IN THE SUPREME COURT OF FLORIDA

KENNETH LOUIS DESSAURE,

Appellant,

v. Case No. SC02-286

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

On August 26, 1999, a grand jury indicted Appellant for the first degree murder of Cindy Riedweg on February 9, 1999. (V1:1-2). Prior to trial, defense counsel moved to preclude the death penalty and death qualification of the jury on the grounds that the State did not allege the aggravating circumstances in the indictment. (SR:1-13). After hearing argument from counsel on the motion at the beginning of the trial, the Honorable Judge Brandt C. Downey, III, denied the motion. (V25:29-35). The court presided over a jury trial between August 28 through September 5, 2001.

Prior to voir dire, the State moved in limine to exclude evidence that a cigarette pack containing two marijuana[1] joints was found in the victim's apartment. (V25:23). The State asserted that the evidence was irrelevant because there is no suggestion that the victim ever used marijuana and none was found in her system at the autopsy. (V25:23). The court granted the State's motion. (V25:24). During the course of the trial, defense counsel requested that the court revisit the issue based on the testimony of crime scene technicians regarding ashes found in the victim's kitchen sink. (V30:804).

[1]Testing was never performed on the substance to confirm that it was indeed marijuana. (V30:805).

The State reiterated that the evidence of marijuana in the apartment was simply bad character evidence with regard to the victim. (V30:805-07). The trial judge refused to overturn his previous ruling that the evidence was inadmissible. (V30:807).

After the State presented its case in chief, Appellant moved for a judgment of acquittal which the trial court denied. (V35:1551-56). Thereafter, Appellant presented numerous witnesses, including an acquaintance of the victim, Daniel Copeland. Mr. Copeland was a business partner and long-time friend of Stuart Cole, the victim's boyfriend. After Mr. Copeland testified, defense counsel proffered Copeland's testimony regarding Mr. Cole's use of marijuana.[2] (V35:1583-86). Defense counsel again sought to introduce the evidence of the marijuana cigarettes found in the victim's apartment arguing that Mr. Cole's habit of smoking marijuana allowed him to introduce the evidence. The State countered by arguing that the proffered testimony only established that Mr. Cole smoked

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[2]According to Mr. Copeland, Stuart Cole often used marijuana when they played golf together. (V35:1584). At the time of the victim's murder on February 9, 1999, Mr. Cole was playing golf at a local golf course with Copeland and two other friends. (V34:1431-33; V35:1582-85). Mr. Copeland did not know if Cole had smoked marijuana prior to arriving at the course for their afternoon tee time. (V35:1582-85).

Stuart Cole died in a car accident soon after the victim's murder, but he had cooperated with police at the time of the murder by providing a taped interview, blood sample, and fingerprints. (V34:1373-79).

marijuana while golfing and the testimony did not establish that Cole smoked marijuana on February 9, 1999, prior to the golf round. Thus, the State argued the evidence was not relevant. (V35:1587). The trial judge ruled that the proffered testimony was insufficient to link the marijuana to Mr. Cole and was simply bad character evidence that was inadmissible under Florida's evidence code. (V35:1588).

After the defense presented its case and rested, defense counsel renewed his motion for judgment of acquittal. (V36:1653-54). The trial judge denied the motion. (V36:1654). After the State presented evidence in rebuttal, defense counsel moved in limine to prevent the State from arguing that the ashes in the victim's sink were linked to Appellant in any manner.[3] (V36:1684-85). Defense counsel argued that the evidence did not link the ashes to Appellant, and to allow the State to make such an argument would be unduly prejudicial. The State countered that Appellant's footprint was found near the sink and numerous witnesses had testified about the immaculate cleaning habits of the victim. The fact that her water cup was sitting next to the sink indicated that the victim had filled it up with water at some point, and if the ashes had been there at that time, she

[3]Numerous witnesses testified that Appellant was smoking cigarettes on the day of the murder.

would have washed them down the sink. (V36:1685). The trial court overruled defense counsel's objection, and the State briefly argued in closing that the ashes were left by Appellant. (V36:1685; 1693-94). The jury convicted Appellant of first degree murder as charged and the court adjudicated him guilty. (V23:4201; V24:4366).

On September 6, 2001, Appellant filed a motion against the advice of his three attorneys waiving his right to present mitigating evidence to the jury. (V24:4310-11; V37:1827-32). At a hearing conducted on September 11, 2001, Appellant filed a "Waiver of Argument for Life Sentence" and joined the State in seeking a death sentence. (V24:4313). Defense counsel proffered mitigation evidence to the trial judge, and at the conclusion of the hearing, the trial judge ordered the preparation of a presentence investigation (PSI) report. (V38:1843-1905;1917-19). On October 15, 2001, the court conducted a Spencer[4] hearing wherein defense counsel presented evidence from Appellant's fiancee, Mary Parent, Appellant's grandmother, Louise Randall, and Appellant himself. Appellant testified that he had changed his mind and now was seeking a life sentence. (V24:4446-47). Prior to the court actually

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

imposing a sentence, both parties filed sentencing memorandums[5] and Appellant filed a "Waiver of Presentation of Additional Mitigation." (V24:4333-34; 4337-41; 4342-49; 4351-52).

On October 26, 2001, the court sentenced Appellant to death. The trial judge found four aggravating circumstances had been established beyond a reasonable doubt: (1) the capital felony was committed by a person previously convicted of a crime, conspiracy to commit armed robbery, and was placed on community control (some weight); (2) the defendant was previously convicted of a felony involving the use or threat of violence (little weight); (3) the capital felony was committed during the course of a burglary (great weight); and (4) the capital felony was especially heinous, atrocious, and cruel (very great weight). (V24:4358-63). In mitigation, the court found: (1) the defendant's age of 21 (some weight); (2) the defendant's quality of being a caring parent (little weight); (3) the defendant's family background (some weight); (4) the capacity of the defendant to form personal relationships (little weight); and (5) the defendant's behavior in court (little weight). After weighing the aggravating circumstances against the mitigating circumstances, the trial court found that the

[5]Appellant filed two different sentencing memorandums. (V24:4333-34; 4337-41).

aggravating factors far outweighed the mitigation. (V24:4358-63).

On December 19, 2001, the trial court denied Appellant's motion for new trial. (V24:4405). Defense counsel filed a notice of appeal to the Second District Court of Appeal on December 26, 2001, and filed amended notices of appeal to this Court on February 6 and 11, 2002. (V24:4422-23).

STATEMENT OF THE FACTS

State's Case-in-Chief

The victim in this case, Cindy Riedweg, moved into apartment 1308 of the Village of Countryside in Oldsmar, Florida, on the last weekend of January, 1999. Ms. Riedweg's boyfriend, Stuart Cole, and other friends helped her move into the apartment on Super Bowl weekend. (V29:700-08). Ms. Riedweg did not smoke and she would not allow any of the movers or her boyfriend to smoke inside her apartment. (V29:708-09).

Tim Connole and his fiancee, Amy Cockrell, lived in apartment 1307, next door to the victim's apartment.[6] (V28:489-91). In late December, 1998, Appellant moved in with Connole and slept on the couch in the living room. (V28:491). Appellant was unemployed in late January and early February and spent his days cooped up in the apartment. (V28:517). On the day Cindy Riedweg moved in next door, both Connole and Appellant commented on how pretty she was. (V28:492-93; 519). Connole testified that he knew the previous occupants of apartment 1308 and had been inside the apartment, but he had not been inside apartment 1308 since they had moved out. According to Connole and Cockrell, Appellant had never been inside the victim's

[6]Both apartments 1307 and 1308 were one bedroom, one bathroom apartments, with a living room and kitchen. (V28:515; V29:767).

apartment, and he did not know or socialize with her. (V28:493-94; 519-20). The victim's apartment had been vacant for approximately a month before she arrived.[7] (V28:548).

On Tuesday, February 9, 1999, Amy Cockrell woke up early and left for school about 8:00 a.m. (V28:495). Tim Connole woke up when Cockrell left and started playing video games. Appellant and another individual, Ivan Hup, were still sleeping in the living room. (V28:523-24). Ivan Hup woke up at about 10:00 a.m. and Appellant woke up at approximately 11:45 a.m. (V28:524). At noon, Connole and Hup left for the afternoon and went to lunch and then met Amy Cockrell at her mother's house. (V28:524-25). When Connole and Hup left for lunch, the victim was not outside sunbathing.[8]

Steven Way lived on the other side of the victim in apartment 1309. Mr. Way had seen her during the few weeks she lived there and had said hello to her on a few occasions. (V27:437-38). On the afternoon of February 9, 1999, he left his apartment and went grocery shopping for about 20-30 minutes.

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[7]The apartment manager testified that after the previous tenants had vacated the premises, apartment 1308 had been cleaned and the carpet shampooed. (V29:695).

[8]Cockrell and Connole both testified that they had seen Cindy Riedweg sunbathing in a lawn chair outside her apartment on occasion during the 10-11 days that she had been living at the apartment complex. (V28:494, 525).

When he returned to his apartment, he noticed a lawn chair and telephone outside the victim's apartment on the sidewalk, but he did not see anyone outside. (V27:439). Mr. Way returned to his apartment and had his door open, playing his guitar for a period of time. He testified that he did not hear any unusual noises during this time. (V27:439-441).

John Hayes lived in the Village of Countryside apartment complex and was getting ready to leave for work at about 3:30 p.m. on February 9, 1999, when he encountered Appellant in the parking lot. (V27:449-52). Appellant, wearing shorts and no shirt, acted nervous and had his hand balled up. (V27:450-53). Appellant called Mr. Hayes over and told him that there was someone dead or dying in an apartment. (V27:452-53). Mr. Hayes asked Appellant how he knew this, and Appellant responded that he had went over there for ice. (V27:453). After Mr. Hayes told Appellant to call 911, Appellant left and walked around the building. (V27:453-54). While Mr. Hayes was waiting in the parking lot for his friend to return with his car, the paramedics arrived on the scene. (V27:455). When Mr. Hayes was putting on his work boots, Appellant again came around and asked Mr. Hayes if he had a cigarette. (V27:455). Mr. Hayes later observed Appellant sitting in the parking lot smoking a cigarette. (V27:455-56). Hayes testified that he did not tell

law enforcement officers that he observed Appellant entering and leaving the victim's apartment. (V27:461-62).

At 3:35 p.m. on February 9, 1999, 911 operator Donna Biem received a call from 1308 Amanda Lane. (V27:464-66). The call was transferred to the Sheriff's Office at 3:37, and paramedics arrived on the scene at 3:39 p.m. (V27:467-68). The State introduced the 911 tape into evidence and played it for the jury. (V27:472-74; 480-83). At the outset of the 911 call, Appellant told the operator that his next door neighbor was dead. (V27:472). Appellant stated that he "walked over to see if Cindy had some ice and she was sun bathing and her phone and everything was outside so I opened up the door and she's laying in the middle of her fucking hallway naked." (V27:473). Appellant told 911 operator Biem that he had asked a "home boy" to help him, but he would not come over, so Appellant just used the victim's phone to call 911. (V27:473).

Once the call was transferred to the Sheriff's Office at 3:37 p.m., Appellant told the operator that his neighbor was dead. The following exchange took place with the Sheriff's Office operator:

> COMMUNICATIONS CENTER: Okay. And what's her address?
> KENNETH DESSAURE: 1308 Amanda Lane. Fuck.
> COMMUNICATIONS CENTER: Any idea how?
> KENNETH DESSAURE: Um, I do not know.
> COMMUNICATIONS CENTER: Okay.
> KENNETH DESSAURE: Ow. Fuck.

COMMUNICATIONS CENTER: Excuse me?
KENNETH DESSAURE: Huh?
COMMUNICATIONS CENTER: What's going on?
KENNETH DESSAURE: I just cut my finger. I'm washing my dishes. I just came in to finish washing my damn dishes.
COMMUNICATIONS CENTER: And, um, or are – have you seen her or been in there and touched her or anything?
KENNETH DESSAURE: I haven't touched her at all.

.....

COMMUNICATIONS CENTER: Tell me what happened.
KENNETH DESSAURE: Um, I was cleaning my house and fucking I seen her outside sunbathing and I went next door to see if she had some fucking ice and all her stuff was sitting outside, so I figured that she was in the bathroom or something. And then I go knock on the door and I didn't get no answer so I'm waiting for a response and the door was unlocked so I went in and she's laying in the middle of the fucking hallway.
COMMUNICATIONS CENTER: Okay. All right. Then she was not breathing?
KENNETH DESSAURE: Huh?
COMMUNICATIONS CENTER: She was not breathing?
KENNETH DESSAURE: I don't know. I didn't walk up to her. I just walked out of the house.
COMMUNICATIONS CENTER: Okay.
KENNETH DESSAURE: And I went to the boy's that standing outside and I just cut my fucking finger.
.....

(V27:480-82).

Paramedic Gregory Newland testified that he arrived at the victim's apartment complex at 3:39 p.m. and was met in the parking lot by Appellant. (V27:379, 383). As the paramedics followed Appellant to the victim's apartment, paramedic Newland noticed that the back of Appellant's shirt appeared to have a wet mark. (V27:384). Paramedic Newland entered the victim's

apartment first and observed the victim laying in a puddle of blood and knew that it was a crime scene. Paramedic Newland had his captain escort Appellant outside the apartment, and he and EMT Manines checked on the victim. (V27:387). The victim, while still warm, did not register a pulse or respirations at that time. Paramedic Newland observed what appeared to be stab wounds to her upper back and shoulders. Because he did not want to roll the body over, he placed EKG leads on the victim's back and obtained pulseless electrical activity at a rate of about 30. (V27:394). Because the victim was not flat-lining, she was not officially pronounced dead. Paramedic Newland called an on-duty doctor to explain the situation, and as he was talking to the doctor, the victim went from the pulseless electrical activity into the asystole flat line. (V27:394-95). At the doctor's direction, the paramedics turned the victim's body and observed that her throat has been slashed. (V27:395). Cindy Riedweg was pronounced dead at 3:41 p.m. (V27:402).

After the victim was pronounced dead, the paramedics taped off the entrance to the apartment and stood inside the doorway until law enforcement arrived. (V27:403). While standing there, Appellant approached the paramedics repeatedly and asked them questions about the victim. Paramedic Newland observed Appellant go up to several apartments and talk to people who

were gathering outside. (V27:404).

Steven Way, the neighbor living in apartment 1309, left his apartment while the paramedics were at the victim's door placing tape around the area. (V27:441). A "strange" black man approached him, nervous and almost stuttering, and asked Mr. Way if he had seen anything. (V27:441). Detectives showed Mr. Way a photopack in March 2000, but he could not recognize any of the photos. (V27:442; V34:1379-80).

Tim Connole returned to his apartment sometime between 4:00 or 4:30 p.m. (V27:526). Although paramedics and fire trucks were in the parking lot, Connole's apartment had not been sealed off yet and he was able to enter it.[9] (V28:527). Tim Connole testified that Amy Cockrell arrived at the apartment between 4:30 and 5:00 p.m., before Detective Klein or Detective Pupke arrived. (V28:527-28). When Mr. Connole made contact with Appellant, Appellant appeared nervous and indicated that he had been trying to contact Connole. Eventually, after repeated questioning, Appellant told Connole that there was a dead body lying in the hallway between the kitchen and bathroom. (V28:528-29). Appellant told Connole that he had gone over to Cindy Riedweg's apartment for some ice and knocked on the door,

[9]Because of a computer problem, law enforcement officers were delayed and did not arrive until 4:11 p.m. (V27:470).

but she did not answer. (V28:530). Appellant stated that he had a "gut feeling there was something wrong" so he opened her door and went in. (V28:530). When Mr. Connole asked Appellant why he would walk into a stranger's apartment, he responded, "I don't know. There was a dead body." (V28:530-31). Appellant told Connole that once he saw the body, he ran out of the apartment. (V28:531). Appellant told Connole that he was only in the victim's apartment two seconds.[10] (V28:538).

Appellant informed Mr. Connole that he did not want to be blamed for Cindy Riedweg's murder. (V28:532). Connole noticed blood on Appellant's shirt, and Appellant told him that he cut his hand doing the dishes. Appellant had to point out the cut on his hand to Connole. (V28:532-33). Appellant was wearing a pair of black sandals that the police seized, so Connole loaned Appellant a pair of his tennis shoes. (V28:539-41). Connole also testified that when he moved out of his apartment in March, 1999, he discovered that a knife was missing from a knife set he owned. (V28:541-44).

Amy Cockrell testified that she returned to the apartment

[10]Sometime after February 9, 1999, Appellant called Connole on the phone and talked to him about locating a person that Appellant saw outside the victim's apartment who allegedly observed Appellant enter and leave the victim's apartment. (V28:537-38). Appellant told Connole that Amy Cockrell's mother had hired a private investigator to see if they could find anything to help him out. (V28:537-38).

complex about 4:30 - 4:45 p.m., and Connole and Hup were already there. (V28:499). Ms. Cockrell was made aware that Appellant claimed he went over to the victim's apartment for ice, but she was not sure exactly when she heard this information. (V29:500). The State questioned Cockrell about her prior statement under oath wherein she indicated that when she entered her apartment and opened the freezer door, she saw a tray of solid ice. (V28:500-06). At trial, she testified that she opened the freezer door and saw a cup full of ice, not a tray.[11] (V28:500-06). She acknowledged that in her prior sworn statement she indicated that she thought it was odd that Appellant would go over to the victim's apartment for ice when there was a full tray of ice in the freezer. (V28:504-05).

Crime scene technician Craig Giovo arrived at the scene at approximately 5:41 p.m. and initially videotaped the outside of the complex. After videotaping the exterior, Giovo accompanied detectives and Appellant into Connole's apartment so Appellant could show them the knife he cut his hand on. (V28:555-61).

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[11]When detectives arrived at the scene at 5:14 p.m., there was crime scene tape only restricting access to the victim's apartment. (V34:1347-48). Shortly after the detectives arrived, they expanded the crime scene tape to include Connole's apartment. (V34:1348-50). Crime scene technician Craig Giovo observed a frozen solid tray of ice with frost on it in Connole's apartment at 7:15 p.m. (V28:567). He emptied the ice and seized the tray at that time. (V28:56667).

Giovo testified that the knife was sitting on top of a "rock dry" sponge[12] next to the kitchen sink. (V28:561; 598). The knife had smeared blood on it. (V28:565). The water in the sink appeared greasy and there were dirty dishes in the sink. (V28:563-64). Giovo also noted that there appeared to be blood stains on the exterior door threshold, on the freezer door, on the floor by the freezer, on the ice tray itself, on the kitchen sink and faucet, and on the backsplash. (V28:559, 565, 574-75). He also noted a bottle of bleach under the sink. (V28:568-69). Giovo collected Appellant's shirt and sandals, which both tested positive for blood. (V28:581-82).

Detectives Thomas Klein and Tim Puple arrived at Cindy Riedweg's apartment at 5:14 p.m. They entered the victim's apartment and could see blood stains on the carpet in the living room. (V34:1351). The victim's body was lying in the hallway by the bathroom. They continued into the kitchen area and observed a scuff mark on the floor and a puddle of water by the refrigerator and sink. (V34:1351).

After acclimating themselves with the scene, the detectives went to the parking lot and found Appellant smoking a cigarette. (V34:1356-57). They requested his shirt and sandals, and

[12]Giovo agreed that it would take days for a sponge to become that dry and nappy. (V28:598).

Appellant put on another pair of shoes from inside his apartment. (V34:1358). Appellant was very insistent on showing the detective's his cut hand and the knife which he had cut himself with. (V34:1359). Once inside the kitchen, Detective Klein asked Appellant if he could look into the freezer. When the detective noted the frozen ice tray, Appellant stated that the ice was not quite frozen when he wanted ice earlier in the afternoon. (V34:1360).

Detectives Klein and Pupke transported Appellant to the police station for questioning and did not read him his Miranda rights initially. The detectives spoke with Appellant for a brief time, and then took a break because they were becoming very suspicious of Appellant's statement. (V34:1361-63). After taking approximately a two hour break, the detectives resumed their questioning of Appellant after he waived his Miranda rights. Appellant's taped statement was played to the jury.[13] (V34:1369-70).

Appellant stated that he knew his next door neighbor's name was Cindy. (V34:T9). Appellant told the detectives that he introduced himself to Cindy when she was moving in and offered to help her, but she declined. Because Appellant did not have

[13]The transcript of the taped statement follows page 1369 in Volume 34, but the transcript is numbered separately as pages 1-54 and will be cited as (V34:T__).

a job at the time, he often stayed home and played video games or talked on the phone. (V34:T10). On the day of the murder, Appellant woke up at 11:45 a.m. and smoked a cigarette. (V34:T11). After Tim Connole and Ivan Hup left, Appellant played a video game for "a little while," and then began to clean the kitchen. (V34:T12-14). Although unsure of the exact time, Appellant believed he began cleaning at about 2:00 or 2:30 p.m. (V34:T17). Appellant claimed he started cleaning the knife first, then he corrected himself and stated that he took out the garbage first and that was when he saw Cindy sunbathing in a bikini. (V34:T14-15).

Appellant stated that he observed Cindy sunbathing everyday. (V34:T15). As he walked by to take out the garbage,[14] Cindy appeared to be sleeping. (V34:T14). When he returned from dropping off the garbage, Appellant could not recall whether the victim was still sunbathing because he looks down when he walks and did not pay attention to her. (V34:T18-20). Appellant stated that he thought she was in the bathroom because all of her stuff was outside when he went to go get ice. (V34:T19).

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[14]A detective checked the apartment complex's dumpster at 3:30 a.m. on Wednesday, February 10, 1999, but only found five bags of garbage that did not contain anything of evidentiary value. (V28:610-12). The garbage company serviced the apartment complex on Tuesdays and Fridays, and the apartment manager testified that they usually emptied the dumpster at about 3:30 p.m. (V29:693-95).

After he returned to his apartment from taking out the trash, Appellant stated that he began washing a knife. Appellant put bleach and dish detergent in the sink. (V34:T21). Appellant started with the knife and cut his palm between his thumb and index finger. Appellant demonstrated for the detectives how he was washing the knife when he cut himself. (V34:T22-23). Appellant set the knife down and put cold water on his wound, but did not put any towels or band-aids on the cut. (V34:T23). Next, he finished a cup of water he had and noticed that his ice tray was empty, so he filled the tray up and placed it in the freezer along with a cup, and "went next door to see if she had ice." (V34:T24).

When Appellant left his apartment, he saw a black guy he knew from the apartment complex and asked him if he had seen Appellant's roommates. (V34:T25-26). Appellant then stated that he went to Nathan's house, but he was not there.[15] (V34:T26). Appellant walked back to his house and got a cup and

[15]Nathan Phillips testified that he lived with his girlfriend, Brady Adams, in the Villas of Countryside. (V34:1422-23). Brady Adams testified that she was home all day Tuesday, February 9, 1999, with her windows and door open, and Appellant never came by that day. (V34:1414-18).

Nathan Phillips got home from work a little after 3:00 p.m., took a shower, and then went out to eat with Ms. Adams. There were no paramedic trucks in the parking lot when they left. (V34:1417-18; 1423). Mr. Phillips also testified that Appellant did not come over to his apartment while he was home. (V34:1425).

went to Cindy's apartment. (V34:T27). While Appellant was knocking on Cindy's door and yelling her name, he looked over and saw the black guy watching him. (V34:T27-28). Appellant noticed that the door was unlocked, so he opened her door and "got this chill," and walked into her house. He walked inside and saw her and came right back out and told the black guy to come here. (V34:T28). Appellant told the black guy that she was dead, and he told Appellant to call the police. (V34:T28). When asked what he saw when he walked into Cindy's apartment, Appellant said that he looked around and walked past the hallway to the kitchen, and then as he was coming back out, he looked over and saw the victim on the ground. (V34:T28). Detective Klein asked Appellant if he walked all the way into the kitchen, and Appellant stated that he only walked up to the carpet. (V34:T28).

Appellant stated that after the black guy told him to call the police, he picked up the victim's phone by her lawnchair and called the police. He walked back to his apartment while on the phone to look for a cigarette, but could not find one so he started messing with the knife again and cut himself in the same exact spot. (V34:T29-30). When questioned about picking up the knife again and messing with it, Appellant responded:

> I started trying to clean it cause I was trying to do something to keep me calm so I can talk to this lady

> because I was flipping out the other guy wouldn't stay there and help me, I tried to call Tim, try to get a hold of Tim and Amy and them and I couldn't get a hold of no one and that's I called for an ambulance.

(V34:T30). Appellant told the detectives that he had never been inside the victim's apartment before that day. (V34:T32). Appellant also told the detectives that he was wearing the same clothes earlier that day and that the blood on the front of his shirt was probably from his cut. (V34:T33-34). At this point the detectives took a break so Appellant could eat something and the detectives could talk to Tim Connole. (V34:T34).

When the detectives returned to questioning Appellant, they began by reading him his Miranda rights. Appellant agreed to continue speaking with the detectives. (V34:T35). Appellant stated that he woke up at about 11:45 a.m. and played a video game for about two or two and a half hours. (V34:T36). During this time, Appellant spoke to some people on the phone, including his fiancee. When asked if he had an argument with his fiancee, Appellant responded, "not really no." (V34:T37). Appellant acknowledged, however, that their conversation centered around allegations that she had been cheating on him and he had been cheating on her, and that he hung up the phone

on her.[16] (V34:T38-41). After talking on the phone, Appellant began to clean and took the garbage out. (V34:T43-44).

Appellant acknowledged to the detectives that he thought the victim was good looking. (V34:T44). Appellant had never had much contact with her other than saying "hi," occasionally. When asked why he entered her apartment without an invitation, Appellant stated that he "was worried about her." (V34:T45). When the detectives indicated that it was strange of him to enter her apartment under those circumstances, Appellant claimed to do it all the time with his friends, including Nathan.[17] When the detectives informed Appellant that they did not believe his story about not seeing the victim's body until he turned around, Appellant informed them that he walked into the apartment and did not look to his right until after he turned around and was leaving, at which point he looked to his left and saw the body.

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[16]Prior to trial, Appellant filed a motion in limine seeking to exclude evidence from his taped statement regarding the argument with his fiancee, Mary Parent, on the day of the murder. (V21:3821-22). The State argued below that the argument was relevant to show that Appellant was angry and the argument was "part and parcel of what set him off." The prosecutor also noted that the change in Appellant's tone of voice when discussing the argument was relevant to show his anger. (SR:20; 24-26). Defense counsel renewed his objection to this testimony prior to the tape being played to the jury. (V34:1366).

[17]Nathan Phillips testified that Appellant was not authorized to simply walk into his apartment without invitation, nor would he expect Appellant to do so. (V34:1426).

(V34:T46-47). When the detectives began taking a confrontational approach with Appellant and informing him that they thought he killed Cindy Riedweg and had planned it for days, he denied it and said he had not been there watching her, he had been working and was gone. (V34:T47-50). The detectives confronted Appellant with the fact that he had not worked in weeks, and he stated that he had been looking for a job the last week. (V34:T50). When Appellant was arrested after the interview on an unrelated matter, he started to physically fight with the detectives. (V34:1381).

After Appellant's taped statement was played to the jury, Detective Klein testified regarding his investigation of Cindy Riedweg's boyfriend, Stuart Cole. (V34:1374-75). Detective Klein picked Mr. Cole up at his house and transported him to the police station. When detectives informed him that Cindy was dead, Mr. Cole cried pretty much the entire ride back to Dunedin. (V34:1375). Mr. Cole was interviewed and he provided the detectives with blood samples and fingerprints. (V34:1375-76). As part of the investigation, detectives were able to confirm that Mr. Cole was golfing with friends at a local golf course on Tuesday, February 9, 1999, between approximately 2:00 to 6:00 pm. (V34:1377-78).

The State called numerous crime scene technicians regarding

their collection and examination of evidence involved in this case.

Pinellas County Sheriff's Office forensic specialists Karen Greule, Catherine Holloway, and Robert Detwiler all worked inside the victim's apartment. (V29:721). Technician Greule testified that she photographed a ½ inch cut on Appellant's hand. (V29:718-20). Numerous witnesses who observed the victim's apartment commented that it was "extremely neat and tidy;" that the victim was a "meticulous housekeeper." (V27:388; V29:737-38; 773). Crime scene technicians working Cindy Riedweg's apartment noticed the water puddle in front of the kitchen sink and photographed the ashes in the sink. Gruele observed Appellant smoking in the parking lot and photographed cigarette butts in the area where he was standing. (V29:738-40; 774). Technicians also documented and collected a semen stain on the victim's bed comforter, a hand towel in the bathroom with semen on it, and Appellant's footprint on the kitchen floor next to the sink. (V29:779-88; 819; 830-34; 859-60).

Florida Department of Law Enforcement's (FDLE) crime lab examined a number of items submitted, including Appellant's clothing, and the semen stains found on the comforter and the hand towel. John Wierzbowski testified that he examined Appellant's shorts, shirt, and flip-flops for potential blood

stain pattern analysis. (V30:900). He noted the most significant blood stain was a transfer stain on the inside of the right front pocket of Appellant's shorts.[18] (V30:901-02). Although there were blood stains on the front and rear of the shorts and the flip-flops, they were not of significant size for the purpose of blood stain pattern analysis. (V30:905-07).

Tina Delaroche, an FDLE serologist, testified that she performed polymerase chain reaction (PCR) DNA analysis on some items, including six blood stains found on Appellant's shorts. Stain 6A was taken from the inside of the right front pocket and was consistent with Cindy Riedweg. (V31:1066). Stain 6C from the outside of the pocket also was consistent with the victim. (V31:1068, 1076). Using the FBI database, Ms. Delaroche testified that the chances of a random match for each of those stains were 1 in 3980 Caucasians, 1 in 2,550 African Americans, and 1 in 5,150 Southeastern Hispanics. (V31:1075-76). Stain 6D from the bottom of the right leg of the shorts was a mixture in which Cindy Riedweg, Appellant, and Stuart Cole could be included. (V31:1067-71). Stain 6E from the center of the left leg was a mixture in which Cindy Riedweg and Stuart Cole were included, and Appellant could not be excluded. (V31:1071-72).

[18]A "transfer stain is produced when an object that has blood on it is brought into contact with a non-bloody object leaving some blood from the original bloody object." (V30:902).

Stain 6F from the back right pocket was a mixture in which Cindy Riedweg, Appellant, Stuart Cole, and Donald Cambensy were included, and Tim Connole could not be excluded. (V31:1072-73). Stain 6B from the lower left leg was consistent with Appellant. (V31:1066). Ms. Delaroche also examined Appellant's shirt and found blood stains on the front and back. The stronger blood stain on the back was consistent with Appellant. (V31:1081-83).

Tina Delaroche also examined the sexual assault kit and found no semen in the vaginal, oral, and rectal swabs. (V31:1081). When she examined the hand towel recovered from the victim's bathroom, the crusty white stain tested positive for semen. The DNA profile was consistent with Appellant and the chance for a random match was 1 in 193,000 Caucasians, 1 in 16,600 African Americans, and 1 in 87,700 Southeastern Hispanics. (V31:1086-87). Delaroche also examined the cuttings from the comforter on the victim's bed. The white stains tested positive for semen and she observed sperm cells through a microscope. (V31:1099-1100). She submitted these items for short tandem repeat (STR) DNA testing. (V31:1100).

Robyn Ragsdale, an FDLE forensic serologist, conducted STR DNA testing on numerous items. STR DNA testing is much more discriminating than the PCR testing performed by Delaroche because STR testing involves thirteen loci, rather than six, and

there are more possible combinations at each of these loci. (V32:1206–09). STR DNA testing results in a much higher number when utilizing the FBI database. For example, on stain 6A taken from the inside of the right front pocket of Appellant's shorts, Ms. Ragsdale testified that the profile matched Cindy Riedweg at all 13 loci and amylogenic (a gender determination). The frequency of this profile is 1 in 4.63 quadrillion Caucasians, 1 in 29.6 quadrillion African Americans, and 1 in 3.98 quadrillion Southeastern Hispanics. (V32:1211-13).

Ms. Ragsdale examined the other stains taken from Appellant's shorts and determined that stain 6C and 6E were mixtures with a major and minor profile. With regard to the major profile on both stains, the profile matched Cindy Riedweg at seven STR loci and amylogenic. (V32:1215-17). There was not enough of a DNA sample for her to determine the minor contributor or for her to examine the other STR loci in order to make a complete profile. Nevertheless, she was able to determine that the profile is found in approximately 1 in 39.1 million Caucasians, 1 in 112 million African Americans, and one in approximately 32.4 million Southeastern Hispanics. (V32:1221). On stain 6D, assuming that Appellant was the minor contributor to the mixture, Ms. Ragsdale determined that the major contributor matched Cindy Riedweg at eight STR loci and

amylogenic. (V32:1218-19). The frequency of this profile is 1 in 171 billion Caucasians, 1 in 354 billion African Americans, and 1 in 159 billion Southeastern Hispanics. (V32:1222). Stain 6F was also a mixture and the major contributor matched Cindy Riedweg at nine STR loci and amylogenic. Appellant was excluded as the contributor to the minor component. (V32:1219-20). The frequency of this profile was 1 in 1.42 trillion Caucasians, 1 in 2.78 trillion African Americans, and 1 in 1.31 trillion Southeastern Hispanics.

Ms. Ragsdale testified that she also performed STR DNA testing on the stains found on the victim's bathroom handtowel and the comforter from her bedroom. With regard to the stain on the bathroom towel, Ms. Ragsdale testified that the stain matched Appellant at 12 of the 13 loci as well as the amylogenic (results at one of the loci were inconclusive).[19] (V32:1222-23). The frequency of this occurrence in unrelated individuals is 1 in 27.9 quadrillion Caucasians, 1 in 114 quadrillion African Americans, and 1 in 125 quadrillion Southeastern Hispanics. (V32:1223). Likewise, the stain on the comforter matched Appellant at 12 of 13 loci and amylogenic, and had the same frequency as the stain on the handtowel. (V32:1230-31).

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[19]As Ms. Ragsdale explained to the jury, the fact that one or more loci were inconclusive does not mean that the testing is inaccurate in any way. (V32:1223-24).

During its case in chief, the State called a former inmate who shared a cell pod with Appellant, Valdez Hardy. Hardy testified that he shared a cell with Appellant at the Pinellas County Jail beginning in September, 1999. (V28:620-26). Appellant observed an incident when Hardy spoke with another inmate about the inmate's case, and after this incident, Appellant and Hardy "really got into a lot of different things per se, deeply about his case." (V28:628-29).

One afternoon, Appellant woke up Hardy so they could talk about Appellant's case. Appellant told Hardy the only thing about the case that really worried him was the washrag found in the victim's home that may have had semen on it. (V28:629-30). According to Hardy, Appellant said that on the day of the murder, he observed the victim sunning herself in a lawn chair and she looked good. (V28:631). Appellant wanted to "be with her," so he went upstairs and got the trash and walked back by her and winked. (V28:631). After taking out the trash, Appellant returned to his apartment. He went back out and she was gone. (V28:631). Appellant saw her phone by the lawn chair and maybe a cup, so he went to her door and it was open. Appellant went inside and she saw him and "started tripping." Hardy took this to mean that she started "screaming or what have you." (V28:631). Appellant again started talking about the

washrag and stated that it was "the only thing that can really prove that." (V28:631-32). When Appellant left the apartment, he saw another male and told him that there was a girl in there dead. (V28:632). The guy told Appellant to call 911. (V28:632). Appellant went outside and used the victim's phone to call the police. (V28:632). Mr. Hardy asked Appellant if there was a lot of blood, and he responded yes. A few days later, they spoke again and Appellant told him the victim was naked on the floor. (V28:632).

Mr. Hardy testified that Appellant told him that when the paramedics arrived, he was outside smoking a cigarette. (V28:633). Appellant showed the detectives a cut he had obtained from a knife in his apartment. (V28:633). He said the detectives took his shoes, but Appellant told Hardy that they were his roommate's shoes. (V28:633-34). Appellant always maintained that his main concern was the washcloth, and one time, Appellant told Hardy "that can't nobody say he killed ... her. Don't nobody know what happened but him and her."[20]

[20]During her opening statement to the jury, the Assistant State Attorney stated that "as Kenneth Dessaure said himself, there is only two people that know exactly what occurred in that apartment." (V27:350). Appellant moved for a mistrial and argued that the State's argument was an impermissible comment on Appellant's right to remain silent. (V27:350). The State responded that this was exactly what a witness would testify to during the State's case. (V27:351). The trial judge found that the comment was not an inference on the right to remain silent

(V28:635). Appellant also expressed concern with how he would deal with a scuff mark or footprint in the victim's kitchen. (V28:634-35). When they were discussing how to deal with the evidence, Mr. Hardy suggested that Appellant claim he was dating the victim secretly and that the washcloth was left there the night before. (V28:635-37). Appellant told Hardy that would not work because the victim worked at night, and she had just moved into the apartment. (V28:637-38).

Mr. Hardy testified that he never observed any paperwork in Appellant's cell. In fact, it was very common for inmates not to keep this information with them because other inmates could use it against them. (V28:639). Mr. Hardy met with the prosecutor and gave a sworn statement on November 4, 1999. (V28:640). Mr. Hardy returned to the same cell with Appellant for a couple more months before they moved Appellant. (V28:641).

On cross-examination, defense counsel questioned the witness about the charges he had pending at the time he spoke with the prosecutor. (V28:650-55). When defense counsel asked the witness about seeking a deal from the State in exchange for information, Hardy testified that the prosecutor told him that she would not promise him anything because he could have

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and denied the motion for mistrial. (V27:351).

obtained his information from the newspaper. (V28:654-55). Defense counsel then proceeded to question the witness about his conversation with Appellant allegedly occurring on the same day that the St. Petersburg Times ran an article about the case. Mr. Hardy denied that the conversation took place on that day, but he admitted that he had read the headline of an article about Appellant's case. (V28:655-56).

On redirect, Mr. Hardy stated that Appellant told him the victim's apartment was in immaculate condition. Hardy also related Appellant's version of events as to when he was arrested by detectives. (V28:662). The prosecutor had Mr. Hardy read the newspaper article from the St. Petersburg Times that defense counsel had questioned him about. The article did not mention Appellant taking out the trash, scuff marks on the kitchen floor, leaving the victim naked on the floor, having an immaculate apartment, a phone next to the lawn chair, Appellant having his roommate's shoes, paramedics or Fire Rescue arriving first, the victim working nights, Appellant wearing flip-flops, that Appellant saw a guy when he was leaving and Appellant told the guy she was dead, that the guy told Appellant to call the police, that Appellant had cut himself, and that detectives had slammed Appellant to the floor when he was arrested. (V28:662-64). The article did reference the fact that Appellant's semen

had been found on a towel in the victim's bathroom. (V28:665).

On December 3, 1999, Shavar Sampson turned eighteen and was placed in pod 4F9 in the Pinellas County Jail with Valdez Hardy, Appellant, and another inmate. (V35:1441-45). Mr. Sampson would do favors for Appellant like calling home and having his family conduct a three-way call for Appellant. (V35:1445). In exchange, Appellant would buy items from the canteen for Sampson. Appellant felt comfortable with Sampson and began to talk to him about his case. (V35:1446-47). Appellant told Sampson he saw the victim sunbathing and he thought she looked nice. Appellant attempted to have a conversation with her, but she did not talk to him. The next day, when she was again outside sunbathing, Appellant went inside her apartment to surprise her. (V35:1447). When Cindy Riedweg walked in, she was shocked and asked Appellant what he was doing in her apartment. Appellant told her he wanted to talk to her and she said she did not want to talk to him, and she punched him. Appellant punched her back and knocked her unconscious. (V35:1448). Appellant took off her two-piece bathing suit and began to have sex with her. (V35:1448). When she regained consciousness, she began kicking and punching Appellant. Appellant told Sampson that this was when he began stabbing her

and he stabbed her a number of times. (V35:1449). Appellant then said that "what he had on he had took off and he put on something else that he already had from home." (V35:1449). Appellant then called 911. Appellant also told Sampson that he came inside the victim and "knocked" her period on and got blood on his underwear. (V35:1449).

All of the conversations Sampson had with Appellant occurred when they were housed together in pod 4F9. (V35:1450). In February, 2000, Sampson was housed in 2F7. (V35:1450-51). One night, Appellant came into the cell and saw Sampson, and went back outside and got a transfer to another cell. Sampson never talked to the State about his conversations with Appellant until December, 2000, well after Sampson had been sentenced to 19 years in the Department of Corrections.[21] (V35:1450-52). While housed at the jail the week of Appellant's trial, both Appellant and Rodney Stafford called him a snitch. (V35:1453). Mr. Sampson also testified that Appellant did not keep any paperwork in his cell. (V35:1463).

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[21]Mark Cross, a detention deputy with the Pinellas County Sheriff's Office, testified that he transferred Appellant to pod 2F7 on February 20, 2000. (V35:1545). Appellant informed the deputy that Shavar Sampson was a witness in his murder case and was housed in the same cell, so Appellant requested a transfer. The deputy filled out the required paperwork regarding the incident. This was the first time he had any information that Shavar Sampson was a potential witness in Appellant's murder case. (V35:1547-49).

Dr. Laura Hair, an assistant medical examiner, responded to the scene of the murder on February 9, 1999, and performed the autopsy the next day. (V35:1465-75). Cindy Riedweg was 5'6" tall, weighed 136 pounds, and was 27 years old. Dr. Hair testified that the victim suffered a total of 53 wounds, all of which occurred around the same time. (V35:1476, 1488-89). Three of the wounds were bruises, but the remaining wounds were all consistent with being caused by a knife. (V35:1490). The victim suffered five defensive wounds to her hands. (V35:1498). She suffered numerous wounds to her throat area, some of which perforated her trachea. (V35:1490-94). A number of wounds penetrated the lungs causing both of her lungs to collapse, two wounds cut the exterior jugular vein, one wound cut the liver, one struck a vertebra in the neck, and one cut a spinal nerve. (V35:1483-1527). With the victim's injuries to her lungs, the doctor opined that she would have lost consciousness within four to six minutes, and she could have survived for another four to ten minutes. (V35:1528-29). Pulseless electrical activity could have continued for as much as ten to fifteen minutes. (V35:1529-30). On cross-examination, Dr. Hair testified that the victim did not have any blood in her vaginal area and she had not started her menstrual cycle. (V35:1539-40). Also, the rape kit containing oral, vaginal, and anal swabs tested

negative. (V35:1540).

The State called David Brumfield, a blood spatter expert who supervised the crime scene, to testify about the blood stains in Cindy Riedweg's bathroom and hallway. (V30:932-39). Mr. Brumfield opined that the attack happened in the bathroom near the tub. (V30:996). She went into the tub face-first, and was able to pull herself out and turn towards the hallway. There was a swipe of blood on the tub, which indicated that the victim had grabbed part of the tub. (V30:953-55). The shower curtain had been pulled away from the toilet. There were blood stains on the bottom right corner of the shower curtain. (V30:945). Blood spatter was on the bathtub, behind the toilet, on the toilet, and on the back wall. (V30:947). Most of the blood was located low to the ground and there were stains where Cindy Riedweg's legs, stomach, and hand had made contact with the tub. (V30:956-58). The amount of blood spatter in the bathroom indicated that the victim had been cut, but the level of bleeding did not indicate any life-threatening injuries. (V30:947-48). She was able to move a couple of steps towards the hallway, before the major bloodletting occurred. (V30:947, 996).

The victim was found lying halfway in the bathroom, halfway in the hallway. (V30:966). The highest blood stains in the

hall were 12 to 18 inches above the floor. The highest point the blood could have originated from was 18 to 24 inches above the floor. (V30:968, 980). The victim was face down on the floor and the blood ran down the side of her face indicating that she never was up on her knees. (V30:986-87). The two significant stab wounds to the victim's back appeared to penetrate the lungs. These "death wounds" caused a fine mist of blood on the victims' back and buttocks, with air bubbles in the droplets of blood. (V30:987-88). After the victim received these two wounds, the only body movement was rotating sideways. There was no blood on the bottom of her feet, so she was on her knees or down on the ground during the entire time the injuries occurred. (V30:988-92).

Defense Case

Defense counsel called Susan Puller, a forensic scientist, to testify about her examination of the crime scene. Ms. Puller reviewed some police reports and some of the crime scene photographs and the crime scene videotape. (V33:1282). She opined that it would be reasonable to expect the assailant to have blood spatter on at least his arms as a result of the stabbing murder. (V33:1283-85). Depending on where the assailant's body was at during the attack, she would expect to find impact type of spatter on the front of the assailant's

body. (V33:1283).

Ms. Pullar testified that there was some blood on the victim that did not appear to come directly from a wound, and this could have come from another source like the assailant or the knife. (V33:1291-92). She opined that this blood should have been collected and analyzed. (V33:1292). Ms. Pullar also testified that there was no clear pattern to the transfer blood stain on the inside of Appellant's short pocket. (V33:1297).

Dr. Edward Willey, a forensic pathologist and former medical examiner, testified that he examined a photograph of the cut on Appellant's hand. In his opinion, the cut would have bled, but numerous variables would affect the amount of bleeding. (V35:1558-64). The witness could not determine whether there were two cuts, and he did not see any evidence of scar tissue in the area from repeated cuts. (V35:1561-63).

Diane Strahan, the apartment complex manager, testified for the defense that she observed Stuart Cole in the parking lot on the evening of the murder when police were at the scene. (V35:1565-57). A few days later, she observed Mr. Cole in the victim's apartment assisting her family pack. He was pointing to items he had purchased for Cindy Riedweg that had sentimental value to him and was crying. (V35:1568-69).

Deputy Christopher Hamilton, the first law enforcement

officer to arrive at the scene of the murder, testified that he spoke with John Hayes on February 9, 1999. (V35:1570-71). Deputy Hamilton stated that Hayes told him he observed Appellant enter and exit the victim's apartment. (V35:1571-72). On cross-examination, Deputy Hamilton acknowledged that his job was not to take detailed witness statements at the scene and that homicide detectives had more training in this regard. Specifically, Deputy Hamilton acknowledged that Detective Hilliard conducted a detailed interview with John Hayes and drafted a report with a different documentation of John Hayes' statement about seeing Appellant. (V35:1575-76).

Daniel Copeland testified that he was friends with Stuart Cole and they played golf together on the afternoon of February 9, 1999. (V35:1578). Around 11:00 p.m. that evening, Stuart Cole called Copeland on the phone and Copeland informed him that the eleven o'clock news was showing Cindy Riedweg's car being towed away from the apartment complex. (V35:1579).

Amy Cockrell testified for the defense that when she returned to her apartment at about 4:30 p.m. on February 9, 1999, Connole and Appellant were confined in a small area and she had to have an officer pass Connole some cigarettes. (V35:1590, 1593). She testified that she did not enter her apartment at that time, but was allowed to enter the following

day. (V35:1590-91). Cockrell testified that she observed the kitchen area and it appeared that the dishes were in the process of being washed. (V35:1591).

On cross-examination, Cockrell stated that she did not recall giving the answer in her sworn statement from May, 1999, that she observed a tray of ice in her freezer. (V35:1594-95). After learning that the State was seeking the death penalty against her friend, Cockrell admitted that her mother directed her to write a letter to the prosecutor changing her statement about how often Appellant cleaned the apartment. (V35:1597-99).

Appellant's fiancee, Mary Parent, testified that she left for South Carolina a few months after she had a child with Appellant. (V36:1633-34). In February, 1999, she was living in South Carolina, but she maintained contact with Appellant on the phone almost every day. She acknowledged that their relationship was tempestuous. (V36:1635). On February 9, 1999, she called Appellant during her lunch break, but they hung up on each other after arguing about cheating on each other. (V36:1636, 1638). She called Appellant back and they made up and said they loved each other and she went back to work about 1:30. (V36:1636-37). Ms. Parent also testified about Appellant's "quirk" of always having to have his cup filled to the top with ice whenever he drank a beverage, be it soda, ice

water, or fruit punch. (V36:1637).

William Birchard, an inmate, testified that he was housed in pod 4F9 of the Pinellas County Jail with Appellant and Valdez Hardy in the fall of 1999. (V36:1607). Birchard testified that inmate Valdez Hardy showed him a newspaper article regarding Appellant's case. Birchard read the article and gave it to Appellant. (V36:1608-09). Birchard observed Hardy questioning Appellant about his case, but Appellant did not respond. (V36:1610-11). Birchard testified that Hardy told him he was trying to get information on Appellant's case so that he could make a deal on his own case. (V36:1612).

On cross-examination, the prosecutor questioned Birchard about his five felony convictions. The prosecutor's office prosecuted Birchard for each of his felonies. The prosecutor then asked if her office was currently responsible for Birchard serving a life sentence. Defense counsel objected to the question and moved for a mistrial. (V36:1613-14). The prosecutor responded that defense counsel had questioned the State's inmate witnesses regarding their pending charges and the maximum sentence and stated that she should be allowed to ask the question because there was no remedy for the witness if he perjured himself given his mandatory life sentence. (V36:1614). The trial judge denied the motion for mistrial and allowed the

witness to answer the question. (V36:1614). The prosecutor proceeded to ask the witness if her office was responsible for him serving a mandatory life sentence, and Birchard answered "Yes." (V36:1615).

Birchard testified that he and Hardy both read an article from the St. Petersburg Times, dated October 1, 1999. (V36:1615-16). The prosecutor proceeded to question Birchard about numerous case-specific facts that were not contained in the article; the same specific facts Valdez Hardy testified to earlier in the proceedings. (V36:1616-19). Birchard also acknowledged that Appellant did not keep paperwork or police reports in his cell. (V36:1620).

Another inmate, Rodney Stafford, was also housed in pod 4F9 with Appellant, Valdez Hardy, Shavar Sampson, and William Birchard, in the fall of 1999. (V36:1622, 1624). When Stafford arrived in the pod he was warned that Hardy was snitch, and he shared this information with Appellant and Birchard. (V36:1622-24). Stafford had seen Sampson in the jail recently and asked him about being a snitch because it shocked him. (V36:1624-25).

On cross-examination, the witness did not contest the fact that he did not arrive in Appellant's pod until December 13, 1999. (V36:1626). Stafford was not aware that Hardy had given

a statement to the prosecutor on November 4, 1999, almost six weeks before he ever arrived in the pod. (V36:1626-27). The prosecutor also inquired about the witness' recent conversation with Shavar Sampson regarding his snitching. (V36:1627). Stafford acknowledged that he was serving a mandatory life sentence courtesy of the prosecutor's office. Defense counsel objected to the prosecutor's question, but the trial judge overruled the objection. (V36:1627). When Stafford returned to the Pinellas County Jail to testify in the instant case, he utilized the phones in a central location. He denied telling someone on the phone that he was "back as a witness for my home boy who killed that white girl." (V36:1632).

State's Rebuttal

The State and defense counsel reached the following stipulation:

> Witness Rodney Stafford entered Pod 4F9 at the Pinellas County Jail on December 13, 1999, where he remained until February 10, 2000; that the defendant entered Pod 4F9 at the Pinellas County Jail on September 22, 1999, where he remained until December 4th. He then came back into Pod 4F9 on December 13, 1999, where he stayed until December 24th; that Valdez Hardy was in Pod 4F9 at Pinellas County Jail from May 25th of 1999 continuously through February 7th of 2000.

(V36:1657-58).

The State recalled Shavar Sampson to discuss what happened when he was returned to Pinellas County Jail to testify in this

case. The jail placed a wristband on him that contained his photograph and name. Mr. Sampson saw paperwork indicating that he was supposed to be kept separate from Rodney Stafford. (V36:1659). Mr. Sampson did not recognize the name and had no idea why he was being kept separate from Rodney Stafford. (V36:1660).

When Mr. Sampson was talking on one of the phones in the booking area, he noticed he was standing next to Rodney Stafford. He overheard Stafford state that he was here to testify for his home boy who had killed a white girl. (V36:1660). After they had spoken on the phone, Stafford noticed Sampson's wristband and asked him if he was a Sampson. Stafford stated that he was housed at Avon Park Correctional Institution with Robert Sampson. Stafford did not know who Shavar Sampson was and did not know that he was supposed to keep separate from him. Stafford also did not know why Sampson was in the Pinellas County Jail. (V36:1660-61).

On cross-examination, Sampson testified that he was a freshman at Dixie Hollis High School when Rodney Stafford was a senior. (V36:1662). Sampson did not know Stafford at that time, but had heard of him. Sampson also denied being housed in the same pod with Rodney Stafford, Valdez Hardy, William Birchard, and Appellant. (V36:1662).

Penalty Phase Proceedings

On September 6, 2001, the day after the jury returned its verdict finding Appellant guilty of first degree murder, defense counsel informed the court that Appellant was going to waive the right to have a jury recommend an appropriate sentence and counsel would simply offer mitigation information in summary form to the Court for his determination of the appropriate sentence. (V37:1817; 1827). Defense counsel informed the court that this was not a new development and despite all three defense attorneys opposing the decision, Appellant had given it a considerable amount of thought. (V37:1828). The court proceeded to conduct a colloquy with Appellant regarding his decision to file the Waiver of Right to Presentation of Mitigating Evidence Before the Jury, and Appellant indicated that his decision was against the advice of his attorneys. (V37:1829-31).

At the same hearing, the court inquired as to the aggravating circumstances the State would be seeking. Defense counsel agreed that Appellant had been convicted of a felony and was under sentence of imprisonment or placed on community control at the time of the murder and defense counsel agreed that at least one aggravating circumstance applied. (V37:1832-33; 1835). The State also suggested that three additional

aggravating circumstances applied: (1) that Appellant had a previous violent felony conviction; (2) that the murder was especially heinous, atrocious, or cruel; and (3) that the murder occurred during the commission of a felony. (V37:1833-34). The defense indicated that they would provide the Court with a list of proposed mitigating factors. (V37:1835).

On September 11, 2001, defense counsel filed a "Waiver of Argument for Life Sentence," and Appellant indicated that he was joining the State in seeking the death penalty. (V24:4313). At the outset of the hearing that day, the trial court again conducted an inquiry of Appellant to verify that he was freely, knowingly, and intelligently waiving the presentation of mitigation evidence to the jury. (V38:1846-48). Appellant also confirmed that he did not want his attorneys to present any mitigation evidence to the Court for his consideration, and that this decision was also made against his attorneys' advice. (V38:1847).

The State proceeded to present evidence establishing the applicable aggravating factors. With regards to the aggravating factor that Appellant had previously been convicted of a violent felony, the State presented the judgment and sentence for the crime of resisting arrest with violence. Defense counsel stipulated that the judgment, sentence, and fingerprints were

for Appellant. (V38:1851-54). The prosecutor next asserted that Appellant was on community control at the time of the murder establishing a separate aggravating factor. Defense counsel stipulated that Appellant was on community control for conspiracy to commit robbery on the date of the murder. (V38:1851-54). The State next argued that the facts from the trial established both premeditation and felony murder. Specifically, the prosecutor argued that the capital felony was committed while the defendant was engaged in the commission of a burglary. (V38:1854-55). Finally, the State argued the most grievous aggravating factor that applied in this case was that the murder was especially heinous, atrocious, or cruel. (V38:1855-62). The State noted the medical examiner's testimony that the victim had 53 wounds to her body, a number of which were tortuous in nature. The State showed the court photographic evidence from the trial that demonstrated that the victim suffered defensive wounds on her hands, numerous pick marks to her upper body and face, a slashing wound across her throat that went from one side of her neck to the other, and two significant stab wounds to her back.

After the State presented victim impact evidence, defense counsel proffered, by oral summary, the mitigating evidence defense counsel discovered and would have presented had

Appellant not waived the presentation of such evidence.[22] (V38:1886-1905). Defense counsel stated that he could have called a number of witnesses, including Appellant's juvenile delinquency case manager and full-time counselor, Leonard Stuart; Appellant's biological mother; Appellant's younger half-brother; an older brother; a younger half-sister; a "surrogate mother;" Appellant's grandmother; his fiancee, Mary Parent; Amy Cockrell; and Dr. Maher, a psychiatrist. (V38:1888-1905). Appellant waived the testimony of each of the proposed witnesses. (V38:1891, 1895, 1897, 1899, 1900-03, 1905). Appellant also waived the presentation of any legal argument against the aggravating circumstances. (V38:1905-06).

The State informed the Court that had Appellant presented live testimony regarding his mitigation evidence, the State would have presented evidence in rebuttal. (V38:1907-12). Defense counsel indicated that Dr. Maher found Appellant competent to waive the mitigation evidence. (V38:1912). Appellant informed the Court that he was waiving the presentation of a sentencing memorandum by defense counsel.

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[22]Defense counsel did not argue against any of the aggravating factors proposed by the State because of Appellant's decision to join the State in seeking the death penalty. (V38:1886-87). Appellant agreed on the record that he did not want his attorneys to argue against the aggravating circumstances. (V38:1887).

(V38:1914-15). The trial court ordered the Department of Corrections to prepare a presentence investigation report. (V38:1918-20).

On October 15, 2001, the trial court conducted a hearing pursuant to Spencer v. State, 615 So. 2d 688 (Fla. 1993). Prior to this hearing, Appellant changed his mind and was now seeking a life sentence. Defense counsel filed a sentencing memorandum, and presented live testimony from Appellant's fiancee, Mary Parent, his grandmother, Louise Randall, and Appellant himself. Mary Parent testified that Appellant used to rock their infant baby to sleep, and would feed and bath him. (V24:4426-27). Louise Randall testified that Appellant came to live with her when he was only 13 months old, and stayed there until he was 13 or 14 years old. (V24:4434-36). They lived in an area with a high drug activity. (V24:4439-40). Appellant was malnourished as a child and his mother wanted Ms. Randall to take Appellant before the State of New York took custody of him. Appellant's father did not have any contact with Appellant as he was growing up. (V24:4434-37). Appellant's older brother died in 1994, and after his death, Appellant acted like he did not care if he lived or died. (V24:4438-39).

Appellant testified to the circumstances surrounding his prior violent felony of resisting arrest with violence.

Appellant testified that Detectives Klein and Pupke grabbed his wrists after his interview and during their struggle, they all fell to the ground. Appellant then claimed that one of the detectives punched him in the eye after he threatened to sue them. (V24:4445). Appellant stated that he pled to the resisting arrest with violence charge because he accepted a deal on that charge and his violation of his house arrest. (V24:4445-46). Appellant also testified that he was changing his mind and was now seeking a life sentence. (V24:4446-47). After Appellant testified, defense counsel asked the court to take into consideration Appellant's courtroom demeanor. (V24:4459).

The State called Detective Klein in rebuttal to testify about the circumstances surrounding Appellant's arrest for resisting arrest with violence. Detective Klein testified that he informed Appellant that he was under arrest, but Appellant placed his hand on the doorknob and tried to leave. The detectives struggled with Appellant when they attempted to arrest him, and he physically resisted arrest with violence. (V24:4464-65). Detective Klein also denied that anyone punched Appellant in the eye. (V24:4465-66).

SUMMARY OF ARGUMENT

The trial court acted within its sound discretion when it denied Appellant's motion for mistrial after the State commented in opening statements about a witness' conversation with Appellant. Valdez Hardy, an inmate housed with Appellant, testified that Appellant told him that nobody could say he had killed the victim, because nobody knew what happened but Appellant and her. In her opening statement, the prosecutor informed the jury that "as Kenneth Dessaure said himself, there is only two people that know exactly what occurred in the apartment." The trial court properly found that the comment was not an impermissible comment on Appellant's right not to testify. The prosecutor's statement was an accurate and permissible comment on a witness' anticipated testimony. Even if the trial court erred in allowing the comment, the error was harmless beyond a reasonable doubt as the comment was not so prejudicial as to vitiate the entire trial.

The trial court did not abuse its discretion by excluding evidence of marijuana found in the victim's apartment and by allowing the State to argue that ashes found in the victim's sink may have been left by Appellant. When the State introduced evidence that there were ashes found in the victim's sink, Appellant sought to introduce the evidence of the marijuana and

to argue that Stuart Cole must have left it there because he smoked marijuana when he golfed. However, as the trial judge properly found, the evidence of marijuana in the victim's apartment was not relevant and was simply offered as bad character evidence. There was no evidence introduced or proffered to show that Stuart Cole actually possessed or smoked marijuana at the victim's apartment near the time of her murder. On the other hand, there was substantial evidence introduced surrounding Appellant's act of consistently smoking cigarettes on the day of the murder. Thus, the trial court properly allowed the State to make a reasonable argument based on the evidence. Even if the trial court erred in excluding the evidence, the error was harmless given the overwhelming evidence of Appellant's guilt.

The trial court did not abuse its discretion in denying Appellant's motion for mistrial after the State impeached a defense witness with the amount of time he was serving in prison. The trial judge allowed the State to question two inmate witnesses regarding their mandatory life sentences because the same State Attorney's Office had prosecuted them and was responsible for their sentence, and the State could not do anything further to the witnesses if they committed perjury. Even if this Court finds that the impeachment evidence was

improper, the State submits that the error was harmless.

The trial judge acted within his discretion in denying Appellant's motion in limine seeking to exclude evidence from Appellant's taped statement to detectives regarding a verbal argument Appellant had with his fiancee only an hour or two before the murder. The discussion between Appellant and the detectives regarding this argument was relevant and admissible because the argument was part and parcel of what set Appellant off and motivated the murder, and it was relevant to show his demeanor with detectives and his tendency to give law enforcement officers false information until confronted with contradictory information. Even if the trial court erred in admitting this evidence, the error was harmless. The evidence of Appellant's argument with his fiancee was not a major focus of the State's case and was not unfairly prejudicial to Appellant.

Appellant is procedurally barred from raising on direct appeal an issue regarding the voluntariness of his waiver of a sentencing jury because he failed to move to withdraw his waiver in the trial court. This Court has consistently held that a defendant may only raise such a claim by collateral attack through a postconviction motion.

Appellant's constitutional challenges to Florida's death

penalty statute based on Ring v. Arizona, 536 U.S. 584 (2002), are without merit and have been repeatedly rejected by this Court. Accordingly, this Court should affirm the trial court's judgment and sentence of death.

ARGUMENT

ISSUE I

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED ON THE PROSECUTOR'S COMMENT DURING OPENING STATEMENT.

During the State's opening statement to the jury, the prosecutor stated:

> In this particular case, as Kenneth Dessaure said himself, there is only two people that know exactly what occurred in that apartment. So, therefore, it is my job to take the physical evidence, the photographs, the witnesses' statements, experts, scientists, forensic technicians, and reconstruct what occurred for you.

(V27:350). Appellant objected and moved for a mistrial, arguing that the State's comments constituted an impermissible comment on Appellant's right to remain silent. (V27:350). The State responded that the comment "there is only two people that know, her and me" was exactly what a witness would testify to during the State's case. (V27:351). The trial judge found that the comment was not an inference on Appellant's right to remain silent and denied the motion for mistrial. (V27:351).

The State submits that the trial judge acted within his sound discretion in denying Appellant's motion for mistrial. The law is well established that a motion for mistrial is addressed to the sound discretion of the trial court and "the power to declare a mistrial and discharge the jury should be

exercised with great care and should be done only in cases of absolute necessity." Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982). Furthermore, this Court has stated that "a mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial." Duest v. State, 462 So. 2d 446, 448 (Fla. 1985).

A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999). In Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999), this Court explained that a ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion. "Discretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court.'" Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000) (citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)).

In the instant case, the prosecutor alluded to the anticipated testimony of inmate Valdez Hardy in her opening statement when she stated that "as Kenneth Dessaure said himself, there is only two people that know exactly what occurred in that apartment." Valdez Hardy subsequently

testified during the State's case that Appellant told Hardy "can't nobody say he killed her. Don't nobody know what happened but him and her." (V28:635).

A defendant has the constitutional right to refuse to testify against himself in a criminal proceeding. See U.S. Const. amend. V; Art. I, § 9, Fla. Const; see also Fla. R. Crim. P. 3.250 (prohibiting a prosecuting attorney from commenting on the failure of a defendant to testify in his own behalf). This Court has stated the "very liberal rule" that "any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." Rodriguez v. State, 753 So. 2d 29, 37 (Fla. 2000). However, as noted in Rodriguez, this Court has attempted to draw a distinction between impermissible comments on silence and permissible comments on the evidence in the case. Id.

In this case, the State submits that the prosecutor's comments were permissible comments on the evidence that would be introduced in the case. As previously noted, the prosecutor almost made a verbatim quote of Valdez Hardy's testimony regarding his conversation with Appellant. Although Appellant expressed concern to Valdez Hardy over how to deal with the fact that his semen was found on a washcloth in the victim's apartment, Appellant noted that the only people that knew what

happened was the victim and him. (V28:634-35).

The State acknowledges that this Court has determined that similar comments have impermissibly highlighted the defendant's decision not to testify. See Rodriguez v. State, 753 So. 2d 29, 37-39 (Fla. 2000) (finding prosecutor's comments during closing argument were impermissible comments on the defendant's constitutional right to remain silent); Heath v. State, 648 So. 2d 660, 663-64 (Fla. 1994) (prosecutor stated in opening statement that "you're going to hear testimony, ladies and gentlemen, from the only person who can tell you about what Kenny [Heath] and [the defendant] did. Michael Sheridan's dead; he can't tell you what happened. Kenny Heath is going to come before you and tell you how Michael Sheridan died."); Dailey v. State, 594 So. 2d 254, 257-58 (Fla. 1991) (finding prosecutor's comments that "there are only three people who know exactly what happened on that Loop area . . . . Shelly Boggio and she is dead; Jack Pearcy and he is not available to testify; and the Defendant" were impermissible comments on the defendant's right not to testify); State v. Marshall, 476 So. 2d 150, 151 (Fla. 1985) (prosecutor stated in closing argument that "the only person you heard from in this courtroom with regard to the events on November 9, 1981, was [the one witness to the crime]"). However, in each of the cases, this Court utilized

the harmless error analysis and found that the comments were harmless.

In the instant case, even if this Court finds that the prosecutor's comments were "fairly susceptible" of being interpreted as a comment on Appellant's right to not testify, the error is harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129, 1131 (Fla. 1986). The evidence in the instant case is overwhelming against Appellant and the brief comment in the prosecutor's lengthy opening statement was not so prejudicial as to vitiate the entire trial. Furthermore, when instructing the jury on the applicable law, the trial judge informed the jury that the attorneys' arguments were not the law and Appellant was not required to present any evidence or prove anything. (V37:1798-1802). Finally, as this Court made clear in State v. Murray, 443 So. 2d 955, 956 (Fla. 1984), prosecutorial misconduct is the proper subject of bar disciplinary action, not reversal and mistrial. See also Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (stating that "it is appropriate that individual professional misconduct not be punished at the citizens' expense, by reversal and mistrial, but at the attorney's expense, by professional sanction.").

Appellant argues in his brief that the prosecutor's comment

contributed to, influenced, or affected the jury's verdict by predisposing the jury to consider Appellant's silence. Appellant states in his Initial Brief at page 57:

> The prosecutor invited the jury to conclude that Dessaure must be guilty because he did not take the stand to explain why his foot print was on Riedweg's kitchen floor, how blood consistent with Riedweg's DNA profile got on his shorts, how semen consistent with Dessaure's DNA profile got on Riedweg's comforter and towel, why Valdez Hardy testified Dessaure talked to him about explaining the semen on the towel, and why Shavar Sampson testified Dessaure told him he raped and stabbed Riedweg (especially in light of the medical examiner's testimony that the rape kit test results were negative).

Initial Brief of Appellant at 57. Contrary to Appellant's assertion, the prosecutor's comment on Valdez Hardy's expected testimony and her subsequent statement regarding her role of reconstructing what took place in the victim's apartment were not so prejudicial as to affect the jury's verdict. Clearly, Appellant is reading far too much into the prosecutor's simple comment on the evidence when he alleges that the prosecutor invited the jury to conclude that Appellant was guilty because he did not testify and explain the overwhelming evidence of guilt presented by the State. Appellant's act of highlighting some of the most damaging testimony against Appellant merely supports the State's position that the comments were harmless.

A review of the entire record in this case establishes that

any error in the State's opening statement was harmless beyond a reasonable doubt. The State's evidence establishes that Appellant was responsible for entering Cindy Riedweg's apartment without permission and stabbing her to death after engaging in some sort of sexual activity. The physical evidence in this case establishes beyond a reasonable doubt that Appellant entered Cindy Riedweg's apartment and ejaculated on her bedroom comforter and on a handtowel in the bathroom.[23] Appellant also had the victim's blood on the inside of his short's pocket and on the outside of his shorts. Appellant left his footprint in the victim's kitchen near the sink and near the puddle of water discovered on the floor. There was also a scuff mark on the kitchen floor. The State also introduced evidence from two inmates that Appellant had confessed to committing the offense to them. In short, the evidence presented by the State in this case directly contradicts Appellant's theory of defense. Appellant told law enforcement officers that he went to the victim's apartment for ice and entered her apartment without permission because he had a bad feeling something was wrong. Appellant claimed that he was only in her apartment for a minute

[23]The State urges this Court to review all the photographic evidence admitted at trial and contained in the record on appeal. Photographs of the deceased victim lying in the bathroom hallway show the handtowel sitting on the bathroom counter, only a few feet from the victim's body.

and that he never touched the victim. Appellant was adamant about showing the detective's the knife he cut himself with while allegedly washing the dishes.[24] This Court, after reviewing the evidence in this case, should find that any error in the prosecutor's opening statement was harmless beyond a reasonable doubt.

[24]The State introduced evidence that the sponge in Appellant's kitchen was dry and nappy and would have taken days to become that way. The water in the sink appeared greasy and there were dirty dishes in the sink. The knife Appellant cut himself with was smeared with his blood. Rather than simply reading the transcript of the 911 tape, Appellee urges this Court to listen to the 911 tape Appellant made with the victim's phone immediately after the murder. Appellant went outside and retrieved the victim's phone by her lawn chair, called 911, and while on the phone with 911, he returned to his apartment to finish washing his dishes, specifically starting with the knife. On the tape, Appellant makes sure the 911 operator is aware that he cut his hand by mentioning it on numerous occasions.

ISSUE II

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN GRANTING THE STATE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF MARIJUANA CIGARETTES FOUND INSIDE THE VICTIM'S APARTMENT AND IN ALLOWING THE STATE TO ARGUE THAT APPELLANT MAY HAVE LEFT THE ASHES IN THE VICTIM'S SINK.

Prior to trial, the State moved in limine to exclude evidence that a cigarette pack containing two marijuana joints was found in the victim's apartment. (V25:23). The State argued that the evidence was irrelevant because there is no evidence that the victim ever used marijuana and none was found in her system at the autopsy. (V25:23). The court granted the State's motion. (V25:24). During the course of the trial, defense counsel requested that the court revisit the issue based on the testimony of crime scene technicians regarding ashes found in the victim's kitchen sink. (V30:804). The State reiterated that the evidence of marijuana in the apartment was simply bad character evidence with regard to the victim. (V30:805-07). The trial judge refused to overturn his previous ruling that the evidence was inadmissible. (V30:807).

During his case, Appellant called Daniel Copeland as a witness. Mr. Copeland was a business partner and long-time friend of Stuart Cole, the victim's boyfriend. After Mr. Copeland testified, defense counsel proffered Copeland's

testimony regarding Mr. Cole's use of marijuana when they went golfing. (V35:1583-86). Defense counsel again sought to introduce the evidence of the marijuana found in the victim's apartment by arguing that Mr. Cole's habit of smoking marijuana allowed him to introduce the evidence. The State responded that the proffered testimony only established that Mr. Cole sometimes smoked marijuana while golfing with Mr. Copeland and the testimony did not establish that Cole smoked marijuana on February 9, 1999. Thus, the State argued the evidence was not relevant. (V35:1587). The trial judge ruled that the proffered testimony was insufficient to link the marijuana to Mr. Cole and was simply bad character evidence that was inadmissible under Florida's evidence code. (V35:1588).

Prior to closing arguments, defense counsel moved in limine to preclude the State from arguing that the ashes found in the victim's sink were connected to Appellant. Defense counsel argued that there was no direct evidence linking the ashes to Appellant and allowing the State to argue any connection was unduly prejudicial. (V36:1684-85). The State responded that Appellant's footprint was found near the victim's sink and given the abundance of testimony regarding the victim's immaculate apartment, it was not unreasonable to assume that Appellant was responsible for the presence of the ashes. (V36:1685). The

trial court agreed with the State and allowed the argument. During her closing argument, the prosecutor argued that Appellant left the ashes at the scene:

> He left his ashes behind. You saw the pictures of her apartment. Her apartment was absolutely immaculate. She had only been there 10 days. There was not a book out of place. Everything had its place. Everything had its order. There were only four things out of place in her apartment, four things that the killer left behind, four things that belonged to Kenneth Dessaure. No. 1, the footprint, that's out of place in her apartment. His footprint in her apartment, she had been there 10 days, never been in there before, that's out of place. No. 2, these ashes. Remember the water jug sitting on her counter? I think we have a picture of it. If not, you will have it in the room back there. The water jug on her counter, she had filled her cup with water some time that day while laying out. She was a neat freak. If those ashes were there before she was murdered or before he entered the apartment, they would have been washed down that sink. She filled up her water cup and those ashes would have gone down the sink and they are not. They are right there. And we all know who was smoking that day. Who told the cops around noon, one o'clock, he had a cigarette, who was seen smoking by John Hayes, who the paramedics had seen smoking, who the detectives had seen smoking, Kenneth Dessaure. Footprint out of place, ashes out of place, that towel with semen in it out of place. If he had been in that apartment sometime prior for consensual random sex with her, you, for a second believe she would have left that towel there? She would have thrown it in the washing machine or in the laundry basket. Cindy Riedweg would not have left that towel there and she certainly wouldn't have left a stain on her bedspread. That was not her style. That's not the way she did things. Her apartment was immaculate.

(V36:1693-94).

Appellant argues on appeal that the trial court erred by

preventing him from arguing that Stuart Cole may have left the ashes in the sink because he smoked marijuana, he had been at the victim's house on the day of the murder, and law enforcement officers found a partially-smoked marijuana cigarette in the victim's apartment. Appellant asserts that he was prejudiced by the exclusion of this evidence because the trial judge allowed the State to argue in closing that Appellant was responsible for leaving the ashes behind. Initial Brief of Appellant at 58.

The State submits that the trial judge acted within its sound discretion in ruling that the evidence of marijuana found in the victim's apartment was inadmissible because it was not relevant and it was bad character evidence. The law is well established that a ruling on the admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. White v. State, 817 So. 2d 799 (Fla.), cert. denied, 537 U.S. 1091 (2002); Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000). The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997).

Florida Statutes, section 90.401 defines relevant evidence as "evidence tending to prove a material fact in issue." §

90.401, Fla. Stat. (2001). "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (2001). The trial court must utilize a balancing test to determine if the probative value of relevant evidence is outweighed by its prejudicial effect. White, 817 So. 2d at 806. Florida Statutes, section 90.404 provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, *but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.*

§ 90.404(2)(a), Fla. Stat. (2001) (emphasis added).

In the case at bar, Appellant sought to introduce evidence of marijuana found in a cigarette pack in the victim's apartment, and attempted to link the marijuana to Stuart Cole, the victim's boyfriend.[25] There was no evidence introduced, however, to show that the marijuana belonged to Stuart Cole, or that he had smoked any marijuana in the victim's apartment on

[25]There was no evidence to support the argument that the marijuana belonged to the victim. Testimony from Doreen Cosenzino indicated that Cindy Riedweg did not smoke cigarettes (where the marijuana was found), and there was no marijuana found in her system at the autopsy. (V29:708-09; V25:23).

the day of the murder.[26] Daniel Copeland's proffered testimony indicated that Cole had a habit of smoking marijuana on the golf course when they played, but Copeland could not recall if Cole had smoked on February 9, 1999, when they played golf at Fox Hollow Golf Course.

The trial judge acted within its discretion in ruling that the evidence of marijuana in the victim's apartment was simply bad character evidence and was not material to any fact in issue. Appellant argues that the evidence was relevant to rebut the State's theory that Appellant left ashes in the victim's sink. This argument fails for a number of reasons. First, Appellant's footprint was found next to the victim's sink, near a puddle of water and scuff mark on the floor, and there was an abundance of evidence presented regarding Appellant's habit of smoking cigarettes around the time of the murder. The fact that ashes were found in the sink, arguably left there after water had been turned on in the sink from either the victim obtaining water for her drinking cup found next to the sink, or from Appellant cleaning himself after the murder,[27] was proper

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[26]Doreen Cosenzino testified that the victim did not smoke and she would not allow anyone to smoke inside of her apartment. She made Doreen's husband and Stuart Cole smoke outside whenever they wanted a cigarette. (V29:708-09).

[27]Clearly, Appellant was standing near the victim's sink, despite his statements to the contrary. Not only was Appellant

evidence introduced at trial. Thus, the State and defense were free to make permissible arguments regarding this evidence during their closing arguments.

The second reason Appellant's argument is without merit is the evidence of the possession of marijuana, another crime, was simply offered to prove Stuart Cole's bad character. Despite Appellant's argument in his brief that the evidence was not offered to show that Cole killed Riedweg, defense counsel at trial argued to the contrary in his closing argument. (V37:1734-37). Appellant was attempting to argue evidence of another crime to show that Cole may have killed the victim and left the ashes in her sink.

This Court addressed the proper standard regarding the admissibility of similar fact evidence of other crimes in State v. Savino, 567 So. 2d 892 (Fla. 1990). In Savino, the defendant was charged with the first degree murder of his stepson by blunt trauma to the stomach. Id. at 894. In his defense, Savino sought to introduce evidence that his wife, the boy's natural mother, allegedly killed her one-month-old daughter with a blunt instrument seven years previously. Id. The trial judge refused

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standing next to the sink, he was standing without his black sandals on his feet. Appellant's foot print was found in the kitchen, near the sink, the puddle of water, and the scuff mark on the floor.

to allow him to introduce this evidence. In upholding the court's discretionary ruling, this Court stated:

> The test for admissibility of similar-fact evidence is relevancy. Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959). When the purported relevancy of past crimes is to identify the perpetrator of the crime being tried, we have required a close similarity of facts, a unique or "fingerprint" type of information, for the evidence to be relevant. Drake v. State, 400 So. 2d 1217 (Fla. 1981); State v. Maisto, 427 So. 2d 1120 (Fla. 3d DCA 1983); Sias v. State, 416 So. 2d 1213 (Fla. 3d DCA), review denied, 424 So. 2d 763 (Fla. 1982). **If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense.** Evidence of bad character or propensity to commit a crime by another would not be admitted; such evidence should benefit a criminal defendant no more than it should benefit the state. Relevance and weighing the probative value of the evidence against the possible prejudicial effect are the determinative factors governing the admissibility of similar-fact evidence of other crimes when offered by the state. **These same factors should apply when the defendant offers such evidence.**

Id. (emphasis added); see also White v. State, 817 So. 2d 799 (Fla.), cert. denied, 537 U.S. 1091 (2002). The Savino court found that the trial court did not abuse its discretion in finding that the wife's alleged abuse of a one-month-old child, in a different state, in a different marriage, and in a different manner was not sufficiently similar to be admissible in Savino's trial.

Likewise, in the instant case, the trial judge found that evidence of possession of marijuana was not admissible to show that Cole may have committed the offense. If Cole had been on trial for the murder of Cindy Riedweg, the evidence of marijuana possession would not have been admissible. In fact, in the instant case, defense counsel successfully excluded evidence that Appellant and his roommates used recreational drugs. (V25:23). Clearly, possession of marijuana is not the type of "fingerprint" similarity required to be admissible as similar fact evidence of another crime.

Finally, Appellant cannot establish an abuse of the trial court's discretion in ruling on this matter because Appellant was not prejudiced in any manner. Appellant asserts that the evidence was subject to two possible explanations, one consistent with guilt and one consistent with innocence. Appellant, however, was not precluded from presenting a theory consistent with innocence. Appellant simply could not introduce the evidence of marijuana found in the cigarette pack. Nevertheless, Appellant had other arguments available to him regarding the ashes which were not dependent upon the admissibility of the marijuana evidence. Defense counsel could argue that the ashes were from cigarettes found in the apartment given the testimony that the victim's friends and boyfriend

smoked cigarettes. Defense counsel also stated during a bench conference that he could present a witness to testify that the victim's apartment "reeked" of incense when crime scene technicians were on the scene. (V30:804). Thus, defense counsel could have also argued to the jury that the ashes were the result of burnt incense. In sum, defense counsel was not prevented from rebutting the State's argument regarding the ashes. Because Appellant has failed to establish an abuse of the trial court's discretion in this regard, this Court should affirm the trial judge's ruling.

Even if this Court finds that the trial court abused its discretion in refusing to permit Appellant to introduce evidence that the victim possessed marijuana in her apartment, the State submits that the error was harmless. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). As noted in the discussion of Issue I, the State's evidence overwhelmingly established Appellant's guilt beyond a reasonable doubt. The evidence regarding the ashes in the sink paled in comparison to the much stronger evidence establishing Appellant's guilt: his semen stains in the victim's bedroom and on a towel in the bathroom, his footprint in the victim's kitchen, the victim's blood on the inside and outside of his shorts, and his statements to law enforcement detectives and to fellow inmates. The State questioned two

crime scene technicians about the ashes (V29:739-40; 775), and then briefly alluded to this evidence during their 50-page closing argument. (V36:1693-94). Thus, the evidence surrounding the ashes was not a major focus of the State's case and given the other overwhelming evidence of Appellant's guilt, it obviously did not affect the jury's verdict in any manner. Accordingly, this Court should find that any abuse of discretion by the trial judge was harmless beyond a reasonable doubt.

ISSUE III

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ALLOWING THE PROSECUTOR TO IMPEACH DEFENSE WITNESSES WITH EVIDENCE THAT THEY WERE SERVING MANDATORY LIFE SENTENCES AND IN DENYING DEFENSE COUNSEL'S MOTION FOR MISTRIAL AS A RESULT OF THIS TESTIMONY.

Defense witness, William Birchard, was housed in pod 4F9 with Appellant and Valdez Hardy in the fall of 1999. Birchard claimed that Hardy was always questioning Appellant about his case and the only information Hardy had about Appellant's case came from the October 1, 1999, article in the St. Petersburg Times.[28] (V36:1607-12). During Birchard's cross-examination, the prosecutor asked the five-time convicted inmate if her office was "currently responsible for you serving a life sentence right now?" (V36:1613-14). Defense counsel objected and moved for mistrial. (V36:1613-14). Counsel argued that inquiring into the length of the sentence was impermissible impeachment. The State responded that the maximum mandatory life sentence was relevant because there was nothing her office could do if the witness committed perjury. The court denied the motion for mistrial. (V36:1614). The prosecutor then asked Birchard if he was serving a mandatory life sentence and if her

[28]During cross-examination, the witness acknowledged that there were numerous facts Hardy knew that were not contained in the newspaper article. (V36:1615-19).

office was responsible for the imposition of that sentence. Birchard responded "yes" to both questions. (V36:1615).

Defense counsel also presented the testimony of another inmate, Rodney Stafford. Stafford testified that when he entered pod 4F9 in December, 1999, he was made aware that Valdez Hardy was a snitch. (V36:1625-26). Stafford testified that the whole pod, including Appellant, was aware of Hardy's reputation. (V36:1623-24). Stafford also confronted inmate Shavar Sampson at the Pinellas County Jail the week of Appellant's trial about being a snitch. (V36:1624-25). On cross-examination, Stafford acknowledged that he was not aware that Hardy had given his statement to prosecutor's almost six weeks before Stafford was ever assigned to the pod. (V36:1626). The prosecutor asked the witness if he was serving a mandatory life sentence courtesy of her office, and he responded in the affirmative. Defense counsel objected and the trial judge overruled the objection. (V36:1627).

Appellant now argues on appeal that the court erred in denying his motion for mistrial after the prosecutor questioned Birchard about his mandatory life sentence and in overruling defense counsel's objection when Stafford testified that he too was serving a mandatory life sentence courtesy of the Sixth Judicial Circuit's State Attorney's Office. Appellant asserts

that the State's impeachment of these two witnesses tipped the balance of credibility in the favor of Hardy, thereby contributing to, influencing, or affecting the jury's verdict. Appellant, citing to Fulton v. State, 335 So. 2d 280 (Fla. 1976), also asserts that the testimony allowed the jury to improperly consider Appellant guilty "by association."

As a general rule, a trial court's ruling on the admissibility of evidence is within the sound discretion of the trial judge, and the court's ruling will not be reversed unless there has been a clear abuse of that discretion. White v. State, 817 So. 2d 799 (Fla.), cert. denied, 537 U.S. 1091 (2002). Specifically, this Court has stated that the admission or rejection of impeaching testimony is within the sound discretion of the trial court. McCoy v. State, 853 So. 2d 396, 406 (Fla. 2003) (stating that unless the trial court abused its discretion, this Court will not disturb the judgment below); Winner v. Sharp, 43 So. 2d 634, 635 (Fla. 1949) ("The admission or rejection of impeaching testimony is within the sound discretion of the trial court.").

Additionally, this Court has previously stated that a motion for mistrial is addressed to the sound discretion of the trial court and "the power to declare a mistrial and discharge the jury should be exercised with great care and should be done only

in cases of absolute necessity." Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982). "[A] mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial." Duest v. State, 462 So. 2d 446, 448 (Fla. 1985). A trial court's ruling on a motion for mistrial is also subject to an abuse of discretion standard of review. Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999).

The State submits that the trial judge acted within its discretion in denying Appellant's motion for mistrial and in allowing the State to impeach the two inmates with their mandatory life sentences. Florida Statutes, section 90.608(1)(b) states that a party may attack the credibility of a witness by showing that the witness is biased. § 90.608(1)(b), Fla. Stat. (2001). Section 90.610 specifically allows a party to attack the credibility of any witness "by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted." § 90.610, Fla. Stat. (2001).

In Fulton v. State, 335 So. 2d 280 (Fla. 1976), the State cross-examined a defense witness about his pending charge of second degree murder, an offense which was unrelated to the defendant's charge. The State argued that the evidence of the

pending charge was relevant to show the witness' bias. This Court ruled that "[a] defense witness' supposed bias, attributable to charges concerning a totally distinct offense, is not a proper subject for impeachment." Id. at 284. This Court stated that a party may only bring out the fact that a witness has been convicted, and may not inquire into the details of the charge unless the witness denies the conviction. If the witness denies the conviction or misstates the number of convictions, counsel can introduce the prior convictions which would incidentally note the specific offense. Fulton, 335 So. 2d at 284. In addressing the issue in Fulton, this Court found that the error was not harmless because the defense witness' testimony went to the heart of the defendant's self-defense theory. Id. at 285.

In Howard v. State, 397 So. 2d 997 (Fla. 4th DCA 1981), the defendant was charged with battery on a police officer and resisting arrest with violence. During her trial, a defense witness testified that the police may have been the aggressors. Id. at 997. On cross-examination, the prosecutor questioned the witness about his conviction for obstructing the police in an effort to show his bias or prejudice against law enforcement. The appellate court found that the trial court did not err in allowing this evidence. Id. at 997-98. The court stated:

> To show bias it is obviously necessary to show the nature of acts by the witness which evidence such bias. To do this it is necessary to show and explain the nature of the crime of which the witness was convicted. Thus we agree with the trial court's conclusion that conviction of a specified crime *may* be introduced to show bias of a witness.

Id. at 998. The court further noted that, under appropriate circumstances, evidence of the nature of the crime for which a witness has previously been convicted may be admissible to demonstrate bias on the part of the witness. Id.; see also Strickland v. State, 498 So. 2d 1350 (Fla. 1st DCA 1986) (holding that defense witness' nolo contendere plea to misdemeanor disorderly conduct was admissible to show possible bias against the law enforcement officers involved in the defendant's case).

In this case, the evidence that the two defense witnesses were serving mandatory life sentences was relevant to show bias against the State Attorney's Office and to show that there was no remedy for the State if the witnesses committed perjury. Florida Statutes, section 90.608 allows a party to attack the credibility of a witness by showing bias. Although courts have restricted the use of prior conviction evidence under 90.610, a trial court may, under appropriate circumstances, allow a party to delve into the nature of the prior crimes or the witness' current sentence in order to demonstrate potential bias.

Even if the trial court erred in allowing this evidence, the error was harmless. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986) (stating that error is harmless where there is no reasonable possibility that the error contributed to the conviction). This case is distinguishable from the cases relied on by Appellant. In Fulton, supra, the court found that the error was not harmless because it went to the heart of the defendant's defense theory. Similarly, in Reeves v. State, 711 So. 2d 561 (Fla. 2d DCA 1997), the court found reversible error when the State questioned the sole defense witness, the defendant's brother, about his incarceration on a traffic offense. In Roper v. State, 763 So. 2d 487 (Fla. 4th DCA 2000), the trial court allowed the State to elicit the fact that a defense witness was currently incarcerated at the South Florida Reception Center. In closing argument, the prosecutor focused on the conflict between the arresting officer and the defense witness[29] and challenged the credibility of the defense witness with the evidence that he was incarcerated at the reception center. The appellate court reversed and found the error harmful because of the considerable conflict between the arresting officer and the defense witness. Roper, 763 So. 2d at

[29]The defense witness observed the officer arrest the defendant and the witness contradicted the officer's testimony regarding the arrest. Id. at 488.

490-91.

Unlike these cases, any alleged error in this case was harmless beyond a reasonable doubt. Appellant states in his brief that the error was not harmless because "[t]he jury had to decide whether to believe State witness Hardy or defense witnesses Birchard and Stafford." Initial Brief of Appellant at 71. Contrary to Appellant's assertion, the jury's verdict did not revolve around a credibility determination between Valdez Hardy and the two defense inmate witnesses. Unlike the situation in Reeves, Roper or Fulton, this case was not a credibility contest between two groups of witnesses. As detailed earlier in this brief, the State had sufficient and overwhelming evidence of Appellant's guilt without having to utilize Hardy's corroborating testimony. Also, unlike Roper, the prosecutor in the instant case did not challenge the defense witnesses' credibility in closing argument based on their incarceration.

Furthermore, contrary to Appellant's assertion, there was no issue of spill-over or "guilt by association." The jury could not contribute the Pinellas County Jail's act of assigning various inmates to Appellant's particular pod as a voluntary "association" by Appellant. Also, the jury would not associate Birchard or Stafford's mandatory life sentences as reflecting on

Appellant in any way; they were simply housed together in the same pod. Rather, a review of the record demonstrates that the jury found Appellant guilty of first degree murder based on the overwhelming evidence of his guilt. Thus, this Court should find that any error in the impeachment of these two defense witnesses was harmless beyond a reasonable doubt.

ISSUE IV

THE TRIAL JUDGE ACTED WITHIN ITS DISCRETION IN DENYING APPELLANT'S MOTION IN LIMINE SEEKING TO EXCLUDE EVIDENCE THAT APPELLANT HAD A VERBAL ARGUMENT WITH HIS FIANCEE SHORTLY BEFORE THE MURDER.

Prior to trial, Appellant filed a motion in limine seeking to exclude evidence from his taped statement to detectives that he had argued with his fiancee shortly before the murder. (V21:3821-22).

Defense counsel asserted that Appellant's argument with his fiancee, Mary Parent, about each of them cheating on each other was not relevant to any issues in the case. (SR:20-22). The State argued that Appellant's statement was relevant to show that he was angry and the argument was "part and parcel of what set him off." The prosecutor also noted that the change in Appellant's tone of voice when discussing the argument was relevant to show his anger. (SR:20; 24-26). The trial court denied Appellant's motion in limine, and defense counsel renewed his objection to this testimony prior to the tape being played to the jury. (SR:25-26; V34:1366). A trial court's ruling regarding the admission of evidence is reviewed by this Court under the abuse of discretion standard of review. White v. State, 817 So. 2d 799 (Fla.), cert. denied, 537 U.S. 1091 (2002); Ray v. State, 755 So. 2d 604, 610 (Fla. 2000). In the

case at bar, the State submits that the trial court acted within its discretion by refusing to exclude the conversation about Appellant's fight with his fiancee from his taped statement to detectives. The evidence of Appellant's argument with his fiancee was relevant to the State's case-in-chief in that it showed a possible motivation for the murder, it demonstrated Appellant's tendency to give the detectives false information, and it showed Appellant's change in demeanor after being confronted with the argument.

The State's theory below was that Appellant's argument with his fiancee was part and parcel of what motivated him to commit the murder and what "set him off." Only an hour or two after the argument, he committed the heinous and torturous murder of Cindy Riedweg. Also, the State argued to the trial judge that during the post-Miranda interrogation, Appellant's voice and demeanor changed when the detectives began questioning him about his argument with Mary Parent and his act of cheating on her with Renee Listopad. Furthermore, throughout this conversation concerning his fiancee, Mary Parent, and his girlfriend, Renee Listopad, Appellant made numerous contradictory statements to detectives.[30] For instance, Appellant began by denying that he

[30]Although not argued by the State below, this would be a valid evidentiary basis to support the trial court's ruling. See Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002) (The

had an argument with Mary Parent, and subsequently admitted that they had an argument about cheating on each other and he hung up on her. (V34:T37-39). Appellant initially denied seeing Renee Listopad, but when the detectives confronted Appellant with information that they had obtained from Renee, Appellant admitted that he had slept with Renee a few days earlier. (V34:T39-41). Appellant claimed that he was not cheating on his fiancee when he slept with Renee Listopad because he had broken up with Mary Parent. (V34:T40-41). Mary Parent, however, testified that they were still together in February, 1999, and she was planning on returning to Florida on February 14, 1999, so they could get married. (V36:1634-35). Thus, because Appellant's statement to detectives regarding his argument with Mary Parent was relevant to the State's case, and was not unfairly prejudicial to Appellant, the trial court properly denied Appellant's motion in limine.

Even if this Court finds that the trial judge erred in

"tipsy coachman" doctrine allows an appellate court to affirm a trial court that "reached the right result, but for the wrong reasons" so long as there is any basis which would support the judgment in the record); see also Muhammad v. State, 782 So. 2d 343, 359 (Fla. 2001) ("The trial court's ruling on an evidentiary matter will be affirmed even if the trial court ruled for the wrong reasons, as long as the evidence or an alternative theory supports the ruling.").

allowing the State to introduce this portion of Appellant's taped statement, the error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The evidence of the argument was not a major focus of the State's case and was not highlighted in closing arguments. Additionally, when Mary Parent testified as a defense witness, she explained their tempestuous relationship and informed the jury that even after the argument on February 9, 1999, she called Appellant back and they made up and each said "I love you." (V36:1636-37). The fact that Appellant had argued with his fiancee, even if improperly admitted, could not have affected the jury's verdict in any way given the abundance of evidence establishing Appellant's guilt beyond a reasonable doubt. Thus, this Court should affirm the trial court's ruling on Appellant's motion in limine.

Additionally, although not raised by Appellant, the State would note that Appellant's sentence is proportionate when compared with other capital cases. This Court has previously stated that its proportionality review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). In conducting its proportionality review, this

Court compares the case under review to others to determine if the crime falls within the category of *both* (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

Clearly, Appellant's death sentence is proportionate when compared to other cases. A review of the facts established in the instant case demonstrates the proportionality of the death sentence imposed. See White v. State, 817 So. 2d 799 (Fla.) (finding death sentence proportionate when defendant stabbed victim fourteen times and slit her throat), cert. denied, 537 U.S. 1091 (2002); Singleton v. State, 783 So. 2d 970 (Fla. 2001) (stating that defendant's death sentence was proportionate in stabbing murder where the two aggravating factors of HAC and prior violent felony conviction outweighed statutory mitigators of extreme mental disturbance, inability to appreciate the criminality of conduct, the defendant's age and nine nonstatutory mitigators); Mansfield v. State, 758 So. 2d 636 (Fla. 2000) (upholding death sentence where two aggravators, heinous, atrocious, or cruel and crime committed during the commission of a sexual battery, outweighed five nonstatutory mitigators).

In the instant case, there are four substantial aggravating factors: (1) prior violent felony conviction; (2) prior felony

conviction and under sentence of community control; (3) committed during a burglary; and (4) HAC. This Court has previously stated that HAC is one "of the most serious aggravators set out in the statutory sentencing scheme." Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). The aggravating factors far outweigh the insubstantial mitigation found in this case: (1) Appellant's age; (2) his quality of being a caring parent; (3) his family background; (4) his capacity to form personal relationships; and (5) his behavior in court. Accordingly, when this Court conducts its proportionality review, it should affirm Appellant's death sentence based on a finding that the instant case is one of the most aggravated and least mitigated of first degree murders.

ISSUE V

APPELLANT IS BARRED FROM ARGUING ON DIRECT APPEAL THAT HIS DECISION TO WAIVE THE PRESENTATION OF MITIGATING EVIDENCE TO THE JURY WAS NOT A KNOWING AND VALID WAIVER.

Appellant argues that he did not knowingly and voluntarily waive his right to a jury in the penalty phase of his trial or his right to present mitigating evidence to the jury. The gist of Appellant's claim is that it was not a knowing waiver because the trial court did not inform him that he had the right to have the jury determine whether the State had proven an aggravating circumstance sufficient to justify the imposition of the death

penalty.

The morning after the jury convicted Appellant of first degree murder, he filed a motion, against the advice of his three attorneys, waiving his right to present mitigating evidence to the jury. (V24:4310-11; V37:1827-32). Defense counsel informed the court that this was not an event that just sprang up, but was something Appellant had been considering for some time. (V37:1827-28). Appellant had the benefit of three experienced defense attorneys advising him against the decision, but ultimately Appellant decided to forego presenting mitigating evidence to the jury and opted to present it to the trial court in summary fashion. After the trial judge conducted a colloquy with Appellant regarding his waiver, the trial judge inquired whether there was an aggravating factor justifying the need for a penalty phase. (V37:1829-36). Defense counsel conceded that at least one aggravating circumstance was established; Appellant had been convicted of a felony and was on community control at the time of the murder. (V37:1833-36). Appellant never moved the trial court to withdraw his waiver of a jury recommendation.

This Court has held that a defendant is barred from attacking the validity of his waiver of a jury recommendation if he did not preserve the issue below by moving to withdraw the waiver. Griffin v. State, 820 So. 2d 906 (Fla. 2002); Spann v.

State, 28 Fla. L. Weekly S784 (Fla. Apr. 3, 2003). In Griffin, the defendant pled guilty to the charges and waived his right to a sentencing jury. The trial judge, Judge Brandt Downey (the same judge as in the instant case), conducted a colloquy with Griffin to ensure that he understood the nature and importance of the rights he was relinquishing. Griffin, 820 So. 2d at 912. This Court stated that the standard to determine the voluntariness of a waiver is similar to that of determining the validity of a plea. Id. (relying on Lamadline v. State, 303 So. 2d 17 (Fla. 1974) and Boykin v. Alabama, 395 U.S. 238 (1969)). Because Griffin did not raise the voluntariness of his waiver with the trial court, this Court held that "the failure of a capital defendant to first attack the voluntariness of a waiver of a sentencing jury at the trial court precludes review on direct appeal." Id. at 913; see also Spann v. State, 28 Fla. L. Weekly S784 (Fla. Apr. 3, 2003) (following Griffin and finding that the claim was not preserved for direct appeal review; the defendant may only raise the claim by collateral attack through a postconviction motion).

Even if this claim was preserved, a review of the record demonstrates that Appellant knowingly and voluntarily waived his right to a penalty phase jury and conceded that an aggravating factor was established. In Wuornos v. State, 676 So. 2d 966

(Fla. 1995), this Court rejected Wuornos' contention that her plea was invalid where the record showed that she was represented by counsel who assured the court that her plea was knowing and voluntary. This Court stated:

> The obvious evil addressed by the United States Supreme Court in Boykin [v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)] was of **poorly advised defendants unwittingly subjecting themselves to death penalties by a guilty plea, or of facts that simply do not merit a death penalty.** We believe that this is the type of "prejudice" contemplated by rule 3.172(I). Here, however, the record substantially and competently supports the trial court's finding of a basis to accept the plea. Wuornos herself indicated she was aware of the penalties she faced, knew the rights she was abandoning, and voluntarily had agreed to plead guilty. Although the procedures used below were not the most desirable, they nevertheless did not prejudice Wuornos within the meaning of rule 3.172(I). **The record refutes any contention she was poorly advised or unwittingly subjected herself to the death penalty, and the facts here are of a kind that would warrant the death penalty in a full trial.**

Wuornos, 676 So. 2d at 968-70 (emphasis added).

Appellant, like Wuornos, has failed to establish actual prejudice from any alleged failure of the judge to inform him of the various nuances of a penalty phase. In addition to the trial court, Appellant had the benefit of three experienced defense attorneys informing him of his rights and advising him against waiving the jury recommendation. In Griffin, this Court suggested that a rule similar to Florida Rule of Criminal Procedure 3.172(c) be created to provide a checklist for trial

judges to ensure that defendants are aware of "all the rights relinquished through a waiver (i.e., presentation of mitigation, advisory nature of jury, etc.)." Griffin, 820 So. 2d 906, 913 n.9 (Fla. 2002). This Court stated, "**[o]f course, an attendant requirement of a showing of prejudice would also apply just as provided for by rule 3.172(i) in the context of a plea**." Id. (emphasis added). Here, Appellant cannot demonstrate any prejudice as a result of the waiver of a jury recommendation. Thus, even if this Court were to address Appellant's unpreserved claim, the claim is without merit.

ISSUE VI

APPELLANT'S CONSTITUTIONAL CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE IS WITHOUT MERIT.

Appellant argues that Florida's death penalty statute, Florida Statutes, section 921.141, is facially unconstitutional because it violates the Sixth Amendment of the United States Constitution as interpreted by the United States Supreme Court in Ring v. Arizona, 536 U.S. 584 (2002). Appellant specifically alleges that the Sixth Amendment requires that aggravating factors be found by the jury. Of course, as noted in the discussion of the previous issue, Appellant voluntarily and knowingly waived his right to a jury penalty phase and opted to present mitigation to the trial judge and allow the judge to determine the existence of aggravating and mitigating factors.

Initially, Appellee submits that the instant claim is procedurally barred since Appellant waived the right to have the jury find the existence of an aggravating circumstance at the penalty phase. It is clear that Appellant did not at the time of his waiver of a jury penalty phase claim that the Sixth Amendment required the jury to find an aggravating factor. In fact, Appellant conceded at that time that an aggravating factor existed based on his prior felony conviction and community control status. While Appellant might contend that Ring had not

been decided at the time of trial, that fact does not suffice to avoid the procedural default. What is important is not the existence of a particular decision but whether the tools were available to construct the argument. Engle v. Isaac, 456 U.S. 107, 133 (1982); Pitts v. Cook, 923 F.2d 1568, 1571-1572 (11th Cir. 1991). The Sixth Amendment right to jury trial has always been known and the tools have been available for the defense to construct the argument. See Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing); Hildwin v. Florida, 490 U.S. 638 (1989) ("This case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida."); Spaziano v. Florida, 468 U.S. 447 (1984). The decision in Ring was not required as a predicate for counsel to assert his Sixth Amendment claim in a timely and appropriate fashion.

In view of this procedural bar, Appellant attempts to frame his constitutional challenge as fundamental error. However, allegations involving Ring and/or its predecessor, Apprendi v. New Jersey, 530 U.S. 466 (2000), fail to constitute fundamental error. In Barnes v. State, 794 So. 2d 590 (Fla. 2001), this Court found an alleged Apprendi error had not been preserved for appellate review. The United States Supreme Court has also held

that an Apprendi claim is not plain error. United States v. Cotton, 535 U.S. 625 (2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). These cases confirm that any possible constitutional violation under Ring or Apprendi is not "fundamental error" warranting judicial review of an unpreserved claim.

Even if preserved for review, this Court has consistently upheld Florida's death penalty statute in response to constitutional challenges under Ring. See King v. Moore, 831 So. 2d 143 (Fla. 2002); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); Marquard v. State, 850 So. 2d 417, 431 n 12 (Fla. 2002); Chavez v. State, 832 So. 2d 730, 767 (Fla. 2002); Bruno v. Moore, 838 So. 2d 485 (Fla. 2002); Fotopoulos v. State, 838 So. 2d 1122 (Fla. 2002); Lucas v. State, 841 So. 2d 380 (Fla. 2003); Porter v. Crosby, 840 So. 2d 981 (Fla. 2003) ("Contrary to Porter's claims, we have repeatedly held that the maximum penalty under the statute is death and have rejected the other Apprendi arguments."); Spencer v. State, 842 So. 2d 52 (Fla. 2003); Conahan v. State, 844 So. 2d 629 (Fla. 2003); Anderson v. State, 841 So. 2d 390 (Fla. 2003); Cole v. State, 841 So. 2d 409 (Fla. 2003); Doorbal v. State, 837 So. 2d 940 (Fla. 2003);

Kormondy v. State, 845 So. 2d 41 (Fla. 2003); Jones v. State, 845 So. 2d 55 (Fla. 2003); Lugo v. State, 845 So. 2d 74 (Fla. 2003); Lawrence v. State, 846 So. 2d 440 (Fla. 2003); Banks v. State, 842 So. 2d 788 (Fla. 2003); Grim v. State, 841 So. 2d 455 (Fla. 2003), Butler v. State, 842 So. 2d 817 (Fla. 2003); Chandler v. State, 848 So. 2d 1031, 1034 n.4 (Fla. 2003); Pace v. State, 854 So. 2d 167 (Fla. 2003); Cooper v. State, 28 Fla. L. Weekly S497 (Fla. June 26, 2003); Duest v. State, 855 So. 2d 33 (Fla. 2003); Blackwelder v. State, 851 So. 2d 650 (Fla. 2003); Wright v. State, 28 Fla. L. Weekly S517 (Fla. July 3, 2003). See also Nelson v. State, 850 So. 2d 514 (Fla. 2003); Caballero v. State, 851 So. 2d 655 (Fla. 2003); Belcher v. State, 851 So. 2d 678 (Fla. 2003); Allen v. State, 854 So. 2d 1255 (Fla. 2003); Fennie v. State, 855 So. 2d 597 (Fla. 2003); Owen v. Crosby, 854 So. 2d 182 (Fla. 2003); McCoy v. State, 853 So. 2d 396 (Fla. 2003); Conde v. State, 28 Fla. L. Weekly S669 (Fla. Sept. 4, 2003); Stewart v. State, 28 Fla. L. Weekly S700 (Fla. Sept. 11, 2003); Jones v. State, 855 So. 2d 611 (Fla. 2003); Rivera v. State, 28 Fla. L. Weekly S704 (Fla. Sept. 11, 2003); Davis v. State, 28 Fla. L. Weekly S692 (Fla. Sept. 11, 2003); Anderson v. State, 28 Fla. L. Weekly S731 (Fla. Sept. 25, 2003); Henry v. State, 28 Fla. L. Weekly S753 (Fla. Oct. 9, 2003); Cummings-El v. State, 28 Fla. L. Weekly S757 (Fla. Oct.

9, 2003); Johnston v. State, 28 Fla. L. Weekly S779, 783 (Fla. Oct. 16, 2003); Owen v. State, 28 Fla. L. Weekly S790, 795 (Fla. Oct. 23, 2003). Since Florida's death penalty statute does not suffer from the constitutional infirmities that resulted in the remand to Arizona in Ring, Appellant is not entitled to relief.

Finally, Appellant's specific Ring claim is without merit in the instant case given his prior felony convictions. Since the defect alleged to invalidate the statute - lack of jury findings as to an aggravating circumstance - is not even implicated in this case due to the existence of the prior felony convictions, Appellant has no standing to challenge any potential error in the application of the statute. Accordingly, this Court should deny Appellant's claim.

ISSUE VII

APPELLANT'S ARGUMENT THAT HIS DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE THE AGGRAVATING FACTORS WERE NOT CHARGED IN THE INDICTMENT IS WITHOUT MERIT.

Appellant argues that the trial court erred in denying his motion to declare Florida Statutes, section 921.141(5) unconstitutional because the State failed to allege the aggravating circumstances in the indictment. Appellant moved prior to trial to preclude the death penalty and death qualification of the jury on the grounds that the indictment did not allege the applicable aggravating circumstances. (SR:1-13; V25:29-35). The trial court denied Appellant's motion. (V25:34-35).

As noted in the previous issue, this Court has consistently rejected this argument. In the recent case of Blackwelder v. State, 851 So. 2d 650 (Fla. 2003), this Court specifically rejected the argument that the indictment must allege the aggravating factors. See also Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (finding "meritless" claim that aggravating circumstances must be charged in the indictment). In Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003), this Court stated that Ring does not require that the defendant receive notice of the aggravating factors that the State will present at sentencing. Appellant has failed to offer any compelling reason for this

Court to reconsider its long line of precedent with regards to this issue. Accordingly, this Court should affirm Appellant's conviction and sentence of death.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the trial court's judgment and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Paul C. Helm, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000 – Drawer PD, Bartow, Florida 33831, on this 14th day of November, 2003.

_____
COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR APPELLEE