IN THE SUPREME COURT OF FLORIDA

BENJAMIN DAVIS SMILEY, JR.,

Appellant,

v.

CASE NO. SC18-385
L.T. NO. CF15-004903-XX
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

AMENDED ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: the record on direct appeal will be referred to as "R._" with the appropriate page number inserted within the blank spaces. The penalty phase trial transcript will be referred to as "P._" with the appropriate page number inserted within the blank spaces.

STATEMENT OF THE CASE AND FACTS

On July 15, 2015, Benjamin Davis Smiley was indicted for the first-degree murder of Clifford Drake, robbery with a firearm, tampering with physical evidence, aggravated assault with a firearm, and burglary of a dwelling with an assault or battery while armed with a firearm, for offenses which occurred on April 16, 2013. (R. 58-63) A superseding indictment was filed on November 19, 2015; the date of the offense was amended to include April 15, 2013. (R. 677-81)

The State filed an (amended) notice of intent to offer evidence of other crimes, wrongs or acts per §90.404, Florida Statutes, to admit evidence of the robbery and homicide of Carmen Riley on or about March 22, 2013, in Polk County Case No. CF15-5388. (R. 695) The evidence would be presented to show motive, intent, identity/modus operandi. The trial court found the evidence was relevant to establish Smiley as the person carrying and discharging the firearm; however, the trial court placed restrictions on the evidence the State could

introduce, essentially just allowing the State to introduce evidence that on March 22, 2013, the date of the Riley murder, Smiley was "seen in the possession of a firearm and that the firearm was discharged", and that the projectiles from the Drake homicide crime and from the prior "incident" matched. (R. 695-700) The jury was not to be told that Smiley committed another homicide due to the "highly prejudicial" nature of such evidence. (R. 699-700)

The State filed a Notice of Intent to Seek Death Penalty, on September 2, 2015. (R. 93) The State disclosed aggravating circumstances on October 23, 2015: (1) prior capital felony; (2) commission during robbery; (3) pecuniary gain. (R. 640). On March 30, 2016, the State filed a Notice of Intent to Seek Death Penalty and Disclosure of Aggravating Factors; the aggravators didn't change from previous notice. (R. 724) The State then filed an amended notice on April 14, 2016, with all the same aggravators. (R. 745) On April 11, 2017, the State filed another amended notice with the same three aggravators. (R. 1154) On April 13, 2017, the State filed a Second Amended Notice to Seek Death Penalty, whereby the State added the heinous, atrocious, and cruel (HAC) aggravator. (R. 1186)

On or about October 13, 2015, Smiley filed a "Motion to Prohibit Death Qualification of Prospective Jurors for Separate Juries for the Guilt, and, if necessary, Penalty Phases of Defendant's Trial". (R. 475) The parties agreed that

the guilt and penalty phases were to be bifurcated; and the penalty phase was ultimately delayed after the *Hurst* decision. The guilt phase on the Riley case, first-degree homicide and robbery with a firearm, was held from November 9, 2015 until November 18, 2015. (R. 6156) Smiley was found guilty of all counts, as charged. (R. 8019)

Guilt Phase

The guilt phase trial for Clifford Drake's homicide, the instant case on appeal, was held from September 26, 2016 until October 6, 2016. (R. 3051) The guilt phase and penalty phase were bifurcated, and the parties agreed the court would inform the jury that they would not "be involved in any aspect of the sentencing". (R. 3061). After reading the charges in the indictment, the trial court informed the venire they would not be involved in sentencing. (R. 3128)

The State presented twenty (20) witnesses during its case-in-chief: Michael Lewis, Jason Vickers, Tracy Grice, Kimberly Patterson, Mario Wilkerson, Mark Wilkerson, Jean Gardner, Ronald Witt, Jeff Hendrickson, Bell Marsh, Ashley Tilka, Michelle Mullins, Michael Robinson, Darlene Melius, Kasi Lancaster, Vera Volnikh, Tracy Grice (recalled), Mary Pacheco, Samantha Lee, John McDonald, and Brian Wallace.

Mario Wilkerson and John McDonald, aka “Little Mike”, were friends. (R. 3949) Approximately a month before Clifford Drake was murdered, Mario and John McDonald were outside joking around, and Clifford Drake drove by and stopped to talk to them. (R. 3953) Drake joked to McDonald that he had money. (R. 3953) A few days prior to Clifford Drake’s murder, Mario bragged to McDonald that Drake kept money in a safe; information which he relayed to Samantha Lee and Benjamin Smiley. (R. 4692, 4695) John McDonald, Samantha Lee, and Benjamin Smiley devised a plan to rob Clifford Drake. (R. 4692-93) Smiley’s friend, “Big Jit” became involved when McDonald picked Smiley and him up in Tampa, from Samantha Lee’s house, on the night of the murder. (R. 4696)

Sometime before midnight (“like ten something”), on April 15, 2013, Mark Wilkerson left his sister’s apartment to return home. (R. 3976) McDonald drove Big Jit and Smiley, dressed in a dark hoodie, armed with a .38 caliber revolver, gloves and a black book bag, to the Dakota Apartments behind the Drake residence, and he watched them jump the fence surrounding the Drake home. (R. 4699, 4701-02) Around this time, McDonald saw Mark Wilkerson riding his bike towards his home, the Drake residence. (R. 4700) After stopping to talk to a friend [R. 3979], Mark was approaching his backyard when he heard the rattling of the

chain-link fence that surrounded his backyard. (R. 3982) He called out and saw two unknown black men coming from the Dakota Park Apartments, located to the rear of the house. (R. 3983-84, 3839, 3916) Both men were dressed in black hoodies, one man was tall and light-skinned, and the other was shorter and darker skinned, with wide eyes and a wide clean-shaven face. (R. 3985-91, 5012) Mark identified the gunman as Benjamin Smiley, from a photo lineup, as well as an in-court identification of Smiley. (R. 4024, 4028) "Big Jit" was identified as Casey Thomas Bisbee; two photographs of Smiley and Casey were admitted into evidence, over objection. (R. 4631; 4875)

Smiley and Big Jit hopped the fence of the Drake residence and Smiley pointed a revolver at Mark and told him to "shut the fuck up" and remove his clothing, to which Mark complied. (R. 3985, 3992) Smiley forced Mark to lie face down on the ground and covered his head with his pants. (R. 3993-94) Smiley asked Mark where his stepfather's safe was located, but he did not know. (R. 3994) Mark believed he was going to be killed and pleaded for his life. (R. 3995) Smiley went through Mark's pant pockets, taking his cellphone and a set of house keys. (R. 3995) Smiley then led Mark Wilkerson to the front of the house and forced him to open the door and accompanied him inside the residence. (R. 3997, 4001)

Whilst inside, Smiley forced Mark to direct him to Clifford Drake's room. (R. 4001) Smiley entered the bedroom alone; the bedroom light was off, the tv was on, and Smiley used a cigarette lighter to illuminate the path to the closet. (R. 4002) Smiley did not find what he was looking for and returned to the hall, gave Mark the backpack, and told him to awaken Clifford Drake. (R. 4003) After Mark opened the light, Smiley hit Clifford in the head with the revolver, and Clifford woke up. (R. 4005) Smiley kept asking Clifford where the money was, but he claimed he had none. (R. 4006-07) Smiley then shot Clifford in the hip area. (R. 4009) Smiley kept asking for the money and told Clifford that he was "fixing to kill his ass": Smiley then fatally shot Clifford in the chest. (R. 4010) Smiley then aimed the gun at Mark and told him to find the money, and Mark began searching the dressers. (R. 4011) Drake's bedroom was ransacked, the mattress was overturned, and the drawers removed from the dresser. (R. 3841) Big Jit told Smiley they needed to leave, and Smiley, leaving the backpack, directed Mark to the ground and then they left. (R. 4013)

Smiley and Big Jit ran off in search of John McDonald's car, discarding a hoodie and a pair of gloves in the back of Bell Marsh's pickup truck, evidence later collected by Lakeland Police Officer Mark Robinson. (R. 3877, 4283, 4375-76) McDonald drove away from the Drake residence when saw Mark riding his

bicycle. (R. 4715) Smiley used the cell phone he stole from Mark and called Samantha Lee to arrange a spot to meet McDonald, who was the getaway driver. (R. 4595-96, 4694, 4716) Lee placed a three-way call to McDonald, and he and Smiley were able to meet up, after which McDonald drove Smiley and Casey back to Tampa. (R. 4596, 4722-23) During the car ride, Smiley told McDonald the he did not get the safe, just a cell phone, then Smiley confessed to shooting Drake. (R. 4720-21) Smiley no longer had the hoodie or backpack. (R. 4722)

The State presented evidence, through FDLE senior crime laboratory analyst Michelle Mullins (DNA), FDLE analyst Ashley Tilka (serology), and FDLE analyst Mary Pacheco, that Smiley's deoxyribonucleic acid (DNA) was found on evidence collected from Marsh's truck and the crime scene. Benjamin Smiley's DNA matched the single DNA contributor on the hoodie, as well as the DNA found on the backpack [R. 4542]: the frequency of occurrence of his profile is rarer than 1 in 700,000 billion individuals (100 times the population of Earth). (R. 4350-51, 4544) The gloves had the presence of DNA; however, Smiley was not able to be conclusively included as a contributor, but Sheila Drake, Clifford Drake, Mario Wilkerson, and Mark Wilkerson could all be excluded. (R. 4346-48, 4353-54) The hoodie and the backpack were matched in the national database prior to having obtained Smiley's DNA. (R. 4350, 4541) The findings were confirmed after

receiving buccal swabs from Smiley. (R. 4351, 4542-43) Samantha Lee confirmed seeing Smiley wear the backpack, in Lakeland on March 23, 2013 [the night of the Riley murder]. (R. 4598) McDonald saw Smiley with the same .38 revolver, same hoodie, and same backpack on March 22, 2013 and April 15-16, 2013. (R. 4702) Additionally, Smiley admitted to McDonald that he discharged that same revolver on March 22, 2013. (R. 4713)

Through Ronald Witt, of T-Mobile, the State presented cell phone records for Mark Wilkerson's phone number, 863-934-8156, which was in the name "Renea Drak", and Samantha Lee's phone number, 813-458-4997, as evidence that Smiley called Samantha Lee from the stolen cell phone after Clifford Drake's murder. (R. 4163-655, 4188) Through Jeff Hendrickson, of AT&T, the State presented phone records for March, April, and May 2013, for John McDonald's phone number 863-529-6343, under the name "Kenya S. Watkins", who was later identified as John McDonald's wife. (R. 4227, 4235, 4689) John McDonald's phone records show him being present in Lakeland on April 15, 2013, travelling to Tampa (at 9:05 p.m.), back to Lakeland (at 11:52 p.m.), then down to Polk Parkway, possibly travelling towards Tampa, then back to Lakeland; McDonald confirmed the route. (R. 4269-74, 4279, 4693, 4722-23)

After Smiley and Big Jit left the Drake residence with Mark's phone, Mark frantically went into his brother Mario's room, woke him up, told him that their stepfather had been shot, and borrowed his phone to call the police. (R. 3946, 4014) Officer Michael Lewis, of the Lakeland Police Department, arrived on the scene and made contact with Mark and Mario Wilkerson. (R. 3804) Lewis interviewed Mark about his recollection of events. Mark provided information on the course of events and the description of the perpetrators, and Lewis issued a BOLO (be on the lookout) advisory. (R. 3805) Lakeland Police Department forensic artist Darlene Melius produced a sketch portrait of the gunman based on Mark's description: Mark emphasized Smiley's wide eyes. (R. 5012)

Upon the arrival of the Lakeland Fire Department's paramedic Jason Vickers, Drake was found to be deceased. (R. 3831) The cause of 58-year-old Clifford Drake's death was a gunshot to the torso: Drake had three bullet holes-two in the hip (entrance and exit wounds) and one in the left chest (no exit wound). (R. 4478-79, 4494) Drake's death was not immediate. (R. 4493)

Lakeland Police Department's supervisor of the crime scene unit, Tracy Grice, arrived on scene, took photographs, processed the scene for fingerprints, and collected DNA and other forensic evidence. (R. 3841). A safe, containing paperwork and documents, was retrieved from Drake's closet. (R. 3868) An empty

backpack was retrieved from Drake's bedroom (R. 3857, 3868) An afghan and a bullet projectile were also retrieved from inside the bedroom. (R. 3868) Another Lakeland Police Department crime scene technician, Jean Gardner, took photographs and collected evidence from Clifford Drake's body, including fingerprints, GSP and fingernail scrapings, personal effects, and a bullet from Dr. Volnikh, which was removed from Clifford Drake's body during his autopsy. (R. 3872-73; 4134-35) DNA samples from Clifford Drake, Sheila Drake, Mario Wilkerson, and Mark Wilkerson were also collected, for elimination purposes. (R. 3875-76)

Another Lakeland Police Department crime scene technician, Kimberly Patterson, assisted Grice in processing the Drake crime scene, and she video recorded the scene. (R. 3910-11) Patterson conducted a gunshot residue (GSR) test on Mark Wilkerson. (R. 3919) Patterson also collected a projectile from another incident [the Riley homicide], at a home located at 702 West 14th Street in Lakeland, On March 23, 2013. (R. 3920) She sent the projectiles from the Drake and Riley homicides to FDLE for comparison purposes. (R. 3921) FDLE firearms analyst Kasi Lancaster testified that the projectile found at the Drake murder matched the projectile found at the other "incident" (Riley murder): both projectiles came from the same .38 caliber firearm. (R. 4435)

Sergeant Brian Wallace, of the Lakeland Police Department, was assigned to the Drake homicide investigation. (R. 4833) After interviewing witnesses, collecting evidence, and placing a BOLO, the Drake homicide investigation went cold. (R. 4834-61) In February of 2015, FDLE contacted Sgt. Wallace that there was a DNA match to Benjamin Smiley for the evidence submitted for the Drake homicide. (R. 4861) Wallace was then able to connect the evidence together between the DNA, phone records, and witness statements. (R. 4862-4863) Wallace, and the crime analyst unit, compiled a photo lineup (in black and white) and showed it to Mark Wilkerson, who picked Smiley as the man who shot and killed his stepfather, Clifford Drake. (R. 4864-69) Wallace interviewed Samantha Lee on July 1, 2015, and she was able to provide Wallace with information about the three-way call between herself, Smiley, and McDonald, on the night of the murder, as well as information pertaining to Casey/"Big Jit". (R. 4870-71) Wallace looked through Smiley's Facebook photos and found photographs of Smiley with Casey/Big Jit, and his full name "Casey Lamar Thomas Bisbee". (R. 4872-73) Wallace and Casey had a face-to-face meeting with Casey, who confirmed his friendship with Smiley and his presence in the Facebook photos. (R. 4873) Mark was shown a photo lineup including Casey Bisbee, and although Mark pointed to Casey as the second perpetrator, he was not sure enough to make a positive

identification. (R. 4877). After these connections had been made, Wallace again interviewed John McDonald, the first interview being the day of Clifford Drake's murder; during this second interview, McDonald informed Wallace of the robbery scheme between himself, Samantha Lee, and Smiley. (R. 4878-81)

The defense put on a case through two witnesses: Darlene Melius and Appellant, himself. Darlene Melius, as testified to in the State's case, created the composite sketch of the suspect as described by Mark Wilkerson. (R. 5001) She testified that the witness did not want to make changes to the final composite sketch. (R. 5011)

Benjamin Smiley testified that he was related to Samantha Lee and John McDonald, and he was friends with Casey Thomas, and that he was present in the photographs with him. (R. 5015-17) Smiley has a dark spot in one eye and tattoos on his hands, which were colorful in 2013. (R. 5018-22) Smiley owned dark hoodies and saw the black backpack in evidence when John McDonald brought his kids around Samantha Lee's home. (R. 5026) Smiley denied knowing the Drakes and the Wilkersons, and he denied being involved in the robbery and homicide at their residence. (R. 5030, 5078-79) He further denied being in Lakeland at that time. (R. 5030) Smiley confirmed that State's exhibits 161 and 162 were photographs which accurately depicted him and Casey Thomas together. (R. 5065-

66, 5070) One photo (stripes) was taken during the summer of 2012. (R. 5066) The second photo was taken between October and December of 2014. (R. 5072) Smiley confirmed that he was aware that Casey had been referred to as "Big Jit", and that they had a very close friendship and had "hung out" most days. (R. 5066-67) He acknowledged that he was smaller, darker, and shorter than Casey. (R. 5068, 5071)

The jury returned guilty verdicts, as charged, on counts one (felony murder), two (robbery with a firearm), four (aggravated assault with a firearm) and five (burglary of a dwelling with assault/battery with firearm); on count three (tampering with physical evidence), the jury returned a verdict of not guilty. (R. 1085-88)

On April 12, 2017, Smiley filed a motion to arrest verdict based on alleged inconsistencies in the verdict. (R. 1166-72) After a hearing, the motion was denied. (R. 1211)

Penalty Phase

Before a new jury, the penalty phase was held from April 24 through April 28, 2017. (R. 1247). At the penalty phase proceeding, the State argued that the following aggravating factors were proven beyond a reasonable doubt:

> 1. BENJAMIN SMILEY, JR., was previously convicted of another capital felony. The crime of First-Degree Murder is a capital felony. (Carmen Riley-5388)

2. BENJAMIN SMILEY, JR., was previously convicted of a felony involving the use or threat of violence to the person. The crime of Robbery With A Firearm is a felony involving the use or threat of violence to the person. (Carmen Riley-5388)
3. BENJAMIN SMILEY, JR., was previously convicted of a felony involving the use or threat of violence to the person. The crime of Robbery With A Firearm is a felony involving the use or threat of violence to the person. (Mark Wilkerson-4903)
4. BENJAMIN SMILEY, JR., was previously convicted of a felony involving the use or threat of violence to the person. The crime of Aggravated Assault is a felony involving the use or threat of violence to the person. (Mark Wilkerson-4903)
5. BENJAMIN SMILEY, JR., was previously convicted of a felony involving the use or threat of violence to the person. The crime of Burglary With An Assault or Battery While Armed is a felony involving the use or threat of violence to the person(s). (Clifford Drake and Mark Wilkerson-4903)
6. The First-Degree Murder was committed while BENJAMIN SMILEY, JR., was engaged in the commission of a robbery. (Mark Wilkerson- 4903)
7. The First-Degree Murder was committed while BENJAMIN SMILEY, JR., was engaged in the commission of a Burglary Of A Dwelling With An Assault or Battery While Armed With A Firearm (Clifford Drake and Mark Wilkerson - 4903)
8. The First-Degree Murder was committed for pecuniary gain. (Clifford Drake- 4903)

(R. 1224-38)

The State presented eight witnesses who testified in support of the aggravating factors: Tracy Grice, Kimberly Patterson, Russell Hurley, Samantha

Lee, Vera Volnikh, Sgt. Brian Wallace, John McDonald, and Traci Hartig (rebuttal). The State also presented two victim impact statements by Temera Brooks and Sheila Drake. (P. 1984-1989)

Tracy Grice is employed by the Lakeland Police Department as a crime scene supervisor. (P. 1639) On or about April 16, 2013, she responded to the crime scene (the Drake residence) and assisted with the investigation. (P. 1640) Photos of the crime scene and other exhibits were introduced into evidence as she described the scene. (P. 1646) A .38 caliber projectile was found at the scene of the Drake homicide, which matched the bullet in Drake's chest. (P. 1657) The murder weapon was not recovered. (P. 1666) The projectiles, hoodie, and backpack collected by the crime scene technicians were sent to FDLE for further testing. (P. 1664-65) The DNA on the hoodie and backpack matched Smiley. (P. 1667)

Kimberly Patterson is a Lakeland Police Department crime scene technician. (P. 1690) On March 23, 2013, she responded to Carmen Riley's residence and assisted in the processing and collection of evidence in the Riley homicide investigation. (P. 1691) Patterson retrieved a .38 caliber projectile from the Riley residence, which was sent to FDLE. (P. 1698) The projectile

from the Riley homicide matched the two projectiles from the Drake homicide. (P. 1712-13)

Russell Hurley is the Lakeland Police Department homicide investigator who was assigned as the lead detective of the homicide of Ms. Riley. (P. 1740) Ms. Riley's residence is approximately three blocks from the Drake's residence. (P. 1747) In June of 2015, the investigators learned that the FDLE Crime Lab concluded that evidence collected from both homicide scenes revealed that the same firearm was used in the Drake and Riley homicides. (P. 1748)

Samantha Lee is Smiley's maternal aunt. (P. 1761) She and Smiley were close, and Smiley lived with her at various times in the past. (P. 1762, 1765) After the Drake homicide, Smiley called Lee for her to make a three-way call to John McDonald. (P. 1769-70) Lee overheard Smiley say that he was in Lakeland, jumped a fence, and robbed someone. (P. 1772) As to the Riley homicide, she denied any prior knowledge of the plan to commit the robbery; however, she was the one who brought Smiley to Lakeland on the day of the Riley robbery (March 22, 2013). (P. 1773) While in Lakeland, she and McDonald dropped Smiley off and McDonald pointed out the Riley residence to Smiley; she thought that the Defendant was going to get marijuana. (P. 1778)

After the Defendant, wearing a hoodie, returned to the car, she also noticed, for the first time, that the Defendant had money, marijuana and a gun in his backpack. (P. 1782-83) Smiley told McDonald that the victim was a fighter and he shot her. (P. 1774, 1782) McDonald gave her $35.00 for gas, and she drove Smiley back to Tampa. (P. 1784-85) Lee testified that Smiley was not easily manipulated and showed no hesitation in going into the Riley residence. (P. 1785, 1787)

Dr. Vera Volnikh is an associate medical examiner. (P. 1853) She testified about the fatal injuries suffered by both Ms. Riley and Mr. Drake. Drake suffered three bullet wounds: two entrance wounds and one exit wound. (P. 1858-59) Riley had two bullet wounds: one entrance and one exit. (P. 1876) Volnikh ruled the cause of death on both homicides to be a gunshot wound to the torso. (P. 1875, 1877)

Sergeant Brian Wallace is a Lakeland Police Department homicide investigator. (P. 1895) He was involved in the homicide investigations of Carmen Riley and Clifford Drake. (P. 1897, 1900) Based on the investigations and based on the results obtained from the analysis of the .38 caliber projectiles and DNA testing on the hoodie and backpack, the evidence showed that the two homicides were linked. (P. 1901, 1906) Wallace testified about the details

that Mr. Mark Wilkerson provided regarding the actions of the two robbers which started outside the residence and how he was forced, at gun point, to allow the gunmen inside the residence, and how Mr. Wilkerson witnessed Smiley shoot Clifford Drake twice. (P. 1898, 1908-09, 1921-38) Wallace testified how he tied Smiley, John McDonald, and Samantha Lee together with phone records. (P. 1903-07) During Sergeant Wallace's testimony, the State introduced into evidence Mark Wilkerson's 9-1-1 call [P. 1918] and certified copies of convictions for First-Degree Murder and Robbery With A Firearm in case number 2015CF-005388 (the Riley homicide) and for the charges the Defendant was convicted of in this case (the Drake homicide). (P. 1944)

John McDonald, aka Little Mike, is Smiley's cousin. (P. 1990) He testified that he, Smiley and his aunt, Samantha Lee, devised the plans for the robberies because Samantha Lee needed financial help. (P. 1992-95) He testified that his role was to find the people to rob and to be the getaway driver. (P. 1997, 2011, 2022) During both of the robberies, Smiley was armed with a revolver. (P. 1997, 2011) Smiley wore a dark hoodie and carried a black backpack to both the Riley and Drake homicides. (P. 2002) McDonald testified that after the Riley homicide, all of them went back to his residence and they split the proceeds of the robbery: he and Samantha Lee split the

money and Smiley took a bag of weed. (P. 2017) Smiley was not hesitant to participate and was not easily manipulated. (P. 1998, 2012) Smiley admitted to shooting both Riley and Drake. (P. 2008, 2015) McDonald was given immunity for his role in the two homicides. (P. 2037)

The State presented psychologist Dr. Tracy Lyn Hartig in rebuttal. (P. 2441) Dr. Hartig interviewed Smiley twice, on May 19, 2016, and on August 15, 2016, at the request of his attorneys. (P. 2446-47) She reviewed some police reports regarding the Defendant's case and reviewed the Defendants medical records from Tampa General Hospital pertaining to his aneurysm in 2012. (P. 2448) She spoke to Smiley's mother, Ms. Frankie Grandberry, who told Dr. Hartig that she did not observe any significant change in his behavior after the aneurysm, but other family members did. (P. 2451-52) Dr. Hartig spoke to Smiley's girlfriend, Ms. Tamaya Johnson, who said that Smiley was not a fighter and was not aggressive. (P. 2453) Smiley scored 114 on the composite I.Q. score, and did not have difficulties completing the administered psychological tests. (P. 2456-57) During the evaluations, the Defendant was logical and goal-directed, and did not present any symptoms of paranoid delusions. (P. 2472)

Smiley presented five witnesses in support of his mitigation: Michael Clayton, Samantha Lee, Russell Hurley, Frankie Grandberry, and Dr. Alan Waldman. Smiley argued that the following mitigating circumstances applied to his case:

> 1. BENJAMIN SMILEY, JR., has no significant history of prior criminal activity.
> 2. The First-Degree Murder was committed while BENJAMIN SMILEY, JR., was under the influence of extreme mental or emotional disturbance.
> 3. The capacity of BENJAMIN SMILEY, JR., to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.
> 4. BENJAMIN SMILEY, JR's., age at the time of the crime.
> 5. The existence of any other factor(s) in BENJAMIN SMILEY, JR's., character, background, life, or the circumstances of the offense that would mitigate against the imposition of the death penalty.

(R. 1224-38)

Michael Clayton is a retired National Football League player. (P. 2153) He founded the Generation Next Foundation to help young people and to try to make a difference in their lives. (P. 2153) He met Smiley when he was fourteen years of age. (P. 2155) Smiley stood out to Clayton as a student with potential, and he built a personal relationship with the

Defendant. (P. 2155-56). Clayton found Smiley to be "bubbly" and extremely intelligent. (P. 2155, 2158) Smiley helped the Foundation with building homes and renovations. (P. 2157) Smiley helped one of his brothers and his sister during that period. (P. 2160) Clayton found out that Smiley had ran away from home and was homeless; Clayton helped Smiley by providing him a place to stay and by getting him a job in the State of Colorado. (P. 2157-59) Smiley had a girlfriend and they had a son together. Smiley wanted the best for his son. (P. 2161) Clayton noticed a significant change in Smiley's personality after the aneurysm. (P. 2164-65) Mr. Clayton testified about a confrontation that he and Smiley had after the aneurysm; Smiley challenged him but then took a break and managed to calm himself down. (P. 2165)

Smiley's aunt, Samantha Lee, testified that Smiley's parents were strict due to their religious beliefs. (P. 2157) Around the age of seventeen, the Defendant left his home and he came to live with her. (P. 2157) When Smiley was twenty years old, he suffered from a brain aneurysm; he was hospitalized and was in a coma. (P. 2179) After his discharge from the hospital, he stayed with her for about a month. (P. 2186) After the aneurysm, she noticed a significant change

in his behavior. He became short-tempered, wild, agitated, angrier, and more violent. (P. 2180, 2186)

Russell Hurley is the Lakeland Police Department homicide investigator who was assigned as the lead detective of the homicide of Ms. Riley. (P. 2191) He testified that the Riley and Drake murders went "cold" until the FDLE matched the projectiles from the two murders as originating from the same firearm. (P. 2198) Following that, DNA from evidence collected at the Drake crime scene matched Smiley. (P. 2199)

Frankie Grandberry is the Defendant's mother. (P. 2297) Smiley was born June 23, 1992. (P. 2297) Smiley has six brothers and one sister. (P. 2297) Smiley's biological father was not involved in his childhood; she was pregnant with Smiley when she and his father became separated. (P. 2298-99). She got married to Smiley's step-father when Smiley was approximately one-and-half years old. (P. 2299) Smiley had a close relationship with his stepfather, who taught Smiley how to remodel houses. (P. 2299-2300). Smiley was a good boy and a good student and was involved in the chess club and in track and field at a private Christian School. (P. 2301-02) Smiley attended church and participated in community service activities until the age of seventeen, when he left home. (P. 2309) At twenty years old, Smiley was admitted to Tampa General Hospital

for brain aneurysms. (P. 2311) After his discharge, she noticed he had gotten a temper and became more aggressive with others; one time, he threatened a person and told him that he had a gun. (P. 2317-18) Ms. Grandberry believed her sister, Samantha Lee, with whom Smiley lived and who was involved in drugs and illegal activities, was a bad influence on Smiley. (P. 2324-25)

Dr. Alan Waldman is a board-certified forensic psychiatrist and forensic neuropsychiatrist. (P. 2343) He reviewed Smiley's medical records, police reports and he had met with Smiley for about three and a half hours. (P. 2356) One of Smiley's aneurysms was not treated. (P. 2360) The damaged areas to Smiley's brain are the areas that controls impulsivity and rage. (P. 2370) He diagnosed Smiley with major neurocognitive disorder, vascular type, which is a very severe brain injury. (P. 2365) Dr. Waldman opined that Smiley was under extreme mental or emotional disturbance. (P. 2365) He added that due to the brain damage, Smiley had an impaired ability to understand the law and comport himself to the constraints of the law. (P. 2366) Smiley's mother told him that Smiley's personality had changed after the aneurysm; however, Dr. Waldman testified that he read a report in which the Defendant's mother told Dr. Tracy Lyn Hartig that she did not observe any differences in her son's behavior after the aneurysm. (P. 2386-

87) Dr. Waldman testified that the records he reviewed revealed that after Smiley left his home, and before the aneurysm, he got in trouble with the law. (P. 2387-88) Dr. Waldman stated Smiley's denial of any change in his behavior should be attributed to his brain injury. (P. 2389) Dr. Waldman also added that he was not aware of any jail disciplinary reports that Smiley had since his arrest. (P. 2414) Smiley told Dr. Waldman about a recent conflict he had at the jail and how he was able to walk away from the conflict. (P. 2415)

The sentencing jury unanimously found the following aggravators: (1) prior capital felony conviction (Carmen Riley); (2) prior violent felony conviction (robbery with a firearm of Riley); (3) prior violent felony conviction (robbery with firearm of Mark Wilkerson); (4) prior violent felony conviction (aggravated assault with firearm of Mark Wilkerson); (5) prior violent felony conviction (burglary of a dwelling while armed with firearm of Clifford Drake and Mark Wilkerson); (6) commission of murder during robbery with firearm (Mark Wilkerson); (7) commission of murder during burglary of dwelling with assault/battery with firearm (Clifford Drake and Mark Wilkerson); (8) pecuniary gain. (R. 1240-42) The sentencing jury unanimously found the aggravating factors were sufficient to warrant a sentence of death. (R. 1242)

One or more members of the sentencing jury found the existence of the following three mitigating circumstances: no significant prior criminal history, mitigating character evidence, and mitigating circumstances of the offense. (R. 1243-45) The sentencing jury unanimously found that the aggravating factors outweighed the mitigating circumstances. (R. 1245) The sentencing jury unanimously recommended that Smiley be sentenced to death. (R. 1245)

After the jury returned its unanimous recommendation, Smiley had the opportunity to address the court during the November 13, 2017 *Spencer* Hearing. (R. 5598) At the hearing, Smiley presented the testimony of Dr. Tracy Lyn Hartig. (R. 5612) She indicated that she authored a report (dated September 14, 2016) and her report was submitted into evidence. (R. 3038-50) Dr. Hartig testified to the following: Smiley did not have the benefit of a relationship with his biological father until the Defendant reached the age of eighteen; Smiley's step-father was not abusive but was strict and used corporal punishment; Smiley became homeless after he left his home; Smiley didn't have a criminal record as a youth; Smiley had no discipline issues at school; the Defendant was friendly and cooperative; Smiley can be of help to others but due to his aneurysm, his ability to solve problems is compromised; Smiley was twenty-one years of age at the time the offenses were committed; Smiley was admitted

to the hospital for the aneurysm on September 15, 2012, and was discharged on October 3, 2012; Smiley used alcohol and cannabis; and Dr. Hartig also indicated that a traumatic head injury could result or cause change in personality. (R. 5619-5626)

Both the State and defense filed sentencing memorandums. (R. 2875-2994; 3009-3033) On February 23, 2018, the trial court entered an order sentencing Smiley to death for the first-degree homicide of Clifford Drake. (R. 5400) The trial court found four aggravating factors: (1) prior capital felony of Carmen Riley (merged with prior violent felony conviction of robbery of the same victim) (great weight); (2) the murder of Clifford Drake was committed while engaged in the commission of the robbery of Mark Wilkerson (merged with prior violent felony conviction of robbery of the same victim) (great weight); (3) prior violent felony conviction for burglary with an assault or battery of Clifford Drake and Mark Wilkerson (merged with murder committed while engaged in the burglary of same victims) (moderate weight); and (4) the murder was committed for pecuniary gain (substantial weight). (R. 5396-97) The trial court found that all of the mitigating evidence had been established by the greater weight of the evidence: (1) no significant prior criminal history (moderate weight); (2) extreme mental or emotional stress (little weight); (3) capacity to appreciate criminality was

substantially impaired (little weight); (4) age at the time of the crime (little weight); (5) character, life, or circumstances of the offense (moderate). (R. 5397-99) After conducting a qualitative weighing of the aggravators and mitigators, and giving great weight to the sentencing jury's recommendation, the trial court determined that Smiley would be sentenced to death for the first-degree homicide of Clifford Drake. (R. 5399) He was sentenced to 30 years for the robbery with firearm, with a firearm minimum mandatory ten-year term, 15 years for the aggravated assault with firearm, with a firearm minimum mandatory ten-year term, 30 years for the burglary with assault or battery with firearm, with a firearm minimum mandatory ten-year term. (R. 5400, 5426)

This appeal follows.

SUMMARY OF THE ARGUMENT

Issue I: After a *Richardson* inquiry, the trial court properly found that the State did not commit a discovery violation.

Issue II: The trial court properly found that the State laid a proper foundation for the admission of photographic evidence depicting Casey Bisbee and Smiley together. The probative value of the evidence outweighed any prejudice.

Issue III: The trial court properly denied the motion for mistrial based on witness testimony that Appellant wore gloves on the night of Mr. Drake's murder. The collateral crime evidence was admissible to show planning and preparation. Moreover, the response was invited by trial counsel.

Issue IV: The trial court properly denied the motion for mistrial based on witness testimony that Appellant told the witness that the State was seeking death against him. This statement was made to explain the witness' state of mind when he lied to the police. Moreover, no harm can be shown as the jury was instructed that sentencing was not their concern.

Issue V: The trial court properly denied the motion for mistrial based on the State's comment in voir dire. First, there was no objection to that comment, so the issue is waived. Second, when taken in context, the statement was not improper.

Issue VI: The trial court properly permitted the State to tell the jury that Appellant was the shooter because he was found guilty of shooting and killing Clifford Drake.

Issue VII: The closing arguments made by the State and trial counsel, individually and collectively, did not rise to the level of reversible error.

Issue VIII: There was no reversible error based on the penalty phase jury instructions as the jury was informed as to its proper role in deliberations.

Issue IX: The sentencing order complied with the requirement of § 921.141(4), Florida Statutes, and is therefore, not invalid.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE STATE'S EXHIBIT #161 FOLLOWING A DETERMINATION THAT THE STATE DID NOT COMMIT A DISCOVERY VIOLATION.

The State introduced two photographs of Smiley and Casey Thomas Bisbee into evidence. One photo, exhibit 162, had been provided to the defense during discovery. The second photo, exhibit 161, was provided to the defense after the trial began, but prior to the intended admission of the photograph. Appellant objected to exhibit 161 on the basis of the State's late disclosure. (R. 4810) On appeal, Appellant claims that the trial court did not conduct a full *Richardson* hearing based on the disclosure of exhibit 161 during trial.

Once the court is on notice of a *potential* discovery violation, the court must conduct an inquiry to determine whether a violation occurred. First, the court must determine whether a discovery violation actually occurred. *Sinclair v. State,* 657 So. 2d 1138, 1140 (Fla. 1995). Next, if a violation is found, the court, pursuant to *Richardson*, "must assess whether the State's discovery violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what affect [sic] it had on the defendant's ability to prepare for trial." *Id*. at 1140. *See Richardson v. State,* 246 So. 2d 771 (Fla. 1971):

> When the State violated a discovery rule, the trial court has discretion to determine whether the violation resulted in harm or prejudice to the defendant, but this discretion can be properly exercised only after adequate inquiry into all the surrounding circumstances. In making such an inquiry, the trial judge must first determine whether a discovery violation occurred. If a violation is found, the court must assess whether the State's discovery violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what affect [sic] it had on the defendant's ability to prepare for trial.

The State did not commit a discovery violation because, first, the State never had possession of the photograph prior to trial. Sgt. Wallace testified he had previously seen the photo, but he never took downloaded it or made a copy. Law enforcement is not required to disclose every detail of what was seen during an investigation. *See Street v. Florida*, 636 So. 2d 1297, 1302 (Fla. 1994). The photo was not in the State's constructive possession or control before the prosecutor received it from Samantha Lee. However, after the prosecutor received the photo, she turned it over to the defense. Because she turned it over once it was in the State's possession or control, she met her continuing duty to disclose. *Cf. Goldsmith v. State*, 182 So. 3d 824, 828 (Fla. 4th DCA 2016):

> Although the prosecutor advised that he did not learn about the page until a few minutes before appellant testified, the prosecutor was under a continuing duty to promptly disclose the information to the defense. *See* Fla. R. Crim. P. 3.220(j) (2012). The fact that a defendant's Facebook page may be publicly available does not

> excuse the prosecutor's duty to disclose to the defense any statements made by the defendant on Facebook where such material is within the State's possession or control. Thus, the prosecutor committed a discovery violation and the trial court erred in concluding otherwise.

Second, it does not appear that Rule 3.220(b), Florida Rules of Criminal Procedure, requires photographs found on a defendant's social media page to be disclosed where there is no (written or oral) statement. *Cf. Goldsmith*, 182 So. 3d at 828 ("The State was required to disclose the Facebook page ***because*** it contained a written statement that was made by the defendant-or at least a written statement that a jury could reasonably conclude was made by the defendant"). (emphasis added). The photo was taken from Appellant's Facebook page; therefore, he was aware of its existence, and since another Facebook photo had already been disclosed, he was aware that the State was aware of his Facebook page.

Where there is no discovery violation, there is no further inquiry warranted as to whether the State's discovery violation was inadvertent or willful, whether the violation was trivial or substantial, or what effect it had on the defendant's ability to prepare for trial. Here, there trial court inquired into the circumstances surrounding the disclosure of exhibit 161 to the defense. The trial court properly found that there was no discovery violation. Therefore, the other two prongs were

rendered extraneous. Only where the reviewing court finds that the trial court abused its discretion in finding no violation would the *Richardson* inquiry be rendered inadequate.

Furthermore, even if there had been a discovery violation, not holding a *Richardson* hearing would have been harmless because Appellant was not procedurally prejudiced:

> [P]rocedural prejudice and substantive prejudice are not the same. *See Schopp*, 653 So. 2d at 1019–1021; *Smith*, 500 So. 2d at 126. An analysis of procedural prejudice does not ask how the undisclosed piece of evidence affected the case as it was actually presented to the jury. Rather, it considers how the defense might have responded had it known about the undisclosed piece of evidence and contemplates the possibility that the defense could have acted to counter the harmful effects of the discovery violation. *Evans*, 721 So. 2d at 1210. By contrast, an analysis of substantive prejudice would ask whether it was possible that the error affected the jury's verdict. *Schopp*, 653 So. 2d at 1021. While this standard itself is a high one for the State to overcome, it is of an entirely different quality than a procedural prejudice analysis. *Id.* at 1019.
>
> We now clarify that *Schopp's* harmless error standard does not focus on whether the discovery violation would have made a difference in the verdict. Such an analysis would make the standard for procedural prejudice identical to substantive prejudice. Instead, we reaffirm our statements in *Schopp* that the inquiry is whether there is a reasonable possibility that the discovery violation "materially hindered the defendant's trial preparation or strategy." *Schopp*, 653 So. 2d at 1020. Under *Schopp*,

> only if the appellate court can determine beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless. *Id.* at 1021.

Scipio v. State, 928 So. 2d 1138, 1149-50 (Fla. 2006).

Appellant was provided a similar Facebook photo of Smiley and Casey Thomas Bisbee (exhibit 162), so exhibit 161 did not materially hinder Appellant's trial strategy and preparation. Moreover, Appellant knew that he was being identified by the victim/eyewitness Mark Wilkerson and John McDonald, to whom he also confessed, as well as being identified by a DNA match. So, despite Smiley testifying that he was not present at the Drake residence, identity was hardly an issue. Lastly, the exclusion of evidence is an extreme sanction and should only be used as a last resort. *State v. Roberson*, 152 So. 3d 776, 779 (Fla. 5th DCA 2014), *citing McDuffie v. State*, 970 So. 2d 312, 321 (Fla. 2007).

ISSUE II

THE TRIAL COURT PROPERLY ADMITTED PHOTOGRAPHIC EVIDENCE WHERE THERE WAS SUFFICIENT PREDICATE AND WHERE THE PROBATIVE VALUE OUTWEIGHED THE PREJUDICIAL IMPACT.

Appellant disputes the trial court's ruling to allow the State to admit photographic exhibit 161 on the basis that there was insufficient predicate and prejudice analysis. A trial court's ruling on the admissibility of photographic evidence is reviewed under an abuse of discretion standard. *Dennis v. State*, 817 So. 2d 741 (Fla. 2002); *Mansfield v. State*, 758 So. 2d 636, 648 (Fla. 2000).

Trial courts have broad discretion in deciding the admissibility of photographic evidence, and this discretion will not be disturbed absent a clear showing of abuse. *Pangburn v. State*, 661 So. 2d 1182, 1187 (Fla. 1995). If reasonable men could differ as to the propriety of the action taken by the court, then it cannot be said that the court abused its discretion. *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980). Furthermore, "the trial court's ruling on an evidentiary matter will be affirmed even if the trial court ruled for the wrong reasons, as long as the evidence or an alternative theory supports the ruling." *Muhammad v. State*, 782 So. 2d 343, 359 (Fla. 2001). *See Trease v. State*, 768 So. 2d 1050, 1053 n. 2 (Fla. 2000) ("Discretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that

discretion is abused only where no reasonable [person] would take the view adopted by the trial court.' ") (*quoting Huff v. State,* 569 So. 2d 1247, 1249 (Fla. 1990)). No abuse of discretion can be found on the facts of the instant case.

A. Predicate

"The law is clear that the trial court has discretion, absent abuse, to admit photographic evidence so long as the evidence is relevant." *Thompson v. State,* 565 So. 2d 1311, 1314 (Fla. 1990). A photograph's admissibility is not based on necessity, rather it is based on whether the evidence tends to prove or disprove a material fact. *Pope v. State,* 679 So. 2d 710, 713 (Fla. 1996); § 90.401, Fla. Stat. (2016). "The laying of the predicate requires 'evidence sufficient to support a finding that the matter in question is what its proponent claims.' In determining whether the evidence submitted is sufficient for this purpose, the trial judge must evaluate each instance on its own merits, there being no specific list of requirements for such a determination." *Justus v. State,* 438 So. 2d 358, 365 (Fla. 1983). Evidence may be authenticated by appearance, content, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances." *Lamb v. State,* 246 So. 3d 400, 408 (Fla. 4th DCA 2018). "[A]uthentication for the purpose of admission is a relatively low threshold that only requires a prima facie showing that the proffered evidence is authentic; the

ultimate determination of the authenticity of the evidence is a question for the fact-finder. Once a prima facie showing of authenticity is made, the evidence comes in, and the ultimate question of authenticity is for the jury." *Mullens*, 197 So. 3d 16, 25 (Fla. 2016); *Gosciminski v State*, 132 So. 3d 678, 700-701 (Fla. 2013).

Appellant argues that the silent witness theory, as explained in *Wagner v. State*, 707 So. 2d 827, 831 (Fla. 1st DCA 1998), is the appropriate criteria to admit a photograph. The State disagrees. *Wagner* explains that in addition to the "silent witness" method to admitting a photograph, photographs may also be admitted through the "pictorial testimony" method. The silent witness method may be used to admit photographs or videotapes which are self-testifying, but the pictorial method may be used to supplement a testifying witness. The pictorial testimony method only requires that the witness be able to testify that the photograph is a fair and accurate representation. *See* § 90.901, Fla. Stat. (2016); *Dolan v. State*, 743 So. 2d 544, 545 (Fla. 4th DCA 1999).

Sgt. Wallace's testimony was sufficient to authenticate exhibit 161 to be a fair and accurate representation of Smiley and his friend Casey Lamar Thomas Bisbee, together. Both photographs were found on Smiley's personal Facebook page. (R. 4872) Sgt. Wallace met with Casey Bisbee in person and confirmed Casey's friendship with Smiley and their presence in the photograph. (R. 4808-09)

Furthermore, any concern as to the alleged deficiency in the authentication of the photographs was ameliorated when Appellant testified that he was in the photographs with his friend, Casey Thomas/Bisbee. (R. 5017-18). On cross-examination, Appellant testified that exhibit 161 was taken in June to August 2012; that he is darker skinned than Casey, he is shorter than Casey, and that the photo was an accurate depiction of the two. (R. 5068, 5070) Exhibit 162 was taken in from October to December 2014. (R. 5072) Therefore, any alleged error was cured.

Nevertheless, even if there had been error, it would have been harmless because there is no reasonable possibility that the error affected the verdict. Casey was unable to be positively identified by the witnesses; yet, Mark Wilkerson positively identified Smiley as the shooter, and John McDonald saw Smiley with the gun, and Smiley admitted to McDonald that he shot Clifford Drake. (R. 4721)

B. 90.403 analysis

Appellant challenges the admission of exhibit 161 based on its alleged "prejudicial effect". (R. 4824) "If a photograph is relevant to an issue at trial, either independently or to corroborate other evidence, it is admissible unless the probative value is outweighed by undue prejudice." *Allen v. State*, 662 So. 2d 323, 327 (Fla. 1995); *Straight v. State*, 397 So. 2d 903, 906 (Fla. 1981); § 90.403, Fla. Stat. (2016). "Only when the unfair prejudice *substantially* outweighs the probative

value of the evidence should it be excluded." *Wright v. State*, 19 So. 3d 277, 296 (Fla. 2009). This determination is a matter within the sound discretion of the court, which will not be overturned absent a showing of abuse. *Id*.; *See Thompson v. State*, 565 So. 2d 1311 (Fla. 1990).

All evidence of guilt is prejudicial; the concern is whether evidence is *unduly* prejudicial. "Section 90.403... is directed at evidence which inflames the jury or appeals improperly to the jur[ors'] emotions." *Steverson v. State*, 695 So. 2d 687, 689-690 (Fla. 1997). Appellant conceded that exhibit 161 was probative, but argued that it was prejudicial, in comparison to exhibit 162, because Smiley was holding an [empty] liquor bottle and Casey was gesturing his hand to look like a gun. (R. 4824) The State responded that exhibit 162 showed Casey with a blunt in his mouth and Smiley gesturing his hand to look like a gun; therefore, neither photograph was more prejudicial than the other. (R. 4825-26) The trial court properly found that the photographic evidence was admissible because it showed "acquaintance, connection, nexus or friendship between the parties" and there was sufficient probative value based on "testimony regarding heugh descriptions, various weight descriptions and tone of skin colors between the defendant and this person known as Big Jit now has been identified as Casey Bisbee." (R. 4826)

Even if there had been error, it would have been harmless because there is no reasonable possibility that the error affected the verdict. Casey was unable to be positively identified by the witnesses; yet, both Mark Wilkerson positively identified Smiley as the shooter, and John McDonald saw Smiley with the gun, and Smiley admitted to McDonald that he shot Clifford Drake. (R. 4721)

ISSUE III

THE TRIAL COURT DID NOT ERR IN DENYING THE REQUEST FOR A MISTRIAL AFTER DEFENSE COUNSEL OPENED THE DOOR TO JOHN MCDONALD'S TESTIMONY THAT HE AND DEFENDANT WORE GLOVES.

Appellant argues that the trial court erred in denying his motion for mistrial after John McDonald testified as to why he thought that Appellant wore gloves during the criminal episode which resulted in the death of Clifford Davis. A ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion. "Discretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court.'" *Trease v. State*, 768 So. 2d 1050, 1053 n.2 (Fla. 2000).

Defense counsel asked John McDonald why he thought Smiley had worn gloves on the night of the Drake murder, however, when McDonald responded that

it was because "when we normally operate like that, we normally use gloves", defense counsel objected to the response and motioned for a mistrial. (R. 4738-39) The trial court denied the mistrial, but offered to give a curative instruction, or to instruct the witness as to his responses, both of which the defense refused. (R. 4740-41) The trial court however acknowledged that McDonald's response was the result of trial counsel's question: "the defense pursued the line of questioning at the risk of getting a response like that…", and "[t]he question that was previously asked was just an example of sometimes we ask the question not knowing what the witness is going to answer". (R. 4741, 4744) The trial court properly denied the motion for mistrial because defense counsel invited the error asking the witness an open-ended question about why he thought Appellant was wearing the gloves. (R. 4738) Because the alleged error was invited, this issue is waived.

Moreover, there was no error. Similar fact evidence of other bad acts is admissible when relevant to "prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity". § 90.404(2)(a), Fla. Stat. (2016). Contrary to Appellant's argument, the fact that appellant wore gloves during the two "incidents" that the jury knew about (Riley and Drake), was not

propensity evidence, but rather evidence of preparation and plan, which is permissible evidence of other bad acts, and this evidence was admissible, absent becoming a feature of the trial, which it did not. Finally, the defense requested an additional jury instruction, on "other acts", rather than give a curative instruction. (R. 1040, 5100-01) Since, the jury is presumed to follow the instructions given, no harm can be shown. *See Lowe v. State*, 259 So. 3d 23, 52 (Fla. 2018).

ISSUE IV

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR MISTRIAL AFTER JOHN MCDONALD SPONTANEOUSLY TESTIFIED THE DEFENDANT TOLD HIM THE STATE WAS SEEKING DEATH AGAINST HIM.

Appellant argues that the trial court erred in denying his motion for mistrial after John McDonald testified that he lied to law enforcement because Smiley, his cousin, told him that the State "was trying to get death". (R. 4784) A ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion.

This issue is not preserved. There was no contemporaneous objection to the response from McDonald. Rather, defense counsel waited until he was called to the bench to discuss an unrelated matter, after the witness has already finished testifying. (R. 4787) Defense counsel admitted that he did not make a contemporaneous motion when this testimony was elicited; he attempted to excuse

his lack of objection by saying he feared that he would bring "undue attention to this remark". (R. 4878) However, there is no excuse for the untimely objection as defense counsel could have objected and asked for a bench conference to address the matter as to not exaggerate the issue in front of the jury. In fact, throughout the trial, defense counsel routinely asked for these bench conferences to argue his objection; therefore, his excuse is unjustified and inconsistent with other trial objections.

Moreover, the argument can be made that this issue was waived. When trial counsel objected to McDonald's "glove" response (from issue 3), he asked for a bench conference, the trial court offered to give McDonald instructions on how to properly respond to questions, and trial counsel stated, "I do not care to take him back out again. If he is going to do it, he is going to do it again and I will make a contemporaneous objection" (R. 4744) Despite this assertion, trial counsel did not make a contemporaneous objection concerning the statement at issue here. The trial court was not timely informed of the concern with the testimony, and was unable to give a curative instruction, or to allow the State to clarify his testimony that he was not asserting that the State was seeking death, he was just repeating what his cousin had told him to get him to change his testimony. The untimely objection and motion for mistrial did not preserve this issue. Because he waived

the instruction to inform the witness, he invited him to continue to make questionable/improper comments, and trial counsel's solution was to just object whenever McDonald said something improper or inappropriate. Therefore, he may not receive the benefit on appeal, if he could have prevented the comment from being said by virtue of an instruction.

Even if the issue had been preserved, there is no merit. The witness did not testify that the State was seeking death. Instead, he testified that he wanted to help his cousin because his cousin told him that the State was seeking death. This was evidence explaining the witness' state of mind.

Even if the evidence were to be considered improper, "[w]hen improper evidence is elicited or when improper evidence is volunteered, or when improper conduct on the part of attorneys occurs, the charge of the trial court directing the jury to disregard such testimony or such conduct cures the error and corrects the irregularity." *Wall v. Little*, 102 Fla. 1015 (Fla. 1931). Here, the trial court told the jury that it was not concerned with the sentencing portion of the trial. (R. 3059-60) Since jurors are presumed to comply with the instructions, no harm can be shown. *See Lowe v. State*, 259 So. 3d 23, 52 (Fla. 2018).

ISSUE V

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR MISTRIAL FOLLOWING THE PROSECUTOR'S STATEMENTS IN THE PENALTY PHASE VOIR DIRE THAT NOT ALL FIRST-DEGREE HOMICIDES QUALIFY FOR THE DEATH PENALTY.

Appellant challenges the State's comment to the venire, "we have, you know, 60 death—60 first-degree murder cases pending in our circuit. Okay? Probably nine of them are death eligible". (P. 677-78) It is within the trial court's discretion to determine whether remarks made by the prosecutor during voir dire are prejudicial, and the trial court's denial of a motion for mistrial or a motion to strike the venire will not be disturbed on appeal absent an abuse of that discretion. *See Edwards v. State*, 108 So. 3d 639 (Fla. 2013).

This issue is not preserved. Smiley failed to make a contemporaneous objection to the comment which is the subject of this issue. *See Joiner v. State,* 618 So. 2d 174, 176 (Fla. 1993) (holding that to preserve a voir dire issue, a contemporaneous objection and renewal of the objection must be made prior to the jury being sworn or accept the jury subject to the specific prior objection).

The challenged comment was made when the prosecutor was dialoging with Prospective Juror Coatney about how a first-degree murder conviction would not result in an automatic death sentence:

> Okay. We have, you know, 60 death—60 first-degree murder cases pending in our circuit. Okay? Probably nine of them are death eligible. So just because you're charged with first-degree murder does not mean that your case qualifies as a case that we would seek the death penalty in. Do you understand that?

(T. 677-78) There was no objection to this comment. Later, as the prosecutor was dialoguing with Prospective Juror Clark about the understanding that there are certain criteria the State must meet before the State can seek death, she stated: "Okay. All right. So like I said, we have lots of cases but we don't – there are only cases that meet that--". (T. 679) It is at this point, trial counsel objected, acknowledged that he failed to make a contemporaneous objection to the prior comment, and moved to strike the panel, which was denied. (P. 681) The next day, trial counsel moved again to strike the panel and to poll the jurors, both of which were denied. (P. 757, 771) Smiley and his counsel accepted the panel subject to the prior objections. (P. 1475-77)

A week after the jury was sworn, and after all the evidence had been presented, defense counsel moved for mistrial based on the prosecutor's closing remark which included the name "Jeffrey Dahmer". He then piggybacked the comment about "60 cases in Polk County and only 8 or 9 of them are qualified for the death penalty", which, as conceded by defense counsel [T. 2549], was not

followed by a contemporaneous objection. Therefore, this issue is not properly before this Court for review because the basis for a mistrial must also have been accompanied by a contemporaneous objection. *See, eg., Nixon v. State*, 572 So. 2d 1336, 1341 (Fla. 1990):

> Nixon argues that under *Cumbie*, his motion for mistrial at the close of argument, absent a contemporaneous objection, was sufficient to preserve this issue for appeal. We do not construe *Cumbie* to obviate the need for a contemporaneous objection. The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system. A contemporaneous objection places the trial judge on notice that an error may have been committed and thus, provides the opportunity to correct the error at an early stage of the proceedings. *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978). While the motion for mistrial may be made as late as the end of the closing argument, a timely objection must be made in order to allow curative instructions or admonishment to counsel. As noted by defense counsel in this case, in many instances a curative instruction at the end of closing argument would be of no avail. Accordingly, defense counsel's motion for mistrial at the end of closing argument, absent a contemporaneous objection, was insufficient to preserve this claim under our decision in *Cumbie*.

Even if this issue had been preserved, the State's comments were not improper. The State was explaining to the jurors that not every homicide qualified for the death penalty. This conversation was part of voir dire, and it was proper for

the State to explain the process by which a death sentence may be imposed. When taken in context, the State's first, unpreserved statement was not improper and did not "vouch" for its decision to seek death. The statements most resemble the situation this Court addressed in *Braddy v. State*, 111 So. 3d 810 (Fla. 2012):

> Here, the State did not further "vouch" for its decision to seek the death penalty by claiming that "it is clear that this is a case that demands the death penalty," *Brooks*, 762 So. 2d at 901, or affirming that "[t]his is one of those cases," *Ferrell*, 29 So. 3d at 987. The focus of the prosecutor's remarks was on the responsibility of the jury to weigh the relevant factors, and the prosecutor did not invoke a direct, unambiguous appeal for the jurors to give weight to the fact that the State had decided to seek the death penalty. In the portion of the comments for which the objection was overruled, the prosecutor's statement that "[t]he death penalty is not applied to every murder case" is reasonably understood as a reference to the legal framework governing imposition of the death penalty, rather than to the State's determination whether to seek the death penalty. We thus conclude that the trial court did not abuse its discretion in overruling the objection to that portion of the argument.

Appellant cites *Brooks v State*, 762 So. 2d 879, 901 (Fla. 2000), *Pait v. State*, 112 So. 2d 380, 383 (1959) and *Ferrell v State*, 29 So. 3d 959 (Fla. 2010), as support for its argument that the State's statement was improper. However, each of those cases involved egregious statements made in closing arguments whereby the State was attempting to persuade the jury to recommend death based, in part, on

the State's mere decision to seek death. This was not the case here. Here, the State was informing the venire of the law surrounding the imposition of the death penalty. This was not improper; it was the State's job.

Moreover, even if the State's comment was improper, it was harmless as the comment was brief and isolated, and it occurred in voir dire, not closing arguments.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO PRESENT TESTIMONY AND ARGUMENT DURING THE PENALTY PHASE THAT MR. SMILEY POSSESSED AND DISCHARGED A FIREARM.

Appellant waived any challenge to alleged inconsistencies in the verdict by not registering an objection before the jury was discharged. (R. 5360) *See* Rule 3.570, Fla. R. Crim. P. Appellant had plenty of time to object after the verdict was published while the jury was polled and while the trial court monologued about the jury's civic duty. (R. 5356-60) However, defense counsel waited until the jury was discharged, to inquire as to specific findings, yet he still took no action. (P. 2312) Instead, he waited months before filing a motion to arrest judgment on the basis of alleged inconsistent verdicts. (R. 1166-72) Because the issue should have been addressed while the jury was still sworn, this issue has been waived.

Alternatively, Appellant waived this claim of an inconsistent verdict by assenting to the answer to the jury question, directing the jury disregard the special interrogatories concerning Clifford Drake. (R. 1072) In fact, defense counsel's statement concerning the special interrogatories was as follows: "the question as I understood it was from the jury to us, does Count 4, aggravated assault, include Mr. Drake? And I think the answer to that is clearly no. It's to Mr. Wilkerson only. I think that answers that question." (R. 5349) Defense counsel made it clear that the special interrogatories were not appropriate as to Clifford Drake; the same is to be said of count 2. Therefore, it was disingenuous to argue that there were inconsistent verdicts on the basis of the interrogatories not be completed. *See*, *generally*, *Brown v. State*, 959 So. 2d 218, 223 (Fla. 2007) ("Brown invited the true inconsistent verdicts error by assenting to the instruction that the jury consider each count separately").

Even if this issue had not been waived, there is no merit. Inconsistent verdicts are permitted in Florida, as are incomplete verdicts. Nevertheless, the jury did not return an inconsistent verdict because the jury made a clear finding that Smiley actually shot and killed Clifford Drake, as charged, and the jury did not make a specific finding contrary to the indictment. *See State v. Iseley*, 944 So. 2d

227, 230 (Fla. 2006); *Cf. Proctor v. State*, 205 So. 3d 784, 788 (Fla. 2d DCA 2016).

Moreover, there was no error because evidence that Smiley was the shooter was relevant and probative evidence which was entirely admissible in this penalty phase trial. *See Mullens*, 197 So. 3d at 26. On count one, the jury found Appellant guilty of "First Degree Felony Murder, as charged in the indictment". Count one of the indictment charged Appellant as follows:

> BENJAMIN DAVIS SMILEY, JR., on the 16th day of April, Two Thousand Thirteen, in the County and State aforesaid, from a premeditated design to effect the death of a human being, unlawfully did kill a human being, to wit: Clifford Drake, by shooting the said Clifford Drake with a firearm and during the commission of the said felony, the said Benjamin Davis Smiley, Jr., actually possessed and discharged a firearm, and as a result of the discharge, great bodily harm or death was inflicted upon Clifford Drake, in violation of Sections 782.04 and 775.087 Florida Statutes, contrary to the form of the statutes, in such cases made and provided and against the peace and dignity of the State of Florida.

(R. 677) Because the jury found that Appellant was guilty as charged to First-Degree Homicide, the State was entitled to present testimony that he possessed and discharged a firearm. *See State v. Iseley,* 944 So. 2d 227 (Fla. 2006):

> We hold that when a charging document alleges that the defendant used a firearm in committing an offense enumerated in

> (2002), and the jury specifically finds the defendant guilty of the offense "with a firearm" as charged in the information, the three-year mandatory minimum term authorized by that provision may be imposed."
> …
> the Court concluded that in each of these decisions, "the essential holding is the same: that the verdict form itself contain an express reference to the use of a firearm." *Tucker*, 726 So. 2d at 772. Though we stated that the better practice is to include a specific question or special verdict addressed to the firearm issue, we reiterated our prior holdings in Hargrove and Overfelt that "an enhanced sentence should be upheld if based on a jury verdict which specifically refers to the use of a firearm, either as a separate finding or by the inclusion of a reference to a firearm in identifying the specific crime for which the defendant is found guilty." *Id.* at 772.

Moreover, the special interrogatories at to counts 2, 4, and 5 did not nullify the charge that Smiley actually possessed the firearm, discharged the firearm, and murdered Clifford Drake. There was eyewitness testimony that Smiley shot and killed Clifford Drake, and later confessed to John McDonald, who saw Smiley, and only Smiley, with a firearm. *Cf. Feeney v State*, 621 So. 2d 505 (Fla. 5th DCA 1993) (evidence was unclear as to whether the defendant was convicted on a principal theory and whether one or both robbers had a gun).

Finally, the jury verdict is consistent with the evidence, especially considering the response to the jury's question regarding the special interrogatories. There were several interrelated crimes which occurred during this

criminal episode. On count 2, Appellant was charged with robbery with a firearm of Mark Wilkerson: Mark Wilkerson is the named victim in this count. At the time Mark was robbed of his cell phone, as specified in the indictment, he was outside of the house, and the gun had not yet been discharged. Also, at this time, Clifford Drake had not yet been shot and killed- that occurred later in this criminal episode. On Count 4, Appellant was charged with aggravated assault with a firearm of Mark Wilkerson: Mark Wilkerson is the named victim in this count. When Wilkerson had the gun pointed at him, the gun was not discharged, and Clifford Drake was not killed. Clifford Drake was killed when the gun was pointed at Clifford Drake. On Count 5, Appellant was charged with burglary of a dwelling with a firearm, in his actual possession, of Mark Wilkerson and/or Clifford Drake. The jury made no special finding with two opposite results, which shows this was not a jury pardon. Moreover, the jury was instructed to disregard the special findings as to Clifford Drake. The jury question pertained to Count 4, but given the verdict, it is entirely likely that the jury interpreted that to disregard all the special interrogatories as they all seemed to involve Clifford Drake. Speculation as to the jury's thought process would not be necessary had defense counsel made an objection prior to the jury being discharged. *See Thomas v. State*, 789 So. 2d 1104 (Fla. 4th DCA 2001).

Appellant argued to the trial court that it was improper to allow the State to present evidence that Smiley was the shooter based on the verdict because the verdict indicated that the jury may have believed the defense theory that Casey Bisbee shot and killed Clifford Drake. Appellant reasserts this argument on appeal. (IB 63) However, this argument has no merit because Appellant's defense theory at trial was not that Casey Bisbee, and not appellant, shot Clifford Drake; rather, the defense theory was that Appellant was not in Lakeland and not at all involved in this robbery- murder. Appellant testified as follows:

> Q: Let me ask you this: On April 15th or April 16th. were you involved in a robbery, a shooting, a homicide in the city of Lakeland?
>
> A: I wasn't involved in anything in the city of Lakeland.

(R. 5030) And on cross-examination:

> Q: … Now, is it your testimony here today that you were not the person who held Mark Wilkerson at gunpoint the night of April 16th, 2013?
> A: Yes, ma'am, that is my testimony.
> …
> Q: And your testimony is also that you were not the person who murdered Clifford Drake; is that correct?
> A: That is correct.
> Q: And it's your testimony that you were not carrying that black backpack at the Drake residence the night that Clifford Drake was murdered?
> A: Yes, ma'am, that's my testimony.
> …

> Q: … And it's your testimony that you did not take Mark Wilkerson's phone and call your auntie, Samantha Lee, because you were lost that night?
> A: That is my testimony.
> …
> Q: And finally, it's your testimony that you don't recall what you were doing April 15thd or April 16ths of 2013?
> A: No, ma'am.

(R. 5078-5085) Smiley was the only person identified at the guilt phase trial to be the person who shot and killed Clifford Drake; therefore, it was not improper to argue that Smiley was the shooter to the penalty phase jury. Nevertheless, no harm can be shown because the trial court permitted the defense to argue that Smiley was not the shooter, contrary to the verdict.

ISSUE VII

THE PENALTY PHASE CLOSING ARGUMENTS OF THE STATE AND OF DEFENSE COUNSEL DID NOT DEPRIVE MR. SMILEY OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Appellant complains about statements made by both the prosecutor and defense counsel in closing argument. Some of which were objected to and some of which were not. As this Court noted, in *Card v. State*, 803 So. 2d 613, 622 (Fla. 2001), a contemporaneous objection is required to preserve an issue surrounding a prosecutor's comments in closing argument. This Court stated:

> As a general rule, the failure to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review. *See, e.g., Brooks v. State*, 762 So. 2d 879, 898 (Fla. 2000); *McDonald v. State*, 743 So. 2d 501, 505 (Fla. 1999). A timely objection allows the trial court an opportunity to give a curative instruction or to admonish counsel for making an improper argument. *See Nixon v. State*, 572 So. 2d 1336, 1341 (Fla. 1990). The exception to the contemporaneous objection rule is where the unobjected-to comments rise to the level of fundamental error, which has been defined as error that reaches down into the validity of the trial itself to the extent that a verdict of guilty or jury recommendation of death could not have been obtained without the assistance of the alleged error. *See McDonald*, 743 So. 2d at 505 (quoting *Urbin*, 714 So. 2d at 418 n.8); *Chandler v. State*, 702 So. 2d 186, 191 n.5 (Fla. 1997) (holding that for an error to be raised for the first time on appeal, the error must be so prejudicial as to vitiate the entire trial). Having reviewed the unobjected-to comments made by the prosecutor in this case, we conclude that none of these comments constitute fundamental error.

Card, 803 So. 2d at 622 (Fla. 2001). An abuse of discretion standard of review applies to a ruling on an objection during closing arguments, and unobjected-to comments are reviewed for fundamental error. *Id.*; *Moore v. State*, 701 So. 2d 545 (Fla. 1997), *cert. denied*, 523 U.S. 1083 (1998).

The trial court is given great discretion in controlling argument presented to the jury by counsel, and wide latitude is generally given to both prosecution as well

as defense in considering restrictions of closing argument. *Id.; Franqui v. State*, 804 So. 2d 1185, 1194-1195 (Fla. 2001):

> This Court has held that wide latitude is afforded counsel during argument. *See Moore v. State*, 701 So. 2d 545, 550 (Fla. 1997); *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. *See Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999). The standard jury instructions contain cautions that while the arguments of counsel are intended to be helpful and persuasive, such arguments are not to be taken as sources of the law or evidence. Further, the control of comments made to the jury is within the trial court's discretion, and an appellate court will not interfere unless an abuse of discretion is shown. *See Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990).

"Control of prosecutorial comments to the jury is within the trial court's discretion, and the exercise of that discretion will not be disturbed absent a showing of an abuse of discretion." *Sinclair v. State*, 717 So. 2d 99 (Fla. 4th DCA 1998). "In order to require a new trial, the closing arguments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." *Voorhees v. State*, 699 So. 2d 602 (Fla. 1997).

The purpose of closing argument is to "help the jury understand the issues by applying the evidence to the law," *Haliburton v. State*, 561 So. 2d 248, 250 (Fla. 1990), and to "review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985). Prosecutors' obligation to seek justice is not violated where they "argue the State's case with passion and conviction." *Diaz v. State*, 797 So. 2d 1286, 1287 (Fla. 4th DCA 2001). The State's closing arguments are not limited to a "flat, robotic recitations of 'just the facts.'" Closing argument "is a time for robust, vigorous, challenging . . . of an opponent's ideas." *Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016, 1032 (Fla. 4th DCA 1996) (Farmer, J., dissenting). Courts should have "great confidence in the common sense of jurors to decide cases on the law and facts without being unduly swayed by the lawyers' oratory." *Diaz*, 797 So. 2d at 1287. A mistrial is appropriate only where a statement is so prejudicial that it vitiates the entire trial. A trial court's ruling on a motion for mistrial is within the sound discretion of the court and will be sustained on review absent an abuse of discretion." *Ford v. State*, 802 So. 2d 1121, 1129 (Fla. 2001) (footnotes omitted). The State's comments during Smiley's penalty phase trial did not result in reversible error.

1. Objected-to arguments by State

A. Smiley is responsible for his own decisions.

Appellant challenges the State's comment,

> Now, do not think for one second that we think or take this decision likely. We understand that if your decision is to put Mr. Smiley to death, it is a very difficult decision that you are going to make, and we don't expect that you are going to leave the courthouse having made that decision being happy or excited about that decision.
>
> But one thing that I want to say is that it should not be lost on you is that Mr. Smiley is the reason why you are here today. Mr. Smiley is the one that made the decisions that put you in the position that you are in today.

(P. 2507-08) Appellant claims that this statement was an "objected-to" comment. It was not. The statement to which defense counsel objected concerned the State's mention that the State only had one chance to address the jury during closing arguments, as opposed to a guilt phase closing. (P. 2508) Therefore, this sub-issue is not preserved.

Appellant argues that the comment that the defendant was the reason for the jury being there was not a comment on his right to jury trial. The comment, taken in context, was the State's expression to the jury that it was going to be a difficult decision to determine whether another man should live or die, but the jury should

remain mindful that it was defendant's actions that led them to this point. This comment did not vitiate the sentencing recommendation.

B. Comments to rebut impulsiveness.

The prosecutor's comment that Appellant's actions were planned, premeditated, and calculated were not for the purpose of aggravation. Rather, it was in response to the defense's presentation of evidence through Dr. Waldman that Appellant acted impulsively. It is entirely proper for the State to make comments on the evidence presented, or to rebut a defense argument *See Bell v. State*, 108 So. 3d 639, 649 (Fla. 2013) ("Because the prosecutor's comment was a direct rebuttal to the defense attorney's argument, it falls within the "invited response" exception to the fairly susceptible test and was therefore not improper."*); Caballero v. State*, 851 So. 2d 655, 660 (Fla. 2003).

C. Smiley was the shooter.

The State did not obfuscate the facts concerning the actual murderer of Clifford Drake. The jury returned a guilty verdict to first-degree homicide, as charged. (R. 5356). The State was absolutely correct that there was no evidence that anyone but Smiley shot and killed Clifford Drake. That there was another robber present while he killed Drake does not present evidence that the other man was the shooter where there was only evidence presented, through Mark

Wilkerson, that Smiley shot and killed Drake. Moreover, John McDonald testified that Smiley admitted he killed Drake. Therefore, identifying Smiley as the shooter was not improper.

D. Smiley is not like Jeffrey Dahmer.

Smiley challenges the State's argument that the death penalty is not just reserved for people such as Jeffrey Dahmer. The mere mention of Dahmer, Hitler, Bundy, etc. is not reversible error. *See Poole v. State*, 997 So. 2d 382, 395-96 (Fla. 2008):

> Poole next alleges that the prosecutor belittled evidence in mitigation and commented on matters not in evidence.[5] This comment was not improper because the prosecutor was attempting to rebut mitigating evidence argued by the defense. During the penalty phase, defense counsel admitted into evidence a photograph of Poole when he was a child and a photograph of the church Poole's family attended. Defense counsel used these photographs and asked Poole's family members questions about attending church to demonstrate in mitigation that Poole was a good, loving person who came from a good family. The prosecutor responded during his closing argument that although Poole was a child who went to church at one time, he was not a child anymore, but a thirty-nine-year-old man who committed a crime.
>
> fn. 5: The prosecutor argued:
> This is what you saw. A picture of a church, isn't that nice. When did he go to this church? When he was like 12, 16, 19. He is 39 years old when he murdered this boy. 39. Does it matter what he looked like in this picture?

> Was Ted Bundy okay in the fourth grade? I don't care, and I think you shouldn't care what he was doing in the fourth grade. A nice little picture in the fourth grade.

See also Cave v Straw, 476 So. 2d 180 (Fla. 1985); *Randolph v. State*, 562 So. 2d 331 (Fla. 1990).

Here, the State's comment, when taken in context, was not improper. The State was attempting to rebut the anticipated argument that the defense would say that the death penalty is reserved for people like Jeffrey Dahmer. This anticipated argument likely stemmed from the defense counsel's mention of Hitler in voir dire. (P. 317) However, the State did not compare Smiley with Dahmer; rather, it disassociated Smiley from killers like Dahmer. *See Mignotte v. State*, 576 So. 2d 809, 810 (Fla. 3d DCA 1991):

> The defendant's first argument on appeal is that the trial court erred in denying the motion for mistrial because the prosecutor's statement referencing a notorious criminal was totally irrelevant and meant solely to inflame the passions of the jury. A review of the record in context, reveals that the reference in the present case did not constitute error. The prosecutor's comment did not compare the defendant to Ted Bundy, and was made in response to the testimony of a defense expert, who had testified that persons who commit crimes have a sickness of some sort suggesting that such persons are therefore not responsible for their crimes. In commenting on this testimony, the prosecutor was attempting to show the folly of such an argument if taken to its natural extreme.

Cf. Copertino v. State, 726 So. 2d 330 (Fla. 4th DCA 1999) (the prosecutor's "young Mr. Hitler" remark was improper, yet not fundamental error).

Finally, even if the comment was improper, it was harmless as the comment was brief and isolated, and the trial court immediately sustained the objection. *See Edwards v. State*, 145 So. 3d 174 (Fla. 1st DCA 2014) (trial court did not abuse its discretion by denying the motion for mistrial because the prosecutor's comment was brief and isolated and the trial court immediately sustained appellant's objection).

2. Unobjected-to arguments by State

Smiley's challenge to the unobjected-to comments made during the State's closing arguments has been waived. To preserve an issue for appeal based on improper argument, counsel is required to object and request a mistrial. *Nixon v. State*, 572 So. 2d 1336, 1340 (Fla. 1990); *Poole v. State*, 997 So. 2d 382, 390 (Fla. 2008). "A timely objection allows the trial court an opportunity to give a curative instruction or to admonish counsel for making an improper argument". *Card v. State*, 803 So. 2d 613, 622 (Fla. 2001). The Florida Supreme Court has held that a curative instruction may even cure any prejudice flowing from an allegedly improper comment during closing argument assuming a timely objection is made. *See Ferguson v. State*, 417 So. 2d 639 (Fla. 1982). The State acknowledges,

however, the *Poole* Court's "carved out" exception that these comments can be reviewed by appellate court "when the unobjected-to comments rise to the level of fundamental error". *Poole*, 997 So. 2d at 390. "To constitute fundamental error, 'improper comments made in the closing arguments of a penalty phase must be so prejudicial as to taint the jury's recommended sentence.' " *Fennie v. State*, 855 So. 2d 597, 609 (Fla. 2003); *State v. Smith*, 240 So. 2d 807, 810 (Fla. 1970); *Wade v. State*, 41 So. 3d 857, 868 (Fla. 2010).

Contrary to Appellant's assertions, the unobjected-to comments made during the State's closing did not rise to the level of fundamental error.

A. Smiley possessed and discharged a firearm

Appellant was convicted of *actually* possessing a gun, discharging that gun, and killing Clifford Drake under a first-degree felony murder theory. (R. 678, 5361) Therefore, the State's comment that Smiley was the gunman was a *fact* in this case. Nevertheless, the trial court permitted defense counsel the flexibility to argue his interpretation of the verdict. Hence, Appellant has failed to show fundamental error.

B. Aggravating factors

Appellant challenges the State's description of the aggravating factors listed in the jury instructions. Because Appellant agreed to these instructions, any alleged

error concerning the State's explanation of the law and jury instructions would be invited and cannot be complained about on appeal. Moreover, Appellant has failed to show fundamental error as the jury is required to find each aggravating factor which could be used to enhance Smiley's sentence.

C. Alleged Golden Rule violation

Appellant argues a Golden Rule violation occurred when the prosecutors stated, "…the defendant has an utter disregard for not only the sanctity of the safety of – the security of your home, of Mr. Drake's home, of Ms. Riley's home…" (P. 2530) However, the State's comments did not rise to the level of a Golden Rule violation. *See Pagan v. State*, 830 So. 2d 792, 812-813 (Fla. 2002):

> "In general, a 'golden rule' argument encompasses requests that the jurors place themselves in the victim's position, that they imagine the victim's pain and terror, or that they imagine that their relative was the victim." *Williams v. State*, 689 So. 2d 393, 399 (Fla. 3d DCA 1997); *see also Davis v. State*, 604 So. 2d 794, 797 (Fla. 1992); *Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985). The argument Pagan complains of in no way violates the prohibition against such arguments. The prosecutor did not ask the jury to place themselves in the victim's position, to imagine the victim's pain and terror, or to imagine that their relative was the victim.

See also Bailey v State, 998 So. 2d 545 (Fla. 2008); *see also Williamson v State*, 994 So. 2d 1000 (Fla. 2008).

Here, the State's comment did not ask the jurors to place themselves in the victims' shoes, nor did it create an imaginary screenplay of the offense. Moreover, even defense counsel conceded that the prosecutor appeared to make a "flub" and immediately corrected herself. (P. 2553) Nevertheless, even if this Court were to find the State's comment improper, it would not constitute fundamental error as the verdict was sure to be reached regardless of this isolated comment. Moreover, this Court has found far more egregious comments to be harmless. *See Lugo v. State*, 845 So. 2d 74, 106-07 (Fla. 2003):

> An error is fundamental in nature when it "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *McDonald*, 743 So. 2d at 505. An improper "Golden Rule" argument typically occurs when counsel asks jurors to place themselves in the circumstances of the victim. It extends beyond the evidence and "unduly create[s], arouse[s] and inflame[s] the sympathy, prejudice and passions of [the] jury to the detriment of the accused." *Urbin v. State*, 714 So. 2d 411, 421 (Fla. 1998) (quoting *Barnes v. State*, 58 So. 2d 157, 159 (Fla. 1951)). The prosecutor unmistakably asked the jurors to place themselves in Furton's position, which clearly is error. We reject the State's assertion that the prosecutor's remarks were merely permissible comments on the evidence. A seasoned prosecutor involved in a capital case knows better than to make an improper "Golden Rule" argument. However, because this incident was isolated, and an overwhelming amount of unrebutted evidence exists against Lugo, we determine that the error is, on this record, harmless in nature and therefore deny relief.

See also Doorbal v. State, 837 So. 2d 940 (Fla. 2003):

> These statements are erroneous and needlessly violated the prohibition against "Golden Rule" arguments, because they asked jurors to place themselves in the position of the victim. However, in the absence of a contemporaneous objection, we must determine whether the guilty verdict could not have been obtained without the assistance of the error. *See McDonald, 743 So. 2d at 505*. As noted above, a mountain of physical and testimonial evidence established Doorbal's responsibility for the crimes with which he was charged. Therefore, we conclude that the remark, though erroneous, was also isolated and did not affect the jury's verdict. No relief is warranted.

D. Statements of law

Appellant challenges four comments in this subsection: (1) the jury should not base its decision on sympathy; (2) having an aneurysm should not preclude the imposition of the death penalty; (3) the jury should focus on the "guilty, as charged" verdicts rendered by the guilt phase jury; and (4) the death penalty exists as an alternative to a life sentence.

First, contrary to Appellant's argument, sympathy should not play a role in the jury's deliberations. *See Zack v. State*, 753 So. 2d 9, 23-24 (Fla. 2000):

> At trial, Zack sought an instruction regarding the role of sympathy in the deliberative process. Zack concedes that "[t]his Court has ... consistently rejected arguments similar to the one Zack raises here." *Hunter v. State*, 660 So. 2d 244 (Fla. 1995); *Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990), *vacated on other grounds*, 505 U.S.

1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992). However, in his tenth point on appeal, Zack calls on us to reconsider this precedent. We decline to recede from these decisions.

Our decisions in *Hitchcock* and *Hunter* were based upon the clear holding in *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). In *Parks*, the Court specifically rejected an argument identical to the one urged in this case, that the jury would erroneously disregard any mitigating evidence which evoked its sympathy once instructed that it could not consider sympathy in its deliberations. *Id.* at 492, 110 S.Ct. 1257. In rejecting Park's argument, the Supreme Court noted:

> This argument misapprehends the distinction between allowing the jury to consider mitigating evidence and guiding their consideration. It is no doubt constitutionally permissible, if not constitutionally required, or the State to insist that "the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence."

Id. at 492–93, 110 S.Ct. 1257 (citations omitted). The trial court properly rejected Zack's proposed sympathy instruction.

Further, a review of this record in light of Parks convinces us that the State's argument concerning sympathy was a proper admonition for the jurors to consider the mitigation evidence without resort to their emotions.

In fact, the jury instructions approved by this Court, include that same language. *In re Standard Criminal Jury Instructions in Capital Cases*, 214 So. 3d 1236, 1266 (Fla. 2017) ("Your decisions should not be influenced by feelings of prejudice, racial or ethnic bias, or sympathy. Your decisions must be based on the evidence and the law contained in these instructions"). Because the law instructs the jury that their decision should not be based on sympathy, the State's argument was not improper.

Next, the remaining challenged comments (having an aneurysm should not preclude the imposition of the death penalty, the jury should focus on the "guilty, as charged" verdicts rendered by the guilt phase jury, and the death penalty exists as an alternative to a life sentence) were not misstatements of the law. Rather, they were proper arguments made based on the law and evidence. No fundamental error can be shown.

E. Comments on mitigation evidence.

Appellant argues that prosecutor improperly denigrated Smiley's mitigation. "Improper denigration includes comments characterizing mitigation as 'flimsy,' 'phantom,' and 'excuses.' " *Carr v. State*, 156 So. 3d 1052, 1065 (Fla. 2005). However, the State is permitted to put mitigation in context. *See Carr*, 156 So. 3d at 1065:

> Nor is it improper to suggest that the jury should put mitigating evidence in context. *See Cox v. State*, 819 So. 2d 705, 718 (Fla. 2002). For example, in *Cox*, 819 So. 2d at 718, we held that a prosecutorial comment "designed to convey the concept that while the mitigator [relating to the defendant's traumatic childhood] may be valid, perhaps its weight should be somewhat discounted because of the passage of time and the lack of an evidentiary nexus to the defendant[,] is a valid argument."

The State did not dispute that Smiley suffered from brain aneurysms, or diminish the severity of such a condition; however, it argued that, even though Smiley suffered brain aneurysms, that fact should not be given great weight because, essentially, there was no evidence that being murderous was a by-product of this medical condition. Similarly, the State's comments on Smiley's high IQ and history of poor behavior prior to the aneurysms were fair statements on the evidence that showed that the aneurysms did not materially alter Smiley's behavior or diminish his intellect, and that such mitigation should not be considered weighty enough to prevent Smiley from receiving a death sentence.

Smiley further argues that the State improperly denigrated mitigation by commenting,

> "The defense showed you numerous photographs of the defendant as a child, and I would submit to you that this is an attempt to appeal to your sympathies for the defendant. But in looking at the photographs of that cute kid, let's not forget what that cute kid turned into. And

> I'm referring to State's Exhibit 162 and 161. There's that cute kid. Not so cute anymore.

(T. 2543) The State's comment did not denigrate Smiley's mitigation; rather, it was a comment made to refocus the jury on the person Smiley had become. This Court has upheld similar comments as proper. In *Poole v. State*, 997 So. 2d 382, 395 (Fla. 2008), this Court held that it was proper for the prosecutor to suggest that the jury "shouldn't care what [the defendant] was doing in the fourth grade" since he was 39 years old when he murdered the victim. Smiley is not entitled to relief.

F. Death sentence as a deterrent

Smiley argues that the State's comment, that the death penalty is a deterrent sanction, was improper. However, this is a true statement of the law. *See Provenzano v. State*, 760 So. 2d 137 (Fla. 2000). Smiley argues that the comment relied on facts not in evidence; however, this argument was not made below. In *Gibson v. State*, 351 So. 2d 948, 950 (Fla. 1977), this Court rejected the argument that fundamental error occurred because the prosecutor argued that the jury should recommend death as a deterrent to crime. Moreover, this Court, in *Kennedy v. State*, 455 So. 2d 351, 354 (Fla. 1984), found that the prosecutor's statement during the penalty phase closing argument that the defendant's prior life sentence had not deterred him from committing another murder was relevant to the aggravating

circumstance that appellant was under sentence of imprisonment. Although Smiley had not yet been sentenced for the murder of Carmen Riley in a "robbery gone bad" just weeks prior to killing Clifford Drake under similar circumstances, Smiley was clearly not deterred from killing again. The State's argument was a fair comment on the evidence.

Even if this Court were to find (some of) the comments made in the State's closing arguments improper, they were not so egregious as to require a new trial. *See McCarthy v. State*, 773 So. 2d 88, 89 (Fla. 2d DCA 2000):

> Next, Mr. McCarthy complains of three comments the prosecutor made during closing argument. We are not required here to pass upon the prosecutor's eloquence or lack thereof. Rather, we measure the comments against existing legal standards and in the context each was made. It is a long-standing rule that improper argument has no place in a criminal trial. *See Palazon v. State*, 711 So. 2d 1176 (Fla. 2d DCA 1998). To insure compliance with this rule, the supreme court has stated that prosecutors must refrain from inflammatory and abusive argument, maintain their objectivity, and behave in a professional manner. *See Gore v. State*, 719 So. 2d 1197, 1202 (Fla. 1998). Here, none of the prosecutor's comments is a contender for an eloquence award, but only one appears to be improper, as a comment on facts not in evidence, and we do not find it so egregious as to require a new trial.

Moreover, it is not presumed that jurors are led astray to wrongful verdicts by "the impassioned eloquence and illogical pathos of counsel," *Blair v. State*, 406 So. 2d 1103, 1107 (Fla. 1981) (quoting from an earlier case):

> Defendant also argues that the prosecutor, in his closing argument, improperly "continued to use his own comments to influence the jury", and made other statements not supported by the record. We have reviewed the transcript, and are of the opinion that there was a basis in the record for the allegedly unsupported statements.
>
> As for the other comments complained of, we cannot say that they were "of such a nature so as to poison the minds of the jurors or to prejudice them so that a fair and impartial verdict could not be rendered." *Oliva v. State*, 346 So. 2d 1066, 1068-69 (Fla. 3d DCA 1977), *cert. denied*, 434 U.S. 1010, 98 S. Ct. 719, 54 L.Ed.2d 752 (1978). They did not "materially contribute to this conviction", *Zamot v. State*, 375 So. 2d 881, 883 (Fla. 3d DCA 1979) were not "so harmful or fundamentally tainted so as to require a new trial", *Smith v. State*, 354 So. 2d 477, 478 (Fla. 3d DCA 1978); and were not so inflammatory that they "might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise ...", *Darden v. State*, 329 So. 2d 287, 289 (Fla. 1976), cert. dismissed, 430 U.S. 704, 97 S. Ct. 1671, 51 L.Ed.2d 751 (1977). As we noted in *Paramore v. State*, 229 So. 2d 855, 860 (Fla. 1969), *modified*, 408 U.S. 935, 92 S. Ct. 2857, 33 L.Ed.2d 751 (1972), "it will not be presumed that ... (jurors) are led astray, to wrongful verdicts, by the impassioned eloquence and illogical pathos of counsel." The statements here complained of do not warrant a new trial for defendant.

The trial court instructed the jury on how to apply the law. Additionally, the trial court instructed the jury that "what the attorneys say is not evidence and you are not to consider it as such" (R. 1225) In fact, the trial court gave repeated commands to the jury: "use your common sense in deciding which evidence is the best evidence, and which evidence should not be relied upon in making your decision…" [R. 1236]; "you may rely on your own conclusion about the credibility of any witness. A juror may believe or disbelieve all or any part of the evidence or testimony of any witness" [R. 1237]; and, the verdict must be based on the law "spelled out in these instructions" [R. 1238]. Because Smiley cannot show fundamental error, no relief is due.

3. Defense counsel's closing arguments

Appellant argues that fundamental error and/or ineffective assistance occurred based on defense counsel's closing penalty phase arguments. To prove fundamental error, the error must affect the validity of the trial to the extent that the verdict would not have been the same if the error had not occurred. *See State v. Delva,* 575 So. 2d 643, 644-45 (Fla. 1991). To determine whether an error is fundamental, the reviewing court must consider the totality of the circumstances. *Neal v. State,* 169 So. 3d 158, 161 (Fla. 4th DCA 2015); *Bryant v. State,* 30 So. 3d 591, 593 (Fla. 2d DCA 2010). As an alternative argument, Appellant claims that

trial counsel was ineffective on the face of the record. However, claims of ineffective assistance of counsel are not generally cognizable on direct appeal. *Mansfield v. State*, 758 So. 2d 636 (Fla. 2000). The Fourth District Court of Appeal has said such instances are rare indeed. *Henley v. State*, 719 So. 2d 990 (Fla. 4th DCA 1998). That court has noted such claims "may be raised for the first time on direct appeal only when the facts giving rise to the claim are apparent on the face of the record, a conflict of interest is shown, or prejudice to the defendant is shown." *Fones v. State*, 765 So. 2d 849, 850 (Fla. 4th DCA 2000). This issue is reviewed "[o]nly in cases where the incompetence and ineffectiveness of counsel is apparent on the face of the record and prejudice to the defendant is obvious." *McMullen v. State*, 876 So. 2d 589, 590 (Fla. 5th DCA 2004) This Court has said there is a "strong presumption" that counsel was effective "and made all significant decisions in the exercise of reasonable professional judgment. . . " *Jennings v. State*, 583 So. 2d 316, 320 (Fla. 1991).

The State asserts that Appellant's claim of ineffectiveness does not fall into these categories and that there must be further inquiry into Appellant's allegations because it is not apparent from the face of the record that counsel was ineffective. Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's decisions. *Davis v. State*, 875 So. 2d 359, 366 (Fla. 2003). The

State asks this Court to decline to engage in speculative, second-guessing of trial counsel's strategy in this direct appeal.

The issue of trial counsel's ineffectiveness must be decided on the basis of more than the current record because the reasons for trial counsel's decisions are not apparent on the face of the record. For example, Appellant, himself, could have suggested or agreed to the comments raised on appeal.

A. Death penalty qualification

Appellant claims that trial counsel's statement acknowledging that Appellant qualified for the death penalty is the equivalent to asking for the imposition of the death penalty statement. This is not so. In this case, Smiley clearly committed the requisite offenses, proven by the admission of certified copies of the judgments and sentences for the Riley and Drake offenses. These prior violent felonies qualified Smiley for the death penalty. There was no obfuscating the fact that those aggravators were proven, so defense counsel addressed the issue directly. This was not ineffective assistance, it was strategy. Defense counsel is not ineffective for conceding aggravating factors in a penalty phase trial when the facts of the aggravating factors were proven in the guilt phase trial. *See Gamble v State*, 877 So. 2d 706 (Fla. 2004); *Schwab v. State*, 814 So. 2d 402 (Fla. 2002).

B. Possession and discharge of a weapon

Appellant claims that trial counsel erred in making statements regarding Smiley being the shooter. However, Appellant was convicted of possessing a gun, discharging that gun, and killing Clifford Drake under a first-degree felony murder theory. (R. 678, 5361) Therefore, the defense counsel's statements represented *facts* in this case. Defense counsel is not ineffective for conceding facts that were found in the guilt phase trial. *See Gamble, supra*; *Schwab,* supra.

C. Statements of fact

Given that Appellant presented no legal argument in defense of his position, this issue should be deemed waived. *Doorbal v. State*, 983 So. 2d 464, 482 (Fla. 2008); *Bryant v. State*, 901 So. 2d 810, 827-28 (Fla. 2005); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). Moreover, Appellant has not shown fundamental error.

D. Statements of law

Given that Appellant presented random quotations, with commentary, but without legal argument as to why those comments were improper, this issue should be deemed waived. *Doorbal v. State*, 983 So. 2d 464, 482 (Fla. 2008); *Bryant v. State*, 901 So. 2d 810, 827-28 (Fla. 2005); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). Moreover, Appellant has not shown fundamental error.

Additionally, as argued above, trial counsel was correct that sympathy should not play a role in the jury's deliberations. *Zack v. State*, 753 So. 2d 9, 23-24 (Fla. 2000); *In re Standard Criminal Jury Instructions in Capital Cases*, 214 So. 3d 1236, 1266 (Fla. 2017) ("Your decisions should not be influenced by feelings of prejudice, racial or ethnic bias, or sympathy. Your decisions must be based on the evidence and the law contained in these instructions").

ISSUE VIII

THE PENALTY PHASE JURY INSTRUCTIONS ON AGGRAVATING FACTORS AND MITIGATING CIRCUMSTANCES AND THE PENALTY PHASE VERDICT FORM DID NOT RESULT IN REVERSIBLE ERROR.

The record reflects that, in this case, the jury was thoroughly and accurately instructed on its penalty phase responsibilities in accordance with all relevant authority. (R. 1224-38) Jury instructions are subject to the contemporaneous objection rule. *State v. Delva*, 575 So. 2d 643 (Fla. 1991). When the issue has been preserved, a review of the trial court's instructions to the jury is reviewed under an abuse of discretion standard. *See Chesnoff v. State*, 840 So. 2d 423 (Fla. 5th DCA 2003):

> A trial court has wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal. *Carpenter v. State***,** 785 So. 2d 1182, 1199-1200 (Fla. 2001). A trial judge is not constrained to give only those instructions contained in the Florida Standard Jury

> Instructions. *Carpenter,* 785 So. 2d at 1200; *Cruse v. State*, 588 So. 2d 983 (Fla. 1991). While it is preferable that a standard jury instruction is given if it adequately explains the law**,** *see, e.g., McGuire v. State*, 639 So. 2d 1043, 1047 (Fla. 5th DCA 1994), and giving a non-standard instruction that misleads the jury is reversible error, *see, e.g., Doyle v. State,* 483 So. 2d 89, 90 (Fla. 4th DCA 1986), the trial court's decision to give a particular instruction will not be reversed "unless the error complained of resulted in a miscarriage of justice, or where the instruction or failure to give a requested instruction was reasonably calculated to confuse or mislead the jury." *Reyka v. Halifax Hosp. Dist.*,657 So. 2d 967, 969 (Fla. 5th DCA 1995). Thus, absent "prejudicial error," the trial court's decision will not be disturbed on appeal. *Card v. State,* 803 So. 2d 613, 624 (Fla. 2001).

A. Aggravating factors in the instructions and verdict form

"With regard to claims of error pertaining to jury instructions, we have held that "[i]ssues pertaining to jury instructions are not preserved for appellate review unless a specific objection has been voiced at trial." *Overton v. State*, 801 So. 2d 877, 901 (Fla. 2001); *see also Urbin v. State*, 714 So. 2d 411, 418 n.8 (Fla. 1998). Because this issue was not preserved by an objection, Smiley argues that aggravator instruction constitutes fundamental error. When constitutional rights are implicated, this Court has considered issues for the first time on appeal as fundamental error where the error "goes to the foundation of the case or the merits

of the cause of action and is equivalent to a denial of due process." *J.B. v. State*, 705 So. 2d 1376, 1378 (Fla. 1998).

However, since Appellant agreed to the jury instructions, "[f]undamental error is waived under the invited error doctrine because 'a party may not make or invite error at trial and then take advantage of the error on appeal.' " *Universal Ins. Co. of North America v. Warfel*, 82 So. 3d 47, 65 (Fla. 2012) (*citing Sheffield v. Superior Ins. Co*., 800 So. 2d 197, 202 (Fla. 2001). Because counsel affirmatively agreed to the instruction, even if the instruction given was improper, fundamental error is waived. *See Armstrong v. State*, 579 So. 2d 734, 735 (Fla. 1991); *Van Loon v. State*, 736 So. 2d 803, 804 (Fla. 2d DCA 1999).

Moreover, while the State agrees that the individual listing of aggravating factors is unconventional, it is understandable since this penalty phase was conducted during a time of uncertainty. Part of the analysis on this issue must take into consideration that this penalty phase was the first post-*Hurst* penalty phase (in Polk County) and the attorneys were trying to interpret the new law to give appropriate instructions. This Court, in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), stated that the jury's role in death penalty sentencing was being altered: "in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the

imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge". *Id.* at 54. The State and trial counsel agreed to these instructions, clearly thinking that this was the best way for the jury to understand that it had to make a finding as to the "*existence* of any aggravating factor" that could be used to enhance the sentence. *Hurst*, 202 So. 3d at 54; § 921.141(2)(b), Fla. Stat. (2016). The result was an agreement that each aggravating factor would be listed separately. (P. 1493)

In his argument, Appellant mentions that the jury sent a question as to "aggravating factor #1" [IB 92]; however, Appellant has misread the jury's question as the jury asked about "mitigating factor #1", not "aggravating factor #1". (R. 1239) The jury was asking whether they should consider that Smiley had killed Carmen Riley prior to killing Clifford Drake in determining whether Smiley's "prior criminal history" had been significant or not.

Finally, Appellant's concern that there was harm based on the weight of the collective aggravators was safeguarded by the Court's final weighing process. The jury was only required to find the existence of each aggravating factor, not to give weight to each individual factor. Moreover, in determining whether the aggravators outweighed the mitigators, the jury was instructed that it was a qualitative, not a quantitative evaluation. (R. 1235) Since juries are presumed to follow the

instructions, no harm can be shown. *See Lowe v. State*, 259 So. 3d 23, 52 (Fla. 2018).

B. Mitigating circumstances in the instructions and verdict form

Appellant argues that the trial court gave improper instructions on the mitigating circumstances, and that the verdict form should not have been used because it asks the jury to determine each mitigating circumstance, and to account for the numerical tally. Such a ruling is reviewed de novo. *State v. Tovar*, 110 So. 3d 33 (Fla. 2d DCA 2013). However, when an issue is not sufficiently briefed, it is considered waived. *Doorbal v. State*, 983 So. 2d 464, 482 (Fla. 2008); *Bryant v. State*, 901 So. 2d 810, 827-28 (Fla. 2005); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). Given that Appellant presented no argument as to why the instruction was erroneous, or was an improper statement of the law, this issue should be deemed waived. Additionally, it was trial counsel who requested that the three broad categories of nonstatutory mitigators be included in the verdict form; any claim of error as to that point is waived.

Nevertheless, this issue has no merit because the trial court gave the instructions and verdict form which were suggested by this Court on April 13, 2017- the week before the penalty phase trial. *In re Standard Criminal Jury Instructions in Capital Cases*, 214 So. 3d 1236, 1239-40 (Fla. 2017) Appellant

relies on the verdict form this Court published the year *after* the verdict in this case. Just because the trial court did not have the benefit of the amended instruction and verdict form, it cannot be said that the standard interim instruction and verdict form were improper. Again, this penalty phase was tried in a time of uncertainty and the trial court, the State, and defense counsel were all trying to interpret the law to conduct a fair trial. However, the trial court did not improperly rely on fresh, new (interim) standard instructions. As opposing counsel states, they are presumed correct. *Stephens v. State*, 787 So. 2d 747 (Fla. 2001). That the instructions were amended a year later cannot be used to say that the trial court committed reversible error.

Moreover, there is no showing that any prejudice arose from the instruction being given. The jury's recommendation was then presented to the trial court, which conducted its own weighing and balancing test. *See Gonzalez v. State*, 136 So. 3d 1125, 1166 (Fla. 2014).

ISSUE IX

THE TRIAL COURT'S SENTENCING ORDER IS LEGALLY VALID.

A valid sentencing order is one that address all of the requirements of § 921.141(4), Florida Statutes, in relevant part:

> In each case in which the court imposes a sentence of death, the court shall, considering the records of the trial

> and the sentencing proceedings, enter a written order addressing the aggravating factors set forth in subsection (6) found to exist, the mitigating circumstances in subsection (7) reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence.

A. Enmund/Tison analysis

Appellant argues that the trial court erred in its *Enmund/Tison* analysis. In *Enmund v. Florida*, 458 U.S. 782 (1982), the United States Supreme Court reversed Enmund's death sentence for felony murder because the record showed that Enmund neither killed the victim nor did he have the intent that the victim be murdered. *Id*. In *Tison v. Arizona*, 481 U.S. 137 (1987), the United States Supreme Court affirmed Tison's death sentence for felony murder even though he was not the actual killer, because the record showed that Tison was a major participant in a felony committed with a "reckless indifference to human life". *Id*.

Here, the trial court did not err. In accordance with this Court's instructions, the trial court made an explicit written finding that the defendant was the perpetrator with the gun, who shot and killed Clifford Drake. (R. 5384, 5385, 5386, 5394, 5397) *See Perez v State*, 919 So. 2d 347 (Fla. 2005); *Stephens v. State*, 787 So. 2d 747, 760 (Fla. 2001).

Even if there had been error, Smiley can show no harm. In this case, there is no *Enmund/Tison* concern. The evidence presented through John McDonald and Mark Wilkerson showed that Appellant possessed a gun during the burglary-robbery, and Mark Wilkerson testified that Appellant possessed the gun, pointed the gun at him and Clifford Drake, and shot and killed Clifford Drake. McDonald also testified that Smiley admitted to killing Drake. (R. 4721) Therefore, even though there were other people involved in the criminal episode which resulted in the death of Clifford Drake, the evidence and conviction showed that Appellant was found guilty of being the *actual* shooter in the homicide of Clifford Drake. (R. 5361). Therefore, *Enmund/Tison* protections are inapplicable to Smiley.

B. Aggravating factors

This issue is waived. The trial court addressed the aggravating factors as the defense and State agreed them to be charged to the jury. *See Brown v. State*, 959 So. 2d 218, 223 (Fla. 2007) (Brown invited the error by assenting to the instruction that the jury consider each count separately"). Moreover, the trial court conducted a weighing analysis whereby it merged many of the aggravating factors. (R. 5400) The trial court found four aggravating factors: (1) prior capital felony of Carmen Riley (merged with prior violent felony conviction of robbery of the same victim); (2) the murder of Clifford Drake was committed while engaged in the commission

of the robbery of Mark Wilkerson (merged with prior violent felony conviction of robbery of the same victim); (3) prior violent felony conviction for burglary with an assault or battery of Clifford Drake and Mark Wilkerson (merged with murder committed while engaged in the burglary of same victims); and (4) the murder was committed for pecuniary gain. (R. 5396-97)

The trial court does appear to have found two aggravating factors for "prior capital felony" and "prior violent felony"; however, such doubling was harmless in this case. *See Bright v. State*, 90 So. 3d 249, 260-61 (Fla. 2012). Smiley committed two prior/contemporaneous robbery-homicides, which is one of the weightiest aggravators, especially when a prior violent felony is another homicide. *See Winkles v. State*, 894 So. 2d 842, 847 (Fla. 2005); *see also Jones v. State*, 998 So. 2d 573, 586 (Fla. 2008) (reiterating that the prior violent felony aggravator is one of "the most weighty in Florida's sentencing calculus" (*quoting Sireci v. Moore*, 825 So. 2d 882, 887–88 (Fla. 2002). Because the trial court afforded great weight to the prior capital felony, the effect of the other prior violent felony aggravator(s) would only serve to enhance that finding, and is therefore, harmless. *See Cannon v. State*, 180 So. 3d 1023, 1033 (Fla. 2015) (due to multiple prior violent felonies, the trial court assigned it "very great weight").

The trial court considered and rejected the merger of the "commission of a robbery" and "pecuniary gain" aggravators. This was not improper as they involved different aspects of the crime because (1) Mark Wilkerson was the victim of the robbery, and (2) Smiley had just committed a prior robbery-homicide a few weeks prior. Because the robbery was committed against Mark Wilkerson, that aspect of the crime is different than the murder committed on Clifford Drake. Second, because Smiley had volunteered to commit this robbery just weeks after he committed the robbery-murder of Carmen Riley without any financial benefit, Smiley's personal motivation seems to also be attributed to other factors, such as power or pleasure. *See, eg., Brown v. State*, 473 So. 2d 1260 (Fla. 1985). The evidence that Smiley forced Mark to strip and lay on the ground was more a show of power than a simple robbery, and the evidence of Smiley shooting Clifford Drake in the hip before killing him moments later, shows a degree of Smiley taking pleasure in Drake's pain. Smiley did not personally gain any financial benefit from these robbery-homicides. Therefore, the trial court properly found that the "pecuniary gain" and "commission of a robbery" aggravators to be based on separate aspects of the crime.

Even if this Court were to find that the sentencing order is deficient based on the trial court's weighing of the aggravators, Appellant is not entitled to a new

penalty phase hearing because this alleged error would be a weighing error. The proper relief would be to remand for a new sentencing hearing, where counsel may present argument; however, Appellant would not be entitled to have a new penalty phase jury or to present new evidence. *See, eg., Jackson v. State*, 767 So. 2d 1156, 1160 (Fla. 2000):

> First, upon remand, "the court is to conduct a new hearing, giving both parties an opportunity to present argument [regarding the proper sentence] and submit sentencing memoranda before determining an appropriate sentence." *Reese*, 728 So. 2d at 728. Because a reweighing does not entitle a defendant to present new evidence, *see Crump v. State*, 654 So. 2d 545, 548 (Fla. 1995), "[n]o new evidence shall be introduced." *Reese*, 728 So. 2d at 728.

C. Appellant was the shooter

Appellant claims that the sentencing order was invalid because the trial court identified Smiley as the shooter. However, there was no error in the trial court identifying Appellant as the shooter because that is what the jury found when it convicted him of First-Degree Murder, as charged. There was eyewitness testimony identifying Smiley as the shooter, forensic evidence connecting Smiley to the homicide, and Smiley's confession to John McDonald and Samantha Lee.

D. Bundling of Mitigators

Smiley argues that the trial court erred in bundling the nonstaturory mitigators, pursuant to *Campbell v. State*, 571 So. 2d 415 (Fla. 1990). However, this Court made it clear, in *Campbell*, that it is proper for a trial court to bundle the nonstatutory factors in a sentencing order. *Id*. at 419 n. 3; *see Gonzalez v. State*, 136 So. 3d 1125, 1166 (Fla. 2014):

> Finally, Gonzalez claims that the trial court improperly bundled a number of factors into a single nonstatutory mitigating factor and then only assigned the factor little weight. To form the fourth mitigator, the trial court combined that Gonzalez came from a broken home, suffered from depression and an attention disorder, and was addicted to prescription pain medication. The court found this "combination of factors" to be proven as a mitigating circumstance, but only gave it "little weight in light of all the evidence presented during the penalty phase proceedings which showed that defendant did not have a deprived childhood but rather a normal upbringing." Sentencing order at 7.
>
> The trial court did not err in its characterization of the fourth mitigator. In fact, this group of factors mirrors Gonzalez's grouping in his sentencing memorandum. In addition, this Court has explained that "proposed nonstatutory circumstances should generally be dealt with as categories of related conduct rather than as individual acts." *Campbell*, 571 So .2d at 419 n. 3. We have even noted broad categories of nonstatutory mitigating evidence which may be valid, including abused or deprived childhood; contribution to community or society as evidenced by an exemplary work, military, family, or other record; remorse and potential for

> rehabilitation; good prison record; disparate treatment of an equally culpable codefendant; and charitable or humanitarian deeds. *Id.* at 419 n. 4.
>
> In *Kearse*, the defendant raised a similar claim regarding the grouping of over thirty proposed mitigating factors into a category relating to the defendant's "difficult childhood and his psychological and emotional condition because of it." 770 So. 2d at 1133. We concluded that the trial court did not abuse its discretion in grouping the nonstatutory mitigating circumstances in this manner. *Id.* Similarly, in *Reaves v. State*, 639 So. 2d 1, 6 (Fla. 1994), we found no abuse of discretion in the trial judge's finding of only three nonstatutory mitigators. Although Reaves proffered nonstatutory factors in greater number, "the judge reasonably grouped several proffered mitigating factors into three." *Id.* Likewise, in the instant case, the trial court's grouping or bundling of these proposed nonstatutory mitigating factors does not constitute error.

See also Mullens, 197 So. 3d 16, 32 (Fla. 2016) ("We hold that Mullens is not entitled to relief on this claim. The trial court aggregated several related nonstatutory factors into general categories for its consideration, which was permissible"). The trial court did not err and Smiley is not entitled to relief.

E. Firearm minimum mandatory terms

Appellant has misread the trial court's order on the firearm minimum mandatory term. (R. 5426) The trial court did not sentence Smiley to a ten-year term; rather, it found that based on the jury verdicts, no minimum mandatory term

would be imposed. (R. 5426, 5454) However, the State argues that the minimum mandatory should apply. *See Dunbar v. State*, 89 So. 3d 901 (Fla. 2012) (holding that double jeopardy principles are not violated where a sentence is corrected to include a firearm minimum mandatory term).

Appellant was found "guilty, as charged" of having actual possession of a firearm during a "Robbery with Firearm" (count 2), "Aggravated Assault with a Firearm" (count 4), and "Burglary of a Dwelling with an Assault or Battery with a Firearm" (count 5). (R. 677-680; 2792) There were no specific jury findings to the contrary. Therefore, a ten-year minimum mandatory firearm enhancement would be required on count 2 (robbery with a firearm) and 5 (burglary with a firearm), and a three-year term is required on count 4 (aggravated assault with a firearm). 775.087(2)(a)1., Florida Statutes (2013); *see Tucker v Florida*, 726 So. 2d 768 (Fla. 1999) (holding that jury verdict of 'guilty of attempted first-degree murder with a firearm supported the enhanced sentence for use of a firearm); *State v. Woodall*, III, 216 So. 3d 30 (Fla. 2017).

STATEMENT REGARDING SUFFICIENCY OF THE EVIDENCE

Appellant does not challenge the sufficiency of the evidence to support the jury's verdict, finding him guilty of first-degree murder in the death of Clifford Drake. Because this Court reviews this issue on direct appeal in every capital case, this statement is offered to assist the Court in that function.

The State presented evidence through the testimony of John McDonald that he, Samantha Lee, and Smiley worked together to plan the robbery of Clifford Drake. On the night of April 15, 2013, McDonald drove Smiley and his friend to the Drake residence to commit the robbery. After hopping the fence to the Drake residence, Smiley forced the surviving victim, Mark Wilkerson, to let him into the Drake residence. While inside, Smiley went to Clifford Drake's room to search for the safe. When Drake refused to tell him where the safe was located, Smiley shot him in the hip; soon thereafter, Smiley shot him in the chest, killing him. McDonald testified that after the Drake homicide, he drove Smiley back to Tampa, and during the ride, Smiley made an admission that he killed Drake. Smiley's DNA was found on the backpack found at the Drake residence, and on the hoodie found in a neighbor's truck bed. Further, the State testimony and corroborating cellphone evidence that Smiley used Mark Wilkerson's stolen cell phone to call Samantha Lee, who then made a three-way call to McDonald to pick Smiley up

after the Drake homicide. Finally, Mark identified Smiley as the shooter who robbed him and killed Clifford Drake. The State's direct and circumstantial evidence is more than sufficient to support the verdict in this case.

STATEMENT REGARDING PROPORTIONALITY

Appellant does not challenge the proportionality of his sentences. Because this Court reviews this issue on direct appeal in every capital case, this statement is offered to assist the Court in that function.

As this Court has noted numerous times this Court's proportionality review involves "'a qualitative review . . . of the underlying basis for each aggravator and mitigator rather than a quantitative analysis.'" *Martin v. State*, 151 So. 3d 1184, 1197–98 (Fla. 2014) *quoting Offord v. State*, 959 So. 2d 187, 191 (Fla. 2007). Therefore, this Court should not simply compare the number of aggravating circumstances versus the number of mitigating circumstances. Instead, this Court must do a qualitative assessment of the aggravating and mitigating circumstances.

In fact, this Court has affirmed death sentences in cases where, "the sole aggravating circumstance was a prior violent felony conviction for second-degree murder." *See Ferrell v. State*, 680 So. 2d 390 (Fla. 1996); *Duncan v. State*, 619 So. 2d 279 (Fla. 1993). Additionally, a qualitative assessment takes into consideration not just the existence of a prior conviction, but also the nature of the prior

conviction. This Court has previously stated that an "appellant's prior convictions are particularly weighty" when they include murders of the other victims as well as other violent offenses. *See Winkles v. State*, 894 So. 2d 842, 847 (Fla. 2005). *See also Jones v. State,* 998 So. 2d 573, 586 (Fla. 2008) (reiterating that the prior violent felony aggravator is one of "the most weighty in Florida's sentencing calculus" (*quoting Sireci v. Moore,* 825 So. 2d 882, 887–88 (Fla. 2002)). Smiley committed two (home invasion) robbery- homicides. These are particularly weighty aggravators which are sufficient to establish that a death sentence is proportional.

CONCLUSION

Based on the foregoing, Appellee respectfully requests that this Honorable Court affirm the judgment and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of March 2019, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Andrea M. Norgard, Esquire, Norgard, Norgard & Chastang, Post Office Box 811, Bartow, Florida 33831, **norgardlaw@verizon.net**.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

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