

IN THE SUPRME COURT OF FLORIDA

HENRY MARTIN STEIGER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC20-1404
L.T. Case No. 1D19-3217

RESPONDENT'S BRIEF ON THE MERITS

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RECEIVED, 02/23/2021 11:46:33 AM, Clerk, Supreme Court

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PRELIMINARY STATEMENT

Petitioner, Henry M. Steiger, was the defendant in the trial court. He will be referred to as Petitioner or as Defendant in this brief. Respondent, the State of Florida, was the prosecution in the trial court. It will be referred to as Respondent or the State in this brief. The child of Petitioner and Cassandra Robinson will be referred to as the child, their child, the daughter, their daughter or something similar in this brief. The First District Court of Appeal will be referred to as the First District in this brief.

The electronic record on appeal in the First District, which consists of one volume comprised of pages 1 through 436, will be referenced by page number as follows: (R. ____). The trial transcript in the First District, which consists of pages 1 through 939, will be referenced by page number as follows: (T. ____). “PB” will designate Petitioner’s Brief on the Merits, followed by any appropriate page number.

All ***bold-type emphasis*** is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND OF THE FACTS

The State has prepared its own Statement of the Case and of the Facts, as set forth below.

(Statement of the Case)

Because Defendant choked the victim to her death on February 1, 2018, the State charged Defendant by Amended Information with second-degree murder. (R. 13)

A jury trial was conducted from June 17, 2019 through June 21, 2019, after which the jury found Defendant guilty as charged. (T. 926)

Sentencing was deferred until August 13, 2019, when Defendant was sentenced to life in prison. (R. 391) Restitution in the amount of \$7,500 was agreed upon by the State and Defendant and imposed by the court, whereas costs, fines, etc. were civil judged. (R. 391)

Defendant appealed his conviction, which was affirmed by the First District in *Steiger v. State*, 301 So. 3d 485 (Fla. 1st DCA 2020).

Defendant sought discretionary review by this Court based on a conflict of decisions in the district courts of appeal regarding direct

appeal review of claims of ineffective assistance of trial counsel. This Court granted jurisdiction on December 23, 2020.

(Statement of the Facts)

The Murder

On February 1, 2018, after Defendant and Cassandra Robinson (hereafter “the victim”) celebrated their daughter’s first birthday at home, Defendant killed the victim by choking her with his hands until she died, all while the victim held their daughter in her arms and Defendant told her, “It’s your time to go.” (T. 368-369) Why did Defendant kill the victim? Because the victim on that same day sent him the following message: “This thing between us is OVER nothing left to say or discuss. I will tolerate u till lo^[1] turns three then I’m leaving to get my own job and place and we can then start a schedule on co parenting.” (R. 238; T. 681)²

The Discussions Before the Murder

¹ lo or LO referred to their daughter and was short for Little One. (T. 816)

² Julian Measure also testified that Defendant told him that the victim had people who could take care of her, she didn’t need him, and she was going to take her stuff and go with the baby. (T. 369)

Prior to killing the victim, Defendant talked of harming or getting rid of her and debated the ethical implications of (i) killing her; (ii) selling her into slavery; or (iii) paying her to leave Defendant and the child. (T. 350) Defendant drew parallels between the victim and Defendant's mom, saying that he and his siblings would have been better off putting his mom in a hole, and that it was in the best interest of their child that the victim not be around. (T. 351) Defendant wanted the victim in the baby's life until the victim was done breast-feeding the baby. (T. 351)

The Murder Day Arrives

On the day Defendant killed the victim, he was frustrated, very fed up and continued to draw parallels between the victim and his mother. (T. 353-354) He said that the victim was upset with him because Julian Measure was at their residence to run errands with Defendant on the child's birthday. (T. 354) As a result, Defendant said, "The only thing left for me to decide is the where and when" with respect to him killing the victim. (T. 354)

The Cover Up

After killing the victim, Defendant said and did several things that constituted admissions and his consciousness of guilt, which included:

- Not calling 911; (T. 782; 786; 790)
- After calling Julian Measure and asking him to return to his and the victim's residence on February 1, telling him at the residence "the where and when has been decided"; (T. 357)
- Telling Measure at the residence, "What was a philosophy argument for you has just become a reality"; (T. 358)
- Enlisting Measure's help in transporting the victim's body—that had been placed in a closed plastic container—to a trailer registered in Defendant's name parked at Paul's on the Bay; (T.359-365)
- Talking about what happened and trying to rationalize it and trying to figure out how he was going to be the primary caretaker of the baby; (T. 367)
- Telling Measure how he killed the victim and why; (T. 368-369)
- Moving the victim's body from their residence on Strong Street on the night she died; (T. 779; 827)
- Destroying or otherwise disposing of the victim's cellphone, ipod and credit cards; (T. 361; 367; 370; 371-373; 796; 803; 812; 828)
- On February 8, transferring the victim's body from the closed plastic container to a sealed 55 gallon barrel; (T. 375-377; 830-831)
- Telling Measure upon transferring the victim's body from the closed plastic container to the sealed 55 gallon barrel there was no decomposition and no smell; (T. 377)
- Maintaining the victim's body in the sealed 55 gallon barrel in either the garage or trailer at Defendant's

Clubhouse Terrace address from the first week in February until mid-June 2018; (T. 830-831)

- Transferring the victim's body that was in the sealed 55 gallon barrel from the Clubhouse Terrace address to Shelby Johnson's property in June of 2018; (T. 275-276; 376-377; 832-833)
- Lying to Ndemma Sigmund (T. 178; 181-182), Erica Reed (T. 191; 192), Carla Colby (T. 196-197), and Shelby Johnson (T. 270) about whether the victim was alive; and
- Lying to police about the victim's whereabouts and whether she was alive. (T. 146-172; 458-569; 759)

Defendant testified at trial and said or admitted under oath the following:

- He has four felony convictions; (T. 755)
- He looks guilty; (T. 756)
- He looks like he is hiding something; (T. 756)
- His actions make it look worse; (T. 756)
- His lies to law enforcement will make it more difficult for the jury to accept the truth with respect to the rest of what he is saying; (T. 759)
- He propagated a story; (T. 759)
- The victim did not leave that night like he told police and others; (T. 771)
- He moved the victim's body the night she died; (T. 779; 827)
- He called Johnson the next day to get some barrels and then got some barrels with Ndenna Sigmund's help; (T. 829)
- He put the victim's body in one of the barrels on February 8; (T. 830-831)
- He moved the barrel from the garage at the Clubhouse Terrace address to the trailer in the driveway the same week where it stayed until mid-June 2018; (T. 831)

- He moved the trailer to Johnson's property; (T. 832)
- He did not call 911; (T. 782)
- When he decided to not call 911, he painted himself into a corner; (T. 786)
- He felt responsible for the victim's death; (T. 793)
- He acted like a person responsible for the victim's death; (T. 796)
- He ditched the victim's phone(s) and ipod; (T. 796; 803; 812; 828)
- He knew "they" would blame him; (T. 800)
- "...there's a response to cover my tracks and act exactly like a guilty person would act..."; (T. 803)
- Propagated a charade; and (T. 759; 832-833)
- Was in "the cover-my-tracks mode like a guilty person." (T. 822)

The Plastic Shopping Bag Defense...with a Twist

At trial, Defendant testified³ that he did not kill the victim, but rather, she accidentally killed herself during a stunt designed to get his attention. (T. 787-792; 824) Defendant opined that the victim wanted him to discover her pretending to be in the act of suicide. (T. 792) According to Defendant, when he discovered the victim in their laundry room, she was on the floor and had a Publix plastic shopping bag loosely over her

³ Notably, Defendant fails to mention, cite or otherwise address his trial testimony, notwithstanding that he testified longer than any other witness. His trial testimony consisted of 84 pages. It appears Defendant, on appeal, has abandoned his trial testimony and wants this Court to ignore its impact on the jury and effect on this appeal.

head and two plastic shopping bags shoved down her throat, which he removed. (T. 788-789; 793)

While trying to revive the victim, Defendant felt a hand on his shoulder that meant she was okay and that her family—those who had already died—were there. (T. 790-791) The victim wanted to be with her mom and the hand on his shoulder was the victim's grandfather, both of whom predeceased the victim. (T. 790-791; 824)

The inference from Defendant's testimony was that in order to get his attention, the victim—without telling or showing Defendant—shoved two plastic grocery bags down her throat and put another bag over her head in the laundry room.

Defendant's Misdirection with Law Enforcement

Knowing the victim was dead, Defendant, when asked in his recorded statement to law enforcement what he thought could have happened to her, said (i) she could have been sold into slavery; (ii) she could be dead, (iii) she could be deciding whether she's coming back; or (iv) she may have decided she's not coming back. (T. 544) This was after telling law enforcement, in response to the same question in the same statement, that there were only three

possibilities as to what happened to the victim and where she may be located. At that time, Defendant said (i) she's decided that's she's not coming back, (ii) she's indisposed, or (iii) she could be in rehab. (T. 539-540)

SUMMARY OF ARGUMENT

In 1996, the Florida Legislature enacted § 924.051, Fla. Stat., which sets forth the terms and conditions applicable to direct appeals and collateral review of claims in criminal cases. In the First District, Defendant failed to adhere to § 924.051(3), Fla. Stat. by not arguing fundamental error with respect to his unpreserved claims. Instead, he raised multiple unauthorized claims of ineffective assistance of trial counsel. This Court should uphold the application of § 924.051(3), Fla. Stat. and this Court's holding in *State v. Barber*, 301 So. 2d 7 (Fla. 1974), neither of which authorize the direct appeal of claims of ineffective assistance of trial counsel.

Alternatively, Defendant has failed to allege and establish any claim for ineffective assistance of counsel on the face of the record on appeal.

Additionally, no fundamental error occurred during Defendant's trial.

Finally, no error occurred in introducing photographs depicting the victim as she was found and appeared after having been placed by Defendant in a sealed 55-gallon barrel and left in that condition for several months.

ARGUMENT

ISSUE: WHETHER GENERAL LAW ENACTED BY THE FLORIDA LEGISLATURE AND THIS COURT'S HOLDING IN STATE v. BARBER PRECLUDE DEFENDANT FROM DIRECTLY APPEALING THE ISSUE OF TRIAL COUNSEL'S ALLEGED INEFFECTIVE ASSISTANCE?

Standard of Review

There are two standards of review applicable to this Court's review of the First DCA's decision. First, because the conflict of decisions asserted by Defendant involves the interpretation of § 924.051, Fla. Stat., the first level of review is *de novo*. *McCloud v. State*, 260 So. 3d 911, 914 (Fla. 2018) ("This Court undertakes *de novo* review for questions of statutory interpretation."). "If the statute is 'clear and unambiguous,' then this Court does not look beyond the plain language or employ the rules of construction to determine legislative intent—it simply applies the law. *Gaulden v. State*, 195 So.3d 1123, 1125 (Fla. 2016) (*quoting Borden v. E.-Eur. Ins. Co.*, 921 So.2d 587, 595 (Fla. 2006)). *Id.* at 914-915.

Second, Defendant acknowledges the lack of an objection to the matters raised in his brief on the merits other than an objection relating to photographs that were admitted at trial (PB 15-16); therefore, after determining the applicability of § 924.051, Fla. Stat.

to this case, the standard of review, assuming any error occurred, is whether the claimed errors constitute fundamental error. § 924.051(3), Fla. Stat. Fundamental error has been defined as follows:

As the Florida Supreme Court has acknowledged: ‘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.’ *State v. Delva*, 575 So. 2d 643, 644–45 (Fla. 1991) (quoting *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960)).

Sampson v. State, 213 So. 3d 1090, 1092 (Fla. 3d DCA 2017).

Burden of Persuasion

Additionally, an Appellant bears the burden of demonstrating error. § 924.051(7), Fla. Stat., provides:

In a direct appeal . . . the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

Moreover, “In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error.” *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979). Additionally, because the trial court’s decision is presumed correct, “the appellee

can present any argument supported by the record even if not expressly asserted in the lower court.” *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 645 (Fla. 1999); *State v. Hankerson*, 65 So. 3d 502, 505 (Fla. 2011), *as revised on denial of reh'g* (June 30, 2011).

Merit Analysis

(i)

Defendant ignored in the First District and ignores in this Court the requirements of § 924.051(3), Fla. Stat. in prosecuting his appeal. Specifically, that statute reads as follows:

(3) An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.

The First District had no statutory authority to reverse Defendant’s judgment or sentence without finding fundamental error occurred if the error was not preserved. Defendant admitted in the First DCA and admits in this Court that the errors claimed on appeal

were not preserved⁴, yet he fails to argue why the errors are fundamental. Instead, seemingly to avoid the fundamental error standard, Defendant raises his claims as ineffective assistance of counsel. As a result, the First District properly declined to address Defendant's claims.

(ii)

The First District, on more than one occasion, has addressed a defendant attempting to avoid the requirements of § 924.051(3), Fla. Stat. In *Marshall v. State*, 291 So. 3d 614 (Fla. 1st DCA 2020), that Court wrote,

In arguing that she is entitled to relief even if the issues are unpreserved, we note that Marshall does not argue that they constitute fundamental error. Instead, Marshall claims that counsel's failure to make the correct arguments was ineffective and this ineffectiveness can be addressed on direct appeal.

This argument reveals an issue identified by the concurring opinion in *Latson v. State*, 193 So. 3d 1070 (Fla. 1st DCA 2016) (Winokur, J., concurring). The *Latson* concurring opinion notes that 'if the defendant does not properly preserve a claimed error,

⁴ Preserved is defined in § 924.051(1)(b), Fla. Stat. as follows: "(b) 'Preserved' means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor."

the only statutorily-authorized basis for appellate relief is a showing that the error is fundamental.’ *Id.* at 1072. ‘The appellant should not be permitted to circumvent this standard by claiming that the failure to raise issues constitutes ineffective assistance, which entails a different standard that could provide an easier path to reversal, and which deprives trial counsel of the opportunity to defend themselves against allegations of unprofessional conduct.’ *Id.* at 1074. We agree. Ineffective assistance cannot be claimed as a means to avoid application of the fundamental error standard on direct appeal.

As referenced above, in *Latson v. State*, 193 So. 3d 1070 (Fla. 1st DCA 2016), Judge Winokur in a concurring opinion, explained why raising claims in the form of ineffective assistance of counsel claims on direct appeal is inappropriate, writing,

In this appeal, appellant does not raise a single claim of preserved error or even a claim that any error below is fundamental. Instead, appellant identifies numerous alleged specific instances of ‘ineffective assistance of counsel on the face of the record[.]’[.]. I concur in the majority opinion, but write separately to discuss the growing frequency of claims of ‘ineffective assistance of counsel on the face of the record’ as an unjustifiable substitute for claims of fundamental error.

Id. at 1071–1072.

...

§ 924.051(3), Fla. Stat., prohibits an appeal in a criminal case unless the claimed error is properly preserved or, if not properly preserved, constitutes fundamental error... In other words, if the defendant does not properly preserve a

claimed error, the only statutorily-authorized basis for appellate relief is a showing that the error is fundamental. As the Supreme Court has put it, ‘the sole exception to the contemporaneous objection requirement is fundamental error.’ *Harrell v. State*, 894 So. 2d 935, 941 (Fla. 2005).

Id. at 1072.

...

It seems clear that fundamental error is the ‘sole exception’ to the general rule that a party must preserve errors to raise them on appeal. But this clarity has been blurred by the use of a wholly different theory to permit appeals of issues not raised at trial. Instead of arguing that the unpreserved error was fundamental, more and more defendants are claiming on appeal that their trial counsel was ineffective for failing to raise at trial whatever alleged error they wish to raise on appeal and that this ineffectiveness itself provides a basis for reversal on direct appeal. To the extent that any such alleged errors are not fundamental, I believe this constitutes an unwarranted extension of unpreserved errors that may be raised on direct appeal.

Id. at 1072.

...

The procedure for raising a claim of ineffective assistance of counsel is likewise well known: the defendant must make sworn allegations in the trial court by motion for postconviction relief pursuant to Florida Rules of Criminal Procedure 3.850 or 3.851. ‘The trial court is the more appropriate forum to present such claims where evidence might be necessary to explain why certain actions were taken or omitted by counsel.’ *McKinney v. State*, 579 So. 2d 80, 82 (Fla. 1991).

Id. at 1072–1073.

...

This procedure makes sense because ineffective assistance of counsel claims are ‘generally fact-specific,’ *Aversano v. State*, 966 So. 2d 493, 495 (Fla. 4th DCA 2007), and ‘both sides are entitled to present relevant evidence to the trial court to resolve those issues.’ *Gordon v. State*, 469 So. 2d 795, 798 (Fla. 4th DCA 1985) (Anstead, C.J., concurring specially). Moreover, counsel accused of unprofessional errors ‘so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,’ *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052, ought to be afforded an opportunity to explain their actions, which cannot happen in an appellate proceeding. See *Dennis v. State*, 696 So. 2d 1280, 1282 (Fla. 4th DCA 1997) (noting that ‘[w]hen a motion for post-conviction relief is first raised in the trial court, trial counsel and the state have a full opportunity to refute the claim that the representation of a defendant amounted to a constitutional violation’).

Id. at 1073.

...

In summary, I conclude that the practice of permitting claims of ineffective assistance of counsel on direct appeal stemmed from a misreading of case law, and is directly contrary to controlling statutory law. ***If defense counsel did not raise an issue below, an appellant must demonstrate that the error meets the stringent fundamental-error standard in order to secure relief on direct appeal. The appellant should not be permitted to circumvent this standard by claiming that the failure to raise issues constitutes ineffective assistance, which entails a different standard that could provide an easier path to reversal, and which***

deprives trial counsel of the opportunity to defend themselves against allegations of unprofessional conduct.

Id. at 1074.

...

[T]hese issues should be raised as fundamental error rather than ineffective assistance of counsel. At the very least, claims of ineffective assistance of counsel on direct appeal should hew as closely as possible to the fundamental-error standard, in order to preserve the statutory scheme for criminal appeals and to ensure fairness for counsel accused of unprofessional conduct.

Id. at 1075.

(iii)

Section 924.051, Fla. Stat. is consistent with this Court's holding in *State v. Barber*, 301 So. 2d 7 (Fla. 1974), in which this Court wrote, in relevant part,

As to whether the issue of adequacy of representation by counsel can properly be raised for the first time on a direct appeal, we hold that it cannot properly be raised for the first time on direct appeal, since, as was recognized in *Chester [v. State]*, 276 So.2d 76 (Fla. 2d DCA 1973)⁵ 'it is a matter that has not previously been ruled upon by the trial Court.' An appellate court must confine itself to a review of only those questions which were before the trial court

⁵ The holding in *Chester* was "[a]n appellate Court may confine itself only to a review of those questions which were before the trial Court and upon which a ruling adverse to the defendant was made." *Id.* at 77.

and upon which a ruling adverse to the appealing party was made.

301 So. 2d at 9.

This Court continued by writing,

...[I]t is clear, in any event, that the interests of justice do not require review of counsel's claimed inadequacy in this case, since Cr.P.R. 3.850 provides a means by which this issue may properly be resolved in a correct procedural setting in the trial court where evidence may be taken, as was recognized in analogous circumstances in *Wainwright v. Simpson*, *Supra*."

Id. at 9.

Several district courts after *Barber* recognized the impropriety of claiming on direct appeal ineffective assistance of trial counsel because no ruling was rendered in the trial court. *See, Arline v. State*, 303 So. 2d 37 (Fla. 1st DCA 1974); *Compo v. State*, 617 So. 2d 362 n.2 (Fla. 2nd DCA 1993); *Dorsey v. State*, 847 So. 2d 587 (Fla. 5th DCA 2003); *Gonzalez v. State*, 841 So. 2d 650 (Fla. 3rd DCA 2003); and *Valero v. State*, 393 So. 2d 1197 (Fla. 3rd DCA 1981).

It was not until this Court's decision in *Foster v. State*, 387 So. 2d 344 (Fla. 1980), that this or any other appellate court addressed a claim of ineffective assistance of counsel on direct appeal. In *Foster*, this Court found ineffective assistance of counsel based upon an

actual conflict of interest when defense counsel represented both the defendant and a state witness.⁶ The enactment of § 924.051, Fla. Stat., however, legislatively overruled *Foster*. See, e.g. *Hayes v. State*, 803 So. 2d 695, 699 (Fla. 2001) (“As we explained in *Borges [v. State]*, 415 So.2d [1265] at 1266 [(Fla. 1982)], the common law ‘single transaction rule,’ which had previously limited convictions arising out of a criminal transaction or episode to the most serious offense, has been legislatively overruled. Therefore, if the Legislature intended separate convictions and sentences for a defendant's single criminal act, there is no double jeopardy violation for the multiple punishments.”); *State v. Smith*, 547 So. 2d 613, 616 (Fla. 1989) (“Although legislative amendment of a statute may change the law so

⁶ Noteworthy is Justice Adkins dissent in *Foster*, in which he wrote, The question of whether joint representation of appellant and Strouder by trial counsel in any way prevented effective assistance of counsel to the appellant was not ruled upon by the trial court. In the past, we have held that the issue of adequacy of representation by counsel cannot be properly raised for the first time on a direct appeal. *State v. Barber*, 301 So.2d 7 (Fla.1974).

I would relinquish jurisdiction for the purpose of allowing the trial judge to conduct post-conviction proceedings and allow the state and appellant to present facts upon which the trial court could make an adequate determination of whether a conflict of interest between appellant and Strouder existed which would preclude effective representation of appellant.

that prior judicial decisions are no longer controlling, it does not follow that court decisions interpreting a statute are rendered inapplicable by a subsequent amendment to the statute. Instead, the nature and effect of the court decisions and the statutory amendment must be examined to determine what law may be applicable after the amendment.” citing, *Heath v. State*, 532 So. 2d 9, 10 (Fla. 1st DCA 1988).

In light of § 924.051, Fla. Stat., this Court wrongly decided *Monroe v. State*, 191 So. 3d 395, 402 (Fla. 2016), when it held “...that the failure of Monroe’s trial counsel to preserve the sufficiency of the evidence issue for appellate review constitutes ineffective assistance of counsel that is apparent from the face of this record.” This Court did not address the impact of § 924.051, Fla. Stat. and otherwise ignored its own precedent.

The impact of § 924.051, Fla. Stat. was recognized by the Fourth District in *Dennis v. State*, 696 So. 2d 1280 (Fla. 4th DCA 1997), which addressed the issue of raising a claim of ineffective assistance of counsel on direct appeal. That court wrote,

Dennis argues that she is entitled to a new trial as a result of ineffective assistance of counsel, because her trial attorney failed to request a self defense instruction.

The general rule is that the adequacy of a lawyer's representation may not be raised for the first time on a direct appeal. The rationale for the rule is that that issue has not been raised or ruled on by the trial court. *State v. Barber*, 301 So.2d 7, 9 (Fla.1974).

An appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made.

Id. The case law basis for the rule has been reinforced by the passage of section 924.051, Florida Statutes (Supp.1996). Section 924.051(2) provides that the right to direct appeal "may only be implemented in strict accordance with the terms and conditions" of section 924.051. Section 924.051(3) provides that

[a]n appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error.

An issue is not "preserved" within the meaning of the statute unless it was "timely raised before, and ruled on by, the trial court." § 924.051(1)(b), Fla. Stat. (Supp.1996).

Under both the statute and case law, the proper procedural vehicle for an ineffective assistance of counsel claim is a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. Rule 3.850 procedures allow for full development of the issue of counsel's incompetence under the standards of *Downs v. State*, 453 So.2d 1102 (Fla.1984) and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). When a motion for post-conviction relief is first raised in the trial court, trial counsel and the state have a full opportunity to refute the claim that the representation of a defendant

amounted to a constitutional violation. See *Williams v. State*, 438 So.2d 781, 787 (Fla.1983), cert. denied, 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed. 2d 146 (1984).

This case demonstrates why the law should require an ineffective assistance claim to be presented first to the trial court. The record does not contain counsel's thinking concerning the self defense issue. Nor do the pages of the transcript give any sense of how the trial developed. It may have been that the state witnesses were so numerous and so convincing that a self defense approach withered under scrutiny and that counsel would have lost credibility with the jury by advancing it. This case does not present that narrow category of cases—such as where the claim of ineffectiveness arises from a conflict of interests between co-defendants represented by the same attorney—to justify departure from the general rule requiring the ineffectiveness of counsel issue to be presented first to the trial court in a motion for post-conviction relief. See *Foster v. State*, 387 So.2d 344 (Fla.1980); *Gordon v. State*, [footnote omitted] 469 So.2d 795 (Fla. 4th DCA 1985) (ineffectiveness based on defense counsel's failure to object to repeated prosecutorial improprieties), cert. denied, 480 So.2d 1296 (Fla.1985); *Washington v. State*, 419 So.2d 1100, 1101, n. 3 (Fla. 3d DCA 1982); *Wright v. State*, 423 So.2d 633 (Fla. 5th DCA 1982).

Id. at 1282.

(iv)

Long ago this Court recognized the practical limitations and unfairness to the State and trial counsel of claims of ineffective assistance of counsel raised on direct appeal. In *Williams v. State*, 438 So. 2d 781, 787 (Fla. 1983), this Court wrote,

Here, the appellant improperly attempted to raise the question of ineffective assistance of counsel in an amended motion for a new trial. In so doing, Williams failed to provide the trial court with *sworn to* allegations necessary to prevent unfounded complaints in motions for post-conviction relief. While the trial judge received Williams' letter alleging ineffective assistance of counsel prior to sentencing and stated that defendant's argument would be preserved for further appellate review, this, in itself, does not warrant our present consideration of the issue. "[R]elief cannot be had by appeal until issues of *fact* have been first resolved in the trial court." *Pinder [v. State]*, 421 So.2d [778] at 779 [(Fla. 5th DCA 1982)] (emphasis added). After thorough review of the record we find *no* evidence that the ineffective assistance of counsel allegation was sufficiently resolved so as to warrant our review. At most, defendant's letter presented "bald assertions" totally devoid of factual support. *United States v. Rodriguez*, 582 F.2d 1015 (5th Cir.1978). **Moreover, neither the state nor the court-appointed trial counsels were granted the opportunity to refute the unsworn ineffective assistance of counsel allegation.** *United States v. Prince*, 456 F.2d 1070 (5th Cir.1972); *compare*, *United States v. Phillips*, 664 F.2d 971 (5th Cir.1981), *cert. denied*, *Meinster v. United States*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). For the above reasons, we find that Williams' claim of ineffective assistance of counsel is not, at present time, properly before this Court.

The unique position of trial counsel and that person's choices during trial are perhaps best explained in *Bates v. Secretary, Florida Department of Corrections*, 768 F.2d 1278 (11th Cir. 2014). In that case, co-authored by Judges Carnes and Tjoflat, the Eleventh Circuit set the stage by writing,

We imagine Bowers, the defense lawyer, sitting in the courtroom and watching the victim's husband testify about the day of his wife's murder. During this testimony, the husband mentions that her funeral took place at First Baptist Church, and Bowers recalls that one day earlier Reverend Langford—also of First Baptist Church, or at least *a* First Baptist Church—had delivered a prayer at the start of jury selection. What should Bowers do?

Id. at 1295.

In first explaining the standard of reviewing trial counsel's actions, the court wrote,

When a petitioner says his attorney was ineffective for failing to make an objection, *Strickland* requires proof that the attorney fell below the standard of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065. This test “has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.” *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir.1995) (en banc).

...

Strickland speaks only to the small class of cases in which “counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment” at all, 466 U.S. at 687, 104 S.Ct. at 2064, and does not operate as a catch-all mechanism for “fixing” trials we might have conducted differently.

Id. at 1295 and 1299-1300.

In deferring to trial counsel's strategy, the court wrote,

We want to be clear: our point is not that it would be *wrong* for Bowers to object. Our point is only that the answer is not obvious. Reasonable lawyers could disagree about the best way forward. ... Bowers, in this hypothetical, faces a choice where his conduct is “neither directly prohibited by law nor directly required by law,” which is to say: the choice is strategic, and “a court must not second-guess counsel's strategy.”

...

There is not a “right” answer here that all attorneys must follow in all cases. In every trial, attorneys have to make hundreds of tiny ambiguous decisions like this one, where they must decide to act or react or not act at a moment's notice in circumstances where their legal position is uncertain.

Id. at 1297-1298 and 1299.

(v)

Section 924.066, Fla. Stat., entitled, “Collateral relief,” reads in relevant part,

(1) Subject to the terms and conditions set forth in this chapter, a prisoner in custody may seek relief based upon claims that the judgment of conviction or sentence was imposed in violation of the Constitution or law of the United States or the State of Florida.

(2) Either the state or a prisoner in custody may obtain review in the next higher state court of a trial court's adverse ruling granting or denying collateral relief. The state may obtain review of any trial court ruling that fails to enforce a procedural bar.

Fla. R. Crim. P. 3.850 is the procedural vehicle by which a

defendant takes advantage of § 924.066.⁷ Under that rule, a defendant is required to file a written motion that must comport with the requirements of that rule. Additionally, the rule sets forth the procedure a post-conviction court must follow in disposing of the motion that is “...intended to result in a single, final, appealable order that disposes of all claims raised in the motion.” Fla. R. Crim. P. 3.850(f). This specifically includes disposition by an evidentiary hearing, when required, in which the post-conviction court “...shall determine the issues, and make findings of fact and conclusions of law with respect thereto.” Fla. R. Crim. P. 3.850(f)(8)(A). “The order issued after the evidentiary hearing shall resolve all the claims raised in the motion and shall be considered the final order for purposes of appeal.” Fla. R. Crim. P. 3.850(f)(8)(C).

This leads to the inescapable conclusion that the State and trial counsel are both entitled to defend the accusation that trial counsel failed to function as counsel, which requires questions to and answers from trial counsel. This can only occur at an evidentiary hearing. Thus, Rule 3.850 affords a defendant a procedure by which

⁷ There is no waste of judicial resources exception to § 924.066 or Fla. R. Crim. P. 3.850.

he or she may seek relief and simultaneously protects the interest of the State to defend—with evidence—the allegation that trial counsel did not function as counsel.

(vi)

Notwithstanding *Monroe*, this Court has previously recognized the limitations imposed by § 924.051, Fla. Stat. In *State v. Jefferson*, 758 So. 2d 661, 664 and 666 (Fla. 2000), this Court wrote,

We find it is clear from the language of section 924.051(3) that the Legislature intended to condition reversal of a conviction on the existence of either an error that was preserved and prejudicial or an unpreserved error that constitutes fundamental error.

...

After considering the language of the Act and the legislative history of section 924.051(3), we conclude that construing this statute as merely codifying the existing procedural bars to appellate review both upholds the statute's constitutionality and is consistent with the actual legislative intent in passing the Act. Nothing in our opinion today circumvents the requirement codified in the Act that in order to constitute reversible error, the error must first either be preserved for review or amount to fundamental error.

Additionally, in the context of criminal sanctions in a juvenile proceeding, this Court wrote in *Cargle v. State*, 770 So. 2d 1151, 1154 (Fla. 2000),

The Legislature clearly intended that when criminal sanctions are imposed in a proceeding under section 39.059(7), the criminal statutes governing review of those sanctions apply, and that the application of procedural bars “be strictly enforced ... to ensure that all claims of error are raised and resolved at the first opportunity.” § 924.051(8), Fla. Stat. (Supp.1996). In the present case, Cargle was afforded the opportunity to seek collateral review of his sentence under rules 3.800(b) and 3.850, and therefore must abide by the mandates of section 924.051, which conditions appeals and collateral review on the preservation of alleged errors in the trial court. Cargle failed to comply with the preservation requirements of section 924.051 and this issue thus was not preserved for review. Furthermore, the instant error does not constitute fundamental error as defined in *Maddox v. State*, 760 So.2d 89 (Fla.2000). Accordingly, we approve *Cargle* and hold that section 924.051, Florida Statutes (Supp.1996), applies to juveniles who are sentenced as adults pursuant to section 39.059(7), Florida Statutes (1995).

(vii)

In addition to the previously cited First District opinions, that court long ago also spoke on the impact of § 924.051, Fla. Stat. with respect to claims of ineffective assistance of counsel on direct appeal. Specifically, in *Wingate v. State*, 729 So. 2d 492, 493 (Fla. 1st DCA 1999), that court wrote,

Appellant’s claim of ineffective assistance of counsel is not properly raised on direct appeal, particularly in light of the enactment of section 924.051, Florida Statutes (Supp.1996). See *McKinney v. State*, 579 So.2d 80 (Fla.1991); *Gibson v. State*, 351 So.2d 948 (Fla.1977); *State v. Barber*, 301 So.2d 7 (Fla.1974); *Dennis v. State*,

696 So.2d 1280 (Fla. 4th DCA 1997). We therefore affirm without prejudice to appellant bringing the claim in an appropriate proceeding under Florida Rule of Criminal Procedure 3.850.

See also, Thompson v. State, 745 So. 2d 444-445 (Fla. 1st DCA 1999) (“Under present statutory law, an appeal may not be taken in a criminal case “unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error.” § 924.051(3), Fla. Stat. (1997). “ ‘Preserved’ means that an issue ... was timely raised before, and ruled on by, the trial court” § 924.051(1)(b), Fla. Stat. (1997). Given these requirements, the case will be exceedingly rare when a district court of appeal reviews a claim of ineffective assistance of counsel raised for the first time on appeal. Nothing raised in this appeal suggests fundamental error. Accordingly, the claim of ineffective assistance of counsel must be first brought before the trial court in an appropriate proceeding.”).

At least one other district court has addressed the relationship between § 924.051, Fla. Stat. and a claim of ineffective assistance of counsel on direct appeal. In *Kidd v. State*, 978 So. 2d 868, 869 (Fla. 4th DCA 2008), the Fourth District wrote,

After the passage of section 924.051, Florida Statutes (Supp.1996), governing the terms and conditions of

appeals and collateral review in criminal cases, appellate courts are even more reluctant to review an ineffective assistance claim on direct appeal. See *Wingate v. State*, 729 So.2d 492, 493 (Fla. 1st DCA 1999) (finding appellant's ineffective assistance claim not properly raised on direct appeal in light of enactment of section 924.051, Florida Statutes (Supp.1996)); *Dennis*, 696 So.2d at 1282 n. 1 (stating that this court would not reach question of continued viability of Gordon, in light of passage of section 924.051, Florida Statutes (Supp.1996)).

(viii)

In light of this Court's precedent and the enactment long ago of § 924.051, Fla. Stat., this Court should (i) reject Defendant's appeal because he fails to raise his unpreserved claims as claims of fundamental error, (ii) recede from *Foster* and *Monroe* or limit *Foster* to claims of actual conflict of interest based upon joint representation, and (iii) announce a rule that claims of ineffective assistance of counsel may not, or subject to the limited holding of *Foster*, be raised on direct appeal.

ISSUE: ALTERNATIVELY, WHETHER DEFENDANT HAS
STATED AND ESTABLISHED A CLAIM FOR RELIEF ON
APPEAL OF INEFFECTIVE ASSISTANCE OF COUNSEL?

Assuming this Court addresses Defendant's claims of ineffective assistance of counsel on appeal, the First District has written:

With regard to the two unpreserved issues, Marshall argues that, even if the issues were unpreserved, she is still entitled to relief because they both constitute ineffective assistance on the face of the record. 'Claims of ineffective assistance of counsel are rarely addressed on direct appeal because they normally turn on questions of fact and both sides are entitled to present relevant evidence at an evidentiary hearing.' *Barnett v. State*, 181 So. 3d 534, 536 (Fla. 1st DCA 2015). ***In order to prevail on an ineffective-assistance claim on direct appeal, an appellant must demonstrate "ineffectiveness on the face of the record, indisputable prejudice, and an inconceivable tactical explanation for the conduct."*** *Morales v. State*, 170 So. 3d 63, 67 (Fla. 1st DCA 2015).

Marshall, 291 So. 3d at 615.

Defendant does not articulate the correct standard of review in this case, or otherwise argue its application.⁸ Defendant must allege and demonstrate on this record:

- Ineffectiveness of counsel on the face of the record;
- Indisputable prejudice; and

⁸ Defendant cites to a mixed standard of review that involves deference to the trial court's factual findings if supported by competent, substantial evidence; (PB 17) however, this further reflects why such claims should not be addressed on direct appeal because there are no factual findings made by the trial court.

- An inconceivable tactical explanation for the conduct.

Because Defendant has failed to articulate or argue the correct standard of review, Defendant cannot prevail on any claim of ineffective assistance of counsel.

Moreover, a review of the record for each alleged claim of ineffective assistance of counsel reflects that Defendant has not established any of the three prongs of the standard. In that respect, the trial judge, at Defendant's sentencing, said,

THE COURT: Okay. We're about to start argument on the sentencing phase here. And before you start, though, Mr. Hamlin, I do want to say that you've had a difficult case that you had to present here today and over the course of the entire trial of this matter. ***And I believe I can recognize that I don't think anyone could have done a higher job in defending your client than you did, sir. So I think I haven't seen anything for me to question the level of effort you put into and the integrity that you approached the case with, and the preparation that you put into it, I believe, was very apparent. So I don't think there's anything negative anyone could say about the job you have done in this case, sir.*** (R. 387)

Thus, the trial judge, who sat through the entire trial, effectively found on the record that trial counsel did not render ineffective assistance to Defendant.

For all these reasons, Defendant's claims of ineffective

assistance of counsel should be denied.

ISSUE: WHETHER DEFENDANT HAS STATED AND ESTABLISHED A CLAIM FOR RELIEF ON APPEAL OF FUNDAMENTAL ERROR?

Applying the required fundamental error analysis to Defendant's unpreserved claims results in Defendant's conviction, nevertheless, being affirmed. This Court has written, "For the error to constitute fundamental error, '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.' *State v. Delva*, 575 So. 2d 643, 644–45 (Fla. 1991) (quoting *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960))." *Goodman v. State*, 284 So. 3d 1169, 1170 (Fla. 1st DCA 2019). In this case, Defendant has not alleged or otherwise shown that any of the unpreserved claims reach to the validity of the trial to the extent the guilty verdict could not have been obtained without the assistance of the unpreserved error.

Reference to Defendant's Federal Matter

Defendant ignores telling this Court that he was a four-time convicted felon who testified at trial. (T. 755) In fact, Defendant was permitted to testify to details regarding his prior convictions with the knowledge the prosecutor would not ask further questions on the subject. (T. 752) Thus, Defendant testified that his four convictions

were wrapped into one as a financial crime involving him trying to help the FBI; however, the FBI betrayed him. (T. 755) He testified that he took a plea deal for a conspiracy. (T. 755)

Thus, the jury learned essentially nothing more in Defendant's recorded statement to law enforcement than it learned from Defendant's testimony. Additionally, the discussion of the parties after playing for the jury Defendant's statement to law enforcement reflects that both Defendant and defense counsel did not want a curative instruction. (T. 667-669). This was a reasonable strategic decision by the defense designed to not draw further attention to the matter.

Finally, Defendant's statement in his brief that "[O]n over ten occasions, the prosecution played a recorded statement which included references to a federal investigation of [Defendant], [Defendant] being on federal probation and [Defendant] having out of state issues which would prevent him from being able to get a driver's license," (PB 3) misstates the evidence. The prosecution did not play Defendant's recorded statement ten times. And to the extent Defendant's misstatement means there were ten references, that is also a misstatement of the evidence because the discussion was

about a single matter—Defendant’s federal matter. (T. 600-611)⁹ In fact, Defendant made a point of saying in his statement that he had not been charged by the federal authorities, and the law enforcement officers agreed with him in saying negative things about the federal system, which undermines any claim of prejudice. (T. 600) It is also clear from the transcript that law enforcement had no interest in Defendant’s federal matter, (T. 600-611) nor did the prosecutor argue in closing argument this portion of Defendant’s recorded statement.

Based upon the foregoing, no fundamental error is shown on this record

Defendant’s Recorded Call with Det. Galloway

Defendant claims that Sgt. Martez Lawrence was unable to authenticate the telephone call between Defendant and Det. Galloway, who did not testify at trial. (IB. 10) Defendant overlooks, however, that he testified and his testimony authenticated the telephone call. Defendant testified on direct examination as follows:

Q: Okay, So what - -

A: So I basically - - what happened was - - what I’d like the family and jury to understand watching those two

⁹ Reference to going to the DMV was entirely innocuous and referenced no illegal conduct by Defendant. (T. 621)

videos that were - - or the video ***and the audio that were placed is that everything in there is true except for what happened that night.*** (T. 758)

There is no argument by Defendant on appeal that Defendant is not the person speaking on the recording. In fact, Defendant admitted to and ***authenticated at trial*** the telephone call between Defendant and Det. Galloway; therefore, Defendant fails to demonstrate that the evidence is not what the State offered it to be—a telephone conversation between Det. Galloway and Defendant that occurred on June 11, 2018. § 90.901, Fla. Stat. (“The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”); *Symonette v. State*, 100 So. 3d 180, 183 (Fla. 4th DCA 2012)(“Evidence may be authenticated by appearance, content, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances. In addition, the evidence may be authenticated either by using extrinsic evidence, or by showing that it meets the requirements for self-authentication.” *Jackson v. State*, 979 So. 2d 1153, 1154 (Fla. 5th DCA 2008)).

Defendant also claims the call violated his right of confrontation under the Confrontation Clause of the United States Constitution;

however, to state the obvious, Defendant was a participant in the call. Defendant's statements made in the call constitute an exception to the inadmissibility of hearsay. Specifically, § 90.803, Fla. Stat. reads, in relevant part, as follows: "...[T]he following are not inadmissible as evidence, even though the declarant is available as a witness: (18) ADMISSIONS. - A statement that is offered against a party and is: (a) The party's own statement in either an individual or a representative capacity[.]" Defendant's statements made on the recorded call are, therefore, admissible against him and there is no confrontation challenge to his statements.

To the extent that Defendant argues Det. Galloway's questions or statements in the call are inadmissible, Defendant is wrong. Det. Galloway's questions or statements are admissible to place in context Defendant's statements on the call; therefore, they are not considered hearsay because they are not admitted for the truth of what is contained in them. *McWatters v. State*, 36 So. 3d 613, 638 (Fla. 2010) (Officer's questions and statements in interview of Defendant admissible to place Defendant's answers in context); *See also, Symonette*, 100 So. 3d at 183–184 (Text messages authenticated and admissible hearsay evidence because they were admissions, or

defendant's own statements offered against him. § 90.803(18), Fla. Stat. (2009)). In fact, Defendant does not complain about Det. Galloway's questions or comments, only about his admissions in response.

No error occurred in admitting this evidence, let alone fundamental error.

Attorney/Client Privileged Matters were Introduced

Defendant omits on appeal relevant factors with respect to this claim in order to place the relationship, if any, between Defendant and Erica Reed in proper context. Defendant alleges on appeal an attorney/client relationship between Defendant and Ms. Reed at the time Defendant made statements to Ms. Reed. (PB 36) The record on appeal, however, does not reflect such a relationship at the time of the complained of statements.¹⁰ Instead, the record reflects that Ms. Reed was the in-house counsel for Baptist Health Care. (T. 187) There is no record evidence of Defendant having a relationship, attorney/client or otherwise, with Baptist Health Care.

¹⁰ In fact, the only reference to an attorney/client relationship between Defendant and Ms. Reed occurred when Ms. Reed testified that she had met the victim "through [her] capacity as an attorney **at one point in time** for [Defendant]." (T. 188)

In March of 2018, Defendant asked Ms. Reed to meet him at Defendant's new business venture in the downtown area. (T. 189) The record reflects no attorney/client relationship during the meeting in March 2018 because Defendant was with Defendant's child and their dog, while Ms. Reed was with her mother. (T. 189) Similarly, the next time they met, in April of 2018, Defendant and Ms. Reed met at the same location and the same persons were present, Defendant's child and dog, along with Ms. Reed's mom and son. (T. 190-191) Finally, in May of 2018, there was a telephone conversation between Defendant and Ms. Reed in which he was panicky and admitted that the victim would not be coming back. (T. 192)

Having represented Defendant ***at one point in time***, which is undetermined in time from the record, does not mean that Ms. Reed represented Defendant at the time of Defendant's statements at issue. The best evidence of this fact is that Ms. Reed—not current defense counsel—is the person who needed to assert an attorney/client privilege, yet she did not do so. Also, it appears that the statement in which Defendant describes the turbulent relationship between him and the victim was made in the presence of third persons and not meant to be confidential; therefore,

assuming any attorney/client privilege existed, it was waived. § 90.502(1)(c), Fla. Stat.; *Mobley v. State*, 409 So. 2d 1031, 1037-1038 (Fla. 1982).

The record, therefore, undermines Defendant's claim that there was a violation of this privilege. Assuming any violation, no fundamental error resulted.¹¹

Cumulative Error Claim

DNA Testimony. Defendant fails to articulate how the admission of DNA testimony prejudicially affected his defense, which was that the victim died from a stunt gone wrong when, in an attempt to get Defendant's attention, she stuffed two plastic shopping bags down her throat and covered her head with another plastic shopping bag. The State does not concede that any error occurred during the admission of this testimony; however, assuming any error, it was not fundamental.

Fingerprint Examiner. Defendant adopts the argument set forth above with respect to the DNA testimony. Moreover, both Shelby

¹¹ Interestingly, Autumn Blackledge is listed as Defendant's attorney on State's Exhibit 148, which is the Verified Petition to Establish Paternity, Timesharing and for Related Relief signed on June 15, 2018. (R. 297-302)

Johnson and Defendant testified that Defendant obtained the barrels from Johnson and Defendant further testified that he put the victim's body in the barrel; therefore, no error occurred and assuming any error, it was not fundamental.

Cellphone Mapping. Defendant fails to state a claim for relief on appeal. Failing to challenge the admission of evidence for which there is no legal challenge is not a legally cognizable claim on appeal. No error occurred; therefore, no fundamental error occurred.

Scant Witness Examinations. As with the cellphone mapping claim, Defendant fails to state a claim for relief on appeal. Barely cross-examining witnesses or cross-examining witnesses for less than two transcript pages, and the similar arguments made by Defendant, are not legally cognizable claims on appeal; therefore, no error occurred, including fundamental error.

Burden-Shifting Rebuttal Closing Argument.

Defendant writes in Petitioner's Brief that "[t]he biggest mystery in this case is how Ms. Robinson died." (PB 44) The State prosecuted Defendant knowing that he murdered the victim. The jury, after seeing and hearing the evidence, including Defendant's recorded call, recorded statements and trial testimony, found beyond a reasonable

doubt that Defendant murdered the victim. There is no mystery as to how the victim died.

The complained of comment referenced in Defendant's Initial Brief does not constitute burden-shifting, but rather a comment on the record evidence, including Defendant's testimony. Defendant's conduct after murdering the victim was filled with consciousness of guilt actions. That included sealing the victim's body in a 55 gallon barrel and leaving the barrel inside a trailer that was located outside. Defendant testified that he saved the victim's body for the purpose of delivering it to the police (T. 763) and that he put the victim in the barrel to preserve and protect her to be delivered to the medical examiner. (T. 801) However, the medical examiner testified that due to the condition of the victim's body, including the victim's discoloration, her examination of the victim was hindered and, as a result, she could not identify a specific cause of death other than homicidal violence of undetermined means. (T. 722; 730) The prosecutor's argument did nothing more than comment on this evidence.

Moreover, defense counsel in his closing argument said the State's case was "all about moving the body." (T. 882) Defense

counsel argued that the medical examiner could not say how the victim died. (T. 882). He argued, “She can’t say it wasn’t suicide. There’s no evidence directly showing that she did not accidentally die from that suicide.” (T. 882) Thus, the prosecutor’s comment was also an invited response to Defendant’s closing argument when he said:

Defense counsel wants you to question the medical examiner and what she said because she couldn’t find the evidence because (sic) the body’s condition. Don’t reward Henry Steiger for putting her in that condition, for hiding and destroying the evidence of murder. He’s the reason she’s in that condition. He’s the reason she cannot give you an opinion as to how it happened. (T. 896)

Cumulative Error Standard of Review

Defendant makes a cumulative error argument; however, Defendant cites inapplicable law in doing so. Defendant cites to a harmless error analysis in making this argument; however, that is not the proper standard when the claims are unpreserved. For the reasons already articulated in this brief, there is no fundamental error upon which this Court can grant relief.

ISSUE: WHETHER THE TRIAL COURT PROPERLY ADMITTED
PHOTOGRAPHS TAKEN OF THE VICTIM'S BODY AFTER IT
WAS RECOVERED?

Defendant, at trial, objected to the admission of State's exhibits 154, 156 and 158, which were photographs taken of the victim's body after it was recovered. (T. 687-698; 724) A proffer of the exhibits was made. (T. 692-695) After considering the proffer, and conducting his own research, the trial judge ruled the exhibits admissible. (T. 689-692)

Defendant's objection in the trial court was the photographs of the victim were not relevant and not necessary for the expert witness to use to explain matters to the jury. Additionally, that the photographs did not establish identity, reveal cause of death or assist the jury in understanding the expert witness's testimony. If relevant, they were too inflammatory. (T. 689) Defendant appears to make a different argument on appeal. If so, because the arguments are different, the issue is not preserved. Specifically, on appeal, Defendant argues, "Here, the prosecution admitted the challenged photos solely to arouse the same improper sympathies." (PB 29) Also on appeal, Defendant seems to argue the photographs were not needed by the State. (PB 29-31)

To the extent the issue is preserved because the argument below is the same as the argument on appeal, the standard of review is abuse of discretion; however, the trial court's discretion is limited by the rules of evidence. *Jenkins v. State*, 107 So. 3d 555 (Fla. 1st DCA 2013).

In this instance, the trial court did not abuse its discretion in admitting the photographs. In fact, the trial court required a proffer of the testimony from the medical examiner and, with respect to each photograph, asked the witness how the photograph assisted the witness's testimony. (T. 690; 691) Thereafter, in reliance upon *Campbell v. State*, 271 So. 3d 914 (Fla. 2018), the trial court admitted the photographs based upon the proffer.

In *Campbell*, this Court wrote of relevance to this claim:

"The test for admissibility of photographic evidence is relevancy rather than necessity." *Pope v. State*, 679 So. 2d 710, 713 (Fla. 1996).... This Court has upheld the admission of autopsy photographs when they are necessary to explain a medical examiner's testimony, the manner of death, or the location of the wounds. See, e.g., *Philmore*, 820 So.2d at 932 (autopsy photograph was relevant to show the nature and extent of the bullet wound, and for demonstrating premeditation); *Floyd v. State*, 808 So. 2d 175, 184 (Fla. 2002) (autopsy photographs "were relevant to show the circumstances of the crime and the nature and extent of the victim's injuries"); *Brooks v. State*, 787 So. 2d 765, 781 (Fla. 2001)

(five autopsy photographs were relevant to the medical examiner's determination as to the manner of the victim's death); *Pope*, 679 So.2d at 713-14 (autopsy photographs were relevant to illustrate the medical examiner's testimony and the injuries he noted); *Wilson v. State*, 436 So. 2d 908, 910 (Fla. 1983) (nine autopsy photographs were admissible because they were relevant to show identity, the nature and extent of the victims' injuries, the manner of death, the nature and force of the violence used, and premeditation).

Id. at 933–934.

Thus, the long-established test is relevance, not necessity. To that end, the medical examiner explained with respect to each photograph how the photograph helped explain her testimony. The fact that certain matters may not have been in dispute does not make the photographs irrelevant. They still helped the medical examiner explain her testimony, including how the condition of the victim's body was received and how the body's condition prevented her from being able to see or determine certain things, including the exact cause of the victim's death.

The trial court found that the probative value of the photographs outweighed any prejudicial effect (T. 697-698) That ruling should not be disturbed on appeal.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court affirm Appellant's judgment and sentence.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by efileing to all appellate counsel of record on February 23, 2021.

Respectfully submitted, served and certified,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Florida Rule of Appellate Procedure 9.045(e), the foregoing document was created using 14-point Bookman Old Style and based on the “word count” feature in

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