

IN THE SUPREME COURT OF FLORIDA

CECIL SHYRON KING,

Appellant,

CASE NO. SC17-1486

L.T. No. 2010-CF-001450

v.

STATE OF FLORIDA

DEATH PENALTY CASE

Appellee.

_____ /

**ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA**

ANSWER BRIEF OF THE APPELLEE

**PAMELA JO BONDI
ATTORNEY GENERAL
JENNIFER L. KEEGAN
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0105283
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3579 (tel)
(850) 487-0997 (fax)
capapp@myfloridalegal.com
Jennifer.Keegan@myfloridalegal.com
COUNSEL FOR APPELLEE**

RECEIVED, 03/09/2018 11:08:26 AM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF THE ARGUMENT	13
STANDARD OF REVIEW	14
STATEMENT ON JURISDICTION AND TIMELINESS.....	14
ARGUMENT	15
ISSUE 1: TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE AND CHALLENGE THE STATE’S CASE.....	15
I. Redaction of King’s Interrogation Video	19
II. Objections to Detective Cayenne’s Trial Testimony.....	21
III. Introduction of a Bloody Shirt at Trial.....	24
IV. Presenting and Investigating Expert Witnesses at Trial.....	26
V. Presenting DNA Evidence and Rebutting the State’s DNA Evidence.....	27
VI. Presenting a Shoeprint Expert and Rebutting the State’s Shoeprint Evidence	32
VII. Presenting a Latent Print Expert and Rebutting the State’s Latent Print Evidence.....	34
VIII. Presenting a Cellular Phone Location Expert and Rebutting the State’s Cellular Phone Location Evidence.....	36
ISSUE 2: TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE OBJECTIONS.....	39
I. Failure to Object to the State’s Direct Examination of Rashad Montfort and his Resulting Testimony	39

II. Failure to Object to the State’s Direct Examination of
Detective Cayenne and his Resulting Testimony 43

III. Failure to Object to the State’s Closing Argument 45

ISSUE 3: THE TRIAL COURT’S DENIAL OF KING’S CUMULATIVE ERROR
CLAIM SHOULD BE AFFIRMED 47

CONCLUSION..... 49

CERTIFICATE OF SERVICE 50

CERTIFICATE OF FONT COMPLIANCE 50

TABLE OF AUTHORITIES

Cases

<u>Adams v. Wainwright</u> , 709 F.2d 1443 (11th Cir. 1983)	17
<u>Berman v. United States</u> , 302 U.S. 211 (1937).....	15
<u>Breedlove v. State</u> , 413 So. 2d 1 (Fla. 1982)	45
<u>Bryant v. State</u> , 901 So. 2d 810 (Fla. 2005).....	16
<u>Chandler v. United States</u> , 218 F.3d 1327 (11th Cir. 2000).....	17, 22, 24
<u>Crain v. State</u> , 78 So. 3d 1025 (Fla. 2011).....	17, 18, 26, 27, 29, 38
<u>Derden v. McNeel</u> , 978 F.2d 1453 (5th Cir. 1992)	47, 48
<u>Dingle v. Sec’y Dept. of Corr.</u> , 480 F.3d 1092 (11th Cir. 2007).....	17, 24, 29
<u>Farina v. State</u> , 191 So. 3d 454 (Fla. 2016)	14
<u>Franqui v. State</u> , 59 So. 3d 82 (Fla. 2011)	18
<u>Gonzalez v. State</u> , 990 So. 2d 1017 (Fla. 2008).....	18, 22
<u>Gonzales v. State</u> , 95 So. 3d 1002 (Fla. 3d DCA 2012).....	22
<u>Gordon v. State</u> , 863 So. 2d 1215 (Fla. 2003)	36
<u>Griffin v. State</u> , 866 So. 2d 1 (Fla. 2003)	48
<u>Happ v. State</u> , 922 So. 2d 182 (Fla. 2005).....	39, 40
<u>Hoskins v. State</u> , 965 So. 2d 1 (Fla. 2007)	38, 47
<u>Hurst v. Florida</u> , 136 S.Ct. 616 (2016)	7, 12
<u>Hurst v. State</u> , 202 So. 3d 40 (Fla. 2016)	7, 12, 14
<u>Insignares v. Florida</u> , 755 F.3d 1273 (Fla. 11th Cir. 2014).....	15
<u>Israel v. State</u> , 985 So. 2d 510 (Fla. 2008).....	48
<u>Jackson v. State</u> , 18 So.3d 1016 (Fla. 2009).....	19, 21, 34
<u>King v. Florida</u> , 134 S.Ct. 1323 (2014)	6
<u>King v. State</u> , 130 So. 3d 676 (Fla. 2013)	1-6

<u>Magwood v. Patterson</u> , 561 U.S. 320 (2010).....	15
<u>Martinez v. State</u> , 761 So. 2d 1074 (Fla. 2000)	20
<u>McMillian v. State</u> , 214 So. 3d 1274 (Fla. 2017).....	19-21
<u>McWatters v. State</u> , 36 So. 3d 613 (Fla. 2010).....	19
<u>Pagan v. State</u> , 29 So. 3d 938 (Fla. 2009).....	14, 16
<u>Pietri v. State</u> , 885 So. 2d 245 (Fla. 2004).....	16
<u>Provenzano v. Singletary</u> , 148 F.3d 1327 (11th Cir. 1998).....	17, 22, 24, 29
<u>Rogers v. State</u> , 957 So. 2d 538 (Fla. 2007)	45
<u>Sears v. Upton</u> , 561 U.S. 945 (2010).....	16
<u>Sochor v. State</u> , 883 So. 2d 766 (Fla.2004)	14
<u>Spera v. State</u> , 971 So. 2d 754 (Fla. 2007)	18
<u>State v. Preston</u> , 376 So. 2d 3 (Fla. 1979)	14
<u>Stewart v. State</u> , 801 So. 2d 59 (Fla. 2001)	18
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	passim
<u>Thompson v. State</u> , 796 So. 2d 511 (Fla. 2001).....	18
<u>Trepal v. State</u> , 754 So. 2d 702 (Fla. 2000).....	14
<u>Troy v. State</u> , 57 So. 3d 828 (Fla. 2011).....	18
<u>United States v. Lamons</u> , 532 F.3d 1251 (11th Cir. 2008).....	23, 37
<u>Vining v. State</u> , 827 So. 2d 201 (Fla. 2002)	48
<u>Walls v. State</u> , 926 So. 2d 1156 (Fla. 2006)	18
<u>Williamson v. State</u> , 994 So. 2d 1000 (Fla. 2008)	45, 46

Statutes

§ 90.803, Fla. Stat. (2011).....	39
----------------------------------	----

PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on appeal shall be referred to by “PCR” and followed by the volume and page number; the direct appeal record shall be referred to by “R” and followed by the volume and page number; Appellant’s Initial Brief shall be referred to by “IB” followed by the page number.

STATEMENT OF THE CASE AND FACTS

Trial and Direct Appeal

King was convicted of first-degree murder and sentenced to death for the murder of Renie Telzer-Bain. Her family last saw her at 5:30 P.M. on December 28, 2009. Around 7:00 P.M. the following day, Telzer-Bain’s daughter-in-law, Lyza Telzer, found her dead in her ransacked home. King v. State, 130 So. 3d 676, 679 (Fla. 2013). Her 2001 Cadillac, jewelry, purses, electronics, and other items were missing, her house appeared to be ransacked, and the sliding glass door was sitting ajar and it had a damaged frame. Telzer-Bain was found dead on the bedroom floor. Id. at 679-80.

During the investigation, a container of partially eaten cantaloupe was found on the kitchen table, and the bite mark was swabbed for DNA, revealing a partial male profile with 11 of 13 loci being identifiable. Large-sized shoeprints were

located on the exterior garage door and near the entry where the yard was fenced in. King, 130 So. 3d at 680. The medical examiner, Dr. Rao, testified the cause of death was blunt head trauma. Telzer-Bain had been struck at least 17 times with the head and claw of a hammer. She had injuries on the back of her head, the back and front of her neck, her upper back, the back of her right hand, her right leg, and her left knee. Three of the head wounds would have been fatal. The wounds on her right hand and left arm were defensive wounds. Id.

Telzer-Bain's Cadillac was discovered on December 30, 2009, a few blocks from King's apartment. Fingerprints inside matched King's cousin, Rashad Montfort. When police interviewed Montfort, he explained that King allowed him to borrow the car when he went to King's apartment in late December 2009, and King told him to park it a few blocks from King's apartment when he returned it. Montfort offered to wear a wire and attempted on two occasions to get King to admit he had lent Montfort the car. King did not admit to lending Montfort the car, but told Montfort "say you don't know" when questioned by police about the Cadillac. King, 130 So. 3d at 680.

James Roman owned a residential lawn business and serviced Telzer-Bain's lawn for four or five years. King worked for Roman from July to October 2009, and serviced Telzer-Bain's lawn with Roman eight or ten times. Roman always

went with King to service Telzer-Bain's lawn. King, 130 So. 3d at 680. Roman testified that he made a point not to go inside clients' homes. He testified that King never went inside Telzer-Bain's home and does not believe he ever met her. She never came outside to give them food or drinks and paid Roman by leaving a check under her doormat. Roman was out of town at the time of the murder, and King called him to tell him something happened to one of their clients. Id. at 681.

On January 8, 2010, King pawned a gold bracelet, later identified as belonging to Telzer-Bain, for \$300. On the morning of the murder, King made a call on his cell phone at 5:24 A.M. The call utilized a tower three miles from his home by a bus station downtown. Phone calls usually utilize the closest tower, and if King was at home, there is a high likelihood that the call would have utilized a different tower. His next call was at 10:10 A.M., and that call utilized a tower closer to King's home. On the morning of the murder, a bus leaving that station at 5:25 A.M. stopped directly across from the entrance to Telzer-Bain's subdivision. The bus driver confirmed that the bus ran on time that day but could not identify King because it was rush hour. King, 130 So. 3d at 681.

A police search warrant executed at King's residence on February 1, 2010, revealed numerous personal items belonging to Telzer-Bain, including day planners, jewelry, clothing, and other items. Police also found a hammer without

any blood on it and large-sized shoes that did not match the shoeprints found at the crime scene. King, 130 So. 3d at 681. Police questioned King on two occasions, during which he did not admit guilt. During the first interview, on February 1, 2010, he denied possessing the Cadillac, claimed he acquired one of Telzer-Bain's bracelets from someone named "Budha," and had mowed her lawn but had never been inside her home. Id. When questioned about Telzer-Bain's property that was found in King's home, he said he found the items stashed in a vacant apartment. Id. at 681-82.

Prior to the second interview, police matched King's DNA to a sample taken from the partially eaten cantaloupe. On February 5, 2010, they interviewed him a second time, where he reiterated that he had never been in Telzer-Bain's home and never took money from her. When confronted with DNA evidence, King's story changed, and he stated he had been in her living room and she had served him fruit. King, 130 So. 3d at 682.

The jury convicted King of first-degree premeditated and felony murder, burglary, grand theft of an automobile, dealing in stolen property, and false verification of ownership to a pawnbroker. King, 130 So. 3d at 682.

During the penalty phase, the State presented victim impact testimony from the victim's family and friends. King presented mitigation testimony from family

members and friends, testifying that he was caring and intelligent. He took care of his mother as she battled a fatal bout of breast cancer and cared for his grandmother while she suffered from Alzheimer's disease. King had a close relationship with his three-year-old son. The jury recommended the death penalty by a vote of 8-4. King, 130 So. 3d at 682.

During the Spencer hearing, King presented his former girlfriend as a character witness, and a correctional officer that testified that King was not a troublesome inmate. The trial court imposed the death penalty, finding two aggravating factors ("aggravators")¹ and found numerous nonstatutory mitigating factors ("mitigators").² King, 130 So. 3d at 682-83.

¹ The trial court found the following aggravators: (1) the capital felony was committed while the defendant was engaged in the commission of a burglary and for the purpose of pecuniary gain (merged); and (2) the capital felony was especially heinous, atrocious, or cruel (HAC).

² The trial court found the following nonstatutory mitigators: (1) King is a good inmate (slight weight); (2) King has the potential for rehabilitation and positive contributions to the prison population (slight weight); (3) lack of violent history (little weight); (4) King is a good parent (moderate weight); (5) King loves children in general, and they love him (moderate weight); (6) King is the only biological child of his parents (little weight); (7) King's parents divorced when he was young, negatively affecting his relationship with his father (little weight); (8) King was on high school track and football teams (slight weight); (9) King graduated from high school and attended community college (little weight); (10) King was close with his mother and took her death very hard (some weight); (11) King attended church with his mother and considered becoming a minister (slight weight); (12) King cared for ill family members (moderate weight); (13) King loves his sister and she loves him (little weight); (14) King was consistently employed (no weight); (15) King has relationships with family members and would continue to do so if given a life sentence (slight weight); and (16) a death sentence would adversely affect King's family (some weight).

On direct appeal to the Florida Supreme Court, King raised five claims.³ The Florida Supreme Court affirmed King's convictions and death sentence. King, 130 So. 3d at 676. The Florida Supreme Court found the evidence of the crimes to be sufficient, and the death sentence to be proportionate. Id. at 686-89. King filed a motion for rehearing which was denied on October 3, 2013. King's petition for writ of certiorari in the United States Supreme Court was also denied on February 24, 2014. King v. Florida, 134 S.Ct. 1323 (2014).

Postconviction Proceedings

On February 24, 2015, King filed a Motion to Vacate Judgment and Sentence under Rule 3.851 with Special Request for Leave to Amend, raising six claims (Claims One through Four contained multiple sub-claims). (PCR 1:156-228).⁴ The State timely responded with the filing of its Answer on April 27, 2015. On August 26, 2015, King filed his first Motion for Leave to Amend his 3.851 motion. This Court granted King's motion at the Case Management Conference

³ (1) the trial court erred in instructing the jury on and in finding HAC; (2) the death sentence was disproportionate; (3) the trial court erred in allowing the prosecutor to make improper closing arguments about an avoid-arrest aggravator not submitted to the jury or found by the trial court; (4) the trial court erred in prohibiting defense counsel from making the proper argument that King had no history of violent crime; and (5) the death penalty is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002).

⁴ King's claims included, One: Counsel was Ineffective in Jury Selection; Two: Counsel was Ineffective in the Guilt Phase; Three: The State Committed a Brady Violation in Failing to Disclose its Coercion and Coaching of Rashad Montfort; Four: Counsel was Ineffective in the Penalty Phase; Five: Lethal Injection Violates the Due Process Clause and the Eighth Amendment; and Six: Cumulative Error. (PCR 1:157-59).

held on August 27, 2015. This Court also heard argument on each of the claims. On August 31, 2015, this Court entered an order granting an evidentiary hearing on Claims One, Two, Three, and Four (including all sub-claims). On February 8, 2016, eight days before the evidentiary hearing was scheduled to commence, King filed his Second Amended Motion to Vacate Judgment and Sentence. On February 16, 2016, King argued an ore tenus motion to amend, seeking to file a third amended motion for postconviction relief. This Court granted his motion. On March 14, 2016, King filed the Motion at issue here, his Third Amended Motion to Vacate Judgment and Sentence.⁵ On February 16-19, 2016, November 3, 2016, and February 1, 2017, this Court held an evidentiary hearing on King's Motion.

At the evidentiary hearing, Refik Eler and Quentin Till were called to testify. (PCR). Till was the first chair attorney and primarily managed the guilt phase, and Eler managed the penalty phase. (PCR 1:4694-99). Both Till and Eler were highly experienced lawyers with lengthy careers; Till for 46 years and Eler for 30. (PCR 1:4694-99, 4913-14, 4923). They were assisted in King's case by junior attorneys Deb Billard and Shawn Arnold, and by mitigation specialists Holly Ayers and

⁵ King also filed motions seeking authorization to file a fourth, fifth, and sixth amended motion, on October 19, 2016, October 21, 2016, and January 27, 2017, respectively, all of which were denied by this Court. On February 7, 2017, King filed a supplemental motion requesting relief pursuant to Hurst v. Florida, 136 S.Ct. 616 (2016), and Hurst v. State, 202 So. 3d at 40 (Fla. 2016). The State filed its answer on March 10, 2017.

David Douglas. (PCR 1:4697-700). While working the case, the team had in-depth meetings where they shared information about what they were working on, and addressed strategy and evidence issues. Once they came to an agreement, they would meet with King about their recommendation. (PCR 1:4789-91).

Eler testified that the team was aware that King had confessed to murdering Telzer-Bain to one of their investigators, and this influenced some of their strategic decisions. (PCR 1:4740). Eler explained that when considering calling experts to try to implicate a guilty third party, they made a tactical decision based on what they knew in the case, and whether it fit with their defense theme. (PCR 1:4799-800). The team considered and rejected the prospect of hiring various guilt phase experts. In determining whether to hire a DNA expert, they consulted Bruce Budowle, who told them his testimony would not provide much assistance in their case. He indicated that if he retested the DNA results it would likely confirm the Florida Department of Law Enforcement's (FDLE) results. Till testified at the evidentiary hearing that when he consulted with Dr. Budowle about the case, Dr. Budowle advised Till that doing additional DNA testing could be problematic and that, based on the quality of the DNA result, calling an expert would not be helpful. Eler testified that they did not want to risk creating additional evidence in

light of King's admission to their investigator that he had committed the murder. (PCR 1:4738-40, 4791, 4960-62).

The team also rejected hiring a cell phone location expert and a shoeprint expert. Till testified that he did not need a cell phone expert because he was able to identify the weaknesses in Detective Cayenne's testimony and bring those weaknesses out through cross-examination. (PCR 1:4958-59). He also testified that there was no need to call a shoeprint expert because the shoeprints at the scene did not match any of King's shoes. Till noted that law enforcement found numerous shoeprints but were unable to match even one of them to King. (PCR 1:4962). He was also aware that King was implicated in a robbery at a nearby home in Telzer-Bain's neighborhood the month before her murder. Till was concerned about opening the door for that evidence to be brought out as rebuttal evidence. (PCR 1:4962-63).

King called several expert witnesses at the evidentiary hearing, including Dr. Kevin Noppinger, William Bodziak, Elzner Brown, and Robert Wyman. (PCR 1:3301-72, 3378-3455, 3457-3512). Dr. Noppinger provided expert testimony on DNA testing. (PCR 1:3301-44). He disagreed with some of FDLE's findings and procedures, noting that the cantaloupe could have been frozen to preserve it for further testing. (PCR 1:3306-07). He also determined a partial DNA profile

retrieved from Telzer-Bain's socks excluded Telzer-Bain and King as contributors. FDLE had previously determined that the swab did not contain enough DNA to create a profile, and they could not compare it to DNA standards. (R 16:1228; PCR 1:3308-20).

William Bodziak provided expert testimony on forensic shoeprint evidence. While he criticized the police investigation for determining the size of the prints based on photographs, he noted "the most common way to collect this evidence would be photography." (PCR 1:3354). Bodziak said the best way to determine the size of the shoeprints and make a 2-dimensional impression is to seize the door that had the prints on them. (PCR 1:3354-55). After reviewing the evidence in the case, Bodziak was unable to determine the size of the shoes that left the prints. He concluded that because of the multiple shoe impressions on the door and the inaccuracy of the scale, even if he had samples of the full range of sizes for the shoe that was used, determining the size would be impossible. (PCR 1:3367). He also noted that the shoeprints found in the dirt around Telzer-Bain's home appeared to be like the prints on the door, but were "partial impressions" and yielded inconclusive results. (PCR 1:3371-72).

Elzner Brown provided expert testimony on latent print evidence. He testified that he agreed with the Jacksonville Sheriff's Office (JSO) findings on 11

of the 12 print cards from Telzer-Bain's home. (PCR 1:3464). Brown disagreed with JSO's determination as to one fingerprint, found on a Ziplock food container in Telzer-Bain's home, that JSO determined was of no value. (PCR 1:3464-65). However, Brown provided conflicting testimony on why he disagreed with JSO's conclusions. Initially, he testified that the print did not match Telzer-Bain, King, Rashad Montfort, or Montfort's cousin, Robert Epps. (PCR 1:3469-70). On cross-examination, Brown admitted that he could not conclusively rule out Telzer-Bain. (PCR 1:3495). Ultimately, Brown stated that the print on print card 6 "could be anybody's." (PCR 1:3498).

Robert Wyman provided expert testimony on GPS and cellular phone location data. Specifically, Wyman concluded that King could have been at home when he placed the 5:24 A.M. phone call the day of the murder, and the tower his phone utilized in making the call is not necessarily the tower that King was closest to when he placed the call. (PCR 1:3410-11, 3426). He explained that only a phone company employee would know the directionality of a cell phone tower; a detective would not be able to determine that from the records he was provided. (PCR 1:3402-03).

On July 11, 2017, following the conclusion of the postconviction evidentiary hearing, the trial court issued a written order. (PCR 1:2945-3003). The trial court

denied all of King's guilt phase claims, denied his claim regarding lethal injection, denied his claim on cumulative error, granted his penalty phase claim seeking Hurst⁶ relief, and declined to address his other penalty phase claims because they were moot. (PCR 1:2945-3005). This appeal follows.

⁶ Hurst v. Florida, 136 S.Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016).

SUMMARY OF THE ARGUMENT

King's appeal is untimely and this Court lacks jurisdiction to hear his appeal. As there is no final judgment and sentence in King's case, his appeal is untimely and this Court lacks jurisdiction to hear it. If King's guilt phase claims are litigated absent a valid judgment, he could potentially relitigate those claims after his sentence is re-imposed.

Trial counsel was not ineffective for failing to present evidence and challenge the state's case. Trial counsel made reasonable strategic decisions regarding what issues to object to and whether to call guilt phase experts to testify at trial. Trial counsel's decisions were informed by the evidence in the case and extensive trial experience. As trial counsel was not deficient and King was not prejudiced by counsel's actions, the trial court's order denying King's ineffective assistance of counsel claims should be upheld.

Trial counsel was not ineffective for failing to raise objections. Trial counsel made reasonable strategic decisions about when to object throughout trial. Many of the objections King claims counsel should have made were legally baseless or strategically unsound. Counsel's failure to object did not prejudice King as much of the testimony at issue was admissible and the objections would not have been sustained. As trial counsel was not deficient and King was not

prejudiced by counsel's actions, the trial court's order denying King's ineffective assistance of counsel claims should be upheld.

The trial court did not err in denying King's cumulative error claim. As all of King's claims are meritless, he is not entitled to cumulative error relief.

STANDARD OF REVIEW

Because ineffective assistance of counsel claims present mixed questions of fact and law, this Court employs a mixed standard of review, deferring to the trial court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. Pagan v. State, 29 So. 3d 938, 949 (Fla. 2009) (citing Sochor v. State, 883 So. 2d 766, 771-72 (Fla.2004)).

STATEMENT ON JURISDICTION AND TIMELINESS

The State questions whether this Court has jurisdiction of this appeal given the trial court's order vacating King's penalty phase pursuant to Hurst v. State, 202 So. 3d 40 (Fla. 2016). See State v. Preston, 376 So. 2d 3, 4 (Fla. 1979) (declining to hear an interlocutory appeal from a murder trial because a death sentence was not imposed); Trepal v. State, 754 So. 2d 702, 706-07 (Fla. 2000) (exercising jurisdiction over an interlocutory appeal from a capital postconviction proceeding because a death sentence was imposed); cf. Farina v. State, 191 So. 3d 454 (Fla. 2016). As there is no final judgment and sentence in King's case, his appeal is

untimely and this Court lacks jurisdiction to hear it. Holding King's appeal in abeyance will moot any jurisdictional challenges and prevent the possible relitigation of his guilt phase claims in the future.

Moreover, a judgment and sentence are not intended to be litigated separately. When a sentence is vacated, the related judgment is also vacated. Berman v. United States, 302 U.S. 211 (1937). If King's guilt phase claims are litigated absent a valid judgment, he could potentially relitigate those claims after his sentence is re-imposed, wasting valuable state and judicial resources. See Magwood v. Patterson, 561 U.S. 320 (2010); Insignares v. Florida, 755 F.3d 1273, 1278 (Fla. 11th Cir. 2014). For these reasons, King's appeal is untimely until he is resentenced and a new judgment is entered. Accordingly, the State prays this Court hold King's appeal in abeyance pending completion of resentencing.

ARGUMENT

ISSUE 1: TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE AND CHALLENGE THE STATE'S CASE⁷

To establish ineffective assistance of counsel (also known as a Strickland claim), King must satisfy a two-prong test, establishing both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668 (1984). To establish deficient performance, King must show that trial counsel made specific errors so

⁷ This claim is identified as section C in King's Initial Brief.

serious that he was not functioning as the counsel guaranteed to King by the Sixth Amendment. Id. at 687; Pietri v. State, 885 So. 2d 245, 252 (Fla. 2004) (“a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct”) (quoting Strickland, 466 U.S. at 690). Strickland refrained from providing specific guidelines to evaluate counsel’s performance, and held “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” 466 U.S. at 688. To establish prejudice, King must show that there is a reasonable probability that but for trial counsel’s deficiencies, he would have received a different outcome. Sears v. Upton, 561 U.S. 945 (2010).

“Judicial scrutiny in these cases must be ‘highly deferential’ and ‘every effort ... made to eliminate the distorting effects of hindsight.’” Bryant v. State, 901 So. 2d 810, 820 (Fla. 2005) (citing Strickland, 466 U.S. at 689). The standard for evaluation is not whether an attorney could have done more. Pagan v. State, 29 So. 3d 938, 949 (Fla. 2009). Rather, “[c]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690.

The presumption of adequacy is heightened when reviewing the conduct and performance of an experienced trial lawyer. Chandler v. United States, 218 F.3d 1327, 1316 (11th Cir. 2000); Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998) (stating, “Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel.”). In line with this standard of deference, an attorney is not ineffective for strategic decisions that are part of the trial strategy, even if these decisions appear to be unwise in retrospect. “The decision will be held to have been ineffective assistance only if it was ‘so patently unreasonable that no competent attorney would have chosen it.’” Dingle v. Sec’y Dept. of Corr., 480 F.3d 1092, 1099 (11th Cir. 2007) (quoting Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983)).

Decisions on whether to hire experts and when to object during trial are well within the realm of strategic decisions and are entitled to the same deference as other strategic decisions. Strickland does not require defense counsel to retain an expert to rebut every State expert. In many instances, cross-examination is sufficient to expose the flaws in an expert’s testimony. Crain v. State, 78 So. 3d 1025, 1040-41 (Fla. 2011) (holding, counsel was not deficient for failing to retain an expert to rebut the State’s forensic pathology expert regarding whether scratch marks on defendant were consistent with that of a seven-year-old victim; counsel

obtained significant concessions from State's expert during deposition regarding nature of scratch marks and counsel made the reasonable decision to confront State's expert at trial through cross-examination); Gonzalez v. State, 990 So. 2d 1017 (Fla. 2008) (holding trial counsel's failure to object at various points throughout trial was either a reasonable strategy, was not legally warranted, or was not prejudicial).

Because a court can make a finding on the prejudice prong of Strickland without ruling on the deficiency prong, claims of ineffective assistance of counsel are subject to denial when the court can determine the outcome of the proceeding would not be affected even if counsel were deficient. Franqui v. State, 59 So. 3d 82, 96 (Fla. 2011); Troy v. State, 57 So. 3d 828 (Fla. 2011); Walls v. State, 926 So. 2d 1156, 1173 (Fla. 2006) (summary denial appropriate on ineffective assistance of counsel claim where evidence was cumulative). See also Stewart v. State, 801 So. 2d 59, 65 (Fla. 2001) (where the Strickland standard requires establishment of both the deficient performance and prejudice prongs, when a defendant fails to make a showing as to one prong, it is not necessary to assess the other prong). "Failure to sufficiently allege both prongs results in a summary denial of the claim." Spera v. State, 971 So. 2d 754, 758 (Fla. 2007) (citing Thompson v. State, 796 So. 2d 511, 514 fn. 5 (Fla. 2001)).

I. Redaction of King's Interrogation Video

King alleges that the trial court erred in denying King's claim that trial counsel was ineffective for failing to redact statements made by law enforcement during their recorded interview of King. (IB at 19). As trial counsel's efforts to redact the video were reasonable and did not prejudice King, the trial court's ruling should be upheld.

This Court has recognized that a jury may hear an interrogating detective's remarks about a crime when they provoke a relevant response from the defendant. McMillian v. State, 214 So. 3d 1274 (Fla. 2017) (holding a jury may hear an interrogating detective's statements about a crime when they provoke a relevant response from the defendant); Jackson v. State, 18 So. 3d 1016, 1032 (Fla. 2009); McWatters v. State, 36 So. 3d 613, 638 (Fla. 2010) (holding that when the interrogating detective's statements are placed in "their proper context," the statements could be perceived as "techniques" used by law enforcement to secure confessions) (quoting Worden v. State, 603 So. 2d 581, 583 (Fla. 2d DCA 1992)).

King failed to demonstrate that Till's representation was deficient. King asserts that trial counsel Quentin Till "never thought to object" at trial because he already spent significant time redacting the tape, (IB at 23), but this assertion misapprehends Till's evidentiary hearing testimony. Till testified that he filed a

motion to redact portions of the interrogation video and the trial court ultimately decided what would come in. (PCR 1:4956). He worked extensively on the redaction of the video, was thoroughly aware of the case law on this issue, and did his best to redact everything he thought was improper. (PCR 1:4954, 4956). He also worked with the prosecutor to come to an agreement about some of the redactions. He estimated that he spent close to 100 hours on the redaction of the video. (PCR 1:4954-55).

Till's testimony demonstrates that he made every effort to redact improper portions of the video and spent an extensive amount of time on this issue. Till's decision to withhold objection at trial was not ineffective, but rather was a reasonable choice as he had already raised all his objections prior to trial and the court had issued a ruling on the matter.

King's reliance on Martinez v. State, 761 So. 2d 1074 (Fla. 2000), to argue that the officer's statements in the video are inadmissible is misplaced. In Martinez, a detective was called to the stand and asked his opinion about the defendant's guilt. Id. at 1079. The Martinez facts are far different from the present case or McMillian, 214 So. 3d at 1286-87, where officers made comments about the crime in an interrogation for the purpose of eliciting a response. McMillian makes clear that admission of such comments is allowed. Id. at 1286.

King fails to demonstrate that Till's representation prejudiced him. The detectives' comments on the interrogation video were made for the purpose of eliciting a response from King, which he gave. (R 14:916-15:1019, 1026-51). Such comments are not unfairly prejudicial under McMillian, 214 So. 3d at 1286-87, or Jackson, 18 So. 3d at 1032. Similarly, King is not prejudiced by trial counsel's failure to object to evidence that is not legally excludable. Even if Till succeeded in excluding the statements, it would not have affected the outcome; the evidence of guilt in this case is overwhelming and includes DNA evidence, several incriminating and inconsistent statements by King, and the discovery of the victim's property in King's possession. This claim is meritless and should be denied.

II. Objections to Detective Cayenne's Trial Testimony

King alleges that the trial court erred in denying King's claim that trial counsel failed to object to hearsay and other objectionable statements in portions of Detective Cayenne's trial testimony. (IB at 25-32). King's claim fails because trial counsel's decision not to object was strategic, many of the statements were admissible, and admitting the statements was not prejudicial to King. The trial court's denial of King's claim was based on competent, substantial evidence and should not be disturbed.

During the evidentiary hearing, Till testified that excessive objections are common in newer lawyers and suggested that such an approach is not strategically sound. He suggested that excessive objections annoy the jury and can create a bad impression when he objects to testimony from one witness, but another witness is later brought in to testify to the same thing. (PCR 1:4979). As a matter of strategy, Till said he saves his objections for things that are actually prejudicial. (PCR 1:4978-79). Till's decision not to object was a reasonable strategic decision, and does not constitute a Strickland violation under Gonzalez, 990 So. 2d at 1017; Chandler, 218 F.3d at 1316, or Provenzano, 148 F.3d at 1332.

Furthermore, many of the statements King complains of, (IB 26-29), were not objectionable. For instance, many of the comments he identifies as improper opinion or speculation, (R 14:891, 892-93; 15:1023-24, 1169, 1170), were knowledgeable statements by Detective Cayenne that were based on his personal knowledge and experience as a law enforcement officer. See Gonzales v. State, 95 So. 3d 1002, 1003-04 (Fla. 3d DCA 2012) (police officer's testimony that statements given by two witnesses were consistent was not improper opinion testimony on witness credibility). Objections to such statements would not have been sustained, thus, trial counsel cannot be faulted for not raising them. Additionally, many of the statements King identifies as inadmissible hearsay were

not admitted to prove the truth of the matter asserted, were otherwise not hearsay, or fell within a lawful hearsay exception. See § 90.803, Fla. Stat.; United States v. Lamons, 532 F.3d 1251 (11th Cir. 2008) (holding that testifying regarding the content of phone company call logs is not inadmissible hearsay). (R 14:890, 892-93, 896, 898).

Finally, trial counsel's failure to object to the statements did not prejudice King. Detective Cayenne's alleged hearsay statements were not unfairly prejudicial and most of them were admitted through other witnesses, such as Lyza Telzer, Jason Hitt, Thomas Howell, Rashad Montfort, and James Roman, among others. Even if trial counsel had objected, the evidence was still presented to the jury through other witnesses. (R 12:434-92, 13:709-13, 679-98, 16:1228, 14:866-69). Furthermore, Detective Cayenne's statements would not have impacted the outcome of King's trial. The statements concerned minor aspects of the trial, addressed evidence that was presented by other witnesses, or were entirely innocuous.

In denying King's claim, the trial court noted that many of the statements King complained of were testified to by the original declarants, some of the additional hearsay statements were actually beneficial to King's case, and some others were not hearsay. (PCR 1:2968-70). The trial court ultimately held that trial

counsel was not ineffective for making the tactical decision to not object and that King failed to demonstrate prejudice. (PCR 1:2970-71). While King argues that the trial court's ruling was contrary to the evidence, (IB at 32), the record shows that the trial court's ruling was based on competent, substantial evidence, and should be upheld.

III. Introduction of a Bloody Shirt at Trial

King alleges trial counsel was deficient for failing to object to introduction of a bloody shirt found in King's apartment. (IB at 32-34). Trial counsel's decision not to object was a reasonable strategic decision and the trial court's denial of King's claim was based on competent, substantial evidence and should not be disturbed.

Strategic decisions are generally insulated from Strickland unless they are “so patently unreasonable that no competent attorney would have chosen it.” Dingle, 480 F.3d at 1099. The presumption of adequacy is heightened when reviewing the conduct and performance of an experienced trial lawyer. Chandler, 218 F.3d at 1316; Provenzano, 148 F.3d at 1332.

At the evidentiary hearing, Till testified that the bloody shirt could not be matched to the victim or King and he used the presence of the shirt to argue in closing that the police were careless with their investigation. (PCR 1:4960-61).

Indeed, during closing argument, Till used the bloody shirt to argue the detectives badgered King into believing the shirt was his, (R 17:1410), and if they could gain a false confession about a shirt they could gain a false confession that King was ever in Telzer-Bain's home. (R 17:1411-12). In his testimony, Till noted other evidence in the case that he used to argue to the jury that the police did an inadequate investigation of the crime. (PCR 1:4960). Many of the references to the shirt during trial were drawn out by trial counsel to show that the shirt was not in King's size, and that the police failed to compare the blood on the shirt to the DNA of the people who left prints in Telzer-Bain's car, or conduct other forensic tests. (R 15:1146-51, 1175-76; 16:1273-77). The argument of careless police work was a theme of the defense case, and Till used the existence of the shirt to his client's advantage.

While King claims that the bloody shirt "took on a large part of the case," (IB 33), and that the trial court ignored this fact in its order, (IB 34), the record indicates that the shirt played a minimal role overall in the trial. The State never mentioned the shirt in opening or closing, (R 12:409-24, 16:1326-66; 17:1438-50), and many of the references to the shirt were made by defense counsel to support his theme. Furthermore, because the blood on the shirt did not match King or

Telzer-Bain, the evidence did not incriminate King and its use at trial did not prejudice him.

In denying King's claim, the trial court noted that Till's strategy to use the shirt in his defense was a reasonable trial strategy, and that he was not prejudiced by its introduction because the State did not make it a feature of the trial and trial counsel used the shirt in its defense. (PCR 1:2966-67). The trial court's order denying relief was based on competent, substantial evidence, and this claim should be denied.

IV. Presenting and Investigating Expert Witnesses at Trial

King puts forth a cursory claim that trial counsel was ineffective for failing to present or retain any expert witnesses at trial. (IB 35). King provides little factual support for his claim, suggesting that the lack of defense experts necessarily indicates that King's trial counsel failed to investigate his claims of innocence. This claim fails to allege a deficient act, fails to allege any prejudice, and is meritless.

This Court has never held that a defense attorney must call expert witnesses to provide effective assistance of counsel. Failure to call an expert witness is not ineffective when it is part of a strategic plan. Crain, 78 So. 3d at 1040-41 (holding counsel was not deficient for failing to retain an expert to rebut the State's forensic

pathology expert regarding whether scratch marks on defendant were consistent with that of a seven-year-old victim; counsel obtained significant concessions from State's expert during deposition regarding nature of scratch marks and counsel made the reasonable decision to confront State's expert at trial through cross-examination). King fails to allege in this claim what experts should have been called and why, or what helpful testimony could have been provided by experts if counsel had called any. King further fails to explain what prejudice he suffered by trial counsel's strategic decision.

Trial counsel made decisions about whether to call expert witnesses based on an informed strategy. As discussed, infra, pages 27-39, trial counsel contacted potential experts, discussed King's case with them, and made determinations about what testimony would be helpful to King's case.⁸ Trial counsel was not ineffective and this claim should be denied.

V. Presenting DNA Evidence and Rebutting the State's DNA Evidence

King alleges that trial counsel should have retained a DNA expert to rebut the State's evidence of King's DNA found on a piece of cantaloupe in Telzer-Bain's home; to testify regarding holes in the chain of custody, flaws in the testing

⁸ To the extent that King makes more detailed arguments regarding trial counsel's failure to retain experts in subparts V, VI, VII, and VIII of Claim One, the State's response to those claims is incorporated here.

process, and the State's failure to test various items; and to test or retest items including a bloody shirt, Telzer-Bain's socks and fingernail clippings, and the piece of cantaloupe. (IB at 36-40). King's claim fails because trial counsel's strategic decision not to test or retest items or call a DNA expert to testify was informed and reasonable and King was not prejudiced by trial counsel's choice.

Firstly, the decision not to call a DNA expert was a reasonable strategic decision. Both Quentin Till and Refik Eler were involved in addressing DNA evidence at trial. Till testified at the evidentiary hearing that he consulted with DNA expert Dr. Bruce Budowle about testifying at trial, conducting additional testing, and the quality of the tests already performed by FDLE. After reviewing the case, Dr. Budowle advised Till that doing additional DNA testing could be problematic and that, based on the quality of the DNA result, calling an expert would not be helpful. Eler testified that they did not want to risk creating additional evidence in light of King's admission to their investigator that he had committed the murder. (PCR 1:4738-40, 4961-62).

Refik Eler was responsible for cross-examining the State's DNA expert, Jason Hitt, at trial and was involved in the defense team's discussions about whether to call a defense DNA expert to testify at the trial. (R 16:1256; PCR 1:4739). Eler testified that the defense team was very hesitant to do additional

forensic testing at the murder scene because King admitted committing the murder to one of their investigators, and the team was afraid that further forensic testing would only reveal more evidence against King. (PCR 1:4739-40).

Given the circumstances and Dr. Budowle's recommendation, the defense team's strategy was to argue the weaknesses of the State's DNA evidence, such as emphasizing that the DNA match to King was incomplete, and that the cantaloupe was destroyed after testing. (PCR 1:4790-91, 4982-84). While King now claims trial counsel was ineffective for not seeking out evidence of another suspect in the home, Eler suggested presenting evidence of another perpetrator would be inconsistent with their overall theme. (PCR 1:4800).

Refik Eler's cross-examination of the prosecution's DNA expert, Analyst Jason Hitt, was thorough and fully exploited various weaknesses, including the possibility of cross-contamination and the existence of an incomplete DNA profile, among other points. (R 16:1256-85). The trial transcript and Till's testimony at the evidentiary hearing demonstrate that King's defense team used a reasonable and informed decision-making process when deciding not to use a DNA expert, and their strategic decision was not deficient. See Crain, 78 So. 3d at 1040-41; Dingle, 480 F.3d at 1099; Provenzano, 148 F.3d at 1332.

Secondly, the decision not to call a DNA expert was not prejudicial. During his second recorded interview on February 5, 2010, King admitted being inside Telzer-Bain's home prior to the murder. (R 15:1038-40). Thus, the DNA match found on the cantaloupe was consistent with the defense's theory. Furthermore, King's postconviction DNA expert, Kevin Noppinger, did not identify any material evidence that should have been presented at trial, but rather, agreed with all but one of FDLE's findings on the DNA samples. (PCR 1:3301-44). Noppinger's only criticism of Hitt's DNA results was for failing to indicate that the swabs from the victim's socks were sufficient for exclusion. While he agreed with Analyst Hitt's finding that the swabs were insufficient for inclusion, his analysis revealed that the socks contained some alleles foreign to King, Telzer-Bain, and her son, Miles Telzer. (PCR 1:3318-21). However, this point is immaterial because, as Noppinger confirmed, the alleles could have transferred to her socks from innocuous activity, like walking around her house. (PCR 1:3323).

King argues his due process rights were violated when the trial court denied his request to retest the bloody shirt and Telzer-Bain's socks, and that this denial prevented him from proving prejudice. (IB at 41). In light of the evidence in the case, even if King could identify the DNA contributors on the shirt or the socks, it would not have affected the outcome of his case. It is known that the blood on the

shirt is not King's or Telzer-Bain's, so if the blood is matched to anyone it would be a third party. Identifying a third party's blood on a shirt found in King's home in no way demonstrates that he is innocent. In a similar vein, if the socks were tested and matched to a third party, the evidence would have little consequence as DNA can transfer easily onto socks simply by walking around.

In denying King's claim, the trial court noted that King's expert agreed with FDLE's findings that King's DNA was on the cantaloupe. The court also highlighted the reasonableness of trial counsel's reasoning for not calling a DNA expert. (PCR 1:2972). After carefully weighing the facts of the case and the testimony at the postconviction hearing, the trial court concluded that trial counsel was not deficient in their decision not to call a DNA expert and King was not prejudiced by this decision. (PCR 1:2971-77).

As trial counsel's reasoning for not calling a DNA expert witness at trial was a reasonable strategy, and King failed to produce any DNA evidence that could have been presented at trial and would have changed the outcome of his case, his claim is meritless. The trial court's ruling denying King's claim was based on competent, substantial evidence and should be upheld.

VI. Presenting a Shoeprint Expert and Rebutting the State's Shoeprint Evidence

King alleges that trial counsel should have called a shoeprint expert to testify to the accurate size of the shoes that left the shoeprints at the crime scene. (Motion at 30). King's claim fails because trial counsel's strategic decision to not call a shoeprint expert to testify was reasonable and King was not prejudiced by trial counsel's choice.

Quentin Till did not utilize a shoeprint expert in this case because it was not sensible given the evidence. (PCR 1:4962-63). Till noted that law enforcement found numerous shoeprints but were unable to match even one of them to King, (PCR 1:4962; R 14:881-83), which was highly beneficial to the defense. Till attacked the State's shoeprint evidence on cross-examination and during closing argument, argued that Detective Pfister was unqualified to testify about shoeprints and that the State could have called a qualified witness but did not. (R 13:662-63; 17:1422-23). He was also aware that King was implicated in a robbery at a nearby home in Telzer-Bain's neighborhood the month before her murder. Till was concerned about opening the door for that evidence to be brought out in the State's rebuttal. (PCR 1:4962-63). Till's decision not to use a shoeprint expert was clearly a reasonable strategic decision and does not establish deficient performance.

William Bodziak, King's postconviction shoeprint expert, did not identify any material evidence that would have affected the outcome of his case if it had been produced at trial. While he criticized the police investigation for determining the size of the prints based on photographs, he noted "the most common way to collect this evidence would be photography." (PCR 1:3354). Notably, Bodziak's testimony did not support King's claim that the State's evidence was inaccurate or flawed because he could not determine the size of the shoes that left the prints. Bodziak concluded that because of the multiple shoe impressions on the door and the inaccuracy of the scale, even if he had samples of the full range of sizes for the shoe that was used, determining the size would be impossible. (PCR 1:3367). He also noted that the shoeprints found in the dirt around Telzer-Bain's home appeared to be like the prints on the door, but were "partial impressions" and yielded inconclusive results. (PCR 1:3371-72).

As Till's reasoning for not calling a shoeprint expert witness at trial was a reasonable strategy, and King failed to produce any new shoeprint evidence that would have affected the outcome of his case if it had been presented at his trial, his claim is meritless and should be denied.

VII. Presenting a Latent Print Expert and Rebutting the State's Latent Print Evidence

King alleges that trial counsel was ineffective for failing to retain a latent print expert to reexamine inconclusive prints and rebut the State's fingerprint evidence. Specifically, King claims that trial counsel should have hired an expert to retest a fingerprint found on a Ziplock food container lid in Telzer-Bain's home that JSO determined was of no value. (IB 50-51). Trial counsel was not ineffective for failing to retain a fingerprint expert, and King was not prejudiced by trial counsel's choice. This claim is meritless and should be denied.

Firstly, King's claim disregards the obvious and significant risk associated with processing items inside the victim's home in light of King's admission to detectives that he was inside the home, (R 15:1038-40), and his admission to trial counsel's investigator that he committed the murder. (PCR 1:4715-18). Should additional latent print processing reveal that King's prints were on retested or newly tested items, such findings would generate additional evidence of guilt.

Secondly, King failed to produce any evidence at the evidentiary hearing that would have a reasonable probability of changing the outcome of his trial. King's postconviction latent print expert, Elzner Brown, testified that he agreed with the JSO findings on 11 of the 12 print cards from Telzer-Bain's home. (PCR 1:3464). Brown disagreed with JSO's determination as to only one fingerprint,

found on a Ziplock food container in Telzer-Bain's home, that JSO determined was of no value. (PCR 1:3464-65). However, Brown provided conflicting testimony on why he disagreed with JSO's conclusions. Initially, he testified that the print did not match Telzer-Bain, King, Rashad Montfort, or Montfort's cousin, Robert Epps. (PCR 1:3469-70). On cross-examination, Brown admitted that he could not conclusively rule out Telzer-Bain. (PCR 1:3495). Ultimately, Brown stated that the print on print card 6 "could be anybody's." (PCR 1:3498). Obviously, if the print could belong to anyone, Brown's disagreement with JSO's "no value" determination is meaningless.

Thirdly, when Till was questioned at the evidentiary hearing about his decision not to use a shoeprint or fingerprint expert, he mentioned that King was implicated in a robbery at Telzer-Bain's neighbor's home. Till was concerned about opening the door for that evidence to be brought out as rebuttal evidence. (PCR 1:4962-63). These factors weighed against calling such experts, and his strategic decision to not use such experts was reasonable. Till adequately cross-examined the State's fingerprint witness, getting favorable concessions that King's prints were not found anywhere in Telzer-Bain's house or car, and he reiterated this point in closing argument. (R 17:1394, 1417, 1423-24).

Reprocessing the Ziplock container risked creating incriminating evidence, and calling an expert to testify would not have produced favorable evidence that would have a reasonable probability of changing the outcome of King's trial. The trial court's order denying this claim was based on competent, substantial evidence and should be upheld.

VIII. Presenting a Cellular Phone Location Expert and Rebutting the State's Cellular Phone Location Evidence

King alleges that trial counsel was ineffective for failing to object to Detective Cayenne's allegedly improper testimony on cellular phone location data, and failing to present an expert in cellular phone location data to establish reasonable doubt and rebut the State's evidence. (IB 53). King's claim fails because Detective Cayenne's testimony was not improper, and a cellular phone expert's testimony would have covered the same points trial counsel elicited from Detective Cayenne on cross-examination.

Trial counsel was not ineffective for failing to object to Detective Cayenne's cell phone location data testimony. King claims that Detective Cayenne lacked the qualifications to testify on cellular phone location data and that his testimony was inaccurate and misleading. (IB 53). However, this Court has held that witnesses need not be experts to testify about cell phone records. See Gordon v. State, 863 So. 2d 1215, 1219 (Fla. 2003) (holding that testimony on the content of cellular

phone records and comparing cellular tower site maps to the records was not expert testimony). The Eleventh Circuit Court of Appeals has held that testifying regarding the content of phone company call logs is not inadmissible hearsay. Lamons, 532 F.3d 1251. Quentin Till was aware of the case law and indicated that he did not object because there was no legal basis to do so. (PCR 1:4958). He noted that Detective Cayenne was straightforward when questioned and conceded the main point Till wanted to get across: King could have been sitting on his own front porch when he made the call in question. (PCR 1:4958-59). It was clearly more prudent to cross-examine Detective Cayenne on the weaknesses in his testimony than to make meritless objections.

Till skillfully cross-examined Detective Cayenne, highlighting and gaining concessions from Detective Cayenne on the points of his testimony that King claims were inaccurate or misleading. Specifically, Detective Cayenne conceded that the cellular tower utilized for the 5:24 A.M. call did not conclusively put King at the downtown bus station at that time. He agreed that a call does not always utilize the nearest tower, and a tower can have a range of up to ten miles. Detective Cayenne further agreed that it was possible that King was at home, on his front porch when the call was made at 5:24 A.M. (R 15:1111-14). Till testified that he did not need a cellular phone expert because he was able to sufficiently cross-

examine Detective Cayenne and bring out the weaknesses in his testimony through cross-examination. (PCR 1:4958-60). Till's choice not to call a cellular phone expert was clearly a reasonable strategic decision.

Finally, Till's cross-examination produced the same favorable testimony for the defense that King's postconviction cell phone expert, Robert Wyman, produced at the evidentiary hearing. His material conclusions were exactly the same as the points Till brought out in his cross-examination of Detective Cayenne; specifically, that King could have been at home when he placed the 5:24 A.M. phone call, and the tower his phone utilized in making the call is not necessarily the tower that King was closest to when he placed the call. (R 15:1111-14; PCR 1:3410-11, 3426). Hiring an expert would have accomplished nothing more than what Till accomplished on cross-examination. Thus, trial counsel's decision not to hire an expert here was clearly a reasonable strategic decision that did not prejudice King. Crain, 78 So. 3d at 1040-41.

While King claims the trial court misunderstood the facts in rendering its ruling, (IB 56-58), his objections boil down to a disagreement with the trial court about its interpretation of the facts and the evidence. This Court has a long history of deferring to the trial court's interpretation of the facts and testimony because the trial court is in the best position to evaluate the evidence. Hoskins v. State, 965 So.

2d 1 (Fla. 2007). The trial court’s ruling was sound and thoroughly reviewed the relevant portions of the trial record and the evidence presented at the postconviction hearing in its order. (PCR 1:2979-83). The trial court’s denial of King’s claim was based on competent, substantial evidence and should not be disturbed.

ISSUE 2: TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE OBJECTIONS⁹

I. Failure to Object to the State’s Direct Examination of Rashad Montfort and his Resulting Testimony

King alleges that trial counsel was deficient for failing to object to leading questioning which resulted in misleading testimony from Montfort, and that the trial court erred in denying this claim. (IB 60). This claim fails because most of the questioning King complains of was not leading, Montfort’s testimony was not misleading, and trial counsel’s decision not to object to portions of the State’s questioning was a reasonable strategic decision. The trial court’s ruling is supported by competent, substantial evidence and should not be disturbed.

King quotes several portions of Montfort’s direct-examination testimony wherein he claims the State improperly led the witness. This Court has recognized repeatedly that a question is not leading simply because it asks for a “yes” or “no”

⁹ This claim is identified as section D in King’s Initial Brief.

answer. Rather, a question is leading when it points out the desired answer. Happ v. State, 922 So. 2d 182, 192 (Fla. 2005) (denying Strickland claim where much of the line of questioning—including questions, “... did you see Mr. Happ again on Thursday?” “This was 11:00 o’clock in the evening now?” “And he was off that Saturday?”—was not leading). The line of questioning King now objects to was not leading because it did not suggest to Montfort which answers to give. While many of the questions called for a “yes” or “no” answer, that in itself does not make a leading question. Trial counsel had an insufficient legal basis to object to the questioning at issue, and was not ineffective for choosing not to.

The line of questioning King complains of did not “mislead” the jury into believing that King lent Montfort the Cadillac. The jury listened to the wire recordings in State Exhibit 336, and heard firsthand that King did not deny giving the vehicle to Montfort, and directed Montfort to tell the police “you don’t know.” (R 13:719). On direct examination, Montfort recounted, “... I was up there chilling talking to him and he was like what you fixing to do. I’m like I’m fixing to take my girl some food. And he was like I got this car if you want to go out and use it and bring it back.” (R 13:711-12). Improper questioning did not trick the jury into believing that King lent Montfort the Cadillac; this fact was presented to the jury by Montfort’s own clear eyewitness account at trial. While the State did fast

forward portions of the recording, which exceeded 100 minutes in length, the exhibit itself contains the entire recording, none of which contradicts the portions that the jury heard.

King also argues that the State elicited improper testimony from Montfort, “which included facts not in evidence.” (IB 61). One cannot testify about facts not in evidence as the very act of testifying about a fact puts the fact into evidence. King fails to explain what portion of Montfort’s testimony concerned facts not in evidence, but King is likely referring to his complaint that the State’s questioning misled the jury to believe that Montfort asked King about matters that were not contained in the tapes. (IB 62). King points to a line of questioning where the State and Montfort paraphrase what occurred on the tape, alleging that this testimony misled the jury into believing that King made incriminating statements that were not presented to the jury. (IB 62-63). A review of the audio tape (State Exhibit 336) reveals that these questions and answers simply paraphrased the conversation on the tapes and sought Montfort’s eyewitness account of what occurred. Furthermore, asking Montfort about facts and events that are not reflected on an audio recording is a permissible subject for an eyewitness to testify to. Montfort is not prohibited from testifying about what he saw or heard just because it was not

captured on the audio recording. A reasonable juror would not have been misled by Montfort's testimony, and thus, it was not objectionable.

Even if Till failed to object to a few isolated leading questions, it was reasonable for trial counsel to choose not to object to the questioning. During the evidentiary hearing, Till testified that excessive objections are strategically unsound and often annoy the jury. As a matter of strategy, Till said he saves his objections for things that are actually prejudicial. (PCR 1:4978-79).

The trial court carefully weighed the facts in the trial record and the evidence presented at the hearing, and determined that King's claim was meritless. Even if the trial court had sustained objections to the questioning, the substance of the questions was permissible and would have been elicited when the questions were rephrased. The trial court further found that the State's method of questioning was permissible as the jury heard each segment of the audio tape that the State asked Montfort to interpret, and the jury was free to draw its own conclusions. Finally, the trial court concluded that trial counsel was not ineffective as he raised numerous objections and effectively cross-examined Montfort. (PCR 1:2991-92). King's claim is meritless and the trial court's ruling is supported by competent, substantial evidence and should not be disturbed.

II. Failure to Object to the State's Direct Examination of Detective Cayenne and his Resulting Testimony

King alleges that trial counsel was ineffective for failing to object to Detective Cayenne's misleading testimony at trial. (IB 66-67). This claim fails because the State's redirect questioning accurately summarized the relevant evidence, there was no lawful basis to object, and it was reasonable for trial counsel to avoid questions that focused the jury's attention on unfavorable evidence.

King claims that one brief exchange during the State's redirect of Detective Cayenne was misleading and prejudicial. (IB 66-67). On redirect, the State asked Detective Cayenne: "Did [King] have any response to when Mr. Montfort says, hey, you know that vehicle you let me hold?" Detective Cayenne responded that King did not. (R 15:1173-74). King presumably takes issue with this question because the State paraphrased Montfort's words instead of quoting them exactly. It is clear from the context of the questioning, (R 15:1173-74), that the State was merely paraphrasing Montfort's words during the recorded conversation he had with King, and the questioning was not misleading. Montfort was talking to King about a car Montfort borrowed from him, (R 13:708-13, 738-39, 766), and Montfort's testimony and the audio recording the jury heard indisputably established this fact.

At one point on the recording, King asked Montfort why the police stopped him to inquire about Telzer-Bain's Cadillac, and Montfort replied that he was "in the car." King's only reaction to this was, "That shit crazy, man (inaudible) man. You serious?" (R 13:730-31). This exchange demonstrates that King was not confused or uninformed as to what car Montfort was referring. Rather, King's reaction reflected his recognition that Montfort was referring to Telzer-Bain's Cadillac that he had lent Montfort. Furthermore, as Montfort testified at trial that he borrowed the car from King, (R 13:708-14), any suggestion the State made to that effect in its questioning was based on evidence presented to the jury.

If the State's questioning implied that King's lack of denial was incriminating, that implication was counteracted by Till's argument that Montfort's testimony was an attempt to protect himself. Till pointed out that King never said anything incriminating on the audio recording and that his responses to Montfort were simply the result of feeling "leery that Montfort may be involved in the killing of [the victim]." (R 17:1397-98). Even if the State's questioning was improper, the exchange was a very limited portion of a lengthy direct- and redirect-examination, and would have had no impact on the outcome of the trial.

The trial court's ruling carefully evaluated the trial record and determined that King's claim was meritless. The trial court ruling highlighted that the

questioning was very limited and was not misleading, and that the jury heard the relevant portions of the audio recording, allowing them to make their own determinations about the meaning of King and Montfort's conversation. (PCR 1:2993-94). As King's claim is meritless and the trial court's ruling is based on competent, substantial evidence, the trial court's ruling should not be disturbed.

III. Failure to Object to the State's Closing Argument

King alleges that trial counsel was ineffective for failing to object to comments during State's closing argument because the State argued facts not in evidence, and for failing to make specific counterarguments in his closing. (IB 69-70). Specifically, King claims the State mischaracterized evidence on the audio recording of King and Montfort's conversation when he argued that King lent Montfort the car, and that Montfort told King he lied to the police for King. He also claims that trial counsel should have argued that King did not admit guilt, and did not tell Montfort to say "you don't know." This claim fails because the State's characterization of evidence was accurate, and trial counsel's approach to closing argument was reasonable.

Attorneys are permitted wide latitude in closing argument. Breedlove v. State, 413 So. 2d 1 (Fla. 1982). Furthermore, prosecutors are allowed to rebut comments and theories put forth in defense counsel's closing argument. Rogers v.

State, 957 So. 2d 538, 548 (Fla. 2007) (holding that it was not improper for prosecutor to say defense theory was based on defense counsel’s “vivid” imagination, or bolster a state witness’s credibility where defense counsel made closing arguments that were not based on the evidence and directly attacked the state witness’s credibility); Williamson v. State, 994 So. 2d 1000, 1013 (Fla. 2008) (holding that prosecutor’s suggestion that a state witness’s testimony was credible was not improper bolstering when made in response to defense’s closing argument suggesting that the witness was not believable).

King isolates statements in which the State described evidence to the jury and made arguments about the meaning of the evidence. For instance, the State described Montfort’s taped conversation with King, saying Montfort let King know, “Don’t worry, I’m not going to tell them to implicate you.” (R 16:1353). It is obvious from the record that the State was paraphrasing the conversation for the jury and not attempting to mislead them.

Furthermore, the State’s comments were not based solely on the audio recording, as King appears to represent. Rather, the State’s assertions were based on the content of the recording as well as Montfort’s lengthy testimony about what occurred. (R 13:708-66). The State’s comments clearly were not objectionable because they were an accurate accounting of the evidence in the record. If trial

counsel had objected, his objection would have been meritless, and would have served to draw additional attention to evidence that was harmful to King. Trial counsel prudently focused his closing argument on the weaknesses in the State's case rather than splitting hairs over the State's characterization of the evidence. Trial counsel is under no obligation to raise meritless objections and is not ineffective for failing to do so.

King claims the trial court erred in finding that the State's comments in closing argument were not misleading. (IB at 70). However, King's disagreement with the trial court is nothing more than his disagreement with the court's factual interpretation. As this Court has always afforded trial courts wide latitude on making factual determinations, Hoskins, 965 So. 2d at 1, King's complaint is unconvincing. This claim is meritless and should be denied.

ISSUE 3: THE TRIAL COURT'S DENIAL OF KING'S CUMULATIVE ERROR CLAIM SHOULD BE AFFIRMED¹⁰

King alleges that he did not receive a fair trial due to the numerous errors in his case. He asserts that the errors complained of in his Initial Brief tainted his case and denied him a fundamentally fair trial. (IB 72-73). The trial court denied King's cumulative error claim because each of his claims was either meritless,

¹⁰ This claim is identified as section E in King's Initial Brief.

procedurally barred, or did not meet the Strickland standard for ineffective assistance of counsel. (PCR 1:3005).

The United States Supreme Court has never addressed the issue of cumulative error. Derden v. McNeel, 978 F. 2d 1453, 1456 (5th Cir. 1992) (en banc) (noting the Supreme Court has not directly spoken regarding cumulative error). Invoking cumulative error is an open admission that none of the individual errors warrants reversal while asserting that the combined effect of legally insufficient claims still merits relief. Id. (“[t]hat the constitutionality of a state criminal trial can be compromised by events none of which individually violated a defendant’s constitutional rights seems a difficult theoretical proposition”).

Although King presents this claim as an independent basis for relief, a cumulative error claim cannot warrant relief unless the trial court finds specific claims of error meritorious. Israel v. State, 985 So. 2d 510, 520 (Fla. 2008) (holding where individual claims of error are meritless or procedurally barred, a defendant is not entitled to relief based on cumulative error). Because all of King’s claims are meritless, he is not entitled to cumulative error relief. See Griffin v. State, 866 So. 2d 1, 22 (Fla. 2003) (“[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail.”); Vining v. State, 827 So. 2d 201, 219 (Fla. 2002) (where the defendant’s

claims were either meritless, procedurally barred, or did not meet the Strickland standard, his cumulative error claim necessarily failed). In denying King's cumulative error claim, the trial court held that he was not entitled to relief because each of his claims was either meritless, procedurally barred, or did not meet the Strickland standard for ineffective assistance of counsel. (PCR 1:3005). Accordingly, the trial court's denial of this claim was proper and King is not entitled to relief.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, State of Florida, respectfully urges this Court to affirm the trial court's denial of postconviction relief and affirm the conviction and sentence of death imposed herein.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

JENNIFER L. KEEGAN
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0105283
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3579 (tel)
(850) 487-0997 (fax)

capapp@myfloridalegal.com
Jennifer.Keegan@myfloridalegal.com
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of February, 2018, I electronically filed the foregoing with the Clerk of the Court by using the e-portal system which will send a notice of electronic filing to Gonzalo Andux, Attorney for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Time New Roman, in compliance with Fla. R. App. P. 9.210.

/s/Jennifer L. Keegan
COUNSEL FOR APPELLEE