

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC2023-1077

STEVEN WOLF,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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

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STEVEN WOLF,

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INITIAL BRIEF OF APPELLANT

INTRODUCTION

This is a direct appeal from judgments of conviction and a sentence of death, imposed by the Honorable Mark H. Jones, Judge of the Sixteenth Judicial Circuit in and for Monroe County, Florida. In this brief, the clerk's record on appeal is cited as "R.," the transcript of the proceedings as "T."

STATEMENT OF THE CASE AND FACTS

On November 21, 2018, Nivaldo Fajardo Roque was fishing at Vaca Cut. (T. 882-83). He saw he saw the nude body of a woman. (T. 886). He recognized her as homeless woman he had seen around. (T. 886). He called 911. (T. 887).

Deputy Christopher Aguanno was the first deputy to arrive at Vaca Cut. (T. 844). There is a small, wooded area between the cut and San Pablo Catholic Church, just off U.S. 1. (R. 697). A narrow unpaved path or trail runs along the cut, screened only by a narrow strip of vegetation. (T. 853, 896; R. 697). The area is not exposed, but neither is it secluded. A sense of the location can best be obtained by viewing the CCTV video from the restaurant and marina on the other side of the cut. (Ex. 37).

Aguanno got there a little after 2:00 pm. (T. 843). He found Mr. Roque waiting there. (T. 84, 851). The body was not very far down the little road and a short distance off it, not far into the vegetation. (T. 853, 868; R. 699). Aguanno checked for a pulse. (T. 860). The body was cold to the touch and rigor mortis had set in. (T. 860).

Deputy Joel Slough noticed what appeared to be fresh damage to some buttonwood and mangrove patches along the path. (T. 898).

Later, Lieutenant Charlene Sprinkle noticed certain “car parts” on the ground. (T. 919). She continued:

The parts that were found, we gave the description and photographs of those car parts to 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 –

(T. 919). The court overruled a hearsay objection. (T. 919). Sprinkle continued: “So we were told that we were looking for an older-model conversion van with aftermarket wraparound skirt,” that was damaged. (T. 919).

Lieutenant Sprinkle left Vaca Cut with Captain Phelps. As they were driving, Sprinkle spotted a conversion van in the parking lot of the Winn Dixie and Kmart. (T. 918-20). She saw a man in the driver’s seat and could see damage to the van. (T. 920-21). Other officers arrived, and they took the driver out of the car. (T. 921-22). The driver turned out to be Steven Wolf. (T. 922). He had no weapons, and did not resist. (T. 934). He was eventually taken to the Marathon substation. (T. 924).

In 2018, Matt Pitcher was a narcotics detective in the Monroe County Sheriff’s department. (T. 943). When he heard that Sprinkle

and Phelps may have found a vehicle connected to the crime, he went to the Winn Dixie.

Mr. Wolf was handcuffed in the back of a police car. (T. 950-51). Detective Pitcher went over and told him he was not under arrest. Pitcher testified that Mr. Wolf agreed to speak with him. (T. 951). He was transported to an interview room at the substation. (T. 951). Pitcher secured a waiver of Mr. Wolf's *Miranda*¹ rights. (T. 953-55). He obtained a buccal DNA swab. (T. 956-57).

Detective Digiovanni was in the interview with Mr. Wolf and Detective Pitcher, recording the interrogation on her body-worn camera. (T. 962). The interrogation went on for more than ten hours.² The prosecution introduced a three-hour edited excerpt and published it to the jury. (T. 767, 977-1208; Ex. 28). It is unclear how far into the interrogation the edited portion starts.

The published excerpt began with Pitcher confronting Mr. Wolf with the claim that some of Ms. Osborne's hair^{3,4} had been found in

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² Defense counsel asked Detective Pitcher if the interrogation had taken place over nineteen hours. (T. 1209-10). Pitcher said it wasn't nineteen, "but it was a lot. It was over 10 hours." (T. 1210).

³ Police testified to finding a clump of hair on the ground near the body they believed was consistent with Ms. Osborne's. (T. 1226-33,

his van, and that some blood was found on a cushion in the van. (T. 977).

Mr. Wolf responded that the blood wasn't the victim's, and he had no idea about the hair. (T. 996). Detective Pitcher then directly accused Mr. Wolf of murdering Ms. Osborne. (T. 996). Mr. Wolf denied it, as he would continue to do throughout the interrogation. (T. 996).

During the interrogation, Mr. Wolf invoked his right to counsel:

THE DEFENDANT: Thing of it is, you guys, I probably ought to invoke my right (indiscernible) ask an attorney. I was going to need one apparently. I don't know. I don't have the answers that you need. I don't have any idea how this is happening other than I went down there and I shouldn't have.

(T. 1041). Pitcher did not immediately end the interrogation, but soon thereafter Mr. Wolf repeated his invocation:

[MR. WOLF]: I need a lawyer, you guys.

[DETECTIVE PITCHER]: Okay.

1380; R. 749-53). The medical examiner, however, testified that there was no evidence clumps of hair had been pulled out of Ms. Osborne's head. (T. 1645).

⁴ At this point the police had not yet identified Ms. Osborne and she was referred to as Jane Doe.

[MR. WOLF]: I can't – I need a lawyer, man. I can't answer these questions. I don't know what to say. I don't know what to do. Follow the rules, I guess, and procedures: Never talk to the police and get a lawyer.

[DETECTIVE PITCHER]: All right.

(T. 1043).

After Mr. Wolf apologized for offending the officers by requesting an attorney, Pitcher said:

[DETECTIVE PITCHER]: All right. I wish you the best; all right? You asked for a lawyer, so we're going to leave you alone.

[MR. WOLF]: I don't need a lawyer. I mean, I need a lawyer when I get to court and stuff but I'm –

[DETECTIVE PITCHER]: You're fine right now?

[MR. WOLF]: Yeah, I'm not invoking my right to silence and all that, no ...

(T. 1043-44). Pitcher did not reread *Miranda* warnings or remind Mr. Wolf of his rights.

Later, Mr. Wolf said that he knew the woman's boyfriend killed her. (T. 1123). He said they were having sex in the back of his van. (T. 1123). He picked them up at the Wal-Mart in Florida City. (T. 1124). They wanted to get to the Keys. (T. 1124). Mr. Wolf said he was guilty of covering the murder up, helping to get rid of the body. (T. 1124). Then the man walked away, and he was gone. (T. 1124).

At this point Mr. Wolf told Pitcher that the blankets from his bed were covered in blood, and could be found in the dumpster behind the Winn-Dixie or Kmart. (T. 1125, 1135).

Mr. Wolf described the man with Ms. Osborne as scruffy-looking, with a “little goatee thing.” He was probably at least six feet tall. (T. 1126). While Wolf drove, the two were in back. (T. 1126). He couldn’t see what was happening; he just thought they were having a good time. (T. 1126). Afterward, the man came up to the front seat and said, “She’s dead, bro.” (T. 1126, 1131). Mr. Wolf did not know how the man killed the woman. (T. 1126). He assumed the man had stabbed her because there was blood everywhere. (T. 1127). The man dumped the body at Vaca Cut, while Mr. Wolf remained in the car. (T. 1127). The man then left on foot. Mr. Wolf reversed out of the small path in a panic. (T. 1135).

The man’s name may have been something like Eric or Derek. (T. 1129, 1138). Mr. Wolf discarded bloody clothes the man left behind in the bin at the library. (T. 1128).

Detective Pitcher asked Mr. Wolf to retell the sequence of events.⁵ Mr. Wolf left the Keys sometime after 10:00 pm. (T. 1143-

⁵ Some of the information that is repeated appears to have originally come out during edited portions of the interrogation.

44). He went to Home Depot in Florida City, “did his errand,” and then went to sleep. (T. 1144). He got up sometime around 11:00 the next morning. (T. 1144). He encountered the man and woman at the Walmart. (T. 1144-45). They said they were heading to Key West. (T. 1150). They wanted to go to Fantasy Fest. (T. 1177). The two were having sex in the back of the van during the drive. (T. 1148-49). At some point it started getting rough. (T. 1154).

When the man came to front of van and told Mr. Wolf the woman was dead. (T. 1158). He added, “I’ve got to get rid of the body.” (T. 1158). When they got to Vaca Cut, the man got out of the van and pulled out the body. (T. 1160-61). This may have been at about 3:00 or 3:30. (T. 1161).

Mr. Wolf went to the dumpster near the Winn-Dixie and threw everything out (T. 1172-73). Then he went to McDonalds to wash his hands. (T. 1174). Mr. Wolf said the woman’s clothing was with his blanket, which he discarded at the city marina dumpster. (T. 1194).

Detective Barney Sajdak executed a search warrant on the van. (T. 1244-45). Among the items he found was a piece of finely braided orange rope with what he called a sliding collar, as well as two bottles, a bookbag with white cordage, a conical cylinder, an

orange string, and an iPhone. (T. 1244-1264; R. 826-88). FDLE later extracted data from the iPhone. The web history included visits to two Pornhub sites: Big, Bigger, Biggest in the Butt, and Bigger the Better, Extreme Insertions. (T. 1409-1514; R. 1268-80).

Detective Danielle Malone participated in the search of the dumpster behind the Winn-Dixie. (1387-88). The officers found a blanket and a pillow. (T. 1390-91). Blood saturated the blanket. (T. 1390-91). Malone also searched the City Marina dumpster. (T. 1393). There she found bedding, clothes, string tied into a ball, and blood-stained foam. (T. 1395-1396). In a second dumpster at the City Marina, she found clothing, including two green polos and a sundress. (T. 1397-99; R. 1145-52).

Sgt. Edward Bryant Askins went to the library near the sheriff's office. There he found a rag, a t-shirt, a spool of rope, and bracelet. (T. 1293-99).

Police collected security video from the Florida City Walmart, the City Marina, and Captain Hook's, a restaurant and marina across the Vaca Cut from where the body was found. (T. 1426-28, 1443, 1450-52, 1463, 1471-73). The time stamp on the Captain Hook's video is twenty-five hours off from Eastern Standard Time. (T. 1428).

The video from the Florida City Walmart showed Mr. Wolf arriving at the store at about 11:20 a.m. on November 21, 2018. (Ex. 39, 00:06).⁶ He entered the store at 11:24 and went into the bathroom. (Ex. 39, 02:48-03:34). He exited at 11:29 and walked directly out of the store and back into the parking lot. (Ex. 39, 03:38-4:43).

The video from Captain Hook's shows that the van pulled off the road at Vaca Cut at 1:19 p.m., and departed at 1:25. (Ex. 37, 2:19:00, 2:25:30).⁷

The City Marina video shows Mr. Wolf's van at that location at around 5:45 p.m. (E. 38)

The Medical Examiner, Dr. Steckbauer was on vacation when the body was discovered, and he did not return for five days. (T. 1535-36). His investigator went to Vaca Cut and was there to examine the body when it was moved. (T. 1642). Dr. Steckbauer reviewed photographs and his investigator's information. Based on

⁶ Exhibit 39 is an edited video combining views from several cameras and overlapping times. References to it are to the playback time of the edited video.

⁷ Exhibit 37 is unedited. References to it are to the timecodes on the video, which are off by twenty-five hours. (T. 1428). Thus timecode 2:19:00, November 22 shows what happened at 1:19 on November 21.

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.” (T. 1643). The body was moved sometime around 5:00-6:00 p.m. (T. 1268; 1278-80).

The doctor’s initial examination revealed bruises on Ms. Osborne’s ankles, thigh, and wrists. (T. 1545-48, 1648). The bruises on the ankles and wrists were not caused by a ligature. (T. 1649). There were abrasions and bruising to the chin which Dr. Steckbauer thought might be consistent with bite marks. (T. 1560, 1580). There were lacerations to the lips. (T. 1550, 1555). There were no defensive wounds. (T. 1548).

Ms. Osborne was strangled with a ligature. (T. 1560). There was petechial hemorrhaging. (T. 1551). Police brought Steckbauer a bungee cord with a “slip apparatus in the middle.” (T. 1585). This would have been consistent with the ligature marks he found on the neck. (T. 1585). Because of pressure on the carotid and vertebral arteries, Ms. Osborne may have lost consciousness within forty-five seconds of the time the ligature was applied to her throat. (T. 1625, 1648).

The vagina and the anus each had a large laceration as well as some smaller ones. (T. 1570-72). The laceration to the vagina was

11 centimeters and the anal laceration was 6.4 centimeters. (T. 1573). In both cases the wounds went into the abdominal cavity. (T. 1570, 1572). The wounds could not have been caused by a penis; some other object must have been used. (T. 1573). Blood loss from these injuries would have killed Ms. Osborne “within a few minutes.” (T. 1575). Death could have come in four to five minutes, or perhaps as much as twenty minutes. (T. 1575).

These injuries would have caused severe pain, but Dr. Steckbauer could not testify that Ms. Osborne was conscious at the time they were inflicted. Asked whether Ms. Osborne was “fully able to experience what had taken place to her,” he replied: “I wouldn’t testify as to whether or not she was conscious or unconscious at the time.” (T. 1578). He affirmed this on cross-examination:

Q. [Y]ou can’t say to a degree of medical certainty that she was conscious at the time.

A. That’s correct.

(T. 1650). On redirect the doctor said, “I would say she was conscious for some part of the experience.” (T. 1676).⁸ He did not

⁸ As discussed below, Dr. Steckbauer gave testimony more favorable to the State during a voir dire examination outside the presence of the jury. There he said that it would be his professional opinion that Ms. Osborne was conscious for some part of this because the level of pain would rouse someone who was unconscious. (T. 1666).

say what part of the “experience” he was referring to, if it included the sexual batteries, or how long that consciousness might have lasted. In a voir-dire examination never put in evidence before the jury, Dr. Steckbauer said it was professional opinion that Ms. Osborne was conscious for some part of this because the level of pain would rouse someone who was unconscious. (T. 1666).

Ms. Osborne had a blood alcohol content above the legal limit and tested positive for cocaine. (T. 1659-60). These substances could cause a person to bleed more quickly. (T. 1660). They would not have rendered her unconscious. (T. 1661).

Kayleigh Brownell, an FDLE laboratory analyst, testified to the results of DNA testing. (T. 1682-56). Red-brown spots on a tank top tested positive for a mixture of DNA from Ms. Osborne and Mr. Wolf. (T. 1723-38). Swabs from the driver’s side door of the van and rear seat also showed a mixture of Ms. Osborne and Mr. Wolf’s blood. Ms. Brownell tested a number of different sites on the plastic bottle that appeared to have blood on it. The cap and neck had a mixture of Ms. Osborne and Mr. Wolf’s DNA. (T. 1744-45). The side of the bottle had a mixture that matched Ms. Osborne. (T. 1746-47). Brownell was unable to interpret the DNA for the other contributor or contributors. (T. 1747). The bottom of the bottle yielded a

mixture of three people: Ms. Osborne, Mr. Wolf, and at least one unknown individual. (T. 1748-49). Mr. Wolf's fingerprints were found on the bottle. (T. 1803).

The top of the "conical cylinder" from the van had a mixture of three people. (T. 1753). Ms. Osborne was excluded from the mixture. Mr. Wolf's DNA was present. (T. 1753). A swab from the bottom of the cylinder showed DNA from Mr. Wolf only. (T. 1753-54). Mr. Wolf was included in tests on Ms. Osborne's fingernail trimmings and a swab of her chin. (T. 1705). FDLE analyst Tamara Dizdarevic performed Y-STR testing on anal swabs and Mr. Wolf's buccal swabs. (T. 1828). One in every 9,750 men, including Mr. Wolf, would match the DNA on the anal swab. (T. 1832).

The State charged Mr. Wolf with first-degree murder, two counts of sexual battery, and one count of tampering with physical evidence. (T. 523-525). The indictment states that the crimes all took place in Monroe County. (T. 523). The State filed a notice of intent to seek the death penalty the same day. (T. 144). The defense filed a motion to precluded the death penalty for failure to charge the aggravating factors in the indictment. (R. 510-14).

The State offered Mr. Wolf a life sentence in exchange for a guilty plea. (T. 1613). Mr. Wolf rejected the offer. (T. 1613-17; 1655-61).

During jury selection the judge explained that in order to serve on the jury they must be “open to a recommendation of death” and “willing to recommend a life sentence.” (T. 264-47). “You have to be open to both, always remembering that, ultimately, the jurors don’t sentence. It’s the judge who does that.” (T. 247). He asked prospective juror Kinne for her thoughts on this. (T. 248). She indicated that opposed the death penalty, but that didn’t mean she couldn’t impose it, and she was open to both. (T. 249). She, “would listen to both sides, but I would be extremely careful about recommending death. (T. 249). Her main reason was that many executions “ha[d] not gone well.” (T. 249).

In individual voir dire Ms. Kinne reiterated her concerns, pointing to recent botched executions and people who had been sentenced to death even though they shouldn’t have been. (T. 259). There have been some cases where she thought the death penalty made sense. (T. 263). She could consider the death penalty as an appropriate penalty. (T. 263).

The State moved to strike Juror Kinne for cause. (T. 267). The judge granted the strike over defense objection. (T. 268-69). The defense moved to strike other jurors for cause, including jurors Young, Whalen, and Leto. Juror Young stated: “And you know, if you did it, that’s it.” (T. 630). The court overruled all the cause challenges. (T. 725-26; 733-34; 736-37).

When the State rested, the defense moved for a judgment of acquittal. Among other things, defense counsel argued that the State had failed to prove venue. (T. 1844-45). The court denied the motion. (T. 1860).

The defense rested without presenting a case. Counsel again argued that the State had failed to prove venue. (T. 1934). The court denied this motion as well. (T. 1939-40).

After closing arguments from counsel and the court’s instructions, the jury returned a verdict of guilty on all counts. (T. 2125-2127).

Mr. Wolf instructed his lawyers to not present a case in mitigation, at least as it related to his family:

My direction and my request is that they don’t involve my children, my immediate family. They have their lives. They’re doing well. I don’t want those people, my family, involved in all this. There’s enough family impact going

on already that I'm aware of and I don't want to involve mine if I can help that.

I don't think that I would preclude the Court from hearing about my friends and my vocational history and my interaction with the church and other people, mitigating things of that nature. I'm not forbidding them from presenting that, but to what purpose.

(T. 2116). When defense counsel questioned the claim that Mr. Wolf's waiver had been limited to his family, Mr. Wolf explained:

If I may, your Honor, I was alluding to what he had just told the Court, that I don't have a problem with that information going out there, whether they – you know, I don't want them to have to come to court or write a statement or in any way impact their lives. I don't want mitigation of that nature.

The fact that that mitigation was potentially possible, if that helps me or not, I don't know. But I forbid them from impacting anyone in my life. This is my problem. This is about me.

(T. 2167-68).

Defense counsel protested that Mr. Wolf had since 2018 insisted that he did not want them to involve anyone from his life or present any other evidence. (T. 2168). Mr. Wolf agreed this was accurate. (T. 2168-69).

In its second-phase opening argument, the prosecution reviewed the steps leading up to the penalty verdict, describing the final decision:

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.

(T. 2186).

The State introduced an Idaho record of conviction showing that Mr. Wolf had pleaded guilty to second-degree murder and been sentence to thirty years in prison. (T. 1297-98). It also introduced a copy of the plea colloquy and his codefendant's testimony at a preliminary hearing. (T. 1346-54, 1300-44). According to these documents, Darren McLenna, Steven Wolf, and two other boys smothered Enrico Flory and stole his money. (R. 1311-18, 1347-48).

Defense counsel requested a special instruction on mercy. (T. 2257; R. 595). The court denied the request. (T. 2262).

In its closing, the prosecution once again suggested Mr. Wolf should receive no mercy because he had shown none: "He had it and threw it away **and now he asks you for mercy when he was unwilling to give it.** (T. 2289-90).

The prosecutor also criticized Mr. Wolf for failing to show remorse and take responsibility for the crime during the

interrogation: “But all of it was designed to avoid responsibility and accountability, to avoid going to prison.” (T. 2284).

When arguing in favor of the EHAC aggravator, the State relied on facts not in evidence, claiming that Ms. Osborne *did* live for 20 minutes after her injuries, and that she would not have bled had she been unconscious. (T. 2280).

Defense counsel argued that the State had not proven that Ms. Osborne was conscious and therefore it had not proven EHAC. (T. 2297). He pointed out that Mr. Wolf had been only fifteen at the time of Idaho murder, and that he went to prison as a boy and stayed there for thirty years. (T. 2298-99). Counsel pointed out that the jury could find mitigation anywhere, including the State’s case, and defended Mr. Wolf’s faith. (T. 2299-2300). Primarily, he relied on a plea for mercy. (T. 2300-02).

The jury returned a verdict for death. (T. 2327-33; R. 693--95). It found all three aggravating factors and that they were sufficient to merit death. (T. 693-94). One or more jurors found one or more mitigating circumstances. (T. 694). The jury found that the aggravating factors outweighed the mitigating circumstances, and that Mr. Wolf should be sentenced to death. (R. 694-95).

The defense filed a motion for new trial arguing the verdict was contrary to the evidence, there was insufficient evidence to support an instruction on EHAC, the court erred in failing to give the requested “mercy instruction,” the court erred in permitting the State to use an offense committed while Mr. Wolf was a juvenile to establish the prior violent felony aggravator, the State improperly denigrated the defense of mercy, and argued that Mr. Wolf did not show Ms. Osborne mercy. (R. 1356-57). At the hearing on the motion the defense further renewed the argument that the State had failed to prove venue. (T. 1700).

The parties filed sentencing memoranda. (R. 1358-64; 1373-99). As mitigation established at trial, the defense argued: 1) Mr. Wolf’s age during the time he spent in prison; 2) Mr. Wolf was a religious man; and 3) Mercy. (R. 1382-82).

It also suggested: 4) Mr. Wolf was raised in a home used to run a prostitution ring; and 5) Mr. Wolf is a caring father. Counsel attached two articles from the South Idaho Press and Associated Press covering the arrest and conviction of Fred Wolf for running a brothel out of his home. (R. 1398). As to being a caring father, Mr. Wolf’s refusal to present mitigation itself established this circumstance. (R. 1384). Mr. Wolf preferred to spare his children

the trauma and guilt they might suffer rather than use their testimony to save his own life. (T. 1384).

After conducting a *Spencer*⁹ hearing,¹⁰ the judge issued his sentencing order. (R. 1405-12). The court found that the State had established the following aggravating factors: 1) The capital felony was committed while the defendant was engaged in a sexual battery, giving it great weight; 2) the capital felony was especially heinous, atrocious, or cruel (enormous weight); 3) the Defendant was previously convicted of a felony involving the use of violence to the person (great weight). (R. 1406-08). In finding the EHAC aggravator, the court relied on Dr. Steckbauer's voir dire statement 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." (R. 1407).

As to mitigation, the court found: 1) Mr. Wolf entered prison at the age of eighteen and served a sentence of thirty years (moderate weight); 2) Mr. Wolf is a religious man (slight weight); 3) Mercy (moderate weight); and 4) Mr. Wolf lived with his father while the

⁹ *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

¹⁰ R. 1695-1767.

father ran a brothel out of the home (slight weight). (R. 1409-11); 5) Mr. Wolf is a caring father (slight weight); and Mr. Wolf's demeanor and behavior in court (slight weight).

The court sentenced Mr. Wolf to death for first degree murder. (R. 1411; 1423). It sentenced him to life imprisonment on each count of sexual battery, and five years for tampering with evidence. (T. 1411-12; 1424-31). The court also entered an order finding Mr. Wolf to be a sexual predator. (R. 1419).

This appeal follows.

SUMMARY OF THE ARGUMENT

I. The State failed to prove venue. The indictment alleges that the crimes took place in Monroe County and Monroe County alone. Security video introduced by the State proves that Mr. Wolf was in Miami-Dade County at 11:29 a.m. The medical examiner's testimony established that Ms. Osborne was dead well before that time. The State introduced no evidence at all to show that the murder or sexual batteries occurred anywhere other than Miami-Dade.

II. The court erred in excusing Juror Kinne for cause. Ms. Kinne opposed the death penalty based on concerns about reliability and cost. But she did not indicate that she would be unable to serve as a juror and render a death verdict in an appropriate case.

III. The trial court erred in denying cause challenges to Jurors Young, Whalen, and Leto. Ms. Leto would require the defense to prove mitigation to consider a life sentence, Mr. Whalen would only consider life with extreme mitigation. And Mr. Young said: **“And you know, if you did it, that’s it.”**

IV. The trial court permitted the defense to introduce hearsay to establish a connection between Mr. Wolf's van and the crime scene. Lieutenant Sprinkle testified that she showed a trooper and a

detective the debris found at Vaca Cut, and they that told her she was looking for an “older-model conversion van with an aftermarket wraparound skirt.”

V. The prosecution relied on improper arguments to secure the death sentence. The prosecutor suggested the jury should show Mr. Wolf the same mercy he showed Mr. Osborne, an argument this Court has repeatedly condemned. He argued Mr. Wolf’s failure to take responsibility for his crimes during the interrogation as aggravation. And he relied on facts not in evidence to prove the Especially Heinous, Atrocious, or Cruel aggravating factor.

VI. The court should have granted Mr. Wolf the Mercy Instruction he requested. While this Court has found that the standard instruction is ordinarily sufficient, the prosecution’s “same mercy” argument undermined the standard instruction.

VII. The State did not prove the Especially Heinous, Atrocious, and Cruel aggravating factor. The medical examiner stated he “wouldn’t testify as to whether or not [Ms. Osborne] was conscious or unconscious at the time,” and that he “couldn’t say to a degree of medical certainty that she was conscious at the time.”

VIII. The trial court relied on facts not in evidence to find that the killing was Especially Heinous, Atrocious, or Cruel. It cited a

statement from the medical examiner made during a voir dire examination that was never placed in evidence before the jury.

IX. The State failed to allege the elements of capital murder in the indictment. Mr. Wolf had the right to be tried by indictment in a capital case. A “capital case” is one where the charge is actually eligible for the death penalty. First degree murder is not “eligible” for the death penalty unless aggravating factors are proven. Mr. Wolf should not have faced the death penalty where the grand jury had not returned a bill on all the elements of capital murder.

X. Each of the errors raised on appeal are harmful. Considered singly or together they require reversal.

ARGUMENT

I. THE STATE FAILED TO PROVE VENUE, AND THE TRIAL COURT ERRED IN DENYING MR. WOLF'S MOTION FOR JUDGMENT OF ACQUITTAL.

The state violated Mr. Wolf's right to be tried in the county where the alleged crimes occurred. The Florida Constitution declares:

In all criminal prosecutions the accused shall ... have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place.

Art. I, § 16(a), Fla. Const; *see also* § 910.03, Fla. Stat. "Venue is a necessary part of the indictment, and must be proven as laid."

Rimes v. State, 103 So. 550, 551 (Fla. 1931). Where the state fails to establish that the crime occurred in the venue alleged in the indictment, the conviction must be reversed. *See McClellion v. State*, 858 So. 2d 379 (Fla. 4th DCA 2003). The State failed to prove that the charged crimes occurred in Monroe County, and the trial court erred in denying Mr. Wolf's motions for judgment of acquittal.¹¹

¹¹ The Court reviews the denial of a motion for judgment of acquittal *de novo*. *See Kopsho v. State*, 84 So.3d 204 (Fla. 2012).

The indictment charges that Mr. Wolf committed the offenses of murder and sexual battery in Monroe County. (R. 523-25). The state did not invoke the exception permitting it to “charge venue in two or more counties conjunctively.” Had it done so, Mr. Wolf would have had the right to choose the county in which he was to be tried. Instead, the indictment alleges that the crimes were committed in Monroe County and Monroe County only.

The State’s own proof refutes this. The Florida City Walmart video shows the van arriving at 11:20 a.m. on November 21, 2018. (Ex. 39, 00:06).¹²¹³ Mr. Wolf entered the store at 11:24 and went into the bathroom. (Ex. 39, 02:48-03:34). He exited at 11:29 and walked directly out of the store and back into the parking lot. (Ex. 39, 03:38-4:43). The video from Captain Hook’s shows that the van pulled off the road at Vaca Cut at 1:19 p.m., and departed at 1:25. (Ex. 37, 2:19:00, 2:25:30).¹⁴ Detective Alvarez testified that the drive

¹² Exhibit 39 is an edited video combining views from several cameras and overlapping times. References to it are to the playback time of the edited video.

¹³ Florida City is in Miami-Dade County.

¹⁴ Exhibit 37 is unedited. References to it are to the timecodes on the video, which are off by twenty-five hours. (T. 1428). Thus timecode 2:19:00, November 22 shows what happened at 1:19 on November 21.

between Florida City and Marathon would take between ninety minutes and two hours. (R. 1480). 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.” (T. 1643). The body was moved sometime around 5:00-6:00 p.m. (T. 1268; 1278-80). The prosecution itself agreed that Ms. Osborne was dead well before Mr. Wolf left Miami-Dade County at 11:30. (T. 1858).

At the close of the State’s evidence, the defense moved for a judgment of acquittal as to venue. (T. 1844). The State argued that because the crimes must have taken hours before Mr. Wolf went into the Florida City Walmart, there was “ample time” for the murder to have been committed in Monroe County. (T. 1849). The prosecution also suggested that venue was established by the stipulation that Ms. Osborne’s body was found in Marathon, Monroe County. (T. 1852-53). It argued that there was “no evidence that it happened elsewhere.” (T. 1853). The State also relied on *Monroe v. State*, 14 So. 3d 1205 (Fla. 4th DCA 2009), which it claimed was “directly on point.” (T. 1853).

The trial court denied the motion, stating that the stipulation, “makes it abundantly clear.” (T. 1860). The judge added: “Monroe

County is where the body was found and the events occurred, at least all the investigative thing and the like.” (T. 1860). He also concluded that “this *Monroe* case ... it is right on point.” (T. 1860). After resting, the defense again moved for judgment of acquittal on venue. (T. 1938). The court denied the motion, explaining:

I’m quite satisfied that this Monroe case that was cited, a copy of which was provided by the State, and that I gave the citation to earlier, *Monroe v. State*, 14 [So. 3d] 1005, Fourth DCA, 2020, I do think that’s right on point and I do think that it supports venue and jurisdiction of venue here in Sixteenth Judicial Circuit, in and for Monroe County, Florida, and jurisdiction lies as well.

(T. 1940).

The trial court was wrong. First, the fact that Ms. Osborne’s body was stipulated to have been found in Monroe County does not establish that she was murdered there, particularly in light of the evidence that the van and her body were in Florida City before being moved to Vaca Cut. The fact that the body was found in Monroe County does not establish that “the acts constituting the offense[s]” of murder and sexual battery occurred there. See *Crittendon v. State*, 338 So. 2d 1088 (Fla. 1st DCA 1976); § 910.05, Fla. Stat.; *c.f. Monroe* at 1208.

Second, the fact that there may have been “ample time” to commit the crimes in Monroe County, leave, and return is not proof

that the offenses took place in Monroe and not Miami-Dade. At best, this is speculation, but “proof of venue ‘cannot be left to guesswork on the part of the jury.’” *Pennick v. State*, 453 So. 2d 542 (Fla. 3d DCA 1984) (quoting *Powell v. State*, 181 So. 901, 901 (Fla. 1938)).

Third, *Monroe v. State* does not help the State. In that case, the defense did not “raise venue either during trial or after the trial. He did not raise the issue in his motion for judgment of acquittal. He filed no motion for a new trial based on the failure to prove venue as charged. He did nothing in the trial court to alert the Judge or the State that he had any issue regarding venue.” *Id.* at 1208. The court found that Monroe had waived the issue and could not establish fundamental error. *Id.* at 1210. In this case, Mr. Wolf *did* raise venue in both motions for judgment of acquittal, as well as the motion for new trial. (T. 1844, 1938; R. 1356-37). This was sufficient to preserve the issue for appeal. *See Berry v. State*, 306 So. 3d 1256, 1259 (Fla. 2d DCA 2020); *McClellion* at 382.

To the extent that *Monroe* addressed the merits, it suggested that venue in Broward County had been proven by the defendant’s confession that he committed the crime in Broward County. *Id.*,

1207-08. Here the state introduced no evidence establishing where the offenses took place.

II. THE TRIAL COURT ERRED IN STIKING JUROR KINNE BASED ON HER RESERVATIONS ABOUT THE DEATH PENALTY.

A court may not exclude a juror simply because she favors life over death. *See Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968); *Farina v. State*, 680 So. 2d 392 (Fla. 1996); *see also Ault v. State*, 866 So. 2d 674, 684 (Fla. 2003) (“[P]rospective jurors may not be excused for cause simply because they voice general objections to the death penalty.”). The only question for the trial judge is whether the juror can “conscientiously apply the law and find the facts.” *Wainwright v. Witt*, 469 U.S. 412, 423 (1985). The exclusion of Juror Kinne denied Steven Wolf his right to trial by an impartial jury of his peers, in violation of the Sixth, Eighth, and Fourteenth Amendments and Article I, Sections 9, 16, 17, and 22, and the Court must reverse for a new sentencing trial. *See Farina* at 397 n.2.¹⁵

On the first day of jury selection, the trial court opened voir dire on death-penalty issues with an extemporaneous discussion of

¹⁵ The standard for disqualification is a question of law and therefore subject to de novo review. *State v. Glatzmayer*, 789 So. 2d 297 (Fla. 2001). The Court otherwise reviews the judge’s decision for abuse of discretion. *See Farina*, 680 So. 2d at 398.

the process in capital cases. (T. 242-47). Describing what it means to be a qualified juror, he explained:

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. You have to be open to both, always remembering that, ultimately, the jurors don't sentence. It's the judge who does that.

(T. 246-47).

Asked for her thoughts on this, Juror Kinne indicated she opposed the death penalty, but that didn't mean she couldn't impose it, and she was open to both:

[Juror Kinne]: I don't believe in the death penalty. **Never say never. 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 there's just a real problem institutionally with it.

(T. 249). The judge followed up on this:

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?

[Juror 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.

[Juror Kinne]: Correct.

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

[Juror Kinne]: Yes.

THE COURT: I appreciate that fact, and I thank you for sharing them with us.

(T. 249).

The prosecution suggested Ms. Kinne should be excused for cause based on her comment, “never say never.” (T. 254). The prosecution requested an individual sequestered examination of the juror because “I think the difference with her is that she’s on the fence.” (T. 256).

The prosecutor began that examination by asking her if she had said she did not believe in the death penalty.

[STATE]: ... Did you make that statement?

[JUROR KINNE]: **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.

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

[JUROR 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.

[STATE]: And I think the judge alluded to that it's somewhat unfair in that you had no idea when you were coming down here today that you were dealing with this situation. So it doesn't give you a lot of opportunity to reflect on a lot of the questions that you're being asked.

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.

[JUROR 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."**

[STATE]: Okay. Only you can answer these questions for us. And we are so dependent on your honesty and straightforwardness in answering our questions. 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 –

[JUROR 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.

[STATE]: You mean kind of financial implications?

[JUROR KINNE]: Well, both, yeah. I'm in finance so –

[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?

[JUROR KINNE]: **I'm not going 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.**

(T. 258-61).

Defense counsel asked Ms. Kinne to consider cases where a defendant is guilty of first-degree murder: "Not cases where there was an intentional murder, not an accident or mistake, and the defendant was not insane, or intellectually disabled." (T. 261-62). Juror Kinne answered, "I still think a life sentence is an option." Asked what evidence she would need to hear, Kinne replied:

[JUROR 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.

[DEFENSE]: Now, do you understand, in the State of Florida, you just have to consider the death penalty. **Can you consider the death penalty as an appropriate penalty?**

[JUROR KINNE]: **Yes.**

[DEFENSE]: It's never required. The death penalty is never required, as Judge Jones alluded. It's an individual moral decision whether or not to give death. And you're okay with that?

[JUROR KINNE]: Yes.

[DEFENSE]: And you get to decide if you were on the jury what's mitigating. Can you do that?

[JUROR KINNE]: Mm-hmm.

[DEFENSE]: And mitigation.

[STATE]: Was that a yes? I'm sorry.

[JUROR KINNE]: Yes. I'm sorry.

(T. 263).

Later, the defense directly asked if Ms. Kinne could consider the death penalty:

[DEFENSE]: And, again, just so we're clear, you could consider the death penalty, and there have been cases where you're like – I don't want to put words in your mouth.

[JUROR KINNE]: Right, because cases that you hear about on TV or, you know, podcasts so –

(T. 265).

The judge followed up about Ms. Kinne's podcast-listening:

THE COURT: ... You mentioned you listen to podcasts, ma'am. Is this podcasts that involve murder cases, or criminal justice, or the death penalty?

[JUROR KINNE]: Everything. It's across the board, music, art and entertainment, sometimes book reviews.

THE COURT: But it did come up in the context of counsel's question.

[JUROR KINNE]:¹⁶ Just recently, I heard a podcast with WLRN, exposé on some cases in Mississippi.¹⁷

THE COURT: So murder or death penalty cases?

[JUROR KINNE]: Death penalty cases, yeah.

(T. 265-66).

The State moved to excuse Juror Kinne for cause, “based on the statements she’s made, which I think established a reluctance on her part to consider it equally with a recommendation of life as well.” (T. 267). Defense counsel objected, quoting *Witherspoon*, and pointed out that Ms. Kinne had said there were some cases where it would be appropriate. (T. 267-68). The judge granted the State’s cause challenge:

I appreciate your argument, but she was just really in distress, in my view. And you – yes, she said she could consider it after she talked about botched executions,

¹⁶ The transcript identifies the speaker as prosecutor Castillo. From context, it is clear that it is Juror Kinne answering a question about her own experiences.

¹⁷ Jury selection took place in January 2023. The year 2022 saw a large number of botched executions. See, e.g., Juliana Kim, *More Than A Third Of Executions In 2022 Were ‘Botched,’ A Report Finds*, NPR (Dec. 21, 2022), <https://www.npr.org/2022/12/21/1144188268/executions-2022-botched-lethal-injection> (last visited Feb. 13, 2024).

after she talked about her general opposition to it, after she told us her reluctance to do it. I guess she didn't mouth the phrase, "I can consider it," but I don't believe that that is a meaningful willingness to genuinely consider both options. I think she had an absolute prejudice against the death penalty, which is fine, but I don't think it withstands a cause challenge.

(T. 268-69).

The record does not demonstrate an "absolute prejudice against the death penalty." Ms. Kinne's concerns about the death penalty were not moral or religious. She explained: "I think there's just a real problem institutionally with it." (T. 249). She explained that her problems with the death stemmed from the expense and stories of botched executions in other states. (T. 249, 259-60, 65). The judge told jurors that to serve they had to be "open to making a recommendation for death," and "open to both." (T. 247). Ms. Kinne told the judge she was "open." (T. 249). Though she didn't "believe in the death penalty," she immediately added, "Never say never." (T. 249). She repeated this statement when the prosecution asked her about not believing in the death penalty. (T. 258).

When the prosecutor asked her if her opinions would impair her ability to recommend the death penalty, Ms. Kinne declined to say yes: **"I'm not going 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.” (T. 261).

Ms. Kinne did not just say she would “consider” the death penalty. She answered “yes” to the question: “Can you consider the death penalty as an appropriate penalty?” (T. 263). When defense counsel gave the example of a planned, calculated murder of an innocent without justification, she said, “I still think a life sentence is still an *option*. (T. 261-62). Ms. Kinne said there *were* cases where the death penalty “made sense,” though she still did not like it.

Although she expressed concerns about some aspects of how the death penalty was administered, Ms. Kinne did not say they would prevent her from doing her duty as a juror as explained by the court. A juror’s duty is to consider the evidence in both aggravation and mitigation, weigh that evidence according to the court’s instructions, and render a recommendation based on that evidence. “The relevant inquiry is whether a juror can perform his or her duties in accordance with the court’s instructions and the juror’s oath.” *Farina* at 396. Nothing requires that a juror approach these questions with perfect neutrality toward the death penalty. Even if a juror might personally lean in favor of one penalty over

another does not mean that her views “prevent or substantially impair the performance of [her] duties ... in accordance with [her] oath.” *Wainright v. Witt*, 469 U.S. 412, 424 (1985); see *Farina*; *Chandler v. State*, 442 So. 2d 171, 173-75 (Fla. 1984) (fact that a juror “might go toward life” or “lean towards life” insufficient basis for strike)¹⁸

If Ms. Kinne’s limited concerns made her “anti” death penalty, this Court has held that even more *pro*-death-penalty jurors should be allowed to serve. In *Bryant v. State*, 656 So. 2d 426, 428 (Fla. 1995), the trial court denied cause challenges against jurors who “expressed ... a predisposition to impose the death penalty if the defendant was convicted of first-degree murder.” The Court found no error because the jurors “stated either that 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.”¹⁹

¹⁸ *Chandler* predated the decision in *Witt*. This Court nevertheless relied on *Chandler* in deciding *Farina*. *Id.* at 398.

¹⁹ See also *Ramsay v. Bowersox*, 149 F.3d 749 (8th Cir. 1998) (jurors who stated they would lean towards death were qualified where they stated they could vote for either life or death).

In *Dufour v. State*, 905 So. 2d 42, 54 (Fla. 2005), two jurors “voiced a predisposition to impose death.” The Court held that both could serve because they could consider whether the aggravating factors outweighed the mitigating circumstances.” *Id.* In *Penn v. State*, 574 So. 2d 1079, 1081 (Fla. 1991), a prospective juror “indicated that he strongly favored the death penalty.” Nonetheless, this Court approved the denial of a cause challenge where the juror said he would follow the law as instructed. *Id.*

In *Deviney v. State*, 322 So. 3d 563 (Fla. 2021), juror Henderson said he would automatically impose the death penalty in the case of premeditated murder. *Deviney*, 322 So. 3d at 580 (Lawson, J., dissenting). In subsequent questioning, he said he could “follow the law” and the death penalty was not automatic, and he could listen to and weigh the aggravators and mitigators. *Id.* But he later repeated that “if thought had been involved prior to the actual act, then I could not vote for a life sentence, it would be death.” *Id.* at 581. A plurality of the Court held that Henderson was qualified to serve on a capital jury. *Id.* at 571.

If there was no reasonable doubt about the jurors’ ability to serve in *Bryant*, *Penn*, *Dufour*, and *Deviney*, there can be none about Ms. Kinne Treating pro-death-penalty and anti-death-penalty

jurors differently is the opposite of what *Witherspoon* and *Wainright* require. This cause must be remanded for a new trial.

III. THE TRIAL COURT ERRED IN DENYING CAUSE CHALLENGES TO JURORS YOUNG, WHALEN, AND LETO.

“[J]urors should if possible be not only impartial, but beyond even the suspicion of partiality.” *Matarranz v. State*, 133 So. 3d 473, 485 (Fla. 2013) (quoting *O’Connor v. State*, 9 Fla. 215, 222 (Fla. 1860)). “[I]f there is basis for any reasonable doubt as to any juror’s possessing that state of mind which will enable him to render an impartial verdict,” she must be excused for cause. *Singer v. State*, 109 So. 2d 7, 23-24 (Fla. 1958); accord *Hamilton v. State*, 547 So. 2d 630 (Fla. 1989); *Hill v. State*, 477 So. 2d 553 (Fla. 1985).²⁰ Here the court erroneously denied challenges to jurors Young, Whalen, and Leto even though Whalen and Leto would require mitigation and Young said: **“And you know, if you did it, that’s it.”** (T. 630).

Juror Young

During its voir dire examination on the death penalty, the Court explained that some people feel, “I would not be able to vote for a death sentence no matter what,” while “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

²⁰ The Court reviews the denial of a cause strike for abuse of discretion. See *Singleton v. State*, 783 So. 2d 970, 973 (Fla. 2001).

murder, I can only give him death. I couldn't even consider a life sentence." (T. 246). The judge asked:

And is there anyone here for whatever reason who feels that they would not be able to participate in this sort of proceeding as I have described it should we get to a penalty phase for whatever reason?

Is there anybody who feels like, "I just couldn't do it one way or the other"? Raise your right hand, and I'll be happy to speak to you. This is the time.

No? Everybody -- so I don't see any hands.

So what that tells me is that all you folks, which is great, feel that, "Judge, I understand what you've explained here, and I can do it one way or the other. I can follow the law and evidence.

I don't have any predispositions for one or the other. That's what I understand your position to be because nobody's indicating they feel unable or unwilling to participate in that process. So, apparently, that's the case. Great.

(T. 248). Jury Young did not respond.

When asked individually for his views, however, Mr. Young volunteered a belief that death was the only appropriate penalty:

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

[JUROR 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. 630).

The judge immediately interceded, accusing Mr. Young of changing his answers:

THE COURT: 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 had 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 that was a possibility, depending upon the circumstances.

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

PROSPECTIVE JUROR: 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.

(T. 631).

The judge did not erase any reasonable doubt about Juror Young's ability to serve. Mr. Young's silence in the face of the judge's original question did not establish that he did not believe "if you did it that's it." Silence in response to a question to the panel as a whole does not overcome a reasonable doubt. *See Juede v. State*, 837 So. 2d 1114, 1116 (Fla. 4th DCA 2003). Mr. Young's swift retreat when confronted by the judge did not better the situation. Jurors respond differently to questions from judges as opposed to questions from attorneys attempting to probe their beliefs, and they

may try to please the judge. See *Mendez v. State*, 898 So. 2d 1141, 1143 (Fla. 5th DCA 2005); *Campbell v. State*, 812 So. 2d 540, 543 (Fla. 4th DCA 2002); *Price v. State*, 538 So. 2d 486, 489 (Fla. 3d DCA 1989).

Ultimately, the judge successfully embarrassed Mr. Young into retracting his answer. This was not right, and it was not enough. See *Matarranz*, 133 So. 3d 489-90 (“Furthermore, we have concerns with regard to any measure of impartiality that roots itself in juror ‘embarrassment.’”).

Juror Whalen

Juror Whalen said he could consider a life recommendation, but only with the most extreme mitigation. (T. 649-50). During defense voir dire, he said:

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

PROSPECTIVE JUROR: 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.

(T. 649-50).

The fact that a juror can consider a penalty phase verdict in the most extreme cases does not make him qualified. For example, in *Miller v. State*, 42 So. 3d 204, 214 (Fla. 2010), the fact that a juror could envision the death penalty in the case of mass murder or genocide did not prevent him from being excused for cause. See also *Randolph v. State*, 562 So. 2d 331 (Fla. 1990). The same must be true for jurors who could recommend life only when confronted with the most extreme mitigation: Someone who lived a normal life and “just lost their minds” due to mental illness or failing to take their medications.

Juror Leto

Juror Leto required the defense to prove mitigation before she could vote for life. (T. 654-55). She was not opposed to voting for death “if all the factors are there and the verdict is guilty.” (T. 654). She was open to a life sentence “if there’s mitigating circumstances.” (T. 654). “[I]f there were other things that kind of soften the sentence to just life, I’d be open to that as well.” (T. 655). There is no burden for a defendant prove mitigation in order be sentenced to life. Ms. Leto placed the defense in a position where the death penalty would have been automatic unless they

established mitigating circumstance – something they knew they could not do since they would presenting no mitigation at all.

Defense counsel moved to strike all three jurors for cause. (T. 725-26; 733-34; 736-37). The defense exhausted its peremptory strikes and requested three additional challenges. (T. 749, 754-55, 758-59, 761). The court granted two but denied a third. (T. 749, 754-55, 758-59, 761). Counsel identified Jurors Bittner and Leto as jurors they would strike with the extra peremptory strike they had requested. (T. 761). He renewed Mr. Wolf's objections to the jury before it was sworn. (T. 762-63). Both Bittner and Leto served on the jury that convicted Mr. Wolf and sentenced him to death, as did three other jurors²¹ the defense had challenged for cause. (T. 763). This error is both preserved and per se harmful. *Trotter v. State*, 576 So. 2d 691 (Fla. 1990); *Leon v. State*, 396 So. 2d 203 (Fla. 3d DCA 1981). The denial of the cause challenges denied Steven Wolf his right to trial by an impartial jury of his peers, in violation of the Sixth, Eighth, and Fourteenth Amendments and Article I, Sections 9, 16, 17, and 22, and the Court must reverse for a new trial.

²¹ Jurors Araque, Schulte, and Barnaby. (T. 738, 743-44, 760-61).

IV. THE TRIAL COURT ADMITTED HEARSAY TYING MR. WOLF TO THE PLACE WHERE THE BODY WAS DISCOVERED.

The core guarantee of the constitutional right to confront the witnesses is that the government cannot use the hearsay statements of non-testifying witnesses at a defendant's trial. See *Crawford v. Washington*, 541 U.S. 36 (2004); Amends. VI, XIV U.S. Const.; Art. I, §§ 9, 16, Fla. Const. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. § 90.801(1)(c), Fla. Stat. (2014). The prosecution cannot escape the Sixth Amendment or the hearsay rule by not quoting or by paraphrasing the extrajudicial statement. See *Diaz v. State*, 890 So. 2d 556, 558 (Fla. 5th DCA 2005).²²

The State relied on hearsay to prove that Mr. Wolf's van was on the path at Vaca Cut. Lieutenant Charlene Sprinkle testified that at Vaca Cut she found certain "car parts" on the ground. (T. 919). She continued:

²² Whether a statement falls within the definition of hearsay is a pure question of law reviewed de novo. *Leonard v. State*, 192 So. 3d 1258, 1259 (Fla. 2d DCA 2016).

The parts that were found, we gave the description and photographs of those car parts to 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 –

(T. 918).

The defense objected to hearsay. (T. 919). The State claimed the testimony was not being admitted for the truth of the matter asserted, “but only to determine what she was looking for.” (T. 919). The court overruled the objection.” (T. 919). Sprinkle then testified: “So we were told that we were looking for an older-model conversion van with aftermarket wraparound skirt” that was damaged. (T. 919). She soon spotted a conversion van in the Winn-Dixie parking lot, with Steven Wolf in it. (T. 918-22).

The real effect of the out-of-court statements was to inform jurors that Mr. Wolf's van was a match to the parts found at Vaca Cut. There was no legitimate use for it. “Determin[ing] what she was looking for,” wasn't a valid excuse to use hearsay. There is no course-of-the-investigation or logical-sequence-of-events exception to the hearsay rule. *See Keen v. State*, 775 So. 2d 263, 274 (Fla. 2000); *State v. Baird*, 572 So. 2d 904, 907 (Fla. 1990).

V. THE PROSECUTOR INVITED JURORS TO SHOW MR. WOLF THE SAME MERCY HE HAD SHOWN TO MS. OSBORNE, ARGUED NONSTATUTORY AGGRAVATION, AND RELIED ON FACTS NOT IN EVIDENCE.

A prosecutor has an ethical duty to seek justice rather than pursuing a conviction at all costs. *See Lewis v. State*, 711 So. 2d 205 (Fla. 3d DCA 1998). “It is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” *Gore v. State*, 719 So. 2d 1197, 1201 (Fla. 1998) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). “While prosecutors should be encouraged to prosecute cases with earnestness and vigor, they should not be at liberty to strike ‘foul blows.’” *Id.* This is especially true in a death penalty case. *Brooks v. State*, 762 So. 2d 879, 905 (Fla. 2000).

The prosecutor in this case invited jurors to show Mr. Wolf the same mercy he had shown Ms. Osborne, argued his failure to take responsibility as an aggravator, and argued facts never introduced into evidence to establish an aggravating circumstance. This prosecutorial misconduct deprived Steven Wolf of due process of

law and trial by an impartial jury.²³ Amends. VI, VIII, XIV, U.S. Const.; Art. I, §§ 9, 16, 17, Fla. Const.

A. The prosecutor invited the jury to show Mr. Wolf the same mercy he showed Ms. Osborne.

The prosecutor argued that the jury should show Mr. Wolf the same mercy he showed to Ms. Osborne, an argument this Court has repeatedly condemned. *See Brooks v. State*, 762 So. 2d 879, 901 (Fla. 2000); *Urbini v. State*, 714 So. 2d 411, 421 (Fla. 1998); *Rhodes v. State*, 547 So. 2d 1201, 1206 (Fla. 1989). In its penalty-phase opening, the State walked the jury through the steps leading to a penalty verdict, describing the finding of aggravators, the sufficiency of the aggravators to warrant death, the finding and weighing of mitigators as, “the mechanical process by which you go through.”

Then:

And after you’ve done that and if you concluded that the death penalty is an appropriate recommendation by you all to the Court, 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?

²³ Because there was no contemporaneous to the improper arguments, the Court reviews for fundamental error. *See Evans v. State*, 177 So. 3d 1219, 1234 (Fla. 2015).

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.

(T. 2185-86).

The State returned to this theme near the end of its closing argument:

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.**

(T. 2289-90).

This Court has condemned such an argument as “blatantly impermissible.” *Urbini*, 714 So. 2d at 421. It was an “unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation.” *Rhodes v. State*, 547 So. 2d 1201, 1206 (1989).

The misconduct in this case was particularly insidious. The State was well aware that the defense would not be presenting mitigation. (T. 2165-71). The defense had made it clear that mercy would be the focus of its argument to spare Mr. Wolf's life, and indeed it was. (T. 2163, 2195, 2300 – 2302; R. 595). Knowing this, the prosecution chose to make an argument the Court condemned

in 1989,²⁴ and in 1992,²⁵ and in 1998,²⁶ and in 2000,²⁷ and again,²⁸ and again,²⁹ and again.³⁰ The Court most recently denounced this argument a little more than six months before Mr. Wolf's trial began.³¹ There is only one reason for a seasoned prosecutor to thumb his nose at thirty years of precedent: He believes it is necessary and knows it is effective.

²⁴ *Rhodes*, 547 So. 2d at 1206.

²⁵ *Richardson v. State*, 604 So. 2d 1107, 1109 (Fla. 1992).

²⁶ *Urbin*, 714 So. 2d 411, 421–22.

²⁷ *Brooks*, 762 So. 2d at 901; *Kearse v. State*, 770 So. 2d 1119, 1130 (Fla. 2000).

²⁸ *Reed v. State*, 875 So. 2d 415, 438 (Fla. 2004).

²⁹ *Ferrell v. State*, 29 So. 3d 959, 987–88 (Fla. 2010).

³⁰ *Merck v. State*, 975 So. 2d 1054 (Fla. 2007).

³¹ *Ritchie v. State*, 344 So. 3d 369, 379–80 (Fla. 2022), *reh'g denied*, SC20-1422, 2022 WL 3593821 (Fla. Aug. 23, 2022), and *cert. denied sub nom. Ritchie v. Florida*, 143 S. Ct. 1005 (2023).

B. The prosecutor argued non-statutory aggravation.

Florida's death-penalty statute strictly limits the factors the jury and judge may consider in aggravation. § 921.141, Fla. Stat. (2018); see *State v. Steele*, 921 So. 2d 538, 544 (Fla. 2005) (citing *Miller v. State*, 373 So. 2d 882, 885 (Fla. 1979)). The Court must “guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.” *Miller*, 373 So. 2d at 885. The requirement of defined and limited aggravating circumstances is essential to the constitutionality of Florida's death penalty statute. *Id.* at 885; *Proffitt v. Florida*, 428 U.S. 242 (1976); Amends. VIII, XIV, U.S. Const.; Art. I §§ 9, 13, Fla. Const. Here the State used non-statutory aggravators to put its thumb on the scales.

The State argued Mr. Wolf's failure to take responsibility or confess as aggravation. “[L]ack of remorse should have no place in the consideration of aggravating factors.” *Colina v. State*, 570 So. 2d 929, 933 (Fla. 1990) (quoting *Pope v. State*, 441 So. 2d 1073, 1078 (Fla. 1983)). Here the prosecution criticized Mr. Wolf's failure to confess and take responsibility for the murder:

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?"

This is comments that 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.

(T. 2283-84).

The State was not rebutting mitigation – Mr. Wolf never advanced remorse as mitigation. Instead, the prosecutor argued that the crime was worse because Mr. Wolf never came clean to his interrogators, and instead claimed his innocence.

C. The State relied on facts not in evidence to establish the Especially Heinous Atrocious and Cruel aggravator.

A prosecutor may comment on the evidence and logical inferences from that evidence. *See Conahan v. State*, 844 So. 2d 629, 640 (Fla. 2003). However, the Court has “long held that argument on matters outside the evidence is improper.” *Bigham v. State*, 995 So. 2d 207, 214 (Fla. 2008) (citing *Pope v. Wainwright*, 496 So. 2d 798, 803 (Fla. 1986)). In this case the prosecution misstated the evidence to persuade the jury that Ms. Osborne was “conscious and aware of impending death,” a necessary element of the EHAC aggravator. *Williams v. State*, 37 So. 3d 187, 199 (Fla. 2010)).

The prosecutor told jurors:

Now, Mr. McCarthy, 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.

(T. 2280).

This was not true. Dr. Steckbauer did not testify that Ms. Osborne “did live for 20 minutes or more.” He said that death could have come in four to five minutes, or perhaps as much as twenty minutes. (T. 1575). He testified that bleeding would have continued as long as the heart was beating, regardless of whether she was conscious or not. (T. 1629).

Dr. Steckbauer could not testify to a degree of medical testimony that Ms. Osborne was conscious. (T. 1650). Without this manufactured testimony, the State could not establish the EHAC aggravator.

VI. THE COURT ERRED IN DENYING THE REQUESTED INSTRUCTION ON MERCY.

Mercy is a proper consideration for a sentencing jury. *See Kansas v. Carr*, 577 U.S. 108, 119 (2016); *Perry v. State*, 210 So. 3d 630, 639-40 (Fla. 2016), *abrogated on other grounds by Santiago-Gonzalez v. State*, 301 So. 3d 157 (Fla. 2020); *State v. Dixon*, 283 So. 2d 1 (Fla. 1973). Defense counsel requested an instruction that the jury “may always consider mercy in making [its] determination.” (T. 2163, 2257-62; R. 595-96). In rejecting this request the court denied Mr. Wolf his rights to due process and to be free from cruel and unusual punishments under the United States and Florida Constitutions. Amends. VIII, XIV, U.S. Const.; Art. I §§ 9, 13, Fla. Const.³²

This Court has held that the standard jury instructions adopted in 2017, though they omit the word mercy, are sufficient to instruct the jury on this issue, and a special instruction is not required. *See Bevel v. State*, 48 Fla. L. Weekly S207 (Fla. Oct. 26,

³² The Court reviews the denial of a requested jury instruction for abuse of discretion. *See Coday v. State*, 946 So. 2d 988 (Fla. 2006). But this discretion has been described as “fairly narrow,” because a defendant is entitled to have the jury instructed on his theory of defense. *Peterson v. State*, 24 So. 3d 686, 690 (Fla. 2d DCA 2009).

2023), *reh'g denied*, SC2022-0210, 2023 WL 8664112 (Fla. Dec. 15, 2023); *Woodbury v. State*, 320 So. 3d 631, 656 (Fla. 2021). But this case is different because the prosecution undermined the effect of the instruction. The prosecutor – in the context of each juror’s final and unfettered ultimate decision to vote for life – tied this decision to the mercy Mr. Wolf had not shown to Ms. Osborne:

And after you’ve done that and if you concluded that the death penalty is an appropriate recommendation by you all to the Court, 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.

(T. 2185-86). Later he argued: “[N]ow he asks you for mercy when he was unwilling to give it.” (T. 2289-90).

“[W]hether [the defendant] showed the victim mercy during the killing is irrelevant to the jury’s determination as to whether to extend mercy to [the defendant].” *Ritchie v. State*, 344 So. 3d 369, 380 (Fla. 2022). In this case the prosecution successfully negated the standard silent-mercy instruction. A direct instruction was

required to inform the jurors of the true role of mercy in their decision-making.

VII. THE STATE FAILED TO PROVE THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The State failed to prove the Especially Heinous, Atrocious, and Cruel (EHAC) aggravating factor. To prove this factor, the prosecution must establish beyond a reasonable doubt that “the victim was conscious and aware of impending death.” *Williams v. State*, 37 So. 3d 187, 199 (Fla. 2010)). “[N]othing done to the victim after the victim is dead or unconscious can support this aggravator.” *Deviney v. State*, 322 So. 3d 563, 575 (Fla. 2021) (quoting *Buzia v. State*, 926 So. 2d 1203, 1212 (Fla. 2006)). “[A] victim’s suffering and ‘awareness of impending death is critical in determining whether [an attack] unnecessarily tortured the victim.’” *Id.*

There was no evidence that Ms. Osborne was conscious at the time of the sexual battery and death. The trial court erred in instructing the jury on the EHAC aggravator and in finding it in the sentencing order, violating Mr. Wolf’s rights under the United States and Florida Constitutions. Amends. VIII, XIV, U.S. Const.; Art. I, §§ 9, 16, 17, Fla. Const.³³

³³ This Court reviews the finding of an aggravator to determine “whether the trial court applied the right rule of law ... and, if so,

The medical examiner told the jury that Ms. Osborne’s injuries would have caused severe pain, but he could not testify that she was conscious at the time they were inflicted:

Q. Doc, from looking at the injuries that you had observed to the genitalia of Michelle Osborne, was there anything from the examination of her body that would indicate to you that she was not conscious at the time that these injuries happened?

A. No.

Q. So she was fully able to experience what had taken place to her?

A. I wouldn’t testify as to whether or not she was conscious or unconscious at the time.

(T. 1578).

Dr. Steckbauer testified that because of pressure on the carotid and vertebral arteries, Ms. Osborne may have lost consciousness within forty-five seconds of the time the ligature was applied to her throat. (T. 1625). She would have died “within a few minutes.” (T. 1575). The doctor added death could have come in four to five minutes, or perhaps as much as twenty minutes. (T. 1575). He said nothing about whether Ms. Osborne would have

whether competent substantial evidence supports its finding.” *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997); *Smith v. State*, 170 So. 3d 745, 760 (Fla. 2015).

been conscious during this time. Dr. Steckbauer found no evidence of defensive wounds. (T. 1548, 1648).

On cross-examination, Steckbauer conceded:

Q. [Y]ou can't say to a degree of medical certainty that she was conscious at the time.

A. That's correct.

(T. 1650). He agreed that he could not say Ms. Osborne knew what was going on because she could have been unconscious. (T. 1651).

On redirect he ventured, "I would say she was conscious for some part of the experience." (T. 1676).³⁴ He did not say what part of the "experience" he was referring to, if it included the sexual batteries, or how long that consciousness might have lasted.

The defense argued that the EHAC aggravator should not be submitted to the jury. (T. 2239-40). The court denied the motion. (T. 2242).

³⁴ As discussed below, Dr. Steckbauer gave testimony more favorable to the State during a voir dire examination outside the presence of the jury. There he said that it would be his professional opinion that Ms. Osborne was conscious for some part of this because the level of pain would rouse someone who was unconscious. (T. 1666).

In its closing argument the prosecution misstated the evidence.³⁵ arguing that Ms. Osborne was conscious because Dr. Steckbauer testified that death would have taken twenty minutes or more and that she would not have bled if she was unconscious. (T. 2280). The jury found the EHAC aggravator had been proven. (R. 693).

In its motion for new trial and sentencing memorandum, the defense again argued that the EHAC aggravator had not been proven beyond a reasonable doubt because the State had not established Ms. Osborne was conscious. (R. 1380-31, 1356-57). At the *Spencer* hearing the State argued that they had proven there was a struggle. (R. 1723). But Dr. Steckbauer's testimony did not establish what the nature of the "struggle" might have been. (T. 1648). He pointed to petechiae, bruises to the ankles and wrists, and a laceration to the lip. (T. 148). Asked if there was no evidence of a struggle, he answered that would "depend[] on how you define if there was no evidence of a struggle. (T. 1648).

The trial court nonetheless found that the EHAC aggravator had proven:

³⁵ See Argument V., *supra*.

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 petechia 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. 1407).

The evidence was insufficient to prove EHAC. It did not show that Ms. Osborne was "conscious and aware of impending death."

Williams, 37 So. 3d at 199. Ultimately all the State presented was evidence that:

- Ms. Osborne suffered injuries that would be extremely painful. (T. 1663).

- Those injuries caused blood loss that could end her life within four to five minutes (though the record is silent as to how quickly this would have rendered a conscious person unconscious). (T. 1575).
- Ms. Osborne may have lost consciousness within forty-five seconds of the time the ligature was applied to her throat. (T. 1625).
- Dr. Steckbauer “wouldn’t testify as to whether or not she was conscious or unconscious at the time” the injuries were inflicted. (T. 1578).
- Dr. Steckbauer could not say to a degree of medical certainty that Ms. Osborne was conscious. (T. 1650).
- He could not say she knew what was going on because she could have been unconscious. (T. 1651).
- Steckbauer *would* say [though not to a medical certainty] that Ms. Osborne “was conscious for some [undefined] part of the experience.” (T. 1676).
- There was no evidence of defensive wounds. (T. 1548, 1648).
- Some of the injuries could be evidence of a struggle. (T. 1648).

This was not enough. At most, the State could speculate – against the bulk of the evidence – that Ms. Osborne was conscious. But speculation cannot establish the EHAC aggravator. *See Campbell v. State*, 159 So. 3d 814, 832 (Fla. 2015) (No EHAC where “trial court only speculated that the victim ‘must have suffered great emotional strain, fear and terror when he awoke after the first blow.’”); *Williams*, 37 So. 3d at 193 (“The medical examiner was

unable to testify without speculating about whether [the victim] remained conscious after the first blow with the bat ...”).

The absence of defensive wounds weighs against a finding of EHAC. “[A]n important factor in determining if the victim was conscious and aware of impending death [is] the presence of defensive wounds.” *Deviney*, 322 So. 3d at 576 (Fla. 2021) (quoting *Campbell*, 159 So. 3d at 833. In *Campbell* the Court found no EHAC where it was “undisputed that there were no defensive wounds.” 159 So. 3d at 833. In *Williams* the Court reversed where the evidence “did not establish the existence of any defensive wounds.” *Williams*, 37 So. 3d at 200. Even where there *are* defensive wounds, evidence that the victim may have been conscious for a short time will not suffice. In *Elam v. State*, 636 So. 2d 1312, 1314 (Fla. 1994), there were defensive wounds, but the medical examiner testified that the attack could have taken place in less than a minute. In this case there were no defensive wounds and Ms. Osborne could have lost consciousness within as little as forty-five seconds.

Dr. Steckbauer repeatedly testified he could not say Ms. Osborne was conscious and aware of impending death and that he could not say otherwise to a medical certainty. (T. 1578, 1650, 1651). Dr. Steckbauer’s testimony that Ms. Osborne “was conscious

for some [undefined] part of the experience” did not contradict this. (T. 1676). A very generous reading would be that this testimony created some ambiguity. But even then, ambiguous testimony would not be enough. *See Campbell*, 159 So. 3d at 833 (rejecting EHAC where “Dr. Shaw’s testimony was ambiguous as to how long the victim would have lived after the blows and whether he would have been conscious.”).

Dr. Steckbauer’s voir dire would likewise at best create ambiguity, had it been in evidence. Defense counsel was granted an opportunity to voir dire Dr. Steckbauer outside the presence of the jury to determine whether evidence that Ms. Osborne had alcohol and cocaine in her system. The State was permitted to ask questions as well. (T. 1667-1673). During this examination, Steckbauer stated that, “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.” (T. 1666). He then qualified: “[T]hat doesn’t mean that things couldn’t have been done to then make her unconscious again.” (T. 1666). He did not specify how briefly a person would be aroused.

At best, Dr. Steckbauer told the jury he could not say to a medical certainty whether Ms. Osborne was conscious and aware of

impending death, but outside the presence of the jury his professional opinion was that she became conscious at some point but may have lost consciousness again. Again, this “professional opinion” might at best have created ambiguity. More importantly, it was not in evidence and the jury never heard it.

Because there was no competent and substantial evidence that Ms. Osborne was conscious and aware of impending death, the EHAC aggravator was not proven. The State argued that EHAC was “the most compelling of the aggravating circumstances that the State of Florida lists in its statutory design,” and that on its own it justified the death penalty. (T. 2184-85, 2279). The judge assigned it “enormous weight.” (R. 1407). The decision to execute Mr. Wolf based on this unproved aggravator violates his rights under the Federal and State constitutions. Amends. VI, VIII, XIV, U.S. Const.; Art. I, §§ 9, 16, 17, Fla. Const.

VIII. THE TRIAL COURT RELIED ON FACTS NOT IN EVIDENCE TO FIND THE MURDER WAS ESPECIALLY HEINOUS ATROCIOUS AND CRUEL.

A trial court may not rely on facts not in evidence to find an aggravating factor. *See, e.g., Lawrence v. State*, 846 So. 2d 440, 450 (Fla. 2003); *Vining v. State*, 827 So. 2d 201, 209 (Fla. 2002); *Hartley v. State*, 686 So. 2d 1316, 1323 (Fla. 1996). “[I]t is crucial that a sentencing order only reflect facts drawn from the record in the particular case.” *Kormondy v. State*, 703 So. 2d 454, 463–64 (Fla. 1997).

In this case the judge leaned heavily on evidence that was never in evidence before the jury. (R. 1407). He conceded that “Dr. Steckbauer was unable to determine how long Ms. Osborne remained alive during the attack and to what extent she was conscious.” (R. 1407). But then the court found:

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.

(R. 1407). This “professional opinion” was only voiced outside the presence of the jury during a voir dire examination for the purpose of determining whether the defense could elicit evidence that Ms.

Osborne had cocaine and alcohol in her system. (T. 1667-1673). The defense had no opportunity or motive to object to this opinion (which was not established to a reasonable degree of medical certainty) or to cross-examine Dr. Steckbauer on this point. See *Gardner v. Florida*, 430 U.S. 349 (Fla. 1977). The trial court's reliance on facts not in evidence deprived Mr. Wolf of his rights under the Federal and State constitutions. Amends. VI, VIII, XIV, U.S. Const.; Art. I, §§ 9, 16, 17, Fla. Const.

IX. THE COURT ERRED IN DENYING MR. WOLF’S MOTION TO PRECLUDE DEATH PENALTY FOR FAILURE TO CHARGE AGGRAVATING FACTORS IN THE INDICTMENT.

Article I, section 15 of the Florida Constitution guarantees the right to be tried by indictment in a capital case. Art. I § 15(a), Fla. Const. The State failed to allege the elements that made this a “capital case,” and the trial court’s denial of the Motion to Preclude the Death Penalty was error, impairing Mr. Wolf’s right under Amends. V, VI, VIII, XIV, U.S. Const.; Art. I, §§ 9, 15, 16, 17, Fla. Const.³⁶

A “capital case” is one where the charge is actually eligible for the death penalty. *See Pinder v. State*, 42 So. 3d 335, 337 (Fla. 3d DCA 2010) (capital sexual battery may be charged by information). Proof of the elements of first-degree murder alone does not authorize the death penalty. The elements of death-eligible first-degree murder include one or more aggravating factors. *See State v. Poole*, 297 So. 3d 487 (Fla. 2020), *as clarified on denial of reh’g* (Apr. 2, 2023) (contrasting aggravating factors with the ultimate decision to impose death). Because the indictment does not allege these

³⁶ This issue presents a pure question of law and is therefore reviewed de novo. *State v. Glatzmayer*, 789 So. 2d 297 (Fla. 2001).

elements, Mr. Wolf was denied his right to have a grand jury decide whether he should face the death penalty.³⁷

³⁷ The Appellant recognizes the Court has previously rejected arguments that aggravating factors must be charged in the indictment. *See Tai A. Pham v. State*, 70 So. 3d 485 (Fla. 2011).

X. CUMULATIVE ERROR

The cumulative effect of the above errors deprived Steven Wolf of a fair trial, due process of law, and a reliable sentencing process. His fate was decided by a jury that included jurors whose impartiality was in doubt, and from which a juror had been excluded because she had reservations about the death penalty. The prosecution relied on improper arguments and facts not in evidence. The State failed to prove the especially heinous atrocious or cruel aggravating factor. The trial court nonetheless found that aggravator, relying in part on facts not in evidence.

Cumulatively, these errors together with the other errors identified above undermine any confidence in the outcome of Mr. Wolf's trial and sentencing.

CONCLUSION

For the foregoing reasons, the convictions and sentence of death must be vacated, and this cause must be remanded for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served to counsel for the appellee Jennifer Davis, Assistant Attorney General, 1 SE 3rd Avenue, Miami, FL 33131, via the Court's e-filing portal on March 4, 2024.

/s/ Andrew Stanton
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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies this brief complies with the requirements of Florida Rules of Appellate Procedure 9.045 and 9.210.

/s/ Andrew Stanton
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