

IN THE SUPREME COURT OF FLORIDA

MARLIN LARICE JOSEPH,

Appellant,

CASE NO. SC20-1741

v.

DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.

_____ /

**ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA**

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., “Joseph.” Appellee, State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. Reference to the appellate record will be by “ROA” followed by the page number; the trial transcript “T” followed by the page number; the supplemental transcript “S” followed by the page number indicated at the top right of the transcript. Joseph’s initial brief will be “IB” followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

As a preliminary statement, Appellee does not accept the unsupported facts and arguments presented in the statement of the facts section in Appellant's initial brief. Appellant's initial brief is not in compliance with the spirit of rule 9.120(b)(3), Florida Rules of Appellate Procedure. While there are citations to the record, there are many unsupported factual assertions as well as extensive and improper legal arguments. *See e.g. Island Harbor Beach Club, Ltd. v. Dept. of Nat. Resources*, 471 So. 2d 1380, 1381 (Fla. 1st DCA 1985) (explaining that the court struck a "brief containing a 13 page statement of the case and facts, with only seven references to the record on appeal"); *Dowell v. Sunmark Indus.*, 521 So. 2d 377, 378 (Fla. 2d DCA 1988) (court struck a brief because the "brief contained very few record citations, set forth facts in an argumentative manner, and included references to matters not contained within the record on appeal"). The State takes issue with that section and asks this Court to discount it and the remaining portions that contain unsupported argument or are not corroborated by the trial record. While a brief may be stricken for failure to comply with the appellate

rule, Appellee has chosen instead to provide its own statement of the case and facts.

CHARGES

Marlin Joseph was indicted for two counts of first-degree murder with a firearm and for one count of felon in possession of a firearm or ammunition (actual possession). The firearm charge was bifurcated for trial. (S. 10).

GUILT PHASE

The State's first witness was Joseph's mother, Robin Denson. On December 28, 2017, she lived in West Palm Beach in a home belonging to her girlfriend, Kaladaa Crowell. (T. 1152; 1154). Ms. Crowell's daughter, Kyra Inglett, lived there too. (T. 1153). Ms. Denson's sons Marlin, Parice, Cordarius and Patrick Joseph¹ lived there as well. (T. 1158.) Marlin Joseph's daughter, Kamare Canty,² stayed there from time to time. When she did, she slept in Kyra's

¹The witnesses who share surnames with each other or the Appellant will be referred to by their first name to avoid confusion. Further, these witnesses are occasionally referred to by their nicknames: Parice (Ted); Cordarius (Pop); Patrick (Pint).

²The correct spelling of this name is "Kamarrie," however because it is spelled "Kamare" throughout the transcript and record, the State has spelled it as it was transcribed.

bedroom. (T. 1161). Jeshema Tarver, Ms. Denson's god-daughter, was present at the home on the day of the murders. (T. 1165).

While Ms. Denson was at work that day, she was alerted by Ms. Crowell that there had been an incident between Kyra and Kamare. (T. 1168). After hearing this, Ms. Denson called Cordarius because he was home at the time. (T. 1170). When her workday was over, Parice picked Ms. Denson and Patrick up from work and drove them home. (T. 1172). When she arrived home, Kyra, Kamare, and Jeshema were sitting on the sofa playing with their phones and laughing and talking. (T. 1172).

At this point in Ms. Denson's testimony, she deviates from the statement she provided to police on the night of the incident. (T. 1176-1206). During the trial, Ms. Denson indicated that Marlin was not upset or disrespectful when she arrived home that night. In the statement given to police immediately after the incident, Ms. Denson stated that Marlin was still upset about the disagreement between Kyra and Kamare and that Marlin was "going on and on" and was "being disrespectful". (T. 1185-86). Ms. Denson also told police that she had told Marlin that if he didn't calm down, he was going to need to leave. (T. 1187). After an exchange with Marlin, Ms. Denson went

outside and spoke with Cordarius and Parice, who were on the porch. (T. 1191).

Ms. Denson indicated she wished to speak with Cordarius, so they left the porch and moved over to a nearby tree in the front yard. After a few minutes, she heard several gunshots coming from inside her home. (T. 1193). Neither she, Parice, or Cordarius had a gun. Of the people inside the home, none of the girls had a gun, and she had not seen Patrick with a gun. (T. 1194). Cordarius told her to run, but she ended up on the ground near a neighboring house, where Patrick eventually picked her up. (T. 1196; 1204).

At trial, Ms. Denson denied that Parice had confronted Marlin after the shooting. However, on the night of the incident she told police that she had heard “Ted (Parice) hollering at Marlin”. (T. 1204). When Patrick helped her up, he was frantic and crying and told her that Kaladaa had been shot. (T. 1205-06). At trial, Ms. Denson couldn’t remember if Patrick had mentioned either Kyra or who the shooter had been, but in her police statement she said that Patrick

had told her that Marlin had shot Kaladaa and Kyra and that they were both dead. (T. 1206-07).³

Ms. Denson returned to her home and saw Kyra lying on the sidewalk. Kyra wasn't moving, but she was breathing. After this, Ms. Denson ran into the house and saw Kaladaa lying on the floor. Ms. Denson checked for a pulse but could not find one. (T. 1212-16).

Eventually the police arrived. With the exception of Marlin, all of the adults who had been present during the murders had remained on scene and spoken with police. (T. 1217). Eventually Ms. Denson, Parice, Patrick, and Cordarius all went to the police station and gave statements to law enforcement. (T. 1218). While there, at the request of the police, Ms. Denson attempted to contact Marlin. He did not respond to those attempts. (T. 1219-20).

³ During their trial testimony Robin Denson, Patrick, and Cordarius, each denied remembering what had occurred on the night of the murders. Subsequently, the State used their prior statements for impeachment. Overruling a defense objection to admissibility, the Judge instructed the jury, "So, just a reminder. When she's point (sic) out things that may have been in a prior statement, the offering of that statement is not for the truth of that. It's to show that maybe an inconsistent statement was made. So, it's offered not for substantive evidence but for impeachment purposes." This instruction was given at the request of the defense. (T. 1201-02).

Ms. Denson is vague about when she realized that Ms. Crowell's car was missing, but does say that after the incident, the car's location was unknown. (T. 1220). At some point in the days after the murders, Cordarius located the car and Ms. Denson went to the location to confirm it was the missing vehicle. When she arrived, Ms. Crowell's purse was in the back seat. (T. 1224-25).

Patrick Joseph confirmed that an incident occurred on December 28, 2017, and provided other foundational information to the court. (T. 1241-43). Other than that, Patrick admits having spoken to police, but claims he remembers none of the details surrounding the statement or what he told police. (T. 1243-45). Eventually Patrick becomes hostile with the court and refuses to answer *any* questions, even after being instructed to do so by the Judge. Ultimately, Patrick either refuses to answer or claims not to remember anything about the actual shooting or the events leading up to it. (T. 1247-74). Several times Patrick claims he was not at the house. (T. 1250; 1256; 1257; 1260).

Patrick was repeatedly impeached with the statements he made to police shortly after the incident. (T. 1244-74). Patrick was so argumentative and hostile during his testimony that during a bench

conference the judge stated that a fraud had been committed upon the court. (T. 1261-62). Eventually, the judge told the prosecution that she would not allow the impeachment to continue, noting “he’s not going to change his answers so I think the jury gets the idea. But I’m not going to have you read the whole...statement...into evidence, okay?” (T. 1269).

When confronted during trial, Patrick claimed he did not remember large portions of the night. Naming only a few for illustration, he did not recall telling police that Kaladaa had asked someone to call for an ambulance, that he had seen a bullet and bullet hole with blood coming out of her (Kaladaa), or that he saw a man shoot a lady. (T. 1272-73).

Parice Joseph is the defendant’s older brother and was also living at the home in West Palm Beach. On the date of the incident, using Ms. Crowell’s vehicle, Parice picked up Ms. Denson and Patrick from work. (T. 1281). After they returned to the home, Parice went out to the porch to use his phone. Parice remembers hearing gunshots but isn’t sure of how many. (T. 1284). By this time, both Cordarius and Ms. Denson were also outside. (T. 1287).

Shortly after hearing gunshots, Parice saw Kyra running outside while looking backwards. Marlin came out behind Kyra with a gun in his hand. (T. 1299). The gunshots had scared Parice, so he tackled Marlin and they both went to the ground. Prior to tackling Marlin, Parice saw that while Marlin was running, he had a gun in his hand. Marlin got away from Parice after being tackled and still had the gun. (T. 1285-86; 1299).

Parice then saw Kyra lying on the sidewalk in front of the house. (T. 128-89). By this time Marlin had gone back into the house. (T. 1288; 1290). Parice had seen Marlin with a gun on Christmas night. (T. 1295). Parice would not admit to having seen Marlin shoot Kyra but did say that Marlin was the only person in the house that he saw with a gun. (T. 1296). Further, neither Patrick, Cordarius, Ms. Denson, nor he had shot either Kaladaa or Kyra. (T. 1294-95). Parice also had not seen anybody unknown come onto the property. (T. 1294). While Kyra was lying on the sidewalk, Marlin came back out of the house and drove away in Kaladaa's car. (T. 1291).

The responding police officers asked Parice to go to the police department and make a statement about what he had seen and heard, and he agreed to do so. (T. 1297).

Cordarius Joseph is the youngest of the brothers. He wasn't working on the date of the incident and had stayed home with Kamare, Jeshema, and Kyra. Cordarius did not recall any issues among the three girls that day. After the rest of the family arrived home, he went outside to wait for his girlfriend to pick him up. While he was waiting, Ms. Denson approached and told him that they needed to get Marlin some help. While standing there, he heard gunshots, but wasn't sure where they were coming from. He didn't recall telling Ms. Denson to run but remembers that he went headfirst down to the ground. (T. 1306-18).

After that, Cordarius remembers seeing Kyra come outside and then she just fell to the ground. He wasn't sure if she was running. He then saw Marlin leave the house, get in the car, and drive away. (T. 1319).

Once the police arrived, Cordarius agreed to go to the police department and make a statement. During testimony, Cordarius says he does not remember the statement, and reading it did not refresh his memory. In that statement, Cordarius told police that he had seen "Kyra go outside. She tried to run. Then my brother kept doing it." (T. 1320-21). The court then gave the jury an explanation

of impeachment evidence and reminded them that impeachment testimony is not to be used as proof that the prior statement was true. (T. 1322). Cordarius again read a portion of his statement and continued to claim a lack of memory. He was then asked, “So when Detective Creelman asked you, ‘So you told me that he came out and he shot the gun at the little girl, was the little girl running away?’ And your response was, ‘she was trying to get out of the house.’ You don’t recall telling Detective Creelman that?” Cordarius said he did not recall that statement. (T. 1327-28).

In court, Cordarius stated that he did not remember seeing Parice attempting to stop Marlin and continued to deny any memory of that night, even after reviewing his police statement. In that statement, Cordarius had said that Parice was trying to stop Marlin. (T. 1324-25; 1326). The court gave the jury another verbal instruction regarding impeachment evidence. (T. 1326).

Cordarius also said he did not remember whether Marlin had a gun that night. After reviewing his statement, he said he still did not recall. He was then asked if he remembered being asked (by police) if he knew Marlin had a gun and answering, “Yeah, I knew.” To this question his response was “false.” (T. 1330). Cordarius testified that

he did not see any other person with a gun, nor did he see any other people present shoot Kaladaa or Kyra. (T. 1331-32).

Jeshema Tarver was present in Ms. Crowell's home on December 28, 2017. Jeshema had been in the home most of the day and had mainly spent time with Kyra and Kamare. Sometime before lunch, Kyra and Kamare had gotten into a little argument, but it resolved quickly. This incident occurred when Kamare asked both girls to sit on her back because it was bothering her. The girls did so, but it began to hurt and Kamare told them to get off. Kyra had trouble getting off of Kamare, and this upset her. After the argument, Kyra sent a text to someone, but Jeshema was not sure to whom. Later in the day, after Marlin had arrived home, Jeshema went to take a shower in the common bathroom. During the shower, she could hear Marlin and Kaladaa arguing. Marlin referenced the disagreement between the girls and made a comment about Kyra being mean to Kamare.

Immediately after that, there was a loud bang. Jeshema turned off the water and heard Ms. Crowell screaming and crying and asking for someone to call 911. Jeshema grabbed her towel and opened the bathroom door. She heard several gunshots just as she was leaving

the bathroom, and then she heard one more. Kamare was outside the door and said that Kyra and Ms. Crowell had been shot. Jeshema got dressed and exited the bathroom. Jeshema froze for a moment, but hearing no more gunfire, decided to continue. She saw Ms. Crowell on the floor and a large amount of blood. Patrick came inside and told Jeshema and Kamare to go into Kyra's room. Jeshema and Kamare went into the room, hid under the bed, and called 911.

Two days before Christmas, five days before this incident, Jeshema overheard a conversation between Marlin and Ms. Denson. During this exchange, Marlin was yelling and said that Kyra had one more time to make him mad and that she had better leave Kamare alone. (T. 1598-1615).

Officer Ryan Forbes worked for the West Palm Beach Police Department. He was the first officer to respond to the incident at Ms. Crowell's home and arrived at approximately 7:30 p.m. Officer Forbes saw Kyra lying on the sidewalk, noting a gunshot wound to her head, and began to talk to her. She was breathing but he could not get her to respond. He then noticed an older female and two little girls at the door of the home. After approaching them, noting the girls were crying, he went inside the home. Officer Forbes saw Ms. Crowell on

the floor but saw no signs of life. He could see that she too had been shot, and also saw two shell casings on the floor. (T. 1338-46).

Lt. Noruling Rosales was a firefighter/paramedic for West Palm Beach Fire and Rescue. He was one of the first responders to arrive at the home. He saw one victim outside, face-down on the sidewalk. After signaling to his crew to attend to Kyra, he went inside to check on Ms. Crowell. He saw what appeared to be gunshot wounds to her head and confirmed that there were no signs of life. After this, Lt. Rosales went back outside to assist with Kyra's medical treatment. Kyra was immediately taken to a trauma center where she was transferred to hospital staff. At no point during this time did Kyra regain consciousness. (T. 1349-56; 1359).

Asia Eckroth was a crime scene investigator who responded to the Crowell home on the night of December 28, 2017. The first of her duties that night included photographing and documenting the crime scene; in this case, both the exterior and interior areas. Part of the documentation process is using markers to identify items or locations with potential evidentiary value. CSI Eckroth ultimately identified five spent Winchester .9mm cartridge casings on the exterior of the

residence. All five casings had an impression from a firing pin which indicated a round had been fired from the casing.

Inside of the home, Ms. Crowell's body was still present. While inside, CSI Eckroth recovered four spent cartridge casings; three were in the same general area and one was partially concealed under Ms. Crowell's arm. All four cartridge casings contained an impression from a firing pin, and all were Winchester .9mm Luger cartridge casings.

Later, CSI Eckroth received multiple projectiles from the medical examiner. These projectiles had been removed from the bodies of both Ms. Crowell and Kyra. After receiving them, they were secured and placed into evidence. (T. 1386-1437).

Dr. Mario Rueda is the trauma surgeon who treated Kyra after she arrived at the hospital with multiple gunshot wounds. Kyra was assessed and treated according to a special protocol for trauma victims. Kyra had already been intubated by the paramedics, but her blood pressure was too low to sustain life. Because of this and the multiple gunshot wounds, she was immediately taken to the operating room and stabilized. Kyra lived for approximately four hours, and was breathing with the assistance of a respirator, but her

heart stopped, and resuscitation attempts were unsuccessful. Kyra did not regain consciousness while at the hospital. (T. 1466-74).

Colleen Salzer was a crime scene investigator for the City of West Palm Beach. She responded to the crime scene at Ms. Crowell's home on the night of December 28, 2017. Ultimately CSI Salzer was sent to the hospital to photograph and retain evidence from Kyra. Upon arrival to the hospital, Kyra was still being treated. After Kyra's death, she was photographed. There were bullet fragments next to Kyra's head as well as a bullet jacket entangled in her hair. These items were collected and placed into evidence. (T. 1476-87).

Detective Paul Creelman was the next witness, but before calling him to the stand, the prosecution informed the court that they intended to offer testimony that during their police interviews, both Parice and Cordarius had identified Joseph as the shooter. The defense objected on hearsay grounds. The prosecution noted that statements offered for the purpose of identification were not hearsay. After hearing argument from both sides, the court ruled the statements of identification were admissible under section 90.801(2)(c), Florida Statutes. (T. 1449-62). The court also decided to

instruct the jury that this testimony, unlike the impeachment evidence, could be considered as substantive evidence. (T. 1490-92).

Detective Creelman works for the West Palm Beach police department in the homicide unit. He was the lead investigator in the deaths of Kaladaa Crowell and Kyra Inglett and responded to the scene along with several other detectives and police personnel. While at the scene, he met with Robin Denson, Parice, Cordarius, and Patrick. Each of them agreed to come to the station and give a statement. Marlin Joseph was not present at the scene.

While looking around the outside area, there was a location on the sidewalk where someone had been shot. Looking through the doorway to the home, shell casings and a large amount of blood were immediately visible.

Back at the police department, Ms. Denson, Parice, Cordarius, and Patrick were all placed in interview rooms. Prior to conducting the interviews, each person was placed under oath and promised to tell the truth.

Cordarius explained what happened, outlining what he had seen and heard during the incident. Cordarius said that his brother,

Marlin Joseph, had shot Kyra. During this statement, Cordarius was very sad and covered his face because he was crying so hard.

The defense objected to the specificity of the question because Kyra had been explicitly named. After this was overruled, the defense moved for a mistrial, which the court denied. At this point the court instructed the jury on impeachment evidence and evidence offered for the truth of the matter asserted and reminded them that just like any of the other evidence, it was their choice to believe or disbelieve what they had heard.

Parice was the next to be interviewed. During the statement Parice was sad, upset, and angry, but communicated what he had seen and heard during the incident. Parice identified his brother, Marlin Joseph, as the shooter.

During the interview with Ms. Denson, she attempted to call Marlin two different times, both at Detective Creelman's request, but Marlin did not answer either call. Because Marlin was the only suspect, many different tools were used to locate him. One of the options utilized was the U.S. Marshal Service, largely because of their expertise in locating fugitives. All activated agencies worked around

the clock to locate Marlin until he was eventually taken into custody by the U.S. Marshal Service on January 2, 2018. (T. 1490-1515).

Omar Felix was employed by the Palm Beach County Sheriff's office and assigned to the firearms identification unit within the crime laboratory. Mr. Felix examined the nine shell casings that had been retrieved from the crime scene. Using a comparison microscope, he was able to determine that all nine casings were fired from the same firearm. (T. 1621-28). Although he could not be 100% certain, he believed that the casings had been fired from a semi-automatic pistol. (T. 1660).

Dr. Reinhard Motte was a Palm Beach County Medical Examiner at the time of the incident. Dr. Motte performed the autopsies on both Ms. Crowell and Kyra. Ms. Crowell had several bullet wounds. One of them was on the back of her right hand and was consistent with holding a hand up as a defensive gesture. There was another bullet wound to her left thigh and hip area. This bullet exited that area and then reentered her body, injuring muscle, skin, fat, intestine, and the mesentery before stopping in the abdomen where it was ultimately recovered. There was another bullet wound to Ms. Crowell's chest. This bullet hit her lung, rib, diaphragm, and

liver. There was also a bullet wound to the back of her skull. This bullet entered in the back of her head and exited near her right ear. Each of these wounds would have been painful to a conscious person. There was a final shot which would have been immediately fatal. This one entered her forehead, broke her skull, and destroyed her brain.

Dr. Motte also conducted Kyra's autopsy noting she was eleven years of age, and when he received the body it was apparent that trauma surgeons had attempted to save her life. Kyra had an entrance wound near her left buttock area. The bullet from this wound was recovered from her left hipbone. This wound would have broken her hip bone and rendered her immobile. There was another gunshot wound to her lower back. This bullet entered there, went upwards, and exited out of her armpit, reentered her body and finally exited out of her right shoulder. Kyra had another gunshot wound on the right side of her head. This bullet entered through the right side of her head, travelled through skin, soft tissue, and muscle, and ultimately lodged in a back molar. She also had a grazing bullet wound to the right side of her face. Each of these injuries would have been painful to a conscious person. There was a final bullet wound to the back of Kyra's skull. This one entered her head, fractured her

skull, and damaged her brain. Dr. Motte recovered bullets and multiple bullet fragments from Kyra's body.

The cause of death in both cases was attributed to multiple gunshot wounds. Ms. Crowell's and Kyra's deaths were both ruled as homicides. (T. 1664-1704).

Following this witness, the State rested. (T. 1717; 1731). The defense moved for judgment of acquittal, which the court denied. (T. 1721; 1770). The defense then rested. (T. 1726; 1731). The parties made closing arguments, the jury was instructed, and ultimately returned verdicts of guilty as charged to both counts of first-degree murder. (T. 1790-1860; 1861-65; 1889).

PENALTY PHASE

Johnny Mangual had been Joseph's probation officer at the time of the murders. Joseph had been on probation after being found guilty of battery of a child. Mr. Mangual began supervising Joseph in December of 2017 and instructed him on the conditions of supervision, which included no violations of the law. Joseph read, understood, and signed these conditions of release. (T. 1940-45). Joseph's plea form related to this charge was admitted into evidence. (T. 1947).

Crystal Grillo was a latent print examiner for the West Palm Beach Police Department. Ms. Grillo was present in court on February 18, 2020, when the defendant's fingerprints were taken. Ms. Grillo compared those fingerprints to the fingerprints related to Joseph's conviction for battery on a child and confirmed that both sets of fingerprints belonged to Marlin Joseph. (T. 1948-58).

The defense began their mitigation with Robin Denson who was the first of twenty witnesses. She confirmed that she was the defendant's mother and that she had been in a relationship with the victim, Kaladaa Crowell. Ms. Denson brought a number of videos and photographs of the defendant which showed him at family events as well as him playing high school football. Joseph practiced a lot and worked hard at physical conditioning for the sport, making the varsity team as a sophomore. Joseph was close with all of his family and extended family. This included his siblings, aunt, cousins, and nieces and nephews. The defense also submitted several newspaper clippings which mentioned Joseph and related to the high school football team. Ms. Denson brought and read letters written to Joseph by his children along with some pictures they had drawn. Ms. Crowell

and Joseph had been friends on Facebook and tagged each other in photos. (T. 1978-2019; 2048-50).

Ms. Denson went on to discuss Joseph's life. Joseph was born in Lake Worth in 1991. Shortly thereafter, Ms. Denson and Joseph's father split up and after that none of the children had much contact with their father. Ms. Denson raised all of the kids as a single parent, often working two jobs and moving around a lot, frequently staying with her family or in public housing. During this time Joseph attended five or six different schools, struggled academically, and eventually quit school in the 12th grade because he didn't have enough credits to graduate. (T. 2020-27).

Shortly after that Kamare was born, followed by two more children, Marlin, Jr. and Marquon. Both Kamare and Marlin, Jr. lived with Ms. Denson and Joseph from time to time. Joseph was involved in parenting his children. (T. 2028-31).

Ms. Denson recalled that after Joseph returned from prison, he wasn't himself, and exhibited some odd behavior. From that point until this incident, Joseph had lived with Ms. Denson, Ms. Crowell, and Kyra, in one place or another. They all attended church together

and Joseph often read the bible. He had a good relationship with both Ms. Crowell and Kyra. (T. 2032-47).

Valerie Mitchell is Joseph's aunt and Ms. Denson's older sister. Ms. Mitchell was very involved with Joseph and remembers him as respectful and responsible. Joseph lived with her for about a year while he was in high school and she supported his football career. Ms. Mitchell and Joseph spent time going through scripture together. She looked through the photographs provided earlier and confirmed the family members depicted and noted that some of the photos were taken on her birthdays. (T. 2052-69).

Ms. Mitchell remembered that Joseph had acted odd on a few occasions. On one of her birthdays, Joseph had an outburst of profanity which was uncommon as he had never used profanity in front of her prior to this incident. Joseph used to telephone her while he was in prison and had made some bizarre statements about things being inserted into his body and that somebody at the jail was controlling him. At one point Joseph telephoned her nearly every day but the calls eventually tapered off and then stopped altogether. (T. 2070-78).

Parice Joseph confirmed that he is Joseph's oldest brother and that they had lived together most of their lives, including during this incident. In high school, they played football together and Joseph took it very seriously and practiced frequently. Parice shared some stories of his best memories with Joseph while they were growing up. (T. 2078- 94).

Next to testify for the defense was Dr. Adam White, a clinical and forensic psychologist. In addition to interviewing Joseph on three separate occasions for two different evaluations, Dr. White also interviewed a number of Joseph's family members, and reviewed jail, prison, mental health, and school records. (T. 2111-15). Dr. White made it clear that the focus of his evaluation of Joseph was to determine competence, not sanity. (T. 2105-06; 2122).

Joseph's school records were comprehensive and thorough, yet unremarkable, showing the biggest issues as truancy and tardiness. (T. 2116-17). The mental health records came from a period just prior to Joseph's release from custody, and were also unremarkable, noting no history of treatment, medication, or involuntary treatment. (T. 2118).

Regarding the jail and prison records, there were two documents that seemed significant. One was a mental health referral which discussed radical changes in Joseph's behavior beginning in April of 2018 and the other outlined some allegations he had made which didn't seem to make sense. At some point after this, Joseph had been transferred to the mental health unit in the jail. (T. 2121-20; 2152).

Referencing the first competency evaluation, Dr. White met Joseph in his cell on December 27, 2018. (T. 2145). Joseph provided information about where he grew up, his family, his schooling, and jobs. The relevant medical records for this evaluation were conflicting; some indicating a possible psychiatric condition and some concluding that Joseph was exaggerating, feigning, or dissimulating the symptoms. Noting that the information, though extensive, was ambiguous, and considering the nature of the charges and penalties and believing Joseph to be suffering from a delusional disorder, Dr. White ultimately declared Joseph incompetent and recommended competency restoration. (T. 2124-26). Dr. White also opined that Joseph had exhibited behaviors consistent with this diagnosis prior to the crimes for which he had just been convicted.

Because of Joseph's reticence to cooperate, this opinion was based on information gathered from Ms. Denson. Further, noting a history of schizophrenia in the family, a schizophrenia diagnosis, while not confirmed, could likewise not be ruled out. (T. 2135-36).

Joseph underwent competency restoration at Treasure Coast Forensic Treatment Center. While Joseph declined psychotropic medication, he did undertake competency restoration classes, mock court, and group sessions. (T. 2140-41). Joseph was ultimately declared competent by Dr. Matthew Jalazo, who was on staff at the facility. In a report generated on September 23, 2019, Dr. White agreed with this and declared Joseph competent to proceed. (T. 2139; 2147).

Dr. White testified that Joseph had not had any previous mental health diagnoses, had not been exposed to domestic violence, and had never suffered from physical, emotional, or sexual abuse. (T. 2155-56). Dr. White noted that while he did not believe that Joseph was malingering, he could not rule it out. (T. 2165-66). According to Dr. Jalazo, Joseph did not display any indicators of an active mental illness nor were any delusions or disorganized behaviors apparent. (T. 2172). A second doctor attempted to confirm this, but Joseph

refused to participate because he'd already been found competent. (T. 2174). Another psychiatrist, Dr. Molly Ryan, also did not find any sign of illogical thinking or impaired perceptions and noted that Joseph's mental status was unremarkable. (T. 2174-76). Upon return to the jail, Joseph was seen by Dr. Perez Beauvil who confronted Joseph about his previous symptoms and behaviors. Joseph responded to this by saying there was nothing wrong with him, that he had no mental illness and that he had behaved like that because of his court case. (T. 2179-80).

The defense then called some previous co-workers of Joseph's. They included Ryan Dix, Michael Preller, and Macey Preller who all testified that in the approximately three months they had known Joseph, he was a hard worker when he showed up, was easy to work with, and was generally a good employee. Each of them also remembered Joseph believing that certain individuals were trying to get him fired even though this was inaccurate. (T. 2200-04; 2207-12; 2216-18).

Next to testify was Jose Burgos who was the medical records custodian for the Palm Beach County Sheriff's Office. Mr. Burgos supplied some records, including the two noteworthy referrals

regarding Joseph's behavior, which had been discussed by Dr. White. The documents contained observations, details, and facts surrounding Joseph's time in custody. Mr. Burgos testified that there were many other documents contained within Joseph's file. (T. 2222-29).

Suzanne Matuella had been an assistant principal at one of Joseph's elementary schools. Ms. Matuella remembered Joseph as a very quiet student who worked hard but struggled academically. She believed he had been held back twice during elementary school and recalled that he had trouble "getting his voice out" and had a difficult time reading. (T. 2234-35).

Ms. Matuella said that Joseph had stayed in her memory over the years. She recalled that Joseph would not eat his lunch and that she would engage, coaxing him to eat. She said he was very, very shy and she talked with him, trying to get him to interact. She remembered him as a gentle giant and believed that he trusted her. (T. 2234-35).

Willard Monroe, Jr. coached Joseph in high school. Mr. Monroe recalled that Joseph was a hard worker who made the varsity football team as a sophomore. It was difficult to get Joseph to be aggressive

because he didn't want to hurt anyone, but he was a team player who was well regarded by his teammates. On occasion, Mr. Monroe would offer Joseph extra support on the academic front and Joseph accepted it. Joseph had been a gifted football player but didn't go on to play football in college. After watching a video of Joseph playing football, Mr. Monroe became emotional and said that he had not had any contact with Joseph after high school. (T. 2238-52).

Rose McLeod is Joseph's Godmother and has known him since he was 8 or 9 years old. When she met Joseph, she and Ms. Denson were in a relationship. During this time, she and Ms. Denson co-parented, and they all lived together (including Joseph's siblings). Ms. McLeod's relationship with Ms. Denson ended 6 or 7 years ago and she had not remained in touch with Joseph.

Ms. McLeod said that Joseph had always been a quiet and respectful child who got along well with other kids. Joseph showed her a lot of love and he was just like her own son and would often help her with household chores. She used to attend his football games and was very proud of him. (T. 2253-59).

Christina Canty is the mother of two of Joseph's children, Kamare and Marlin, Jr. Ms. Canty and Joseph co-parented their

children. Joseph was a great father and worked hard to support the children and was involved in day to day parenting. Ms. Canty recalled seeing Joseph in the weeks prior to the homicides and observed that he had lost a lot of weight and was acting strangely. Because she hadn't seen him in four or five months, the changes were obvious. While unable to give a specific example of any strange behavior, she said that Joseph seemed out of it and wasn't himself. (T. 2261-66).

Latisha Jones has one child in common with Joseph, 9 year old Marquan. Ms. Jones and Joseph had an off and on relationship before and after Marquan was born. Prior to the homicides Joseph had been a good and involved father and Marquan enjoyed their time together. (T. 2270-75).

Cordarius Joseph confirmed that he is Joseph's youngest brother and that Joseph had been a role model. Cordarius testified that he looked up to Joseph and wanted to be just like him. When their mother wasn't home, Joseph would cook for the siblings and make sure everyone was doing well. Cordarius and Joseph played football together in high school. Cordarius shared a story about an event from football practice and recalled that Joseph was a great

player. Cordarius felt that Joseph was on the right path and that he tried hard and did everything well.

In the weeks leading up to the homicides, Joseph stopped eating and would stay to himself. Cordarius recalled that Joseph would peek out of the window and comment that people were watching despite the fact that there was nobody outside. Prior to the homicides, Cordarius had never known Joseph to have a firearm and did not know where the gun had come from. Despite the murders, Cordarius still loves Joseph and still looks up to him. (T. 2279-87).

The final defense witness was Chrisaria Joseph, Joseph's sister. Chrisaria is a middle child, with Joseph being one year older than she is. Chrisaria discussed a video she had taken in October of 2017 of Joseph goofing around with Patrick. She also watched another video, noting that Joseph, Patrick, and Parice were in it. The video depicted joking and horseplay, which was typical behavior. Joseph had a good sense of humor and was hilarious. Chrisaria looked up to Joseph while growing up and was a cheerleader for his football team.

Joseph is Chrisaria's favorite brother and is down to earth, sweet, kind, and loving. Joseph often babysat Chrisaria's daughter Alia and loved her like one of his own. Joseph often watched Alia

overnight and Chrisaria never had concerns about leaving Alia alone with him. Joseph had a normal relationship with Kaladaa and treated Kyra the same as he treated all of the other kids.

After Joseph was arrested, Chrisaria had some conversations with Joseph that she considered strange. Joseph would say things about someone controlling his mind and that people in the jail were trying to hurt him. (T. 2289 -99).

The defense rested and the State called no witnesses. The defense had a single objection to jury instruction 7.11, arguing that a simultaneous conviction should not count as an aggravator. The court overruled this objection and the parties proceeded to closing argument. (T. 2328-30). During the State's closing argument, the defense objected 6 times. (T. 2345; 2347; 2357; 2378; 2379; 2382). One of those objections was sustained, and a curative instruction was given. (T. 2362; 2368). The defense moved for a mistrial 3 times with each of these motions being denied. (T. 2362; 2378; 2386). When closing arguments concluded the jury was instructed. (T. 2425-26).

The jury returned with verdicts recommending a penalty of death by a 12-0 vote on each count, determining the aggravating

factors outweighed the mitigating circumstances, and finding the following aggravators on both counts: (1) Joseph was previously convicted of a felony and was on felony probation; (2) Joseph was previously convicted of another capital felony or a felony involving the use of or threat of violence to another person; (3) the first-degree murder was especially heinous, atrocious, or cruel; and, (4) the first-degree murder was committed in a cold, calculated and premeditated manner. On the charge relating to Kyra Inglett, the jury also found a fifth aggravator – that the victim was a person less than 12 years of age. (T. 2462-69).⁴

DEFENSE MOTION TO INTERVIEW JURORS

In between the verdict and the *Spencer*⁵ Hearing, the defense filed a motion to interview the jury panel based on an affidavit filed by Robin Denson on May 30, 2020. In this affidavit, Ms. Denson describes an interaction with a member of the venire. It is not clear when this interaction is alleged to have occurred. (ROA 1330-32).

⁴ The bifurcated charge, felon in possession of a firearm or ammunition, was dealt with at this time.

⁵ *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

In a written order, the court denied this request noting that there had been a three month delay between the incident and the report. The court did not find Ms. Denson's statements reliable and ruled that there was insufficient evidence to support juror interviews or to support that the verdict was subject to challenge. (ROA 1335-36).

SPENCER HEARING

A *Spencer* Hearing was held October 16, 2020. Neither party called any witnesses,⁶ with both parties relying upon their written memorandums and brief oral argument. Joseph declined to testify. (ROA 1623-35).

SENTENCING AND SENTENCING ORDER

Sentencing took place on November 19, 2020. The trial court found four aggravators which applied to both counts: (1) Joseph was previously convicted of a felony and under sentence of imprisonment or on felony probation (moderate weight); (2) Joseph was previously

⁶ Appellant's initial brief states that ten witnesses were called. In actuality, the *Spencer* Hearing had concluded when the witnesses testified. In fact, the defense brought a motion to be sure there was a clear delineation between the *Spencer* Hearing and the people addressing the court about sentencing. (IB 15; ROA 1620).

convicted of another capital felony or a felony involving the use or threat of violence (great weight); (3) The first-degree murder was especially heinous, atrocious, or cruel (HAC) (great weight); (4) The first-degree murder was committed in a cold, calculated, and premeditated manner (CCP) (great weight). In the count involving Kyra Inglett, the trial court found an additional aggravator: (5) The victim of the first-degree murder was a person less than 12 years of age. The trial court considered and found as proven the statutory mitigator of no significant history of prior criminal activity and accorded it little weight. The court rejected other statutory mitigators but did find that 7 non-statutory mitigators had been proven assigning little weight to 6 and moderate weight to 1. (T. 1702-32).

The judge agreed with the jury recommendation and sentenced Joseph to death for the murders of Kaladaa Crowell and Kyra Inglett. (ROA 1735).

SUMMARY OF THE ARGUMENTS

ISSUE I: The trial court properly denied Appellant's motion to exclude the testimony of Omar Felix. Appellant filed the motion on February 13, 2020, the same day the prosecution provided him with the ballistics report. Trial began on February 14, 2020 and jury selection

commenced without the issue being raised or a continuance being requested. The trial court ruled that although there had been a violation, the violation was inadvertent, and no prejudice resulted.

ISSUE II: The trial court properly allowed the prosecution to impeach its witnesses with prior inconsistent statements. Any party, even the party calling the witness, may attack the credibility of a witness. Because the three witnesses involved made prior sworn statements that were inconsistent with their trial testimony, impeachment was appropriate.

ISSUE III: The trial court properly admitted out of court statements which identified the defendant as the shooter. These statements are not considered hearsay under the rule and were appropriate to use as substantive evidence.

ISSUE IV: There was no error in allowing Jeshema Tarver to testify about recent threats she had heard Joseph make. These threats were directed at the victims and demonstrate Joseph's motive and state of mind. The statements were made just days prior to the murders and tended to prove a material fact to the prosecution which made it relevant evidence.

ISSUE V: The trial court did not abuse its discretion when it denied Joseph's motion to dismiss as there are no facts in evidence to support Joseph's claims of constitutional violations regarding the treatment to restore competency.

ISSUE VI: The trial court did not err or abuse its discretion by denying the motion to dismiss based on juror misconduct. The trial court weighed the evidence provided and found that it was neither reliable, nor supported the allegation that jurors had disregarded the court's admonitions.

ISSUE VII: This Court properly determined that comparative proportionality review of death sentences is not required by the eighth amendment, thus Joseph's sentence was not imposed in an arbitrary or capricious manner.

ISSUE VIII: The only finding a capital sentencing jury must make beyond a reasonable doubt is whether a given aggravator is proven. There is no requirement that capital juries make findings beyond a reasonable doubt as to the sufficiency of the aggravation and whether the aggravation outweighs the mitigation. Thus, the trial court did not err in instructing the jury during sentencing.

ISSUE IX: There is competent, substantial evidence to support the HAC aggravating factor and it was proven beyond a reasonable doubt. Noting that both victims suffered a great deal, that one begged for someone to call 911, and that the other fled and was running for her life when she was disabled by a gunshot to the hip support this aggravator. This, combined with other evidence, was sufficient proof beyond a reasonable doubt that the jury and the judge were correct in finding the existence of HAC in this case.

ISSUE X: There is competent, substantial evidence to support the CCP aggravating factor and it was proven beyond a reasonable doubt. Appellant's behavior, threats, and the acquisition of a firearm show that he had planned the murders. This, combined with other evidence, was sufficient proof beyond a reasonable doubt that the jury and the judge were correct in finding the existence of CCP in this case.

ISSUE XI: This Court has ruled that comparative proportionality review is contrary to the conformity clause of the Florida Constitution. Because of this, a proportionality argument is precluded.

ISSUE XII: Florida's capital punishment scheme is constitutional.

ISSUE XIII: The prosecution's comments during the penalty phase closing argument were not improper, and if they were, they were either cured by admonition or were harmless.

ISSUE XIV: There is no competent evidence to support the claim that the jurors did not follow the law or that Appellant did not receive a fair trial.

ISSUE XV: The cumulative error claim was not properly presented on appeal. Moreover, there was no cumulative error. For there to be cumulative error, two or more errors are required, and here there are not. Finally, even if this Court were to find multiple errors occurred, these errors, even considered collectively, would remain harmless.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S MOTION TO EXCLUDE WITNESS TESTIMONY. (Restated)

The trial court properly denied Appellant's motion to exclude the testimony of Omar Felix after conducting a *Richardson*⁷ hearing and ruling that any violation committed by the State was inadvertent

⁷ *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

and that Joseph suffered no prejudice. “[A] trial court's decision on a *Richardson* hearing is subject to reversal only upon a showing of abuse of discretion.” *Rimmer v. State*, 59 So. 3d 763, 787 (Fla. 2010) (citing *Conde v. State*, 860 So. 2d 930, 958 (Fla. 2003)).

Upon being notified of an alleged discovery violation, the court must conduct a *Richardson* hearing to inquire about the circumstances surrounding the State's violation of the discovery rules and examine the possible prejudice to the defendant. *Cliff Berry, Inc. v. State*, 116 So. 3d 394, 418 (Fla. 3d DCA 2012); *Jones v. State*, 32 So. 3d 706, 710 (Fla. 4th DCA 2010). The exclusion of evidence is a permissible tool in a trial court's cure options however “this sanction should only be imposed when there is no other adequate remedy.” *McDuffie v. State*, 970 So. 2d 312, 321 (Fla. 2007).

On February 14, 2020, the defense filed a motion to authorize a firearms expert, raised the issue of the late disclosure and asked for a *Richardson* hearing. The court indicated that the hearing could be held that afternoon. (T. 115). However, before the afternoon recess, when the court asked if there were any other issues to discuss, the defense demurred on the topic, telling the court there was nothing else to do, noting their motion for a firearms expert had been granted.

Part of a conversation between the defense and the State was conducted on the record. In that conversation the parties discussed how to get the bullet casings to the defense expert. (T. 207; 220).

The issue was not raised again until February 20, 2020, after the jury had been selected and the testimonial portion of the trial was about to begin. The defense then discussed his firearms expert.

I got a firearms expert approved, and we did JAC stuff, you issued an order allowing me to get a firearms expert and I got a firearms expert and we sent him the report and the firearms expert said you don't need a firearms expert. This is not firearms, this is tool mark identification.

(T. 1090). Counsel then went on to explain to the court how there “were no tool mark experts in Florida or anywhere.” (T. 1092). After this, the court conducted the *Richardson* hearing. The prosecution explained that upon final case review of the evidence on February 12, 2020, they discovered there was no firearms report. Because it was after hours, Detective Creelman said he would look first thing in the morning. It was only then, on the morning of February 13, 2020, that he discovered the shell casings had not been sent to the lab for comparison, thus no report existed. The State requested the casings be submitted to the lab that day and a report generated immediately

thereafter. The State contacted the defense and put them on notice of the witness and the pending report and filed both with the court and the defense this same day. (T. 1100-02; ROA 523; 530).

As was done here, once the trial court became aware of a potential discovery violation, an inquiry must be conducted to determine whether or not a violation had occurred. *Sinclair v. State*, 657 So. 2d 1138, 1140 (Fla. 1995). Next, if a violation is found, pursuant to *Richardson*, the court “must assess whether the State’s discovery violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what affect it had on the defendant’s ability to prepare for trial.” *Id.* at 1140. See *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

The State explained that the ballistics report would show that even though no firearm had been found, each of the recovered casings had been fired by the same gun. In making its ruling, the court noted that the casings had been in evidence since the beginning of the case and the only new evidence related to this piece of physical evidence was the report confirming that each casing had been fired from the same gun. (T. 1104). The court clarified that neither party

anticipated there would be any evidence of multiple guns or multiple shooters. (T. 1107).

When asked to outline any prejudice to the court, the defense responded, “What if my firearms expert who examines it says no, they weren’t from the same gun. What the court’s asking me to do is accept their firearms expert as to being correct.” (T. 1108). The court pressed and asked if it (the ballistics report) changed the theory of the case or theory of the defense. (T. 1110). The defense insisted it would be prejudiced, yet remained unable to provide a reason other than “not agreeing” with “the State’s facts of how many shooters there was who did the shooting.” (T. 1110). After hearing argument, the court ruled there was an inadvertent violation, however it was insubstantial and did not prejudice the defense in their preparation for trial. (T. 1102; 1110).

The proper inquiry here is whether there is a reasonable possibility that the discovery violation “materially hindered the defendant's trial preparation or strategy.” *Schopp v. State*, 653 So. 2d 1016, 1020. Joseph put forward no evidence to support the hinderance of trial strategy or preparation thus the court properly ruled the defense suffered no prejudice. The trial court noted that the

report would simply corroborate the currently anticipated evidence and went on to assure the defense that accommodations would be made were the defense to retain an expert to testify. (T. 1110-11).

Importantly, even though the court *found* a violation, arguably this finding was erroneous. In actuality the State did not commit a discovery violation because it had not possessed the ballistics results prior to its disclosure. Because the bullet casings had never been sent to the crime lab for analysis, there was no report to deliver. *See Street v. Florida*, 636 So. 2d 1297, 1302 (Fla. 1994). The ballistics report was not in the State's constructive possession or control before the prosecutor received it from the lab on February 13, 2020. Upon receipt it was immediately provided to the defense. Because it was turned over once it was in the State's possession or control, the duty to continue to disclose was satisfied. *Cf. Goldsmith v. State*, 182 So. 3d 824, 828 (Fla. 4th DCA 2016).

Moreover, the exclusion of evidence is an extreme sanction and should only be used as a last resort. *State v. Roberson*, 152 So. 3d 776, 779 (Fla. 5th DCA 2014), *citing McDuffie v. State*, 970 So. 2d 312, 321 (Fla. 2007). An alternative remedy for the late report would have been a continuance or a lengthy recess in order for Joseph to

conduct testing. Joseph never made this request. If the addition of the ballistics report to the State's evidence truly did impact their trial strategy or preparation, surely the defense would have asked for a ruling prior to court being adjourned on February 14, 2020,⁸ or at a minimum, when court next reconvened, so they could modify or adjust their strategy or defense as necessary. In fact, after the defense told the court they couldn't find an appropriate expert, considering the trial schedule, they had ample time to locate one; especially considering the court's specific assurances that every effort would be made to accommodate a new expert witness.

During the trial, the judge followed up on her previous ruling by stating,

So I don't find that it was a prejudicial effect on trial prep as this testimony, all it does is confirm that all the witnesses have indicated, that there was one, I guess, one shooter or no one else was present and they've denied other people shot him and it only leaves a conclusion that there was one shooter. There's no evidence that there's multiple shooters or anything else, so I don't find that there is a prejudicial effect on the late disclosure of the witness.

⁸ This was a Friday at 3:30 p.m. and court did not resume until the following Tuesday, February 18, 2020.

(T. 1618-19). After this statement, the defense again failed to put forward any specific defense strategy stating, “My trial strategy is to do whatever is necessary to represent my client as the evidence comes in...” (T. 1620). While this is indeed a laudable undertaking, it nonetheless does not meet the requirement of prejudice.

There was no discovery violation, or if there was, the judge did not abuse her discretion in finding that the defense was not materially hindered in its preparation or trial strategy. Further, even if there was error, it was harmless, thus this claim should be denied.

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PERMITTED THE PROSECUTION TO IMPEACH ITS WITNESSES WITH THEIR OWN PRIOR INCONSISTENT STATEMENTS. (Restated)

The trial court properly allowed the prosecution to impeach its witnesses with prior inconsistent statements because any party, even the party calling the witness, may attack the credibility of a witness. “The admission or rejection of [evidence for the purpose of impeachment] rests in the sound discretion of the trial court who must judge the propriety thereof from what transpires upon the trial, and the conduct of the witness upon the stand. And this discretion

will not be interfered with unless abused.” *Tennyson v. State*, 254 So. 3d 510, 516 (Fla. 3d DCA 2018) (citation omitted). The trial court's decision whether to allow impeachment of a witness's trial testimony by way of prior inconsistent statements is reviewed for an abuse of discretion. *Mordica v. State*, 305 So. 3d 745, 752 (Fla. 3d DCA 2020).

A party may attack a testifying witness's credibility by way of prior inconsistent statements. § 90.608(1), Fla. Stat. (2020). In order to impeach a witness with a prior inconsistent statement, “the prior statement must be both (1) inconsistent with the witness's in-court testimony, and (2) the statement of the witness.” *Wilcox v. State*, 143 So. 3d 359, 383 (Fla. 2014) (citation omitted). Prior statements are deemed inconsistent only if they directly contradict or are materially different from testimony during trial. *Wilcox*, 143 So. 3d at 383 (citation omitted).

“[I]ntroduction of a prior statement that is inconsistent with a witness's present testimony is also one of the main ways to attack the credibility of a witness.” *Pearce v. State*, 880 So. 2d 561, 569 (2004) (citing § 90.608(1), Fla. Stat. (2001)).

The theory of admissibility is not that the prior statement is true and the in-court testimony is false, but that because the witness has not told

the truth in one of the statements, the jury should disbelieve both statements. To be inconsistent, a prior statement must either directly contradict or be materially different from the expected testimony at trial. The inconsistency must involve a material, significant fact rather than mere details.

Id.

Here, three of the witnesses (Robin Denson, Patrick Joseph, and Cordarious Joseph) who gave sworn statements to police immediately after the murders, testified inconsistently with those previous statements. Each witnesses' previous statement directly contradicted their trial testimony in meaningful ways; thus it was "inconsistent" within the meaning of section 90.608(1), Florida Statutes. The State laid the foundation to impeach each witness by asking if they remembered speaking to police directly after the murders and each recalled making a statement to police. The first instance of impeachment came with Ms. Denson, and just as the State finished laying the foundation, defense counsel objected on the grounds of hearsay and improper attempted impeachment. (T. 1179). At sidebar, the court ruled that the State was not refreshing the witness's recollection, but instead was confronting her with her inconsistent statement. (T. 1181). Considering this analysis, and its application to

each of the witnesses, the court did not err in allowing the State to impeach the witnesses with the prior inconsistent statements.

Impeachment of Robin Denson:

The first witness to be impeached by the State was Robin Denson. She agreed she had made a statement to police shortly after the murders. (T.1178-80). The State asked about several specific items within that statement, but Ms. Denson either said something contrary to the original statement, or that she didn't remember making the statement.

The first contrary statement included the denial that Joseph was upset or disrespectful on the night of the murder (T. 1183; 1185). Yet, in her original statements to police when referencing Joseph's state of mind, she had said, "You still upset because two kids got into a disagreement and look at the two kids now, they both sitting on the sofa playing together," and "Marlin kept going on and on, you know, kind of being disrespectful." (T. 1186). Ms. Denson was also asked about other statements Joseph had made to her, but she denied Joseph had said anything else. (T. 1197). However, Ms. Denson had told police that immediately prior to the murders Joseph had said, "Ma, you taking up for Kaladaa?" (T. 1198). Ms. Denson denied that

after the shots were fired she heard one of her sons yelling at Joseph outside the house. (T. 1204). In her police statement she said, “I did hear Ted hollering at Marlin so I, through all the bullshit and commotion...I did hear him yelling at Marlin.” (T. 1204).

Impeachment of Patrick Joseph:

Patrick’s testimony began with a recitation of the details on the night of the murders, including who was present in the home and what led up to the event, but he quickly became recalcitrant. When asked about the specific details of the murders, he began to get overtly hostile with responses such as, “I’m not going to say nothing no more” and “next question”. (T. 1241-48). Immediately after this, there was an exchange with the judge,

Court: Sir, you have to answer the questions as you’ve been called here under subpoena. You –

Witness: Man, you can’t say nothing? Sir, you can’t call me—I already answered your question.

Court: Mr. Joseph, Mr. Joseph, this is not how this works.

Witness: Yes, ma’am.

Court: When a question is asked, you will answer, okay?

Witness: What your name is again? Miss, oh, okay.

Court: It's Judge Caracuzzo --

Witness: Okay, okay, Ms. Caracuzzo. I apologize.

Court: -- to you. No, it's not Ms. Caracuzzo to you. It's Judge Caracuzzo to you. Do you understand our roles?

Witness: Huh?

Court: I want to make sure we understand our roles. It's Judge Caracuzzo to you, okay?

Witness: All right. You got it.

Court: Just like it's Mr. Joseph to you. All right:

Witness: Yes, uh, yes, ma'am.

Court: If he asks you a question, I'm ordering you to answer the question.

(T. 1248-49).

After the admonishment, the State attempted again to ask a question and Patrick interrupted the prosecutor stating, "You shouldn't play with me like that." (T. 1249). As the prosecutor attempted to clarify, Patrick said, "I don't remember nothing, I was at work all day. I wasn't even there....When we got home, I ain't seen nothing. I don't know what you're talking about." (T. 1250). Patrick's

responses continued with generally the same tone and attitude, with most answers being “no” or “nope”.

Ultimately the prosecutor moved to the statement Patrick gave to police on the night of the murders, asking, “Do you remember when you spoke with the police officers after this had happened; you saying I don’t know a hundred percent why he did it?” (T. 1253). After receiving “nope” as an answer, the State asked if Patrick remembered being asked that he would tell the truth in the police interview and if he remembered saying he would tell the truth. Patrick answered no to both questions. (T. 1254). The prosecutor kept asking questions, and Patrick became increasingly hostile and continued to offer contradictory and contrary responses and continued to deny he had been at the scene or that he remembered anything from that night. The defense while not offering a formal objection, asked to approach the bench where the following exchange occurred:

Mr. Susaneck: Your Honor, this witness has testified he wasn't there, he doesn't remember anything, no to every single one of their questions. They are now apparently attempting to impeach him with a prior statement, which would mean the only reason they called this witness was to impeach him, because I'm sure they talked with the witness before they put him

on the stand and knew that he was going to say that he doesn't remember anything. So, there's no grounds for them impeaching somebody who, their only reason for impeaching him was to put him on the stand to impeach him.

Court: No, they're putting him on the stand because he allegedly was a witness to this, is what –

Mr. Susaneck: He says he wasn't a witness to this.

Court: I know, but I think they have a statement that says differently, so the intent to call them is not -- I mean are you saying that they should have known he was going to come in here and commit fraud upon the court?

Mr. Susaneck: I don't know that he committed fraud upon the court.

Court: Really? Because this Court might have a different taking on that, watching his demeanor, his body? So, he remembers of course going to work, he remembers leaving work, he remembers going to Walmart and then miraculously remembers nothing else from there. The way he's answering the questions, the way that he is in his body language suggests otherwise. So, Airhart [sic] lays out if they do not remember, that it is proper to impeach him with the prior statement. So is there any other objection?

Mr. Susaneck: My position is, Your Honor, this is not my witness, this is the State's witness.

Court: Understood.

Mr. Susaneck: So I'm sure they prepped them. I know they prepped, I know they spoke with him. So, if he was prepped, I'm sure they told him -- he told them what his testimony was going to be, and unless the State wants to say that he said his testimony was something different and then we'd have to have another hearing on that.

Court: No. Your objection is overruled. Okay?

MR. Susaneck: Your Hon --

Ms. Ellis: That is absolutely true. We met with this witness and I can tell you in no uncertain terms he told us exactly what he said in the previous statement. He did not come into our office and tell us, I don't know, I don't recall, I don't remember.

Court: All right, and there's no evidence of that. Defense is just making an allegation without any evidence of that happening, so if you're telling me it didn't happen then I have no reason to disbelieve that. Defense, do you have any reason to disbelieve that? Okay. So the objection is overruled.

(T. 1261-63).

After that, Patrick was given a copy of the statement he made to police. After review, he still denied any recollection of the incident. At this point, the prosecutor zeroed in on specific statements Patrick had made just after the murders.

Mr. Clausi (to Patrick):

Q: You read it completely then?

A: Still I don't remember nothing.

Q: So, even after reading this -- and so after looking at this, you don't remember saying My brother Ted came and picked us up in Kaladaa car since my Mom, she got brake problems, she don't like driving her car like that. You don't remember saying that?

A: No.

Q: Okay. Do you remember if the officer asked you whether Kyra and Kamare had been in fights before?

A: No.

Q: Okay. Would it help if I showed you, or no?

A: No.

Q: Okay. So you don't remember then answering that, saying, no, come on, Kyra 11-years old, this girl seven, you know what I mean? You don't remember saying that?

A: I don't remember nothing like that.

Q: Okay. Do you remember telling the officer, But my brother just don't like it when somebody touch his kids and it's a problem. Do you remember saying that to the officer?

A: No.

Q: All right. Do you remember telling the officer, like he get mad at me when I touch his son when his son was supposed to be doing something he ain't supposed to be doing. Do you remember telling the officer that?

A: No.

(T. 1267-68). Here, the court had the attorneys approach the bench and made the following ruling:

Court: All right. We're not going to go do one by one. A proper impeachment is only to impeachment what he says he doesn't remember. These are questions you haven't asked him about and so we're not going play his whole statement. He doesn't remember. You can get out on the questions where he says I don't remember repeatedly. Those questions can come in where he said it and it's to impeach him, but other statements he may have said, he wasn't hasn't been given the opportunity to know if he said or didn't say it. So I don't want to sit here and read the whole statement? Okay, so I don't know if you guys want to discuss, talk, how what your next strategy is with him. He's not going to change his answers so I think the jury gets, gets the idea. But I'm not going to have you just read the whole...statement...into evidence, okay?

(T. 1269). The prosecution continued to ask Patrick about discrete portions of his statement and he repeatedly stated either that he wasn't there or that he couldn't remember. (T. 1272-74).

Impeachment of Cordarius Joseph:

Cordarius began his testimony by confirming some basic details including identifying his family members, where and with whom he lived, and an in-court identification of Joseph. (T. 1305-09). Interspersed with the questions he answered, there were several times he claimed he was unable to answer due to lack of memory. *Id.* Eventually when asked about the specifics of Kyra's murder, Cordarius testified inconsistently with the statement he acknowledged he had given to police immediately after the incident. After reviewing his statement, Cordarius said it had not refreshed his recollection. (T. 1320-21). The prosecution asked Cordarius about his statement to police identifying Joseph as the shooter, and Cordarius testified that he couldn't remember saying that. (T. 1321). Among other things, Cordarius claimed not to remember telling police that Parice tried to stop Joseph, that Joseph had shot Kyra as she was running away, or that Joseph had a gun prior to the shooting. (T. 1325-26; 1328; 1330).

Argument:

Because each witness testified contrary to previous statements made to police, and the required foundation was laid, the court

properly allowed the State to impeach these witnesses. To satisfy the foundational requirements for impeachment by prior inconsistent statement, the witness must be advised of the substance of the prior inconsistent statement, the time and location the statement was made, and the person to whom the statement was made. See *Garcia v. State*, 351 So. 2d 1098 (Fla. 3d DCA 1977). Additionally, the trial court also recognized that the State could not call a witness for the primary purpose of impeachment, noting that as witnesses to the crime, each provided testimonial evidence which was important to the State's case. This supports the court's finding that there was a separate purpose for the testimony and that it was not being offered solely to impeach. (T. 1182). Finally, the State made it clear that they were surprised by the reticence and hostility of the various witnesses, thus they did not "knowingly" call them only for impeachment and the Court found the statement credible. (T. 1263).

The inconsistent statements were not offered as substantive evidence but to demonstrate bias and lack of credibility on behalf of each of the three witnesses. Substantive evidence is the evidence offered to support a fact in issue, as opposed to impeachment or corroborating evidence. *Laur v. State*, 781 So. 2d 452 (Fla. 4th DCA

2001). The State used the prior inconsistent statements made by each witness to show bias or that the statements made during trial were untruths. See *Brumbley v. State*, 453 So. 2d 381, 385 (Fla.1984) (finding it proper for State to impeach witness by quoting the precise language of his prior statements as “such references were a correct method of laying a predicate for the introduction of the prior statements”).

Appellant claims error because the physical statements themselves were not offered into evidence. (IB 30). However, under section 90.608 of the Florida Statutes, there is no requirement that the hard copy be offered into evidence. Appellant’s reliance on *Shere v. State*, 579 So. 2d 86 (Fla. 1991), is misplaced. (IB 31.) In *Shere*, this Court took issue with the fact that the **court** had called the witness after the prosecution refused to vouch for her credibility, noting that this threw the notion of court neutrality into question. The trial court there failed to assess the nature of the statements used to impeach, thus the bulk of the testimony was the witness saying she didn’t remember and the State “reading to the jury her prior, unsworn, out-of-court statements that inculpated Shere.” The error with that impeachment was that the in-court statements were

not materially inconsistent with the out of court statements. *Id.* at 93.

Joseph's reliance on *Castillo v. State*, 217 So. 3d 1110 (Fla. 3d DCA 2017) is similarly dubious, since the statements in that case were being offered for the truth of the matter asserted, and as such, would be used as substantive evidence. The evidence rule relied upon there was § 90.801(2)(a), Fla. Sta. (2015), which allows, with proper foundation, a statement under oath to be used as substantive evidence. That statement was given during a police investigation, thus did not qualify as a statement under oath – this is what gave rise to the ultimate error. Noteworthy though, is that the appellate court stated, “[a]ccordingly, while Ordonez’s prior inconsistent statement **could be used for impeachment**, [the] prior inconsistent statement cannot constitute admissible substantive evidence.” *Castillo* at 1115 (emphasis added). In fact, considering this, *Castillo* supports the State’s use of the statements for impeachment in the present case.

Ultimately the facts here are far more similar to those in *Laur*, 781 So. 2d 452 (Fla. 4th DCA 2001), where the prosecution called the victim of the crime to testify. During trial, the victim minimized the

seriousness of the crime and denied being injured, despite having visible injuries on the night of the assault. She also denied that she had made certain statements to police. There, the victim was not called for the primary purpose of introducing her prior statement to the investigating officer; she was called for a legitimate purpose and gave “some” testimony that supported the State’s case. Further, because the victim gave testimony that was “affirmatively harmful” to the State’s case, the credibility of her trial testimony became an issue. *Id.* at 454-55.

This is directly in line with the facts from Joseph’s trial. Each of the three witnesses offered significant pieces of the puzzle as to what had happened on the night of the murders - who was present, where those people were located, who had not possessed a firearm, who had not shot the victims, etc. The State relied upon this foundational testimony. Additionally, because each witness also gave testimony that was “affirmatively harmful”, the credibility of the witnesses became an issue.

To be inconsistent, a prior statement must either directly contradict or be materially different from the expected testimony at trial. The inconsistency must involve a material, significant fact

rather than mere details. *Id.* “Even if there is some relevancy, the evidence is subject to exclusion if its probative value is substantially outweighed by the danger of confusing the issues, unfair prejudice, misleading the jury, or needless presentation of cumulative evidence.” *Caruso v. State*, 645 So. 2d 389, 394–95 (Fla. 1994).

The trial court did not err in allowing the State to impeach its own witnesses with their prior inconsistent statements because the foundation was properly laid and the statements were not presented as substantive evidence; instead, they were offered to impeach, to show bias, and to attack the credibility of the witnesses. Importantly, to ensure that the evidence was not considered substantive, the court instructed the jury on this on at least five separate occasions; even taking care to explain the difference between impeachment and substantive evidence. (T. 1201-02; 1266-67; 1321-22; 1326; 1383-84). Considering the caution of the trial court and its limiting instruction, this claim should be denied.

ISSUE III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING AS SUBSTANTIVE EVIDENCE, OUT OF COURT STATEMENTS WHICH IDENTIFIED JOSEPH AS THE SHOOTER. (Restated)

This Court reviews “a trial court's decision to admit evidence under an abuse of discretion standard.” *McWatters v. State*, 36 So. 3d 613, 639 (Fla. 2010) (quoting *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008)). The trial court's discretion is not unfettered, but is “limited by the rules of evidence.” *Hudson*, 992 So. 2d at 107.

Appellant argues reversible error occurred when the trial court permitted the State to introduce evidence through Detective Creelman that both Parice and Cordarius had identified Joseph as the shooter on the night of the murders. To support this claim, Appellant states the error came about because Parice and/or Cordarius “had not themselves testified inconsistently in court; and where the State provided no in-court proof of same; as a consequence of various discussions before his testimony and as to objections” made by Joseph while Detective Creelman was testifying. (IB 34). Appellant specifically argues that the evidence was not admissible pursuant to section 90.801(2)(c), Florida Statutes. The State disagrees. No error occurred.

Here, *Rutherford v. State*, 902 So. 2d 211 (Fla. 4th DCA 2005) is instructive. *Rutherford* determined that a statement of identification, which was made the day after the robbery and

indicated that the defendant committed the crime, fell under the non-hearsay exception pursuant to section 90.801(2)(c). The *Rutherford* court noted that the witness to the robbery, Norwell, did not identify Appellant as the person who committed the robbery until the day after the crime took place. *Id.* at 213. The *Rutherford* court specifically indicated, “[t]he state offered Angela Nowell’s post-arrest identification of Rutherford as ‘the guy that did the robbery’ through the testimony of Investigator Valerio. Nowell testified at trial. Valerio’s description of Nowell’s statement was non-hearsay under section 90.801(2)(c), Florida Statutes (2004).” *Id.* at 215.

Appellant is under the misapprehension that the statements offered through Detective Creelman are hearsay. (IB 35-37). They are not. Generally, hearsay is “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.” *Dixon v. State*, 107 So. 3d 527, 533 (Fla. 4th DCA 2013) (citing § 90.801(1)(c), Fla. Stat. (2010)). While a declarant’s out-of-court statement will typically fall within this blanket prohibition, section 90.801(2)(c), Florida Statutes (2020), provides for an exclusion from hearsay for certain identification testimony, providing, in pertinent part “[a] statement is not hearsay

if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:...(c) *One of identification of a person made after perceiving the person.* § 90.801(2)(c), Fla. Stat. (2011) (emphasis added). See, *Liscinsky v. State*, 700 So. 2d 171, 172 (Fla. 4th DCA 1997) (The trial court did not err by allowing an officer to testify that a witness to the crime identified Appellant by name immediately following the incident.)

In *A.E.B. v. State*, 818 So. 2d 534, 535 (Fla. 2d DCA 2002), the Second District held that the trial court did not err by admitting the testimony of a witness's out-of-court identification when her loss of memory, due to a stroke, essentially caused her to be unavailable for cross-examination at trial. The *A.E.B.* court further stated as follows:

A.E.B. argues that Mrs. LaFleur's identification was inadmissible because she was essentially unavailable for cross-examination due to her memory loss. We disagree. In applying section 90.801(2)(c), Florida courts have held that the declarant need not make an in-court identification of the defendant, nor even confirm that the prior identification was made. See, e.g., *Brown v. State*, 413 So. 2d 414, 415 (Fla. 5th DCA 1982) (*holding that prior identification is not hearsay when the declarant is available at trial for cross-examination and that it “makes no difference whether the witness admits or denies or fails to recall making the prior identification”*); *A.T. v. State*, 448 So. 2d 613, 614 (Fla. 3d DCA

1984) (*finding prior identification admissible even though declarant testified at trial that he possessed neither past nor present ability to identify defendant*). Therefore, in order to admit prior identification testimony under section 90.801(2)(c), it is only necessary that the declarant testify at trial and be subject to cross-examination.

Id. at 535-36. (emphasis added). Therefore, it does not matter if a witness fails to make an in-court identification of the defendant or confirm that a prior identification was made. The law only requires that the witness testify at trial and be subject to cross-examination. Here, both of these requirements were satisfied.

ISSUE IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED TESTIMONY ABOUT A SPECIFIC PRIOR THREAT MADE BY THE APPELLANT AND DIRECTED AT THE VICTIMS. (Restated)

If reasonable men could differ as to the propriety of the action taken by the court, then it cannot be said that the court abused its discretion. *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980). “Discretion is abused only ‘when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court.’” *See Trease v. State*, 768 So. 2d

1050, 1053 n. 2 (Fla. 2000) (*quoting Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990)). No abuse of discretion can be found on the facts here.

The statements were relevant to show Joseph's state of mind in the days leading up to the murders and were not overly prejudicial. "Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. *See Clinton v. State*, 970 So. 2d 412, 414 (Fla. 4th DCA 2007) (an objection to evidence that the defendant used a slur after stabbing the victim would not have been sustained because it was relevant).

Relevant evidence is inherently prejudicial. However, exclusion is required only when unfair prejudice substantially outweighs the probative value of the evidence. Generally speaking, unfairly prejudicial evidence is that which inflames the jury or appeals improperly to the jurors' emotions. *Steverson v. State*, 695 So. 2d 687, 689–90 (Fla. 1997) quoting C. Ehrhardt, *Florida Evidence*, § 403.1 (2d ed. 1984).

There are two categories under which evidence of uncharged crimes or bad acts will be admissible—similar fact evidence,

otherwise known as *Williams*⁹ rule evidence, and dissimilar fact evidence. *Victorino v. State*, 23 So. 3d 87, 98 (Fla. 2009) (citing *Zack v. State*, 753 So. 2d 9, 16 (Fla. 2000)). The requirements and limitations of section 90.404, Florida Statutes (2009), govern similar fact evidence while the general rule of relevancy set forth in section 90.402 governs dissimilar fact evidence. *Id.* at 98–99. This Court has explained the test for dissimilar fact evidence as follows:

[E]vidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not *Williams* rule evidence. It is admissible under section 90.402 because “it is a relevant and inseparable part of the act which is in issue.... [I]t is necessary to admit the evidence to adequately describe the deed.”

Griffin v. State, 639 So. 2d 966, 968 (Fla.1994) (quoting Charles W. Ehrhardt, *Florida Evidence*, § 404.17 (1993 ed.)). The statements here qualify as dissimilar fact evidence.

Dissimilar fact evidence of uncharged misconduct—which is governed by section 90.402's general rule of relevancy—is admissible to “establish the relevant context in which the [charged] criminal acts occurred.” *Caruso v. State*, 645 So. 2d 389, 394 (Fla.1994). “[T]o

⁹ *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

prove its case, the State is entitled to present evidence which paints an accurate picture of the events surrounding the crimes charged.” *Griffin*, 639 So. 2d at 970. Accordingly, evidence of uncharged misconduct is relevant when its admission is “necessary to adequately describe the events leading up to” the commission of the charged offense. *Id.*

Considering the current assertion that the trial court was required to do a balancing test, Appellant now seems to be claiming that the threat was *Williams* rule evidence. (IB 39-40). Importantly, Appellant’s objection at trial was relevance; he made no argument that the evidence was unfairly prejudicial. (T. 1611). An objection only on relevance grounds does not preserve the claim of unfair prejudice on appeal. *See Andrews v. State*, 82 So. 3d 979, 982 n. 2 (Fla. 1st DCA 2011) (“Appellant failed to object at trial on undue prejudice grounds pursuant to section 90.403, Florida Statutes.... As a result, he waived any possible undue prejudice argument on appeal.”) (internal citations omitted). Joseph failed to preserve a prejudice claim; no balancing test is required for this dissimilar fact evidence - it need only be relevant, which it was.

The evidence at issue here illuminated the reason behind Joseph's aggression toward both of the eventual victims – namely that he was angry about Kyra's perceived mistreatment of his daughter, Kamare. Because this helped explain the sequence of events leading up to the murders, it was relevant. See *McGirth v. State*, 48 So. 3d 777, 786–87 (Fla. 2010) (finding evidence about the defendant's drug-based relationship with the victims' daughter was relevant and inextricably intertwined with the crimes charged).

The trial court properly ruled that the statements were admissible because, as noted by the trial court, they were “inextricably intertwined...it gives a motive to all this, it explains why all this happened.” (T. 1613). There was no error.

ISSUE V

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED JOSEPH'S MOTION TO DISMISS BASED ON VIOLATIONS OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF BOTH THE UNITED STATES AND FLORIDA CONSTITUTIONS. (Restated)

Because of the vagueness of this claim and the lack of supporting authority, the State can only guess as to the appropriate standard of review. Appellant filed a motion to dismiss at the trial court level, however it appears that his claimed violation of the right

to counsel would have more appropriately been considered a motion to suppress statements. Appellate courts should accord a presumption of correctness to the trial court's rulings on motions to suppress, but must independently review mixed questions of law and fact that ultimately determine constitutional issues. *See Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001). Additionally, as part of the claim appears to be a denial of due process, the standard of review for a constitutional claim is *de novo*. *Asay v. State*, 210 So. 3d 1, 27 (Fla. 2016). Again, as Appellant's argument in the lower court stated only, "I believe that violated his right to counsel and all the amendments..." during argument to support this claim, the State is unable to ascertain the true nature or harm of this alleged violation. (SR 13).

Appellant asserts that constitutional violations occurred while Joseph's competency was being restored at Treasure Coast Forensic Treatment Center (TCFTC). The prosecution was not a party to this treatment, was not privy to the treatment methods used, and played no role whatsoever in Appellant's restoration. More importantly, the prosecution is neither aware of any illegally obtained statements nor sought to use any of these unidentified statements at trial. Notably,

if there were known statements, the remedy would be suppression, not dismissal. Thus, not only has Appellant failed to state a specific claim, he has also failed to outline any actual prejudice.

Joseph proclaims that his right against self-incrimination was violated, despite the fact that no statements were offered, let alone incriminating ones. Nobody, including Appellant, testified about any statements he may have made during his stay at TCFTC. Accordingly, it is difficult to imagine how he was compelled to “be a witness against himself.” (IB 43). Further, Appellant’s claim lacks any analysis of the record below regarding how the facts would apply to the claimed violation. Appellant asserts that TCFTC “engaged in ‘training’ Appellant ‘how to act in court’ (r. 381);” however Joseph is simply quoting his own brief filed in the lower court. (IB 42; ROA 381). Considering the actual records and reports from TCFTC are not contained in the record, Appellant essentially cites to his own unsupported assertions below to bolster his current claim. Speculating about what *could* have or *may* have occurred does not constitute a violation. The most Appellant can offer is that the facts of the case “may well have been discussed.” (IB 43). This fails to state any claim, let alone a claim deserving of relief.

There are no facts in evidence to support constitutional violations surrounding Joseph's competency restoration. Because these claims were not properly preserved with specificity as to the alleged violations, they are meritless and should be denied.

ISSUE VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S MOTION TO INTERVIEW JURORS. (Restated)

Appellant claims the jury did not follow the trial court's instructions. While this claim is styled as a juror misconduct claim, it must be analyzed based on the trial court's denial of Appellant's request to interview jurors as misconduct cannot be ascertained without an interview. A court's ruling on a motion to interview jurors is reviewed for an abuse of discretion. *Dowd v. State*, 227 So. 3d 194 (Fla. 2d DCA 2017)(citing *Anderson v. State*, 18 So. 3d 501 (Fla. 2009)).

More than three months after Joseph's verdict had been rendered, Appellant filed a motion to interview jurors. (ROA 1327-29). It is unclear exactly when this supposed misconduct took place; there is no date specified in Robin Denson's *undated* affidavit. (ROA

1330-32). It seems, however, that the claimed impropriety likely occurred *during* jury selection.

In order to be entitled to juror interviews, Joseph must present “sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings.” *Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001). Appellant cannot meet this burden for many different reasons, not the least of which is the claimed misconduct seems to have taken place (if it did at all), during jury selection. Because of this, no court could possibly know if any of the jurors who were ultimately seated for trial were even in the portion of the venire that allegedly behaved inappropriately.

In *Baptist Hospital of Miami, Inc. v. Maler*, 579 So. 2d 97 (Fla. 1991), this Court clarified the showing counsel must make before a trial court can permit a juror interview. Emphasizing the “strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it,” the court held “an inquiry is never permissible unless the moving party has made sworn factual allegations that, if true, would require a trial court to order a new trial.” *Id.* at 100. This

holding was intended to clarify language in *State v. Hamilton*, 574 So. 2d 124 (Fla. 1991), which could be construed to authorize a juror interview “even though the alleged misconduct [by a juror] was of a type highly unlikely to indicate any prejudice whatsoever.” *Maler*, 579 So. 2d at 100. Ultimately, this Court stated, “the case law on this topic allows inquiry only into objective acts committed by or in the presence of the jury or a juror that might have compromised the integrity of the fact-finding process.” *Id.* at 101; *see also Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001) (“As explained ... in [*Maler*], juror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings.”).

The appropriate rule states as follows:

A party who has reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview of a juror or jurors to so determine. The motion shall be filed within 10 days after the rendition of the verdict, unless good cause is shown for the failure to make the motion within that time. The motion shall state the name of any juror to be interviewed and the reasons that the party has to believe that the verdict may be subject to challenge. After notice

and hearing, the trial judge, upon a finding that the verdict may be subject to challenge, shall enter an order permitting the interview, and setting therein a time and a place for the interview of the juror or jurors, which shall be conducted in the presence of the court and the parties. If no reason is found to believe that the verdict may be subject to challenge, the court shall enter its order denying permission to interview.

Fla. R. Crim. P. 3.575.

Appellant's motion alleged that a prospective juror approached Ms. Denson and told her that the jury venire was discussing the case. Joseph contends the prospective juror's allegations demonstrate the "verdict may be subject to challenge."

The trial court denied the motion primarily because Ms. Denson's statements were not deemed reliable. The allegations also were not supported by the statements of the prospective juror who, in fact, had previously spoken to the court and the attorneys about her concerns and had not voiced any of the issues contained in Ms. Denson's affidavit. While the trial court needed to go no further in its ruling, this Court should also consider that the motion was not timely. The rule requires it be filed within ten days of the verdict or later upon a showing of good cause. Appellant cannot show good

cause as to why this information was not available. It is difficult to imagine a person more sympathetic to the defendant than his mother, who was present in court every day and had routine contact with the defense.

The trial court properly analyzed the defense motion and ruled the supporting affidavit offered by Joseph's mother was unreliable. An appellate court will ordinarily defer to the trial court's factual findings and credibility determinations. See *Ault v. State*, 866 So .2d 674, 684 (Fla. 2003). Absent any reliable evidence to support the request to interview jurors, the request was properly denied. Additionally, the request was not timely filed and there is no legitimate good cause to support the three month delay. Finally, Appellant cannot make a claim as to any specific *seated juror* who engaged in any of the behavior outlined in his claims, remembering, of course, that the purported misconduct presumably occurred during jury selection.

The trial court had no grounds to invade the province of the jury based on an untimely and unsupported motion to interview jurors - this claim should be denied.

ISSUE VII

THIS COURT PROPERLY DETERMINED THAT COMPARATIVE PROPORTIONALITY REVIEW OF DEATH SENTENCES IS NOT REQUIRED BY THE EIGHTH AMENDMENT. (Restated)

This Court has receded from the judge-made requirement to review the comparative proportionality of death sentences finding it contrary to the conformity clause of the Florida Constitution. *Lawrence v. State*, 308 So. 3d 544, 552 (Fla. 2020).¹⁰

Here, Joseph asserts that this Court's decision in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020) ending comparative proportionality review of death sentences violates the Eighth Amendment to the United States Constitution. In, *Lawrence*, this Court decided that comparative proportionality review of death sentences violates the conformity clause found in Article I, Section 17 of the Florida Constitution. In reaching its decision, this Court relied on the U.S. Supreme Court's decision in *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984). Further, after *Pulley v. Harris*, comparative proportionality

¹⁰ In decisions subsequent to *Lawrence*, this Court has declined to review death sentences for proportionality. Because of that, the State has submitted only a cursory argument on this issue. See *Deviney v. State*, __ S. 3d __, 2021 WL 1800101 (May 6, 2021) (Opinion released but subject to revision or withdrawal).

review of death sentences is not required by the Eighth Amendment. *Lawrence* at 3.

Of course, Joseph's general contention is that this review is a necessary part of maintaining the constitutionality of Florida's capital sentencing scheme. He argues that as a result of the Court abandoning proportionality review, it has "gutted" the "meaningful safeguards we had for many years" against arbitrary and capricious enforcement in capital sentencing. (IB 58-59). However, this argument is mere hyperbole.

Joseph claims that the aggravators in Florida have "mushroomed" and this differentiates Florida's capital sentencing scheme from that of the California scheme the Supreme Court found constitutional in *Pulley v. Harris*. However, this argument continues to ignore what the Supreme Court in *Pulley v. Harris* explained were the underlying problems *Furman* stated needed to be addressed. As the Court pointed out, it had explained in *Furman*¹¹ that the problem which leads to the arbitrary and capricious enforcement of the death penalty is unguided sentencing discretion in juries and judges:

¹¹ *Furman v. Georgia*, 408 U.S. 238 (1972).

[C]apital punishment, as then administered *under statutes vesting unguided sentencing discretion in juries and trial judges*, had become unconstitutionally cruel and unusual punishment. The death penalty was being imposed so discriminatorily, 408 U.S., at 240, 92 S.Ct., at 2727 (Douglas, J., concurring), so wantonly and freakishly, *id.*, at 306, 92 S.Ct., at 2760 (Stewart, J., concurring), and so infrequently, *id.*, at 310, 92 S.Ct., at 2762 (WHITE, J., concurring), that any given death sentence was cruel and unusual.

Pulley at 44. (emphasis added).

Florida has addressed these concerns. The issue is not one of proportionate review or “mushrooming” aggravators, but rather, providing the appropriate guideline to juries and judges so that arbitrariness is avoided by ensuring that all are focusing on the same lawful considerations. Because Florida’s capital sentencing scheme properly adheres to these principles, Joseph’s claim that the current sentencing scheme is now arbitrary, capricious, and unconstitutional should be rejected.

ISSUE VIII

THE TRIAL COURT DID NOT ERR WHEN IT IMPOSED THE DEATH PENALTY WITHOUT FINDING BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS WERE SUFFICIENT TO JUSTIFY DEATH AND THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING CIRCUMSTANCES. (Restated)

Appellant argues that there was “harmful and fundamental error by each of the jury and the trial court in their determinations to impose the death sentence, such that their determinations were not sufficient.” (IB 61). The standard of review for Appellant’s claim of fundamental error is *de novo*. See *State v. Knight*, 286 So. 3d 147, 151. The trial court did not err when it sentenced Appellant to death.

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....” The United States Supreme Court has interpreted the right to an impartial jury, in conjunction with the Fourteenth Amendment’s right to due process, to “entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’” *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). Stated another way, in a criminal case the Sixth Amendment requires a jury, or a trial court if the defendant elects for a bench trial, to find all of the facts necessary to constitute a statutory offense and those facts must be proven beyond a

reasonable doubt. *Id.* at 483-84; *see also Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993); *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

The United States Supreme Court has applied this framework to death penalty cases and concluded the Sixth Amendment requires a jury to find the existence of aggravating factors beyond a reasonable doubt before a trial court may sentence a defendant to death. *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (“Because Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ *Apprendi*, 530 U.S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury.”). Importantly though, the Sixth Amendment’s requirements are limited to facts that must be found by a jury in order to impose the death penalty. *Ring* at 612-13 (Scalia, J., concurring) (“What today’s decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing

phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.”). The United States Supreme Court further articulated this in *Hurst v. Florida*, 136 S. Ct. 616 (2016), when the Court found that a defendant’s death sentence violated the Sixth Amendment because Florida law required a trial court, rather than a jury, to find the fact that an aggravating factor existed before the court could sentence the defendant to death.

The United States Supreme Court has never held that the sufficiency of the aggravating factors, the weighing of the aggravating factors and mitigating circumstances, or the jury recommendation are elements that must be proven beyond a reasonable doubt under the Sixth Amendment before a trial court may impose the death penalty on a criminal defendant. In fact, the Court has expressly rejected such contentions. *McKinney v. Arizona*, 140 S. Ct. 702, 707-08 (2020).

Accordingly, Appellant’s entire argument is predicated on an erroneous interpretation of the Sixth Amendment’s requirements. The Sixth Amendment only requires that the *facts* which make a criminal defendant eligible for the death penalty be found beyond a

reasonable doubt. Neither the sufficiency of the aggravating factors, nor the weighing of the aggravating factors and mitigating circumstances are facts, as explained by the United States Supreme Court. *McKinney*, 140 S. Ct. at 707-08.

Florida's new death penalty statute sets out specific steps the jury must take before recommending a death sentence for a criminal defendant. If the jury:

2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:

a. Whether sufficient aggravating factors exist.

b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.

c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

§ 921.141(2)(b), Fla. Stat. (2020).

The statute's requirements thus differ from the Sixth Amendment's requirements because the statute requires the jury to make non-factual selection findings before recommending a death sentence. The statute's text reflects this as it identifies the unanimous finding of at least one aggravating factor as the eligibility requirement for the imposition of the death penalty. Put another way, the statute identifies the existence of an aggravating factor as a fact that must be unanimously found by the jury before the death penalty may be imposed. The additional statutory requirements, sufficiency and weighing, are selection findings that pertain to the jury recommendation, not the Sixth Amendment.

Appellant's argument conflates the selection findings under section 921.141 with the factual findings required by the Sixth Amendment in an effort to convince this Court to adopt a position expressly rejected by the United States Supreme Court in *McKinney*, 140 S. Ct. at 707-08. As such, Appellant's argument is without any legal merit.

In this case, the trial court's sentencing order found that the State had proven the existence of four aggravating circumstances in Ms. Crowell's death, and five aggravating circumstances in Kyra's

death, all beyond a reasonable doubt. (ROA 1443-52). Under a correct Sixth Amendment analysis, such as the one this Court adopted in *State v. Poole*, 297 So. 3d 487 (2020), the trial court's sentencing order is devoid of error. Furthermore, this Court has explicitly, and correctly, rejected Appellant's argument that the sufficiency and weight of the aggravating factors are determinations that must be made beyond a reasonable doubt. *Santiago-Gonzalez v. State*, 301 So. 3d 157 (2020) (quoting *Rogers v. State*, 285 So. 3d 872, 885-86 (Fla. 2019)).

In *Santiago-Gonzalez*, the defendant argued that his death sentence was invalid because the trial court did not find that the aggravating factors outweighed the mitigating circumstances beyond a reasonable doubt. *Id.* at 15. This Court found the defendant's argument without merit because "we have already receded from the holding that the additional *Hurst v. State* findings are elements." *Id.* quoting *Poole*, 297 So. 3d 487 (2020).

Accordingly, because the trial court here found that the State had proven five statutory aggravators beyond a reasonable doubt, the aggravating factors were sufficient to impose the death penalty, and the aggravating factors outweighed the mitigating circumstances,

Appellant's death sentence is not constitutionally deficient and Appellant is not entitled to relief.

ISSUE IX

THE HEINOUS, ATROCIOUS, AND CRUEL AGGRAVATOR
WAS PROVEN BEYOND A REASONABLE DOUBT.
(Restated)

Appellant contends there was insufficient evidence that the murders were heinous, atrocious, or cruel. He argues that the facts in the sentencing order are “open to different or divergent interpretation.” (IB 67). This is not the standard used to assess the evidence of this aggravator, thus there is no merit to Joseph's claim that HAC finding was in error. In assessing the trial court's finding of an aggravating circumstance, the Court reviews the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding. *McWatters v. State*, 36 So. 3d 613, 641; *Ellerbee v. State*, 87 So. 3d 730; 740–41.

This Court has explained the meaning of the HAC aggravator as follows:

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile;

and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). “In determining whether the HAC factor was present, the focus should be upon the victim’s perceptions of the circumstances as opposed to those of the perpetrator.” *Lynch v. State*, 841 So. 2d 362, 369 (Fla. 2003); *see also Heyne v. State*, 88 So. 3d 113, 122 (Fla. 2012); *McGirth*, 48 So. 3d at 794. “[I]n order to support a finding of this aggravator, ‘the evidence must show that the victim was conscious and aware of impending death.’” *King v. State*, 130 So. 3d 676, 684 (Fla. 2013). However, this Court has “explained that the actual length of the victim’s consciousness is not the only factor relevant to this aggravating circumstance.” *Hernandez v. State*, 4 So. 3d 642, 669 (citing *Beasley v. State*, 774 So. 2d 649, 669 (Fla. 2000)). The victim’s mental state may be evaluated in accordance with common-sense inferences from the circumstances. *Swafford v. State*, 533 So. 2d 270, 277 (Fla.

1988). “[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel.” *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997); *see also Swafford*, 533 So. 2d at 277; *Hall v. State*, 87 So. 3d 667, 671-72 (Fla. 2012).

Appellant argues that because the medical examiner could not determine “the order of the shots” as to either victim and whether they were rendered unconscious immediately, the HAC aggravator cannot apply. (IB 69). However, Appellant ignores other evidence surrounding the murder of this mother and her eleven year old child that support the trial court’s finding.

The trial court outlined the facts and reasoning below (as to Ms. Crowell’s murder):

Here, the Defendant shot Kaladaa Crowell in her home while her child was present. Although the medical examiner testified that he could not conclusively opine based on examining the body the exact sequence of the gunshots, he did opine that at least one of the shots to the head was fatal and would have rendered Kaladaa Crowell unconscious immediately. However, the State presented testimony that Jeshema Tarver heard multiple gunshots as she was showering. She also heard Kaladaa Crowell begging for help and for someone to call 911 after she heard the first round of gunshots. Jeshema got out of the

shower and while getting dressed, heard a final shot. There was no testimony that Kaladaa ever spoke another word after the sound of that last shot.

This series of events clearly establishes that Kaladaa Crowell was alive after being shot multiple times, as she was heard begging for help and for someone to call 911. Based on Jeshema's testimony, and the testimony of the medical examiner that one of the gunshot wounds to the head would have rendered Kaladaa unconscious immediately, it is reasonable to conclude that Kaladaa Crowell received her fatal gunshot wound last. This evidence establishes that Defendant fired multiple shots into her body, and that she laid there begging for help. Moments passed, and when Defendant realized she still was not dead, he delivered the final shot killing her. Kaladaa thus was well aware of her impending death, and the act of the final shot was conscienceless and pitiless. *McGirth v. State*, 48 So. 3d 777, 794 (Fla. 2010) (HAC "aggravator is applicable where the murder is 'both conscienceless or pitiless and unnecessarily torturous to the victim'" (quoting *Victorino v. State*, 23 So. 3d 87, 104 (Fla. 2009))).

(ROA 1444-45).

The trial court incorporated the same legal authority as above, and outlined its facts and reasoning below (as applied to Kyra's murder):

Kyra Inglett was in her home when Defendant shot her mother multiple times. Undoubtedly,

Kyra heard her mother crying and begging for help as she laid on the floor. Having just seen this, Kyra fled from her home. She was looking back as Defendant was chasing her down. Defendant's own brother tried to stop the attack but was unsuccessful. Defendant then shot Kyra five (5) times. Kyra was aware of her impending death. There can be nothing more terrifying for a child than knowing that someone has just shot their mother multiple times and now was coming after them. There is no doubt that this panic-stricken little girl experienced a level of terror that no child or no one should ever have to endure.

(ROA 1448-49).

The HAC aggravator can apply to instantaneous deaths and executions. This Court has stated:

Although this Court also has explained that the HAC aggravator does not apply to most instantaneous deaths or to deaths that occur fairly quickly, fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel. See *Wyatt v. State*, 641 So.2d 1336 (Fla.1994); *Preston v. State*, 607 So.2d 404 (Fla.1992).

James v. State, 695 So. 2d 1229, 1235 (Fla. 1997) (HAC where child victim looked into defendant's eyes as she quickly died as he squeezed her neck, hearing bones pop). In *Covington v. State*, 228 So. 3d 49, 64 (Fla. 2017) this Court upheld HAC where the evidence

suggested several possibilities: that the child was conscious and could see the defendant's rage as he picked her up and tossed her or was conscious as the defendant cut her throat. This Court has upheld this aggravator in execution style murders. In finding HAC where a woman was killed with a shot to the forehead after being kidnapped, taken to a bank for her to get money, and then driven to a remote location, this Court said that in such execution type killings "[t]he common element in these cases is that, before the instantaneous death occurred, the victims were subjected to agony over the prospect that death was soon to occur." *Baker v. State*, 71 So. 3d 802, 821 (Fla. 2011) (citing *Routly v. State*, 440 So. 2d 1257, 1264 (Fla.1983)).

Here, as outlined by the trial court, both murders were horrific. The first victim, Ms. Crowell, was approached and shot by a person to whom she had opened her home. When the first, second, and third, shots did not kill her, and as she lay there begging for help, pleading for someone to call 911, Joseph "delivered the final shot, killing her." (ROA 1445). It is not unreasonable to conclude that she knew her child was also in danger – they were all in the home together that

night, and she knew Joseph's rage was focused on Kyra - and that this was her last thought before being killed.

It is difficult to imagine a more terrifying death than Ms. Crowell's, until, that is, the events of Kyra's murder are considered. Kyra's murder was arguably even more petrifying than her mother's. Having just seen her mother gunned down by a person she knew and trusted, begging for help until the final shot, Kyra quite literally ran for her life. As she looked over her shoulder, Joseph shot her five times. As the trial court stated, "[t]here is no doubt that this panic-stricken little girl experienced a level of terror that no child or no one should ever have to endure." (ROA 1449).

Appellant's argument is not only based on a premise that is clearly counter to the requirements to uphold an HAC finding, it also has no factual support, thus it is without merit. Finally, any error would be harmless given the aggravators based on the contemporaneous murders, the previous capital felony conviction, the CCP finding, Appellant's placement on felony probation, and with respect to Kyra, the victim being less than 12 years of age. The State asks this Court to affirm.

ISSUE X

THE COLD, CALCULATED, AND PREMEDITATED
AGGRAVATOR WAS PROVEN BEYOND A REASONABLE
DOUBT. (Restated)

Joseph contends the record does not support the CCP aggravating factor because the evidence was “speculative conjecture and, at best, indirect inference” of the existence of a plan to kill before the incident happened. (IB 71). The State disagrees and maintains that there was competent, substantive evidence to support the CCP aggravator. This Court’s review “is limited ‘to ensuring that the trial court applied the correct rule of law and, if so, that there is competent, substantial evidence to support its findings.’” *Altersberger v. State*, 103 So. 3d 122, 126 (Fla. 2012) (quoting *Caballero v. State*, 851 So. 2d 655, 661 (Fla. 2003)).

Four factors are required to prove the CCP aggravator: (1) the killing was a product of cool calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage (cold); (2) the defendant had a careful plan or prearranged design to commit the murder before the fatal incident (calculated); (3) the defendant exhibited heightened premeditation (premeditated); and (4) the defendant had no pretense of moral or legal justification. *See Eaglin v. State*, 19 So. 3d 935, 947

(Fla. 2009); § 921.141(6)(i), Fla. Stat. (2017). The focus of the CCP aggravating circumstance “is the manner of the killing, not the target.” *Oliver v. State*, 214 So. 3d 606, 616 (Fla. 2017) (quoting *Doorbal v. State*, 837 So. 2d 940, 961 (Fla. 2003)). *See also Campbell v. State*, 159 So. 3d 814, 830 (Fla. 2015) (CCP aggravator centers on the manner in which the defendant executed the crime).

Legally sufficient evidence supporting a CCP finding includes advance procurement of a weapon, lack of resistance or provocation and the appearance of a killing carried out as a matter of course. *See Campbell*, 159 So. 3d at 830. Examples of the calculated prong are when the defendant arms himself in advance, kills execution-style, and had time to coldly and calmly decide to kill. Heightened premeditation can sometimes overlap with evidence proving a prearranged plan, and can be shown by evidence that the defendant had the opportunity to leave the crime scene and not commit the murder, but instead committed it. *Campbell* at 831. A legal or moral justification is any colorable claim based on at least partly or uncontroverted and believable factual evidence or testimony that...would constitute an excuse, justification, or defense as to the homicide. *Id.* (quoting *Nelson v. State*, 748 So. 2d 237 (Fla. 1999).

Even taking the facts in the light most favorable to the defense, this case is similar to *Marquardt v. State*, 156 So. 3d 464 (Fla. 2015), where this Court upheld the CCP aggravator. There, the facts showed Marquardt procured two weapons before arriving at the victims' house, and started shooting from the outside, supporting "the conclusion that Marquardt approached the house with the prearranged design to shoot and kill any occupants." *Id.* at 487. The heightened premeditation was supported by the evidence that Marquardt started shooting from the outside and, as Appellant did, pursued his victim and ensured her death by shooting her multiple times. *Id.* In fact, Appellant's actions are more horrific considering he chased down and repeatedly shot an eleven year old child.

Appellant's contention is that these murders occurred "spur of the moment". (IB at 73). But this assertion is based on an extremely liberal interpretation of the evidence. In reality, on the day of the murders, when Joseph believed the precursor of his threat had occurred, he arrived home and went into his bedroom alone, isolating himself from the rest of the family. After having ample time to contemplate his actions, instead of changing his mind about what he had decided to do, he left his room, confronted and murdered Ms.

Crowell and then hunted Kyra down and murdered her while she ran for her life.

Ample evidence also demonstrates the murders were premeditated, as established by noting the horrific facts of the murders and Joseph's conduct in the days prior. His advance planning is evidenced by the threats he made toward both of the victims based on his anger toward an eleven year old child. (T. 1612). Up until just before this incident, nobody had seen Joseph with a firearm, but he acquired one in the days before the murders. (T. 1295). On the day of the murders, Joseph learned of a dispute between his daughter and Kyra. (T. 1601). This is exactly what he had warned about in his threat and when he believed it had occurred, he acted on it. Appellant asserts Joseph did not have a gun while speaking to his mother immediately before the murders. (IB 73). This, however, is speculation. Nobody can say with any certainty that Joseph did not have a weapon; at best, nobody saw one. Appellant's arguments for this issue are based largely on conjecture and place significant reliance on evidence that was ultimately rejected by both the judge and the jury.

Cases where this Court has found that murder was committed in an impulsive manner are under wholly different facts or involved defendants who were severely impaired by substances and/or mental issues. *See, e.g., Almeida v. State*, 748 So. 2d 922 (Fla. 1999) (No CCP where the trial court found both mental health mitigators, defendant had severe impulse control issues due to a brutal childhood in Brazil, and defendant had been drinking the night of the murder and told police it was an impulsive act he committed shortly after getting drunk by himself); *Mahn v. State*, 714 So. 2d 391 (Fla. 1998) (No CCP when 19-year-old defendant retrieved a knife from the kitchen and started stabbing one victim, only stabbing a second when the second victim ran into the room after hearing the noise, and an expert testified defendant was impulsive and doesn't think about consequences); *Richardson v. State*, 604 So. 2d 1107 (Fla. 1992) (No CCP where defendant shot his wife in the middle of an active, heated argument); *McWatters v. State*, 36 So. 3d 613 (Fla. 2010) (No CCP where the only evidence related to heightened premeditation was defendant's confession that he only attacked and strangled the victim after she threatened him with a knife).

Comparing the ample evidence of CCP in this case with those cited *supra*, it's clear the finding of CCP in both murders was proper. Competent, substantial evidence existed to support the trial court's finding of the CCP aggravator. Finally, any error was harmless given the other previously noted aggravators. The State asks this Court to affirm.

ISSUE XI

THIS COURT HAS RULED THAT PROPORTIONALITY REVIEW IS CONTRARY TO THE CONFORMITY CLAUSE OF THE FLORIDA CONSTITUTION, THUS IT SHOULD NOT BE UNDERTAKEN. (Restated)

Joseph contends that the death sentence is inappropriate in this case because his case is not among the least mitigated first-degree murders. He refers to this Court's use of proportionality prior to *Lawrence* and argues that was the proper process. However, as noted above under Issue VII, comparative proportionality review is no longer required under Florida law. *Lawrence*, 308 So. 3d at 544. As such, this Court should decline Joseph's invitation to proceed under the now invalid prior law.

Regardless, even under this Court's pre-*Lawrence* case law Gordon's death sentence is clearly proportional. "Proportionality

review compares the sentence of death with other cases in which a sentence of death was approved or disapproved.” *Palmer v. Wainwright*, 460 So. 2d 362, 364 (Fla. 1984). The Court must “consider the totality of the circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.” *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1991). The weight a trial court assigns each mitigating circumstance is reviewed on appeal for an abuse of discretion. *Lowe v. State*, 259 So. 3d 23, 61 (Fla. 2018). *See also Covington v. State*, 228 So. 3d 49 (Fla. 2017). Were this Court to conduct a proportionality review, this case would certainly satisfy it.

ISSUE XII

FLORIDA’S DEATH PENALTY SCHEME IS
CONSTITUTIONAL AND VIOLATES NEITHER THE U.S.
NOR FLORIDA CONSTITUTIONS.

Appellant argues that Florida’s death penalty statute and related laws have broadened the number of cases to such a degree as to betray those requirements of *Furman*.¹² (IB 90). He goes on to claim that “[o]ur current sixteen aggravating factors and our other

¹² *Furman v. Georgia*, 408 U.S. 238 (1972).

legislative changes, i.e. including, but not limited to, the current interpretation of the Conformity Clause, appear to comprise many additional fact patterns that could result in consideration of, as well as imposition of, the death penalty.” (IB 97). Even if we assume this assertion is correct for the sake of argument (which it is not), it completely ignores how the death penalty is implemented in the State of Florida. The existence of an aggravating factor is only the first step in the process Florida uses to narrow the large number of first-degree murder cases that result in the death penalty to only the worst-of-the-worst. *See Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003) (“We have previously rejected the claim that the death penalty system is unconstitutional as being arbitrary and capricious because it fails to limit the class of persons eligible for the death penalty.”) (citing *Shere v. State*, 579 So. 2d 86, 95 (Fla. 1991)).

A jury must go through several steps before returning a verdict for the death penalty. First, they must unanimously determine that at least one aggravating factor has been proven beyond a reasonable doubt; they can only choose from those presented by the prosecution, and the prosecution is limited by a statutory list of specific aggravators. Fla. Stat. § 921.141 (2)(a);(6) (2020). Before they even

start the weighing process, they then must unanimously find that any aggravators are sufficient on their own to warrant the death penalty. *See* Fl. Standard Jury Inst. 7.11 (“If you do unanimously find the existence of at least one aggravating factor *and* that the aggravating factor[s] [is][are] sufficient to impose a sentence of death, the next step...”)(emphasis added). After making this unanimous determination, the jurors make individual determinations about which, if any mitigating factors were proven by a preponderance of the evidence. *Id.* Unlike the State and aggravating factors, in addition to a list of statutory mitigating circumstances, the defense is permitted to present, “the existence of any other factors in the defendant’s background that would mitigate against imposition of the death penalty,” and so the defense is not limited in any way as to what they can present in mitigation. Fla. Stat. § 921.141 (7) (2020). The jury must then make another unanimous finding, this time that whatever aggravators they had to unanimously find outweigh any mitigators they each individually found to exist. Fla. Stat. § 921.141 (2)(b)(2) (2020). After all this, their job is still not done; they must then unanimously find, after unanimously agreeing that the aggravators outweigh the mitigators, that the appropriate

punishment is death. Fla. Stat. § 921.141 (2)(c) (2020). Even after all of these findings were made by a unanimous jury, the judge still has the authority to impose a life sentence instead of death; the judge, however, cannot override a life sentence. Fla. Stat. § 921.141 (3)(a) (2020). This lengthy narrowing process is a far cry from Appellant's suggestion that the only inquiry that matters is the existence of one aggravating factor.

This claim should be denied.

ISSUE XIII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE MOTION FOR A MISTRIAL DURING CLOSING ARGUMENT OF THE PENALTY PHASE. (Restated).

This issue has several standards which must be applied; because Appellant did not break them down individually, the State will attempt to do so. One claim of error applies to a comment in which the court sustained the defense objection, denied a motion for mistrial, and read the jury a curative instruction which was proposed by the defense. Where the trial court recognizes the error, sustains the objection, and gives a curative instruction, the correct appellate standard of review is whether the trial court abused its discretion in

its denial of a mistrial. *Anderson v. State*, 841 So. 2d 390, 403 (Fla. 2003) (internal citations omitted); *see also Villanueva v. State*, 917 So. 2d 968, 972 (Fla. 3d DCA 2005). In determining whether the improper remarks warrant a new trial, the remarks must be examined in “the context of the closing argument as a whole and considered cumulatively within the context of the entire record.” *McArthur v. State*, 801 So. 2d 1037, 1040 (Fla. 5th DCA 2001). “Generally speaking, the use of a curative instruction to dispel the prejudicial effect of an objectionable comment is sufficient.” *Rivera v. State*, 745 So. 2d 343, 345 (Fla. 4th DCA 1999) (citing *Buenoano v. State*, 527 So. 2d 194 (Fla. 1988)).

Appellant also argues within this issue that the court committed error by not granting their motions for mistrial. (IB 101; 103). A motion for mistrial is left to the sound discretion of the trial judge and should only be granted “in cases of absolute necessity” “when the error is so prejudicial and fundamental that the expenditure of further time and expense would be wasteful if not futile.” *Ferguson v. State*, 417 So. 2d 639, 641 (Fla. 1982) (internal citation omitted).

Appellant’s claim also asserts the court improperly overruled his objections to other statements made by the prosecution during

the penalty phase closing argument. A trial court's rulings regarding the propriety of comments made during closing argument are reviewed for an abuse of discretion. *Salazar v. State*, 991 So. 2d 364, 377 (Fla. 2008). If the trial court erred in allowing the prosecutor to engage in improper argument but there is no reasonable probability that the improper comments affected the verdict, such error is harmless and does not require reversal. *Hitchcock v. State*, 755 So. 2d 638, 643 (Fla. 2000). Appellant argues several statements made by the State during its closing arguments were “inflammatory”, “egregious”, “abhorrent”, “improper”, and “outrageous”. (IB 99; 100; 101; 102; 104). However, as the statements were not misstatements of the law and any error did not affect the verdict, the claim must be denied.

Each of the challenged comments is discussed in turn below. The first comment Appellant claims was error is one for which the objection was sustained and a curative instruction was given. It is based on the following argument made while the prosecution was referencing mitigation:

Mr. Clausi: There is no question, there is no question that he understood the criminality. It's just that he didn't care. Didn't care. He was on probation, ladies and gentlemen.

You heard the probation officer say that any crime can violate you. Still doesn't. Doesn't care about jail. That's why that punishment is not appropriate.

Now, the fourth, the existence of any other factors --

Mr. Wagner: I'm going to object to the last as improper argument. Aggravators are the only things that you can consider.

(T. 2357). The parties approached the bench and defense counsel argued that the death sentence could only be based on aggravators and moved for a mistrial. (T. 2358). The trial court reviewed the record, ultimately sustained the objection and denied the motion for a mistrial. The court then asked the defense to propose a curative instruction. Ultimately, the court instructed the jury exactly as the defense had requested, telling them:

Let me just tell you that both parties are aware of what the Court will be instructing you at the close of the arguments. I have sustained the Defense objection based on improper argument that the defendant did not care about jail. Your decision regarding the appropriate sentence should be based upon proven aggravating factors and established mitigating circumstances that have been presented to you during these proceedings. The fact that the State believes that Mr. Joseph doesn't care about jail is not an aggravating circumstance upon which you are permitted to base a decision or to recommend the death penalty.

(T. 2368-69).

Appellant argues now that the prosecutor attempted to “inflame the emotions and sentiments” of the jury. (IB 101). Appellant, however, fails to incorporate any case law that supports the contention that the jury did not follow the curative instruction. Because the defense proposed the wording of the curative instruction, and the jury is presumed to have followed it, there is no error.

Also related to this statement, Appellant asserts the trial court abused its discretion in failing to grant the defense motion for mistrial. However, this motion was properly denied because the prosecutor’s comment was not so serious or egregious to warrant a mistrial. “A trial court should grant a motion for mistrial only when ‘the error upon which it rests is so prejudicial as to vitiate the entire trial, making a mistrial necessary to ensure that the defendant receives a fair trial.’” *Bright v. State*, 90 So. 3d 249, 259-60 (Fla. 2012) (quoting *Dessaure*, 891 So. 2d at 464–65); *Floyd v. State*, 913 So. 2d 564, 576 (Fla. 2005); *Wade v. State*, 41 So. 3d 857, 872 (Fla. 2010).

Additionally, a prosecutor’s actions must be evaluated in context rather than focus on the challenged statement in isolation.

See State v. Jones, 867 So. 2d 398, 400. This Court outlined the factors to look to in evaluating whether or not a comment vitiates an entire trial including whether or not the comment is of an isolated nature, the context in which the comment was made, the comment in light of the evidence, and whether or not the trial court instructed the jury properly. *Bright* at 260; *See generally Dessauere*, 891 So. 2d at 465. Here, the prosecutor only briefly referenced jail not being an appropriate punishment. The trial court, believing the prosecution was arguing an aggravator, had to have the statement read back, thus it is reasonable to assume the jury believed the same, especially considering the contents of the admonition submitted by the defense. (T. 2358-2369). The prosecutor did not mention it again, making it nothing more than an isolated comment. Contextually, the State was arguing that the defendant's ability to conform his conduct to the requirements of the law was not impaired, noting that he hid for several days after the murders because he knew the new offense was a probation violation. (T. 2356). This is a reasonable inference to draw in argument.

Assuming, *arguendo*, that this comment was improper, when considered individually or collectively with any of the other

purportedly improper comments, reversal is not warranted. The prosecutor's reference was isolated, it was not repeated before or after the objection, and the remark was not made a theme or feature of the State's closing. *See Lammons v. State*, 246 So. 3d 524, 526 (Fla. 3d DCA 2018) (holding that the objected-to improper comment by the prosecutor was harmless error because it was isolated, not repeated after the objection, and was not made a feature of the State's rebuttal close). In addition, immediately prior to closing argument, the trial court instructed the jury that what the attorneys say in closing is not evidence. (T. 2335). Finally, the jury was properly instructed on the law by the court and reminded that any decision must be based only on the evidence. (T. 2426-52; 2439). There was no error in these rulings.

The next statement subject to a claim of error was objected to by the defense, yet received no ruling from the court. The statement, objection, and ruling are below:

Mr. Clausi: It's saying, based on what we've seen, based on what we've heard, based on those jury instructions, based on the aggravating factors that were presented by the State in light of the mitigating factors that were presented by Defense, the correct sentence, the proportionate sentence, is death. When that

gets turned in, ladies and gentlemen, this doesn't happen unless she thinks it should.

Mr. Wagner: Objection, it's diminishing the jurors' roles.

Court: I want to tell you, of course your recommendation is something that you would recommend to the Court. The Court does impose the final sentence. However, I want you to know I would take your recommendations very heavy, I would weigh those heavy. Okay? So, I don't want to minimize your recommendation but it does, legally I still have to come to the same conclusion as you. If I don't, then I can impose a life sentence. But I want you to know I would take your recommendations as a heavy recommendation.

(T. 2377-78). As a preliminary point, the State contends that the defense objection of “diminishing jury roles”, is not sufficiently specific to preserve the issue for appeal. “To preserve an issue for appellate review, ...a contemporaneous objection must be made with sufficient specificity ‘to apprise the trial court of the putative error.’ ” *Ramos v. State*, 798 So. 2d 4, 5 (Fla. 4th DCA 2001) (quoting *Williams v. State*, 414 So. 2d 509, 511 (Fla. 1982)). This is especially applicable since Appellant now argues that the prosecution was attempting to inflame the emotions of the jury, a wholly different argument. See *Morrison v. State*, 818 So. 2d 432, 446 (Fla. 2002) (concluding that a

party must have made “the same argument to the trial court that it raises on appeal” to preserve the issue for appellate review); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) (holding that defense counsel did not preserve an issue for appellate review because he “did not present [the same] argument to the trial court”). The prosecutor’s entire role in closing argument of a penalty phase is to convince the jury that the aggravating factors outweigh the mitigating circumstances, which can include explaining why the jury should give less weight to mitigation - exactly what the State did here.

Additionally, this objection was never ruled upon by the trial court thus it is unpreserved on a separate basis. *See Braddy v. State*, 111 So. 3d 810 (Fla. 2012) (Because Braddy failed to obtain a clear ruling on his objection, he failed to preserve the issue for appeal.) *See also, Carratelli v. State*, 832 So. 2d 850, 856 (Fla. 4th DCA 2002) (noting that “[a] plethora of Florida cases support the notion that a party must obtain a ruling from the trial court in order to preserve an issue for appellate review”); *Schreidell v. Shoter*, 500 So. 2d 228, 233 (Fla. 3d DCA 1986) (holding that “[f]ailure to secure a ruling on an objection waives it, unless the court deliberately and patently refuses to so rule”).

Appellant erroneously claims that the “trial judge immediately attempted to cure the State’s abhorrent statement”. (IB 102). Considering that the trial court didn’t actually rule on the objection and denied a motion for mistrial, Appellant takes great liberties in assuming both that the judge found the statement abhorrent and that there was anything to cure. It is equally as likely that the court felt the need to minimize the defense objection.

Appellant’s final claim of error comes where their objection was overruled and involved the following statement by the prosecutor:

And the person who committed them has provided no mitigation worthy to allow him to live out his days in jail and that’s why we’ll ask that when you go back there, read everything. Read those jury instructions.

(T. 2382). The defense then objected and argued in sidebar that the prosecution had commented on Joseph’s right to remain silent. The court overruled this objection noting that the statement was not referencing Joseph’s decision not to testify, rather it was in the context of the State challenging the sufficiency of the mitigation provided by the defense. (T. 2387-88).

The control of prosecutorial argument lies within the trial court's sound discretion and will not be disturbed absent an abuse

of discretion. *Esty v. State*, 642 So. 2d 1074, 1079 (Fla. 1994). “Wide latitude is permitted in arguing to a jury. Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments.” *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982) (internal citations omitted). Furthermore, as the Eleventh Circuit has noted, the United States Supreme Court has never granted relief based on a prosecutor’s comments. *Reese v. Sec’y, Fla. Dep’t of Corr.*, 675 F.3d 1277, 1287-88 (11th Cir. 2012) (observing that the Supreme Court has “never” held that a prosecutor’s closing arguments were so unfair as to violate the right to due process.) This is because the United States Supreme Court has a very high barometer regarding what a prosecutor must say to amount to a denial of due process. Many arguments that state courts find to be error, or even fundamental error, such as comments where the prosecutor argues that the jury should “show the defendant the same mercy he showed the victim” or that the jury has a duty to recommend an appropriate sentence are viewed as proper arguments by the federal courts. This is important, as Appellant does make an oblique claim regarding due process.

This was a heavily aggravated case, with five aggravators (four of which were given great weight by the trial court), coupled with very minimal mitigation. Because of how weighty the aggravation was in comparison to the mitigation, any cumulative error this Court may find from one or two isolated comments in closing do not rise to the level of tainting the recommendation for death.

ISSUE XIV

THERE IS NO FACTUAL BASIS TO SUPPORT APPELLANT'S CLAIM THAT THE JURY DID NOT FOLLOW THE LAW. (Restated)

It is well established that a verdict cannot be subsequently impeached by matters that exist in the verdict and surround the jury's deliberations. *See Duckett v. State*, 918 So. 2d 224, 231 n. 7 (Fla. 2005); *Marshall v. State*, 854 So. 2d 1235, 1240 (Fla. 2003); *Johnson v. State*, 593 So. 2d 206, 210 (Fla.1992). Further solidifying this concept, section 90.607(2)(b), Florida Statutes (2020), provides that “[u]pon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment.” This Court has held that section 90.607(2)(b) “absolutely forbids any judicial inquiry into emotions, mental process, or mistaken beliefs of jurors.” *Baptist Hosp. of Miami*,

Inc. v., 579 So. 2d 97, 99 (Fla. 1991) (quoting *State v. Hamilton*, 574 So. 2d 124, 128 (Fla.1991)). In *Maler*, it was further explained that “the reasons why jurors reach a particular verdict clearly are subjective impressions or opinions that are not subject to judicial inquiry.” *Id.* at 100.

Appellant’s claim of error is based on pure speculation and should be disregarded. There is no evidence to support any allegation of wrongdoing. This claim must be denied.

ISSUE XV

THE TRIAL COURT ERRORS, IF ANY, CONSIDERED CUMULATIVELY, DO NOT WARRANT A NEW TRIAL.

Appellant claims that a combination of errors deprived him of a fair trial. This Court has held, however, that where individual claims of error are either procedurally barred or lack merit, a claim of cumulative error must be rejected. *Israel v. State*, 985 So. 2d 510 (Fla. 2008). There can be no accumulation of error where no individual error is shown, and Appellant’s claims in this regard fail. The concept of cumulative error is based on the due process right to a fair trial and due process claims are reviewed de novo. *Norvil v. State*, 191 So. 3d 406, 408 (Fla. 2016); *see also United States v.*

Brown, 822 F.3d 966, 971 (7th Cir. 2016) (reviewing de novo a claim that the cumulative errors were so serious that the defendants did not receive the due process).

Not properly presented

Preliminarily, the issue of cumulative error was not properly presented on appeal to this Court. This Court concluded in *Dufour v. State*, 905 So. 2d 42, 75 (Fla. 2005), that a claim of cumulative error was not sufficiently articulated to warrant relief where appellate counsel “simply” referred to the “sheer number and types of errors.” The *Dufour* Court stated that the purpose of an appellate brief is to present arguments in support of the points on appeal. *Id.* at 75 (quoting *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990)); *see also Porter v. Crosby*, 840 So. 2d 981 (Fla. 2003) (finding a claim of cumulative error to be insufficiently pled on appeal because the brief only generally asserted there were errors). This claim of cumulative error is nearly as bare bones as the claim in *Dufour*. The entire claim of cumulative error is a mere three sentences in the appellate brief with a single case quoted but provided no analysis or application of the law that is cited to this particular case. *Greenwood v. State*, 754 So. 2d 158, 160 (Fla. 1st DCA 2000) (declining to address an issue

raised in one sentence in the appellate brief followed by a “smorgasbord” of case citations). This Court recently condemned defense postconviction counsel for merely mentioning the basis for a claim in the postconviction motion but not actually developing the claim until the written closing arguments when it was too late for the State to respond, *Sparre v. State*, 289 So. 3d 838, 849. The same observation applies to appellate briefs. Appellate counsel should not be permitted to raise an issue but merely hint at the basis for the claim and then only fully develop the argument in the reply brief which is filed after the State has already provided its answer brief. The claim is not properly presented on appeal.

Merits

The claim of cumulative error is meritless. The Constitution entitles a criminal defendant to a fair trial, not a perfect one. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). If there are no errors, then there necessarily is no cumulative error. *Foster v. State*, 132 So. 3d 40, 74 (Fla. 2013) (explaining because the Court found no error at all, there was no error “that can be considered cumulatively with any other errors”). If an alleged error is found meritless by this Court on appeal, then that claim may not be considered in any

cumulative error analysis. *Matthews v. State*, 288 So. 3d 1050, 1065 (Fla. 2019) (explaining where the “individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error also necessarily fails” quoting *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008)). Courts do not perform cumulative error analysis on the “cumulative effect of non-errors.” *Thacker v. Workman*, 678 F.3d 820, 849 (10th Cir. 2012).

Moreover, for cumulative error to apply, this Court must determine that there are at least two errors of merit. “A single improper comment in closing argument does not support a cumulative error analysis.” *Bright v. State*, 299 So. 3d 985, 1000-01, (Fla. 2020); *see also United States v. Bailey-Snyder*, 923 F.3d 289, 296 (3d Cir. 2019) (stating that cumulative error “requires more than one error”), *cert. denied, Bailey-Snyder v. United States*, 140 S. Ct. 847 (2020); *Weimer v. Allbaugh*, 766 Fed. Appx. 728, 734 (10th Cir. 2019) (stating that a court undertakes a cumulative error analysis “only if there are at least two errors” citing *Lott v. Trammell*, 705 F.3d 1167, 1223 (10th Cir. 2013)); *United States v. Hall*, 945 F.3d 1035, 1048, n.7 (8th Cir. 2019) (rejecting a claim of cumulative error based on a single error).

Harmless error

Cumulative error is really the concept that two or more errors that are individually harmless are no longer harmless when considered together. *Hanson v. Sherrod*, 797 F.3d 810, 852 (10th Cir. 2015) (explaining that cumulative error analysis merely aggregates all the errors that individually have been found to be harmless but then analyzes whether their cumulative effect was such that collectively they can no longer be determined to be harmless); *Noeling v. State*, 40 So. 2d 120, 121 (Fla. 1949) (explaining that while any one of the errors may not in and of itself constitute reversible error, but when considered together the errors are such that the ends of justice requires a new trial). So, cumulative error, although a stand-alone claim, is really a collective harmless error analysis.

Given the fact that Joseph's family members were the eyewitnesses in this case who identified him to police as the shooter, coupled with their statements immediately after the incident and noting that Joseph fled after the murders and avoided capture until days later when he was forcibly apprehended, any error, including any cumulative error, is still harmless. Furthermore, to prove motive, there was testimony that Joseph had acquired a gun and made

threats to the victims in the days leading up to the murders. It is an understatement to describe the evidence in this case as overwhelming. Any cumulative error remains harmless.

STATEMENT ON SUFFICIENCY OF THE EVIDENCE

Although Joseph did not raise the sufficiency of the evidence for his convictions to either murder, this Court has a duty to address it when reviewing a capital case. *Ferguson v. State*, 417 So. 2d 639, 642 (Fla. 1982). Whether the evidence is sufficient is judged by whether it is competent and substantial. *See Blake v. State*, 972 So. 2d 839, 850 (Fla. 2007). “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); *see also Simpson v. State*, 3 So. 3d 1135, 1147 (Fla. 2009) (applying competent, substantial evidence standard to determine sufficiency of the evidence).

In this case, the State presented evidence from the defendant’s family members who were present during the murders. Despite the fact that three of these family members recanted in significant ways,

in the light most favorable to the State, the sum of the evidence is still significant. The defendant threatened the victims in the days leading up to the murders. He obtained a gun. He was angry about Kyra and Kamare's argument. He confronted Ms. Crowell about what he believed Kyra had done. Immediately after this he shot Ms. Crowell multiple times, firing the final shot after she begged for help. He then hunted Kyra down and executed her. There is no testimony that any other person had any motive to kill either victim. There is no evidence that any other person in the home had a gun. The defendant was identified as the shooter by multiple witnesses.

Further, Joseph knew that the he was identifiable by his family, so he fled the scene, stole the victim's car, discarded his clothing, and remained a fugitive for five days. Where there is a sufficient nexus between flight and the crime with which a defendant is charged, evidence of flight is relevant to infer consciousness of guilt. See *Hertz v. State*, 803 So. 2d 629, 644 (Fla. 2001); *Thomas v. State*, 748 So. 2d 970, 982 (Fla.1999); *Shellito v. State*, 701 So. 2d 837, 840 (Fla. 1997) (admitting evidence of defendant's flight within twenty hours of a murder).

The evidence establishes that competent, substantial proof of Joseph's guilt exists and is sufficient to demonstrate that a rational jury could have found him guilty of the crimes charged.

CONCLUSION

Based upon the foregoing, the State respectfully requests this Court affirm.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail through the e-portal to: Fredrick R. Susaneck, Esq., Counsel for Appellant, Levine & Susaneck, P.A., P.O. Box 1313, West Palm Beach, Florida, 33402 at Levine.Susaneck@gmail.com on this 3rd day of June, 2021.

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. 4. App. P. 9.210 (a) (2).

Respectfully submitted,

ASHLEY MOODY

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