

IN THE SUPREME COURT OF FLORIDA

STEVEN MATTHEW WOLF,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC23-1077

L.T. NO. 2018-CF-375

DEATH PENALTY CASE

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTEENTH JUDICIAL CIRCUIT,
IN AND FOR MONROE COUNTY, FLORIDA**

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows:

The record on direct appeal will be referred to as “R.____” followed by the page number. References to the trial transcripts from the direct appeal will be referred to as “T.____” followed by the page number.

STATEMENT OF THE CASE AND FACTS¹

On August 25, 2022, a grand jury indicted Appellant for the November 21, 2018, first-degree murder and sexual battery of Michelle R. Osborne; the indictment also charged Appellant with one count of tampering with physical evidence. (R. 523-24). Trial commenced on January 9, 2023. (T. 1).

Guilt Phase

Nivaldo Fajardo Roque lived in Marathon and worked as a fisherman. (T. 881-82). On the afternoon of November 21, 2018, he was fishing around Vaca Cut, an area where homeless people often sleep. He saw what he believed to be a mannequin. (T. 882-85, 894). As he continued to walk, he began to doubt that it was a mannequin, so he returned. (T. 885-86). Mr. Fajardo discovered it was the body of a homeless woman whom he recognized as having lived in Marathon and who used to drink at a gas station. (T. 886). He called 911. (T. 887).

¹ The parties stipulated: (1) on November 21, 2018, Michelle R. Osborne was a person over 12 years of age and was the person named in the indictment; (2) Michelle R. Osborne was the person that was found dead on November 21, 2018, in Monroe County, Florida; and (3) Dr. Michael Steckbauer, M.D., performed an autopsy on the body of Michelle R. Osborne on November 26, 2018. (T. 840).

At approximately 2:00 p.m., a Monroe County Sheriff's Office ("Sheriff's Office") deputy responded. (T. 843-44). He met Mr. Fajardo who led him to the body. (T. 845, 887). The victim had no pulse and was cold. (T. 860). An investigator believed that lividity had set in. (T. 861). There were deep purple ligature marks on her neck, scratch marks on the back of her heels, and smeared blood and scratches on her buttocks. (T. 865, 1380).

Other officers responded and observed what appeared to be fresh damage to vegetation as well as parts of an older-model conversion van. (T. 893, 898, 915-16, 920, 946). Deputies later saw Appellant driving a conversion van with vegetation stuck in its windows and damage consistent with the recovered parts. (T. 917-918, 920, 922, 949, 1287).

By the time the officers reached the van, Appellant had parked. (T. 932). Deputies ordered him out of the van. (T. 932). Appellant complied. (T. 950). He agreed to speak with Detective Matt Pitcher at the Marathon substation. (T. 951). He waived his Miranda² rights. (T. 953-56). The interview was videorecorded. (T. 968).

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

Appellant initially denied that he knew anything about the victim or the murder and claimed no one had been in his van. (T. 995-98, 1001-04, 1007-11, 1013-16, 1018-20, 1025-27, 1029-30, 1032, 1034-35, 1044, 1051, 1055, 1058, 1088-89, 1092, 1101), but he did admit to “dr[iving] down there” and damaging his van. (T. 999, 1003, 1099, 1104, 1108-10, 1119). He “hit a lot of stuff.” (T. 1071).

Appellant explained that recovered hairs must have come through the open driver’s side door. (T. 1027). The door had been open “[t]o back out of that stupid little thing I drove down...” (T. 1027). He continued: “And I noticed it’s the other side of it that I broke the fender off because I couldn’t see that side as well. The trees every – it was thick...That van didn’t fit down that road. I tried to get in there and I thought it would open up but it didn’t. Scratched it all, jeez, and backed right out.” (T. 1027). Blood within the van might have come from a woman named “Tracey” who had been in the van two days earlier. (T. 1071).

Appellant’s story later changed:

I didn’t kill her. Her boyfriend killed her.
They fought. They fought. I didn’t rape nobody. They were having sex, though, in the back of my van.

And they fought. And I kept driving, saying “Calm down.

Calm down. Quiet down.” I don’t know their names.

DETECTIVE PITCHER: How did you have them back –

APPELLANT: I picked them up.

DETECTIVE PITCHER: Where did you pick them up at?

APPELLANT: The Wal-Mart. They wanted to come to the Keys. Oh, f***, man.

I’m guilty of covering up. I helped him get rid of her.

He walked away and he was gone.

And I said, “Jesus, what am I going to do?”

My blankets from my bed are in the dumpster behind Winn-Dixie.

They are covered with her blood.

I went into panic mode. What am I going to do?

Got to get rid of her,

got to get rid of her. Then I was thinking, oh, my God. Got to get rid of him, got to –

...

They were all the way from Key Largo – not even – before Key Largo. They were having sex back there. They were happy and having a good old time, and then it had to get mean.

...

And he came up and he said, “She’s dead, bro.”

...

I picked her up in Homestead, in Florida City.

...

He ran away. He didn’t – gone. I backed out of there freaking out. Oh, God. Oh, God. And I thought call the police.

...

... He pulled her out of the van. I stayed in the van. I never did get out of the van.

...

I tried to take off as I’m freaking out. But my brain is working right now overtime. I was thinking got to get away,

got to call the police. I know, got to call the police because you got to. But you already dumped her. You done – what are you going to do? You know and I pulled into the library. That’s not my shirt.

...

It's his shirt.

...

And I went through my blankets and I said, “Oh, my God.” Didn’t even look at the bed at first. And I – jees, it was covered in blood.

...

I pulled [them] off and I threw them in the dumpster and I thought, oh, jees....I never thought – and then I saw the blood on my sheet, and I think, oh, God.

...

... I think I heard her call him Eric or Derek.

(T. 1123-30).

Appellant continued that the couple had been in front of Walmart while he was exiting McDonald’s around noon. (T. 1130, 1144). They walked up to him and asked if he could give them a ride. (T. 1142). They were going to Key West. (T. 1148). Appellant responded: “Matter of fact, I’m going back to the Keys. Hop in.” (T. 1142).

A van traveling through the Florida City Walmart parking lot between 9:00 a.m. and 12:00 p.m. on November 21, 2018, was captured by surveillance cameras. (T. 1470-71). Within ten to fifteen minutes, a man got out of the van, entered the store through the front

door and then returned to the van. (T. 1471, 1474-77). The drive from this Walmart to Marathon is approximately an hour and a half to two hours. (T. 1480).

Appellant explained, “This happened, I was over the 18-mile when they went in the back...I was crossing the 18-mile stretch but I wasn’t past Morada Bay.” (T. 1150-51). “And then somewhere they started having sex between the 18-mile stretch and Morada Bay, in there.” (T. 1151). That was probably still in Homestead. (T. 1154). “I didn’t really pay attention other than (indiscernible) down there on the side of the marina on Morada Bay.” (T. 1155). “[T]here’s sex all the way to Morada Bay right there.” (T. 1181). Then the couple began to argue. (T. 1165-66). In Islamorada, the man came to the front seat and said, “Bro, she’s dead.” (T. 1156). The man told Appellant, “I got to get rid of the body.” (T. 1158).

Appellant thought he had to “get rid of this. [He had] to get rid of both of them but [he had] got to get her out of [t]here [immediately].” (T. 1159). Appellant drove to Vaca Cut. (T. 1202). The man jumped out of the van and pulled her out. (T. 1160). Appellant did not exit the vehicle. (T. 1184). The man walked away at around 3:00 p.m. (T. 1160-61).

Appellant drove to the Dollar Store where he bought a drink. (T. 1162, 1186). He arrived at the library around 4:00 p.m. (T. 1162). There was “a lake of blood.” (T. 1163). He cleaned but there was blood remaining. (T. 1186-87). Appellant washed his hands at the library and at McDonald’s. (T. 1164, 1173-74, 1183). He threw his comforter into the dumpster behind Kmart/Winn-Dixie. (T. 1134-35, 1140). He also discarded his mattress at the city marina. (T. 1194).

Appellant maintained that he neither raped nor touched the victim. (T. 1131, 1134, 1172, 1204-05). He did, however, touch the pillow, the sheet, and the comforter. (T. 1132).

Law enforcement obtained a search warrant for Appellant’s van. (T. 1318). Deputies collected swabs from various locations and items within the van. (T. 1339-45, 1364-65). Appellant’s and the victim’s DNA were on the driver’s side door.³ (T. 1739-40). The victim’s DNA was on the rear seat.⁴ (T. 1740-41).

³ The profile is greater than 700 billion times more likely to have occurred if originating from Appellant and the victim than from Appellant and an unrelated individual. (T. 1739-40).

⁴ The profile is greater than 700 billion times more likely to have occurred if originating from the victim than from an unknown or unrelated individual. (T. 1741).

Items recovered from the van included:

- A finely braided rope with a sliding collar. (T. 1250).
- A conical-shaped bottle with a ring on the bottom, pull handle or pull tab; something big enough to put a finger through or a large piece of rope. (T. 1251).
- Another bottle with a type of heat-shrink or tape around the cap. (T. 1251-52).
- A ribbed bottle with a red substance on it. (T. 1262).
- A hose. (T. 1253).
- A piece of yellow rope with a loop. (T. 1253).
- An apparent blood stain on the bed. (T. 1254).
- A white rope or cordage. (T. 1255).
- A piece of plywood with discoloration consistent with blood. (T. 1255).
- A pillow with apparent body fluid on it. (T. 1330).
- A blanket with apparent body fluid on it. (T. 1332).

From various Marathon dumpsters and trashcans, deputies recovered:

- A blanket and a pillow with biological stains. (T. 1389-90, 1392).
- Bedding, clothing, and a string tied into a ball. (T. 1395).
- An orange cord wrapped around a piece of bloodstained foam bedding. (T. 1395-96).
- A bloodstained white shirt. (T. 1396).
- A green woman's polo shirt and sundress. (T. 1398-1400).
- A rag with apparent body fluid on it. (T. 1293).
- A T-shirt and a bracelet. (T. 1293).

Appellant's and the victim's DNA were on a grey tank top.⁵ (T.

⁵ The profile is greater than between 29 billion and 700 billion times more likely to have occurred if originating from Appellant and an

1727). His DNA was on the conical cylinder.⁶ (T. 1753-54). Appellant's fingerprints and palm print were on the ribbed, plastic water bottle on which there was suspected blood. (T. 1802-05). His and the victim's DNA were on the bottle's cap and neck.⁷ The victim's DNA was on the sides of the bottle. (T. 1746-47). A mixture of their DNA was on the bottom of the bottle. (T. 1749).⁸

Medical Examiner Michael Steckbauer performed the victim's autopsy on November 26, 2018. (T. 1535). Appellant's DNA was

unrelated individual than from two unrelated individuals. (T. 1727-37). The profile is greater than between 11,000 and 700 billion times more likely to have occurred if originating from the victim and an unrelated individual than from two unrelated individuals. (T. 1728-38).

⁶ The profile is greater than 700 billion times more likely to have occurred if originating from Appellant and two unrelated individuals than from three unrelated individuals. (T. 1753-54).

⁷ The profile is greater than 700 billion times more likely to have occurred if originating from Appellant and an unrelated individual than from two unrelated individuals. (T. 1744-45). The profile is greater than 700 billion times more likely to have occurred if originating from the victim and an unrelated individual than from two unrelated individuals. (T. 1745).

⁸ The profile is greater than 700 billion times more likely to have occurred if originating from Appellant and two unrelated individuals than if originating from three unrelated individuals. (T. 1749). The profile is greater than 700 billion times more likely to have occurred if originating from the victim and two unrelated individuals than from three unrelated individuals. (T. 1749).

recovered from the victim's right fingernail clippings. (T. 1705).⁹His DNA was also present in a sample taken from what might have been a bite mark on the victim's chin. (T. 1680, 1705-06).¹⁰

Petechiae were observed in the victim's right eye. (T. 1551, 1553). Hemorrhaging and small lacerations on the victim's lips were consistent with the application of a blunt force to the mouth. (T. 1555-57). The doctor opined that these injuries as well as bruises on the victim's wrists and ankles were inflicted at or near the time of death and were signs of a struggle. (T. 1648, 1650).

The doctor observed ligature curl furrows coursing around the victim's neck, from front to back. (T. 1560). The two lines came together at the base of the neck. (T. 1560). There was a large amount of hemorrhage in all the strap muscles going down into the deep tissues of the neck. (T. 1582). The injuries were consistent with force having been exerted from the left side putting pressure on the right

⁹ The profile is approximately 2.1 billion times more likely to have occurred if originating from the victim and Appellant than from the victim and an unrelated individual. (T. 1705).

¹⁰ The profile is greater than 700 billion more likely to have occurred if originating from the victim and Appellant than from the victim and an unrelated individual. (T. 1706).

side of the neck. (T. 1583).¹¹A bungee cord with a slip apparatus recovered by the police was consistent with the victim's neck injuries. (T. 1585-86).

There was an 11-centimeter, full thickness laceration to the victim's vagina that went into the fat and soft tissues of the pelvic region. (T. 1572-73). The circumference of the object causing the injury would have been larger than what the elasticity of the vaginal vault would have been able to withstand, because it surpassed its ability to stay intact. (T. 1571). Male genitalia could not have caused the injury. (T. 1573). The victim also sustained smaller, superficial lacerations throughout the surface of the vaginal vault. (T. 1572).

There was a 6.4-centimeter, full thickness laceration to the victim's anus that went through the skin mucosa into the underlying fat and abdominal cavity. The circumference of the object that caused the injury would have been larger than what the elasticity of the anal vault would have been able to withstand, because it surpassed its ability to stay intact. (T. 1571). Male genitalia could not have caused

¹¹ Compression of the neck blood vessels can lead to unconsciousness within 45 seconds, however if the compression is released the person could regain consciousness. (T. 1626).

the injury. (T. 1571, 1573).

Appellant's Y-STR DNA profile matched the Y-STR profile obtained from the anal swabs and smear sperm cell fraction recovered from the victim. (T. 1831).

Because of multiple lacerations, the doctor opined that the object or objects were inserted into the victim's anal and vaginal orifices multiple times. (T. 1574). The injuries were inflicted in close proximity to one another because of the extensive amount of hemorrhage in the anal vault, vaginal vault, surrounding soft tissue, fat, and adipose tissue up to the abdominal cavity. (T. 1572, 75). The victim would have died between four and 20 minutes following the infliction of the injuries due to blood loss. (T. 1575). So long as the hemorrhaging took place, the victim was alive. (T. 1627-28).

Appellant's cell phone Internet browsing history included recent visits to "Big Bigger Biggest in the Butt-Pornhub.com" as well as a to "Bigger the Better Extreme Insertions-Pornhub.com." (T. 1490, 1505, 1515-16, 1507).

Nothing learned during the autopsy indicated the victim was unconscious when the injuries were inflicted or that they occurred simultaneously. (T. 1627). The doctor opined that the victim was

conscious for some of the “experience.” (T. 1578, 1676). However, he could not say whether she was conscious when she suffered the fatal injury. (T. 1578, 1627).

The toxicology report showed that the victim had a blood alcohol content of 0.11 percent. (T. 1674). The doctor opined that this was not a lot of alcohol. (T. 1675). It might have lessened her ability to feel pain but would not have affected her level of consciousness. (T. 1674-75).

On January 24, 2023, the jury found Appellant guilty of first-degree murder as charged in the indictment, two counts of sexual battery and one count of tampering with physical evidence. (T. 2125-26; R. 682-85).

Penalty Phase

The penalty phase began on January 25, 2023. (T. 2147). The aggravating factors alleged by the State were: (1) Appellant was previously convicted of a felony involving the use of violence to another person—second-degree murder; (2) the first-degree murder was committed while Appellant was engaged in the commission of a sexual battery; and (3) the first-degree murder was especially heinous, atrocious, or cruel (“HAC”). (T. 2181-84).

The State moved into evidence the preliminary hearing transcript, guilty plea colloquy, and judgment and sentence for Appellant's December 28, 1978, second-degree murder conviction. (T. 2198-2230). One of the victim's daughters gave victim impact testimony on behalf of herself and her five siblings. (T. 2235-38).

In its penalty phase closing argument, the defense argued there was no evidence that the victim had been tied down and there was a lack of defense marks. (T. 2296). The HAC aggravator had not been proven, it asserted, because the victim could have bled to death after five minutes. (T. 2297). It argued that the 1978 second-degree murder conviction was actually a mitigating circumstance due to Appellant's age and the effect of incarceration. (T. 2297-99). The defense asked the jurors to consider Appellant's faith and background. Finally, it urged the jury to be merciful. (T. 2399-2402).

The jury began its penalty phase deliberations at 2:42 p.m. and reached a verdict at 4:02 p.m. (T. 2325-26). It unanimously found that the State had established beyond a reasonable doubt that: the murder was committed while Appellant was engaged in the commission of a sexual battery; the murder was especially heinous, atrocious or cruel; and Appellant had previously been convicted of a

felony involving the use of violence to another person. (T. 2328). It unanimously found that the aggravating factors were sufficient to warrant the possible sentence of death. (T. 2328-29).

The jury also determined that one or more mitigating circumstances had been established by the greater weight of the evidence. (T. 2329). Nevertheless, the aggravating factors outweighed the mitigating circumstances. (T. 2329). It unanimously found that Appellant should be sentenced to death. (T. 2330).

The judge ordered a presentence investigation, and the parties filed sentencing memoranda. (R. 1358-64, 1373-99; T. 2334). The defense asserted the following mitigating factors: (1) Appellant's age when earlier imprisoned and the effect of his prior imprisonment; (2) Appellant was religious; (3) mercy; (4) Appellant was raised in a home used to run a prostitution ring; and (5) Appellant is a caring father. (R. 1382-85).

Spencer¹² Hearing

The trial court held a Spencer hearing on April 6, 2023. (R. 1695). It first heard Appellant's motion for new trial, which it denied.

¹² Spencer v. State, 615 So. 2d 688 (Fla. 1993).

(R. 1700, 05). The defense provided the court with letters from the Interfaith Council in support of a life sentence. (R. 1712).

Sentencing Order

The court rendered its sentencing order on June 29, 2023. (R. 1405). It found that the State had proven the following aggravating factors beyond a reasonable doubt: (1) the capital felony was committed while Appellant was engaged in a sexual battery (great weight); (2) the capital felony was especially heinous, atrocious, or cruel (enormous weight); and (3) Appellant was previously convicted of a felony involving the use of violence to the person (great weight). (R. 1406-08).

It found the following mitigating circumstances established: (1) Appellant entered prison at the age of 18 and served a sentence of approximately 30 years (moderate weight); (2) Appellant is religious (slight weight); (3) mercy (moderate weight); (4) criminal environment in which Appellant grew up (slight weight); (5) Appellant is a caring father (slight weight); and (6) Appellant's demeanor and behavior in court (slight weight). (R. 1408-11).

The trial court held that the aggravating factors outweighed the mitigating circumstances by an overwhelming margin. It adjudicated

Appellant guilty and sentenced him to death for the first-degree murder of Michelle Osborne, life imprisonment with a 50-year minimum mandatory term for each sexual battery conviction, and five years' imprisonment for tampering with physical evidence. (R. 1411-12). Finally, the trial court rendered an order finding Appellant to be a sexual predator. (R. 1419).

SUMMARY OF THE ARGUMENT

I. The evidence provided a basis for the jury to infer that Appellant committed the crimes in Monroe County as alleged in the indictment. Appellant dumped the victim's body in Monroe County. He disposed of evidence in Monroe County. He washed blood from his hands in Monroe County. Finally, Appellant told the police that the victim died in his van in Morada Bay/Islamorada, Monroe County.

II. The lower court did not commit manifest error when it excused venireperson Kinne for cause. The totality of her responses established a reasonable doubt as to whether her views on the death penalty would prevent or substantially impair the performance of her duties as a juror in accordance with the juror's instructions or oath. She identified herself as not having the required mindset for a juror in a death penalty case. Her follow-up answers regarding whether she could vote for the death penalty if appropriate were equivocal.

III. The lower court did not abuse its discretion when it denied defense cause challenges to venirepersons Young, Whalen and Leto. Unlike Ms. Kinne, none identified themselves as not having the required mindset for a juror in a death penalty case. When their

responses are read in their totality, there was no reasonable doubt that their views on the death penalty would prevent or substantially impair their performance of their duties as jurors in accordance with their instructions and oath. Finally, Appellant cannot demonstrate prejudice unless all three challenges were preserved for appellate review and erroneously denied, because the trial judge granted the defense two additional peremptory strikes.

IV. The trial court did not abuse its discretion when it overruled Appellant's hearsay objection to officer testimony regarding car parts relayed to her by other officers. The testimony was not elicited for the truth of the matter asserted. Instead, it established why officers stopped Appellant's van. Because it was not hearsay, there was no Confrontation Clause violation nor was the statement "testimonial" for purposes of Confrontation Clause analysis.

V. None of the unpreserved challenged comments, if error, reached down into the validity of the trial itself to the extent that the jury's recommendation of death could not have been obtained without its assistance. First, the State did not explicitly ask the jury to show Appellant the same amount of mercy he had shown the victim. Instead, the prosecutor accurately set forth the law and asked

whether Appellant's criminal acts warranted mercy.

Second, the State did not improperly argue non-statutory aggravation. When read in context, the comments anticipated defense arguments, i.e., his prior second-degree murder sentence transformed an otherwise innocent youth into the person who committed the instant crimes; and his plea to the prior violent felony to person had been coerced.

Finally, any misstatement regarding how long the victim took to bleed to death was immediately corrected by the defense in its closing. The prosecutor's statement, which began with the subjunctive phrase "could have," conveyed that for her to have bled to death, she had to have been alive, not that she was conscious for a specific duration.

VI. Because the lower court read Standard Jury Instruction 7.11, including its "mercy instruction," it did not abuse its discretion when it denied a defense request for a special jury instruction addressing mercy. Further, Appellant cannot demonstrate fundamental error was caused by his unpreserved claim that such an instruction was warranted because of State arguments.

VII. The trial court's finding that the murder was heinous,

atrocious, or cruel is supported by competent substantial evidence. Bruises on the victim's wrists and ankles, lacerations and hemorrhaging in her mouth and petechia in her eyes were inflicted at or near the time of death and were signs of a struggle. Appellant strangled her with a makeshift garrote, bit her on the chin, and inserted objects into her vaginal and anal vaults, which were too large for them to withstand. Although the medical examiner could not give an opinion as to whether she was conscious when the fatal injuries were inflicted, there was no evidence that she was not and she was conscious for at least part of the "experience." Applying commonsense inferences from the circumstances, this murder was a conscienceless and pitiless crime, which was unnecessarily torturous to the victim.

VIII. The sentencing order's reliance on medical examiner testimony given during voir dire was proper. The trial court's question, which elicited the answer, made clear the judge was seeking information for the trial court's benefit, not the jury's. The witness was under oath and subject to cross-examination. Like Spencer hearing testimony, the fact that it was given outside the presence of the jury does not render it extra-record information for

purposes of the trial court's sentencing decision.

IX. Pursuant to this Court's precedent, the indictment provided Appellant with sufficient notice of the aggravating factors that might lead the trial court to sentence him to death. It charged him with capital first-degree murder in violation of section 782.04, Florida Statutes, which advises that the crime is punishable as provided in section 775.082. That section, in turn, states that the proceeding is to be held according to the procedure set forth in section 921.141. Section 921.141(6) lists the aggravating circumstances that may warrant a death sentence.

X. Because none of Appellant's nine claims has merit and the cumulative effect of any alleged harmless error does not amount to fundamental error, his claim of cumulative error fails.

XI. Appellant's convictions for first-degree murder, sexual battery and tampering with evidence are supported by competent substantial evidence.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE PROVED VENUE.¹³

Appellant contends that the trial court erred when it denied his motion for judgment of acquittal¹⁴¹⁵ arguing the State had not established venue. The State disagrees.

The Florida Constitution provides that “[i]n all criminal prosecutions the accused ... shall have the right ... to have a speedy and public trial by impartial jury in the county where the crime was committed.” Art. I, § 16(a), Fla. Const “To help protect this right, the

¹³ The motion for judgment of acquittal argued in part that the State had failed to establish venue. (T. 1844-45). The trial court denied the motion. (T. 1860-61).

¹⁴ This Court reviews the denial of a motion for judgment of acquittal de novo. Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002). “If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. Id

¹⁵ If Appellant’s argument had merit, “his remedy may not have been acquittal but merely a new trial.” Monroe v. State, 14 So. 3d 1205, 1208 n.1 (Fla. 4th DCA 2009) (citing Powell v. State, 132 Fla. 659, 181 So. 901 (1938); McKinnie v. State, 44 Fla. 143, 32 So. 786 (1902); Warrace v. State, 27 Fla. 362, 8 So. 748 (1891); McClellion v. State, 858 So. 2d 379, 382 (Fla. 4th DCA 2003)).

State is required to allege the venue of each crime charged.” Braddy v. State, 111 So. 3d 810, 835 (Fla. 2012).

Venue need not be established beyond a reasonable doubt and if the evidence provides a basis for the jury to infer that the offense was committed in the county, evidence of venue is sufficient. Simmons v. State, 934 So. 2d 1100, 1112 (Fla. 2006). Such evidence may include references to “localities and landmarks at or near the scene of the alleged offense, known or probably familiar to the jury...” Id. (quoting Lowman v. State, 80 Fla. 18, 85 So. 166, 167 (1920)).

Here, the State presented competent substantial evidence from which the jury could infer that Appellant murdered and sexually battered the victim in Monroe County. The man who discovered the victim’s corpse recognized her as a homeless woman who used to drink at the gas station; her body was found in an area frequented by the homeless. (T. 886). The parties stipulated the victim was found in Marathon, Monroe County, Florida. (T. 840).

Although Appellant blamed a hitchhiker for the victim’s death, he told the police that she died in his van in Morada

Bay/Islamorada.¹⁶ (T. 1150-51, 1156, 1181). Appellant said the victim's body was discarded soon after her death. He disposed of evidence of the murder in Marathon. (T. 1129, 1134-35, 1140, 1164, 1173-74, 1183-84, 1194). He washed his hands of blood in Marathon. Finally, his claim that he picked up hitchhikers at a Walmart in Miami-Dade County was refuted by video surveillance.

Based on this evidence, it could be reasonably inferred that the crimes were committed in the county alleged. See Simmons, 934 So. 2d at 1113 (“While it is possible that the murder and sexual battery could have occurred in a different county, it is reasonable for a jury to infer that the crimes occurred in [the county alleged].”).

Relying on the condition of the victim's body when discovered,¹⁷

¹⁶ Morada Bay/Islamorada is in Monroe County.

¹⁷ Appellant asserts: “Based on lividity, Dr. Steckbauer testified that by the time police moved the body, she had been dead for more than six hours, and ‘more towards that 12 hours or greater time frame.’ Initial Brief at 28. Appellee submits the doctor's testimony was far less definitive. He testified that lividity or livor mortis is “set” approximately 12 hours after death, but “livor” begins to be apparent “almost instantly” after death. (T. 1643). Because he was on vacation, he conducted the autopsy “a few days later.” (T. 1641, 44). Although his investigator reported that lividity was “already fixing” when “they rolled her,” (T. 1644), the doctor “obviously put[s] more faith in [his] own direct judgment. [He] can only take them at what their word is.”

the timing of his arrival at Vaca Cut and his visit to Florida City, Miami-Dade County, Appellant argues there is no evidence he killed the victim in Monroe County. Initial Brief at 26-31. His argument contradicts his own statement that the victim died in Morada Bay/Islamorada. Also, it is unclear why Appellant would have murdered the victim in Miami-Dade County yet waited until his return to Marathon to wash his hands, dump the victim's body and dispose of evidence.

This claim is without merit.

(T. 1643). He continued that when lividity sets in cannot be determined by viewing a photograph. Instead, an examination of the body is necessary. (T. 1642-44).

ISSUES II & III
**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
WHEN RULING ON CHALLENGES FOR CAUSE.**

Appellant next argues that the trial court improperly allowed the State to excuse a potential juror for cause because of her views on the death penalty and improperly denied three defense challenges for cause. The State disagrees.

The validity of a cause challenge is a mixed question of law and fact. Deviney v. State, 322 So. 3d 563, 570 (Fla. 2021). The lower court’s ruling will be overturned for “manifest error, which is tantamount to an abuse of discretion.” Id. (internal quotation/citation omitted). “An abuse of discretion occurs when the judge adopts a view that no other reasonable person would take.” Loyd v. State, 379 So. 3d 1080, 1088 (Fla. 2023).

When exercising its discretion, “the trial court has a unique vantage point in the determination of juror bias ... [and] is able to see the jurors’ voir dire responses and make observations which simply cannot be discerned from an appellate record.” Deviney, 322 So. 3d at 570-71. Thus, this Court “defer[s] to a trial judge’s decision to exclude a prospective juror.” Loyd, 379 So. 3d at 1088 (citing

Johnson v. State, 969 So. 2d 938, 946 (Fla. 2007)).

“A reasonable judge should excuse a prospective juror for cause ‘if any reasonable doubt exists as to whether the [prospective] juror possesses an impartial state of mind.’” Loyd, 379 So. 3d at 1088 (citation omitted); see also § 913.03(10), Fla. Stat. (2023). “In the context of a capital case, this standard is met if a juror’s views on the death penalty prevent or substantially impair the performance of his or her duties as a juror in accordance with the juror’s instructions or oath.” Deviney, 322 So. 3d at 571 (internal quotation/citation omitted). Finally, the venireperson’s responses are considered in their totality. Johnson v. State, 969 So. 2d 938, 946 (Fla. 2007).

State Cause Challenge

Nance Kinne

The trial judge explained to the voir dire panel:

To provide some additional guidance -- again, I’ve presided over these sorts of cases. I’ve engaged in this sort of jury selection and jury questioning, and I’ve heard various responses. Some people feel, "I would not be able to vote for a death sentence no matter what. I just, I can't do it. I don't believe in it. I don't feel I could be part of that process." Some people feel that way. It doesn't matter if the defendant's been convicted of first degree murder. It doesn't matter if the aggravators have been proven and they outweigh the mitigators and death is appropriate by some objective standard. They do not feel that they can

vote for death. Other people on the other side of the coin believe what I call "an eye for an eye." Some people say, "Hey, listen, if I find a person guilty of first degree murder, I can only give him death. I couldn't even consider a life sentence." So those are the two perhaps diametrically opposed responses. And a person who is qualified, who is able to sit in this sort of case, must be able to be open to either sentence.

And so you must, if you are going to be on the jury, be open to make a recommendation for death if you believe it's been proven and you believe it's appropriate. Similarly, you must also be willing to recommend a life sentence if you believe that's what's appropriate under the circumstances.

My right-hand side of the courtroom, it's the same exact question. I've just chosen to, rather than asking as a group, I'd just rather break it down. **Is there anyone who feels what I've explained here today, what would be required, the mindset that a juror in this sort of case must have, anybody feel that they just would not be able to handle it, couldn't do it?**

Okay. It's Nance Kinne, right?

MS. KINNE: **Yes.**

THE COURT: Okay. Well, tell me what your thoughts are.

MS. KINNE: **I don't believe in the death penalty.** Never say never.¹⁸ I'm open, given this is the first time in this type of a trial for me. **But my main reason is because there's been so many that have not gone well,** not necessarily in this state, but in other states. And I think

¹⁸ Dictionary.com defines never say never as "nothing is impossible, anything can happen." Never Say Never, <https://www.dictionary.com/browse/never-say-never> (last visited March 25, 2024).

there's just a real problem institutionally with it.

THE COURT: Well, I certainly understand your position. So you might have some difficulty? Even if the State were to prove or establish the aggravating factors and you felt that they outweighed the mitigators and the law supported a recommendation of death, you would hesitate to make such a recommendation because of your feelings and concerns?

MS. KINNE: I would listen to both sides, but I would be extremely careful about recommending death.

THE COURT: Well -- and I expect everybody would be careful. **But if you mean reluctant, even if it was appropriate, that's different than careful.**

MS. KINNE: **Correct.**

THE COURT: So you would have some concerns? Am I paraphrasing it correctly?

MS. KINNE: Yes.

THE COURT: I appreciate that fact, and I thank you for sharing them with us. Anybody else feel along those lines or differently that would make your participation inappropriate, in your mind, in this particular case?

All right. I'm not seeing any other hands. So that would signify to me, as I said, that those who haven't responded about any concerns would be ready, willing and able to do it if the law and the -- whatever recommendation the law and the evidence support.

(T. 245-50) (emphasis added).

Had Ms. Kinne's subsequent responses alleviated doubts about

her ability to impartially render an advisory verdict, her initial responses to questioning about the death penalty alone might not have automatically provided good cause for excusal. Johnson, 969 So. 2d at 947. However, her later answers were equivocal at best:

Never say never. I would listen to both sides, but I have some real concerns with it, because I listen to a lot of podcasts and there have been a lot of issues where people were put to death and they shouldn't have been, or **they get botched**. I don't know about the State of Florida because I've only lived here for a few years.

THE STATE: How do you personally feel about the death penalty?

MS. KINNE: I don't really like it. I'm not – obviously, I'm not a proponent of it, but I've never been in a situation like this.

THE STATE: The concern that I have is whether your interest in this area, having listened to podcasts or other people's opinions or reports of these, as you said, botched executions having taken place, whether that would cause you to be reluctant to impose the death penalty if you otherwise felt it was appropriate, based on the evidence and the instructions that the judge gave you.

MS. KINNE: I would listen to the evidence. And I can't tell you for sure, but I'm not the type of person that would say "an eye for an eye," or "a tooth for a tooth."

THE STATE: My perception of what you're saying is that you have reservations about your ability to vote for it, even though you might otherwise feel it's appropriate because of what the –

MS. KINNE: **If, ultimately, he was executed, that execution might be botched** or might be inappropriate for some reason. That, and I've heard that it's actually – how do we say this – **a life sentence, I think, is a little bit easier on the community and the taxpayer**, just because of all the appeals that go on.

THE STATE: You mean kind of financial implications?

MS. KINNE: Well, both, yeah. I'm in finance so –

THE STATE: I guess the ultimate question is, all of the considerations that you have as it pertains to the death penalty or related to the death penalty, would they impair your ability to recommend the death penalty if you otherwise felt it was appropriate?

MS. KINNE: I'm not going [to] say a definite "yes" because I think I would want to listen to both sides, but **I just think it would be better not to have a death penalty.**

DEFENSE COUNSEL: ... Again, first degree murder, we're talking about premeditation. A person meant to do it. They knew what they were doing. They took an innocent life. It's not a case of an accident or mistake.

All right. Now, with that in mind, how do you feel about the death penalty as the only appropriate penalty in those cases?

MS. KINNE: I still think a life sentence is still an option.

DEFENSE COUNSEL: What would you need to hear maybe to consider the death penalty?

MS. KINNE: I don't know what I'm going to hear, but, I mean, I think there have been some cases where I thought, **"Okay. Makes sense." But I still don't like it.**

...

THE COURT: I just have one or two [questions].
You mentioned you listen to podcasts, ma'am. Is this
podcasts that involve murder cases, or criminal justice, or
the death penalty?

MS. KINNE: Just recently, I heard a podcast with WLRN,
exposé on some cases in Mississippi.

THE COURT: So murder or death penalty cases?

MS. KINNE: Death penalty cases, yeah.

(T. 256, 258-66) (emphasis added).

Such repeated “equivocation or vacillation by a potential juror
on whether he or she can set aside biases or misgivings concerning
the death penalty in a capital penalty phase supplies the reasonable
doubt as to the juror’s impartiality which justifies dismissal.”
Johnson, 969 So. 2d at 948.

Contrary to the gist of Appellant’s argument, “[t]here is no
‘requirement that a juror may be excluded only if he [or she] would
never vote for the death penalty.’” Morrison v. State, 818 So. 2d 432,
442 (Fla. 2002) (citing Wainwright v. Witt, 469 U.S. 412, 424 (1985)).
“Nor must a court find a juror qualified if he [or she] ‘might vote death
under certain personal standards.’” Id.

Appellant relies on four cases he asserts support the
proposition that venireperson Kinne’s responses did not justify an

objection for cause. This reliance is misplaced as the cited cases are factually distinguishable from the case at bar.

In Bryant v. State, 656 So. 2d 426, 428 (Fla. 1995), the trial court refused to excuse six prospective jurors for cause. Defense counsel argued that the jurors' responses raised reasonable doubts whether they could properly consider recommending a life sentence. The challenged jurors initially expressed support for the death penalty and a predisposition to recommend it if Bryant was convicted of first-degree murder. Id. Five of the six venirepersons subsequently stated either they would follow the court's instructions or that they would weigh the aggravating and mitigating factors to determine whether death was the appropriate sentence. Id.

This Court found that the Bryant trial court had not abused its discretion when denying Bryant's challenges to these jurors for cause. Bryant, 656 So. 2d at 428. The sixth juror, however, gave sufficiently equivocal responses to cast doubt on his assertion that he could follow the trial court's instructions. Id. As such, this Court found that the trial court had abused its discretion when it denied Bryant's challenge for cause of this juror. Id. The opinion provides few facts regarding the venirepersons' responses. Id. at 427-28.

Nevertheless, its partial holding, i.e., despite a potential juror's statement that he or she can follow the trial court's penalty phase instructions a cause challenge is warranted when other responses are sufficiently equivocal, undermines Appellant's argument.

Similarly, the holding of Dufour v. State, 905 So. 2d 42 (Fla. 2005), does not warrant relief. Dufour unsuccessfully argued in a post-conviction motion that counsel was ineffective for failing to strike two jurors because of their views in favor of the death penalty. Id. at 53. Like Bryant, the opinion provides few facts. The two venirepersons in question first expressed views in favor of the death penalty, but upon further questioning the jurors clearly stated that they would follow the law as instructed. Id. at 54-55. Here, venireperson Kinne's responses were equivocal and much of her concern was how the death penalty is administered, not a question for the jury. Dufour is inapposite.

In Penn v. State, 574 So. 2d 1079 (Fla. 1991), the judge denied Penn's challenge for cause. The prospective juror indicated that he strongly favored the death penalty. He later said he would follow the law as instructed. This Court found no abuse of discretion because the prospective juror ultimately demonstrated his competency by

stating that he would base his decision on the evidence and instructions. Id. at 1080-81. Here, venireperson Kinne's responses were equivocal and much of her concern was how the death penalty was carried out, an issue applicable to all death penalty cases and not a question for the jury. Penn is inapposite.

Finally in Deviney v. State, 322 So. 3d 563, 570-72 (Fla. 2021), the defendant argued the trial court erred when it denied two cause challenges, asserting a reasonable doubt existed as to whether their views would substantially impair their ability to vote to recommend any sentence other than death, regardless of the balance of aggravators and mitigators. One responded, "Absolutely," when asked whether she understood that a death sentence was not automatic and that she was required to weigh the aggravating and mitigating factors. Id. at 571. Although some of her earlier responses indicated a predisposition to recommend a death sentence for a premeditated murder, she clarified that she could follow the law and understood that a death sentence recommendation was not required for a premeditated murder conviction. Id. at 571-72. This Court found no abuse of discretion. Id. at 572.

The second potential juror similarly expressed a view that a

death sentence should automatically be imposed where a first-degree murder was premeditated. Deviney, 322 So. 3d at 572. However, he later clarified that: he could follow the law; a death penalty recommendation was not automatic; he could listen to and consider mitigation; and he could make his decision after weighing the aggravators and mitigators. Id. A plurality of this Court found that the trial court did not abuse its discretion in denying the cause challenge to this juror. Id.

Given venireperson Kinne’s initial response to the trial court’s question whether she had the required mindset for a juror in a death penalty case, her follow-up equivocal answers, and her focus on “botched” executions, there was no manifest error when the trial judge ruled, “I don’t even think it’s a close call. I don’t even think – I’m going to grant the cause.” (T. 268).

Defense Motions for Cause

Prospective Juror Young

Mr. John Young has been a commercial fisherman in the Keys and in Alaska since 2000. (T. 394). He and his wife live on a boat. (T. 394).

Unlike Ms. Kinne, Mr. Young did not identify himself as

someone who was not open to making a recommendation for death or a life sentence if he believed it was appropriate. See (T. 245-48, 250). Defense counsel asked various prospective jurors about mitigation and whether they believe that death was the only appropriate penalty for someone found guilty of the intentional first-degree murder of an innocent person. (T. 626-29). The potential juror who was questioned immediately prior to Mr. Young stated that a person guilty of the first-degree murder of an innocent victim should forfeit their life. (T. 629).

Defense counsel then asked Mr. Young for his thoughts. (T. 629). He replied:

I think [they should forfeit their life]. I think it is appropriate in doing to others as you would have others do unto you. And, you know, when you call the tune –

DEFENSE COUNSEL: Okay. Well, let me ask you this: So in that scenario that I gave you, you believe that death is the only appropriate penalty?

MR. YOUNG: **Well, there's no case yet.** We haven't heard the mitigating and –

DEFENSE COUNSEL: What would you like to hear in making your decision? What would you like to – think that you would like?

MR. YOUNG: **The whole thing. The whole case and then decide.**

DEFENSE COUNSEL: Okay. Well, what would you think would be valuable to you in making the decision on a life or death recommendation?

MR. YOUNG: Well, I don't know. Just the whole scene. The whole everything what was going through the victim's mind. What was going through your mind. How did you make that decision to do that other person in. And, you know, if you did it, that's it.

(T. 629-30) (emphasis added).

The trial court then asked:

Okay. I'm sorry, but I'm a little confused, because I asked as a group – and I understand that might be difficult to get individual responses – but if anyone has trouble with the notion that life could be a possible sentence for someone convicted of first degree murder. And you were among those who agreed that was a possibility, depending upon the circumstances.

So I just want to be clear. Are you changing your answers or –

MR. YOUNG: No, not if – if there was some other circumstances, you know, that would play a part in my decision to go with a life sentence.

DEFENSE COUNSEL: Can you give us an example of those things that you're thinking of that could –

MR. YOUNG: No, not really, not unless, you know, you bring up the whole case.

DEFENSE COUNSEL: But what specific – you can't put your hand on anything specific? I mean, I'm not trying to force you to come up with anything.

MR. YOUNG: No. I can't even – I don't know anything about the case. I haven't thought about it.

DEFENSE COUNSEL: We're not talking about this case. We're just talking in general.

MR. YOUNG: I can't think about it in – I can't even think about it, you know. That's all.

(T. 630-32).

The defense challenged Mr. Young for cause:

... He said the only appropriate sentence as far as the appropriate sentence once it comes to the penalty phase after the person has been convicted is an automatic death sentence. So we'd move to strike for cause.

THE STATE: Judge, I disagree. He said, "Well, there hasn't been a case yet. I would like to hear the whole case and decide." And he further indicated, "You know, what's going on through the victim's mind; what's going on through your mind; how did you make that decision to do another person in; if you did it, that's it; if there's some other circumstance that will play a part in my decision to give a life sentence."

He said he couldn't give an idea of what he would want to hear. He said, "I can't even think about it," when asked what mitigation or what he would like to hear to consider something else.

(T. 725-26).

The trial court ruled:

I'm going to deny it. I feel that, once the Court clarified things, that he had a willingness to be open to either option, paraphrasing. So I'm going to deny the cause.

(T. 726).

The defense then exercised a peremptory challenge.

(T. 726, 735).

Appellant asserts that Mr. Young's responses indicate that he believed death was the only appropriate sentence for a defendant who was convicted of the first-degree murder of an innocent victim. Initial Brief at 44-47. His argument fails to consider Mr. Young's responses in their totality.

As demonstrated above, when asked if the death penalty was the only appropriate sentence for the first-degree murder of an innocent victim, Mr. Young responded that he had not heard any evidence and that he would like to hear "the whole thing" to make a sentencing recommendation. Thus, when his answers are read in their totality, his belief was not that a death recommendation is automatically warranted for the first-degree murder of an innocent victim.

Moreover, Mr. Young clarified his point of view when questioned by the trial court. Citing Matarranz v. State, 133 So. 3d 473 (Fla. 2013), Appellant asserts "the judge successfully embarrassed Mr.

Young into retracting his answer.” Nothing about the wording of the trial court’s questions supports this speculation as to the trial court’s intent or the honesty of Mr. Young’s response.

As such, the trial court did not abuse its discretion, because Mr. Young’s views on the death penalty would not have prevented or substantially impaired his duties as a juror in accordance with the juror’s instructions or oath.

Prospective Juror Whalen

Robert Derick Whalen works in maintenance for the Monroe County School District. (T. 420). Unlike Ms. Kinne, Mr. Whalen did not identify himself as someone who was not open to make a recommendation for death or a life sentence if he believed it was appropriate. See (T. 245-48, 250). As outlined above, defense counsel asked prospective jurors whether they felt that death was the only appropriate sentence for the first-degree murder of an innocent person and what mitigation they would need/want to hear. (T. 626-48). Defense counsel asked Mr. Whalen for his thoughts. (T. 648). He responded:

I believe in the death penalty because it's the law in Florida. **To apply it if he were guilty beyond a shadow of a doubt, it would not be hard for me, nor would it be**

easy for me. I know I'm splitting it there. I'm taking the middle of the road. I'm not a moderate, but it is a life or death situation, and we have that power to express our opinions. If we come to a collective agreement, it's not up to us; it's up to the judge to make that decision.

DEFENSE COUNSEL: As the judge pointed out, it's a big decision.

MR. WHALEN: It's huge. It's huge. I do believe in the death penalty, however, but I do believe that we are innocent until proven guilty as citizens. So the evidence would have to be weighty.

DEFENSE COUNSEL: What sort of factors -- the scenario we're talking about, obviously, is, is the death penalty the only appropriate penalty for a guilty first degree murder of an innocent victim. We're like there.

MR. WHALEN: If only -- yes. If all the circumstances line up, premeditation, in its entirety, then, yeah. I would have no problem voting for the death penalty, sir.

DEFENSE COUNSEL: Okay. Well, what would you need to hear to express a life recommendation?

MR. WHALEN: **I don't know. I don't know the law.** But I would say, you know, there's mental factors involved. There's medication involved, if somebody went off their medication. I've had experiences with people that did not take their meds and just lost their minds. And that specific incident, every other time in their life, they were perfect, normal people. That one incident, though, could have caused mayhem. It was at a nuclear facility, and one of the supervisors lost his mind. He had -- I forget what it was. But he was on meds, and he forgot to take his meds that morning.

DEFENSE COUNSEL: Okay. **Would you be able to**

seriously consider mitigation in making your decision?

MR. WHALEN: I would, only if the law provided mitigation.

DEFENSE COUNSEL: Right. Well, the way the law is, there's always mercy. As the judge had stated and counsel had stated, death is never mandated. You can always choose life.

MR. WHALEN: Right. I have no problem having mercy, but, you know, grace is given by unmerited favor. If somebody took someone's life, I'm not sure how much grace I can personally have or how much mercy I can personally have on that person.

DEFENSE COUNSEL: Right. Well, you hit a key point. You know, it's through grace. It's not something earned or deserved, mercy, when you consider what the term is about.

MR. WHALEN: Yes. I understand mercy.

DEFENSE COUNSEL: I appreciate that definition.

(T. 648-50) (emphasis added).

The defense moved to strike Mr. Whalen for cause:

Judge, at this time, we'd ask that he be stricken for cause. When asked about mitigation, he was another one who said he would have to hear mitigation if the aggravators were proved.

THE STATE: And, Judge, if I may be heard on that, I don't believe that's what he said. He said he believed in the death penalty and the law in Florida, and it would not be hard for him to impose the death penalty, nor would it be easy. He also said that if the circumstances line up and

there was premeditation, that he could impose the death penalty.

He also went on kind of an explanation of what he meant by that as far as somebody going off their meds. And he referred to some nuclear incident that he had seen before as an example of some mitigation that he could here.

He then went on to say that he could consider mitigation only if the law provided mitigation, but he has no problem having mercy, and then he made some analogy about grace.

THE COURT: I'm going to deny the cause for Mr. Whalen.

(T. 733-34).

Appellant argues that a strike for cause was warranted because Mr. Whalen “could consider a life recommendation ... only with the most extreme mitigation.” Initial Brief at 47. This claim is both unpreserved and without merit.

First, for an issue to be reviewable on appeal, it must be properly preserved by a contemporaneous objection on the same grounds raised on appeal or the error must be fundamental. J.B. v. State, 705 So. 2d 1376, 1378 (Fla. 1998). The contemporaneous objection requirement affords both the trial judge the opportunity to address and possibly redress a claimed error and prevents counsel from allowing errors to go unchallenged and later using the error to

a client's tactical advantage. F.B. v. State, 852 So. 2d 227 (Fla. 2003).

The defense did not raise the issue he instantly asserts, i.e., a strike for cause was warranted because Mr. Whalen "could consider a life recommendation ... only with the most extreme mitigation." Instead, defense counsel argued a ground that is refuted by the record, i.e., "When asked about, mitigation, he was another one who said he would have to hear mitigation if the aggravators were proved."

Second, when his responses are read in their totality, Mr. Whalen did not assert that a life sentence recommendation was warranted only with the most extreme mitigation. Counsel asked Mr. Whalen: "[W]hat would you need to hear to express a life recommendation?" His nuclear power plant response was preceded by, "I don't know. I don't know." Such statements did not arise from immutable opinions or biases.

Rather, the responses to the open-ended question represent the off-the-cuff answers of someone who presumably had little experience with the criminal justice system and capital sentencing law. See Matarranz, 133 So. 3d at 486-87 ("[C]ourts and counsel ... find themselves addressing jurors who misunderstand aspects of the law and the judicial process. These misunderstandings are based not

on personal experience and beliefs, but on a lack of familiarity with or misinformation concerning the law.”).

The trial court did not abuse its discretion, because when Mr. Whalen’s responses are read in their totality, his views on the death penalty would not have prevented or substantially impaired his duties as a juror in accordance with the juror’s instructions or oath.

Juror Leto

Ms. Beth Leto has lived in Monroe County for over fifty years. (T. 424). She worked for the county for thirty-nine years and for the airport for seven years. (T. 424). She was Facebook friends with defense counsel when he ran for office. (T. 57). Unlike Ms. Kinne, Ms. Leto did not identify herself as someone who was not open to make a recommendation for death or a life sentence if she believed it was appropriate. See (T. 245-48, 250).

When questioned, Ms. Leto stated:

Pretty much echoing what everyone said. I’m not morally opposed to it if all the factors are there and the verdict is guilty. But if there’s mitigating circumstances, I’m open to a life sentence.

DEFENSE COUNSEL: Okay. I appreciate that. Is there anything that you could put your finger on that you would like to hear, expect to hear that you think would be helpful?

MS. LETO: In which way?

DEFENSE COUNSEL: For like aggravating or mitigating circumstances.

MS. LETO: Just what the evidence shows as far as all the factors that would make it, you know, a capital offense and warrant the death penalty in the state. But then if there's mitigating circumstances, which I can't give an example, but if there were other things that kind of soften the sentence to just life, I'd be open to that as well.

DEFENSE COUNSEL: All right. I appreciate that.

(T. 654-55).

Later, the defense asked the trial court to strike Ms. Leto for cause:

Judge, she was another individual who indicated she would have to hear mitigation in order to make a decision, thereby shifting the burden. At this time, we would ask that she be struck for cause.

THE COURT: The State?

THE STATE: don't believe she said that. I think she said that she thinks mitigation could soften the sentence to life, but she was open to that as well.

THE COURT: Deny the cause.

(T. 736-37).

Appellant argues that a strike for cause was warranted because Ms. Leto required the defense to prove mitigation before she could

recommend a life sentence. This argument is meritless.

Appellant fails to analyze Ms. Leto's responses in their totality, including what she was "echoing." She never repudiated the trial court's assertion that her earlier silence in response to the judge's questions about having characteristics of a suitable juror for a death penalty case was affirmation that she did so. She did not state that she had immutable biases or opinions calling for the defense to establish mitigation to recommend a life sentence. Instead, she was responding to defense counsel's open-ended questions.

Like those of Mr. Whalen, Ms. Leto's responses represent the off-the-cuff answers of someone who presumably had little experience with the criminal justice system and capital sentencing law. See Matarranz, 133 So. 3d at 486-87 (layperson misunderstanding of law and judicial process not based on personal experience or beliefs). When her responses are read in their totality, her views on the death penalty would not have prevented or substantially impaired her duties as a juror in accordance with the juror's instructions or oath. There was no abuse of discretion.

Additional Peremptory Challenges

If a defendant is granted the same number of additional

peremptory challenges as preserved cause challenges erroneously denied, he or she cannot demonstrate prejudice. Busby v. State, 894 So. 2d 88, 95 (Fla. 2005).

After the defense exhausted its peremptory challenges, the trial court granted it two additional peremptory challenges. (T. 750, 755). As argued above, Appellant failed to preserve his instant argument regarding Mr. Whalen, leaving two preserved potential cause challenges allegedly erroneously denied—the same number of additional cause challenges granted. Further, none of the cause challenges, let alone all three, was erroneously denied. As such, Appellant has failed to demonstrate prejudice.

Reversal is unwarranted.

ISSUE IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT OVERRULED APPELLANT'S HEARSAY OBJECTION BECAUSE THE STATEMENT WAS NOT OFFERED FOR THE TRUTH OF THE MATTER ASSERTED.

Appellant argues that reversal is warranted because the trial court overruled his hearsay objection to testimony regarding why law enforcement looked for an older-model conversion van based on vehicle parts found at the crime scene. The State disagrees.

This Court reviews evidentiary decisions for an abuse of discretion. See Frances v. State, 970 So. 2d 1118, 1132 (Fla. 2006). “Such discretion is limited by the rules of evidence, and a trial court abuses its discretion if its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” Patrick v. State, 104 So. 3d 1046, 1056 (Fla. 2012) (internal citation/quotation omitted).

A trial court’s admission of evidence over a Confrontation Clause objection is reviewed de novo. McWatters v. State, 36 So. 3d 613, 637 (Fla. 2010). Unpreserved Confrontation Clause claims are reviewed for fundamental error. See Braddy v. State, 111 So. 3d 810, 836 (Fla. 2012). Appellant made no Confrontation Clause violation

objection. See (T. 919).

An out-of-court statement offered for some purpose other than its truth is not hearsay and is generally admissible if relevant to a material issue in the case. Penalver v. State, 926 So. 2d 1118, 1132 (Fla. 2006). If a statement is offered to show the effect on the listener rather than the truth of the statement, it is not hearsay. See Blackwood v. State, 777 So. 2d 399, 407 (Fla. 2000).

At approximately 3:55 p.m., on November 21, 2018, Lieutenant Charlene Sprinkle drove to the scene where she observed damaged car parts. (T. 915-16, 918). The prosecutor asked her:

And with these observations of these car parts you're seeing, do any of the sheriff's office personnel associate them with any particular kind of vehicle?

LIEUTENANT SPRINKLE: Yes, sir. The parts that were found, we gave the description and photographs of those car parts to [a] Florida Highway Patrol trooper and one of our major crime or narcotics detectives, and they're familiar with body work and rebuilding cars. And they said that—they said what you're looking for—

DEFENSE COUNSEL: Objection, your Honor. Hearsay.

THE STATE: Your Honor, may I be heard on that point.

THE COURT: Yes.

THE STATE: Your Honor, it's not being offered for the truth of the matter asserted but only to determine what she was

looking for.

THE COURT: Well, okay. It's limited to that as opposed to what she may have found.

I'll overrule the objection.

THE STATE: Go ahead.

LIEUTENANT SPRINKLE: So we were told that we were looking for an older-model conversion van with after-market wraparound skirt.

THE STATE: That was damaged?

LIEUTENANT SPRINKLE: That was damaged.

THE STATE: And you had that information before you left the scene?

LIEUTENANT SPRINKLE: Correct.

THE STATE: When you observed this conversion van in the parking lot of the Kmart...

(T. 918-20).

The officers' out-of-court statements were not offered for the truth of the matter asserted, i.e., the parts belonged to an older-model conversion van with an after-market wraparound skirt. Rather, the State offered the statement to show why law enforcement stopped Appellant's conversion van. As such, the trial court did not abuse its discretion.

Further, there was no Confrontation Clause violation because the Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004).

Assuming for argument’s sake, the officers’ statements were inadmissible hearsay, there still was no Confrontation Clause violation. Not all hearsay implicates the concerns of the Confrontation Clause. Crawford, 541 U.S. at 51. “Where nontestimonial hearsay is at issue,” the Confrontation Clause is not implicated, and the admissibility of any hearsay evidence is wholly governed by the controlling laws of evidence. Id. at 68. “Statements are nontestimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” Davis v. Washington, 547 U.S. 813, 822 (2006).

Here, the officers’ statements to Lieutenant Sprinkler were made to help law enforcement find a vehicle potentially associated with the newly discovered body, an on-going emergency. In contrast, “testimonial” statements subject to the Confrontation Clause are

those made “when the circumstances objectively indicate that there is no [] ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” Davis, 547 U.S. at 822.

Finally, any error was harmless beyond a reasonable doubt. The erroneous admission of hearsay is subject to the harmless error rule. See Deparvine v. State, 995 So. 2d 351, 371-72 (Fla. 2008). An error is harmless if the State establishes beyond a reasonable doubt that it did not contribute to the verdict. State v. DiGuilio, 491 So. 2d 1129, 1135 (1986).

Appellant admitted to driving near the crime scene and damaging his van. He said the victim died in his van. He was present when her body was discarded. Appellant related that he disposed of evidence. There was rope in his vehicle. His internet browsing history included visits to pornography websites related to how the victim was murdered. Appellant’s DNA was recovered from an apparent bite mark on the victim’s chin, a bottle, and a conical cylinder. His Y-STR DNA profile matched the Y-STR profile obtained from the anal swabs and smear sperm cell fraction. Beyond a reasonable doubt, the admission of the instantly challenged statement did not contribute to

the verdict.

This claim is meritless.

ISSUE V

THE INSTANTLY CHALLENGED COMMENTS, IF ERROR, DID NOT REACH DOWN INTO THE VALIDITY OF THE TRIAL TO THE EXTENT THAT THE JURY'S RECOMMENDATION OF DEATH COULD NOT HAVE BEEN OBTAINED WITHOUT THEIR ASSISTANCE.

Appellant argues that reversal is required because the State made inappropriate comments in its penalty phase opening statement and closing argument. The State disagrees.

The defense did not object to the instantly challenged comments, so this Court reviews them for fundamental error. Cruz v. State, 320 So. 3d 695, 717-18 (Fla. 2021) (citing Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996)) (“We have held that allegedly improper prosecutorial remarks cannot be appealed unless a contemporaneous objection is recorded.”).

Fundamental error “reaches down into the validity of the trial itself to the extent that a ... jury recommendation of death could not have been obtained without the assistance of the alleged error.” Card v. State, 803 So. 2d 613, 622 (Fla. 2001); see also Cruz, 320 So. 3d at 718 (“Error during the penalty phase is fundamental error if it is so prejudicial as to taint the jury’s recommended sentence.”).

“[T]he purpose of opening argument is to outline what an

attorney expects to be established by the evidence.” Conahan v. State, 844 So. 2d 629, 640 (Fla. 2003) (quoting Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990)). “[I]t is not improper for a prosecutor to make comments in opening statement that anticipate the defendant's theory of the case.” Gonzalez v. State, 136 So. 3d 1125, 1141 (Fla. 2014).

“The proper exercise of closing argument is to view the evidence and to explicate those inferences which may reasonably be drawn from the evidence.” Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985). Attorneys are allowed wide latitude to argue to the jury during closing argument. Thomas v. State, 748 So. 2d 970, 984 (Fla. 1999).

When analyzing challenged comments, this Court does not review each in isolation. Braddy v. State, 111 So. 3d 810, 837 (Fla. 2012). Rather, the entire closing argument with specific attention to the challenged comments is examined to determine whether the defendant was deprived of a fair trial. Id.

Mercy

Appellant first argues that during its penalty phase opening statement and closing argument, the State improperly asked the jury to extend the same mercy to Appellant that he had extended to the

victim.¹⁹

This Court has found prosecutorial comments asking a jury to show a defendant as much mercy as he or she showed the victim to be error. See Brooks v. State, 762 So. 2d 879, 901 (Fla. 2000) (explaining that “same mercy” arguments are prohibited); Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) (finding that prosecutor committed error in asking the jury to show defendant as much pity as he showed his victim).

“However, this Court also has repeatedly found ‘no mercy’ arguments, standing alone, do not amount to reversible error.” Reed v. State, 875 So. 2d 415, 438 (Fla. 2004) (citing Kearse v. State, 770 So. 2d 1119, 1130 (Fla. 2000) (single comment not so egregious as to require reversal of entire resentencing proceeding)); Richardson, 604 So. 2d at 1109 (in light of entire record, single comment was harmless beyond a reasonable doubt).

¹⁹ Appellant challenged the penalty phase “same mercy” argument in his motion for new trial, which the trial court denied. (R. 1356-57; 1704-05). The motion did not preserve the issue for appellate review. See Chance v. State, 100 So. 3d 1253, 1254 (Fla. 5th DCA 2012) (“Although Chance raised this issue in a motion for new trial, his trial counsel failed to contemporaneously object to the questions or argument at trial, or request a mistrial, thus failing to preserve the issue for review.”)

Further, the State is not prohibited from addressing mercy. See Conahan v. State, 844 So. 2d 629, 641 (Fla. 2003) (finding no abuse of discretion when trial court overruled objection to State comment asserting that there is a balancing act between mercy for defendant and justice for the victim).

Prior to the parties' penalty phase opening statements, the defense requested a special jury instruction on mercy. (T. 2163). The State's penalty phase opening statement concluded:

And after you've determined whether: the aggravators were proven beyond a reasonable doubt: the proven aggravators warrant a sentence of death; the mitigators were established; the aggravators outweigh the mitigators; and a death recommendation is appropriate, then you should take a step back individually and then ultimately collectively and decide is this really the right thing to do. We have gone through this analysis but is it the right thing to do?

Should we recommend mercy, despite what we have seen and what we have heard?

And I ask you, as you're contemplating that, as you're contemplating that, think to yourself he asked for mercy when he was not willing to give any.

That was the essence of the presentation of our case now. I'll have more comments later at the conclusion of the evidence in this case. But as you go through it, I wanted you to understand the process that will be going on because it needs to be objective. It needs to be reasoned. It needs to result in justice. That is all. Justice. Thank you

very much for your time.

(T. 2185-86).

During its penalty phase opening statement, the defense also addressed mercy:

And then, finally, the one piece of mitigation that no one - - myself, Mr. Smith, Mr. Casey, none of us can prove to you -- and the one piece of mitigation that the State can't argue against because it is yours and yours alone when you make your individual decision, and that is mercy. And [the prosecutor] hit on mercy, that Mr. Wolf didn't show any mercy in the crimes that you have convicted him of. Ladies and gentlemen, mercy is not earned. Mercy is bestowed. It is something you give. It is not something that a person can earn because if it's earned, ladies and gentlemen, it is not mercy. It's justice.

(T. 2195).

During its penalty phase closing argument, the State asserted:

I am confident, based on my conversations with [defense counsel] and the litigation to this point, that he will ask you and urge you to be merciful, to consider mercy. And the law in this state allows you to do that, to look at everything that you've done up to this point and say, "Yes," "yes," "yes," "yes," to every question that has been proposed to you as to the appropriateness of the death penalty, and in the end have this moral dilemma within each one of you about what to do.

If any one of you, just one, says "No," Mr. Wolf gets life. Just one of you.

If you think about what mercy is, mercy is compassion. Mercy is extending someone a second chance when they've

done something wrong. Mr. Wolf has had his second chance and that second chance was very much, very much to the disadvantage of Michelle Osborne. He had it and he threw it away and now he asks you for mercy when he was unwilling to give it.

You know, this was not -- when you break down what happened to Mrs. Osborne, there is opportunity to see what you're doing, to see the consequences of what you're doing because you're going from one orifice to the other and you're inflicting multiple injury to each one of those orifices. There is no mercy. None. He didn't want to hear it. Covered her mouth.

(T. 2289-90).

The unpreserved challenges do not warrant a new penalty phase. In Conahan v. State, 844 So. 2d 629 (Fla. 2003), the appellant argued that the State had made a prohibited “same mercy” argument, when the prosecutor stated:

Mercy for a defendant means nothing if we do not also honor justice for the victim. The statutory scheme in Florida attempts to strike a balance between the equally important values in our society of mercy to a defendant and justice to a victim. It attempts-

Id. at 640.

This Court found no error:

[T]he prosecutor spoke of mercy; however, he did not urge the jury to show the defendant as much mercy as he showed his victim. The prosecutor made the statement that there is a balancing act between mercy for a defendant and justice for the victim. We find that the

prosecutor's remark did not inflame or unnecessarily evoke the sympathies of the jury. Accordingly, we affirm the trial court's ruling.

Id. at 641.

As in Conahan, the prosecutor in this case addressed mercy in his penalty phase closing argument but did not ask the jury to show Appellant the same amount of mercy he had shown to the victim. Instead, he accurately set forth the law, proffered his understanding of what mercy is and explained why it was not warranted. See generally Cruz v. State, 320 So. 3d 695, 718 (Fla. 2021) (“[T]his Court has explained that it is not improper for a prosecutor to ‘attempt[] to rebut mitigating evidence argued by the defense.’”) (quoting Poole v. State, 997 So. 2d 382, 395 (Fla. 2008)).

If error, the comments did not reach down into the validity of the trial itself to the extent that the jury recommendation of death could not have been obtained without them, i.e., they do not constitute fundamental error. In Ritchie v. State, 344 So. 3d 369, 377-87 (Fla. 2022), this Court addressed an unpreserved challenge to a “same mercy” comment as part of a cumulative error argument. While recognizing the “same mercy” comment improper, the opinion held the interests of justice did not mandate a new penalty phase. Id.

at 387.

In reaching this conclusion, the Ritchie Court viewed the unpreserved erroneous comments in light of the entire record. Id. at 387. They were isolated statements in an otherwise proper argument, which asked the jury to return a recommendation of death based on the evidence. Id. at 386. The trial court properly instructed the jury, including that a death sentence recommendation is never required. Id. The State proved substantial aggravation, and the trial judge found minimal mitigation. Id. This Court concluded:

In sum, we cannot say that the improper arguments precluded Ritchie's jury from making a reasoned assessment based on the evidence so as to amount to a denial of due process. Rather, viewing the record in its totality, it was the evidence of Ritchie's horrific and senseless crimes against the victim, not the prosecutor's missteps, that secured the recommendation of death.

Ritchie, 344 So. 3d at 387.

As in Ritchie, the trial court properly instructed the jury that Florida law never requires a recommendation of death. It also directed the jury that, “Your decisions must not be based upon the fact that you feel sorry for anyone or are angry at anyone...Your decisions must be based on the evidence and on the law contained in these instructions.” (T. 2313). See Hurst v. State, 202 So. 3d 40,

63 (Fla. 2016) (“[I]t is presumed that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court’s instructions in a criminal case and strive to understand, make sense of, and follow the instructions given to them.”).

Further, the State proved substantial aggravation. The jury’s verdict established that the capital felony was committed while Appellant was engaged in a sexual battery. Court records established that Appellant had previously been convicted of a felony involving the use of violence to the person—second degree murder. As will be explained below in Issue VII the evidence supporting the HAC aggravator was strong. The trial court found minimal mitigation. See (R. 1408-11). Finally, the comments were isolated in an opening statement and a closing argument, which focused on the facts and law.

Based on this record, Appellant has failed to demonstrate fundamental error, i.e., the jury could not have recommended a death sentence but for the instantly challenged comments.

Non-Statutory Aggravation

Appellant next argues that the State improperly argued non-statutory aggravation in its penalty phase closing argument, i.e.,

failure to confess or take responsibility. Again, the defense did not object to the instantly challenged comments.

“The only matters that may be considered in aggravation are those set out in the death penalty statute.” Zack v. State, 911 So. 2d 1190, 1208 (Fla. 2005); see generally Robertson v. State, 187 So. 3d 1207, 1217 (Fla. 2016) (“Evidence in aggravation—that is, evidence that tends to weigh in favor of a death sentence—may not be introduced unless it relates to one of the aggravating circumstances...”). However, “[a] prosecutor may make comments describing the murder where these comments are based on evidence introduced at trial and are relevant to the circumstances of the murder or relevant aggravators...” Mosley v. State, 46 So. 3d 510, 521 (Fla. 2009).

Appellant contends that the following penalty phase closing comment asked the jurors to consider his failure to take responsibility or confess as aggravation:

The third aggravator that the State has urged you to consider in this case is, "We, the jury, unanimously find that the State has established beyond a reasonable doubt that the defendant was previously convicted of a felony involving the use of violence to the person."

And I showed you and read to you the conviction from

1978, was the conviction. The murder of Mr. Flory happened in 1976, where it identifies Mr. Wolf as a defendant in the judgment and sentence. And then in the sentencing portion of it shows that the sentence is not to exceed 30 years in prison.

The details of what happened were provided to you in the preliminary hearing, the transcript of the preliminary hearing, as well as the plea colloquy the judge engaged in at the time he entered his plea.

It is undisputable ... that Mr. Flory was suffocated, and he was suffocated over his money, over his Social Security benefits. That's what the defendant was after. And the reason -- it's in the transcripts. The reason he was killed was because he wanted to avoid responsibility, accountability for what he had done. Placing his freedom, his freedom, over the life of another human being.

That's the process that goes on with Mr. Flory. And they didn't just do it on the spur of the moment. This had been planned. It had been anticipated. It had been contemplated because they went over there on the 1st of June to see if he had his Social Security check yet and he had not. So they backed away because the timing wasn't right and they returned on the 3rd, when he had gotten his benefits, and killed him.

We see that same, that same exact motive present in the death of Michelle Osborne. He repeatedly, repeatedly lied to Detective Pitcher during the interview. He used every bit of energy and persuasiveness that he could to convince him that he didn't know anything about what happened.

He had absolutely no knowledge of what happened.

Why did he do that for hour upon hour? Because he wanted to avoid responsibility. It was the same mentality that he used when he took the soiled clothing and

mattresses and bedding and put them in different dumpsters, when he got rid of the clothes that he had on and put them in the dumpster. It was all designed to avoid responsibility.

When he tells Charlene Sprinkle, "What is this all about?"
"What is this all about?"

[The comments] are not made in panic. He's thinking about this. This has been hours since the murder happened. Hours. Time for reflection, just as it was with Mr. Flory. And he chose to lie and, when that didn't work, he went to another lie. But all of it was designed to avoid responsibility and accountability, to avoid going to prison. Mrs. Osborne suffered the same fate. Anyone who had that type of injuries, even if they survive, the person who inflicted it knows they're in trouble, knows that there are going to be severe consequences for their behavior, and knows that they're going to go to jail, and that's why Mrs. Osborne is dead.

That's why this is not just a sexual battery, where someone gets gratification from doing this to a woman. This is beyond that. This is way beyond that.

The fact that the defendant had been previously convicted of a felony involving violence to Mr. Flory, I think by the judgment and sentence and the transcript of the defendant's plea to that charge clearly demonstrates that has been proven beyond a reasonable doubt.

(T. 2282-85).

When read in context, the comments did not attempt to interject non-statutory aggravation. Instead, they anticipated the defense argument and addressed the proffered mitigating circumstance—a

coerced plea, Appellant's lost youth and the effect of thirty years in prison.

In its opening penalty phase statement, the defense asserted that:

You heard about the aggravators that the State intends to prove, that [Appellant] has a prior homicide in his history. And [the prosecutor] is correct. We agree that [Appellant] at the time of that crime, was 15 years old, with four other individuals. He was the youngest of the four.

In that 1976 crime, [Appellant] went to prison from 15 years old. He did 30 years with adults as a child. That, ladies and gentlemen, although an aggravator, I would argue is a mitigator. Because you can consider his background and his circumstances. A 15-year-old child locked with men.

(T. 2188, 89).

During its penalty phase presentation, defense counsel read a portion of a 1977 preliminary hearing transcript to establish that Appellant's co-defendant testified for the State in exchange for a favorable plea. (T. 2247-48). It also read the transcript of Appellant's 1978 plea colloquy in which he stated that he was pleading guilty because he was [t]ired of waiting in jail, and that's mostly it right there." (T. 2249).

In its penalty phase closing argument, the defense again

addressed the prior second-degree murder conviction:

And then the prior homicide ... Mr. Wolf was 15 years and 8 months old.

When we read the transcript from the preliminary hearing, ... Mr. Wolf was 16 years and 11 months old, in court being charged by these things.

And you heard the co-defendant testify. [the prosecutor] brought it up. When I came up, I read the cross-examination. The co-defendant, the person who was testifying, was testifying because he got the deal. Mr. Wolf's 30-year deal is not a deal. The person who got the deal was the person who pled to the manslaughter to testify against his two friends.

When Mr. Wolf was sentenced, ... he was 18 years and 2 months old. He did 30 years.

Mr. Wolf, [the prosecutor] would have you believe, he had a chance. He could have gotten out. He could have done something.

Ladies and gentlemen, a 15-year-old being charged as an adult, a 16-year-old sitting in a preliminary hearing listening to his friend testify against him, **a person two months after their 18th birthday accepting a deal to 30 years Florida State Prison because he wanted to get out of jail. He was tired of sitting in jail.** Had no chance of being anything. None.

His formative years were in prison or jail. Where he learned his morals was in prison, from men older and much scarier, I'm sure, than him.

Ladies and gentlemen, yes, [Appellant] has a prior conviction for murder. **That prior conviction does not aggravate this crime.** It mitigates this crime. He never

had a chance.

(T. 2297-99) (emphasis added).

In light of the implicit defense argument that Appellant's instant criminality was a product of his years in prison, the State's argument properly highlighted the similarities between Appellant's behavior prior to being sentenced to prison at the age of 18 and his instant actions. Prison did not transform an otherwise innocent person into the man who committed the instant crimes. See generally Zack v. State, 911 So. 2d 1190, 1208 (Fla. 2005) ("Viewed in context, ... this testimony was offered in rebuttal to the defense, not as a non-statutory aggravator."). Further, it countered the defense's implicit argument that the jury should not find the prior violent felony aggravator, because Appellant was somehow coerced into entering that plea and his co-defendant's testimony should not be believed.

Finally, the trial judge instructed the jury as to which aggravators it could consider, (T. 2303-04), that its decision had to be based on the proven aggravating factors and established mitigating circumstances, (T. 2308), and that it had to follow the law. (T. 2312). There is no evidence that the jury failed to follow the trial court's instructions. See Hurst, 202 So. 3d at 63 (it is presumed

jurors follow trial court's instructions).

Because the State's comments did not interject non-statutory aggravation, but instead addressed proffered mitigation and defense arguments challenging the prior violent felony against a person aggravator, they were proper. See Davis v. State, 136 So. 3d 1169, 1208-09 (Fla. 2014) (State argument permissible in which it cited Davis's lack of truthfulness to first responders as evidence rebutting defense theory that he is a good person and rebutting his testimony that he did not harm the victim).

Alternatively, any arguable error did not reach down into the validity of the trial itself to the extent that a jury recommendation of death could not have been obtained without the assistance of the alleged error. See Card, 803 So. 2d at 622.

Misstatement of the Evidence

Appellant also contends that the prosecutor's penalty phase closing argument, again to which no objection was made, contained a misstatement of fact, i.e., the victim took twenty minutes to bleed out.

"Closing arguments allow the State and defense to review the evidence and to explicate those inferences that may reasonably be

drawn from the evidence.” Patrick v. State, 104 So. 3d 1046, 1065 (Fla. 2012) (citing Dessaure v. State, 891 So. 2d 455, 468 (Fla. 2004)). “However, counsel may not urge the jury to consider facts not in evidence.” Id. (citing Jackson v. State, 552 So. 2d 802, 808 (Fla. 1988)).

Here, Medical Examiner Steckbauer testified that the injuries to the victim’s pelvic region would have caused a massive amount of bleeding, resulting in death within four to twenty minutes. (T. 1575-76). During his second day of testimony, he reiterated this point. (T. 1629).

The challenged comment was made during the State’s penalty phase closing argument:

Now, [defense counsel], in his opening statement had talked about, well, perhaps Ms. Osborne was unconscious and unable to fully absorb the degree of pain and injury that were being inflicted upon her. That's not what the doctor said. The doctor said that she could have survived and lived and did live for 20 minutes or more approximately for her to bleed out, so she definitely was alive during this process. If the ligature had been placed on her neck and she was unconscious or dead from that, if she had been dead from the ligature, she would have not bled. This ligature was fastened there around her neck for control and her struggle, the same that produced all the other injuries, is this neck because it's being pulled from the side. She is struggling for her life. She is struggling to survive. She may not be able to verbalize her screams

because a hand is over her mouth but she was doing the best she could to cope with what was happening to her.

(T. 2280-81).

Almost immediately, the defense addressed the State's comment in its penalty phase closing argument:

And especially heinous, atrocious, and cruel, [the prosecutor] was -- made a point to point out some of the things that Dr. Steckbauer said. But, if you remember, Dr. Steckbauer was noncommittal. She could have died in 20 minutes. Could have been as little as 5. Can't tell if she was unconscious.

(T. 2296-97).

Appellant appears to argue that the State asserted that the victim was conscious for twenty minutes after being vaginally and anally violated with an object. However, when read in context, the prosecutor's statement, which began with the subjunctive phrase "could have," conveyed that for her to have bled, she had to have been alive, not that she was conscious for a specific duration.

Further, any misstatement was not fundamental error. First, prior to the parties' penalty phase opening statements, the trial court instructed the jury, "What the lawyers say during opening statements is not evidence and you are not to consider it as such." (T. 2175). Following the parties' penalty phase closing arguments, the judge

instructed the jurors, “Your decisions must be based only upon the evidence that you have heard from the testimony of the witness, have seen in the form of exhibits in evidence and these instructions.” (T. 2313). There is no evidence that the jury failed to follow the trial court’s instructions. See Hurst, 202 So. 3d at 63 (presumed jurors follow trial court’s instructions).

Second, the defense addressed the amount of time it might have taken for the victim to bleed to death in both its penalty phase opening statement and in its closing argument. In the latter, it corrected what it believed was the State’s misstatement.

Finally, Appellant incorrectly asserts that because “Dr. Steckbauer could not testify to a degree of medical certainty that Ms. Osborne was conscious ... the State could not establish the EHAC aggravator [without this manufactured testimony].” He testified that the injuries would have caused significant and severe pain. (T. 1576). He could not opine that she was conscious when they were inflicted due to her other injuries. (T. 1578).

However, he later clarified that in his professional opinion, she was “conscious for some part of the experience.” (T. 1675). Moreover, it is a reasonable inference from the evidence that Appellant used a

garrote to choke her during a struggle. See Bowles v. State, 804 So. 2d 1173, 1178 (Fla. 2001) (“Strangulation of a conscious murder victim evinces that the victim suffered through the extreme anxiety of impending death as well as the perpetrator's utter indifference to such torture. Accordingly, this Court has consistently upheld the HAC aggravator in cases where a conscious victim was strangled.”).

Any misstatement of fact did not reach down into the validity of the trial itself to the extent that the jury recommendation of death could not have been obtained without the assistance of the alleged error. See Card, 803 So. 2d at 622. This Court should affirm.

ISSUE VI

THE COURT DID NOT ERR IN DENYING APPELLANT'S REQUEST FOR A MERCY SPECIAL JURY INSTRUCTION.

Appellant argues that reversal is warranted due to the trial court's failure to read his proposed mercy special jury instruction. The State disagrees.

First, the argument is unpreserved. This Court has held that proper preservation requires that: (1) a timely contemporaneous objection²⁰ be made; (2) the party must state the legal ground for the objection; and (3) “[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.” Harrell v. State, 894 So. 2d 935, 940 (Fla. 2005) (quoting Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)).

Appellant did not argue that his proposed special jury instruction on mercy was required due to State mercy comments. See

²⁰ Jury instructions are subject to the contemporaneous objection rule and will not be considered on appeal unless a timely objection was made or the error constitutes fundamental error. Knight v. State, 286 So. 3d 147, 151 (Fla. 2019).

(R. 595-97; T. 2163, 2257-62).²¹ Rather, he asserted that Federal courts permit a mercy instruction and that this Court has never prohibited such an instruction. (R. 596). Because Appellant made a different argument below, the instant claim is subject to fundamental error analysis.

“[T]he fundamental error test for jury instructions cannot be met where ... there was no error in the jury instruction for the offense of conviction and there is no claim that the evidence at trial was insufficient to support that conviction.” Knight v. State, 286 So. 3d 147, 154 (Fla. 2019). Appellant does not challenge the first-degree murder jury instruction nor other penalty phase instructions. Further, as will be described in the supplemental issue below there was sufficient evidence to support the first-degree murder conviction.

As to the ruling made by the lower court,²² Appellant acknowledges that “[t]his Court has held that the standard jury instructions adopted in 2017, though they omit the word mercy, are

²¹ Prior to the charge conference, the State had made an alleged “same mercy” argument during its penalty phase opening statement. See (T. 2195).

²² The denial of a special jury instruction is reviewed for an abuse of discretion. Bevel v. State, 376 So. 3d 587, 596-97 (Fla. 2023).

sufficient to instruct the jury on [the issue of mercy], and a special instruction is not required.” Initial Brief at 60 (citing Bevel v. State, 376 So. 3d 587, 597 (Fla. 2023); Woodbury v. State, 320 So. 3d 631, 656 (Fla. 2021)).

The Bevel Court held:

We have repeatedly determined that Standard Jury Instruction 7.11 adequately informs jurors of the applicable legal standard ... We have even referred to the relevant provision in this instruction as the “mercy instruction.” ... Thus, the Court did read an instruction on mercy, and although [the defendant] might have preferred the wording of his proposed instruction, Standard Jury Instruction 7.11 is not ambiguous when it comes to addressing the jurors’ options.

Bevel, 376 So. 3d at 597 (citing Woodbury, 320 So. 3d at 656) (internal quotation marks omitted).

As in Bevel, the trial court read Standard Jury Instruction 7.11. (R. 688-92; T. 2302-22). This included what this Court in Reynolds v. State, 251 So. 3d 811, 816 n.5 (Fla. 2018), referred to as the mercy instruction, i.e., “Regardless of the result of each juror’s individual weighing process – even if you find that the sufficient aggravators outweigh the mitigators – the law neither compels nor requires you to determine that the defendant should be sentenced to death.” (R. 690; T. 2309). Pursuant to this Court’s precedent, the trial court did

not abuse its discretion.

ISSUE VII

COMPETENT, SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT’S FINDING THAT THE MURDER WAS HEINOUS, ATROCIOUS, OR CRUEL.

Appellant argues that the State failed to present competent, substantial evidence²³ supporting the trial court’s finding of the heinous, atrocious, or cruel (“HAC”) aggravator. The State disagrees.

This Court has defined 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.

Hernandez v. State, 4 So. 3d 642, 668-69 (Fla. 2020).

“The HAC aggravator focuses on the means and the manner of the victim’s death and the immediate circumstances surrounding the death.” Bright v. State, 299 So. 3d 985, 1002 (Fla. 2020) (citations

²³ This Court reviews a claim regarding the sufficiency of the evidence to support an aggravating circumstance for competent, substantial evidence. Covington v. State, 228 So. 3d 49, 62 (Fla. 2017).

omitted). “In determining whether any aggravating factor has been proven, this Court ha[s] held that ‘the trial judge may apply a common-sense inference from the circumstances.’” Zommer v. State, 31 So. 3d 733, 746 (Fla. 2010) (quoting Gilliam v. State, 582 So. 2d 610, 612 (Fla. 1991)).

Although the evidence must demonstrate that the victim was conscious and aware of impending death, his or her perception of imminent death need only last seconds. Gonzalez v. State, 136 So. 3d 1125, 1157 (Fla. 2014). Further, the victim need not have been conscious when the immediate cause of death was inflicted. See Lott v. State, 695 So. 2d 1239, 1244 (Fla. 1997) (although victim might not have been conscious when fatal injury inflicted, HAC aggravator supported by “the physical torture and emotional trauma she suffered during the time leading up to her death”).

Finally, “[t]his Court has previously upheld the HAC aggravating factor in cases where a conscious victim was beaten or strangled prior to his or her death.” Zommer, 31 So. 3d at 747; see also Tompkins v. State, 502 So. 2d 415, 421 (Fla. 1986) (“[I]t is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety

and fear, and that this method of killing is one to which the factor of heinousness is applicable.”)

Appellant’s argument fails to consider all the circumstances of the murder. Instead, it focuses solely on whether the victim was conscious when she suffered catastrophic bleeding, the cause of death, ignoring the strangulation and struggle.

The victim sustained abrasions to her lower abdomen, scalp, breasts, and shoulder. (T. 1566-67, 1588). She had an apparent bite mark on her chin from which Appellant’s DNA was recovered. (T. 1580, 1706). Her lower lip reflected hemorrhaging, (T. 1555), while small lacerations on her lips were consistent with blunt force to the mouth and lips. (T. 1555-57). Although he did not document any defensive injuries, (T. 1548), the doctor opined that bruises on her wrists and ankles, lacerations and hemorrhaging in her mouth and petechia in her eyes were inflicted at or near the time of death and signs of a struggle. (T. 1648, 1650).

There was a ligature curl furrow coursing around the victim’s neck, from front to back. (T. 1560). The two lines came together at the base of the neck. (T. 1560). There was a large amount of hemorrhage in all the strap muscles going down into the deep tissues

of the neck. (T. 1582). The injuries were consistent with pressure having been exerted from the left side pulling on it, putting pressure on the right side. (T. 1583). Compression of the neck blood vessels can lead to unconsciousness within 45 seconds, however if the compression is released the person could regain consciousness. (T. 1626).

The injuries to the victim's vagina and anus could not have been caused by male genitalia. (T. 1571). The object used would have been larger than the elasticity the vaginal vault and the anal vault would have been able to withstand. (T. 1571). Due to the multiple lacerations, the object or objects were inserted multiple times. (T. 1574). The victim was alive between four and twenty minutes following the infliction of the injuries to her vaginal vault and anal vault. (T. 1578). These injuries caused significant pain. (T. 1576).

The doctor would not opine whether the victim was conscious when the pelvic injuries were inflicted, however there was nothing discovered during the autopsy that would indicate the victim was not conscious. (T. 1576, 78). Further, while the victim's blood alcohol content was 0.11 percent, it would not have affected her level of consciousness. (T. 1674).

Applying commonsense inferences from the circumstances, this murder was a conscienceless and pitiless crime, which was unnecessarily torturous to the victim. Although the doctor could not testify to the sequence of injuries, (T. 1627), he testified the victim was “conscious for some part of the experience.” (T. 1675). This “experience” included at least forty-five seconds of strangulation prior to the loss of consciousness as well as a struggle. Because the State presented competent substantial evidence that the victim would have suffered fear, emotional strain and terror during the moments leading up to her death, Appellant’s argument lacks merit.

Even if the HAC aggravator were stricken, any error would be harmless beyond a reasonable doubt. See Knight v. State, 746 So. 2d 423, 435-36 (Fla. 1998) (holding erroneous finding of HAC was harmless where case involved five other aggravating factors and minimal mitigation). Here, the jury unanimously found two other aggravators, to which the trial court assigned great weight. The first, capital felony was committed while defendant was engaged in sexual battery was established by the jury’s guilt phase verdict. The second, prior violent felony against a person, which has been described as amongst the most serious aggravators, was supported by court

records. See Dillbeck v. State, 357 So. 3d 94, 105 (Fla. 2023) (citing Buzia v. State, 82 So. 3d 784, 800 (Fla. 2011)); Aguirre-Jarquin v. State, 9 So. 3d 593, 608 (Fla. 2009)). Finally, mitigation was minimal.

This claim does not warrant relief.

ISSUE VIII

THE SENTENCING ORDER'S INCLUSION OF EVIDENCE ELICITED FROM THE MEDICAL EXAMINER UNDER OATH AND SUBJECT TO CROSS-EXAMINATION WAS NOT ERROR.

Appellant argues that the trial court erred when it relied on facts not presented to the jury when finding the HAC aggravator. The State disagrees.

When imposing a sentence of death, the trial court must, considering the records of the trial and the sentencing proceedings, enter a written order addressing the aggravating factors and mitigating circumstances. § 921.142(5), Fla. Stat. (2023). Its aggravating circumstance finding must be established by competent substantial evidence. Pham v. State, 70 So. 3d 485, 496-97 (Fla. 2011). At the Spencer hearing, held outside the presence of the jury, the State is permitted to present evidence of an aggravating nature. Spencer, 615 So. 2d at 691.

The challenged portion of the sentencing order provides: “[I]t was the doctor's professional opinion that she was conscious during at least part of the murder and sexual batteries because the intensity of pain would have been enough to rouse even a person who was

unconscious.” (T. 1407). This testimony was elicited outside the presence of the jury during the voir dire examination of the medical examiner:

THE COURT: **One of the issues that I have to sort out here is was this lady conscious at the time at least during some period of time** while this action, these deeds, however you want to describe it, are occurring to her. Do you have any opinion as to that issue?

MEDICAL EXAMINER: I do. **It would be my professional opinion that she was conscious for some part of this because, again, that level of pain would even rouse a person who is stuporous or unconscious.** Now, that doesn't mean that things couldn't have been done to then make her unconscious again after she was roused, but it is highly unlikely that at no point during this entire proceeding was she conscious -- that she was unconscious for the entire proceeding.

(T. 1666) (emphasis added).

No one objected to the trial judge's inquiry. The trial court asked the parties if they had any further questions. (T. 1667). Defense counsel asked about pain during childbirth and its effect on consciousness. (T. 1667).

The trial court's reliance on the medical examiner's testimony was not error. The question made clear that the trial court was seeking information for the trial judge's benefit, not the jury's. The trial court permitted the parties to ask follow-up questions. Like

Spencer hearing testimony, the fact that it was given outside the presence of the jury does not render it extra-record information for purposes of the trial court's sentencing decision.

Further, in the absence of the challenged evidence, the sentencing order sets forth competent substantial evidence supporting the HAC aggravator:

5. The Court finds that the State has proven beyond a reasonable doubt the aggravating factor under Section § 921.141(6)(h), Florida Statutes, that the capital felony was especially heinous, atrocious or cruel. In the course of murdering Michelle Osborne, the defendant brutally violated the most intimate and private parts of her body. While maintaining control over Ms. Osborne with a ligature wrapped around her neck, causing furrows to be dug into the right side of her neck, and hemorrhaging in all of the strap muscles going down into the deep tissues of the neck, the defendant repeatedly inserted into her anus and vagina an object larger than either of those orifices were anatomically capable of accommodating. As a result, Michelle Osborne sustained traumatic injuries to her pelvic region consisting of a large full thickness laceration in both her anal vault and her vaginal vault, accompanied by numerous smaller lacerations, damage to the surrounding tissue, and extensive blood loss.

6. According to the testimony of Dr. Michael Steckbauer, the board-certified pathologist who performed the autopsy, the level of injuries inflicted upon Ms. Osborne would have caused excruciating pain. Due to the massive amount of bleeding, Dr. Steckbauer was unable to determine how long Ms. Osborne remained alive during the attack and to what extent she was conscious. However, it was the doctor's professional opinion that she was conscious

during at least part of the murder and sexual batteries because the intensity of pain would have been enough to rouse even a person who was unconscious. Certainly, the condition of Ms. Osborne's body indicated that at some point she was alive and conscious and felt excruciating pain and the terror of being raped and murdered and knew that she was about to die. In addition to the injuries caused by the ligature, she had bruises on her ankles and wrists, lacerations and hemorrhages on the inside of her mouth, and petechiae in her eyes, all of which Dr. Steckbauer testified were inflicted at or near the time of death. Clearly at some point Michelle Osborne knew what was happening to her and tried to resist but was overcome by the defendant's brutal use of force. Ultimately Michelle Osborne was the victim of an especially heinous, atrocious, and cruel murder.

The Court assigns enormous weight to this aggravating factor.

(R. 1406-07; 1773-75).

This Court should affirm.

ISSUE IX

APPELLANT'S MOTION TO PRECLUDE THE DEATH PENALTY FOR FAILURE TO CHARGE AGGRAVATING FACTORS IN THE INDICTMENT WAS MERITLESS.

Appellant argues that the lower court reversibly erred when it denied his Motion to Preclude The Death Penalty for Failure to Charge Aggravating Factors in the Indictment. The State disagrees.

In Miller v. State, 42 So. 3d 204 (Fla. 2010), this Court held:

The purpose of an indictment is to provide the accused with sufficient notice of the nature and cause of the offense charged. For a charging document to sufficiently charge a crime it must follow the statute, clearly charge each of the essential elements, and sufficiently advise the accused of the specific crime with which he is charged. Therefore, procedural due process is afforded when an accused receives sufficient notice of these allegations.

An indictment that charges first-degree murder immediately places a defendant on notice that he or she is charged with a capital felony punishable as provided by the statute Section 921.141(5) specifically defines the aggravating circumstances that may be considered by the judge and the jury, thereby rebutting any contention that a defendant lacked notice of the aggravating circumstances on which the State would rely. [B]ecause the statutory language of section 921.141(5) limits aggravating factors to those listed, ... there is no reason to require the state to notify defendants of the aggravating factors that the state intends to prove.

... Ring v. Arizona, 536 U.S. 584 (2002) does not require ... notice of the aggravating factors that the State will present at sentencing. ...Therefore, the indictment is not required

to express this specific statutory language because the statute affords sufficient notice to satisfy due process.

Id. at 215-16 (internal quotation marks/citations omitted).

Here, the original indictment was filed on January 10, 2019. (R. 143). On the same day, the State filed its Notice of State's Intent to Seek Death Penalty Pursuant to Florida Rule of Criminal Procedure 3.181, listing three aggravators. (R. 144). On August 25, 2022, the grand jury issued a superseding indictment that provided in part:

COUNT I: FIRST DEGREE MURDER

IN THE NAME AND BY THE AUTHORITY OF THE STATE
OF FLORIDA:

The Grand Jurors of the County of Monroe charge that on or about November 21, 2018 in Monroe County, Florida,

STEVEN MATTHEW WOLF

did unlawfully from a premeditated design to effect the death of a human being, kill and murder MICHELLE R. OSBORNE, a human being, by ligature strangulation in combination with anal and genital trauma, or did unlawfully kill and murder MICHELLE R. OSBORNE, while engaged in the perpetration of or in the attempt to perpetrate a sexual battery upon MICHELLE R. OSBORNE, and in the course thereof STEVEN MATTHEW WOLF used a weapon, to wit: a ligature, contrary to Florida Statutes 782.04(1)(a)(1), 782(1)(a)(2), 775.087 and 794.011(3). (CAPITAL FELONY).

(R. 523).

On July 26, 2022, Appellant filed his Motion to Preclude The Death Penalty for Failure to Charge Aggravating Factors in the Indictment. (R. 510-14). On September 22, 2022, defense counsel referenced the motion:

And we moved to strike the death penalty on the grounds that the aggravators were not listed in the indictment. The Court's well aware the death penalty has been declared constitutional. The Court is well aware that you don't have to list the aggravators by case law in the indictment. I explained to him that would simply be to preserve the issue to make this potentially a federal issue as well as a state issue.

(R. 1489).²⁴

The indictment charged Appellant with capital first-degree murder in violation of section 782.04, Florida Statutes , which advises that the crime is punishable as provided in section 775.082.

Section 775.082(1) states, in pertinent part:

A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for

²⁴ Appellant does not identify where in the record the trial court denied the motion. See Sparre v. State, 289 So. 3d 839, 848 (Fla. 2019) (“To preserve an issue for appellate review, a litigant must present the issue to the trial court in a timely, specific manner and obtain a ruling.”).

parole.

§ 775.082(1), Fla. Stat. (2018).

Section 921.141(6), in turn, lists the aggravating circumstances that may warrant a death sentence. Thus, the indictment informed Appellant that he was (1) charged with capital murder and (2) could be sentenced to death if any of the aggravating circumstances listed in the section were found by the trial court.

Pursuant to this Court's precedent, the indictment provided Appellant with sufficient notice of the aggravating factors that might lead the trial court to sentence him to death. This claim is without merit.

ISSUE X
CUMULATIVE ERROR

Appellant asserts that the alleged errors considered cumulatively warrant new guilt phase and penalty phase trials. The State disagrees.

“Where multiple errors are found, even if deemed harmless individually, the cumulative effect of such errors may deny to defendant the fair and impartial trial that is the inalienable right of all litigants.” Salazar v. State, 188 So. 3d 799, 818 (Fla. 2016) (internal quotation/citation omitted). “However, where the alleged errors urged for consideration in a cumulative error analysis are individually either procedurally barred or without merit, the claim of cumulative error also necessarily fails.” Id.

As discussed in the analysis of the individual issues above, the alleged errors are meritless. Alternatively, the cumulative effect of any harmless errors did not deprive Appellant of a fair trial. See Gonzalez v. State, 136 So. 3d 1125, 1166 (Fla. 2014) (“The cumulative effect of multiple harmless errors does not amount to fundamental error where the errors share three decisive factors: (1) none of the errors are fundamental; (2) none go to the heart of the State's case; and (3)

the jury would still have heard substantial evidence in support of the defendant's guilt.”).

Reversal is unwarranted.

SUPPLEMENTAL ISSUE
**COMPETENT SUBSTANTIAL EVIDENCE SUPPORTS
APPELLANT’S CONVICTIONS.**

This Court reviews the sufficiency of the evidence for the first-degree murder conviction in every capital case. Craven v. State, 310 So. 3d 891, 907 (Fla. 2020); Fla. R. App. P. 9.142(a)(5). “In conducting this review, [the Court] view[s] ‘the evidence in the light most favorable to the State to determine whether a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.’” Id. (quoting Rodgers v. State, 948 So. 2d 655, 674 (Fla. 2006)).

Appellant was convicted of first-degree murder as charged in the indictment,²⁵ two counts of sexual battery and one count of tampering with evidence. (R. 682-85).

First-degree premeditated murder required the State to prove: (1) the victim is dead; (2) her death was caused by the criminal act of Appellant; and (3) her death was a result of Appellant's premeditated killing. See Fla. Std. Jury Instr. (Crim.) 7.2. “Premeditation is defined

²⁵ The indictment alternatively charged first-degree premeditated murder and first-degree felony murder. (R. 523).

as ‘more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must also exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.’” Bigham v. State, 995 So. 2d 207, 212 (Fla. 2008) (quoting Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997)**Error! Bookmark not defined.**).

First-degree felony murder required the State to prove: (1) the victim is dead; (2) while engaged in the commission of a sexual battery Appellant caused her death; and (3) Appellant was the person who actually killed the victim. See Fla. Std. Jury Instr. (Crim.) 7.3.

Sexual battery (force likely to cause injury) required the State to prove: (1) Appellant committed an act upon the victim in which her anus/vagina was penetrated; (2) Appellant, in the process, used actual physical force likely to cause serious personal injury; (3) the act was done without the victim’s consent; and (4) at the time, the victim was 12 years of age or older. See Fla. Std. Jury Instr. (Crim.) 11.2.

Finally, tampering with evidence required the State to prove: (1) Appellant knew that a criminal investigation by a law enforcement

agency was pending or was about to be instituted; and (2) Appellant concealed any item, with the purpose to impair its availability investigation. See Fla. Std. Jury Instr. (Crim.) 21.8.

At trial, it was undisputed that the victim was dead and that she was over the age of twelve. Appellant told the police that she died in his van during or immediately after a sexual act. He admitted he was in the van at the time she died and was discarded. He confessed to disposing of evidence.

Further, prior to the murder, Appellant conducted an Internet search for pornography depicting the insertion of large objects into the human body. The victim died from massive bleeding caused by the repeated insertion into her vagina and anus of objects whose circumference was too great for her body to withstand. Appellant's DNA was recovered from the victim's anus and from an apparent bite mark on her chin.

Finally, the victim's corpse displayed signs of a struggle, including the bite mark, abrasions to the lower abdomen, scalp, breasts and shoulders, hemorrhaging on her lower lip, and lip lacerations consistent with blunt force to the mouth and lips. There was a ligature curl furrow coursing around the neck, from front to

back and a large amount of hemorrhage in all the strap muscles going down into the deep tissues of the neck.

The record contains competent substantial evidence from which a jury could have convicted Appellant of the crimes alleged, including the first-degree murder of Michelle R. Osborne.

CONCLUSION

Appellee respectfully requests Appellant's convictions and death sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of May, 2024, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Andrew Stanton, Assistant Public Defender, 1320 NW 14th Street, Miami, Florida 33125, **astanton@pdmiami.com**.

/s/ Michael W. Mervine
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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style, and the word count is 20,088 words in compliance with Fla. R. App. P. 9.045.

/s/ Michael W. Mervine
COUNSEL FOR APPELLEE