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IN THE SUPREME COURT OF FLORIDA

TYRONE T. JOHNSON,

Appellant,

v. **CASE NO. SC23-55**
L.T. No. 2018-CF-15518
STATE OF FLORIDA, **DEATH PENALTY CASE**

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the record on direct appeal will be referred to as "DAR __" with the appropriate page number filled in the blank. Citations to the direct appeal transcripts will be referred to as "DAR. T. __" with the appropriate page number filled in the blank.

This brief also contains references to a recorded interview stored on a CD marked as State's Exhibit 56. The recorded interview is divided into two files—Part 1 and Part 2. Therefore, the interview will be referenced as "Ex. 56/p.__, __:__" with either 1 or 2 filled in the first blank indicating the part, and with the timestamp included after the comma.

STATEMENT OF THE CASE AND FACTS

October 21, 2018, started off as a normal Sunday for ten-year-old, Ricky Willis, and his mother, Stephanie. They ate food in their apartment and watched TV. (Ex. 56/p.1, 23:20-21). Ricky went around to his neighbors at his apartment complex and took out their trash, like he usually did. (DAR T. 1911, 1922). The day, however, quickly transformed from being routine, once Appellant, Tyrone Johnson, got out his 40-caliber semiautomatic Glock handgun, and shot Stephanie and Ricky numerous times until they both were dead.

After killing Ricky and Stephanie, Johnson called 911 and reported that he "just shot" his girlfriend and her son and that they were both dead. (DAR T. 1898-99). Law enforcement quickly responded and took Johnson into custody. Johnson voluntarily spoke with law enforcement and admitted that he just kept shooting.

A grand jury indicted Johnson of premeditated first-degree murder, second-degree murder, and aggravated child abuse. (DAR 87-88). The State filed its notice of intent to seek death penalty on December 14, 2018. (DAR 91-92). Johnson's trial was before the Honorable Christopher Sabella on November 8-12, 2021. The jury unanimously found Johnson guilty of all three counts as charged.

The penalty phase was conducted on November 16-17, 2021, and a *Spencer*[1] hearing was held on July 28-29, 2022. The jury unanimously recommended a sentence of death, and the court determined that death was the appropriate sentence and imposed a sentence of death on December 12, 2022.

Dr. Mainland, the medical examiner, testified during Johnson's trial that Ricky had twelve gunshot injuries. (DAR T. 2537-38). He explained that some of the wounds were connected, so it was difficult to determine exactly how many times Ricky was shot; however, he believed it was likely six times. (DAR T. 2537-38). Ricky had a gunshot wound in his upper arm that went through the back of the arm and out of the front. (DAR T. 2549-50). Dr. Mainland considered this gunshot wound to be a defensive wound. (DAR T. 2553).

According to Dr. Mainland, the injury was consistent with Ricky having his arm up by his face, and he believed that the bullet exited out of the arm and went into the jaw. (DAR T. 2550). The bullet went from his right jaw through the back of the mouth and the base of the tongue, and then it traveled through the muscles on the side of the

[1] *Spencer v. State,* 615 So. 2d 688 (Fla. 1993)

neck and exited out of the left side of the neck, slightly below the ear. (DAR T. 2544-45).

Ricky also had a gunshot wound to his lower arm that entered the back of the arm, toward the elbow and fractured the humerus bone. (DAR T. 2552). The bone scattered into pieces and some bone fragments exited with the bullet through the exit wound. (DAR T. 2552). This injury essentially shattered his arm and distorted it, and it would have been difficult for Ricky to use his arm. (DAR T. 2553).

Additionally, Ricky was shot in the thigh, and the projectile was recovered from his tibia bone. (DAR T. 2554). The injury would have been debilitating and would have made it difficult for him to walk. (DAR T. 2555).

Ricky had a gunshot wound to the chest that went through the collar bone and the muscle and exited out of his back. (DAR T. 2547-48). It would have been painful but not immediately fatal, and he would have been able to function. (DAR T. 2548).

Ricky had graze wounds on his shoulder, right thigh, and wrist. (DAR T. 2556-57). The wrist injury exposed some tendons but did not go through the wrist or break any bones. (DAR T. 2558). The wrist

injury also had stippling, which meant that Johnson was no more than three feet away from Ricky when he shot him. (DAR T. 2558).

Finally, Ricky sustained a fatal gunshot wound to the head that fractured the skull, went through both sides of the brain, and came out of the other side of the head. (DAR T. 2540). The injury would have been almost immediately fatal, and Ricky would have been immediately incapacitated. (DAR T. 2542-43). Dr. Mainland determined that the cause of death was the gunshot wound to the head with perforation of the skull and brain, and the manner of death was homicide. (DAR T. 2559).

Dr. Mainland testified that Stephanie had four gunshot wounds that were from three bullets. One gunshot wound went through her breast and out of her back and was not fatal. (DAR T. 2527). That area had stippling on the skin from the gunpowder, meaning that the range of fire was somewhere in the range of inches to a maximum of three feet. (DAR T. 2528).

She had another gunshot wound to the mouth. The bullet grazed her lip area, hit the jaw and continued in a downward trajectory. (DAR T. 2529-31). It broke the jaw, went down the neck, destroyed the right side of her thyroid gland, hit the trachea and then

the aorta, and went through the left lung. (DAR T. 2532). The injury was not immediately fatal, but would not have taken long to have become fatal without medical intervention. (DAR T. 2532).

The gunshot wound to her forehead was fatal; it fractured her skull and went through her brain. (DAR T. 2534-35). She would have only survived within seconds to minutes of sustaining the injury. (DAR T. 2535). Dr. Mainland determined that the cause of Stephanie's death was gunshot wound to the head with perforation of skull and brain, and the manner of death was homicide. (DAR T. 2537).

The call that Johnson made to 911 was admitted into evidence his trial and played for the jury. The relevant portions are as follows:

> Ma'am, I just shot my girlfriend and her son for jacking me.
>
> You just shot him?
>
> Both of them.
>
> …Is the person still alive?
>
> They're dead.
>
> Is this a male or female?
>
> Both male and female, they're dead.

You killed them both?

They were attacking me and I killed them.

…

Who were these people?

My girlfriend and her son. We were arguing and they attacked me, ma'am –

All right. And how old is the son?

I think 10…

You killed a 10-year-old boy?

They were jumping on me, ma'am. Hurry up.

(DAR T. 1898-99).

Trial testimony established that Deputies Barton and Lewis and Detective Marsden from the Hillsborough County Sheriff's Office responded to the apartment complex and saw Johnson crying. (DAR T. 1768-70, 1802-06, 1832-34). Johnson was holding a residential phone still connected with 911, and he complied with the deputies' commands. (DAR T. 1833-35, 1770-71, 1786). Detective Lewis observed what appeared to be blood on both of Johnson's hands, his left forearm, and his socks. (DAR T. 1834-36).

Johnson was taken into custody, and the scene was secured. (DAR T. 1770-71, 1780). The living room TV was on and a football

game was playing. (DAR T. 1773). Directly in front of the TV stand was a Glock 22, 40-caliber and a knife. (DAR T. 1807). There was a red substance on the foregrip of the gun that appeared to be blood. (DAR T. 1773). The deceased bodies of Ricky and Stephanie Willis were on the floor of the master bedroom with multiple gunshot wounds. (DAR T. 1775-77, 1808). Law enforcement obtained a search warrant and the scene was processed. (DAR T. 1880, 1958, 2165).

A video of the crime scene along with photographs were admitted into evidence and published to the jury. (DAR T. 1961-1972). Ricky's room had what appeared to be blood in it and a pile of pink vomit on the floor. (DAR T. 1810, 1999). Crime Scene Investigator Shae Mawhinney tested a red area on the carpet and it testified positive in a presumptive test for blood. (DAR T. 2000). There was apparent blood on Ricky's wrestling toys and other toys in his bedroom. (DAR T. 2005-06, 2183).

There did not appear to be bullet holes on the wall near Ricky's bed or on the sheets; however, the bed was moved. (DAR T. 2011, 2186-87). Upon moving the bed, two bullet holes were visible in the wall. (DAR T. 2016-2020, 2190). One was approximately five to six inches from the ground and the other was about a foot from the

ground. (DAR T. 2241). The drywall was removed and one projectile was found in the wall. The other hole traveled into the adjoining apartment, and law enforcement later retrieved the projectile from the neighbor's apartment. (DAR T. 2020-23, 2151-53, 2190).

After the bed was removed, more apparent blood was observed on the floor and on toys under the bed. There was a cell phone with apparent blood on it that had been under the bed. (DAR T. 2186-87, 2141).

There was what appeared to be blood in various areas of the master bathroom. (DAR T. 2025-31). Law enforcement could not gain entry into the bathroom until the victims' bodies were moved, as the bodies were in front of the door, and the door opened outward. (DAR T. 1994-95).

During the trial, Johnson's father testified that Johnson contacted him on a video call before the murders occurred. The video call was received at 6:36 p.m. (DAR T. 97-98). He could see that Johnson was upset, and Johnson said that he wanted his father to get him. (DAR T. 2297-98). Johnson's father saw a female arm come into view and hit Johnson, and the phone fell to the floor. (DAR T. 2997-98). Johnson's father could hear sounds "off in a distance" that

sounded like gunshots. (DAR T. 2298). He then lost the phone connection. Johnson's father called Johnson back at 6:40, 6:42, and 6:44 to no avail. Johnson eventually answered on the next attempt at 6:46. (DAR T. 2299, 2308). At that time, Johnson was also on the phone with 911. (DAR T. 2300). Johnson's father testified that he never saw Ricky or heard his voice during the phone calls. (DAR T. 2301).

Upon Johnson's arrest, Detective Florio read Johnson his *Miranda*[2] rights, and Johnson indicated that he understood his rights and was willing to speak to the Detective. (DAR T. 2389-90). The recorded interview was admitted into evidence and published to the jury. (DAR T. 2393-2448).

Johnson stated that he got into an argument with Stephanie after dinner about watching TV. (Ex. 56/p.1, 23:20-21). Ricky[3] was in his bedroom while Johnson was arguing with Stephanie in the living room. (Ex. 56/p.1, 26:29-26:45). The argument escalated

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[2] *Miranda v. Arizona,* 384 U.S. 436 (1966).

[3] Ricky is referred to as "Ry" and "Ryan" during the recording; however, in the interest of continuity, the State will continue to refer to the victim as "Ricky."

verbally, and Johnson went into the master bedroom. (Ex. 56/p.1, 27:00-28:29).

Stephanie followed and told Johnson, "I see why your son killed himself like a bitch, because you're a bitch." (Ex. 56/p.1, 14:52-15:08). Johnson then called his dad and told him to come get him in the morning. (Ex. 56/p.1, 15:15-15:23). Johnson started to pack his things when Stephanie began to hit him. (Ex. 56/p.1, 15:24-15:29). Stephanie eventually pushed Johnson off his knee roller and he fell to the floor. (Ex. 56/p.1, 15:30-16:42).

At that point, Ricky entered the room and put his hand on Johnson's shoulder and stated "you hurt my mommy" or "what are you doing to my mom." (Ex. 56/p.1, 19:07-19:44; 48:00-50:06). Johnson pushed Ricky off of him. According to Johnson, Stephanie grabbed the PlayStation to hit him with it, so Johnson got his gun and started firing. (Ex. 56/p.1, 15:30-16:42; 28:00-31:30; 48:00-50:06). Stephanie fell, and he kept firing. (Ex. 56/p.1, 50:11).

Johnson stated that Ricky ran out of the room and came back in. When Ricky returned to the room, Johnson "just started firing." (Ex. 56/p.1, 34:39-34:52). Johnson was asked what he was aiming at, and he said he was "just firing." (Ex. 56/p.1, 34:31-33).

Detective Florio explained that when initially speaking with Johnson, he had no information about the crime scene and was just getting Johnson's side of the story. (DAR T. 2449). Eventually, Detective Florio started receiving information as the scene was being processed, and he wanted to question Johnson about that information. (DAR T. 2449). Therefore, he spoke with Johnson again, and the second recording was played for the jury. (DAR T. 2449-2462).

Johnson was asked whether Ricky's body was moved, and he denied doing so. (Ex. 56/p.2, 1:26-1:33). Johnson was asked why there was blood in Ricky's room, and Johnson replied that he did not know and that he did not move anyone. (Ex. 56/p.2, 3:58-4:07).

Johnson explained that after he shot Stephanie, he looked up and Ricky was standing there, and he just kept firing. (Ex. 56/p.2, 4:09-4:22). Johnson was asked how far away Ricky was from him, and he said "from me to you, sir," referring to the detective who was approximately two feet away from him. (Ex. 56/p.2, 4:09-4:33). Johnson was asked if he fired at Ricky when he was on the ground, and he repeated "I just kept firing." (Ex. 56/p.2, 4:28-4:39). Johnson relayed that it was less than a minute from the time that he went

outside to call for help to when he called 911. (Ex. 56/p.2, 12:05-12:12).

CSI Mawhinney photographed Johnson while he was in the interview room. (DAR T. 1941-42). Johnson was sweating and he appeared to be upset, although she did not see any tears in his eyes. (DAR T. 1942). Detective Florio similarly testified that he never saw tears coming from Johnson's eyes. (DAR T. 2448). Johnson's neighbor, Susan Henderson, testified that she saw Johnson earlier in the day before the shooting and he was standing normally on both feet talking on a phone; he was not using a knee scooter or crutches. (DAR T. 1921).

Nine shell casings were collected from the apartment. (DAR T. 1975). All nine cartridge casings were examined by James Kwong, Florida Department of Law Enforcement ("FDLE") firearms specialist, and he determined that they were all fired from Johnson's gun that was recovered from the apartment. (DAR T. 2327-28).

A sample was taken from under Ricky's bed and later tested by Vicki Bellino from FDLE's Biology and DNA section. (DAR T. 2353-54). Bellino testified that it was Ricky's blood, and the results were greater than 700 billion times more likely that the DNA was from

Ricky than from an unrelated individual. (DAR T. 2354). The handle grip of Johnson's gun contained a DNA mixture, and Bellino was able to include Ricky as a major contributor. (DAR T. 2357). Johnson's DNA was also included in the mixture. (DAR T. 2360).

After hearing all of the evidence, the jury found Johnson guilty of first-degree murder as charged, and specifically found that the killing was both premediated murder and felony murder. (DAR 105). The jury further found that Johnson possessed and discharged a firearm causing death. (DAR 105). In addition, the jury found Johnson guilty of second-degree murder of Stephanie Willis as charged, and the jury specifically found that Johnson possessed and discharged a firearm causing death. (DAR 107). The jury, lastly, found Johnson guilty of aggravated child abuse. (DAR 108).

A penalty-phase hearing was held, and the State presented additional testimony from Dr. Mainland as well as victim impact testimony. (DAR T. 2834-2904). The defense presented mitigation evidence from Johnson's father, mother, brother, children, a former employer, and a close friend. (DAR T. 2911-3047). The defense also presented the following expert witnesses: Aubrey Land, Correctional Expert, and Dr. Scot Machlus. The State presented Dr. Wade Myers

in rebuttal. (DAR T. 3241-3273). After hearing all the evidence of aggravation and mitigation, the jury unanimously recommended that Johnson should be sentenced to death. (DAR 115).

A *Spence*r hearing was subsequently held. The court ultimately agreed with the jury's recommendation and sentenced Johnson to death. The court determined that the State had established the HAC aggravator. The court found that Ricky was present during the altercation that ultimately led to him witnessing his mother's death. (DAR 534). Johnson told law enforcement that Ricky said that Johnson "hurt his mommy" and that Johnson believed Ricky was "just protecting his mama." (DAR 534). The court credited Dr. Mainland's testimony that established that Ricky was alive and conscious when he received five of the six gunshot wounds, and the level of pain would have varied from "moderate" to "extreme." (DAR 534). The court held that the evidence showed that Ricky was hiding under the bed when he received two of the gunshot wounds.

The court noted that two of the wounds were "defensive wounds." (DAR 534). The gunshot that pierced Ricky's arm exited his arm and entered his jaw, breaking his jawbone, several teeth, and cutting his tongue. While the wound would not have been fatal, it

would have resulted in excessive bleeding that would have made it difficult for Ricky to breathe or swallow. (DAR 535).

Additionally, the court agreed with the jury that the State had established the other aggravating factors that the victim was less than twelve years of age and Johnson was previously convicted of another violent felony. (DAR 533-535).

With regard to mitigating circumstances, the court found that Johnson established that his ability to conform his conduct to the requirements of the law was impaired, but the court gave it little weight in light of the fact that Johnson had no prior criminal history and was otherwise able to sufficiently conform his conduct during his years of military service and various jobs. (DAR 537-38). The court found that Johnson was under the influence of extreme mental or emotional disturbance and gave it moderate weight. (DAR 538-39). The court found the mitigating factor that Johnson had no prior criminal history and gave it moderate weight. (DAR 539).

The court found that Johnson established his age at the time of the crime, but gave it no weight. The court found the following mitigation under the catch-all provision: Johnson has a long history of mental illness (moderate weight); as a child, Johnson witnessed

his father emotionally and physically abusing his mother (moderate weight); as a child, Johnson attempted to intervene and rescue his mother from his father's abuses (moderate weight); Johnson suffers from Chronic Obsessive-Compulsive Disorder (moderate weight); at the time of the offense, Johnson was grieving the loss of his son (great weight); Johnson served in the United States Marine Corps and was Honorably Discharged (moderate weight); Johnson has a Bachelor of Arts degree in criminal justice (slight weight); Johnson has a Master's Degree in human services (slight weight); Johnson was employed with the Florida Attorney General's Office in the Child Services Division (slight weight); Johnson was employed with the Magistrate Law Judges in the South Carolina court system (slight weight); Johnson was a court administrator for the Supreme Court of South Carolina (slight weight); Johnson is a paralegal (slight weight); while employed at the Attorney General's Office in 2017, Johnson suffered an overall deterioration psychologically that led to him being committed for mental health treatment (moderate weight); Johnson continually sought mental health treatment up to and including 12 days before the murders (moderate weight); Johnson was diagnosed with Depressive Disorder in 2013 (moderate weight); Johnson was

diagnosed with Anxiety Disorder in 2013 (slight weight); Johnson did not initiate the psychical aggression giving rise to the events in this case (moderate weight); prior to the gunshots, Johnson called his father and asked him to get him (moderate weight); Johnson has four surviving children (moderate weight); Johnson has a loving and caring relationship with his parents (moderate weight); Johnson has a close family network of support and affection (moderate weight); Johnson is a skilled mechanic (moderate weight); Johnson called 911 (little weight); Johnson cooperated with law enforcement (little weight); Johnson could be a mentor to others in prison (little weight); Johnson's friends and family will continue to support him (little weight); Johnson will be sentenced to life without the possibility of parole if the jury does not unanimously find that the death penalty is warranted (moderate weight); Johnson displayed appropriate courtroom behavior during trial (slight weight); and Johnson performed community service as part of his fraternity (slight weight).

The court determined that the aggravating factors heavily outweighed the mitigating circumstances presented, and the court sentenced Johnson to death. (DAR 549-550). The court also sentenced Johnson to life in prison on count two, and thirty years in

prison on count three, with all sentences to run concurrently. (DAR 550).

This appeal follows.

SUMMARY OF THE ARGUMENT

Issue I: Johnson's second recorded statement was relevant evidence that was not unduly prejudicial. Contrary to Johnson's arguments, the recorded statement contained responsive and incriminating statements from Johnson. Furthermore, the detectives did not offer personal opinions of Johnson's guilt. Instead, they confronted Johnson with inconsistencies between his first statement and the evidence at the crime scene in an attempt to have him explain them. The trial court did not abuse its discretion in admitting the second recorded statement.

Issue II: The lower court did not abuse its discretion by denying Johnson's motion for mistrial based on testimony that Johnson had a possible counterfeit bill in his wallet when he was arrested. The comment was brief and isolated and no mention was ever made again of the money. In addition, whether Johnson had a fake bill in his pocket would not have influenced the jury's decision in determining whether Johnson committed murder rather than manslaughter.

Issue III: Johnson did not establish that the prosecutor's rebuttal closing argument constituted improper burden shifting on diminished capacity that amounted to fundamental error. The jury was properly instructed about Johnson's presumption of innocence and the State's burden of proof. Johnson has simply not established that this unpreserved issue amounts to fundamental error that would support his request for a new trial. Accordingly, this claim must be denied.

Issue IV: Johnson's challenge to the penalty-phase testimony of his brother does not involve a cognizable claim for this Court to review on appeal. In other words, there is no error here for this Court to correct. The trial court did not err in any way by permitting Johnson's brother to testify under oath and for continuing the *Spencer* hearing for him to testify again. While the witness did not testify to the facts that Johnson had anticipated, the court could not make the witness testify to facts that the witness was saying were not true. In addition, the court could not force the State to offer the witness immunity when the State was not willing to do so.

Despite Johnson's brother not testifying about their childhood abuse, the jury learned of the abuse through Johnson's expert witness. Johnson is entitled to no relief here.

Issue V: The trial court properly exercised its discretion by allowing victim impact evidence in the form of a short video of Ricky. The video captures the hopes and aspirations of the child victim in this case and was the State's best way of demonstrating his uniqueness as an individual and the resultant loss to the community by his death. His smile, his excitement, his mannerisms, and his own explanation of his likes and preferences could not be relayed and portrayed in the same manner through another person's testimony.

Issue VI: Johnson has not established that the court abused its discretion in how it weighed the impaired capacity and no significant history of prior criminal activity mitigating circumstances. Johnson simply has not established that no reasonable person would have assigned slight and moderate weight (respectively) to those mitigating circumstances.

Issue VII: This Court has consistently rejected similar requests for its reconsideration of *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020). And this Court should again do so here.

ARGUMENT

ISSUE I

THERE WAS NO ABUSE OF DISCRETION IN THE ADMISSION OF JOHNSON'S SECOND RECORDED STATEMENT WHERE DETECTIVES NEVER OFFERED PERSONAL OPINIONS OF JOHNSON'S GUILT OR VERACITY, BUT RATHER, THEY ALLOWED JOHNSON TO EXPLAIN WHY THE CRIME SCENE EVIDENCE WAS INCONSISTENT WITH HIS PREVIOUS STATEMENT, AND JOHNSON PROVIDED RELEVANT INFORMATION AND INCRIMINATING RESPONSES.

The first issue involves a challenge to the second portion of Johnson's recorded statement. Johnson was interviewed by law enforcement after his arrest, and the interviews were recorded separately with a break during the two recordings. At the time of the first interview, the scene still had not been processed, and the detective interviewing Johnson did not have information about the crime scene. (DAR T. 2448-49). Therefore, the focus of the first interview was to get information from Johnson and to get his side of the story. (DAR T. 2448-49).

As Johnson's apartment was getting processed, the interviewing detective started getting information from his supervisor at the scene. (DAR T. 2449). During the second interview, Johnson was confronted

with the inconsistencies between his version of events and the crime scene. (DAR T. 2449).

It is Johnson's position that the second recorded statement is inadmissible because Johnson never changed his story when he was confronted with the evidence. Johnson argues that because his version of events never changed, the second interview serves to only introduce accusatory statements from the detectives and their opinions of Johnson's credibility. As will be shown, Johnson's second recorded statement contained relevant information and was properly admitted into evidence.

This Court will not reverse a decision regarding the admissibility of evidence absent an abuse of discretion by the trial court. *Calloway v. State*, 210 So. 3d 1160, 1189 (Fla. 2017). A court abuses its discretion 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." *White v. State,* 817 So. 2d 799, 806 (Fla. 2002). There was no abuse of discretion in this case.

In Johnson's first recorded statement, Johnson explained that he got into an argument with Stephanie after dinner. (Ex. 56/p.1,

23:20-21). Ricky was in his bedroom while Johnson was arguing with Stephanie in the living room. (Ex. 56/p.1, 26:29-26:45). The argument escalated verbally, and Johnson went into the master bedroom. (Ex. 56/p.1, 27:00-28:29).

Stephanie followed and told Johnson, "I see why your son killed himself like a bitch, because you're a bitch." (Ex. 56/p.1, 14:52-15:08). Johnson then called his dad and told him to come get him in the morning. (Ex. 56/p.1, 15:15-15:23). Johnson started to pack his things and Stephanie began to hit him. (Ex. 56/p.1, 15:24-15:29). Stephanie kept "tussling" with the back of his head and eventually pushed Johnson off his knee roller. (Ex. 56/p.1, 15:30-16:42).

Ricky entered the room and put his hand on Johnson's shoulder and stated "you hurt my mommy" or "what are you doing to my mom." (Ex. 56/p.1, 19:07-19:44; 48:00-50:06). Johnson pushed Ricky off of him. During the interview, Johnson admitted that Ricky was just protecting his mom. (Ex. 56/p.1, 28:00-31:30; 30:00-33:58). In response to Johnson pushing Ricky, Stephanie grabbed the PlayStation to hit Johnson with it. Johnson got his gun and started firing. (Ex. 56/p.1, 15:30-16:42; 28:00-31:30; 48:00-50:06). Stephanie fell, and he kept firing. (Ex. 56/p.1, 50:11).

Johnson was asked if he fired at Ricky too, and Johnson responded, "I just fired, sir." (Ex. 56/p.1, 50:54-51:00). Johnson claimed that he was sitting on the ground while firing. (Ex. 56/p.1, 51:03-51:19). Johnson stated that he was in the master bedroom when he was shooting. (Ex. 56/p.1, 17:26-30). When asked how many times he shot the gun, he stated that he "just kept firing." (Ex. 56/p.1, 18:31-32).

According to Johnson, Ricky ran out of the master bedroom and later returned. Johnson did not know whether Ricky was shot the first time he was in the room. Johnson relayed that Ricky returned to the room and Johnson "just started firing." (Ex. 56/p.1, 34:39-34:52). When asked if Ricky said anything to him when he came back into the room, Johnson stated "No… I just kept firing." (Ex. 56/p.1, 40:16-40:26). Johnson asked what he was aiming at, and he said he was "just firing." (Ex. 56/p.1, 34:31-33). Johnson advised that he used a 40-caliber Glock 22 that he bought about seven years ago and he kept it by the bed. (Ex. 56/p.1, 38:06-39:13).

Throughout the first recorded interview Johnson was breathing heavily, heaving, shaking his head and body, and his voice was quivering, stuttering, and mumbling. As a result, his speech was

often incomprehensible. When Johnson was asked about Ricky, his speech often became unintelligible.

Johnson's clothes were collected and changed in between the first and second interviews and the crime scene was processed. As the scene was being processed, the detectives interviewing Johnson learned details that were inconsistent with Johnson's story that all of the shooting occurred in the master bedroom. While Ricky's deceased body was next to his mother's body in the master bedroom, there were two shell casings, along with two bullet holes, blood, and vomit in Ricky's bedroom. Therefore, Johnson was interviewed again to be given a chance to explain why the evidence was inconsistent with his first version of events that he only shot the victims in the master bedroom.

The second recorded statement is approximately fifteen minutes in length, and the last minute does not involve any questioning. Johnson is markedly calmer at the beginning of the recording. Johnson was asked whether Ricky's body was moved, and he denied doing so. (Ex. 56/p.2, 1:26-1:33). Johnson was asked why there was blood in Ricky's room, and Johnson replied that he did not know and that he did not move anyone. (Ex. 56/p.2, 3:58-4:07).

Johnson explained that after he shot Stephanie, he looked up and Ricky was standing there, and he just kept firing. (Ex. 56/p.2, 4:09-4:22). Johnson was asked how far away Ricky was from him, and he said "from me to you, sir," referring to the detective who was approximately two feet away from him. (Ex. 56/p.2, 4:09-4:33). Johnson was asked if he fired at Ricky when he was on the ground, and he repeated "I just kept firing." (Ex. 56/p.2, 4:28-4:39).

Johnson relayed that it was less than a minute from the time that he went outside to call for help until he called 911. (Ex. 56/p.2, 12:05-12:12). Notably, Johnson admitted that he went all the way outside to the gate of the apartment complex by hopping on his other, uninjured foot. (Ex. 56/p.2, 12:05-12:53). He did that and returned back to his apartment in under one minute.

It was important to see Johnson's demeanor when answering the questions. Johnson stated that Ricky previously never shot at the wall in his room and there would be no reason for bullet holes to be in his wall. (Ex. 56/p.2, 9:17-48). Johnson's demeanor is particularly interesting at this point in the interview when Johnson learned that law enforcement found bullet holes in the wall in Ricky's room.

Moreover, at times it almost appeared that Johnson was pretending to cry. He often resorted to this apparently fake cry when confronted with the evidence against him. (Ex. 56/p.2, 8:00-8:22; 8:40-8:49; 9:32-9:49; 10:37-11:20; 12:50-13:06). When the detective stated, "Well, there are two people dead tonight," Johnson responded by appearing to cry. (Ex. 56/p.2, 6:12-6:46).

The second recording contained valuable, relevant evidence that the State was entitled to present to the jury. Contrary to the argument contained in the initial brief, there was additional information presented in the second recording that was not contained in the first. And while Johnson may have provided some of the same explanations in the first and second recordings, the second recording was much more intelligible; Johnson's explanations are more easily understood in the second recording. Even though Johnson never changed his story that the shootings occurred entirely in the master bedroom, it was meaningful to observe Johnson's demeanor in the second video when he was confronted with the evidence. Further, Johnson still relayed responsive and relevant information regarding both murders.

This case is altogether different from *Jackson v. State*, 107 So. 3d 328, 334-38 (Fla. 2012), where the recorded statement consisted of law enforcement repeatedly insisting that the defendant raped and murdered the victim and that he was lying, and the defendant consistently responding that he did not rape or kill anyone and denying all involvement in the crimes. In *Jackson*, the "great majority of the detectives' statements …did not provoke relevant responses. In addition, none of the detectives' statements set forth the circumstances in which Jackson admitted culpability because he repeatedly denied involvement in Boyer's sexual battery and murder." *Jackson v. State*, 107 So. 3d 328, 340–41 (Fla. 2012). On top of that, the detectives' statements improperly elicited sympathy for the victim by revealing facts about the victim and her life that were not otherwise introduced into evidence. *Id.* at 341.

Here, Johnson relayed valuable information during his second recording, such as how far Ricky was away from him when he shot him, that Stephanie fell to the floor when he initially shot her, that there previously would not have been bullet holes in the wall of Ricky's room, and that he was able to leave the master bedroom, exit the apartment, and go all the way to the apartment gate and then

return to the apartment and call 911 in under one minute while hopping on his good leg. Johnson was calmer during his second interview and his statements were more intelligible than in the first recording. Johnson's second statement provides relevant, insightful evidence as to how Johnson committed the murders.

Unlike *Jackson*, the detectives in this case did not repeatedly express their personal opinions about the defendant's credibility and guilt or make statements like, "There's no doubt in my mind you did it, okay? There's no doubt." *Jackson*, 107 So. 3d at 341. The detectives did not make statements concerning Johnson's credibility or guilt that invaded the province of the jury, and they never called Johnson a liar or incredible. Instead, the detectives informed Johnson that the evidence was inconsistent with his version of events and they gave Johnson an opportunity to change his story. The second recording does not contain improper or inadmissible opinions as to the credibility, guilt, or innocence of the accused like in *Jackson*.

This case is more similar to *Bush v. State*, 295 So. 3d 179, 206 (Fla. 2020), where the detective did not offer personal opinions of the defendant's guilt, but rather, he presented the defendant with some

of the information he had, and confronted the defendant with inconsistencies in an attempt to have him explain them. Confronting a defendant with evidence of his or her guilt is a routine part of a custodial interrogation. *Cf. Ramirez v. State*, 739 So. 2d 568 (Fla. 1999) (codifying factors for determining whether a suspect is in custody); *State v. McAdams*, 193 So. 3d 824, 842 (Fla. 2016) (concluding the defendant was subjected to a custodial interrogation when he was confronted with tangible evidence strongly suggested of guilt and detective told defendant the DNA evidence was inconsistent with his explanation); *see also State v. Vazquez*, 295 So. 3d 373, 382 (Fla. 2d DCA 2020) (recognizing that even when the manner of police questioning is confrontational and at times cajoling, it does not necessarily transfer questioning into a custodial interrogation); *Johnson v. State*, 921 So. 2d 490, 505 (Fla. 2005) (holding that police officers are permitted to falsely inform suspects regarding the evidence they have against them); *Roman v. State*, 475 So. 2d 1228, 1233 (Fla. 1985) (explaining that even where the technique used is determined in context to be a "blatantly coercive and deceptive ploy," a confession that follows will not necessarily be considered inadmissible).

Here, when Johnson was told that it could be perceived from the evidence that he chased Ricky, Johnson responded with "I can't chase anyone." (Ex. 56/p.2, 5:59-6:00). Despite saying that he "can't chase anyone," Johnson later informed the detectives of how he hopped out of his room, exited his apartment, and hopped to the gate in less than one minute. (Ex. 56/p.2, 12:06-12:40). Johnson's position that the recorded statement does not contain inculpatory statements is simply incorrect. The admission of the second recording was entirely proper. Accordingly, the trial court did not abuse its discretion when it admitted the second recording into evidence.

Nevertheless, even if the court erred, any such error would be harmless. The second recording contained less than fourteen minutes of conversation between Johnson and the detectives. And the detectives' statements did not rise to the level of being accusatory and opinionated like the statements from law enforcement in *Jackson*.

Moreover, unlike *Jackson*, the court in this case instructed the jury that there were about to watch "a recorded interview that contains opinions and statements by Detective Tabor and Detective

Florio to Tyrone Johnson." (DAR T. 2392). The court advised that "[t]hese opinions and statements are pertinent only to explain the reactions and responses they elicit. You are not to consider these opinions and statements by the police officers as true, but only to establish the content of Tyrone Johnson's reactions and responses." (DAR T. 2392). The jury was also instructed that "[t]he fact that a witness is employed in law enforcement does not mean that his or her testimony deserves more or less consideration than that of any other witness." (DAR 271). This Court has acknowledged the benefit of jury instructions in similar situations. *See, e.g., Jackson v. State*, 18 So. 3d 1016, 1032 (Fla. 2009) (no abuse of discretion in admitting a recorded interrogation where police probed the defendant for his response to statements allegedly made by a co-defendant revealing details of crime. Before publishing this interrogation to the jury, the court instructed the jury that the officer's statements were only to be considered to establish the context of the defendant's responses and reactions).

Finally, this challenged evidence should be viewed in context of Johnson's entire trial. It was uncontested that Johnson shot the victims. Johnson admitted that he was the only other person in the

apartment with the two victims, and only he had a gun. There were two bullet holes in the wall next to the bed in Ricky's room, two shell casings, and blood throughout Ricky's room as well as under his bed. Johnson presented no evidence to refute the evidence that Ricky was shot while in his bedroom—his only defense was to challenge the reliability of the crime scene evidence. As such, there is no reasonable probability that the admission of the detectives' statements in the second recording relaying what the evidence showed contributed to Johnson's conviction. Therefore, this claim must be denied.

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED JOHNSON'S MOTION FOR MISTRIAL BASED ON A WITNESS BRIEFLY AND UNEXPECTEDLY MENTIONING THAT JOHNSON HAD A BILL THAT WAS POSSIBLY COUNTERFEIT IN HIS WALLET UPON HIS ARREST.

In this issue, Johnson challenges the trial court's denial of his motion for a mistrial that was based on Dalton Lewis's testimony that Johnson had what he suspected to be a counterfeit one-hundred-dollar bill in his wallet. In reviewing a trial court's ruling on a motion for mistrial, this Court applies the abuse-of-discretion standard of review. *Lebron v. State*, 232 So. 3d 942, 952 (Fla. 2017). "A decision

on a motion for a mistrial is within the discretion of the trial judge and such a motion should be granted only in the case of absolute necessity." *Snipes v. State*, 733 So. 2d 1000, 1005 (Fla. 1999).

"A mistrial is a device used to halt the proceedings 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). In other words, a motion for mistrial should only be granted when the error is so prejudicial that it will vitiate the entire trial. *Morris v. State*, 219 So. 3d 33, 44 (Fla. 2017).

Here, the trial court did not abuse its discretion in denying the motion for mistrial. The comment was inadvertent and isolated. The trial court sustained the objection to the comment, and no other mention was made of counterfeit money from any witness or from the State during closing argument.

When an objectionable comment is made, the proper procedure is to request an instruction from the court that the jury disregard the remarks. *Ferguson v. State*, 417 So. 2d 639, 641 (Fla. 1982). Any prejudice arising from the admission of such testimony can usually be cured by an instruction to the jury to disregard the testimony.

Snipes v. State, 733 So. 2d 1000, 1005 (Fla. 1999). While the judge offered to instruct the jury to disregard the comment, Johnson's counsel chose to forgo the instruction so that no further attention would be drawn to the comment. His strategic decision to do without the instruction does not mean that Johnson is then entitled to a mistrial.

Any error in Lewis briefly mentioning the possibility of Johnson having counterfeit money was not so prejudicial as to deny Johnson a fair trial. *Banks v. State*, 46 So. 3d 989, 998 (Fla. 2010) (no abuse of discretion in denying motion for mistrial after witness mentioned defendant's uncharged crime when curative instruction was given and State did not mention it in closing argument); *Snipes v. State*, 733 So. 2d 1000, 1005 (Fla. 1999) (no abuse of discretion in denying motion for mistrial based on witness's mention of the defendant being previously incarcerated where the reference was brief and no curative instruction was requested); *Cole v. State*, 701 So. 2d 845, 853 (Fla. 1997) (where witness commented on criminal history and defendant's counsel denied the judge's offer to give a curative instruction).

It is further important to consider that Johnson's killing of the two victims was uncontested. (DAR T. 2666, 2683, 1762-63). As

Johnson's counsel aptly put it, "this wasn't a whodunit." (DAR T. 2666). Johnson's defense theory was that he committed manslaughter, not murder. (DAR T. 1762-63; 2681-82). Lewis's testimony that Johnson potentially had a counterfeit bill in his wallet had absolutely no bearing on whether Johnson committed first and second-degree murder rather than manslaughter. As such, the comment at issue was not so prejudicial as to deny Johnson a fair trial. *See Cole v. State*, 701 So. 2d 845, 853 (Fla. 1997) (upholding the court's denial of motion for mistrial where witness's unsolicited remark about defendant's prior criminal was not so prejudicial as to require reversal); *Merck v. State*, 664 So. 2d 939, 941 (Fla. 1995) (the trial court was well within its discretion to determine that the statement did not prevent Merck from having a fair trial when deputy referenced Merck's previous trial). Given the circumstances in this case, the lower court did not abuse its discretion in denying the motion for mistrial.

ISSUE III

JOHNSON HAS FAILED TO ESTABLISH THAT THE UNPRESERVED CHALLENGE TO THE PROSECUTOR'S REBUTTAL CLOSING ARGUMENT AMOUNTED TO FUNDAMENTAL ERROR THAT ENTITLES HIM TO A NEW TRIAL.

In his third issue, Johnson challenges the prosecutor's rebuttal closing argument during the guilt phase of his trial. Johnson specifically alleges that the State's argument that Johnson did not present a mental health defense shifted the burden of proof and faulted Johnson for not presenting a diminished capacity defense that was precluded by law. In his brief, Johnson applies the fundamental error standard of review, and he is correct. The fundamental error standard applies because Johnson did not specifically object to the comment at issue in this claim.

In order to fully appreciate the lack of preservation here, it is necessary to look at the chain of events preceding the challenged statement. The defense objected to the prosecutor's comment regarding Johnson's service as a Marine Corps Veteran not being considered because it was not an excuse to commit murder. (DAR T. 2708-09). Johnson's counsel explained that she was objecting because even though it was not a defense, the jury could consider it.

(DAR T. 2709). "They can consider all the evidence in making their determinations." (DAR T. 2709).

The prosecutor subsequently relayed, "I'm also going to talk about PTSD because he mentions it…That's also not an excuse to commit murder." (DAR T. 2709). Jonson's counsel responded that it was an incorrect statement of law because PTSD could be considered in determining whether something is heat of passion. (DAR T. 2710). The prosecutor responded that he would say, "They didn't argue that he did this because of any PTSD." (DAR T. 2710). Johnson's counsel countered with, "I don't have to argue something for them to consider it. They can consider all the evidence." (DAR T. 2710). The judge concluded that the jury could consider any and all evidence. (DAR T. 2711).

As a result, the prosecutor stated, "I understand, Judge, but I can still point out the fact that that's not an excuse to commit murder, PTSD is not an excuse to commit murder, and the defense has not alleged and put in there that this is a reason he committed this murder." (DAR T. 2712). The judge ruled that he would let the prosecutor make the argument, but he had to tell the jury that they

could consider all the evidence. (DAR T. 2712). As a result, the prosecutor argued the following:

> And obviously, ladies and gentlemen, you can consider all the evidence. I mean, that's the point of what you do here, is to consider all the evidence. But you have not heard a mental health defense, You have not heard insanity. There's been no doctor who's testified before you today and told you that he was insane or didn't have the ability to form any requisite intent to commit the crime. So – and they have not alleged that PTSD is what caused him to do this. They have not said that. You have not heard that argument from the Defense, so I urge you to keep that in mind.

(DAR T. 2712-13).

No objection was made to that statement. Notably, no objection was ever made, at any time, that the statement constitutes an improper argument about diminished capacity. "[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). "To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978).

Because no specific and contemporaneous objection was made to the comment at issue, the fundamental error standard of review applies. *Kilgore v. State,* 688 So. 2d 895, 898 (Fla. 1996). Fundamental error reaches down to the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. *Id.* This Court has explained that "Defendants have no constitutional due process right to correct an unpreserved error, and appellate courts should exercise discretion under the doctrine of fundamental error very guardedly." *Ritchie v. State*, 344 So. 3d 369, 386 (Fla. 2022) (cleaned up).

Johnson is not entitled to relief on this unpreserved claim because the comment did not constitute fundamental error. Notably, the jury was instructed about the defendant's presumption of innocence and the State's burden of proof and told that the "defendant is not required to present evidence or prove anything." (DAR 270). The jury was instructed that "[i]t is not necessary for the defendant to disprove anything. Nor is the defendant required to prove his innocence. It is up to the State to prove the defendant's guilt by evidence." (DAR 272). The jury was further properly instructed on the elements of each offense.

The prosecutor's statement at issue was isolated, and given the full context in which the statement was made, Johnson has not shown that the alleged error amounted to a denial of due process. Therefore, even if the prosecutor's argument was improper, the unpreserved error was not fundamental. *Braddy v. State*, 111 So. 3d 810, 841 (Fla. 2012) (where statement did not rise to fundamental error given the full context in which it was made); *Ritchie v. State*, 344 So. 3d 369, 385–86 (Fla. 2022) (finding a new penalty phase was not warranted due to the prosecutor's numerous erroneous arguments because they did not amount to fundamental error); *Guzman v. State*, 214 So. 3d 625, 636 (Fla. 2017) (where even if the prosecutor improperly shifted the burden during closing argument, "any impropriety did not rise to the level of fundamental error such that the conviction could not have been obtained without the error."). The interests of justice do not require a new trial; therefore, this claim should be denied.

ISSUE IV

JOHNSON'S CHALLENGE TO THE MANNER IN WHICH HIS OWN WITNESS TESTIFIED IS NOT A COGNIZABLE CLAIM ON APPEAL, AS THERE IS NO ERROR FOR THIS COURT TO REVIEW, AND EVEN IF THERE WERE, JOHNSON WOULD NOT BE ENTITLED TO A NEW PENALTY PHASE.

In his fourth claim, Johnson takes issue with the penalty-phase testimony of his brother, Edward "Al" Johnson; however, this issue presents no cognizable claim for this Court's appellate review. According to Johnson, his brother Al was supposed to testify regarding the abuse that he and Johnson suffered as children, but Al did not disclose the abuse during his testimony. The trial court permitted Al to testify again during the *Spencer* hearing. The court even continued the *Spencer* hearing to allow time for Al to prepare and to travel to Florida for his testimony. (DAR T. 3501-04). However, Al did not testify in the manner that Johnson desired.

There is no wrong here that this Court can remedy. The lower court certainly could not force Al to testify about the existence of facts that Al denied. Nor could the court make the State offer Al immunity, as doing so would encroach upon the prosecutor's executive function. *State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986); Art. II, § 3, Fla. Const.

While it is unfortunate that Johnson did not get the testimony he had hoped for, this is not an appealable claim.

Even if it were a cognizable claim, Johnson would not be entitled to a new penalty phase. While Al did not testify about the physical abuse Johnson suffered as a child, Johnson's expert, Dr. Machlus, did, and therefore, the jury learned of the abuse. Dr. Machlus testified during the penalty phase that he spent fourteen hours with Johnson, and he traveled to South Carolina to speak with a number of Johnson's family members. (DAR T. 3149-51). As a result, Dr. Machlus opined that Johnson experienced adverse childhood events that included the absence of his father, inadequate parenting by his mother, being physically abused as a child, and witnessing violence in the family. (DAR T. 3153). Dr. Machlus testified in detail about how Johnson was impacted by his father being out of the picture and his mother trying to manage raising the children and working. (DAR T. 3153-3157).

He explained that when Johnson's mother had enough, she would call Johnson's grandmother or his uncle to discipline the children. (DAR T. 3157). They had "heavy hands" and used "corporal punishment to discipline the children to the point that it was

abusive." (DAR T. 3157). Dr. Machlus stated, "Tyrone and his brother talked about how … they were made to strip naked and beaten with extension cords, cords from lamps, fan belts and a black strap." (DAR T. 3157). Johnson's grandmother would say "we're getting married today" when she beat them, which meant that it was a day they were never going to forget. (DAR T. 3157).

Dr. Machlus advised, "It wasn't just Al and Tyrone that talked about the beatings. They were multigenerational." (DAR T. 3157). Johnson's aunt Paulette talked about the "infamous black strap." (DAR T. 3157-58). His Aunt Edna talked about "the belt and the frequent whippings." (DAR T. 3158). Johnson's father described Johnson's Grandma Vicki as "mean" and said that she would "whip" and "beat" the children. (DAR T. 3158). Dr. Machlus relayed additional incidents of violence that Johnson witnessed. (DAR T. 3158-3161).

Given Dr. Machlus's detailed testimony regarding Johnson's abuse and his indication that the accounts of abuse were corroborated by various family members, the additional desired testimony of Al would have only served to corroborate testimony already before the jury and would not have provided any additional

mitigation. This was a heavily aggravated case with the prior felony, HAC, and victim-under-twelve aggravators. Any corroborating testimony regarding physical abuse that Johnson suffered as a child would not have resulted in a life sentence.

Lastly, to the extent that Johnson may be challenging the trial court's denial of his motion for new trial or penalty phase, Johnson is not entitled to relief on this basis either. Johnson first raised this issue in a motion for a new trial prior to being sentenced. (DAR 339-351). Johnson's motion was initially denied without prejudice for Johnson to re-file once he was sentenced. (DAR 487-88); *see State v. Rosario*, 303 So. 3d 555, 559 (Fla. 5th DCA 2020) ("Because Rosario has not yet been sentenced, we agree with the State that it was premature for the court to entertain any motion for a new penalty phase or motion for new trial.").

Johnson filed another motion upon being sentenced, and the court found "that the weight of the evidence supports the jury's verdict and the sentence imposed." (DAR 769-70; DAR T. 3867-68). The court indicated that it had reviewed all Johnson's arguments and found that they do not merit relief. (DAR T. 3867-68; DAR 770).

Johnson's initial brief does not present this issue as a challenge to the trial court's denial of his motion for a new penalty phase. As such, this particular challenge to the trial court's ruling has been waived. *See Simmons v. State*, 934 So. 2d 1100, 1111 n. 12 (Fla. 2006) (failure to fully brief and argue points on appeal constitutes a waiver of those claims). Accordingly, because Johnson's appellate brief does not present any argument regarding an alleged error in the trial court's denial of his motion for a new penalty phase, nor has he asserted that the court abused its discretion in denying the motion, this claim is not reviewable on appeal. For all these reasons, this claim must be denied.

ISSUE V

THE TRIAL COURT PROPERLY ADMITTED A VIDEO CONSTITUTING VICTIM IMPACT EVIDENCE THAT SHOWED THE CHILD VICTIM'S UNIQUENESS.

Johnson's fifth claim involves a challenge to the victim impact evidence. The admission of victim impact testimony is governed by section 921.141, of Florida Statutes, which permits the prosecution to introduce victim impact evidence to the jury that is designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's

death. § 921.141 (7), Fla. Stat. A trial court's decision to admit victim impact evidence is reviewed for an abuse of discretion. *Baker v. State*, 71 So. 3d 802, 817 (Fla. 2011). This Court "regularly upholds the admission of victim impact evidence that falls within the statutory definition." *Sievers v. State*, 355 So. 3d 871, 886 (Fla. 2022).

From the outset it should be noted that the State introduced two videos of Ricky, and Johnson had no objection to one video. (DAR T. 2807). With regard to the video that Johnson took issue with, his objection was based solely on the fact that Stephanie was interviewing Ricky. (DAR T. 2870). Johnson's counsel advised that if someone else had been interviewing Ricky, there would be no objection. (DAR T. 2869). In fact, he stated "We would stipulate to the admissibility of the facts. We don't stipulate to the admissibility of the medium." (DAR T. 2870).

In his brief, Johnson argues that the video constitutes victim impact evidence of Stephanie, rather than just Ricky. The video was introduced as victim impact evidence of Ricky, not Stephanie. The video, which is under three minutes in length, is a recorded interview of Ricky in preparation for his appearance on America's Got Talent. The video does not, in any way, focus on Stephanie. She is never

shown in the video. At most, part of her arm and part of her hand can be seen for two seconds on the video. Her face is never shown, and she does not call attention to herself. Only her voice can be heard interviewing Ricky.

The video is all about Ricky, not Stephanie. The only statements made that are connected to Stephanie are as follows:

- I have my son Ricky Willis here with me today, I have a few questions to ask him. (The State offered to remove this statement).
- Yeah, *Good Luck Charlie* was my favorite TV show also.
- Would you clean up after that puppy or would you try to make me do it? No, you would make me do it.
- Thank you for interviewing with me, son.

There was no abuse of discretion in admitting the video of Ricky. The video was exactly the type of evidence that demonstrated his uniqueness as an individual. While counsel stipulated to the facts contained in the video and would have preferred that another witness testified to those facts rather than showing the video, there was no better way to demonstrate Ricky's uniqueness than by showing Ricky himself. His smile, his excitement, his mannerisms, and his own explanation of his likes and preferences could not be communicated and portrayed in the same manner through another person's testimony. And while Johnson would have taken no issue with a

person other than Stephanie interviewing Ricky and taking a video recording of it, the State had no option or ability to do so given that Johnson murdered Ricky.

The video captures the hopes and aspirations of the child victim in this case and was the State's best way of demonstrating his uniqueness as an individual human being and the resultant loss to the community by his death. In *Sievers v. State*, 355 So. 3d 871, 886 (Fla. 2022), this Court upheld the admission of a short video of the deceased victim, a doctor, discussing her medical practice focusing on holistic and preventative medicine. Like *Sievers*, the video in this case was properly admitted to show the victim's uniqueness.

Nevertheless, even if this Court were to find error, it must be deemed harmless. The video was brief—under three minutes in length. Ricky was the only person that could be seen on the video; Stephanie was never shown, and the State never focused on the fact that Ricky was being interviewed by Stephanie during the recording. Moreover, the judge properly instructed the jury that the victim impact evidence was presented to show the victim's uniqueness as an individual and the resultant loss by his death, and that the jury

was not to consider the evidence as an aggravating factor. (DAR T. 2891). Accordingly, this claim must be denied.

ISSUE VI

JOHNSON HAS FAILED TO ESTABLISH THAT THE COURT ABUSED ITS DISCRETION IN ITS WEIGHING OF THE MITIGATING CIRCUMSTANCES, AND EVEN IF THE COURT ERRED IN SOME WAY, ANY ERROR WOULD BE HARMLESS BEYOND A REASONABLE DOUBT.

In this issue, Johnson challenges the trial court's weighing process of his mitigating circumstances. He specifically contests the court's weighing of the impaired capacity and no significant history of prior criminal activity mitigating circumstances.

It is within the trial court's province to decide whether a mitigating circumstance is proven and the weight to be given to it. *Teffeteller v. State*, 439 So. 2d 840, 846 (Fla. 1983). This Court reviews a trial court's assignment of weight to proven mitigating factors under an abuse-of-discretion standard of review. *Merck v. State*, 975 So. 2d 1054, 1065 (Fla. 2007). This Court defers to the trial court's determination unless no reasonable person would have assigned the weight the trial court did. *Id.* This Court has consistently held that weighing the aggravating circumstances

against the mitigating circumstances is the trial judge's responsibility and it is not this Court's function to reweigh those factors." *Bevel v. State*, 983 So. 2d 505, 522 (Fla. 2008) (cleaned up).

Johnson first takes issue with the lower court's assignment of slight weight to the impaired capacity mitigating circumstance. In evaluating this mitigation, the court noted Dr. Machlus's testimony regarding "adverse childhood evidence" that Johnson experienced throughout his life to include the absence of Johnson's father, inadequate parenting by his mother, being physically abused as a child, and witnessing violence in the family. (DAR 537). Dr. Machlus opined that because of these adverse childhood experiences and Johnson's chronic depression "he wasn't always able to contain these impulses, these agitative actions, acting out in different manners." (DAR 537).

The court ultimately found that Johnson established the mitigating circumstance that his ability to conform his conduct to the requirements of the law was impaired. (DAR 537). The court determined, however, that in light of Johnson's lack of criminal history and ability to conform his conduct during his years of military

service and various jobs, the mitigating circumstance should be afforded slight weight. (DAR 537-38).

Johnson contends that the court's assignment of weight was based on a misunderstanding of the law by improperly focusing on Johnson's earlier life rather than his life at the time of the crime. The court's order demonstrates that the court was merely considering Dr. Machlus's opinion regarding Johnson's impaired capacity being based on adverse childhood experiences. It was not unreasonable for the court to highlight Johnson's ability to conform his conduct throughout his lifetime given that Dr. Machlus's opinion was based in part on Johnson's childhood experiences.

In light of Dr. Machlus's testimony, Johnson has not shown that no reasonable person would have given this mitigating circumstance slight weight. Simply put, Johnson has failed to show that the court abused its discretion in assigning slight weight to the mitigating circumstance. *See Bevel v. State*, 983 So. 2d 505, 522 (Fla. 2008) (no abuse of discretion in assigning little weight to mitigation of the defendant's low IQ because there was no evidence as to any functional deficits that the defendant experienced throughout his life as a result of a low IQ or any demonstration of a relationship to the

circumstances of this crime); *see also Merck v. State*, 975 So. 2d 1054, 1066 (Fla. 2007) (no abuse of discretion where the trial judge "described Merck's difficult childhood" before assigning it some weight and also explained in detail his reasons for finding Merck's alcoholism and his alcohol consumption on the night of the murder merited only little weight).

Next, Johnon challenges the court's determination that Johnson established the mitigating factor of no significant history of prior criminal activity, but "the circumstances of this double murder 'militate against' this factor." (DAR 539). Despite this finding, the court assigned moderate weight to the mitigating circumstance.

This Court has determined that the prior violent felony aggravator and the no significant history of prior criminal activity mitigator are "mutually exclusive." *Gonzalez v. State*, 136 So. 3d 1125, 1163 (Fla. 2014). Therefore, the finding of the prior violent felony aggravator generally precludes a finding of the no significant criminal history mitigator. *Id.* However, contemporaneous crimes do not provide a basis for rejecting the no significant criminal history mitigator. *Id.*; *Bello v. State*, 547 So. 2d 914, 917–18 (Fla. 1989); *see also Scull v. State*, 533 So. 2d 1137, 1143 (Fla. 1988) ("we do not

believe that a 'history' of prior criminal conduct can be established by contemporaneous crimes"). In *Bello*, this Court found that the trial court erred in failing to find the mitigating circumstance of no significant history of prior criminal activity based on the defendant's contemporaneous crime where there was no evidence in the record of any other criminal activity. *Bello,* 547 So. 2d at 917–18.

Here, the court noted that the circumstances of the double murder militated against the no significant prior criminal history mitigating circumstance; nevertheless, the court found the mitigating circumstance was established and assigned it moderate weight. Notably, only one other mitigating circumstance was assigned more weight, and that was that Johnson was grieving the loss of his son. (DAR 542). All of the other mitigation was assigned slight, little, or moderate weight. (DAR 537-549). Thus, it does not appear that the trial court's assignment of weight to this mitigating circumstances was unreasonable or arbitrary, and it cannot be said that no reasonable person would have assigned moderate weight to the mitigation.

In this case, there is simply no indication that the trial court abused its discretion in assigning weight to these two mitigating

circumstances. Even if this Court were to conclude that the trial court erred in failing to give the mitigation greater weight, that error would be harmless beyond a reasonable doubt. The court found that the aggravating factors "heavily outweigh" the mitigating circumstances presented. (DAR 549). Changing the weight of the no significant history of prior criminal activity mitigating circumstance from moderate to great and potentially changing the impaired capacity mitigating circumstance from slight weight to either moderate or great weight simply would not tip the scales so that the heavy aggravation no longer outweighed the mitigation.

As this Court has recognized, the HAC aggravator is one of the most serious aggravators. *Douglas v. State*, 878 So. 2d 1246, 1262 (Fla. 2004). The sentencing order outlines in detail all the evidence and facts that support the HAC aggravating factor. The court found that "the facts in this case establish that the child-victim suffered an extremely physically painful and psychologically torturous death at the hands of Defendant." (DAR 535). Notably, the court gave that aggravating factor great weight in determining the appropriate sentence to impose.

The lower court further gave great weight to the prior violent felony aggravating factor and recognized that it is one of the weightiest aggravators set out in the statutory sentencing scheme. (DAR 533). The sentencing order reflected that the jury unanimously found Johnson guilty of the second-degree murder of Stephanie Willis and unanimously found that the first-degree murder was committed by someone who was previously convicted of a felony involving the use of violence to another person based on the contemporaneous conviction. (DAR 533). The court indicated that it agreed with the jury, and the court assigned great weight to the aggravation.

The court lastly gave great weight to Ricky's age as an aggravating factor, noting that all children under the age of twelve are "vulnerable." (DAR 535). In addition to finding that the aggravating factors heavily outweighed the mitigation in this case, the court expressed agreement with the jury's unanimous recommendation to impose a death sentence based on its own assessment, and the court determined that a sentence of death is the appropriate penalty to be imposed for the murder of Ricky Willis. As such, any alleged error must be deemed harmless. *Cf. Spencer v.*

State, 691 So. 2d 1062, 1064–65 (Fla. 1996) (finding no error where the sentencing order addressed the weighing of the aggravating and mitigating circumstances in great detail, and based upon the evaluation and assessment, the judge concluded that the mitigation could not be accorded overwhelmingly great weight and thus did not outweigh the aggravating circumstances.).

For all these reasons, this claim must be denied.

ISSUE VII

THIS COURT SHOULD DENY JOHNSON'S REQUEST TO RECONSIDER ITS DECISION IN *LAWRENCE V. STATE*, 308 SO. 3D 544 (FLA. 2020).

In his final claim, Johnson requests that this Court reconsider its decision in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), to eliminate proportionality review of death sentences. Johnson acknowledges that this Court has rejected similar requests, and he primarily raises the issue for preservation purposes. Johnson further claims that the Court's refusal to perform proportionality review constitutes an Eighth Amendment violation. Initial Brief at 129-30.

As Johnson concedes, since the issuance of the *Lawrence* opinion, this Court has consistently rejected arguments similar to the ones Johnson makes here. *See, e.g., Loyd v. State,* 2023 WL 7815783,

at *11 (Fla. Nov. 16, 2023) (rejecting argument that the elimination of proportionality review created an arbitrary death penalty sentencing scheme); *Bevel v. State*, 48 Fla. L. Weekly S207 (Fla. Oct. 26, 2023) (rejecting argument that Florida's capital sentencing scheme is unconstitutional because it does not limit the class of persons eligible for the death penalty and violates the Eighth Amendment due to the elimination of comparative proportionality review); *Wells v. State*, 364 So. 3d 1005, 1015 (Fla. 2023) (concluding that the abandonment of proportionality review does not bolster the defendant's Eighth Amendment challenge); *Sievers v. State*, 355 So. 3d 871, 887 (Fla. 2022) (declining to revisit *Lawrence*); *Truehill v. State*, 358 So. 3d 1167, 1186 (Fla. 2022) (declining to revisit precedent established by *Lawrence*).

Similarly, Johnson's Eighth Amendment argument and request for this court to revisit *Lawrence* should be denied.

SUFFICIENCY OF THE EVIDENCE

This Court independently reviews the sufficiency of the evidence in every case in which a death sentence has been imposed, and it does so even if the defendant does not raise the issue. *Morris v. State*,

219 So. 3d 33, 44 (Fla. 2017) (cleaned up). The evidence in this case was certainly sufficient to sustain Johnson's convictions.

It was uncontested that Johnson shot the two victims. While Johnson claimed that the shootings occurred in the master bedroom after getting into an argument with Stephanie, the evidence established that Johnson actually went into Ricky's bedroom and shot him while he was hiding under his bed. There were two bullet holes in the wall toward the ground that were only observable once Ricky's bed was moved away from the wall. (DAR T. 2016-2020, 2190). One was approximately five to six inches from the ground and the other was about a foot from the ground. (DAR T. 2241). One projectile was inside of the wall and the other had traveled through the wall into a room of the neighboring apartment. (DAR T. 2020-23, 2151-53, 2190).

Ricky's blood was under the bed, and there were also toys and a cell phone under Ricky's bed with blood on them. (DAR T. 2186-87, 2141). The blood sample taken from under Ricky's bed matched Ricky's DNA with results greater than a 700 billion times likelihood. (DAR T. 2354). Blood was also observed on Johnson's hands, and the

handle grip of Johnson's gun had Ricky's DNA on it as well as Johnson's. (DAR T. 2357, 2360).

All nine shell casings collected from the apartment were determined to have been fired from Johnson's gun. (DAR T. 2327-28). Two of the shell casings were located in Ricky's room. (DAR T. 2000, 2005). Johnson called 911 and admitted, "I just shot my girlfriend and her son…they're dead…" (DAR T. 1898-99). Johnson repeatedly told detectives that he "just kept firing." He explained that after he shot Stephanie, he looked up and Ricky was standing there, and he just kept firing. (Ex. 56/p.2, 4:09-4:22). Johnson shot Ricky approximately six times, and Ricky sustained twelve gunshot injuries because some of the wounds were connected. (DAR T. 2537-38). Dr. Mainland testified that Ricky had defensive wounds that were consistent with Ricky shielding his face. (DAR T. 2549-50).

Johnson shot Ricky in the upper arm, and the bullet traveled through the back of the arm and out of the front and then went into his jaw. (DAR T. 2549-50). The bullet went from Ricky's right jaw through the back of the mouth and the base of the tongue, and then it traveled through the muscles on the side of the neck and exited out of the left side of the neck. (DAR T. 2544-45).

Johnson also shot Ricky in the back of his lower arm and the bullet fractured Ricky's humerus bone. (DAR T. 2552). This injury essentially shattered his arm and distorted it, and it would have been difficult for Ricky to use his arm. (DAR T. 2553).

Johnson shot Ricky in his thigh, which would have made it difficult for him to walk. (DAR T. 2554-55). Johnson further shot Ricky in the chest; the bullet went through the collar bone and the muscle and exited out of his back. (DAR T. 2547-48). It would have been painful but not immediately fatal and he would have been able to function. (DAR T. 2548).

Ricky had graze wounds on his shoulder, right thigh, and wrist. (DAR T. 2556-57). The wrist injury exposed some tendons but did not go through the wrist or break any bones. (DAR T. 2558). The wrist injury also had stippling, which meant that Johnson was no more than three feet away from Ricky when he shot him. (DAR T. 2558). This evidence was consistent with Johnson's statement to detectives that Ricky was "from me to you" (referring to the detective sitting directly next to him), upon being asked how far away Ricky was from him when he shot him. (Ex. 56/p.2, 4:09-4:33).

Finally, Johnson fatally shot Ricky in the head. The bullet fractured the skull, went through both sides of the brain, and came out of the other side of the head. (DAR T. 2540). The injury would have been almost immediately fatal, and Ricky would have been immediately incapacitated. (DAR T. 2542-43). Dr. Mainland determined that the cause of death was the gunshot wound to the head with perforation of the skull and brain, and the manner of death was homicide. (DAR T. 2559).

Dr. Mainland testified that Stephanie had four gunshot wounds that were from three bullets. One gunshot wound went through her breast and out of her back and was not fatal. (DAR T. 2527). That area had stippling on the skin from the gunpowder, meaning that the range of fire was somewhere in the range of inches to a maximum of three feet. (DAR T. 2528).

Johnson also shot her in the mouth. The bullet grazed her lip, hit the jaw, and continued in a downward trajectory. (DAR T. 2529-31). It broke the jaw, went down the neck, destroyed the right side of her thyroid gland, hit the trachea and then the aorta, and went through the left lung. (DAR T. 2532). The injury was not immediately fatal, but would not have taken long to have become fatal without

medical intervention. (DAR T. 2532). Lastly, Johnson fatally shot her in the forehead. The bullet fractured her skull and went through her brain. (DAR T. 2534-35). She would have only survived within seconds to minutes of sustaining the injury. (DAR T. 2535). Dr. Mainland determined that the cause of Stephanie's death was gunshot wound to the head with perforation of skull and brain, and the manner of death was homicide. (DAR T. 2537).

There is competent, substantial evidence to support the murder convictions in this case.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Honorable Court affirm Johnson's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND TYPE-STYLE REQUIREMENTS

I HEREBY CERTIFY that this document complies with the typeface requirements of Fla. R. App. P. 9.045 because this document has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14-point Bookman Old Style and has 12,595 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of December 2023, I electronically filed the foregoing with the Clerk of the Court by using the e-filing portal system which will send a notice of electronic filing to the following: Steven L. Bolotin, Assistant Public Defender, Public Defender's Office Polk County Courthouse, Post Office Box 9000-Drawer PD., Bartow, FL 33831, **sbolotin@pd10.org, kstockman@pd10.org, appealfilings@pd10.org.**

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