanish speaking officer.⁶ Officer Sosa, along with his brother Marcario Sosa and Investigator Kimble, met Bartolo on February 28, 2006. Officer Jesus Sosa interviewed Bartolo "in Spanish." (T.254-58) After Bartolo said that he was willing to give a voluntary statement, he gave the following accounts, summarized by Officer Jesus Sosa:

At first he denies any involvement. Then he goes ahead and says that he and the victim, they met inside of a club. There was a grand opening at a casino, and that they danced on the dance floor. They're exiting the discotheque, as he would call it, and they're going to go purchase some cigarettes. Then they proceeded outside where he was holding her on his right, and she was holding him on his left. He claims that at one point a vehicle drives by a struck her, hitting her, throwing her backwards. He claims it was a hit and run accident, and he panicked and picked up her phone. And afterwards he goes inside and eats dinner, and then goes to bed.

Later on he finally admits that there was a struggle. That he claims that she is choking him, and on the video he shows me by grabbing me around my neck, how he chokes her, forcing her to pass out. She falls. He claims that he drug [sic] her approximately

⁵Officer Moreno identified this phone as the one previously admitted as State's Exhibit 5. He also testified that his department had turned it over to the Biloxi Police Department. (T.249)

⁶The range was from level one, "the lowest level," to the highest level of five. (T.255)

six paces and then he uses three words. He says in Spanish *la puse la agua*, I placed her in the water. *La deje en el agua*, I left her in the water. And *la tía en agua*, I threw her in the water. ...

* * * * *

I asked him if you have the cell phone, why don't you call 911, and he claims that he didn't want to be accused of stealing her phone or having her phone in his possession. Then I asked him, if you went in to eat at the casino, there is [sic] attendants there, there is [sic] waiters, waitresses, security staff. Why didn't you ask somebody to call 911 for you. He really couldn't answer. To me, he is lying at this point, but I'm not aware of the facts.

(T.261, 263)

Officer Sosa went on to relate that Bartolo elaborated as follows:

He says that they were arguing. He claims that she was offering him sex. He was, you know, pushing her away. She is trying to kiss him. He is pushing her away. They start to struggle. They fall to the ground. She lands on top of him straddling him. She is choking him down. He says he reacts, grabbed her around the neck. In the video he puts his hands around my neck. He says he chokes her, next thing she passes out, falls next to him. Again, he says he panics. He picks up the phone, I believe, drug [sic] her to the water, and that's when he puts her in the water.

(T.264)

Bartolo admitted that he stole Ms. Ayala's cell phone, that he tried to use her credit card, and that he hid her wallet on the eighth floor of the Imperial Palace. He also told Officer Sosa, "It was not my intention. I was not going to kill her. It was when she was not breathing that I threw her in the water." (T.264-68)

Dr. Paul McGarry, accepted by the court as an expert in the field of forensic pathology, performed the autopsy on the victim's body. (T.276-77) Asked to describe the condition of the body, Dr. McGarry testified as follows:

She had evidence of what I would interpret as a struggle. She had many bruises and abrasions, scrape marks, gouges of her skin over her face, over her hands, her forearms, elbows, over the back, over the legs, indication that she had contacted rough surfaces recently, the kind of injuries that occur in a violent struggle where the skin is being torn as she is being rubbed or forced against a rough surface, such as the ground or the pavement.

Around her neck she had a band of blood abrasion and compression one and three fourths inch wide that went from ear to ear and across the front of her neck. Typical strangulation type of injury where the skin was damaged. There was damage to the tissue beneath the skin. The larynx itself was intact. The hyoid bone was intact [sic], but everything was compressed to a point of bruising and hemorrhage in the deep tissues of her neck. This I would interpret as the evidence of a strangulation.

Inside her body she had extensive hemorrhages over her lungs. She had extensive hemorrhages in the covering of her eye balls, in her eye lids, which go along with strangulation. As she is unable to breathe and her oxygen supply is being shut off, the capillaries in her delicate parts of her body being to bleed, and she had all of these characteristic features of strangulation.

She also had fluid in her lungs. Her lungs were almost filled with foamy fluid. It was a little bit of pink aeration along the front of her lungs, but most of her lung tissue, most of her air spaces were filled with blood tinged fluid, which occurs when a person is immersed in water.

Putting it together my interpretation is that there was a violent struggle. That she had something around her neck to a point where she could not breathe, and then was immersed in water and was able to gasp some water into her lungs before she died.

(T. 278-79)

Dr. McGarry went on to testify that if Ms. Ayala had been lying in a safe place after the strangulation ended, she could have recovered, or come back to some degree of consciousness, without a few minutes. He concluded that Ms. Ayala "died of a combination of a violent struggle with strangulation and immersion, all occurring close together." The water in the

victim's lungs indicated "that she was still gasping for breath" when she was placed in the water.
(T.285-87)

The defense rested without presenting evidence.

Additional facts will be set out as necessary in the following argument.

SUMMARY OF THE ARGUMENT

Bartolos's challenge to the sufficiency of the evidence of his guilt of theft of telecommunications services is without merit. He did not object to the admission of the phone records on the ground they were not properly authenticated; therefore he may not be heard to do so here. Alternatively, because the records were obtained by subpoena, the court did not abuse its discretion in admitting them. Finally, the state presented sufficient evidence that the value of the services diverted exceeded \$50.

Next, the state submits the trial court did not err in admitting the defendant's statements into evidence. The finding of admissibility was supported by substantial credible evidence that the statements were given freely and voluntarily after a valid waiver of the *Miranda* rights.

Finally, the state contends the verdict of guilty of murder is based on legally sufficient evidence. The proof is not such that a reasonable juror could have returned no verdict other than guilty of imperfect self-defense manslaughter.

PROPOSITION ONE:

**BARTOLO'S CHALLENGES TO THE SUFFICIENCY
OF THE EVIDENCE OF HIS GUILT OF THEFT
OF TELECOMMUNICATION SERVICES
IS WITHOUT MERIT**

Bartolo first contends the state presented insufficient evidence of Bartolo's guilt of theft of telecommunication services.⁷ The first prong of his argument is that the trial court erred in admitting copies of Ms. Ayala's cellular phone records, which he claims were not properly authenticated.⁸ This issue implicates testimony and argument taken during the direct examination of Investigator Kimble, recounted as follows. When Ms. Kimble was asked the amount of "her total cell phone bill?" she answered, "Was \$97." Defense counsel objected on the ground, "The document speaks for itself." Subsequently, the prosecutor asked whether Investigator Kimble had the records; she replied, "They're in your office." Subsequently, the following was taken:

MR. WARD: Judge, I can go get that. It's a record kept in the regular course of business, which would be admissible, but I don't know which folder. If we could take one second, she could step down and get that, with the Court's permission.

THE COURT: All right. I will allow her to do that.

⁷The pertinent standard of review of this issue is set out under Proposition Three, below.

⁸The state submits that "[a] trial judge has broad discretion as to the admissibility of evidence. Unless this discretion is so abused as to be prejudicial to the accused, this Court will not reverse the lower court's ruling." [citations omitted] *Williams v. State*, 971 So.2d 581, 589 (Miss.2007).

MR. WARD: It's just in our office, your Honor, ten steps away.

(T.213-14)

After a pause, the state resumed questioning Investigator Kimble, who testified that she had printouts of the cell phone records associated with the time period from the victim's death to the time the defendant was apprehended in Texas. She went on to testify that she had received them, by subpoena, at the Biloxi Police Department from Sprint Communication. The printouts were marked State's Exhibit 7 and 8 for Identification. When she was asked, "These are records made and kept in the ordinary course of business?" she answered, "Yes, ma'am." (T.214-)

When the state moved to introduce Exhibits 7 and 8 for Identification, the defense objected, and the following discussion was taken:

MR. STEWART: Judge, the State's Exhibit number 8 is a faxed copy from Sprint. I think the original-- we don't have an original. It is a copy. And on top of it being a copy, it's a fax copy, your Honor. So we would object to the State's Exhibit number 8 coming in.

MS. McFADYEN: Your Honor, the best evidence rule allows that a fax copy is admissible, just as the original.

THE COURT: All right.

MR. STEWART: Judge, if I can respond to that. The original is the best evidence not a fax copy of a copy, so we would object, still hold our objection to State's Exhibit number 8.

THE COURT: Objection is noted and overruled.
(T.216-17)

The foregoing excerpt shows that the sole basis for the defendant's objection was that the admission of the documents would violate the best evidence rule. At no time did the defense object on the ground that they were not properly authenticated under M.R.E. 901 and 902. It is

well-settled that “a party, having specifically objected at trial, cannot present different grounds for the objection on appeal.” *Walden v. State*, — So.2d —, 2008 WL 2894486 (Miss.App., decided July 29, 2008,) citing *Williams*, 971 So.2d at 589. Having failed to present this specific objection to the trial court, Bartolo may not be heard to argue it here.

Solely in the alternative, the state submits a similar issue was raised and rejected in *Seigfried v. State*, 869 So.2d 1040, 1047 (Miss.App.2003). In that case, the prosecution introduced a receipt from a video store where the defendant allegedly had rented pornographic movies. On appeal, the defendant argued that the receipt was inadmissible without the testimony of the custodian of records from the video store. This Court held that in light of the officer’s testimony that the records had been obtained by subpoena, the trial court did not abuse its considerable discretion in admitting the receipt into evidence. Because Investigator Kimble testified that she obtained the records by subpoena, the state submits that should the merits of this issue be reached, the same result should occur here. The state reiterates that Bartolo cannot be heard to advance an objection different from the one made at trial.

Next, Bartolo asserts that the prosecution failed to present sufficient proof that the telecommunication services in question had a value of \$50 or more. This issue arose during the hearing on the motion for direct verdict, when the following transpired:

THE COURT: Mr. Ward, I have some problems with Count 1 because— and I will let you address those problems. The indictment and the statute requires that the use of the telephone service exceed \$50 in value, and I have reviewed the bill that came into evidence, and it has a base monthly charge of like \$60, \$59.99 and a total charge of \$97, I think. And I don’t think that it has been shown or proven that \$50 of that \$94 was the result of usage of the phone by the defendant.

* * * * *

MR. WARD: Judge, in theory if he kept it to a new billing cycle and used it one day in the new billing cycle he would open a whole month. So that's exactly what he did, and she would have been dead after the new billing cycle ...

* * * * *

MS. McFADYEN: Your Honor, the testimony from Investigator Susan Kimble was that they had received information from Sprint Cellular Services regarding the victim's bill, and that we introduced State's Exhibit 8, which was to show the subscriber being Christy Ayala, and that the total bill for services as shown in this invoice from 2/17 of '06 to 2/20 of /06 totaled \$97.14. And at that point as the investigator testified she would then have incurred her base plan charge of \$69.99, in addition to calls made in excess of that billing rate.

Also State's Exhibit number 7 is an itemization of telephone calls that were made from the date the 19th of February, which is subsequent to the victim's death though, it looks like the 21st of February on this portion of the victim's cellular call list. The investigator testified that there were over 100 calls placed after the victim's death.

So we submit that there was been sufficient evidence for the jury to consider theft of communication services under Count 1 based on these two documents, as well as the investigator's testimony.

(emphasis added) (T.299-301)

Although the court had expressed concerns about the sufficiency of the state's proof of the value of the services diverted, it ultimately overruled the motion for directed verdict, thereby implicitly accepting the state's position on this issue. (T.302) Maintaining this position on appeal, we submit the prosecution introduced sufficient proof that the value of the services exceed \$50. Bartolo's first proposition should be rejected.

PROPOSITION TWO:

**THE TRIAL COURT DID NOT ERR IN ADMITTING THE
DEFENDANT'S STATEMENTS INTO EVIDENCE**

Prior to trial, the defense filed a motion to suppress Bartolo's statements. (C.P.23) At the hearing on this motion, the state first called Officer Moreno, who testified that he was a certified Spanish speaking officer, and that when he arrived at the apartment where Bartolo was arrested, he gave him the *Miranda* warnings in Spanish. After reading each right, he ascertained that Bartolo understood it. In Officer Moreno's words, "after each individual one there is a pause, and then ask if he understands that. Each individual one, and then you go on to the next one." Bartolo indicated that he understood each right and stated that he would waive those rights and speak with him. (T.16-19)

Later, at the police department, Officer Moreno re-read Bartolo his rights, again in Spanish. At one point, Bartolo told Officer Moreno that he did not understand what he was telling him. According to Officer Moreno, "That was gone over in a more simpler [sic] definition, and, in fact, at some point the defendant was actually giving me his own definition of his interpretation of the rights set up for him." Asked whether Bartolo's definition was correct, Officer Moreno answered, "Yes, ma'am." Bartolo ultimately told Officer Moreno that he understood all of the rights delineated. Bartolo did not appear to be under the influence of drugs or alcohol. It appeared that he understood the proceedings. He never invoked his right to remain silent and never asked for an attorney. Bartolo was not threatened or coerced; nor was he promised anything in exchange for a statement. Officer Moreno spoke to Bartolo entirely in Spanish and he understood Bartolo's Spanish responses. (T.21-25)

On cross-examination, Officer Moreno acknowledged that Bartolo had told him he could not read or write the Spanish language. He went on to testify, however, "He claimed he couldn't read it [the *Miranda* card], so I explained it to him." (T.28)

Officer Sosa testified that he also read Bartolo his *Miranda* rights. (T.33) He elaborated as follows:

From the card I read to him the Spanish version warning by warning. I asked him if he understood each warning as I read them to him. He had a problem with number one. He told me that he didn't understand it, so I reread it to him, and he-- I asked him if he understood it, and he said yes. Then I continued to do so with each individual warning. And there is [sic] five warnings.

(T.33)

After Officer Sosa "reread it to him ... at a slower pace, he said, yes, that he understood." Bartolo also agreed to waive the rights and speak with the officers. He did not appear to have difficulty understanding the questions asked, and his answers were responsive. He did not appear to be under the influence of drugs or alcohol. He never invoked his right to remain silent; nor did he ask to talk with an attorney. Furthermore, he was not threatened, coerced, or physically assaulted; nor was he promised anything in return for a statement. (T.34-40)

Officer Kimble testified that she did not witness any type of force or threat against Bartolo during the interviews. Nor did Bartolo exhibit any type of injury to his person. (T.49)

The defense called Joshua Coll, a translator who had viewed the videotape of the statements. Mr. Coll testified that Bartolo did not seem to understand the questions. He also disputed the accuracy of the translations. (T.54-55)

The defendant did not testify during the suppression hearing.

At the conclusion of the testimony, the court made preliminary findings and observations set out below:

On the motion to suppress the statement rendered by the defendant, the burden of proof is on the state to prove beyond a reasonable doubt that the statement was voluntary, that it was knowingly and intelligently given, and that the defendant voluntarily waived his Miranda rights to remain silent and to have the benefit of an attorney.

The testimony of Officer Moreno was that he contacted the defendant and arrested him, at which time he gave the Miranda warnings to the defendant. And he testified that the defendant understood each of the warnings and voluntarily waived those warnings. He further stated that the defendant never indicated that he wanted to stop the interview or to request an attorney. And more importantly he testified that the defendant understood the questions and gave good credible answers to his questions, and that no language other than Spanish was used in his interview.

The testimony of Jesus Sosa, also a certified Spanish speaker indicated that he also went over the Miranda rights on March 1st of '06 from the card that the policemen carry, which sets out the five points of the Miranda warnings. He said that he read those rights to the defendant and that the defendant indicated he understood his rights and he voluntarily waived the rights.

He further testified that the defendant was speaking in common Spanish language and that he had no problem understanding the defendant, and the defendant's answers were responsive to his questions.

He further stated that the defendant never invoked his rights to remain silent, stop the interview or request a lawyer. It was his testimony also that there were no promises, threats, force, coercion used on the defendant, and that the defendant never refused to answer any questions.

He further testified that the transcribed statement was a fair and accurate description of the interview.

On the other hand, Mr. Coll, who was called by the defendant, testified that from viewing the DVD of the interview he

didn't think the defendant understood his rights and that some of the interpretation was not true and accurate.

(T.63-65)

The court then allowed the defense to argue its motion. Defense counsel asserted that the defendant was a Zapotec Indian who was not fluent in Spanish, that he had not understood the warnings, and that he had not knowingly and intelligently waived his *Miranda* rights. (T.65-66)

The prosecutor countered with the following, set out in pertinent part:

The evidence would show that the defendant was given Miranda on three or four separate occasions while in the custody of the Houston Police Department.

* * * * *

Most of the cases that were cited in counsel opposite's brief talk about non-English speaking defendants and rights being given to them in English and problems associated with that. That's not what we have here. We have a Spanish speaking individual who was given his rights in Spanish.

And specifically Amano versus United States, 229, Fed 3d, 801, in that case the defendant was Japanese, but was trying to speak in English. The rights were given to the defendant in English. He said he understood them. He gave a statement in English, indicated that he did not need an interpreter, and yet when he went back he said I'm really Japanese, I need all that done is [sic] Japanese. The Court said, no, if you held yourself out to understand English and you understood your rights, that that is sufficient for a statement to be admitted. And that translators aren't required when you say you understand your right, and you go from there. So that would speak to his cases that were cited.

But the rest of the cases are very clear, that when the defendants understand the Miranda rights, when they agree to waive them, the statement can be admitted.

(T.66-68)

The court then made this finding and conclusion:

In reviewing the transcript of the statement, I found it interesting that the defendant understood the situation and the questions well enough to ask how many years he was going to get for this. He seemed to be worried about that.

Based on the testimony of the officers and the totality of the circumstances, the Court finds that the statement was freely, knowingly, intelligently, and voluntarily given by the defendant, and that he voluntarily waived his Miranda rights. So the motion to suppress the statement will be denied.

(T.68-69)

At the outset, the state points out that the appellate court

will reverse the denial of a motion to suppress only if the trial court's ruling is manifest error or contrary to the overwhelming weight of the evidence. *Palm v. State*, 748 So.2d 135, 142 (Miss.1999) (citing *McGowan v. State*, 706 So.2d 231, 235 (Miss.1997)). This Court will not reverse the lower court's finding that the confession was voluntary and admissible so long as the court applied the correct principles of law and the finding is factually supported by the evidence. *Palm*, 748 So.2d at 142 (citing *Greenlee v. State*, 725 So.2d 816, 826 (Miss.1998)). Once a trial judge determines admissibility, the defendant/appellant faces a heavy burden in trying to reverse on appeal. *Greenlee*, 725 So.2d 816, 826 (Miss.1998) (quoting *Hunt v. State*, 687 So.2d 1154, 1160 (Miss.1996)).

Ruffin v. State, 992 So.2d 1165, 1169 (Miss.2008).

The defendant in this case has not met this “heavy burden.” As the foregoing excerpts show, the trial court applied the correct principles of law, and its findings were amply supported by the testimony. Officers Moreno and Sosa testified consistently and unequivocally that they did not proceed until they had ascertained that the defendant understood each of his *Miranda* rights, that he understood the questions and that his answers were responsive. This testimony was not refuted by the defendant himself. Under these circumstances, it cannot be said that the

trial court's ruling is manifestly erroneous or contrary to the overwhelming weight of the evidence. Bartolo's second proposition should be denied.

PROPOSITION THREE:

**THE VERDICT OF GUILTY OF MURDER IS BASED
ON LEGALLY SUFFICIENT PROOF**

Bartolo finally attacks the legal sufficiency of the evidence undergirding his conviction of murder. To prevail, he must satisfy following formidable standard of review:

When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give [the] prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.

Manning v. State, 735 So.2d 323, 333 (Miss.1999), quoting *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

Bartolo argues specifically that the prosecution failed to prove that he killed Ms. Ayala with deliberate design to effect her death, and that the proof establishes, at most, imperfect self-defense manslaughter. The defense was granted this instruction which defined imperfect self-defense:

The Court instructs the Jury that "imperfect self-defense" will reduce the crime of *Murder* to *Manslaughter*. If the defendant, Miguel Angel Solorzano Bartolo, killed Christi Ayala

without malice and under a bonafide belief, but without reasonable cause therefore, that it was necessary for him to do so in order to prevent Christi Ayala from inflicting death or great bodily harm upon him, then you cannot find the Defendant guilty of *Murder* and can only find him guilty of *Manslaughter*.

(C.P.78)

Addressing the issues of the sufficiency of proof of deliberate design and whether the defendant was guilty only of imperfect self-defense manslaughter, the prosecutor argued the following during initial closing argument:

Investigator Jessie Saso ... told you there is nothing wrong with the defendant, there is no injury. They asked him what happened, and within their discussions he admitted that he choked her and he threw her in the water. He then said she fainted and I threw her in the water.

But let's look at what Dr. McGarry said. As you consider his statement, what does the actual medical evidence in this case support? That the victim as the result of a violent struggle where she is numerous times on the ground or hitting some hard object and defensively trying to end the struggle, she is strangled in such a manner that she is near death, but she is not dead. And had she been left on the ground, in a couple of minutes she would have gotten up. But no, he took her, dragged her down to the water and threw her in the Back back bay.

* * * * *

The deliberate design that we're speaking of, is something that is formed in the mind of the defendant and he had a plan. I submit to you that he had that plan. I submit to you that by the evidence that you've seen from the witness stand and the exhibits that you will have, that the state has proven beyond a reasonable doubt that he killed her, had the intent to kill her, and as she struggled against him that morning, that he grabbed her jacket and strangled her as hard as he could. But he went beyond that, picked her up and threw her in the Back Bay.

That is murder, ladies and gentlemen.

(T.322-23)

During final closing, the prosecutor pointed out that after Ms. Ayala fell to the ground,

he's then got to drag her. He's dragging a 160-pound woman not one pace, not two paces, not three paces, not four paces, six paces to the water where he puts her in. She's still alive. ... It's not because he wanted to have sex with her or she wanted to have sex with him and they got into a spat. It's because he strangled her right there, this man. And he decided to drag her to the water and let her die like nothing.

And there is some evidence to reflect that it bothered him so much that he went in and had a nice buffet and got a good sleep in the hotel.

(T.339)

Finally, the assistant district attorney refuted the position that the defendant was guilty at most of imperfect self-defense manslaughter: "But he would have had to have believed at the time that he was going to be killed by this woman. She's got no weapon. No great bodily harm is going to come to him. It's just not there." (T.339)

We incorporate the state's closing arguments by reference, as well as evidence summarized in our Statement of Substantive Facts, in asserting that the proof was not such that a reasonable juror could have returned no verdict other than not guilty, or guilty of manslaughter. The state proved that Bartolo violently strangled Ms. Ayala until she fainted and then dragged her six paces and threw her, while she was still alive, into the bay. This is ample evidence of deliberate design. Furthermore, an unconscious woman would have no ability to engender a

bona fide belief that she was about to kill him or do him great bodily harm.⁹ Yet Bartolo dragged her, unconscious, to the water, where she was left to die.


The state presented legally sufficient proof that Bartolo was guilty of murder. His third proposition should be denied.

CONCLUSION

The state respectfully submits that the arguments presented by Bartolo have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI**


BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

⁹The physical evidence thus contradicts Bartolo's position that he is guilty only of imperfect self-defense manslaughter. It is simply not reasonable to suggest that a man would have a bona fide belief that an unconscious woman was about to kill him or cause him great bodily harm. Thus, this is not one of those "rare" cases which satisfy the requirements of the *Weathersby*. See *Garth v. State*, *Garth v. State*, 771 So.2d 984, 987 (Miss.App.2000), citing *Weathersby v. State*, 165 So.2d 207, 147 So. 481 (1933) (defendant's version of slaying must be uncontradicted, reasonable and credible in order for rule to apply).

CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Roger T. Clark
Circuit Court Judge
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This the 15th day of December, 2008.


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