Filing # 127766112 E-Filed 05/28/2021 02:03:37 PM

IN THE SUPREME COURT OF FLORIDA

MARK SIEVERS,

Appellant,

v. **CASE NO. SC20-225**
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR LEE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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RECEIVED, 05/28/2021 02:04:27 PM, Clerk, Supreme Court

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: Reference to the direct appeal trial transcripts from the direct appeal will be referred to as "T" followed by the appropriate page number, and reference to the record will be referred to as "R" followed by the designated page number.

Response to Appellant's Motion for Reconsideration of his Motion to Relinquish Jurisdiction for Reconstruction of the Record.

In the preliminary statement of Appellant's Initial Brief, he urges this Court to reconsider its December 23, 2020, order denying his motion to relinquish jurisdiction for reconstruction of the record with a copy of the "Curtis Wright proffer[1] video." There are two videos of the Curtis Wright proffer—a short video and a long video. The short video is part of the appellate record, but the long video is not. The

[1] As will be explained in more detail under Claim V, Sievers refers to the video at issue as Wright's proffer. However, Wright's proffer actually occurred on January 6, 2016. (R. 3988-4148). Sievers did not request for the video of Wright's proffer taken on January 6, 2016, to be admitted into evidence. Instead, Sievers tried to admit the video recording of Wright's formal statement taken on February 19, 2016. Therefore, references to Wright's "proffer" under this section are actually referring to the video of Wright's formal statement.

State objected to the inclusion of the long video being part of the appellate record only because it appears that defense counsel never actually entered that video into evidence as a proffered exhibit. It is the State's position that if defense counsel only provided the short video to the clerk for his proffered exhibit, then only the short video should be part of the appellate record.

It would be improper for this Court to relinquish jurisdiction so that defense counsel could enter a proffered exhibit into evidence that he did not previously enter during the trial. And while Sievers argues that his counsel did actually enter the long video into evidence for purposes of a proffer, all the circumstances and record evidence show that he did not.

Sievers filed a motion to supplement the record on May 22, 2020, with a long list of court documents, hearing dates, and exhibits. The video exhibits at issue were included within that request. Undersigned counsel did not object to the motion.

With regard to the requested exhibits, the motion stated as follows:

> 3. EXHIBITS: Defense trial exhibits consisting of video recordings are not in the record. Issues arose at trial concerning video evidence that Sievers' attorney intended

to introduce during the defense's case. The recordings were excluded by the trial court, but the transcript indicates that the recordings were marked for appellate purposes.

4. A video is referenced at T3897 and is described by the Assistant State Attorney as a disk containing a recording of an interview with Mr. Wright while under police and State Attorney interrogation.

5. At T3899, the defense attorney describes the video as exhibit 3 and 3-A (a shorter version). However, in a later discussion, the exhibit is referenced as Exhibit one with an A and B, by the judge, but then called number two by the defense attorney. T3925. But reference is made to Defense 2 as a different exhibit (the Cellebrite). T3926.

6. The record supplied does not appear to contain a Defense exhibit with a description matching that discussed at the trial. Appellate requests that the clerk of the circuit court be directed to attempt to locate the exhibit, which is described at T3897 as disk containing a recording of an interview with Mr. Wright while under police and State Attorney interrogation, and if unsuccessful, to notify that Court so that relinquishment can be ordered for the purpose of reconstructing the record.

7. A second video is not in the record on appeal. It was excluded from the Defense case, and it is described as Exhibit 4 (a thumb drive) and 4A (a disk) in the transcript T3926-27. That video was played in court during a proffer to the trial judge at T3914 and was ruled inadmissible pursuant to a State objection. T3924.

8. The Master Index to the Record supplied by the clerk, at page 17, notes: "Defense Exhibits 004 is Unable to Reporduce [sic] and 004A is Blank (not admitted)." Appellant requests that this Court direct the clerk to copy the contents of the thumb drive to a CD if feasible to reproduce the content in that manner, or in the alternative, relinquish jurisdiction for the purpose of reconstruction of the record with these exhibits.

While defense counsel referred to Exhibit 3 and 3A during the trial when discussing the Curtis Wright video, he also referred to the video as Exhibit 2 (T. 3925), and he ultimately filed a thumb drive referred to as Exhibit 4, and a disk referred to as 4-A. (T. 3926-27).

Notably, the appellate record has been supplemented with Exhibits 4 and Exhibits 4A. Exhibit 4 is the video walk-through involving Taylor Shomaker. Exhibit 4A is the short Curtis Wright video clip. There is no Exhibit 3A and Defense Exhibit 3 is not a video.

Therefore, while defense counsel referenced a long and short video, it appears that the only videos he entered were the short Curtis Wright video (Exhibit 4A) and the video involving Taylor Shomaker (Exhibits 4).

Given that the long video was never made part of the record in the first place, reconstruction of the record is not proper under these circumstances.

STATEMENT OF THE CASE AND FACTS

On June 28, 2015, Teresa Sievers was brutally murdered in her home after returning from a family vacation in New York. (T. 2846-50). She was repeatedly bludgeoned in the head with a hammer. She sustained lacerations to the top, side, and back of her head as well as multiple blunt impact injuries and skull fractures. (T. 3827-28). One laceration actually penetrated through the skull to her brain. (T. 3827-28).

Appellant, Mark Sievers (Sievers) was indicted for first-degree murder and conspiracy to commit murder on May 4, 2016. (R. 79-80). Evidence at his trial established that Sievers had hired his long-time friend, Curtis Wayne Wright, to kill his wife, Teresa Sievers. Wright entered into a plea agreement with the State to testify truthfully during Sievers's trial in exchange for a twenty-five-year prison sentence. (T. 2722).

Sievers was Wright's best man in his wedding on May 2, 2015. (T. 2744-55). Prior to Sievers traveling to Missouri for the wedding, he texted Wright to tell him that he had something personal he needed to speak with him about. (T. 2758). While in Missouri, Sievers attempted to have private conversations with Wright about his

marital problems with Teresa Sievers, but their conversations kept getting interrupted. Eventually they were able to have an uninterrupted conversation when they were riding alone in a car together. (T. 2769). Sievers disclosed that Teresa Sievers was leaving him and taking the kids with her. (T. 2769). He said that he could not let her take the kids away because they would be in danger. (T. 2769). According to Sievers, the only option was for her to die. (T. 2770). Sievers asked Wright if he would help him by killing Teresa Sievers or making sure it got done. (T. 2770). Sievers told Wright that he would be paid with $100,000 from Teresa Sievers's insurance money. (T. 2773-74). If Wright got someone else to help him, Sievers did not want the other person to know who he was, so Sievers would pay Wright directly and Wright could then subcontract the murder. (T. 2774).

Sievers instructed Wright not to talk about it on their regular cell phones because it was not "secure," so Sievers suggested they get anonymous prepaid phones. (T. 2774-75). Sievers purchased his phone within days of returning home from the wedding, and he mailed Wright a card with the phone number on it for his prepaid phone. (T. 2776).

Wright decided to enlist the help of Jimmy Rodgers because he knew he had been involved in other deaths. (T. 2777-78). Wright spoke with Rodgers in person, and he agreed to help. (T. 2777-78). Wright planned to split the $100,000 with Rodgers. (T. 2780). Wright did not tell Sievers about Rodgers, nor did he tell Rodgers about Sievers. (T. 2779).

Wright then purchased his burner phone on May 17. (T. 2778). Wright and Sievers referred to their prepaid phones as their "other" phones, so they would use the word "other" in a text on their regular phones to alert each other to check their burner phones. (T. 2778, 2781). Wright's phone had a (404) area code from Georgia, while Sievers's phone had an (848) area code from California. (T. 2856-57).

Sievers and Wright discussed different ways in which the murder would occur. (T. 2782). Sievers initially thought it should happen at the medical office because she worked late and was usually by herself. (T. 2783). Sievers had Wright pull up an aerial photo of the practice on Google Maps so they could discuss the location and where she exited. (T. 2783-84). The other option was for it to occur at the house, but Sievers wanted to make sure his daughters would not be home. (T. 2790-91).

Sievers planned a family trip with Teresa Sievers and their children to go to the east coast to visit Teresa Sievers's family at the end of June. (T. 2790-92, 2968). Teresa Sievers was returning late Sunday night by herself and Sievers and the kids planned to stay for an extra three days. (T. 2790). Sievers instructed Wright to commit the murder Sunday night when she got home or Monday or Tuesday when she left work, as long as it was done before he returned home. (T. 2792). Sievers left the side door of his house unlocked and he gave Wright the code for the garage and alarm. (T. 2792). Sievers instructed Wright to go over the privacy fence to enter the house through the side door of the garage. (T. 2798). Sievers had trimmed back all of the brush on the fence to prevent them from getting scratched and leaving blood behind. (T. 2798). Sievers told Wright that he went over the fence himself to make sure it could be done easily. (T. 2798). Sievers suggested to make it look like Teresa Sievers arrived home and interrupted a burglary in progress. (T. 2794).

Sievers gave Wright a $600 check for his travel expenses to and from Florida to commit the murder. (T. 2753-54). Wright used $100 to rent a car-a white Hyundai-and the remaining $500 for travel expenses for him and Rodgers. (T. 2755-58). Wright's bank records

were obtained, and Wright had a check dated June 9, 2015, from Teresa A. Sievers, M.D. account. (T. 3111-12).

The night before Wright and Rodgers left to drive to Florida to commit the murder, Sievers called him and recapped all of the pertinent information. (T. 2724). Sievers advised that he would be destroying his phone right after they ended their call; Sievers told Wright that he would remove the SIM card, break it, smash the phone into pieces, and then discard it in multiple locations. (T. 2824).

Wright and Rodgers left for Florida the next morning, which was a Saturday. (T. 2794). Wright left his personal cell phone in his wife's van in Missouri and he only brought his burner phone with him. (T. 2803). Rodgers did not have a burner phone, but he brought his regular phone with him. (T. 2804). They used a Garmin to travel to Florida that Wright had borrowed from his friend Jerry Lubinski. (T. 2803). The Garmin had Bluetooth, and Rodgers connected his personal phone to the Garmin. (T. 2804).

Wright and Sievers arrived in Florida early Sunday morning. (T. 2798). They went to the Sievers residence to confirm that Sievers had prepared the house in the manner he had described and for Rodgers to get familiar with the layout of the house. (T. 2805). They studied

the house and the privacy fence, and they decided not to go over the privacy fence like Sievers had instructed. (T. 2812).

After leaving the house, they took at nap in the beach parking lot, then went to Walmart and the beach. (T. 2813-16). Rodgers bought shoes, a shirt, towels, trash bags, and wet wipes, and Wright bought a pair of water shoes at Walmart. (T. 2821). A surveillance video from Walmart was obtained showing Rodgers and Wright in the store. (T. 3324-27). They also went by the medical office building to see if that location would work for the murder, and Wright and Rodgers ruled it out because they felt it was too exposed. (T. 2820).

Wright and Rodgers went to the Sievers home around 10:30 that evening. (T. 2822). The went to the side yard and put on coveralls over their clothes. (T. 2830-31). Rodgers brought two pairs of his work coveralls to Florida with him for them to use during the murder along with duct tape and industrial latex gloves. (T. 2795-96). Rodgers told Wright that if they wore the gloves and coveralls and wrapped the duct tape around their ankles and arms, it would ensure that their hair did not fall out and prevent them from leaving evidence behind. (T. 2796).

Wright thought that Teresa Sievers was arriving at the airport

at 11:25, but that is when Sievers had estimated she would be home. (T. 2822-23). So, Teresa Sievers arrived home about twenty-five minutes before Wright and Rodgers were expecting her. (T. 2832). Wright was in the garage when the garage door opened, and he hid behind a pile of boxes. (T. 2832). Wright watched as Teresa Sievers drove into the garage, parked, and unloaded her luggage. (T. 2842). Teresa Sievers brought her luggage to the front of the van and opened the door to enter the house. Wright jumped up to follow her into the house and grabbed a hammer along the way. (T. 2842-43). As Wright followed her into the house, he accidently kicked the dog water dish, which prompted Teresa Sievers to jump up and run toward him. (T. 2846). Wright hit her with a hammer in the head, hoping to knock her out, but she continued toward him. She put her hands up to defend herself as Wright struck her two more times, possibly in the arms. (T. 2847). According to Wright, Rodgers then came from Wright's right side and "started blasting her over and over again." (T. T. 2847). He hit her over and over again with the hammer. (T. 2848). Teresa Sievers was still standing, but she eventually put one hand on the countertop as Rodgers attacked her, then she fell facedown on the floor, and Rodgers continued to hit her. (T. 2849). Wright told him

to stop and that it was enough, but Rodgers would not stop. Wright eventually walked over to Rodgers, put his hand on his shoulder, and told him to stop. (T. 2849).

According to Wright, the hammers made it impossible to look like anything other than what it was. "Even a walked-in robbery wouldn't be that brutal." (T. 2850). Lee County Sheriff's Office (LCSO) Crime Scene (Technician Kimberly Van Waus collected a hammer that was left on the floor next to the victim's body. (T. 2479, 2517). Van Waus took swabs of the hammer, which came back matching the victim's blood. (T. 2517-22). According to Wright, the hammer left by Teresa Sievers's body was Wright's hammer. (T. 2850).

Wright testified that after he had dropped the hammer and started walking away, Rodgers ran back and used the claw part of the hammer to hit her and he laughed about it. (T. 2850). Rodgers used wet wipes to wipe the door handles before leaving. (T. 2851). They removed their coveralls suits and gloves and put them in a backpack and wore their clothing they had under the coveralls. (T. 2852).

Rodgers and Wright drove back to Missouri after leaving the house, only stopping at gas stations and rest stops along the way. (T.

2852). Wright threw out his coverall suit at a gas station along the way. (T. 2852).

On Monday morning, Sievers called a family friend Doctor Mark Petrites and asked him to check on Teresa Sievers because she was not at work. (T. 2987-88). Petrites went to the house and pounded on the front door, but there was no answer. (T. 2990). He then opened the garage door with the code Sievers had provided to him. (T. 2990). Once the garage door was opened, one of the dogs ran out into the driveway because the door to the house was open. (T. 2991-92). Petrites walked inside the house and within a few steps, he saw Teresa Sievers dead on the kitchen floor surrounded by a lot of blood. (T. 2991-92). Dr. Petrites noticed that Teresa Sievers had a massive head wound on the back of her head and she was cold and lifeless. (T. 2993-94). Petrites exited the house and called Sievers to ask where the girls were because he did not know whether they were in the house. (T. 2994). Petrites informed Sievers that he needed to return home at once and he told Sievers he would be calling him back. (T. 2994-95). Sievers did not ask why he needed to return home.

Petrites called 911 to report the murder. (T. 2995). At that point,

he did not know whether the perpetrator was still in the house. (T. 2995). Petrites then called Sievers back. He told Sievers that something terrible had happened and that Teresa Sievers was hurt. (T. 2997-98). He did not want to tell Sievers over the phone that Teresa had been murdered. Sievers did not ask how his wife was hurt, where she had been hurt, or what hospital she was going to. (T. 2998). Instead, Sievers asked if it was a robbery. (T. 2998).

Recorded voice messages that Sievers left Petrites were admitted into evidence during Sievers's trial. One message was left the night before the murder. (T. 3001). Sievers said he was just calling to "check on him" and he mentioned that Teresa Sievers was back in town and he would be returning with the girls on Wednesday. (T. 3004-05). Petrites thought that it was odd that Sievers had called him. (T. 3002). The second voicemail was from the next morning asking Petrites to check on Teresa Sievers because she was late for work and not answering her phone. (T. 3005).

Daniele Beradelli was a close friend of Teresa Sievers. (T. 2758). She flew to Florida the day after being notified of Teresa Sievers's death. (T. 3759). Upon arrival, Beradelli met Teresa Sievers's sisters and brothers at the Holiday Inn, where they were staying. (T. 3758).

Sievers went to the hotel to meet her that evening, and he had no tears, no red eyes, or runny nose. (T. 3760). When Sievers hugged Beradelli, he sounded like he was crying, but he was not. (T. 3760). Sievers's first words to Beradelli were not about his wife, but rather, he wanted to have a conversation with her about who would take care of the children in the event that he could not. (T. 3761). Beradelli was confused about why Sievers was so concerned he would not be around. (T. 3762). Sievers then talked about money and his concern about how he would raise the girls financially. (T. 3762). Beradelli mentioned that Sievers had told her about a very large life insurance policy when he asked her to be guardian of the girls. (T. 3762). Sievers looked relieved and said that he had totally forgotten about that. (T. T. 3763).

Sievers asked her three more times during the next week whether she could take care of the girls if he was not able to. (T. 3763). Sievers also expressed concern about the police questioning him and whether people thought he was a suspect. (T. 3764). Sievers was concerned that he could be arrested any time, even in the middle of the night. (T. 3764). He wanted to talk with Beradelli every day so she would know if something happened to him, that way she could

make immediate arrangements to get to Florida. (T. 3764).

Thomas Coyne, the Deputy Chief Medical Examiner for the District 21 Medical Examiner's Office in Fort Myers testified that he performed Teresa Sievers's autopsy, and the cause of death was blunt head trauma. (T. 3814, 3839-40).

Teresa Sievers had blunt impact trauma to multiple areas of her head and face. (T. 3822-23). She sustained two lacerations to the right side of the nose, consistent with blunt impact from a small object, that almost formed a circle. (T. 3824). She had three lacerations to the forehead and three additional lacerations on the sides of the head that had a semicircular shape indicating a small object with a round striking surface had been used. (T. 3824). The skull was fractured under the lacerations. (T. 3824). Another laceration by her ear showed visible brain matter where the brain had been fragmented. (T. 3827). There was a large, open laceration to the back of the head that was made using a greater impact. Dr. Coyne opined that the head was probably fixed, so she was likely slumped to the ground when that injury was sustained. She sustained a minimum of seventeen impacts to the head. (T. 3828). She had small hemorrhages throughout the brain and severe brain trauma and

brain injury from the force of the impacts. (T. 3830).

Teresa Sievers also had bruises to her forearms and wrists that were indicative of defensive wounds. (T. 3835). The size of the bruises were consistent with the diameter of the head of a claw hammer. (T. 3839-41).

Eventually through the investigation, Wright's name was brought to the attention of law enforcement from a person in Illinois. (T. 3043). Detectives Downs and Lebid from Lee County Sheriff's Office (LCSO) travelled to Illinois to follow up on the lead. (T. 3042-45). Based on information they received, they secured a search warrant for Wright's residence in Missouri. (T. 3042-46). The search warrant was executed July 12, 2015. (T. 3046). As a result of the search, Wright's cell phone was seized from his residence and a Garmin GPS unit that was inside a vehicle. (T. 3050-53).

Law enforcement later learned of Jimmy Ray Rodgers through Wright's cell phone records. (T. 3057). Lieutenant Michael Downs went to Rodgers's home in Missouri to speak with him. (T. 3057). At the time, Rodgers was not a suspect.

Subsequent review of the GPS unit retrieved from Wright revealed that it had been synched with a device and email address

later determined to be jimmyrayrodgers90@gmail.com. (T. 3065-66). It became apparent then that Rodgers was involved, and law enforcement went back to Missouri to obtain a search warrant of Rodgers's residence. (T. 3066).

During the execution of the search warrant, LSCO Detective Downs spoke with Rodgers's girlfriend, Taylor Shomaker. (T. 3069-70). Shomaker revealed that there was potential evidence of the crime in existence and she spoke with Downs about where he could locate the evidence. (T. 3071). Shomaker pointed out a plaque hanging in the kitchen, a Budweiser t-shirt, a white cooler, and a black backpack. (T. 3072). She also took him to another location about a half hour away from the residence on a rural road off the highway, where she located a blue jumpsuit. (T. 3072, 3081-82). Detective Downs recovered the jumpsuit, and it was entered into evidence during Sievers's trial. (T. 3086-87).

Shomaker provided a recorded statement to law enforcement. (T. 3089). During her statement, she relayed that she had information about possible cell phone parts located at Doe Run facility, which was where Rodgers worked. (T. 3090). Detective Downs followed up and found the cell phone parts on the side of the road

about a mile away from the Doe Run facility. (T. 3091-92).

Detective Downs also went to the Doe Run facility and obtained two standard suits and a pair of latex gloves from the facility to serve as examples of the type of suit and gloves they used there. (T. 3096). The suits and gloves were entered into evidence during Sievers's trial. (T. 3096).

Jeffrey Conway, from Doe Run Company testified during Sievers's trial that he had employed Rodgers. (T. 3049). He explained the facility provides acid resistant and fire resistant coveralls to employees and there was no daily allotment for how many suits employees got to use. (T. 3051-52). They changed out of the suits whenever they got contaminated or the employees felt dirty. (T. 3052). Most people at the plant wore gloves over the sleeves of the coveralls and taped the gloves to the sleeves. (T. 3058).

Rodgers informed Conway that he was going to Florida the weekend of June 28 to visit his brother who had recently graduated from law school; however, Conway never knew that Rodgers had a brother. (T. 3258-59). Conway tried to contact Rodgers Sunday evening about working, but it went right to voicemail. (T. 3258). Conway sent a text instead, and Rodgers responded by text saying

that he could not work on Monday because he was in Florida. (T. 3259).

Taylor Shomaker testified that she met Sievers when she and Rodgers went to Wright's wedding in 2015. (T. 3691). She saw Wright and Sievers having a private conversation in Wright's bedroom the night before the wedding. (T. 3692). Shomaker confirmed that Rodgers went to Florida in late June of 2015. (T. 3694). When he returned, he was wearing a Budweiser shirt that she did not recall him owning before his trip, and he also returned with a cooler and backpack. (T. 3694-95). She later looked inside the cooler and found gloves, a hammer, and black shoes. (T. 3697). She saw a jumpsuit inside the backpack. (T. 3697). Rodgers brought back a gift for her from Florida that she hung in the kitchen. (T. 3698).

After detectives went to the house to speak with Rodgers, Rodgers threw the shoes from the cooler in a dumpster. (T. 3702). Rodgers and Shomaker then went to Rodgers's work at Doe Run. (T. 3702). Rodgers got his phone out of a locker, put it in a drinking fountain, and then stomped and smashed it into pieces. (T. 3702). As they drove back towards their home, Rodgers instructed Shomaker to throw pieces of his phone out the window. (T. 3703). They returned

home and during another car ride that day, Rodgers had her throw a pair of coveralls out the window. (T. 3703-04). She remembered throwing them out on Highway 47. (T. 3704). Rodgers had told her to throw the coveralls over the bridge and into the water, but her response was delayed, and she threw them after they passed the bridge. (T. 3707).

The evening after the items were thrown away, Shomaker confronted Rodgers about committing murder. (T. 3710-11). She asked Rodgers if he killed the victim with a gun. (T. 3711). He said, "no" they killed her with a hammer. (T. 3711). Rodgers told her he expected to make $10,000 from the murder. (T. 3714). Rodgers called himself "Jimmy the Hammer." (T. 3714).

Shomaker confirmed that she had told Detective Downs about the items she had thrown away for Rodgers when Downs returned to the residence to execute the search warrant. (T. 3705). She further admitted that she assisted law enforcement with locating the coveralls. (T. 3706-07).

Data from Rodgers's phone showed that it pinged on June 28 at 6:02 a.m. from Jarvis Road, which was the morning of the murder. (T. 3547, 3552). The records also documented Rodger's phone

traveling to Florida and back. (T. 3547). Suzanne Buchhofer, LCSO analyst, also analyzed Rodgers's phone and testified about the path of his phone from Missouri to Florida, ending in Lee County. (T. 3583-91). She testified as to various areas Rodgers's phone was on June 29, 2015. (T. 3591-3607).

A forensic search of the Garmin was conducted, which showed plots in Lee County as well as gas stations in Brooksville and Bushnell. (T. 3471-73). The Garmin also showed that it was in the vicinity of the Walmart near Sievers's house. (T. 3475-76). Surveillance videos from a Circle K and RaceTrac in Florida were admitted into evidence from the early morning hours of June 29, 2015. (T. 3442-44, 3451). The rental vehicle—the white Hyundai Elantra—that Wright and Rodgers had used to travel to and from Florida was recovered by law enforcement. (T. 3060-61).

Fibers from the coveralls found off the road in Missouri were tested by forensic examiner Linda Otterstatter from the FBI trace evidence unit. (T. 3635-36). She determined that the fibers from the coveralls were recovered from debris and vacuum sweepings from the Hyundai Elantra as well as from tape lifts from the front of Teresa Sievers's dress and her left leg. (T. 3639-40). The fibers were

consistent with having originated from the coveralls. (T. 3640). Kitchen floor vacuum sweepings from the crime scene also had fibers from the retrieved coveralls. (T. 3643-44). A hair recovered from the coveralls on the side of the road was within the same reference range in common with Rodgers's buccal swab. (T. 3673-76).

Wright and Rodgers were eventually arrested, and Sievers's family and friends were surprised by Sievers's attitude in response to the arrests. Dr. Petrites called Sievers after Wright's arrest to ask him about it. (T. 3009). Sievers said that Wright "didn't do it." (T. 3009). Petrites was surprised that Sievers was not mad that his friend was arrested for killing his wife. (T. 3009). Sievers also disclosed that Wright no longer had computer access while he was incarcerated, and Sievers wanted the jail to give him access so he could get into the computer system at the medical practice. (T. 3010). Petrites found that to be very bizarre. (T. 3010).

According to Beradelli, Sievers did not seem upset or angry that his friend Wright had been arrested for Teresa Sievers murder. (T. 3765). Sievers was more concerned about what Wright might be telling the police and whether Wright would implicate Sievers out of fear of being in that situation. (T. 3766). Beradelli later learned that

Rodgers had been arrested, and she had seen a photo of Sievers talking with Rodgers at Wright's wedding. (T. 3767). Sievers told Beradelli that he did not know Rodgers, he was not acquainted with him, and he had never met him. (T. 3767). When Beradelli asked Sievers what motive Wright would have to murder Teresa Sievers, Sievers said that he had no idea. (T. 3768). Sievers did not believe that Wright had committed the murder. (T. 2768). Sievers was upset with the police for not finding the real murderers. (T. 3768). In Beradelli's opinion, Sievers was more upset with the police than with Wright or Rodgers. (T. 3769).

Doctor Bethany Ann Mitchell, a close friend of Teresa Sievers and a family friend of the Sievers family, testified that Sievers called her when Wright was arrested, and Sievers was panicked that he would be arrested next. (T. 3747). Mitchell asked how Sievers's friend from Missouri could be involved, and Sievers was convinced that Wright had nothing to do with it. (T. 3748). Sievers was not upset or even remotely curious that Wright could be involved. (T. 3748). Each time she spoke with Sievers, he was persistent that Wright was innocent, and that seemed strange to her. (T. 3748-49).

When Mitchell learned that Rodgers had been arrested, she

asked Sievers about him. (T. 3750). Sievers said that he had no idea who he was and that he had never heard of Rodgers. (T. 3751). Mitchell saw a picture of Sievers and Rodgers with their arms around each other at Wright's wedding, so Mitchell was concerned because she knew Sievers was not being honest. (T. 3750-51).

Detective Jamie Nolen of the Lee County Sheriff's Office met with Sievers on July 21, and Sievers signed a consent form for a forensic examination of his cell phone to be conducted. (T. 2439). Sievers's phone was taken to the digital forensic unit to download the contents. (T. 2446).

Sievers advised that he and Teresa Sievers had life insurance policies on each other. (T. 2444). As a result of the conversation, Detective Nolen subpoenaed five insurance companies. (T. 2444-45). When crime scene technician Van Waus had responded to the scene of the murder, she removed a life insurance policy from the document shredder in the house. (T. 2510).

Kevin Stout from the LCSO Digital Forensics Unit testified that he conducted forensic examinations of numerous digital devices in this case, including Sievers's phone. (T. 2607-10). On April 29, 2015, Sievers sent a test message to Wright saying, "Hopefully we can talk

privately tomorrow. Nothing about you or Angie, but it's personal." (T. 2629). That message had been deleted from Sievers's phone, but Stout was able to recover it. (T. 2629). On May 3, 2015, Sievers texted Wright, "Do not want to really use 'secure texts' as I believe nothing is really secure once it's out there." (T. 2630).

On May 5, 2015, Sievers texted Wright, "Is your mail secure at home? Because you could mail me your info." (T. 2630-31). Another text said, "did you get our card? Just want to make sure gift didn't fall out." (T. 2631). Later that day, Sievers texted, "Just got it. Mail tomorrow." (T. 2631).

On May 7, 2015, Sievers texted Wright, "Mailing out today!!!! Call me. It's very simple." (T. 2631-32). He later wrote, "Since neither one of us are likely to carry both with us, whenever you want to use the other one just text me "other" and then when I can, I will call." (T. 2632).

On May 9, Sievers asked Wright, "Did you get mail?" (T. 2632). Later that evening, Sievers wrote "Call late if you want. Text, because you never know." (T. 2633). On May 17, Sievers texted, "Check other." (T. 2633).

LCSO Digital Forensic Specialist Jennifer Kircikyan examined

Wright's cell phone. (T. 2684-89). On May 17, Wright received a message from Sievers stating, "K, other, whenever you want now." (T. 2698-99). On May 22, Sievers texted Wright, "Do you think we can talk a little tonight? Just need three minutes, setting static IP, T home, "other," then changing. (T. 2699). Wright responded to Sievers, "Call me in five minutes." (T. 2700). There were also two calls and a message from Sievers between June 27 and June 28. (T. 2701).

A review of Sievers's and Wright's phone records led law enforcement to believe that they were using other devices to communicate with each other. (T. 3061-62, 3762). The communication on May 17, 2015, raised a red flag to them that prompted them to acquire cell tower records for that day. (T. 3062). They also obtained cell phone tower records for June 28 and 29 for the towers closest to the crime scene. (T. 3062). Law enforcement hoped that the tower records would help them identify a number for the other device that Sievers and Wright used to communicate with each other. (T. 3063). They acquired more data than anticipated, as the records from the Florida towers yielded over 100,000 phone numbers during the relevant time period. (T. 3064).

Detective Downs had analyst Myra Simmons look into phone

records and tower dumps for a phone number with a Georgia area code and another with a California area code, based on the information provided by Wright about the burner phones he and Sievers had used. (T. 3102). Simmons located the phone numbers and they subsequently requested cell phone records. (T. 3103-04). Cell phone records were admitted into evidence. (T. 3105-06).

Myra Simmons testified that Lieutenant Downs had asked her if she could find burner phones used in the homicide that had Georgia and California area codes. (T. 3524-25). She put a tower dump from into the CellHawk software program to analyze all the phones that pinged off the closest tower to Sievers's address on Jarvis road. (T. 3525-26). She searched for Georgia area codes and the (404) number came up. (T. 3526).

She then searched the tower dump for Chapel Hill, which was the closest tower to Wright's residence, and the same phone number that had pinged off the Jarvis tower also pinged off the Chapel Hill tower. (T. 3526-27). Cell phone records from the (404) number were obtained through a search warrant, and most of the calls were made to an (858) number. (T. 3558). She then obtained records from the (858) number and learned that it was a TracFone purchased from

Walmart on Juliet Road in Naples on May 7. (T. 3528). Simmons put Sievers's personal cell phone records into the CellHawk program and ran those records along with the TracFone records, and she determined that both phones pinged off the same tower around the same time on May 7 when the TracFone was activated. (T. 3528-36). On May 7, Sievers sent Wright a message saying, "since neither one of us are likely to carry both with us, whenever you want to use the other one, just text me "other" and then when I can, I will call. (T. 3538).

Simmons created a map of Wright's pings from his personal cell phone and his burner phone. (T. 3540). Wright's cell phone and burner phone pinged off the same tower (two miles away from Wright's residence) at almost the same time. (T. 3541). Wright's burner phone had also pinged within two miles of the closest tower to Sievers's house at the time of the homicide. (T. 3542). She checked the International Mobility Equipment Identifier (IMEI) from the phone that pinged in Missouri and the phone that pinged in Bonita Springs to confirm that the pings were from the same phone. (T. 3542). She explained that the IMEI number is like a VIN number on a car, it stays with the phone. (T. 3542). She determined that the same phone

that had been in Missouri on May 17 was in Southwest Florida on June 28-29. (T. 3543).

Realizing that the burner phones communicated on May 17, she looked through Sievers's personal cell phone messages, and she found a message from Wright's personal cell that said, "Hello, brother from an "other mother." (T. 3543). That occurred on May 17 at 8:11 p.m. (T. 3543-44). Simmons suspected that they were communicating through their burner phones, so she used CellHawk and searched the times and dates on both phones and learned that the (404) burner phone pinged at 8:16 on May 17 in Missouri. The (858) burner phone pinged at 8:16 on May 17 in Bonita Springs. (T. 3544). She created a chart to document how often the (404) and (858) phones communicated. (T. 3544).

She also made a map of the pings from Sievers's personal and burner phones. (T. 3545). The burner phone never left Southwest Florida. (T. 3545-46). The last communication between the (858) and (404) numbers occurred on June 26. (T. 3546).

After hearing all the evidence at trial, the jury found Sievers guilty of first-degree murder and conspiracy to commit murder. A penalty phase was subsequently held, and the jury rendered a

unanimous verdict for the sentence of death. (R. 762). The jury found that the State had established the cold, calculated, and premeditated aggravating factor, but the jury did not find that the murder had been committed for pecuniary gain. (R. 761). The jury also did not find the existence of any mitigating factors. (R. 762).

The court subsequently held a hearing pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), in which it heard legal argument from the parties, received additional evidence, heard Sievers's objection to the PSI, and listened to a statement made by Sievers. (R. 991-1030). The court sentenced Sievers that same day. (R. 1025-30).

In so doing, the court gave great weight to the jury's verdict for death. (R. 1030). The court agreed with the jury that the State had proved the cold, calculated, and premeditated (CCP) aggravating factir, but the court did not find that the State had met its burden in establishing the pecuniary gain aggravating factor. (R. 1026). The court further found the existence of mitigation in this case. (T. 1026).

The court found that Sievers has no criminal record. (R. 1026). Under the "catchall provision," the judge considered that Sievers had been a good father and family member and made charitable contributions throughout his life in the community, and he had no

disciplinary record in the Lee County jail. (R. 1027). The court gave little weight to the mitigating factors. (R. 1028). The court further determined that the evidence did not show that Sievers was a minor participant. (R. 1027-28). The court found that the aggravating factor outweighed the mitigation. (R. 1028).

The court ultimately adjudicated Sievers guilty and sentenced him to death. (R. 1029). Sievers was sentenced consecutively to thirty years in prison for the conspiracy count. (R. 1029).

This appeal follows.

SUMMARY OF THE ARGUMENT

CLAIM I: In his first issue, Sievers challenges the trial court's rulings sustaining the State's objections to defense counsel's references to Wright's polygraph test during closing argument. The legal arguments Sievers presents on appeal were never presented to the court below, and therefore, have not been preserved. Nevertheless, the trial court did not commit fundamental error in sustaining the objection, when the trial court merely had defense counsel rephrase his argument, and counsel was ultimately permitted to argue that the State never gave Wright a polygraph test.

Additionally, the trial court did not err in advising the jury that the results of Wright's lie detector test would not have been admissible after defense counsel had asked the jury panel whether they trusted Wright, and whether they would have felt differently if a polygraph had been administered. The court was acting within its authority to clear up an uncertainty created by defense counsel's argument about Wright's lie detector test. The court did not comment on its view of the case, nor did the court give an opinion on the weight, character, or credibility of the evidence.

CLAIM II: The prosecutor's rebuttal closing argument referencing Wright's polygraph did not constitute improper vouching. Rather, the challenged statements merely amount to a reiteration of the plea agreement that was entered into evidence by defense counsel and referenced by him throughout the trial. The comment that Wright could be subject to a polygraph up to the day he is sentenced is simply a proper explanation of the plea agreement as well as a fair rebuttal to defense counsel's argument that the State chose not to administer the polygraph examination.

CLAIM III: The trial court did not abuse its discretion by overruling defense counsel's objection to the prosecutor's question to Detective Lebid regarding whether he needed a lie detector to tell that Wright was lying. The prosecutor's question to Detective Lebid was properly posed in response to the questions already asked by defense counsel. Defense counsel first asked Detective Lebid about various times that Wright was lying, and defense counsel further asked Detective Lebid whether a lie detector was administered. On re-direct examination, the prosecutor was properly permitted to follow-up with questions

about Detective Lebid being able to tell that Wright was lying and that he did not need a lie detector test to do so.

CLAIM IV: The trial court did not abuse its discretion in overruling an objection to Wright's brief comment that he had prayed. Wright's singular reference to prayer was not intended to enhance Wright's credibility. Wright did not express his religious beliefs or opinions. Nor did he state that he was influenced by prayer or that any sort of divine intervention led him to telling the truth. Instead, he stated that he initially lied, he understood the gravity of telling a lie, but he did so because he was struggling with his own involvement in the murder. So he decided to take a break, talk to his attorneys, and pray. Once the trial court overruled the objection, Wright made no further comment to prayer. Sievers has failed to show error.

CLAIM V: The trial court did not abuse its discretion in precluding admission of Wright's recorded formal statement when the State never opened the door to admission of such evidence and the defense never laid a foundation to having it admitted to show Wright's potential bias.

CLAIM VI: Sievers has failed to show that the trial court abused its discretion in precluding defense questioning of Wright about a sexual relationship between Wright and Sievers. Defense counsel never proffered Wright's testimony on this subject, so there is no record before this Court as to what Wright would have said. Furthermore, Sievers has failed to point to any evidence within the record to show that defense counsel had a good-faith basis to ask such a question. Nevertheless, any alleged error must be considered harmless given that the existence of a sexual relationship would not have negated any evidence showing that Sievers intended and planned for his wife's murder, and he hired Wright to commit the murder for him.

CLAIM VII: The trial court did not abuse its discretion in admitting relevant testimony from Sievers's neighbor Kimberly Torres about seeing Sievers in her backyard and overhearing an argument between Sievers and the victim.

CLAIM VIII: The trial court properly admitted the eleven autopsy photographs in this case when they were used to aid the medical examiner's testimony and to explain the victim's injuries.

CLAIM IX: Given that Sievers's individual claims of error are without merit, his cumulative error claim fails.

CLAIM X: The trial court correctly denied the motion for judgment of acquittal based on the alleged unreliability of Wright's testimony, as the issue of whether Wright was a credible witness was an issue for the jury to decide.

CLAIM XI: The State presented competent, substantial evidence of Sievers's conspiracy to commit murder. There was clearly an agreement between Sievers and Wright to accomplish the victim's murder, and Rodgers became part of the agreement. Sievers authorized Wright to enlist the help of another person, and Rodgers willingly agreed to become involved. Just because Sievers chose to communicate only with Wright and not with Rodgers, does not mean that Sievers somehow was not involved in the conspiracy. Sievers intended for his wife to be murdered, and Rodgers and Wright executed that plan for Sievers. The trial court properly denied the motion for judgment of acquittal on the conspiracy count.

CLAIM XII: Sievers was arraigned on May 9, 2016, and the applicable statute required that the State's notice be filed "within 45 days after arraignment[.]" § 782.04 (1)(b), Fla. Stat. Therefore, the State's notice was timely filed on the forty-fourth day--June 22, 2016. The trial court properly exercised its discretion in allowing the prosecutor to amend the notice with the inclusion of the aggravating factors just five days later when Sievers was not prejudiced in any way by the amended notice.

Additionally, given that the State provided Sievers with notice of its intent to seek the death penalty as well as notice of the aggravating factors that the State intended to prove, the State was in substantial compliance with the statute. From the time that the State provided notice of the aggravating factors, Sievers had three years, five months, and thirteen days to prepare his defense before the penalty phase started. Sievers was clearly given an opportunity to prepare his defense and to rebut the aggravating factors. Sievers is not entitled to appellate relief.

CLAIM XIII: Sievers has failed to show that fundamental error occurred from the prosecutor's isolated misstatement about which

box should be checked if mitigation is found. The singular statement was followed by accurate statements and correct jury instructions about mitigating circumstances and how the boxes should be checked, and the prosecutor never told the jury to disregard or reject the "no prior criminal history" mitigating circumstance.

CLAIM XIV: The trial court acted within its discretion by redacting a small portion of the postcard from Sievers's daughter that Sievers used during the penalty phase. The defense's stated reason for seeking admission of the postcard was to show the loving and caring relationship between Sievers and his daughter, and the redacted document that the lower court admitted showed that.

CLAIM XV: Victim impact evidence in the form of a video from the victim was properly admitted when the brief video showed the victim's uniqueness as a doctor and her approach to healing as well as the impact that she had within the community. The video was permissible victim impact evidence that allowed the jury to consider the victim's uniqueness as an individual human being and the resultant loss to the community's members by her death.

CLAIM XVI: While Sievers claims that the court erred in failing to hold a hearing pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), the record confirms that the court did indeed hold a *Spencer* hearing, and the court merely merged the *Spencer* hearing with the sentencing hearing. Sievers has failed to show any fundamental error by the trial court imposing the sentence on the same day as the *Spencer* hearing, when the judge took time to consider all of the evidence and relevant circumstances before imposing Sievers's sentence.

CLAIM XVII: Competent, substantial evidence supports the cold, calculated, and premeditated (CCP) aggravating factor in this case. The murder was the product of Sievers's cool, cold, and calm reflection rather than panic, emotional frenzy, or rage. Sievers long contemplated and planned for his wife's murder. The evidence of phone records as well as Wright's testimony established that Sievers and Wright purchased burner phones and communicated on them for weeks about the timing and place in which the murder would occur. Sievers planned for the murder to occur while he and the girls

were out of town, which offered him an alibi and ensured that the girls would not be around during the murder.

Sievers provided his garage and alarm codes to Wright and left his side door unlocked for Wright's entry into the home. Sievers told Wright when the victim would be arriving home from the airport, and he recapped all of the pertinent information with Wright before he left for his trip. Sievers also provided Wright with money for his travel expenses to and from Florida in order to commit the murder, and he promised to pay Wright with the proceeds from the victim's life insurance money. Competent, substantial evidence presented in this case clearly supports the finding that the murder was cold, calculated, and premeditated. The amount of time that Sievers spent planning and pre-arranging for the victim's murder is certainly indicative of CCP.

CLAIM XVIII: In light of this Court's decision in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), this Court does not review the comparative proportionality of Sievers's death sentence.

ARGUMENT

CLAIM I

Closing Argument and Jury Instruction

In his first issue, Sievers challenges the trial court's ruling sustaining the State's objection to defense counsel's reference to Curtis Wayne Wright's polygraph test made during closing argument. Sievers further challenges the trial court's statement to the jury that "If Mr. Wright had actually taken a polygraph, those results, if they were – if he passed, would not have been admissible during this trial."

Appellant's legal arguments on appeal have not been preserved for appellate review. "[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). Thus, the specific contention asserted must be the exact same contention raised on appeal. *Farina v. State*, 937 So. 2d 612, 628 (Fla. 2006).

A reviewing court will generally not consider points raised for the first time on appeal. *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978) (citing *Dormineyv. State*, 314 So. 2d 134 (Fla. 1975)). "To meet the objectives of any contemporaneous objection rule, an objection

must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978).

In this case, Sievers failed to lodge the arguments and objections he has now raised on appeal. First with regard to the State's objection to defense counsel's argument about the polygraph test, Sievers argues on appeal that the objection "was sustained in error because the prosecutor misrepresented defense counsel's argument." Initial brief at 49. The exchange at issue occurred in the following context during the defense closing argument:

> And I want to talk to you about something we talked about in jury selection. And one of the things we talked about is, is a conviction. Just conviction, if it happens. But it's a mistake, and we just – we just don't have the scientific tools. They're just not around yet.
>
> In this case, we do. It's called a polygraph. And Mr. Wright never took one.
>
> MS. ROSS: Objection, Your Honor. Improper argument.
>
> THE COURT: Overruled for now.
>
> MR. MUMMERT: You saw – or you can see in the agreement, Mr. Wright must subject himself to a polygraph upon request, and failure, failure to pass a polygraph removes the deal, removes his 25 years, removes the second degree murder. Basically, if he doesn't pass that polygraph, he sits were Mark Sievers sits.

So why not do it?

Well, if you're like me, probably had some Thanksgiving dinner last week.

MS. ROSS: Your Honor, I'm going to object to improper argument.

THE COURT: Sustained.

MR. MUMMERT: So I'll rephrase. When you have Thanksgiving dinner and you've eaten all the turkey and the stuffing and the mas –

MS. ROSS: Your Honor, I'm going to object. This is an improper argument.

THE COURT: Both sides approach.

MS. ROSS: Counsel started this with, why didn't he choose to have a polygraph? That plea agreement in evidence does not make it his choice. It is a requirement if he is asked to do it.

This argument has been improper from the first moment it started, and it is continuing to be improper.

It is not Mr. Wright's choice, and it's not that he declined a choice.

Mr. MUMMERT: Judge, I'm allowed to comment on the investigation. I'm allowed to comment on the prosecution.

This is—this goes directly to reasonable doubt. They said in that argument that it's in evidence, that it's in evidence that he must submit to a polygraph upon request. And the inference of never requesting a polygraph is reasonable doubt, Judge. They don't believe he's going to pass it.

MS. ROSS: No, but, Your Honor, counsel said that Mr. Wright chose not to have it. That is not—

THE COURT: You'll need to rephrase it and say –

MR. MUMMERT: I'll rephrase it.

THE COURT: -- that law enforcement didn't ask him. The objection is sustained as – as it was stated.

MR. MUMMERT: I'll rephrase.

(T. 4174-4177) (emphasis added).

Sievers argues on appeal that his trial counsel's statement concerned the prosecutor's decision to not have the polygraph administered to Wright, rather than Wright's decision not to take the polygraph. However, when the prosecutor objected and argued during the sidebar that it was incorrect for the defense to say that Wright chose not to have the polygraph, defense counsel never corrected the prosecutor. Counsel could have easily argued that he was actually referring to the prosecution choosing not to give Wright the polygraph. Instead, the judge advised defense counsel to rephrase the question, and he agreed to do so, saying, "I'll rephrase it." (T. 4177). Given that defense counsel quickly conceded to rephrase his statement rather than correct an alleged misstatement by the

prosecutor, the trial court was never put on notice of the argument Sievers now raises for the first time on appeal. Accordingly, this issue has not been preserved.

Nevertheless, any alleged error in sustaining the objection does not rise to the level of fundamental error, or even harmless error for that matter, when defense counsel was ultimately permitted to argue to the jury that law enforcement never utilized the polygraph test. (T. 4178). After the objection, trial counsel continued his argument about Wright not getting a polygraph test and his story not being believable. (T. 4178-88). Counsel's argument implied that the State chose not to give Wright the polygraph test out of concern that he would not pass it. (T. 4178-88). Given that the defense counsel was not ultimately hindered in his ability to argue about the State's failure to have Wright submit to a polygraph test, Sievers has failed to show any error, let alone fundamental error.

Next, the prosecutor objected after the following statement from defense counsel's closing argument: "When you weigh the evidence and you look at all these facts, ultimately, the one question you all have to ask yourselves: Do you trust Curtis Wayne Wright? And would you feel different if a polygraph had been administered?"

Sievers argues that the prosecutor's objection to this statement "was frivolous." Initial Brief at 55. Sievers further argues that the judge's comment in response to that argument was improper because it undermined the defense's credibility, and it was legally incorrect. Appellant's challenge to the judge's comment was not properly preserved because the arguments he now makes on appeal were never presented to the court below. The objection and discussion on the instruction arose in the following context:

> When you weigh the evidence and you look at all these facts, ultimately, the one question you all have to ask yourselves: Do you trust Curtis Wayne Wright? And would you feel different if a polygraph had been administered?
>
> Mark Sievers is innocent, and, accordingly, you should return a verdict of not guilty for one count of first degree murder and not guilty for one count of conspiracy to commit murder.
>
> Thank you.

(T. 4187-88). The jury then exited the courtroom for a recess, and the prosecutor argued as follows:

> MS. ROSS: Your Honor, counsel spent quite a bit of time speaking about a polygraph. If Mr. Wright took a polygraph and passed it, it would be absolutely inadmissible, and the State could not present it to this jury.
>
> That's the argument about the polygraph was absolutely improper as it was phrased and presented, and I ask the

Court to instruct the jury that had Mr. Wright been given a polygraph and had he passed that polygraph, the State would not be permitted to introduce that evidence in trial. It is inadmissible and it –

MR. MUMMERT: Your Honor, had he been offered a polygraph and passed the polygraph, I couldn't have made the argument.

And so we're dealing with two levels of speculativeness; one, if he was given a polygraph, and two, that he passed the polygraph.

I simply spoke about the facts, and the facts were he was never administered a polygraph. That is a fact.

THE COURT: Anything else?

MS. ROSS: They argued would they trust him if they'd known he passed a polygraph. Their argument went well beyond where it could be.

THE COURT: Anything else?

MS. ROSS: No, Your Honor.

THE COURT: Defense, anything else?

MR. MUMMERT: No.
[…]

THE COURT: Look. It's fair game to argue it from the defense, but I think it's fair to say it's not admissible if he had taken one, and they could give it whatever weight they think is appropriate.

Would you like me to say that, or would you like to say it in your argument?

MS. ROSS: Pardon me for pausing, Your Honor. So you would say –

THE COURT: It's the status of the law, it's not admissible if he had taken it, the results, so do you want to say it or me?

MS. ROSS: I'd like to you to say the status of the law, Your Honor.

THE COURT: Okay. Acceptable?

MR. MUMMERT: I'd prefer the State just to make it as argument. Again, Judge, this was something that I said in argument based upon facts that came out in evidence, just part of our argument.

I made no statement as to the status of the law. I made no—nothing about admissibility or inadmissibility.

They can look at the agreement and determine the instances in which it would be admissible, and that would be in a trial against Mr. Wright.

THE COURT: It's only in very limited circumstances, that's correct.

Okay. I'll make a brief statement on it. And your objection is noted for the record.

(T. 4189-4194).

When the jury returned after recess, the judge ensured the jurors had followed his instructions regarding not discussing the case, and then he stated the following: "If Mr. Wright had actually

taken a polygraph, those results, if they were - - if he passed, would not have been admissible during this trial." (T. 4195).

Notably, defense counsel never actually objected to the instruction. Instead, he merely stated his preference that the prosecutor make the argument. There was no assertion that any instruction from the judge would inhibit the defense. Nor was there any argument that the judge's proposed instruction was legally incorrect. Therefore, the arguments Sievers now presents on appeal are unpreserved.

"[A] claim of error that is not preserved by an objection during trial is procedurally barred on appeal unless it constitutes fundamental error." *Cox v. State*, 966 So. 2d 337, 347 (Fla. 2007).

> Instructions ... are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred. To justify not imposing the contemporaneous objection rule, the error must reach 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. In other words, fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict.

Cardenas v. State, 867 So. 2d 384, 390–91 (Fla. 2004) (quoting *Reed v. State*, 837 So. 2d 366, 370 (Fla.2002)). "While a judge may take

some initiative to clear up uncertainties in the issues in a case, it is error for the judge to make any remark in front of the jury that might be interpreted as conveying the judge's view of the case or an opinion on the weight, character, or credibility of the evidence." *Jacques v. State*, 883 So. 2d 902, 905 (Fla. 4th DCA 2004). Remarks made by a judge in a jury trial which constitute forbidden comment, to which no objection is made, do not require a reversal unless they constitute fundamental error. § 90.106, Fla. Stat. Ann. (citing *Worthington v. State*, 183 So. 2d 728 (Fla.3rd DCA1966)).

Sievers has failed to meet his burden of establishing fundamental error. Sievers's argument focuses on the judge's comment being in response to the fact that no polygraph test had been given to Wright, but this is incorrect. The judge permitted defense counsel to argue that the State did not give Wright the polygraph exam, and the judge made no comment regarding the State's decision not to administer the test. Rather, the judge's comment was made in response to defense counsel's question to the jury of whether they would be more likely to trust Wright's testimony if he had been given a polygraph test. This statement made at the end of the defense closing argument left the implication that a lie

detector test should have been given to show the jury that Wright's testimony was truthful.

The judge in this case was acting within his authority by clearing up the uncertainty created by defense counsel's argument about Wright's lie detector test. The judge merely advised the jury that the results would not have been admissible. This was not any comment on the judge's view of the case or his opinion on the weight, character, or credibility of the evidence, especially given that the subject of the lie detector test would not have been admissible evidence in this case. "The judge had a duty to keep the jury from hearing this inadmissible evidence, and his actions were directed at carrying out that duty. Carrying out that judicial duty inherently favors neither party." *Lee v. State*, 264 So. 3d 225, 228 (Fla. 1st DCA 2018).

All of the cases Sievers relies upon involve much different factual scenarios than this case. *See Jacques v. State*, 883 So. 2d 902, 905-06 (Fla. 4th DCA 2004) (finding fundamental error based on the trial court's improper commenting on the credibility of a witness where the judge interrupted closing argument and stated, "That's not what she said and that's not what the record shows.");

Brown v. State, 678 So. 2d 281 (Fla. 1951) (finding reversible error where the judge interrupted closing argument and told defense counsel it was improper to call anyone a liar and then instructed the jury, "There is no evidence that anybody is a liar."); *Thomas v. State*, 838 So. 2d 1192, 1195 (Fla. 2d DCA 2003) ("By its comment for defense counsel to stay within the nature of the conversation between the two, the trial court strayed into a factual issue for the jury's determination-namely, whether there was an unrecorded conversation that preceded Thomas's alleged confession."). Unlike those cases, the judge in this case did not comment on the weight of the evidence or the credibility of a witness. Nor did the judge chastise defense counsel or his line of questioning in front of the jury.

Instead, the judge was merely advising the jury that the results of the lie detector test would not have been admissible. The judge was certainly not relaying his view of the case. Nor was the judge indicating whether he believed that Wright's testimony was truthful. Given what the judge said to the jury, the jury was not inclined to believe that the judge either credited or discredited Wright's testimony. Unlike the cases Sievers has cited, the judge in this case made no comment regarding the content or veracity of Wright's

testimony. Accordingly, the comments that the judges made in *Jacques*, *Brown*, and *Thomas* are significantly different from what occurred in this case.

The judge's comment in this case was much more in line with the permissible action of clearing up uncertainties in this case, rather than conveying his view of the case, summing up the evidence, or commenting on the weight of the evidence, the credibility of the witnesses, or Appellant's guilt. Sievers has failed to show that the judge's brief and neutral comment to the jury amounted to fundamental error in this case.

While Appellant has failed to meet his burden of establishing fundamental error and no further analysis is required, it is worth noting that the uncertainty in question in this case was created by defense counsel's own comment to the jury about whether Wright's testimony could be trusted in the absence of a polygraph test. After making the improper argument, defense counsel did not voice a clear objection to the judge's proposed instruction to the jury to clarify that point. Therefore, any alleged error in this case should be considered invited by Appellant. "Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error

on appeal." *Terry v. State*, 668 So. 2d 954, 962 (Fla. 1996). For all these reasons, Appellant's claim must be denied.

CLAIM II

Rebuttal Closing

In his second issue, Sievers challenges the prosecutor's reference to Wright's polygraph test during the State's rebuttal closing argument. Because no objection was lodged below, the fundamental error standard applies. *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996). This Court has "defined fundamental error as being error that reach[es] 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." *Kilgore v. State*, 688 So. 2d at 898 (internal quotation omitted). Sievers has failed to meet his burden of establishing fundamental error.

In response to the arguments made during the defense closing argument, the prosecutor in her rebuttal argument highlighted various pieces of evidence, which included phone records, an autopsy photograph, and Wright's plea agreement. When the prosecutor mentioned the plea agreement, she merely stated:

> Touch on the plea agreement that was entered into by Mr. Wright. Please feel free to read it. And when you do, read Paragraph 9 (e).
>
> Mr. Wright is subject to a polygraph up to the day he is sentenced under this plea agreement, up to the day he is sentenced, and should he fail that polygraph up to the day he is sentenced, his agreement goes away.

(T. 4210-11). No other mention was made of the polygraph exam during the prosecutor's rebuttal, although she later asked the jury to "[p]lease look at all the evidence that's been introduced." (T. 4213). Sievers now challenges the prosecutor's reference to the polygraph examination because she mentioned that Wright was subject to the examination "up to the day he is sentenced." No error, much less fundamental error, has been shown.

Sievers argues that prosecutor's mentioning of Wright being subject to the polygraph up until the time he was sentenced was improper vouching. "Attorneys are permitted wide latitude in closing argument[.]" *Gonzalez v State*, 136 So. 3d 1125, 1143 (Fla. 2014). "The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." *Gonzalez v. State*, 136 So. 3d 1125, 1143 (Fla. 2014) (quoting *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla.1985)).

"Additionally, an attorney is allowed to argue reasonable inferences from the evidence and to argue credibility of witnesses or any other relevant issue so long as the argument is based on the evidence." *Gonzalez*, 136 So. 3d at 1143 (quoting *Miller v. State*, 926 So. 2d 1243, 1254–55 (Fla. 2006)). "[I]mproper vouching or bolstering occurs when the State "places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." *Wade v. State*, 41 So. 3d 857, 869 (Fla. 2010) (quoting *Williamson v. State*, 994 So. 2d 1000, 1013 (Fla. 2008)).

Sievers specifically argues that the prosecutor's argument was improper vouching because it suggested that Wright would not get away with lying. However, the prosecutor said no such thing. The prosecutor never stated that the threat of a polygraph examination assured the reliability of Wright's testimony. Nor did the prosecutor urge the jury to believe Wright's testimony because of the possibility of a polygraph test being administered. It was defense counsel, not the State, who used the polygraph examination (or lack thereof) to argue that Wright's testimony was not reliable. The challenged

remark simply elaborates on the plea agreement that was repeatedly referenced by defense counsel.

In *Wade v. State*, 41 So. 3d 857, 868–69 (Fla. 2010), the defendant challenged several of the prosecutor's statements made during closing arguments about a codefendant who testified against the defendant. The defendant argued that the prosecutor's comments constituted improper vouching for the codefendant when the prosecutor stated: (1) "So why would this guy lie, to get that deal? To get life? That's why he's lying?"; (2) "There's no way Bruce Nixon is that bright"; and (3) "The only reason [Nixon] was involved was because he wanted money and his best friend [Wade] gave him the opportunity and he [Nixon] told the police the truth." *Id*.

In finding that improper vouching did not occur, this Court determined that the first statement was made in rebuttal to the defendant's argument that Nixon was willing to lie, and the other two statements were made as part of the prosecutor's explanation of how all the evidence presented at trial corroborated Nixon's testimony. *Wade*, 41 So. 3d at 869. This Court concluded that the statements were a fair reply to the defense argument that Nixon was not credible. *Id*.

In this case, the prosecutor's challenged statements merely amount to a reiteration of the plea agreement that was entered into evidence by defense counsel and referenced by him throughout the trial. The inclusion of the additional statement that Wright could be subject to a polygraph up to the day he is sentenced is simply a proper explanation of the plea agreement as well as a fair rebuttal to defense counsel's argument that the State chose not to administer the polygraph examination. Sievers failed to show how the prosecutor's comments amounted to improper bolstering especially in light of the fact that the prosecutor did not invoke her personal status as the government's attorney as a basis for Appellant's conviction. Nor did the prosecutor indicate that Wright's testimony was supported by information not presented to the jury. The State's brief mention of the plea agreement during its rebuttal closing argument certainly did not amount to fundamental error. *Wade*, 41 So. 3d at 868-69*; Gonzalez v. State*, 136 So. 3d 1125, 1143–44 (Fla. 2014).

Given that Sievers has failed to establish fundamental error, this claim is procedurally barred and he is not entitled to appellate relief. *See Bonifay v. State*, 680 So. 2d 413, 418 n.9 (Fla. 1996)

(holding claim of improper prosecutorial argument procedurally barred when no contemporaneous objection was made and no fundamental error present); *Marshall v. State*, 604 So. 2d 799, 805 (Fla. 1992) (rejecting claim that the prosecutor made comments vouching for the credibility of a state witness when the defense neither objected nor requested a curative instruction nor moved for a mistrial. "Because these remarks do not constitute fundamental error, this issue is not cognizable in this appeal.").

CLAIM III

Detective Lebid's Testimony

In this issue, Sievers argues that the trial court erred by overruling the defense objection to Detective Lebid's testimony that he could tell when Wright was lying. Sievers argues that by allowing such testimony, the implication was that the detective could also tell when Wright was telling the truth, which constituted improper bolstering and invaded the province of the jury. This argument is flawed because it was the defense who initially questioned Detective Lebid about whether Wright was lying.

The defense asked the following during cross-examination of Detective Lebid:

Q. Okay. And, interestingly, on July 12th of 2015, do you recall asking him, "Would you be willing to take a lie detector test?"

A. I think I said that that time, absolutely

Q. Okay. And did you say that because at the time you believed that he was looking you right square in the eye and lying?

A. Yes.

[…]

I believed he was lying to me, yes.

(T. 3395).

Later during cross-examination defense counsel asked, "And do you recall in the proffer agreement Mr. Wright saying, 'I was there, but I never went in the house when the actual murder occurred'? (T. 3398). Detective Lebid replied, "I do recall that." (T. 3398). Then defense counsel asked, "Do you believe that that was a truthful statement[.] and Detective Lebid answered, "No." (T. 3398).

Defense counsel subsequently asked the following:

> Q. Detective, would you agree with me that – that Mr. Wright had, over the course of this investigation, given you several untruthful statements?
>
> A. Yes.

> Q. Okay. And would you further agree with me that you were present for the proffer agreement, you were present for the sworn statement, and you were present for and conducted all of his previous interviews? Is that correct?
>
> A. Yes.
>
> Q. So is it fair to say out of everyone in the investigation, you personally had the most face-to-face contact with Mr. Wright?
>
> A. Yes.
>
> Q. Okay. So you have firsthand then, you've borne witness to his dishonesty, correct?
>
> A. Correct.
>
> Q. And you know that part of his sworn statement agreement, part of that agreement was he has to provide a polygraph upon demand; is that correct?
>
> A. That sounds right. There was a lot of details on it.
>
> Q. Was a polygraph ever administered to Mr. Wright in this case?
>
> A. No.

(T. 3401-02).

During the prosecutor's redirect examination, he asked about Detective Lebid's discussions with Wright. He further asked whether the Detective at any point during the proffer told Wright what to say. (T. 3407). He continued,

Q. During your initial discussion with Mr. Wright on 7/12, did you need a lie detector machine to tell you he was lying to you?

A. No.

Q. And on 8/27, did you need a lie detector machine to –

MR. MUMMERT: Objection, Your Honor. May we approach?

THE COURT: Sure.

[…]

MR. MUMMERT: Yes, Your Honor. I object to this. Mr. Hunter is purporting, by saying "did you need a lie detector to know that he was lying, " to conversely imply that when he is, quote, telling the truth, that Mr. Lebid also knows essentially giving Detective Lebid the ability to vouch for him, bolster the truthfulness of Mr. Wright's testimony when it is convenient.

MR. HUNTER: Actually, I think the Detective said he was lying, and he didn't need a lie detector to tell that, the same inadmissible lie detector that counsel made repeated references to during his cross-examination.

THE COURT: They're not admissible in court except in very rare circumstances, and we've heard all about it. I think it's fair game. Overruled.

(Sidebar conference concluded.)

- - -

BY MR. HUNTER:

Q. So on 8/27, when Mr. Wright lied to you, did you need a lie detector to tell he was lying?

A. No.

Q. Then during our proffer when Mr. Wright sat across the table from you and lied in the beginning part of that proffer, did you need a lie detector to tell you he was lying to you then?

A. No, I did not.

Q. And you're not some kind of human lie detector, right?

A. No, I'm not.

(T. 3407-3409).

A trial court's ruling on the admissibility of evidence will be upheld absent an abuse of discretion. *Williams v. State*, 967 So. 2d 735, 747-48 (Fla. 2007). Sievers has failed to demonstrate an abuse of discretion in this case. Given the above colloquies, the prosecutor's questions to Detective Lebid were properly posed in response to the questions already asked by defense counsel. Defense counsel first asked Detective Lebid about various times that Wright was lying, and defense counsel further asked Detective Lebid whether a lie detector was administered. The prosecutor was properly permitted to follow-up with questions about Detective Lebid being able to tell that Wright was lying and that he did not need a lie detector test to do so. *See Salazar v. State*, 991 So. 2d 364, 374 (Fla. 2008) (finding no abuse of

discretion in the trial court overruling the defense objection to a detective's testimony that he was trying to find the truth in his investigation).

While the prosecutor's questioning was entirely proper under the circumstances, any alleged impropriety cannot amount to an abuse of discretion when the defense opened the door to the State's line of questioning. "[T]he concept of opening the door allows the admission of otherwise inadmissible testimony to qualify, explain, or limit' testimony or evidence previously admitted." *Hudson v. State*, 992 So. 2d 96, 110 (Fla. 2008) (internal quotations omitted). Here, the defense elicited that the Detective knew that Wright was lying and that he also did not give him the lie detector test. Under these circumstances, it was entirely proper for the State to inquire whether the Detective needed the lie detector test to determine whether Wright was lying.

As the trial court properly found, the questioning at issue was "fair game" on rebuttal given defense counsel's cross-examination. Sievers's argument that this questioning was improper bolstering because it suggested that the Detective could also tell when Wright was telling the truth is refuted by the prosecutor's own questioning

that Detective Lebid is not some sort of human lie detector test. (3409). Sievers's argument is further undermined by the fact that his counsel's questioning had already implied that the Detective was able to determine when Wright was lying without using a lie detector test.

To the extent that this Court finds error, error must be considered harmless in light of the prior questioning from defense counsel. The State's rebuttal questioning was merely cumulative of that already posed by the defense: that Detective Lebid knew that Wright was lying on occasions, and Detective Lebid did not administer a polygraph examination. Additionally, during Wright's trial testimony, he admitted to initially lying to law enforcement. (T. 2729). Wright testified before Detective Lebid, so the jury already heard that Wright had lied before Detective Lebid stated that he did not need a lie detector to tell that Wright had lied.

Finally, Detective Lebid expressed no opinion as to the credibility of Wright as a witness; he merely stated that Wright had lied during the investigation. Detective Lebid made no comment on whether he believed that Wright told the truth during his proffer or his sworn statement. Nor did Detective Lebid opine as to whether the

content of Wright's trial testimony was believable, truthful, or credible. For all these reasons, Appellant's claim must be denied.

CLAIM IV

Wright's Prayer

In this issue, Sievers complains that the trial court improperly overruled the defense objection to Wright's comment that he had prayed. Sievers argues that this testimony improperly allowed Wright to portray himself as a religious man, and that testimony was reinforced by various other comments made about Wright's religion. Notably, Sievers only objected to Wright's reference to praying. Given that no objections were lodged when Wright referenced borrowing chairs from his church and when Jerry Lubinski testified that Wright was a church youth director, those issues are not properly before this Court. *State v. Johnson*, 295 So. 3d 710, 714 (Fla. 2020).

The trial court's ruling on Wright's reference to prayer is reviewed by this Court for an abuse of discretion. *Williams v. State*, 967 So. 2d 735, 747-48 (Fla. 2007). No abuse of discretion has been showed. Wright merely stated that he had initially lied because,

> I still struggled with my own personal involvement in it, the physical part of it, and that's where the – that's where I got off.

I just couldn't quite let go of all of that. And I took a break. I talked to my attorney. I prayed.

(T. 2730). After the objection was sustained, Wright testified to the following:

Q. Okay so during that initial meeting, you told us that you started out lying to us and you took a break.

A. Yes.

Q. And met with your attorneys?

A. Yes.

Q. And then did you decide to tell the truth?

A. I did.

(T. 2732).

Sievers argues that this was an impermissible use of religion to bolster Wright's credibility. However, the reference to praying was extremely brief and Wright made no further reference to prayer when the court overruled the objection. Instead, the jury was left with the indication that Wright decided to tell the truth after he had a chance to speak with his attorneys.

The objection at issue was based on section 90.611 of Florida Statutes. That section states that "Evidence of the beliefs or opinions

of a witness on matters of religion is inadmissible to show that the witness's credibility is impaired or enhanced thereby." § 90.611, Fla. Stat. In this case, Wright did not express his religious beliefs or opinions. He merely mentioned that he had prayed. A brief reference to prayer does not indicate anything specific about his religious beliefs or opinion. Nor did his comment enhance his credibility. He never stated that he was influenced by prayer or that any sort of divine intervention led him to telling the truth. Instead, he stated that he initially lied, he understood the gravity of telling a lie, but he did so because he was struggling with his own involvement in the murder. So he decided to take a break, talk to his attorneys, and pray.

Notably, the prosecutor did not question Wright as to the status of his religion or his beliefs, nor did the prosecutor question Wright about his prayer, even after the objection had been overruled. *Compare United States v. Acosta*, 924 F.3d 288, 305–06 (6th Cir. 2019) (where the prosecutor highlighted the witness's prayer to an idol, elicited testimony on his religious beliefs, and implied he was violating a biblical Commandment). Under these circumstances,

Sievers has failed to show any error that amounted to an abuse of discretion.

CLAIM V

The Video of Wright's Formal Statement

In this claim, Sievers challenges the trial court's exclusion of the video of Wright's statement made on February 19, 2016. "This Court reviews evidentiary rulings for abuse of discretion." *Johnson v. State*, 969 So. 2d 938, 949 (Fla. 2007). A trial court ruling constitutes an abuse of discretion if it is based "on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Johnson*, 969 So. 2d at 949 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)); *see also McDuffie v. State*, 970 So. 2d 312, 326 (Fla. 2007) (explaining that the trial court's discretion is limited by the rules of evidence and the principles of stare decisis, and a trial court abuses its discretion if its ruling is based on an erroneous view of the law). Sievers has failed to show that the trial court abused its discretion in precluding the video at issue.

From the outset, this Court should know that Sievers refers to the video at issue as Wright's proffer. However, Wright's proffer actually occurred on January 6, 2016. (R. 3988-4148). Sievers did

not request for the video of Wright's proffer taken on January 6, 2016, to be admitted into evidence. Instead, Sievers tried to admit the video recording of Wright's formal statement taken on February 19, 2016. During Wright's formal statement from February 19, 2016, he has the conversation with the prosecutor about his wife that is at issue in this claim. (R. 43399-43405).[2] No such conversation occurred during Wright's proffer from January. Therefore, whenever Sievers's trial and appellate attorneys refer to the video of Wright's proffer, they are actually referring to the video of Wright's formal statement from February 19, 2016. For purposes of clarity, the State will refer to Wright's proffer as his actual proffer from January 6, and Wright's statement as his formal statement from February 19, 2016.

The purpose of the defense wanting Wright's recorded statement admitted into evidence was to show the portion of the statement where Wright and the prosecutor discussed Wright's wife. Notably, during defense counsel's cross-examination of Wright, he did not ask Wright any questions about that portion of his formal statement

[2] There is some discrepancy in the record between the Bates stamp on the bottom of the page with this document. The State's filing of the codefendant's statement starts off on page 4149, but the Bates stamp switches over to 43375 after three pages.

where Wright discussed his wife with the prosecutor. After the State rested, the defense sought to admit the video recording of Wright's statement during Detective Lebid's testimony.

The State objected to the admission of the Wright video based on it being "completely hearsay." (T. 3897). The prosecutor explained that the "only way it's admissible is potentially if it's to impeach somebody. However, we can't call a witness for the sole purpose of impeaching somebody." (T. 3898). The prosecutor stated that the defense never cross-examined Detective Lebid about the contents of the statement during the State's case in chief, nor did the defense attempt to have Detective Lebid impeach Wright. (T. 3898). The State believed that it was inappropriate for the defense to call Detective Lebid for the purpose of either impeaching himself or impeaching Wright when they were both subject to cross-examination by the defense. (T. 3898). The State asserted that the recordings were hearsay that did not fall within any recognized exception. (T. 3898).

The defense responded that the State opened the door to the video because they initiated testimony about the proffer. (T. 3898-99). The defense continued,

> And, Your Honor, all I'm simply doing is laying a foundation for admissibility of evidence that was – that's crucial in this case.
>
> There's a portion of the video that goes to – that goes to the defendant's bias; that goes to the jury instructions, whether he was offered something.
>
> And further, Your Honor, when Your Honor reads the jury instruction, 'was the witness offered anything, including money or beneficial treatment' – and I'm paraphrasing – this goes directly to that.
>
> And, Your Honor, I'm simply trying to provide the jury with a greater scope of understanding as to how the investigation unfolded.

(T. 3899).

The judge asked when "would this ever come in under any exception?" (T. 3900). The judge explained that it's a statement that could be used for impeachment purposes. "I don't see where this would come in, in really any circumstance." (T. 3900-01). Defense counsel did not offer any explanation, and instead stated "okay" when the judge sustained the objection. (T. 3900-01). Under these circumstances, the trial court in no way abused its discretion by precluding the video.

Sievers's first assertion for admissibility was that the State had opened the door to the evidence by questioning Wright about whether

he was untruthful during his proffer. Sievers fails to explain how questioning about whether Wright was truthful during his January proffer, somehow opened the door to the admission of Wright's subsequent recorded statement in February.

"The 'opening the door' concept is based on considerations of fairness and the truth-seeking function of a trial, where cross-examination reveals the whole story of a transaction only partly explained in direct examination." *Bozeman v. State*, 698 So. 2d 629, 631 (Fla. 4th DCA 1997). "[T]he concept of opening the door allows the admission of otherwise inadmissible testimony to qualify, explain, or limit testimony or evidence previously admitted." *Hudson v. State*, 992 So. 2d 96, 110 (Fla. 2008) (internal quotations omitted). The State's questioning about the proffer, did not open the door to having Wright's formal statement admitted. Even if the State's questioning had been in reference to the same recorded statement at issue, such questioning still would not have opened the door to making the video admissible.

Just because the State had asked Wright whether he initially lied during the proffer does not render the recording of the entire proffer (or subsequent statement) admissible. The State's questioning

did not require further clarification through admission of the recording, nor did it mislead the jury in any way or paint only part of the picture. The conversation between Wright and the prosecutor about Wright's wife that was captured on the recorded video of Wright's statement is completely separate and unrelated to the State's line of questioning that Sievers claims to have opened the door.

It is further worth noting that the defense made no attempt to question Wright about the portion of the statement where Wright and the prosecutor discussed Wright's wife. If the defense truly thought that the State's direct examination of Wright had opened the door to that evidence, then defense counsel should have questioned Wright about it during the cross-examination. Instead, defense asked no such questions and waited until the defense's direct examination of Detective Lebid to try to introduce the video at issue. Sievers has failed to show that the State's questioning of Wright on direct examination regarding initially being dishonest during this proffer opened the door to later having the recorded statement admitted during Detective Lebid's testimony.

By the same token, given that the defense did not ask Wright about the portion of the statement discussing his wife during cross-examination, his alternative argument that the recording should have been admitted to show Wright's bias also fails. Under section 90.608 of Florida Statutes, any party may impeach a witness by showing the witness is biased. While the video could have potentially shown some bias, Sievers does not get to circumvent the rules of evidence in order to establish such bias. It is unclear how Sievers intended to show Wright's bias (based on the conversation he had with the prosecutor) through Detective Lebid's testimony.

The video of Wright's formal statement is clearly hearsay. *See Stoll v. State*, 762 So. 2d 870, 876 (Fla. 2000) (where the witness's handwritten statement was clearly hearsay because it was a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted). When the State objected based on it being hearsay and an improper method of impeachment, Sievers did not offer any recognized hearsay exception in order to justify its admission.

While on appeal Sievers now claims that the video was not hearsay because it was not being offered for the truth of the matter

asserted, that reason was never stated to the judge as a basis for admission. Instead, the defense merely argued that the State had opened the door and that the video went to the witness's bias. Because defense counsel never advised the judge that the video was being offered as non-hearsay evidence, that argument was not properly presented below. *See Chamberlain v. State*, 881 So. 2d 1087, 1100 (Fla. 2004) (finding issue not preserved when defendant objected to the tape being introduced at trial on grounds that it was double hearsay and cumulative, but defendant never argued to the trial court that the tape did not fall within the evidentiary rule providing that prior consistent statements are not hearsay).

Sievers further argues on appeal that the video was relevant to impeach Detective Lebid's testimony about Wright's wife's involvement in the case, but again, that reason was never offered to the judge. Not only is this argument unpreserved, but it is meritless given that a video of Wright's statement does not serve to impeach Detective Lebid's trial testimony.

Furthermore, because Wright was never questioned about that portion of the statement where he discussed his wife, there is no record of how Wright would have answered such questions. As such,

no foundation was laid for the defense to introduce Wright's statement as an inconsistent statement that would attack his credibility as a witness. *See Pearce v. State*, 880 So. 2d 561, 569-70 (Fla. 2004); § 90.608(1), Fla. Stat. (2020). Accordingly, Sievers has failed to establish that the trial court abused its discretion by precluding the video.

However, in the event that this Court finds error, any error should be considered harmless. Sievers was not prevented from questioning Wright about any motivation he had to lie to protect his wife. Therefore, Sievers was never precluded from attempting to establish that Wright was a biased witness because he potentially complied with the State in order to protect his wife.

In addition, the jury was made aware of Wright's own personal bias, based on his desire to protect himself, throughout the trial. The jury knew that Wright initially lied to law enforcement in order to minimize his involvement and to avoid being implicated in physically committing the murder. The jury knew that Wright received a plea deal from the State in exchange for his testimony against Sievers. Thus, Wright's bias as a witness was clearly exposed, and the defense relied on that bias by using it as one of its main defense theories

throughout Appellant's trial. Given what the jury already knew about Wright, there is no reasonable possibility that the failure to admit a video of Wright's formal statement contributed to Appellant's conviction.

This is especially true given that Wright had already provided his proffer explaining his involvement in the murder prior to making his formal statement at issue that Sievers claims shows his bias regarding his wife. Whether Wright entered into an agreement with the State in order to protect his wife is not really relevant to Wright's credibility when Wright had provided nearly identical information to the State in his proffered statement, which occurred more than a month before he had the conversation with the prosecutor about his wife. In sum, admission of the video of Wright's formal statement discussing his wife with the prosecutor would not have impacted Wright's credibility as a witness when his prior statement is consistent with his former proffer as well as his trial testimony. Wright's trial testimony was also corroborated by physical evidence from trial including cell phone records, surveillance videos, and the GPS tracking device. Accordingly, there is no reasonable possibility

that precluding a video from Wright's formal statement contributed to Appellant's conviction.

CLAIM VI

Cross-Examination of Wright

In his sixth issue, Sievers argues that the trial court erred by prohibiting the defense from cross-examining Wright about a potential sexual motive for the murder. Sievers argues that he should have been able to question Wright about a possible sexual relationship with him in order to show that Wright had a potential motive to murder the victim. "Limitations on the cross-examination of a witness are within the sound discretion of the trial court, and a ruling concerning such limitations will only be reversed if the aggrieved party demonstrates an abuse of that discretion." *King v. State*, 89 So. 3d 209, 223 (Fla. 2012) (citing *Kormondy v. State*, 845 So. 2d 41, 52 (Fla.2003)). No such abuse of discretion has been demonstrated in this case.

There must be a good-faith basis for questions asked during cross-examination. *King v. State*, 89 So. 3d 209, 224 (Fla. 2012). This means that defense counsel must have had some information to believe that Wright and Sievers did indeed have some sort of sexual

relationship. While Sievers claims his attorney was entitled to ask such questions because the detective had a sexual motive theory early on in the case, an uncorroborated theory during an investigation does not amount to evidence that a sexual relationship actually existed.

The trial court was acting within its sound discretion by sustaining the objection unless there was going to be evidence presented to show that Sievers and Wright did indeed have a relationship. *See King*, 89 So. 3d at 225 (finding no abuse of discretion when the trial court instructed the jury to disregard the defense's counsel's questions where defense counsel presented no tangible evidence to support his contention that any of the alleged events actually occurred); *Gosciminski v. State*, 994 So. 2d 1018, 1024 (Fla. 2008) (holding that the State did not have a good faith basis for suggesting to the jury that a ring was dark due to blood during its questioning of the defendant on cross-examination when the State never elicited testimony to show that the darkness on the ring was blood).

Sievers has not pointed to any evidence contained in the appellate record that would have formed a good-faith basis to show

that any sort of relationship existed in order to justify such questioning. Significantly, defense counsel never sought to proffer Wright's testimony on this matter, so there is no record evidence before this Court as to what Wright would have said. This Court has held that without a proffer "it is impossible for the appellate court to determine whether the trial court's ruling was erroneous and if erroneous what effect the error may have had on the result." *Finney v. State*, 660 So. 2d 674, 684 (Fla.1995). Under these circumstances, there can simply be no finding of an abuse of discretion. *Kormondy v. State*, 845 So. 2d 41, 52–53 (Fla. 2003) (where the defense made no attempt to establish through a proffer or other explanation that the trial court should not have sustained the State's objection; the defense did not indicate what was being sought from the witness by the question nor that there was evidence that would demonstrate that the witness had misidentified her assailants); *Finney*, 660 So. 2d at 684 (finding a claim challenging the trial court's refusal to allow him to cross examine the victim about her initial description of the attacker was not properly before the Court where the defendant never proffered the testimony he sought to elicit from the witness).

Moreover, even though Appellant's argument fails that he was improperly deprived of his opportunity to cross-examine Wright about a sexual motive, the alleged error would be considered harmless in light of the evidence adduced at trial. Any potential sexual relationship between Sievers and Wright would not have eliminated or negated the evidence showing that Sievers hired Wright to kill his wife. Nor would such the evidence of a relationship render Wright a less credible witness. Any evidence of a sexual relationship would not have changed the outcome of the trial. This claim must be denied.

CLAIM VII

The Testimony of Kimberly Torres

In this claim, Sievers argues that the trial court erred when it permitted the testimony of his neighbor, Kimberly Torres, regarding seeing Sievers in her backyard and overhearing an argument between Sievers and the victim. Sievers specifically argues that her testimony about seeing Sievers on her lanai was not relevant and should have been precluded. Relevant evidence is evidence tending to prove or disprove a material fact. § 90.401, Fla. Stat. "A trial court has broad discretion in determining the relevance of evidence and such a

determination will not be disturbed absent an abuse of discretion." *Okafor v. State*, 225 So. 3d 768, 773 (Fla. 2017) (quoting *Jorgenson v. State*, 714 So. 2d 423, 427 (Fla. 1998)). The trial court properly exercised its discretion in this case.

Torres testified that she saw Sievers in her backyard on her lanai. (T. 3785). She explained that there was a privacy fence that divided her yard and Sievers's yard. (T. 3787). She could not recall the exact date that she saw Sievers in her yard, but she thought it was closer to the beginning of the year in February or March. (T. 3788). She knew that it did not occur in June. (T. 3788). The State tried to ask her if it had possibly occurred in April or May, but the court sustained the defense's objection. (T. 3788). That was essentially the extent of her testimony regarding seeing Sievers outside of her house.

The State sought to introduce this testimony because Sievers had given Wright information about the back of his house as well as the area of the apartment complexes behind his home. The intent of this testimony was to show that Sievers had scoped out the area in preparation for Wright. According to Wright, Sievers told him about the tall privacy fence and had instructed that he go over the fence

and enter the house through the side door of the garage. Wright testified that Sievers had trimmed back the brush along the fence to make sure nobody got scratched and left a trace of blood. Sievers had even gone over it himself to make sure it could be done. The testimony from Torres was relevant to this aspect of Wright's testimony.

Sievers also challenges the portion of Torres's testimony where she recalls hearing an argument between Sievers and the victim. The victim told Sievers that she was f'ing tired of this and that she was leaving. (T. 3792-93). Torres testified that Sievers said, "If that's what you want to do, fine, but we'll see about that." (T. 3793). According to Torres, the argument occurred about a month and half before the victim was murdered. (T. 3793).

Sievers claims that this was inadmissible hearsay that does not qualify as an excited utterance. During trial, the State argued that the statements were admissible under the theories of excited utterance and then-existing mental or emotional condition.

The excited utterance exception makes a hearsay statement admissible when the statement relates "to a startling event or condition [and was] made while the declarant was under the stress

of excitement caused by the event or condition." § 90.803(2), Fla. Stat. In order to qualify for admission under this exception, the statement must be made: (1) "regarding an event startling enough to cause nervous excitement"; (2) "before there was time to contrive or misrepresent"; and (3) "while the person was under the stress or excitement caused by the event." *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008) (quoting *Henyard v. State*, 689 So.2d 239, 251 (Fla.1996)).

Torres testified that Sievers and the victim were arguing with each other. That argument constituted the event that was startling enough to cause nervous excitement. The statements were made contemporaneously without time for reflection or misrepresentation while both Sievers and the victim were under the stress caused by the argument. "This Court has observed that '[i]f the statement occurs while the exciting event is still in progress, courts have little difficulty finding that the excitement prompted the statement.'" *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008) (quoting Edward W. Cleary, McCormick on Evidence § 297 at 856 (3d ed.1984)). The victim's and Sievers's statements during their argument overheard by Torres met the requirements for an excited utterance and were properly admitted by the trial court.

Alternatively, the statements also qualified under the then-existing emotional condition exception. Under section 90.803(3)(a) of the Florida Statutes, the then-existing mental, emotional, or physical condition hearsay exception states:

> (a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:
> 1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.
> 2. Prove or explain acts of subsequent conduct of the declarant.

When the victim said that she was leaving, Appellant responded "If that's what you want to do, fine, but we'll see about that[.]" Appellant's reaction reveals his state of mind and helps explain his conduct in arranging to have his wife murdered. The testimony from Wright as well as the cell phone evidence showed that Sievers acted in accordance with his state of mind and intent. Sievers's statement overheard by Torres satisfies the state of mind exception to hearsay to explain Sievers's subsequent conduct in committing the murder.

While Sievers argues that Torres never mentioned the argument when she was initially interviewed by law enforcement, that goes to the weight of the evidence, rather than admissibility. The defense

cross-examined Torres on her failure to mention the argument to law enforcement. (T. 3796). The defense also cross-examined Torres about various statements she made to the media. (T. 3796-3800). Her delay in relaying the information was not a reason for the lower court to exclude her testimony altogether.

In the event that this Court finds error in the admission of the testimony, any error should be considered harmless. Torres's testimony was brief and in no way a feature of trial. Her testimony about seeing Sievers in her yard could have easily been discounted by the jury as unconnected to the planning of the murder, especially in light of the timeline Torres provided. Torres's testimony about overhearing the argument was also brief and not a feature of trial. The testimony could easily be perceived as innocuous and a typical marital spat.

Considering this alleged error in light of the evidence the jury properly had in front of it, there is no reasonable possibility that the error contributed to Sievers's conviction and sentence. There was a wealth of evidence that connected Sievers to the murder and showed his heightened premeditation in committing the murder. Whether Sievers was seen in his neighbor's backyard or whether he had a

disagreement with the victim prior to the murder would not have reasonably affected the jury's finding of guilt and CCP. *See, e.g., Ibar v. State*, 938 So. 2d 451, 466 (Fla. 2006) (finding the error in admitting hearsay under the state of mind exception harmless in light of the evidence). This claim should be denied.

CLAIM VIII

Autopsy Photos

Next, Sievers claims that the trial court erred in admitting autopsy photographs. "A trial court's ruling on the admission of photographic evidence will not be disturbed absent a clear showing of abuse of discretion." *Armstrong v. State*, 73 So. 3d 155, 166 (Fla. 2011) (internal citations omitted). Sievers has failed to show any abuse of discretion by the trial court.

Sievers objected to the photographs during the trial based on their probative value being substantially outweighed by the danger of unfair prejudice. (T. 3818). The trial court carefully considered the objection to the autopsy photographs and reviewed the individual photographs, noting that they were from different angles and they were not cumulative. (T. 3819). The court further highlighted that

photographs were limited in number. (T. 3819). Sievers fails to show any error in the admission of these photographs.

The photographs at issue consist of eleven photographs that portray the victim's skull, wrist, arm, and all different angles of her head, including her face. (T. 3820; R. 5448-58). Seven out of the eleven photographs show different areas of the victim's head and face to document her head injuries, lacerations, and fractures. (R. 5448-54). Some of those photographs have rulers to show the size of each head injury, and one photograph includes the hammer in relation to a wound. (R. 5448, 5450-54). There is one photograph of the victim's skull showing her skull fracture. (R. 5457, T. 3828-30). Three additional photographs show different angles of the victim's wrist and arm documenting her defensive wounds. (R. 5455-56, 5458).

The medical examiner used the photographs during his testimony to help explain the victim's injuries. (T. 3822-3837). Each photograph assisted the medical examiner in explaining the nature of the victim's wounds, lacerations, and fractures, as well as their location on the victim's body. Therefore, the challenged photographs were relevant to aid the medical examiner's testimony and to explain the victim's injuries.

This Court has consistently found such evidence relevant when used to aid a medical examiner's testimony. *See Douglas v. State*, 878 So. 2d 1246, 1256 (Fla. 2004) (autopsy photographs were relevant to show the location of the wounds and to aid the medical examiner in explaining the nature of the victim's injuries to the jury); *Pope v. State*, 679 So. 2d 710, 713–14 (Fla. 1996) ("The autopsy photographs were relevant to illustrate the medical examiner's testimony and the injuries he noted on [the victim]."); *Jones v. State*, 648 So. 2d 669, 679 (Fla. 1994) (finding autopsy photographs relevant to assist the medical examiner in explaining the nature of the victim's injuries and the cause of death); *Nixon v. State*, 572 So. 2d 1336, 1342 (Fla. 1990) (holding that photographs that assisted the pathologist in explaining the nature of the victim's injuries and the cause of her death were relevant); *Bush v. State*, 461 So. 2d 936, 939 (Fla. 1984) (holding that photographs are admissible where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted).

Sievers's argument that there was no need to admit the photographs when he was not physically involved in the murder is without merit when Sievers was charged with first-degree murder of

the victim and the photographs were used during his murder trial. The victim's injuries and her cause of death are not somehow rendered irrelevant just because Sievers chose to have someone else commit the murder for him. This Court has rejected similar arguments that autopsy or crime scene photographs of victims were not relevant when there was no dispute regarding the victim's death. *Jones v. State*, 648 So. 2d at 669, 679 (Fla. 1994) (rejecting defendant's argument that because there was no dispute regarding the victim's death, "there was no justifiable relevancy for the admissibility of the [autopsy] pictures."); *Nixon v. State*, 572 So. 2d 1336, 1342 (Fla. 1990) (rejecting Nixon's argument that "there was no justifiable relevancy for the admissibility of the photographs since the cause of death and nature of death had been clearly established and there was no circumstance which necessitated the introduction of photographs of the victim").

Given the use of the photographs in the instant case in assisting the medical examiner with his testimony and explaining the victim's injuries, the photographs were clearly relevant. While "no photograph of a dead body is pleasant," the photographs in this case are not so shocking in nature that it defeats the value of its relevancy. *Bush*,

461 So. 2d 936, 939-40 (quoting *Williams v. State*, 228 So. 2d 377 (Fla.1969)). The trial court properly exercised its discretion in admitting the limited number of autopsy photographs that were not cumulative and were relevant to assisting the medical examiner's testimony.

However, if the trial court somehow erred in admitting the photographs, any alleged error must be deemed harmless given the minor role that the limited photographs played in the State's case, especially in light of all of the evidence implicating Sievers in his wife's murder. *Hertz v. State*, 803 So. 2d 629, 643 (Fla. 2001; *Looney v. State*, 803 So. 2d 656, 670 (Fla. 2001); *Thompson v. State*, 619 So. 2d 261, 266 (Fla. 1993). For all these reasons, Sievers is not entitled to appellate relief.

CLAIM IX

Cumulative Error

In his ninth claim, Sievers argues that the cumulative effect of the alleged errors cited in issues one through eight require reversal for a new trial. When individual claims of error are without merit, the claim of cumulative error must fail. *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003). As previously explained and outlined in the instant brief,

claims one through eight are all without merit. Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit, and Sievers is not entitled to relief on this claim.

CLAIM X

Motion for Judgment of Acquittal-Wright's Testimony

Here, Sievers challenges the trial court's denial of his motion for judgment of acquittal on his first-degree murder conviction. In moving for a judgment of acquittal, a defendant admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the State that a jury might fairly and reasonably infer from the evidence. *Lynch v. State*, 293 So. 2d 44, 45 (Fla. 1974). A motion for judgment of acquittal should not be granted by the trial court unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law." *Hunter v. State*, 8 So. 3d 1052, 1066 (Fla. 2008) (quoting *Coday v. State*, 946 So. 2d 988, 996 (Fla. 2006)). The trial court properly denied the motion for judgment of acquittal in this case.

Sievers argues that the State failed to produce competent substantial evidence because Wright only implicated Sievers when he had the opportunity to negotiate a plea deal. Sievers argues that Wright was an inherently unreliable witness and his testimony was uncorroborated by the evidence. Sievers's entire argument under this claim is based on the purported unreliability of Wright, and he contends that his motion for judgment of acquittal should have been granted on that basis. "Because conflicts in the evidence and the credibility of the witnesses have to be resolved by the jury, the granting of a motion for judgment of acquittal cannot be based on evidentiary conflict or witness credibility." *Sapp v. State,* 913 So. 2d 1220, 1223 (Fla. 4th DCA 2005) (citing *Hitchcock v. State,* 413 So. 2d 741, 745 (Fla.1982)); *see also Lynch v. State,* 293 So. 2d 44, 45 (Fla. 1974) ("The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal."). The assessment of a witness's credibility is a matter reserved for the jury. *Calloway v. State*, 210 So. 3d 1160, 1182 (Fla. 2017).

In denying the motion for judgment of acquittal, the trial court properly determined that it was up to the jury to decide what weight to give Wright's testimony, if any, "and to disregard it or to accept it

all. That's in their hands." (T. 3868). The lower court correctly denied the motion for judgment of acquittal based on Wright's credibility and submitted the case to the jury. Whether Wright was a credible witness was clearly an issue for the jury to decide. *Rodriguez v. State*, 436 So. 2d 219, 220 (Fla. 3d DCA 1983) ("[I]t is the sole responsibility of the jury [not the trial court or the appellate court] to assess the credibility of witnesses."). Sievers is now improperly asking this court to reweigh the evidence and assess Wright's credibility. *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981) (explaining that legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate court). This claim must be denied.

Although Sievers's meritless motion for judgment of acquittal was based entirely on the unreliability of Wright as a witness, the State hereby adds additional argument here confirming that the evidence presented during the trial was certainly sufficient to support Sievers's conviction. *See Miller v. State*, 42 So. 3d 204, 227 (Fla. 2010) (explaining that this Court has a mandatory obligation to independently review the sufficiency of the evidence in every case in which a sentence of death has been imposed.). "In determining the sufficiency of the evidence, the question is whether, after viewing the

evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *Bradley v. State*, 787 So. 2d 732, 738 (Fla. 2001).

Not only did Wright testify in detail as to Sievers's planning and preparation for the murder, but the evidence at trial corroborated his testimony. Wright testified that Sievers asked him to kill Teresa Sievers during the weekend of Wright's wedding on May 2, 2015, in Missouri. (T. 2769-74). According to Wright, Sievers suggested that they get burner phones to discuss their plans in effectuating the murder. (T. 2774-75). Wright testified that Sievers purchased his burner phone within days of returning home to Florida from the wedding, and he mailed Wright a card with the phone number of his burner phone. (T. 2776). Wright then purchased his burner phone on May 17, and Sievers and Wright referred to their burner phones as "other" to alert each other to use those phones for communication. (T. 2778).

The evidence established that on May 7, 2015, Sievers texted Wright, "Mailing out today!!!! Call me It's very simple." (T. 2631-32). Sievers later texted, "Since neither one of us are likely to carry both

with us, whenever you want to use the other one just text me “other” and then when I can, I will call.” (T. 2632). On May 9, Sievers asked Wright, “Did you get mail?” (T. 2632). On May 17, Sievers texted Wright, “Check other.” (T. 2633).

Law enforcement utilized the May 17 date from when they first suspected that Sievers and Wright communicated on their burner phones to acquire records from cell tower dumps from the closest cell towers to Sievers’s and Wright’s homes. (T. 3062-63). Through analyzing that data and also comparing it with records from Wright’s and Sievers’s personal cell phones, they learned the phone numbers for Wright’s and Sievers’s burner phones and acquired those records. (T. 3062, 3103-04, 3525-36, 3543-44, 3558). Wright had relayed that his burner phone had a Georgia area code, and Sievers’s phone had a California area code, and the phone records confirmed the same. (T. 3524-27)

Sievers’s burner phone was purchased from a Walmart in Naples on May 7, 2015. (T. 3528). Most of the calls on Wright’s burner phone were to Sievers’s burner phone. (T. 3558). The phones communicated with each other from May 17, 2015, through June 26, 2015. (T. 3546).

Sievers planned a family trip with his wife and children for the end of June and, according to Wright, Sievers wanted him to commit the murder during that time period. (T. 2790-92, 2968). Teresa Sievers would be returning home from the trip early, which would allow Wright to commit the murder without the girls being home and would also provide an alibi for Sievers. (T. 2790-92). Sievers suggested that Wright commit the murder at either the family home or the medical office, and he provided Wright with pertinent information regarding both locations. Before Sievers left for his family trip in June, he recapped all the information with Wright, including when Teresa Sievers would be arriving home from the airport. (T. 2822-24). Sievers left the side door of his house unlocked and he gave Wright the code for the garage and alarm. (T. 2792). Sievers instructed Wright to go over the privacy fence and enter the house through the side door of the garage. (T. 2798). Sievers had trimmed back all of the brush on the fence to allow for easy access over the fence without get scratched by the brush. (T. 2798). Sievers told Wright that he went over the fence himself to make sure it could be done easily. (T. 2798). Sievers suggested to make it look like Teresa Sievers arrived home and interrupted a burglary in progress. (T.

2794).

According to Wright, Sievers told him that he would be destroying his burner phone after he and Wright ended their conversation, which was the night before Sievers left for his family trip. (T. 2824). Teresa's sister testified that the family trip was scheduled for June 27-28, 2015. (T. 2968). Phone records confirmed that the last communication between Sievers's and Wright's burner phones occurred on June 26, 2015. (T. 3546).

Wright stated that Sievers authorized him to enlist the help of someone else in committing the murder, but Sievers did not want that other person to know who he was or to be in communication with him. (T. 2770, 2774). Wright, therefore, asked his friend Jimmy Rodgers to help him, and Rodgers agreed. (T. 2777-78).

Wright testified that Sievers gave him a $600 check to cover his travel expenses to and from Florida to commit the murder. (T. 2754). The State produced evidence of a $600 check from Teresa Sievers MD paid to Wayne Wright that was dated June 9, 2015. (R. 2091). Wright stated that he used $100 to rent a car-a Hyundai-and the remaining $500 for travel expenses for him and Rodgers. (T. 2755-58). Forensic testing of debris and vacuum sweepings of Wright's rental vehicle

linked it to the crime scene. (T. 3639-40).

Wright testified that Rodgers brought coveralls, latex gloves, and duct tape for them to wear while they were committing the murder so they would not leave their DNA at the crime scene. (T. 2795-96). Wright and Rodgers both wore their coveralls during the murder. (T. 2830-31). The medical examiner's testimony of the victim's injuries and cause of death was consistent with the description of the murder provided by Wright. (T. 3814, 3839-40, 3828, 3830, 3835, 3839-41). Law enforcement later recovered Rodgers's coveralls worn during the murder with the help of his girlfriend, Taylor Shomaker. (T. 3072, 3081-82, 3086-87).

Shomaker testified during Sievers's trial, and she confirmed and corroborated much of Wright's testimony. (T. 3691-3714). Shomaker stated that Rodgers went to Florida in late June of 2015. (T. 3694). He returned with a cooler that contained gloves, a hammer, and black shoes as well as a backpack with a pair of coveralls. (T. 3697).

After law enforcement went to their home to speak with Rodgers about Wright, Rodgers discarded evidence. (T. 3702). He threw shoes in a dumpster, he smashed his phone, and while driving,

he instructed Shomaker to throw his phone and coveralls out the window. (T. 3702-04). Shomaker remembered where she threw the coveralls because Rodgers had instructed her to throw them over a bridge off of Highway 47 so they would land in the water, but Shomaker was delayed in responding, so she threw the coveralls after they drove past the bridge. (T. 3707).

The evening after the items were thrown away, Shomaker confronted Rodgers about committing murder. (T. 3710-11). She asked Rodgers if he killed the victim with a gun. (T. 3711). He said, "no" they killed her with a hammer. (T. 3711). Rodgers told her he expected to make $10,000 from the murder. (T. 3714).

The GPS unit that Wright and Rodgers used to travel to and from Florida was recovered by law enforcement and a forensic search was conducted. The search of the Garmin unit confirmed Wright's testimony in terms of where and when he and Rodgers traveled to Florida from Missouri and the stops that they made along the way. (T. 3471-76). Based on that information, law enforcement acquired surveillance videos from a Walmart and gas stations in Florida verifying that Wright and Rodgers had stopped at those locations. (T. 3324-27, 3442-44, 3451). (T. 3324-27).

Rodgers's coveralls retrieved off the side of a road in Missouri were tested by a forensic examiner from the FBI trace evidence unit. (T. 3635-36). She determined that the fibers from the coveralls were recovered from debris and vacuum sweepings from the Hyundai Elantra rental vehicle as well as from tape lifts from the front of Teresa Sievers's dress and her left leg. (T. 3639-40). Kitchen floor vacuum sweepings from the crime scene also had fibers from the retrieved coveralls. (T. 3643-44). A hair recovered from the coveralls on the side of the road was within the same reference range in common with Rodgers's buccal swab. (T. 3673-76).

Sievers's family and friends testified that they were surprised by Sievers's reaction to Teresa Sievers's murder as well to Wright and Rodgers being arrested. The morning after the murder, Sievers called family friend Mark Petrites and asked him to go inside the home to check on Teresa Sievers because she was late for work. (T. 2987-89). Sievers provided the garage code for Petrites to enter the home. (T. 2990). Petrites found it inappropriate that Sievers wanted him to enter the home without knocking first. (T. 2988-89). Upon arriving at the home, Petrites knocked first, then eventually entered using the code Sievers had provided. (T. 2990).

After seeing Teresa Sievers dead on the floor, Petrites called Sievers and told him he needed to return home. (T. 2994-95). Sievers never asked why he needed to come home. (T. 2995). Petrites eventually told Sievers that his wife was hurt, but Sievers failed to inquire how she was hurt. Instead, he asked if it was a robbery. (T. 2998-99). Even though Petrites told Sievers that the paramedics were there, Sievers did not ask about her injuries or whether she was being taken to a hospital. (T. 2998-99).

Daniele Beradelli, a close friend of Teresa Sievers, testified that she flew to Florida the day after being notified of Teresa Sievers's death. (T. 3759). Upon arrival, Beradelli met Teresa Sievers's sisters and brothers at the Holiday Inn, where they were staying. (T. 3758). Sievers went to the hotel to meet her that evening and greeted her with a hug. (T. 3760). According to Beradelli, Sievers sounded like he was crying when they hugged "and his body was quaking like he was crying, but when we looked at each other, I was searching his face and there were no tears, no red eyes, no runny nose[.]" (T. 3760-61).

Sievers's first words to Beradelli were not about his wife, but rather, he wanted to have a conversation with her about who would take care of the children in the event that he could not. (T. 3761).

Beradelli was confused about why Sievers was so concerned he would not be around. (T. 3762). Sievers then talked about money and his concern about how he would raise the girls financially. (T. 3762). Beradelli mentioned that Sievers had told her about a very large life insurance policy when he asked her to be guardian of the girls. (T. 3762). Sievers looked relieved and said that he had totally forgotten about that. (T. 3763).

Sievers asked her three more times during the next week whether she could take care of the girls if he was not able. (T. 3763). Sievers also expressed concern about the police questioning him and whether people thought he was a suspect. (T. 3764). Sievers was concerned that he could be arrested any time, even in the middle of the night. (T. 3764). He wanted to talk with Beradelli every day so she would know if something happened to him, that way she could make immediate arrangements to get to Florida. (T. 3764).

After Wright and Rodgers were arrested, Sievers's family and friends were surprised by Sievers's attitude in response to the arrests. Dr. Petrites called Sievers after Wright's arrest to ask him about it. (T. 3009). Sievers said that Wright "didn't do it." (T. 3009). Petrites was surprised that Sievers was not mad that his friend was

arrested for killing his wife. (T. 3009).

According to Beradelli, Sievers did not seem upset or angry that his friend Wright had been arrested for his wife's murder. (T. 3765). Sievers was more concerned about what Wright might be telling the police and whether Wright would implicate Sievers. (T. 3766). Beradelli later learned that Rodgers had been arrested, and she had seen a photo of Sievers talking with Rodgers at Wright's wedding. (T. 3767). Sievers told Beradelli that he did not know Rodgers, he was not acquainted with him, and he had never met him. (T. 3767). When Beradelli asked Sievers what motive Wright would have to murder Teresa Sievers, Sievers said that he had no idea. (T. 3768). Sievers did not believe that Wright had committed the murder. (T. 2768). Sievers was upset with the police for not finding the real murderers. (T. 3768). In Beradelli's opinion, Sievers was more upset with the police than with Wright or Rodgers. (T. 3769).

Doctor Bethany Ann Mitchell, a close friend of Teresa Sievers and a family friend of the Sievers family, testified that Sievers called her when Wright was arrested, and Sievers was panicked that he would be arrested next. (T. 3747). Mitchell asked how Sievers's friend from Missouri could be involved, and Sievers was convinced that

Wright had nothing to do with it. (T. 3748). Sievers was not upset or even remotely curious that Wright could be involved. (T. 3748). Each time she spoke with Sievers, he was persistent that Wright was innocent, and that seemed strange to her. (T. 3748-49).

When Mitchell learned that Rodgers had been arrested, she asked Sievers about him. (T. 3750). Sievers said he had never heard of Rodgers. (T. 3751). Mitchell saw a picture of Sievers and Rodgers with their arms around each other at Wright's wedding, so Mitchell was concerned because she knew Sievers was not being honest. (T. 3750-51).

All of this evidence that the State introduced during Sievers's trial certainly shows that Teresa Sievers's death was caused by Sievers's criminal act and that the killing was premeditated. Therefore, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, and the evidence is sufficient to support the jury's verdict of guilt. Accordingly, this Court should find that the State presented sufficient evidence of each element of the crime, and this Court should affirm Sievers's conviction for first-degree murder.

CLAIM XI

Motion for Judgment of Acquittal-Conspiracy

In this claim, Sievers contends that the court erred in denying his motion for judgment of acquittal on the conspiracy count. Sievers specifically argues that the State failed to prove that he conspired with Rodgers, especially in light of Wright's testimony that Sievers had no connection with Rodgers. Initial Brief at 114. "In reviewing a motion for judgment of acquittal, a de novo standard of review applies." *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002). The trial court's denial of a motion for judgment of acquittal will be affirmed if the record contains competent substantial evidence in support of the ruling. *McWatters v. State*, 36 So. 3d 613, 631 (Fla. 2010).

In denying the motion for judgment of acquittal on the conspiracy count, the judge explained,

> As far as the conspiracy goes, there's certain charges that are different than others. I would agree with defense counsel if this were a straight up battery or something else and it was and, and, and, and then the State would have the burden of doing all there; however, in a conspiracy, all the conspirators don't even need to communicate with each other directly in order to be part of the conspiracy.
>
> I think it's been pled appropriately. I think in the light most favorable to the State, they've met their burden.

(3868). The trial court's ruling requires affirmance.

The crime of conspiracy is comprised of the mere express or implied agreement of two or more persons to commit a criminal offense; both the agreement and an intention to commit an offense are essential elements. *Jimenez v. State*, 715 So. 2d 1038, 1040 (Fla. 3d DCA 1998). "A conspiracy exists where there is an express or implied agreement between two or more persons to commit a criminal offense and an intention to commit the offense." *Williams v. State*, 46 Fla. L. Weekly D727 (Fla. 1st DCA Mar. 31, 2021). "[T]he essence of conspiracy is the agreement to engage in concerted unlawful activity." *Id*. (quoting *United States v. Hartley*, 678 F.2d 961, 972 (11th Cir. 1982)). "The fact-finder may infer the agreement from the circumstances; direct proof is not necessary." *Vasquez v. State*, 111 So. 3d 273, 275 (Fla. 2d DCA 2013). The State presented competent substantial evidence that Sievers committed the crime of conspiracy.

Sievers's main argument is that the wording of the indictment requires proof that Sievers conspired with Rodgers. The indictment in this case states the following:

> Between April 30, 2015 and August 27, 2015 in Lee County, Florida, JIMMY RAY RODGERS and MARK D SIEVERS did unlawfully agree, conspire, combine, or

> confederate with each other and Curtis Wayne Wright to commit first degree murder by unlawfully agreeing, conspiring, combining, or confederating with each other to effect the death of Teresa Sievers, a human being, with a deadly weapon, contrary to Florida Statute 782.04;777.04(3);777.011.

(R. 79-80). Sievers argues that the word "and" requires that Rodgers and Sievers conspired together, and he asserts that no such proof was presented at trial.

The evidence adduced at trial established that Sievers asked Wright to kill his wife and they communicated about how and when the murder would occur. Sievers advised Wright that Wright could get someone to help him with the murder, but Sievers did not want to know who that person was or to be in communication with him or her. (T. 2770-73, 79).

Wright enlisted Rodgers's help in committing the murder, and Rodgers agreed. (T. 2778, 2810). Rodgers knew that he and Wright were committing the murder for Sievers. (T. 2794). Sievers had planned to pay Wright with the victim's life insurance money, and Wright would split the money with Rodgers. (T. 2779-80).

Sievers wanted the murder to occur during a family trip. (T. 2789-90). Sievers advised Wright that the victim would be returning

from the trip early, and the murder was to occur while Sievers and his daughters were still out of town. (T. 2789-90).

Sievers gave Wright information for when his wife would be returning home along with suggestions about where to enter the house. (T. 2815). Sievers provided the garage door code and alarm code, and planned to leave the side door unlocked. (T. 2792). Sievers recapped all the pertinent information with Wright over the phone the night before Sievers left for his family trip. (T. 2824). Wright and Sievers had been using burner phones to communicate about the murder, and Sievers advised Wright that he was destroying his phone after they ended the conversation. (T. 2824).

Rodgers prepared for the murder by bringing coverall suits, duct tape, and latex gloves for Rodgers and Wright to wear during the murder so they would not leave their DNA at the crime scene. (T. 2795-96). Rodgers and Wright traveled to Florida in Wright's rental car and used a navigation system that Wright had borrowed. (T. 2794-95, 2803). Sievers gave Wright money to use for the travel, and Wright and Rodgers spent that money during the trip. (T. 2817-18).

When Wright and Rodgers arrived in Florida, they scoped out the home so Rodgers could get familiar with the layout and to ensure

the house was prepared in the manner in which Sievers had described. (T. 2798, 2805). Sievers had instructed Wright to enter over the privacy fence, but Wright and Rodgers decided not to go that way because they would be too exposed. (T. 2798, 2810). Sievers had also offered the medical office as another location in which to commit the murder, but Wright and Rodgers went there and decided against it. (T. 2820).

Rodgers and Wright roamed around the area waiting for the victim to return that evening, and they eventually went back to the house and murdered her upon her arrival home from the airport. (T. 2813, 2747-52). Rodgers and Wright then drove back to Missouri together. (T. 2853).

Based on these facts, it was obvious that Sievers wanted his wife to be murdered. In order to carry out the murder, Sievers conspired with Wright directly and Rodgers indirectly in order for the murder to be committed. Sievers's decision to communicate directly through Wright and to avoid contact with any person Wright chose to have help him does not somehow render Sievers immune from the conspiracy. Sievers clearly intended for the victim's murder to occur and there was ample evidence that Wright and Rodgers agreed to

commit the murder for Sievers. In Wright's own words, "That's what we were hired to do[.]" (T. 2849).

The jury instructions in this case state that "It is not necessary that the agreement, conspiracy, combination, or confederation to commit murder be expressed in any particular words **or that words pass between conspirators.** (R. 737). Notably, Sievers accepted this standard jury instruction without voicing any objection. (T. 4079). Thus, it was not necessary for Sievers to speak directly to Rodgers. Sievers orchestrated the murder, and he advised Wright that he could get the help of someone else. Rodgers agreed to commit the murder and knew that he was doing so for Sievers. It is clear that Sievers, Wright, and Rodgers all shared a common purpose to commit the murder.

> [T]he goal of this conspiracy was the death of the victim. Because the death of the victim was the specific goal of the co-conspirators, their agreement heightened the danger to the public and the victim. And of course, in this case, the goal of the conspiracy, the victim's death, was attained.
>
> As with most conspiracies, the very agreement to work together to kill the victim, provided the co-conspirators with an increase in manpower, an increase in the capacity to plan, and an increase in resources. In theory, this group dynamic astronomically raised the chances that their objective would be attained (the victim would be killed), no

> one would back out of the plan, and if someone did back out, he would be replaced.

Calderon v. State, 52 So. 3d 813, 817 (Fla. 3d DCA 2011). The involvement of Rodgers in this case worked to Sievers's advantage because having the extra manpower coupled with Rodgers's experience helped ensure that Sievers's plan was carried out.

Sievers and his co-conspirators devised and executed a successful plan that resulted in the victim's death. Sievers's argument that he was entitled to an acquittal because he did not communicate directly with Rodgers is entirely without merit. The fact that Sievers chose to communicate directly to Wright and have Wright communicate with an additional coconspirator does not negate Sievers's orchestration of his wife's murder and his participation in the plan to take the victim's life. Wright and Rodgers were merely carrying out Sievers's plan. Sievers and his co-conspirators conspired to kill the victim and the victim was murdered as a result of the conspiracy. Competent, substantial evidence exists to support the trial court's denial of the motion for judgment of acquittal, and this Court should affirm.

CLAIM XII

Amended Notice of Aggravating Factors

In this issue,[3] Sievers argues that the trial court erred in denying his motion to strike the state's notice of intent to seek the death penalty when the State failed to give the required notice of aggravating factors within forty-five days of the arraignment. Here, the State initially filed a notice of intent without listing the aggravating factors and then immediately amended the notice to include the aggravation once Sievers filed his motion to strike.

Sievers specifically argues that the forty-five day time period began to run on May 5, 2016, when he filed his waiver of arraignment. He concludes that the State then had until June 20, 2016, to file its notice. He argues that because the State did not file notice of the aggravating factors until June 27, 2016, the notice was untimely.

[3] It should be noted that Sievers previously raised this very issue in a petition for writ of certiorari filed in the Second District Court of Appeal (2D16-5411). The State filed a response and Sievers filed a reply; however, the Second District Court of Appeal ultimately dismissed the petition.

It is the State's position that the State timely filed the notice of intent on June 22, 2016, and the court properly permitted the State to amend its notice to include the addition of the aggravating factors. With regard to the timeliness issue, the lower court determined that the State timely filed its original notice.

Sievers was indicted May 4, 2016. (R. 80). A capias was issued on that date, and it required Sievers's appearance at his arraignment scheduled for May 9, 2016. (R. 81). On May 5, 2016, defense counsel filed a pleading entitled, "Waiver of Arraignment." (R. 83). A first appearance court order was entered May 6, 2016, listing the arraignment date of May 9. (R. 84-85).

On May 9, 2016, Sievers appeared at his arraignment hearing, although his counsel was not present. (R. 129). The prosecutor informed the judge that Sievers was represented by counsel who had filed a written waiver of arraignment, but he did not know whether the waiver of arraignment contained a plea of not guilty. (R. 129). The judge, therefore, continued the hearing until the afternoon for Sievers to have his attorney present. (R. 129).

Defense counsel appeared at the hearing in the afternoon. He advised the judge that he had filed a written plea of not guilty and

waiver of the arraignment. (R. 130). He continued, "I'll just reassert that plea of not guilty, waive reading of the indictment and ask for 15 days." (R. 130). The court accepted the not guilty plea and scheduled a case management conference. (R. 131).

Forty-four days later, the State filed its notice of intent to seek the death penalty on June 22, 2016. (R. 91). In response, Sievers filed a motion to strike the notice. (R. 98-100). The motion stated that Sievers was arraigned for first-degree murder on May 9, 2016. (R. 98). The motion alleged that the State's notice of intent was "materially defective" because it did not contain a list of the aggravating factors. (R. 98-99).

The State thereby filed an amended notice on June 27, 2016, adding the cold, calculated, and premeditated and pecuniary gain aggravating factors. (R. 102-103). The State also filed a response to the motion to strike alleging that the omission of the aggravating factors in its original notice of intent was inadvertent. (R. 104-105). The State noted that the amended notice had been filed within one week of the original notice. (R. 104). In addition, the response claimed that Sievers had not been prejudiced because no depositions had

been taken, no hearings had been scheduled, and Sievers had waived speedy trial. (R. 104).

Sievers subsequently filed an amended motion to strike, which claimed that his written plea of "not guilty" had triggered the forty-five-day period in which the State was required to file the notice of intent to seek the death penalty. (R. 115-117). He argued that the notice was filed forty-eight days after his arraignment had been waived. (R. 116-117). The State filed a response arguing that the arraignment was held and the original notice was filed within forty-five days of the arraignment. (R. 123-125).

Sievers filed another response in which he acknowledged that he was directed to be present for the arraignment, and he "complied with the order of the court and appeared for the Arraignment." (R. 134). The response further stated that the court "did not give the undersigned counsel the opportunity to waive the arraignment." (R. 134).

The lower court held a hearing to address the motion to strike the notice. During the hearing, Sievers, through counsel, argued that he had a substantive right not to be convicted and sentenced without adequate time to prepare and the right not to be forced to "endure a

capital trial except upon reasonable notice[.]" Defense counsel further argued that the original notice was "deficient on its face" because it did not contain the aggravating factors.

The lower court subsequently entered an order denying the motion to strike the notice. (R. 153-156). The order noted that arraignment was held on May 9, 2016. (R. 153). The order held that pursuant to rule 3.160(a), of the Florida Rules of Criminal Procedure, an arraignment may be waived by a defendant upon the filing of a "written plea of not guilty" at or before the arraignment, but Sievers filed a "waiver of arraignment." (R. 154). The court found that since Sievers did not file a "written plea of not guilty" there was no error in holding an arraignment because he did not file a pleading designed to trigger a waiver of arraignment. (R. 154). The court therefore held that the State's notice was timely filed because it was filed within forty-five days of the arraignment. (R. 155).

The court additionally determined that the State's response and its amended notice constituted good cause to amend the notice, and the amended notice listed aggravating factors which complied with the newly amended statute. (R. 155). The court concluded that the

delay in amending the notice was negligible and Sievers was not prejudiced. (R. 155).

The Trial Court Properly Permitted the State to Amend the Notice

The State agrees with Sievers that the statute at issue went into effect March 7, 2016, and was thereby applicable to this case.[4] The pertinent part of the statute reads as follows:

> If the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a showing of good cause.

§ 782.04 (1)(b), Fla. Stat. Here, because Sievers actually had an arraignment hearing, that was the triggering date for the clock to begin to run in order for the notice of intent to be filed.

While Sievers argues that the clock started when he filed his waiver of arraignment, as the trial court properly determined,

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[4] However, the new rule that was amended in response to this statute did not go into effect until September 15, 2016. *See In re Amendments to Florida Rules of Criminal Procedure*, 200 So. 3d 758 (Fla. 2016); Fla. R. Crim. P. 3.181.

Sievers's pleading did not actually serve to waive the arraignment. Instead, the arraignment was actually conducted in this case, even Sievers's trial counsel acknowledged as much in his pleadings. (R. 98, 134). Given that Sievers was arraigned on May 9, 2016, and the statute required that the State's notice be filed "within 45 days after arraignment[,]" the State's notice was timely filed on the forty-fourth day--June 22, 2016.[5]

Pursuant to section 782.04 of Florida Statutes, the court may allow the prosecutor to amend the notice upon a showing of good cause. The determination of good cause is based on the particular facts and circumstances of each case. *Dohnal v. Syndicated Offices Systems*, 529 So. 2d 267, 269 (Fla. 1988). "[T]he trial court is in the best position to weigh the equities involved, and his exercise of

[5] It is the State's position that the court was merely permitting the State to amend its previously timely filed notice of intent to comply with the statute by including the aggravating factors; however, even if the notice was not considered timely filed, the court was permitted to extend the State's deadline to file the notice of intent to seek the death penalty. *See State v. Chantiloupe*, 248 So. 3d 1191, 1198 (Fla. 4th DCA 2018) (holding that Rule 3.050 provides authority for a circuit court to extend the deadline to file a notice of intent to seek the death penalty).

discretion will be overruled only upon a showing of abuse." *Id*. The lower court did not err in permitting the amendment in this case.

Here, the State filed the amended notice that included the aggravating factors within just five days of it filing its original notice. The State had acknowledged that its failure to include the aggravating factors within the original notice was inadvertent.

In *Dohnal v. Syndicated Offices Systems*, 529 So. 2d 267, 269 (Fla. 1988), this Court determined that there was no abuse of discretion in finding good cause to grant an extension due to a clerical error when there would be no prejudice caused by the extension. Similarly, in this case, the State acknowledged its omission by failing to include the aggravating factors within the notice, and it moved to amend the notice within mere days of filing the original notice. Given the extremely short-time period in between the two filings, and the fact that the amended notice was filed a mere four days beyond the forty-five-day window, Sievers was not prejudiced in any way by the amended notice. Sievers cannot legitimately argue that his trial preparation was impacted by the few days of delayed notice of the aggravating factors, especially given that no discovery or major case activity occurred during that timeframe.

Under these circumstances, the trial court properly exercised its discretion in permitting the State to amend its notice of intent.

The State Was in Substantial Compliance with the Statute

The purpose of the section 782.04 (1)(b), Florida Statutes, is for notice to be provided to the defendant. Here, the State did provide Sievers notice of its intent to seek the death penalty as well as notice of the aggravating factors that the State intended to prove. From the time that the State provided notice of the aggravating factors, Sievers had three years, five months, and thirteen days to prepare his defense before the penalty phase started. This is clearly not a case in which the State's delayed notice hampered the defendant's ability to prepare for trial. Sievers was given an opportunity to prepare his defense and to rebut the aggravating factors. The State complied with the purpose and spirit of the statute. Accordingly, the State was in substantial compliance with the statute. *Cf. Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998) (substantial compliance, not strict compliance of the election laws is what is required); *Megacenter US LLC v. Goodman Doral 88th Court LLC*, 273 So. 3d 1078, 1084 (Fla. 3d DCA 2019) (stating that only substantial and not strict compliance, is necessary where notice is required

under contracts and statutes citing *Patry v. Capps*, 633 So. 2d 9, 10-11 (Fla. 1994)). For all these reasons, this claim should be denied.

CLAIM XIII

The Prosecutor's Closing Argument Concerning Mitigation

Here, Sievers argues that the prosecutor erred by telling the jury to find that no mitigation had been established when the mitigating circumstance that Sievers had no prior criminal history was uncontested. The prosecutor specifically argued that "if one or more individual jurors find that one or more mitigating circumstances was established by the greater weight of the evidence, check 'no." It was not." (R. 1364). As Sievers acknowledges in his brief, no objection was lodged to this challenged statement; therefore, the fundamental error standard applies here. *Kaczmar v. State*, 228 So. 3d 1, 11-12 (Fla. 2017). Sievers has failed to establish fundamental error.

The fact that Sievers had no prior criminal history was uncontested. During the penalty phase, the State conceded that Sievers had no prior criminal history. When the prosecutor was discussing mitigating circumstances during the penalty phase closing argument, he stated the following:

> Let's talk about the mitigating circumstances. **Mark Sievers has no significant history of prior criminal activity. We agree with that. The defense has met its burden.** We checked his criminal history. We agree. **You don't have to use up time trying to figure out whether Mr. Sievers has a criminal history. He does not. Okay? That burden is met.**
>
> **However, his lack of criminal history doesn't outweigh the aggravating circumstances...**

(R. 1361). The prosecutor went on to discuss the remaining mitigating circumstances. (R. 1362-64). As to each additional mitigating circumstance, the prosecutor argued that it had not been proven by a greater weight of the evidence, but if the jury thought it had been proven, they should find that it did not outweigh the aggravating factors. (R. 1362-64).

The portion of the prosecutor's closing argument that Sievers now challenges on appeal appears to be a brief misstatement about which box to check if mitigating circumstances are found. When determining whether an improper comment constitutes fundamental error, this Court's consideration "include[s] whether the statement was repeated and whether the jury was provided with an accurate statement of the law after the improper comment was made." *Bright v. State*, 299 So. 3d 985, 1000 (Fla. 2020) (quoting *Poole v. State*, 151

So. 3d 402, 415 (Fla. 2014)). Here, the prosecutor's misstatement was not repeated.

After the isolated statement, the prosecutor correctly articulated and referenced the instructions during the remainder of the argument. Indeed, the prosecutor advised the jury that the defense had met their burden of establishing the mitigating circumstance that Sievers had no prior criminal history. (R. 1361). Contrary to Sievers's argument, the prosecutor did not tell the jury to reject the conceded statutory mitigation in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The prosecutor told the jury to find that the "no prior criminal history" mitigating circumstance had been established, and the prosecutor urged the jury to find that the mitigation did not outweigh the aggravating factors. (R. 1361). The prosecutor never told the jury to disregard that mitigating circumstance or to find that it was not established by the evidence.

Subsequently, during defense counsel's closing argument, he reminded the jury that the State "conceded" that Sievers "has no criminal history whatsoever[.]" (R. 1374). He continued, "So he's 51 years old, never been arrested in his life." (R. 1374).

The judge then correctly instructed the jury about their determination of whether any mitigating circumstances exist. (R. 1380-82). The judge explained:

> A 'mitigating circumstance' is anything that supports a sentence of life imprisonment without the possibility of parole and could be anything which might indicate that the death penalty is not appropriate.
>
> It is not limited to the facts surrounding the crime. A mitigating circumstance may include any aspect of the defendant's character, background, or life, or any circumstance of the offense that may reasonably indicate that the death penalty is not an appropriate sentence in this case.
>
> It is the defendant's burden to prove that one or more mitigating circumstances exist. Mitigating circumstances do not need to be proven beyond a reasonable doubt. Instead, the defendant must only establish a mitigating circumstance by the greater weight of the evidence, which means evidence that more likely than not tends to establish the existence of a mitigating circumstance.
>
> If you determine by the greater weight of the evidence that a mitigating circumstance exists, you must consider it established and give that evidence such weight as you determine it should receive in reaching your verdict about the appropriate sentence to be imposed.
>
> Any juror persuaded as to the existence of mitigated circumstance must consider it in this case...

(R. 1381-82).

Significantly, the judge instructed:

> C reads: Mitigating Circumstances.
> **One or more individual jurors find that one or more mitigating circumstances was established by the greater weight of the evidence.**

> **If the jury decides "yes," you'll check "yes."**
> And if not, it's "no."

(R. 1386) (emphasis added). The judge further mandated that the jury follow the law as laid out in the instructions, and that their decisions must be based on the evidence and the law contained in the instructions. (R. 1392, 1394). Thus, any potential confusion caused by the prosecutor's isolated comment was corrected by the proper instructions provided to the jury and the requirement that the jury follow those instructions. Given that the prosecutor's misstatement was made only once and it was followed by correct statements of the law and the jury was ultimately provided accurate jury instructions, the statement does not rise to the level of fundamental error. *Kaczmar v. State*, 228 So. 3d 1, 12 (Fla. 2017) (finding that prosecutor's improper characterization of mitigating evidence as "excuses" did not rise to the level of fundamental error where a comment was made only once, and the trial court's instructions included an accurate statement of the law); *Poole v. State*, 151 So. 3d 402, 415 (Fla. 2014) (finding no fundamental error where the prosecutor referred to mitigating testimony from Poole's family members as "all that crap."); *see also Bright*, 299 So. 3d at 1000–01 (where the prosecutor's single

misstatement of the law was not so harmful that the sentence of death could not have been obtained without the assistance of the error).

Standing alone, the jury's determination that no mitigating circumstances had been established simply does not support a finding of fundamental error in this case. CCP is one of the most serious aggravators, and the jury unanimously found that aggravating factor had been established. The jury clearly knew that the State was not contesting the existence of the "no prior criminal history" mitigating circumstance. The parties were in agreement that the mitigation had been established.

It would not, however, have made a difference in Sievers's case if the jury would have credited that mitigation. Sievers's lack of criminal history prior to murdering his wife is not a weighty mitigating circumstance, especially in light of Sievers's heightened premeditation in effectuating his wife's murder.

Moreover, the trial court found that Sievers had no prior criminal history, but the judge gave that mitigating circumstance little weight. (R. 929-30). The court also found additional mitigation, but it ultimately determined that the State's aggravation outweighed

the mitigating circumstances. (R. 932). As this Court has recognized, the CCP aggravator is one of the most serious aggravators set out in the statutory sentencing scheme. *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006). The strong and serious CCP aggravator in this case greatly outweighs the fact that Sievers had no criminal history prior to planning and arranging for his wife's murder. Therefore, even if the jury would have checked "yes" in the box for mitigation, it would not have impacted their unanimous verdict for death. Sievers has failed to satisfy his burden of establishing fundamental error.

Sievers's alternate ineffective assistance of counsel argument on the face of the record is equally without merit. There can be no finding of deficient performance based solely on defense counsel's lack of objection to the prosecutor's argument. Defense attorneys frequently choose not to object during closing arguments and opening statements in order to avoid aggravating the jury and for other strategic purposes. There could be a number of reasons why no objection was lodged here, and thus, this claim cannot be determined based solely on the cold record. Furthermore, there can be no showing of prejudice on the face of the record in light of the proper instructions that were provided to the jury along with the

requirement that the jury follow those instructions as laid out. Sievers simply cannot show that he would have received a life sentence in the absence of the prosecutor's statement.

CLAIM XIV

Redaction of the Postcard

In this issue, Sievers argues that the trial court erred in sustaining the State's objection to a portion of a postcard written by Sievers's daughter that was used during the penalty phase. Sievers contends that redaction of the document violated his constitutional rights. A trial court's rulings as to excluded evidence should be reviewed under the abuse of discretion standard. *Frances v. State*, 970 So. 2d 806, 813 (Fla. 2007). No abuse of discretion has been demonstrated in this case.

Notably, the State initially objected to admission of the entire postcard. (R. 1258). Defense counsel argued that he was seeking to admit it to show the loving relationship between Sievers and his daughter. (R. 1259). The State subsequently explained that even though the entire document was hearsay, if the court wanted to redact the document, the objection would be only to the specific portion of the statement that was not appropriate, where the victim

asks, “Is it possible they could kill you? I really hope not. Please say no.”

As to the State’s hearsay objection, the defense stated that “I don’t think the hearsay argument objection works” because the rules of evidence are relaxed during the penalty phase. (R. 1262). The court responded that the case law holds that the hearsay is not allowed; “technically, under the law, I shouldn’t do it, but the State’s basically saying they won’t object, I’m assuming, if those three lines are redacted.” (R. 1263). The court ultimately found that “the portion where she says she loves him is relevant. I think if there’s no objection from the State, I’ll allow that portion.” (R. 1263). Now, Sievers argues that the lower court erred in excluding the portion of the postcard that had been redacted.

The postcard was admitted through the testimony of Sievers’s mother, Bonnie Seivers. (R. 1286-87). As the State argued, the postcard was hearsay. Because Sievers’s daughter did not testify, the State had no opportunity to cross-examiner her.

Hearsay evidence may be admissible in a penalty-phase proceeding if there is an opportunity to rebut the evidence. *Mendoza v. State*, 700 So. 2d 670, 675 (Fla. 1997). Under section 921.141(1),

Florida Statutes, "Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." "While the statute relaxes the evidentiary rules during the penalty phase of a capital trial, the statute clearly states that the defendant must have an opportunity to fairly rebut the hearsay evidence in order for it to be admissible. **This rule applies to the State as well**." *Frances v. State*, 970 So. 2d 806, 814 (Fla. 2007) (emphasis supplied). In fact, "this Court has repeatedly recognized that the State must be given the same opportunity as the defendant to rebut hearsay statements." *Carr v. State*, 156 So. 3d 1052, 1063 (Fla. 2015).

Here, the State had no opportunity to rebut the hearsay statements contained within the postcard because Sievers's daughter did not testify and therefore was not subject to cross-examination. Thus, the trial court could have properly excluded the *entire* postcard instead of merely redacting it. Such action would be fully supported and authorized under Florida law. *See, e.g.*, *Carr v. State*, 156 So. 3d 1052, 1064 (Fla. 2015) (finding no abuse of discretion in the trial court's exclusion of the defendant's arrest report and petition for

injunction because none of the declarants testified); *Frances v. State*, 970 So. 2d 806, 813–14 (Fla. 2007) (finding no abuse of discretion in exclusion of hearsay statements made by the defendant's brothers when they did not testify and were not subject to the State's cross-examination). In this case, the State was generous in not objecting to the remainder of the postcard, and the trial court properly exercised its discretion in redacting only a portion of it and permitting the rest. The defense's stated reason for seeking admission of the postcard was to show the loving and caring relationship between Sievers and his daughter, and the redacted document that the lower court admitted showed that. Sievers has failed to show an abuse of discretion under these circumstances.

Sievers further argues that the excluded statement was admissible under Marsy's law because Sievers's daughter was the victim's next of kin, so her preference that Sievers receive a life sentence could not be excluded. Sievers did not offer this argument to the lower court below, so it is not preserved. Nevertheless, Sievers, the defendant in this case, does not have standing to challenge the rights of the victim in his appeal. *See* Art. 1, § 16 (c), Fla. Const. (explaining that the victim, the retained attorney of the victim, or the

office of the state attorney may assert and seek enforcement of the victim's rights). Nevertheless, as Sievers recognizes, the State did provide a victim impact statement in the form of a letter during his sentencing hearing. Therefore, in the event that the victim wanted to be heard regarding Sievers's sentencing, she was provided that opportunity in accordance with Marsy's Law.[6]

Sievers, however, does not get to use the provisions of Marsy's Law to circumvent the rules of evidence during his penalty phase proceeding. He chose to admit a letter into evidence without having his daughter testify. The preclusion against hearsay still applies here. The admitted portion of the postcard demonstrates the loving and caring relationship between Sievers and his daughter, while the precluded portion was clearly hearsay intended to prove the truth of the matter asserted—that she did not want Sievers to be executed.

Even if the court somehow erred in permitting redaction of the postcard, any alleged error must be deemed harmless. The admitted evidence established that the daughter wrote Sievers while he was incarcerated, showing that she continued to support him and

[6] It is also worth noting that the defense reentered the postcard into evidence during the *Spencer* hearing. (R. 999).

maintain a relationship with him. The postcard was donned in an envelope containing special messages from her to Sievers that stated, "You're the best" and "I love you."[7] (R. 2859). The defense's reason for wanting to admit the entire postcard was to show the loving relationship between Sievers and his daughter, and that was achieved with the redacted version that the court admitted.

Defense counsel argued to the jury that that they should find mitigation based on Sievers's role as a father. (R. 1375-76). Sievers's penalty phase witnesses all testified about his loving relationship with his daughters and that he was a great father. The jury was clearly unconvinced by this mitigation, most likely given that Sievers killed his daughters' mother. Additionally, the trial court considered the entire postcard but nevertheless found that while Sievers may have been "a good father, he planned for and arranged for the murder of his daughters' mother." (R. 930). Accordingly, the court gave the mitigating factor little weight. Based on the foregoing, the inclusion of the precluded statement would not have resulted in a life sentence. Based on the foregoing, Sievers is not entitled to appellate relief.

[7] The actual messages read, "Ur the best" and "I LY!!" (R. 2859).

CLAIM XV

Victim Impact Evidence

Sievers next complains that the judge erred in admitting victim impact evidence. In this issue, Sievers references a video of the victim as well as testimony from the victim's mother. The challenge to the video being irrelevant and prejudicial was preserved by an objection raised prior to the admission of the video. (R. 135-36, 1240-41).[8] However, Sievers also discusses, and appears to be challenging, victim impact testimony from the victim's mother. Notably, Sievers never objected to her testimony during the penalty phase. (R. 1244-1252). In his brief, Sievers references his pretrial motion to have all the victim impact evidence presented to the judge alone. Initial Brief at 142. That motion objecting in general to all victim impact evidence did not serve to preserve any specific objection to the victim's mother's testimony.

To the extent that Sievers is also challenging the victim's mother's testimony in addition to the video, this issue is procedurally barred on appeal. *Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995);

[8] There was no specific objection raised to the defense being unable to counter or cross-examine the video.

see also Silvia v. State, 60 So. 3d 959, 978 (Fla. 2011) (finding general "standing objection" to the victim impact evidence did not preserve challenge to the specific comments with which defendant takes issue on appeal when no specific objection was raised to those comments); *Wheeler v. State*, 4 So. 3d 599, 606 (Fla. 2009) (where the argument that the victim impact evidence was impermissibly made a feature of the penalty phase was not preserved by the defendant's general pretrial objections addressed to all victim impact evidence); *Deparvine v. State*, 995 So. 2d 351, 379 (Fla. 2008) (rejecting a claim that the trial court erred in permitting the victim impact witnesses to display photographs during their testimony when "Deparvine did not object specifically on this basis, and thus this claim is procedurally barred on appeal.").

With regard to the video at issue, Sievers claims that the video of the victim was not proper victim impact evidence. The admission of victim impact testimony is governed by section 921.141, of Florida Statutes, which permits the prosecution to introduce victim impact evidence to the jury that is designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. § 921.141 (7), Fla.

Stat. A trial court's decision to admit victim impact evidence is reviewed for an abuse of discretion. *Baker v. State,* 71 So. 3d 802, 817 (Fla. 2011). The trial court properly admitted the video in this case.

Here, the judge reviewed the video and found it admissible. In overruling defense counsel's objection, the court determined that "it's appropriate, given its short nature and the fact that it is community impact, as well as victim impact oriented, as to the loss of the community and the family." (R. 1242). Sievers has failed to show that the lower court abused its discretion.

The victim was a board certified doctor of internal medicine with a unique approach to medicine and healing. After practicing as a doctor, she went back to school to get her Master of Science degree in Metabolical Medicine. She eventually became board certified by the American Board of Holistic and Integrative Medicine, and she also obtained certifications in Functional and Antiaging Medicine and Energy Medicine. (R. 1245-46). She was a well-respected doctor within the community who was recognized by her compassion for her patients and comprehensive and holistic approach to treatment and healing. (R. 1247). Prior to her death, she had been selected to host

a television series called Pathways to Healing, and she had started filming episodes focused on the power of healing. (R. 1249-50).

The video at issue is a very short segment from one of her recorded programs that demonstrates the victim's unique approach to healing, and in turn, the impact that she had within the community. She briefly discusses the approach that she takes with her patients, which includes listening to their intuition and practicing preventative medicine. (R. 1253-54). The video constitutes permissible victim impact evidence that allowed the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death."

This Court has consistently upheld similar evidence that demonstrated a victim's unique contributions to his or her family and/or society. *See, e.g.*, *Peterson v. State*, 94 So. 3d 514, 530 (Fla. 2012) (Testimony that the victim was previously a law enforcement officer "who tried to help others and preferred working in the most difficult areas of the city clearly is relevant to 'demonstrat[ing] the victim's uniqueness as an individual human being.'"); *Baker v. State*, 71 So. 3d 802, 818 (Fla. 2011) (holding that that testimony concerning the loss of the victim as a provider or caregiver is

appropriate evidence of the impact of the victim's death); *Franklin v. State*, 965 So. 2d 79, 97 (Fla. 2007) (finding victim impact testimony from various family members and a coworker proper where testimony described the victim's Army service as well as the ways in which he helped family, friends, and neighbors).

The fact that the evidence was a video in and of itself should not impact the admissibility of such evidence. This Court has upheld the use of photographs as victim impact evidence. "There is nothing in our case law or the victim impact statute that prevents the State from presenting photographs as part of its victim impact evidence and, as with victim impact evidence from witnesses, we have never drawn a bright line as to the number of permissible photographs that the State may present." *Wheeler v. State*, 4 So. 3d 599, 608 (Fla. 2009). In *Wheeler*, this Court found neither fundamental error nor a due process violation by the admission of fifty-four photographs of the victim in different settings such as with family members, holding babies, coaching, and serving in the National Guard.

In this case, the video was limited to showing the victim's uniqueness as a human and doctor and the impact that she had on others. This was preciously the type of evidence deemed admissible

and proper. § 921.141 (7), Fla. Stat.; *see also Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ([I]f the State chooses to permit the admission of victim impact evidence [...] the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.). It was not being used to prove any aggravating factor, and this Court has rejected such arguments that victim impact evidence constituted impermissible nonstatutuory aggravators that should be excluded during the penalty phase of a capital case. *Windom v. State*, 656 So. 2d 432, 438 (Fla.1995). The trial court properly exercised its discretion in admitting the video to show the resultant loss to the community by the victim's death.

However, even if this Court were to find error, any error must be deemed harmless. The video was very brief, under two minutes in length. (R. 1235, 1236). Given that the video was of the victim, the video obviously did not include any prohibited conduct such as opinion about the crime, the defendant, or the appropriate sentence. Moreover, the judge properly instructed the jury that the victim impact evidence was presented to show the victim's uniqueness as

an individual and the resultant loss by her death, and the jury "may not consider this evidence as an aggravating factor." (R. 1378). Any alleged error in admitting this evidence was harmless beyond a reasonable doubt. For the foregoing reasons, this claim should be denied.

CLAIM XVI

Spencer Hearing

Sievers argues that the trial court committed fundamental error by failing to hold a *Spencer* hearing in his case. While Sievers claims that no *Spencer* hearing was conducted, it appears that the trial court merely consolidated the *Spencer* hearing with the sentencing hearing. The *Spencer* hearing occurred on January 3, 2020, and transcripts contained in the appellate record are titled, "*Spencer* Hearing." (R. 901). Defense counsel referred to the hearing as a *Spencer* hearing, acknowledging that the court had asked the parties to submit their sentencing memoranda prior to the *Spencer* hearing. (R. 1021).

The hearing in this case served all of the necessary functions of a *Spencer* hearing. The parties and counsel were given an opportunity to be heard; the parties were given an opportunity to present additional evidence; the parties were given the opportunity to

comment or rebut the PSI; and Sievers was given the opportunity to address the court in person. *Spencer v. State*, 615 So. 2d 688 (Fla. 1993). Contrary to Sievers's claim, the court did indeed hold a *Spencer* hearing.

To the extent that Sievers is arguing that the trial court erred in consolidating the *Spencer* hearing with the sentencing hearing, as Sievers properly acknowledges, his counsel did not object when the trial judge informed defense counsel of his intention to impose the sentence that same day. (R. 1021). Therefore, as Sievers recognizes, the fundamental error standard applies here, and Sievers has failed to show that the judge's actions amounted to fundamental error. *See Woodbury v. State*, 46 Fla. L. Weekly S74, n. 10 (Fla. Apr. 15, 2021) (finding no showing of fundamental error in the trial the court's failure to recess after the *Spencer* hearing in order to hold a separate proceeding for the imposition of the sentence).

While *Spencer* hearings are generally separate hearings conducted prior to sentencing, it is not uncommon for a court to hold a joint *Spencer* and sentencing hearing. *See, e.g., Craft v. State*, 312 So. 3d 45, 51 (Fla. 2020) (where the trial court held a held a joint *Spencer* hearing and sentencing hearing); *Robertson v. State*, 187 So.

3d 1207, 1216 (Fla. 2016) (where the jury sentencing had been waived and the judge combined the evidentiary portion of the sentencing hearing, the *Spencer* hearing, and the imposition of the sentence into one proceeding). "The purpose of the *Spencer* rule is 'to ensure that trial judges take the time to consider all relevant circumstances and arrive at an informed decision uninfluenced by haste and initial impressions.'" *Robertson v. State*, 187 So. 3d 1207, 1216 (Fla. 2016) (quoting *Happ v. Moore*, 784 So. 2d 1091, 1103 n. 12 (Fla. 2001)).

Here, the judge considered all of the evidence and relevant circumstances before imposing Sievers's sentence. Sievers has failed to explain how the alleged error in holding a joint *Spencer* and sentencing hearing reached down into the validity of his penalty phase to the extent that his death sentence could not have been obtained without the assistance of the alleged error. Sievers certainly cannot show that he would have received a life sentence had the sentencing hearing been scheduled for a later date.

Sievers did not present any testimony during the *Spencer* hearing. Therefore, there was no additional testimonial evidence received from expert or lay witnesses that would have warranted

extra time and consideration from the trial court prior to sentencing. The only evidence that Sievers admitted during the *Spencer* hearing included (1) his daughter's postcard (addressed in Claim XIV), which was cumulative because it had already been presented during the penalty-phase hearing before the jury, and (2) correspondence from the Lee County Sheriff's Office intended to show that Sievers had no disciplinary reports since his incarceration. (R. 1001). Setting off the sentencing date for the court to contemplate Sievers's lack of disciplinary action during his incarceration certainly was not necessary.

Moreover, the court had asked for sentencing memoranda prior to the *Spencer* hearing, and the record reflects that the court read each side's memorandum prior to the *Spencer* hearing. (R. 994, 997). Thus the judge was aware of the parties' positions and legal argument prior to the *Spencer* hearing, and the judge provided opportunity for additional argument and evidence during that hearing, and therefore, prior to sentencing. *See Robertson*, 187 So. 3d at 1216–17 (finding Robertson was not deprived of the opportunity to present evidence or address the court before the imposition of sentence when the judge combined the imposition of the sentence with the *Spencer* hearing).

The judge made a well-reasoned and well-informed decision after carefully considering all of the evidence, arguments, and authority.[9]

The jury unanimously determined that Sievers should be sentenced to death, and the trial court assigned great weight to the jury's verdict for death. (R. 762, 927). The trial court further gave great weight to the CCP aggravating factor. (R. 928).

As to the mitigating circumstances, the court found that Sievers had proven that he had no significant criminal history and gave it little weight. (R. 929-30). The court further gave little weight to the fact that Sievers was a model prisoner and has been an extended support system for his family and friends. (R. 930). "While Defendant may have been supportive and loving to his family, and a good father, he planned and arranged for the murder of his daughters' mother." (R. 930). The court determined that Sievers did not prove the mitigating circumstance that he was an accomplice because the evidence showed that Sievers instigated the commission of the murder and was the individual planning and making arrangements

[9] It is also worth noting that the judge took several recesses during the *Spencer* hearing as well as one final recess "to collect [his] thoughts" prior to imposing the sentence. (R. 1024).

for it. (R. 930). "Defendant was not an accomplice, and his participation was not minor." (R. 930).

The lower court ultimately concluded that "there is no basis in this case, under the totality of the circumstances and evidence, to override the jury's verdict." (R. 932). The mitigation in this case was minimal and the very weighty CCP aggravator was clearly established. Therefore, the court determined that the aggravating factor proven beyond a reasonable doubt in this case "outweighs the mitigating circumstances reasonably established by the evidence and warrants that the Defendant, Mark Sievers, be sentenced to death." (R. 932). Here, Sievers cannot show that the trial judge would have overridden the jury recommendation and sentenced him to life in prison had the court sentenced him at a later date.

By the same token, Sievers cannot show any prejudice by counsel's failure to object to the trial court imposing the sentence on the same day as the *Spencer* hearing. Ineffective assistance of counsel allegations on direct appeal must be apparent on the face of the record, and no such apparency exists here. *Smith v. State*, 998 So. 2d 516, 522–23 (Fla. 2008) (recognizing that only in "rare exceptions" may appellate counsel successfully raise an issue of ineffective

assistance of counsel on direct appeal where the ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue). Based on the circumstances of this case, neither the deficiency prong nor the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), is apparent on the face of the record by counsel's failure to object. *Cf. Robertson v. State*, 187 So. 3d 1207, 1216–17 (Fla. 2016) (finding no due process violation by the judge's preparation of the sentencing order where the judge combined the evidentiary portion of the sentencing hearing, the *Spencer* hearing, and the imposition of the sentence into one proceeding, and the sentencing order was prepared in advance). For all these reasons, Sievers's claim must be denied.

CLAIM XVII

Evidence of CCP

Next Sievers argues that his death sentence is unconstitutional because there was insufficient evidence to establish the cold, calculated, premeditated aggravating factor. Sievers contends that the State relied solely on Wright's trial testimony to prove the sole aggravating factor in this case, and he argues that Wright's testimony was flawed and incompetent. The State takes issue with Sievers's

description of Wright's testimony. Sievers's appellate counsel may not agree with Wright's testimony, but that is not the standard for determining whether CCP is present. It is further not the function of this Court to reweigh the evidence. Instead, this Court determines whether competent, substantial evidence supports the finding of CCP. *Tai A. Pham v. State*, 70 So. 3d 485, 498 (Fla. 2011). Competent, substantial evidence certainly exists in this case.

> [I]n order to find the CCP aggravator factor ... the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.

Hertz v. State, 803 So. 2d 629, 649–50 (Fla. 2001) (quoting *Jackson v. State*, 648 So. 2d 85, 89 (Fla.1994)). The murderer must fully contemplate effecting the victim's death. *Smith v. State*, 28 So. 3d 838, 867 (Fla. 2009).

The murder in this case was cold. The cold element of CCP is established where the murder is not committed in the heat of passion. *Marquardt v. State*, 156 So. 3d 464, 487 (Fla. 2015). This was not a crime of heat of passion. Sievers long contemplated and

planned for his wife's murder. The murder was the product of Sievers's cool, cold, and calm reflection rather than panic, emotional frenzy, or rage.

The victim's murder was calculated. "This Court has stated that calculation means to plan beforehand, to think out, design, prepare, or adopt by forethought or careful plan." *Marquardt v. State*, 156 So. 3d 464, 487 (Fla. 2015) (citing *Rogers v. State*, 511 So. 2d 526, 533 (Fla.1987)). The evidence shows that Sievers expressed his intent to have his wife murdered to Wright nearly two months before the murder was committed. Wright and Sievers purchased burner phones and communicated on them for weeks about the timing and place in which the murder would occur. Sievers planned for the murder to occur while he and the girls were out of town, which offered him an alibi and ensured that the girls would not be around during the murder. After the murder, Sievers called a family friend to go to the house so that the body would be found while he and the girls were still out of town. This was calculated in every sense of the word.

Sievers had heightened premeditation and there was no pretense or moral or legal justification for the murder. Sievers fully contemplated the victim's death and he effectuated that plan by

hiring Wright to commit the murder for him. Sievers carefully planned out the logistics of when and where the murder would occur, and he equipped Wright with the necessary information for how and where he should gain access to his home, or alternatively, the victim's medical office. He provided his garage and alarm codes to Wright and left his side door unlocked for Wright's entry into the home. Sievers told Wright when the victim would be arriving home from the airport, and he recapped all of the pertinent information with Wright before he left for his trip. Sievers also provided Wright with money for his travel expenses to and from Florida in order to commit the murder, and he promised to pay Wright with the proceeds from the victim's life insurance money.

Competent, substantial evidence presented in this case clearly support's the finding that the murder was cold, calculated, and premeditated. The amount of time that Sievers spent planning and pre-arranging for the victim's murder is certainly indicative of CCP. *See, e.g., Victorino v. State*, 23 So. 3d 87, 106 (Fla. 2009) (finding evidence sufficient to support CCP where Victorino and three codefendants met the morning before the murders and Victorino outlined a plan to recover his property and to kill everyone, Victorino

discussed his plan later in the day, provided bats for himself and the codefendants, and directed where each person should go inside the house). Because the CCP aggravator is clearly supported by competent, substantial evidence, and the jury unanimously found the existence of that aggravating factor, the death sentence in this case is constitutional and Sievers is entitled to no relief.

CLAIM XVIII

Proportionality Review

In his final claim, Sievers claims that his sentence is disproportionate and he challenges this Court's decision in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), ending proportionality review of death sentences. The conformity clause of the Florida Constitution requires the prohibition against cruel or unusual punishment to be construed in conformity with Eighth Amendment precedent from the United States Supreme Court. Art. 1 § 17, Fla. Const. Notably, in *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984), the Supreme Court held that comparative proportionality review of death sentences is not required by the Eighth Amendment.

Therefore, in *Lawrence*, this Court properly recognized that the Florida Constitution's conformity clause "forbids this Court from

analyzing death sentences for comparative proportionality in the absence of a statute establishing that review." *Lawrence*, 308 So. 3d at 545. In so holding, this Court receded from *Yacob v. State*, 136 So. 3d 539 (Fla. 2014), and "eliminate[d] comparative proportionality review from the scope of our appellate review set forth in rule 9.142(a)(5)." *Lawrence*, 308 So. 3d at 552.

While Sievers argues that his death sentence is not proportionate, given that this Court receded from the judge-made requirement to review the comparative proportionality of death sentences as contrary to the conformity clause of the Florida Constitution, no proportionality review of his death sentence should be conducted in this case.

CONCLUSION

Based on the foregoing arguments and authorities, the State of Florida respectfully requests that this Court affirm Sievers's convictions and sentences.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of May, 2021, 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: Karen Kinney, Assistant Public Defender, 10th Judicial Circuit Public Defender's Office, P.O. Box 9000 – Drawer PD, Bartow, Florida 33830, **appealfilings@pd10.org**, **kkinney@pd10.org**, **kstockman@pd10.org**.

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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 Bookman Old Style, in compliance with Fla. R. App. P. 9.045. The word count is 30,641 (Motion to Accept Enlarged Brief pending).

Respectfully submitted,

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