IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-2274

JESUS DELGADO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

Prior to and until 1990, Tomas and Violetta Rodriguez owned and operated a dry cleaning business in Miami Beach. (T. 1381, 1844-48) [1] They sold the business and retired. (T. 1407, 1415, 1849-50) The new owner of the business was Barbara Llamelas. (T. 1851) The business was run by Ms. Llamelas and Defendant, her boyfriend. (T. 1851-54, 1862) After the change in ownership, there were numerous complaints from the customers, regular customers quit using the business and business slowed. (T. 1856-58) Defendant complained to Maria Hernandez, an employee, that the Rodriguezes had cheated him and that the machines did not work properly. (T. 1858-60, 1870)

The Rodriguezes had befriended their next door neighbor Marlene McField. (T. 1380-81, 1382-83) As a result, Ms. McField was frequently at their home. (T. 1384) Ms. McField's observed that the Rodriguez had a gate in front of their front door that they always kept locked. (T. 1396-97) Additionally, they kept the doors to their house locked and were very security conscious. (T. 1397-98) During the evenings, Mr. Rodriguez usually watched TV in a bedroom and Ms. Rodriguez would usually be with him or in the kitchen. (T. 1404) If the Rodriguezes were expecting guests, they were usually not in their robes and

[1] The symbols "R." and "T." will refer to the record on appeal and transcript of proceeding in this appeal.

shorts. (T. 1405)

Ms. McField had an infant son, who was frequently cared for by the Rodriguezes. (T. 1386-90) In fact, Ms. McField's son was at the Rodriguezes' home so often that the Rodriguezes set up a room for him and kept a stock of baby supplies in their home. (T. 1390-91)

Around 7 p.m. on August 30, 1990, Ms. McField observed the Rodriguezes drive into their home. (T. 1409, 1425) During the night, Ms. McField heard the dogs who lived behind the Rodriguezes crying. (T. 1416-17) Around 6 a.m. the following morning, Ms. McField realized that she did not have enough diapers for her son and decided to get some from the supply the Rodriguezes kept. (T. 1410) She waited until around 8:10 a.m. and then went to their house, taking her son with her. (T. 1410-11) She rang the doorbell outside the gate, and as she waited for an answer her son fidgeted and touched the gate. (T. 1411) The gate moved, and Ms. McField heard the sound of keys rattle. (T. 1411) Ms. McField noticed that they were Ms. Rodriguez's keys. (T. 1411-13) This was unusual. (T. 1411) Ms. McField took the keys out of the gate, went to the front door and rang another doorbell. (T. 1413) Receiving no answer, Ms. McField took the keys, locked the gate and returned to her own home. (T. 1414)

Concerned that something was wrong and needing the diapers, Ms. McField left her son with her daughter and returned to the Rodriguezes. (T. 1414) She again rang the doorbell at the gate, received no answer, opened the gate, went to the front door, repeatedly rang the doorbell there and called for the Rodriguezes. (T. 1414-15) When she still got no answer, she returned home, locking the gate behind her. (T. 1415) Ms. McField called the dry cleaning business and was told the Rodriguezes were not there. (T. 1415) Ms. McField then called 911. (T. 1415)

Off. Andre Vaughn and Off. Bobby Jones responded to Ms. McField's call, and Ms. McField went with them to the Rodriguezes' gate and unlocked it. (T. 1418-19, 1423-28) The officers rang the front doorbell and knocked on the door but received no reply. (T. 1419) Off. Vaughn noticed that the door was partially opened and opened it. (T. 1419-28) He called out loudly that the police were there and received no answer. (T. 1428-29) The officers drew their weapons and entered the house. (T. 1429)

The entry and living room were neat and undisturbed. (T. 1429-30) The officers then checked the bedrooms and bathroom, which were also neat and undisturbed. (T. 1432-36) Next, the officers checked the dining room and found a gun and a knife on

the floor near a table. (T. 1436-40, 1657) The gun and knife had blood on them. (T. 1440) However, Off. Vaughn had still seen no signs of a struggle in the house. (T. 1440) Proceeding into the entrance from the garage into a utility room, Off. Vaughn noticed bloody footprints. (T. 1442-44) Looking in the garage, Off. Vaughn saw Mr. Rodriguez's body lying in a pool of blood. (T. 1444-45) Entering the garage, Off. Vaughn found Ms. Rodriguez's body wedged between the front bumper of her car and the wall. (T. 1445-50)

When the officers emerged from the house, one looked gray. (T. 1420) Ms. McField asked the officers what was wrong, but they did not answer. (T. 1420) Instead, one proceeded to the trunk of his car, got crime scene tape and roped off the area. (T. 1420-21, 1454-56) Off. Vaughn then asked Ms. McField to borrow her phone and reported the murders. (T. 1421, 1456)

Crime Scene Tech. Erin Fletcher and Det. Israel Reyes, the lead detective, responded to Off. Vaughn's report and found that the lights were on in the hallway in front of the bedrooms and the TV had been left on. (T. 1469-76, 1648-50) In the master bedroom, a vanity light and TV were on, and a wallet, money and jewelry were visible on top of a dresser. (T. 1476, 1481) A revolver was found in a closed, zippered pouch inside a closed cabinet in that bedroom. (T. 1480, 1482, 1709-10) The gun was

loaded but had not been recently fired. (T. 1482-83, 1710) A light was on in the dining room and a purse was sitting open on the table. (T. 1476-77) A man's purse and keys were lying on the table that had the gun and knife next to it. (T. 1488) The living room was neat and did not look like people had been sitting in it. (T. 1477)

The phone in the kitchen had blood and fingerprints on it and was impounded. (T. 1491-95, 1545, 1658) There were 90 degree drops of blood on the floor near the phone. (T. 1525-29) There were also bloody shoe impressions on the kitchen floor, blood on the kitchen counter near an open drawer, and blood on the front of a second open drawer. (T. 1496-99, 1529-30) The second open drawer contained kitchen utensils, including knives. (T. 1499) The shoe impressions lead from the garage area to the open drawers. (T. 1504, 1512) There was a solid wood door between the garage and utility room, and the light in the utility room was on. (T. 1505) The hinges for this door had been pulled out of the door frame, and the door was cracked. (T. 1510-11) There were three .22 caliber casing in the utility room and three additional casings in the garage. (T. 1508-10, 1514-15, 1538, 1562-70) A projectile was found on the floor in the garage. (T. 1515-16, 1570)

Mr. Rodriguez was lying on his back, barefoot and with no

blood on his feet. (T. 1514-15) Near Mr. Rodriguez's body was a drop of blood that had fallen at a 90 degree angle. (T. 1520, 1525-26) Beyond Mr. Rodriguez's body, Tech. Fletcher found a pair of woman's glasses and a pair of woman's sandals that were separated. (T. 1520-23) The shoe impressions did not appear to be consistent with Ms. Rodriguez's sandals. (T. 1525) Ms. Rodriguez's body was wedge in an 18 inch space between her car and the wall. (T. 1537) She was wearing a night gown and robe. (T. 1574) Near Ms. Rodriguez's body was a magazine for the Ruger with hair on it. (T. 1531, 1594-95)

Tech. Fletcher impounded the gun and knife found in the dining room area. (T. 1477-79, 1500, 1503-04, 1574-76) The gun was a .22 caliber Ruger, which had its serial number drill off. (T. 1479-80, 1891-93) The gun had been equipped with a silencer. (T. 1480, 1657) There were pieces of human tissue and hair on the butt of the gun and blood on the barrel of the gun. (T. 1536, 1577, 1657, 1663-64) There was a dent in the silencer. (T. 1576) There was no ammunition for a .22 caliber gun in the house. (T. 1484, 1708-09) The knife was similar to the knives found in the second open drawer. (T. 1504)

Det. Reyes had Tech. Walter Shafer sent to the crime scene to attach a pen register to the Rodriguezes' phone. (T. 1668) Tech. Shafer attached the pen register to the phone line, and

the redial button was pressed on the bloody phone. (T. 1668-69) The pen register recorded the number that was dialed. (T. 1669, 1699)

The phone company listed the number dialed as being the phone at 3621 SW 5th Terrace, Miami, Florida.[2] (T. 1777) Det. Reyes went to the address and learned that Horacio Llamelas, his wife Barbara and his daughter Barbara lived there. (T. 1716, 1718)

The bloody print on the phone was photograph and compared to Defendant's fingerprints. (T. 1785-1803, 1806-10, 1830) The print matched Defendant's right index finger and right palm. (T. 1810-11, 1825-28, 1834) The knife, the Ruger, the silencer, the magazine and the casings were examined for prints but none were found. (T. 1804-06)

As a result, Defendant was charged by indictment, filed on July 27, 1993, with (1) the first degree murder of Mr. Rodriguez, (2) the first degree murder of Ms. Rodriguez, (3) the armed burglary of the Rodriguezes' homes and (4) the use of a firearm during the commission of a felony. (R. 44-47) The murder charges were plead alternatively as felony or premeditated murder. (R. 44-45)

The matter originally proceeded to trial on October 16,

[2] The phone was billed to George Marino Deayala. (T. 1778)

1995. (R. 16) After considering the evidence, the jury convicted Defendant as charged on all counts. (R. 16) The trial court adjudicated Defendant in accordance with the jury's verdicts. (R. 16) After a penalty phase proceeding, Defendant was sentenced to death for the murders and life for the armed burglary. (R. 16)

On appeal, this Court originally issued an opinion on February 3, 2000. *Delgado v. State*, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000). In this opinion, this Court affirmed Defendant's convictions for premeditated murder but reversed his conviction for armed burglary and his death sentence for Mr. Rodriguez. In doing so, this Court reasoned that in order to give effect to all of the language of the burglary statute, a defendant who established that he entered a dwelling with consent could only be guilty of burglary if he remained in the dwelling surreptitiously. Since the State had argued that Defendant had entered with consent and had not shown that he remained surreptitiously, the evidence was insufficient to convict Defendant of burglary. However, this Court found amply evidence that the murders were premeditated and refused to reach Defendant's claim regarding the manner in which the burglary was charged.

On rehearing, this Court reversed Defendant's convictions

and remanded for a new trial. *Delgado v. State*, 776 So. 2d 233 (Fla. 2000). This Court continued to adhere to its analysis of the burglary consent issue. However, this Court then determined that this analysis made the felony murder theory legally inadequate and required reversal for a new trial. *Id.* at 241-42. This Court did not address any of the other issues Defendant raised.

On January 22, 2003, Defendant moved the trial court to bar his reprosecution on burglary and felony murder. (R. 88-90) Defendant asserted that this Court had acquitted him burglary and that double jeopardy barred his reprosecution for burglary and felony murder. *Id.* At the hearing on the motion, the State agreed that it would not be prosecuting Defendant for burglary and felony murder and stated that it would be proceeding on premeditated murder exclusively. (T. 23) As such, the trial court granted the motion. (T. 24)

On December 9, 2003, Defendant moved to recuse the trial judge because Former Det. Israel Reyes was now a circuit judge and a colleague and friend of the trial judge. (R. 113-15) The judge then assigned to the case and two judge to whom the matter was reassigned recused themselves, and an order was obtained from this Court assigning Senior Judge Oliver Green to hear this matter. (R. 116, 121-22, 124-27)

The matter proceeded to retrial on May 10, 2004. (R. 26) That day, Defendant moved the trial court to bar the State from seeking death sentences, asserting that Florida's capital sentencing scheme violated *Ring v. Arizona*, 536 U.S. 584 (2002). (R. 161-88) Among the arguments presented in this motion were, claims regarding the lack of special verdicts, the lack of unanimity and error in this Court's rejection of *Ring* claims based on the presence of the prior violent felony aggravator. *Id.* The trial court denied the motion. (T. 82-83)

Defendant moved in limine to preclude Det. Reyes from testifying regarding the use of the pen register. (SR. 1-3)[3] In response to Defendant's motion, the State moved to be permitted to present the testimony of Tech. Shafer by satellite. (R. 203-06) In its motion, the State asserted that Tech. Shafer was unable to travel from Brevard County to Miami because he was terminally ill and on a respirator/oxygen machine. *Id.* This motion was subsequently supplemented with affidavits substantiating that Tech. Shafer was ill and could not travel to Miami. (R. 231-32)

In support of the motion, the State argued that Tech. Shafer was an expert in pen registers and that he was too ill to travel to Miami. (T. 139-40) The State asserted that it had

[3] The symbol "SR." will refer to the supplemental record in this proceeding.

could make arrangements to have Tech. Shafer testify by satellite or it was willing to stipulate to his testimony. (T. 140-42) Defendant indicated he was unwilling to stipulate. (T. 142) The trial court indicated that it was inclined to allow the satellite testimony. (T. 142) Later, the trial court indicated that it believed the issue of Det. Reyes testifying about the pen register would be resolved by the satellite testimony of Tech. Shafer. (T. 782)

Also on May 10, 2004, Defendant, *pro se*, moved the trial court to dismiss all charges against him as violative of double jeopardy. (R. 207-10) Defendant asserted that this Court had acquitted him of burglary and felony murder and that this acquittal barred reprosecution on premeditated murder because premeditated murder was the same offense as felony murder. *Id.* Counsel adopted this motion. (R. 136-37) The State argued that this Court had specifically remanded the matter for a retrial on premeditated murder. (R. 137) The trial court denied the motion. (R. 137-38)

During a hearing on the pretrial motions, the trial court indicated to the parties that they should be careful to limit their opening statements to matters that would be supported by evidence. (T. 783-84) It indicated that it might allow comment on the failure to support statements in opening. (T. 784) The

State expressed the concern that Defendant was claiming that the State had no evidence other than hearsay regarding the state of the business. (T. 784-85) The State insisted that it had such evidence. (T. 785-86)

During voir dire, Defendant questioned the venire concerning self defense. (T. 668-73) After two panels of the venire had been questioned, the State requested that the trial court instruct the jury on the nature of the capital sentencing proceedings to avoid some of the confusion that had occurred with the other panels. (T. 788) Defendant agreed, and the court instructed the parties to agree to the form of the instruction. (T. 788-91) The court subsequently instructed the remaining panels about the nature of the penalty phase, including stating that "at this hearing, the evidence of aggravating and mitigating circumstances will be presented for you to consider." (T. 804-05, 1036-37, 1233-34) Defendant did not object to this instruction. At the time these instruction were given, the trial court also instructed the jury on the presumption of innocence and reasonable doubt. (T. 802-04, 1034-36, 1232-33)

After the jury was selected, Defendant asked that he be allowed to reserve opening statement. (T. 1354) The trial court allowed it. *Id.* After the jury was sworn, the trial

court gave the jury preliminary instructions on the conduct of the guilt phase. (T. 1357-63) No mention was made of the penalty phase in these instructions. *Id.*

During trial, Tech. Fletcher testified, without objection, that Tech. Shafer came to the Rodriguezes' home and attached a device to the phone connection to the home to find out the last number dialed on the phone. (T. 1543) She assisted in using this equipment by hitting redial on the bedroom phone. (T. 1543-44)

Tech. Fletcher also testified that the victims' hands were swabbed for gunshot residue. (T. 1582-91) She also collected blood samples from the stains in the garage, the 90 degree blood spots, the kitchen counter, Ms. Rodriguez's car and the phone cord. (T. 1591-94) When the State attempted to introduce the evidence bag containing the blood samples Tech. Fletcher had submitted to the serology section, Defendant conducted a voir dire examination and established that some of the containers that had previously held samples were empty. (T. 1596-99)

Det. Reyes testified that he had attended special training in surveillance techniques when he was assigned to the organized crime bureau before he became a homicide detective. (T. 1638) He also received training in the use of wiretapping and electronic equipment to monitor phone equipment, including pen

registers. (T. 1639-40)

Defendant then objected to having Det. Reyes testify regarding pen registers unless the State certified him outside the presence of the jury as an expert in their use. (T. 1640-41) Defendant asserted that Det. Reyes's testimony about pen registers would be hearsay because he did not personally use the pen register in this case and was not a technical expert in pen registers. (T. 1640-41) The State indicated that it was not going to introduce the pen register through Det. Reyes, and the trial court did not rule on Defendant's objection. (T. 1642)

Det. Reyes then testified that a pen register was a device that attached to a phone line and recorded the numbers called by the phone to which it was attached and the time at which the numbers were called. (T. 1642-43) Det. Reyes had been involved in the use of pen registers in two or three prior cases. (T. 1643) Det. Reyes stated that he was familiar with the use of pen registers from monitoring them in those cases. (T. 1669)

When the State asked Det. Reyes to identify the pen register tape, Defendant objected that Det. Reyes had to testify to the procedure used to produce the tape and the accuracy of the pen register before the tape could be introduced through him. (T. 1669-70) The State responded that the objection was premature but that so long as Det. Reyes could authenticate the

tape as having come from the pen register, it would be admissible and that Defendant's challenges went to the weight of the evidence. (T. 1670-72) Det. Reyes then identified the tape produced by the pen register. (T. 1673-75, 1688)

When the State then attempted to admit the tape, Defendant objected that the tape had not been properly authenticated without testimony for the person who operated the pen register regarding the accuracy of the pen register, the validity of its results, the ability of the person to operate the pen register and the type of equipment used. (T. 1689) The State responded that the tape was properly authenticated through Det. Reyes's testimony that he observed the tape being made and that it was in the same condition. (T. 1689) The State asserted that Defendant's challenges went to the weight of the evidence. (T. 1689) Defendant asserted that since such a predicate was necessary for the admission of breathalyzer results, it was also necessary for pen register results. (T. 1691) The trial court instructed the State "to qualify him better," but stated that it anticipated overruling the objection. (T. 1691)

The State then elicited that Det. Reyes was presented when the pen register was installed and used, that Tech. Shafer signed the tape and that the tape was then impounded. (T. 1692-93) Defendant then conduct a voir dire examination of Det.

Reyes during which Det. Reyes stated that Tech. Shafer had been trained in the use of pen registers and other surveillance equipment and was competent to use such equipment. (T. 1693-95) Defendant then asked if Det. Reyes was an expert in the the use of pen registers, and he responded:

> I would not be an expert. In my humble opinion I would not be in the employment of, but I had some experience in the utilization of, not only because I was a monitor on a couple of wire tap cases, but in addition to a prelude to getting wire taps you have to install penregisters on several phones. So, even though this is not on going, we have penregisters set up on phones. And I was involved in many cases, a dozen or two cases.

(T. 1695) Det. Reyes stated that he had Tech. Shafer assist him because he could not personally connect the pen register to the phone lines. (T. 1695) The trial court overruled Defendant's objection. (T. 1696)

Det. Reyes also testified that he attended the victims' autopsies. (T. 1719) He impounded the three projectiles recovered from Mr. Rodriguez's body and blood samples from both victims. (T. 1736-39, 1756-57) The pattern of the blunt force injuries to Ms. Rodriguez's head matched the butt of the Ruger. (T. 1723-25)

Sgt. Gary Smith testified that he had worked with pen registers 50 to 60 times. (T. 1765) He reiterated that a pen register attaches to the phone line and records the numbers

dialed by the phones connected to that line and the time the numbers were dialed. (T. 1765-66) He observed Tech. Shafer connect the pen register to the main phone line to the Rodriguezes' house. (T. 1767-68) He directed another officer to hit the redial button on the kitchen phone and the pen register printed the number dialed within seconds. (T. 1768-69) This procedure was repeated with the other phones in the house, and one of the phone did not produce a dialed number on the pen register. (T. 1769-70)

Tech. William McQuay testified that he attempted to identify a latent palm print found on the back of Ms. Rodriguez's car but could not do so. (T. 1816) However, Tech. McQuay did not believe he had palm prints from the victims to eliminate them. (T. 1816)

Amos Okegbola drew a blood sample from Defendant and gave it to Det. Juan Sanchez. (T. 1876-80) Det. Sanchez transported the blood sample to the lab. (T. 1880-84)

Tech. Adrian Nunez, a firearms examiner, testified that he examined the Ruger, the silencer, the casings recovered from the scene and the projectiles recovered from the scene and Mr. Rodriguez's body. (T. 1884-90, 1893-94, 1897, 1899) The Ruger was operable and had been modified so that the silencer could be attached to it. (T. 1894-95, 1897) The silencer was home-made

and fit the Ruger. (T. 1895-97) The projectiles and casings had been fired from the Ruger. (T. 1898-1906)

Tech. Gopinath Rao testified that he examined the swabs taken as part of the gunshot residue tests performed on the victims. (T. 1907-15) He found no gunshot residue on their hands. (T. 1915-17)

Tech. Victor Alpizar, a forensic serologist and crime scene reconstruction expert, testified that he went to the Rodriguezes' home the morning their bodies were discovered. (T. 1923-31) He observed the pattern of blood spatter and stains. (T. 1953-63) The pattern around Ms. Rodriguez's body showed that she was at or near the floor when she received her injuries. (T. 1962-63) Mr. Alpizar explained that the 90 degree blood spots were produced by blood dripping onto the floor. (T. 2015)

He also tested some of the blood samples collected from the blood stains by Tech. Fletcher for blood type and PGM type. (T. 1934-52) He explained that it was not possible to do all of the tests on all of the samples because the samples deteriorate over time and some samples were not of sufficient size to permit all of the testing since the testing consumed the samples. (T. 1949-51)

From the blood samples collected from the victims at autopsy, he determined that Ms. Rodriguez was blood type B with

H antigen present, PGM type 1+2+, and Mr. Rodriguez was type O, PGM type 1+. (T. 1969-74) From the blood sample collected from Defendant, he determined that Defendant was type A with H antigen present, PGM type 1-. (T. 1973-75) Ms. Rodriguez's blood types occurred in 2.1% of the population, Mr. Rodriguez's occurred in 18.2% of the population and Defendant's occurred in 1.1% of the population. (T. 1975)

The blood samples taken from the left side of Ms. Rodriguez's car were consistent with her blood or a mixture of her blood and Mr. Rodriguez's blood. (T. 1976-80) The blood sample from the garage floor near the car was consistent with Mr. Rodriguez's blood. (T. 1979) The blood samples from the kitchen counter and the phone cord were consistent with Ms. Rodriguez's blood or a mixture of both victims' blood. (T. 1980-83, 2003-05) None of these samples were consistent with Defendant's blood. (T. 1976-83) The blood from the 90 degree blood spots in the garage were consistent with Defendant's blood. (T. 2012-15, 2017-19) The blood from the 90 degree blood spot in the kitchen was consistent with a mixture of Defendant and both victims' blood. (T. 2019-20)

Mr. Alpizar examined the blade of the knife and found blood consistent with Ms. Rodriguez's blood or a mixture of both victims' blood. (T. 1984) He also examined the gun and found

blood and found blood consistent with Ms. Rodriguez's blood or a mixture of both victims' blood on the trigger. (T. 1986-87) On the grip, Mr. Alpizar found a mixture of A, B and H antigens and PGM type 1+2+. (T. 1988-90, 1997-2000) This was consistent with a mixture of the blood of Defendant and the victims. (T. 1992-97, 2000-02)) He examined the gun magazine and found blood consistent with Ms. Rodriguez's blood or a mixture of both victims' blood. (T. 2002-03) He examined the phone and found a mixture of A, B and H antigens. (T. 2006-08, 2011) This was again consistent with a mixture of Defendant and both victims' blood. (T. 2011-12)

On cross, Mr. Alpizar stated that DNA testing had not been validated for use in Dade County at the time of these crimes. (T. 2029-30) On redirect, he stated that he conducted no DNA testing in this matter. (T. 2035)

Dr. Emma Lew, a forensic pathologist, testified that she examined the reports and autopsy files regarding the victims.[4] (T. 2042-46) Ms. Rodriguez had an abrasion on the back of her left hand, bruises on her left wrist and a slicing cut on the knuckle of her middle finger that were consistent with defensive wounds. (T. 2053-54) Ms. Rodriguez also had abrasions to her

[4] Evidence about the nature of the victims wounds was also testified to by Det. Reyes, who observed the autopsies. (T. 1725-28, 1747-55)

right leg, left forearm, right side of her face, left upper back, left upper arm and left side of her neck. (T. 2075-76) In addition, she had a bruise on the front of her thigh and two behind her right ear. (T. 2076)

Ms. Rodriguez suffered ten lacerations to her forehead and scalp: one of the left side of the forehead just above the eyebrow, one just above that one, one just above that one, three just above the left ear, three to the back of the head and one just above the right eyebrow. (T. 2055-59, 2063) The laceration just above the left eyebrow, one of the lacerations above the ear and two of the lacerations to the back of the head corresponded with four fractures to Ms. Rodriguez's skull. (T. 2059, 2064-66) One of the fractures in the back of the head, which was on the left side, was caused with sufficient force to break off a fragment of the skull, which ripped torn the dura and entered the brain. (T. 2059-63) The four skull fracture would have caused concussions and could have lead to swelling of the brain. (T. 2066) The fracture that caused the portion of the skull to be driven into Ms. Rodriguez's brain would have also caused bleeding in her brain. (T. 2066) These injuries were the result of blunt force trauma and the pattern of injury on at least one of these injuries was consistent with having been caused by the butt of the Ruger. (T. 2066-67)

In addition, Ms. Rodriguez had suffered 12 stab wounds: one to the right side of her neck, two to the left side of her neck, five to the chest, one to her abdomen, one to her right shoulder, one to her back and one to the back of her neck. (T. 2067, 2069-71, 2072-73, 2074-75) One stab wound to the left side of Ms. Rodriguez's chest, which penetrated her left lung and aorta, would have been fatal within a short period of time. (T. 2068, 2071-72) Another stab wound to the right side of her chest, which perforated her liver, would have been fatal in a longer period of time. (T. 2068, 2073)

Ms. Rodriguez's stomach was full, which indicated that she was killed within a few hours of having eaten. (T. 2077) Ms. Rodriguez was coming out of rigor mortis. (T. 2077-78) Based on all of this information, Dr. Lew opined that Ms. Rodriguez died of multiple blunt force trauma and stab wounds the evening before her body was found. (T. 2078)

Mr. Rodriguez had suffered five gunshot wounds: three to the left side of his chest and two to the inside of his right thigh. (T. 2086, 2090-91, 2093-94) In addition, Mr. Rodriguez had a graze wound to the right side of his scrotum. (T. 2093) The blood around the chest wounds indicated that Mr. Rodriguez was already on the ground when he was hit by these bullets and skin around these wounds showed that they were contact wounds.

(T. 2091-93, 2097) The bullet that caused one of the chest wound entered the chest, grazed the sixth rib, perforated the left lung, aorta and esophagus and lodged next to the spine in the neck. (T. 2094-97) The bullet that caused another of the chest wounds followed a similar path but went through the spinal cord, severing it and paralyzing Mr. Rodriguez below the waist. (T. 2099-2101) The bullet that cause the last of the chest wounds perforated the spleen, liver and subclavian artery and lodged behind the inside edge of the right collarbone. (T. 2101) The bullets that caused the wounds to the thigh travel from front to back, left to right and downward. (T. 2102) The higher of the two thigh wounds and the wound to the scrotum were probably caused by the same bullet, which was fired from a distance from the body. (T. 2102-03) The lower thigh wound was caused by a gun fired within inches of the body. (T. 2103)

Mr. Rodriguez also sustained five stab wounds: two to the left side of his neck, two to the area of the left collarbone and one to chest, just below his left nipple. (T. 2088-89) The chest wound was probably inflicted after Mr. Rodriguez had died. (T. 2103-04)

Mr. Rodriguez's stomach was full, indicating that he had been killed within one to two hours after eating. (T. 2104) Dr. Lew opined that Mr. Rodriguez died of multiple gunshot

wounds to the chest. (T. 2105)

After the State rested, Defendant moved for a judgment of acquittal, claiming that while the State had proved that Defendant was at the scene of the murders at the time of the murder, it had not proved that Defendant committed the murders or premeditation. (T. 2113-15) The trial court denied the motion. (T. 2117) Defendant then rested without presenting any additional evidence.[5] During the charge conference, Defendant waived instruction on any lesser included offenses. (T. 2123-25) Defendant objected to the reading of the instruction on first degree murder separately for each count, claiming it placed undue emphasis on the instruction. (T. 2125-26) The State objected because the jury was also instructed to consider each count separately. (T. 2126-27) The trial court decided to read the instruction separately for each count. (T. 2127)

Before closing arguments, the State entered a nolle prosequi to the charge of possession of a firearm during the commission of a criminal offense. (T. 2140-41) When the jury was brought into the courtroom, the trial court indicated that it would review the jury instructions with them. (T. 2145) The court then informed the jury of the entry of the nolle prosequi, read the indictment and began to read the introduction to

[5] During cross examination of Tech. Fletcher, Defendant introduced crime scene photographs of the garage. (T. 1616-18)

homicide jury instruction. (T. 2145-48) The State then interrupted the trial court and indicated that the jury instructions should not be read until after closing argument. (T. 2148) Defendant responded that the instructions could be read at that time if neither party objected. (T. 2148) Defendant later indicated that he wanted the instructions read later. (T. 2149) The trial court indicated that it wanted to complete reading the homicide instruction and stop. (T. 2150, 2151) Defendant indicated that this was acceptable to him but that he was not arguing the murders were justifiable and that it would be acceptable to inform the jury to disregard the instruction. (T. 2150, 2151) The trial court then told the jury to disregard the instruction on justifiable homicide and read the instructions on excusable homicide and both counts of first degree murder. (T. 2152-55) Defendant did not object. (T. 2155)

During its initial closing argument, the State reviewed the testimony of the witnesses and asserted that it had proven that Defendant committed two premeditated murders. (T. 2155-2210) As part of its review of the evidence, the State asserted, without objection, that Mr. Llamelas had purchased the victims' business for his daughter and Defendant to run. (T. 2178, 2183-84) It also contended that Maria Hernandez's testimony showed

that the business declined under their management and that Defendant blamed the victims. (T. 2185-86)

In his closing argument, Defendant asserted that he was not guilty and that the State had failed to prove that he murdered the victims. (T. 2212-15) Defendant asserted that the State had failed to prove that Defendant was motivated to kill the victims because it failed to present the records of the dry cleaning business to show that Defendant had a financial stake in it. (T. 2215-20) When Defendant suggested that the State should have called Mr. Llamelas, the State objected, asserting that Mr. Llamelas was dead and Defendant knew it and that commenting on the failure to call witnesses available to both parties was improper. (T. 2220-23) The trial court instructed Defendant to rephrase his comment. (T. 2223)

Defendant then asserted that the State had proved that the victims were horribly murder but had failed to show Defendant did it. (T. 2223-39) Instead, Defendant asserted that the State was relying on the jury's emotional reaction to the facts of the crime. *Id.* In the course of presenting this argument, Defendant asserted that Tech. Alpizar had testified that DNA testing was not done at the time this crime was committed because it was too expensive, but Defendant asserted that the State could have requested DNA testing before trial. (T. 2232-33) The State

objected, and the trial court sustained the objection, as relying on facts not in evidence. (T. 2233) Defendant then argued that the State had not conducted DNA testing because the State was arrogant. (T. 2233)

After he finished his closing, Defendant objected to the trial court re-reading the jury instructions after closing. (T. 2240-41) Instead, Defendant suggested that the trial court only read those instructions that it had not already read. (T. 2241)

During its rebuttal closing argument, the State stressed that nothing the attorneys said in argument was evidence. (T. 2242-43) The State then responded to Defendant's assertion that the State should not have stressed the horrible nature of the crimes:

> I guess this is a concession at this point in the trial when everything is over that these are premeditated murders. So I guess now I find out that, Gee, I didn't really need to prove that. And here is problem with that theory. I have the only burden. When I come into this court, I have to prove to you two things. Remember, I told you at the beginning of closing: The crimes were committed and the Defendant committed them.
>
> It is all well and good for him to stand up now after we have been in trial for two and a half weeks and tell you that, yeah, these are horrible, premeditated murders, but the problem is that two and a half weeks ago, I didn't hear that concession.

(T. 2243) Defendant objected and argued at sidebar that the State's comments were improper, shifted the burden of proof and commented on his right to remain silent. (T. 2243-44)

Defendant then requested a mistrial. (T. 2244) The State asserted it was responding to Defendant's argument that it had used the crime scene evidence to prey on the jury's emotions when it had, in fact, presented the evidence to show premeditation. (T. 2244-45) During this argument, the State used the word ludicrous to describe Defendant's argument and was admonished not to use that word. (T. 2245) The State responded that it would not use that word in front of the jury. (T. 2245) When the State later during the sidebar stated that Defendant's assertions were a "load of crap," the trial court again admonished the State and instructed the prosecutor to calm down and avoid comments that shifted the burden. (T. 2246) The trial court denied the motion and refused to sustain the objection but again admonished the State to avoid arguments that shifted the burden. (T. 2246) The State then continued that Defendant was charged with premeditated murder, that it had the burden of proof and that it was arguing the crime scene evidence to show that the murders were premeditated. (T. 2247)

In response to Defendant's assertion that the evidence did not show Defendant committed the murders, the State then commented:

> Counsel says I went through a pile of evidence and that does not prove that Defendant did it. I would submit to you that the Defense is never satisfied with anything in a criminal case.

(T. 2248) Defendant objected to this comment, and the trial court sustained the objection. (T. 2248) Defendant then reserved a motion for mistrial. (T. 2248)

The State then asserted that while it did not have a videotape of the murder, it had presented sufficient evidence that Defendant was upset with the victims over the sale of the business and had chosen to kill them as a result. (T. 2248-51) It responded to Defendant's argument that Det. Reyes was not a necessary witness by pointing out the evidence that Det. Reyes provided that Tech. Fletcher did not. (T. 2251-52)

In response to the argument that Defendant had no interest in the business, the State pointed out that Mr. Llamelas had purchased the business and that his daughter was Defendant's common-law wife. (T. 2252-53) The State then commented:

> How could the argument possibly be made to you that he had no interest, financial or otherwise, in that business and its success? That is completely ridiculous. He goes there every day. The man bought the business for them to run.

(T. 2253) Defendant objected that this argument was based on facts that were not in evidence. (T. 2253) The trial court remarked that it did not recall "all of that being put together" and overruled the objection. However, it instructed the jury:

> [T]he Jury must bear in mind that it is their recollection of the facts that prevail and perhaps you can clarify the statement.

(T. 2253) The State then commented that its remarks were not evidence but that it had shown that Mr. Llamelas bought the business and that Defendant was assisting Barbara Llamelas in running the business. (T. 2253-54)

In response to the assertion that the State should have presented records from the business, the State asserted that any records would have been in Barbara Llamelas' possession. (T. 2255) Defendant objected and argued at sidebar the State was inferring that he controlled the business records. (T. 2255) He moved for a mistrial or a curative instruction under *Haliburton v. State*, 561 So. 2d 248 (Fla. 1990), that no inference could be drawn because the evidence was equally available to both parties. (T. 2255-56) The trial court denied the motion for mistrial and refused to give a curative but instructed the State to avoid the subject. (T. 2256) The State responded that the evidence was not equally available because Mr. Llamelas was dead and Barbara Llamelas was Defendant's common-law wife. (T. 2257) The trial court permitted the State to comment on the relationship between Defendant and the Llamelases. (T. 2258)

Responding to Defendant's argument that the presence of the bloody footprints that lead only from the garage to the kitchen, that the presence of blood of Defendant's type, the presence of

Defendant's prints in blood on the phone and the fact that the last number dial on that phone was the Llamelases' number did not show that Defendant committed the murders, the State pointed out that it had not suggested the order of the infliction of the victims' injuries. (T. 2261-62) It also pointed out that Defendant's criticism of this evidence would have required the victims to have allowed the blood to remain in the house. (T. 2262-63) The State asserted that this theory was absurd. (T. 2263-64) Defendant objected, and the trial court instructed the State to "[t]one it down." (T. 2264) The State then commented that the jury was free to conclude that this evidence did not show that Defendant committed the murders. (T. 2264)

After closing argument concluded, Defendant argued that the trial court should grant a mistrial because the State's comments about the defense never being satisfied and Defendant's argument being absurd were attacks on defense attorneys generally and Defendant's counsel in particular. (T. 2271) The trial court stated that it had sustained the objections but that it did not consider the comment about the argument being absurd to have been made as a derogatory comment about counsel. (T. 2271-72) Instead, it believed that the State was simply commenting that the defense hypothesis of innocence was not reasonable. (T. 2272) As such, it denied the motions. (T. 2272)

The State then argued that the trial court should read the instructions in toto. (T. 2272) Defendant objected to the trial court re-reading the instructions that it had read before closing, asserting that it would unduly emphasize these charges. (T. 2273) Because Defendant had requested a change in the introduction to homicide, the trial court decided to read the instructions in toto, which it did. (T. 2276-89) At the conclusion of the instructions, Defendant objected to the court reading the first degree murder instruction separately for each count and reading the instructions in toto after closing. (T. 2289)

After deliberating, the jury found Defendant guilty of both first degree premeditated murders. (R. 287-88, T. 2298-99) The trial court adjudicated Defendant in accordance with the verdicts. (R. 289-91, T. 2300)

The penalty phase commenced on July 8, 2004. At the beginning of the penalty phase, Defendant indicated that he did not wish to present mitigation. (T. 2312-13) The trial court then conducted a colloquy with Defendant concerning his decision to waive mitigation. (T. 2317-44) During the discussion of the waiver, Defense Counsel indicated that Defendant had been steadfast in his desire that mitigation not be presented since the case had been reversed. (T. 2328-29) Counsel also

outlined, over Defendant's objection, the mitigation that had been uncovered and could have been presented. (T. 2329-43) The trial court found that Defendant had knowingly and voluntarily waived mitigation. (T. 2353)

At the penalty phase, Det. Timothy Bahn testified that he investigated an aggravated assault committed by Defendant on July 24, 1995. (T. 2360-61) The investigation revealed that Mr. Spicer had gone to check on his sister's home while she was on vacation and observed a person named Omar riding a motorcycle belonging to Mr. Spicer's sister. When confronted, Omar and Mr. Spicer had a shouting match. (T. 2362) When the motorcycle was returned to Mr. Spicer's sister's home, Defendant was there with Omar, who shoved Mr. Spicer. (T. 2362-63) Defendant then pulled a gun he had in his waistband, threatened Mr. Spicer with it and struck him. (T. 2363-64) As a result of this incident, Defendant pled guilty and was convicted of aggravated assault. (T. 2365-69)

Dr. Lew testified that Mr. Rodriguez suffered five gunshot wounds, three of which would have been fatal, and five stab wounds, which were inflicted after Mr. Rodriguez was dead or dying. (T. 2369-74) Dr. Lew indicated that the blood on Mr. Rodriguez's face indicated that he was aspirating blood as a result of the injuries to his lung. (T. 2375-76) Dr. Lew

opined that Mr. Rodriguez would have experienced pain from being shot and shortness of breath from the bleeding in his lung. (T. 2376-79) Dr. Lew also opined that Mr. Rodriguez would have realized that he was dying as a result of these wounds. (T. 2379) Additionally, the stab wounds would have been painful. (T. 2380-81) Dr. Lew asserted that Ms. Rodriguez would probably have been conscious through the infliction of each of the blows to her head, which would have been painful. (T. 2382-86) The presence of defensive wounds and the nature of those wounds confirmed that Ms. Rodriguez was conscious throughout the attack. (T. 2386-89) The wounds Ms. Rodriguez sustained would have caused excruciating pain. (T. 2389-95)

Denise Reinhart testified that Ms. Rodriguez was a nanny to herself and her retarded brother. (T. 2395-98) She considered Mr. and Ms. Rodriguez to be members of her family, and her family treated them as such. (T. 2398-2402) Ms. Reinhart stated that her family, Ms. McField and Ms. Hernandez all experienced a tremendous sense of loss as a result of the murders. (T. 2404-05)

After the State rested, Defendant renewed his waiver of mitigation. (T. 2406-07) During deliberations, the jury questioned whether Defendant would receive any credit for time served against the 25 year minimum mandatory provision of a life

sentence and whether any life sentences that could be imposed would be served concurrently or consecutively. (T. 2436) After deliberating, the jury recommended the imposition of the death penalty for each murder by a vote of 9 to 3. (R. 312-13, T. 2441-42)

At the conclusion of the penalty phase, the trial court ordered an in-depth PSI and requested copies of the transcript of the prior penalty phase. (T. 2443, 2445) At the *Spencer* hearing, Defendant again refused to present any mitigation. (T. 2451) The trial court noted that it had received a PSI with a psychiatric report attached. (T. 2457)

On October 18, 2004, the trial court followed the jury's recommendations and sentenced Defendant to death for each of the murders. (R. 345-55, T. 2464-69) With regard to the murder of Mr. Rodriguez, the trial court found three aggravating circumstances: (1) prior violent felony, based on contemporaneous conviction for Violetta Rodriguez's murder and a previous conviction for aggravated assault - substantial weight; (2) heinous, atrocious and cruel (HAC) - substantial weight; and (3) cold, calculated and premeditated (CCP) - substantial weight. *Id.* With regard to the murder of Ms. Rodriguez, the trial court found the same aggravators except that it used the contemporaneous murder of Tomas Rodriguez in support of the

prior violent felony aggravator.

Despite Defendant's waiver of mitigation, the trial court considered the mitigation presented at the previous trial, the proffer of mitigation provided by both the State and defense and a presentence investigation report. (R. 350) It found in mitigation (1) Defendant never used drugs or alcohol - moderate weight; (2) physical and emotional abuse by his father, step-father, the Cuban Government and supporters of the Cuban Government - moderate weight; (3) Defendant loved his family - minimal weight; and (4) Defendant's courtroom behavior - moderate weight.

SUMMARY OF THE ARGUMENT

The Double Jeopardy claim was properly rejected as this Court had already ruled on the scope of the retrial in the original appeal. Moreover, the retrial did not violate Double Jeopardy.

The lower court did not abuse its discretion in its rulings regarding the comments during the State's rebuttal closing. The lower court also did not abuse its discretion in admitting the pen register tape or in its instructions to the jury. It also did not abuse its discretion in sustaining an objection to a comment in Defendant's closing that was contrary to the evidence presented and unsupported by any other evidence.

Any error in the explanation of the function of the penalty phase was unpreserved, invited, nonexistent and harmless. The *Ring* claim was properly denied. None of the errors are harmful, either individually or cumulatively.

Defendant's convictions are supported by competent, substantial evidence. His sentences are proportionate.

ARGUMENT

I. THE DOUBLE JEOPARDY CLAIM SHOULD BE REJECTED.

Defendant first asserts that his convictions and sentences must be reversed because they violate Double Jeopardy. Defendant asserts that because this Court found the evidence insufficient to rebut a consent defense to the charge of burglary, he could not be retried for premeditated murder. However, this Court already determined this issue in the original opinion. Moreover, it is meritless.

On Defendant's first appeal, this Court found that the State had failed to show that Defendant had committed a burglary. *Delgado v. State*, 776 So. 2d 233 (Fla. 2000). This Court determined that a defendant who presented evidence that he consensually entered a home could not be guilty of burglary unless the defendant remained in the home surreptitiously with the intent to commit a crime. *Id.* at 240. Since this Court determined that Defendant had presented evidence that he had entered the home with consent, this Court determined that the evidence was legally inadequate to convict Defendant of burglary. *Id.* at 241. Because the State's felony murder theory was based on the burglary and the burglary was legally inadequate, this Court reversed Defendant's convictions for murder pursuant to *Griffin v. United States*, 502 U.S. 46 (1991),

and *Yates v. United States*, 354 U.S. 298 (1957).

In so doing this Court stated:

> We are cognizant that after appellant entered the victims' home, he is accused of committing two heinous murders. Regardless of whether these accusations are true, appellant's actions are not the type of conduct which the crime of burglary was intended to punish. **Our decision in no way prevents the State from prosecuting appellant for whatever crimes he may have committed once inside the victims' home.**

Id. at 240-41 (emphasis added).

As the above language demonstrates, this Court determined that the State was entitled to retry Defendant for the murders during the original appeal. In *Patten v. State*, 598 So. 2d 60 (Fla. 1992), this Court confronted a similar situation. There, the defendant claimed, on his original direct appeal, that he had been acquitted of the death penalty when the jury informed the trial court that it was tied during penalty phase deliberations and the trial court responded by giving a jury deadlock charge. *Patten v. State*, 467 So. 2d 975, 979-80 (Fla. 1985) This Court found that the giving of the charge was error and ordered a jury resentencing. *Id.* After a resentencing proceeding, the defendant claimed on appeal that the resentencing proceeding should have been barred by Double Jeopardy. *Patten*, 598 So. 2d at 62. This Court refused to consider the issue because it had been resolved in the prior opinion. *Id.* at 63. Here, this Court determined in Defendant's

original direct appeal that the burglary theory was flawed but remanded for a retrial on the murders Defendant committed in the home. As such, Defendant's attempt to relitigate the scope of the retrial should be rejected. *See also United States v. Jordan*, 2005 U.S. App. Lexis 23722 (11th Cir. Nov. 3, 2005).

Even if this Court had not already determined this issue, Defendant would still be entitled to no relief. Defendant's argument is premised on the assertion that by finding the evidence legally inadequate to support a burglary and a felony murder theory premises thereon, this Court acquitted Defendant of first degree murder. He then asserts based on *Burks v. United States*, 437 U.S. 1 (1978), that such an acquittal barred retrial.

In *Burks*, the Court determined that an appellate reversal based on a determination the evidence was insufficient to sustain a jury's verdict created a Double Jeopardy bar to retrial. The Court reasoned that since the appellate court had determined that the matter should never had been submitted to the jury and an acquittal by a jury would have precluded a retrial, the appellate reversal would also bar reprosecution. *Id.* at 16-17.

Here, this Court did not determine that the evidence was insufficient to convict Defendant of first degree murder.

Instead, this Court acquitted Defendant of burglary and merely determined that Defendant's first degree murder convictions had to be reversed based on *Yates* and *Griffin*. Under *Griffin*, the factual insufficiency of evidence to support an alternative theory of guilt does not even entitle a defendant to a reversal. At most, the defendant is permitted to obtain instructions that eliminate the unsupported theory from the jury's consideration. The trial court is not required to enter an acquittal of the charge. As such, it does not follow that under *Burks*, the determination of legal inadequacy under *Yates* that requires reversal of a jury's general verdict supports a claim that the defendant has been acquitted of the alternative theory of prosecution. *See United States v. Ellyson*, 362 F.3d 522, 531-35 (4th Cir. 2003); *United States v. Kavazanjian*, 623 F.2d 730, 739-40 & n.20 (1st Cir. 1980).

In an attempt to have it seem as if this Court did acquit him of first degree murder, Defendant asserts that Double Jeopardy bars prosecution for both felony and premeditated murder. He relies upon dicta from *Gordon v. State*, 780 So. 2d 17 (Fla. 2001), for this assertion. However, this is untrue and unsupported by *Gordon*. The dicta in *Gordon* states for the unremarkable position that the State cannot obtain two separate convictions and sentences for both felony and premeditated

murder when a single death occurred. *Id.* at 25. Here, the State has only obtained one conviction and sentence for each of the murders committed in this matter. As such, *Gordon* does not show that the State cannot obtain a conviction for premeditated murder after this Court has determined that its felony murder theory was legally inadequate and required a retrial. Defendant is entitled to no relief.

Moreover, this is not a case in which the State had only prosecuted the case on one of the alternate theories of first degree murder, an acquittal of that charge had been obtained and a second indictment charging the other theory had then been pursued. The State proceeded on both felony and premeditated murder theories at the original trial. This Court determined that the felony murder theory was legally inadequate. On remand, the State pursued only the premeditated murder theory under the original charging document. As such, Defendant's reliance on *State v. Katz*, 402 So. 2d 1184 (Fla. 1981), is misplaced.

Defendant next asserts that even if he could be properly prosecuted for both felony and premeditated murder generally, he could not be in this matter because of the manner in which the State had originally charged and proven the burglary, the underlying felony for the original felony murder conviction.

However, Defendant is still entitled to no relief. This Court has made clear that the determination of whether two crimes contain the same elements is to be done based on the **statutory** elements of the crime and not the pleading or the proof in a particular case. *Gaber v. State*, 684 So. 2d 189 (Fla. 1996); §775.021(4)(a), Fla. Stat. In *Gaber*, the defendant had claimed that Double Jeopardy barred his convictions for both armed burglary and grand theft of a firearm because both offenses involved the single act of taking a firearm. This Court refused to consider this argument because it went beyond the statutory elements of the crimes. *Id.* at 190. Similarly here, Defendant is attempting to rely upon the pleading and proof to show a Double Jeopardy violation. However, this exceeds the appropriate parameters of a Double Jeopardy review. As such, it should be rejected, and Defendant's convictions affirmed.

To the extent that Defendant is attempting to assert that reprosecution was barred by collateral estoppel because the theory of prosecution was the same and he was previously acquitted of intentionally killing the Rodriguezes because of the manner in which the burglary was charged, he is still entitled to no relief. In order for collateral estoppel to bar a reprosecution, it must be shown that an issue of fact was actually determined in the prior proceedings. When the prior

acquittal is based on a general verdict, a court is permitted to examine the prior record, including the pleadings and evidence, to determine whether the jury could have acquitted the defendant based on an issue other than the one which the defendant claims precludes the subsequent prosecution. *Ashe v. Swanson*, 397 U.S. 436, 475-76 (1970). If the prior acquittal did not actually decide the issue on which preclusion is claimed, collateral estoppel does not bar reprosecution. *Gragg v. State*, 429 So. 2d 1204, 1206 (Fla. 1983).

Here, while the first jury did return a general verdict, it did not acquit Defendant; it convicted him. This Court acquitted Defendant of burglary. However, this Court did so because of the consent defense and not because of any lack of proof of intent or another element of the crime of first degree murder. In fact, this Court originally found that the State had sufficiently proven that Defendant killed the Rodriguezes from a premeditated design. *Delgado v. State*, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000). Thus, this Court's acquittal of Defendant of burglary and felony murder based thereon cannot be said to have been based on a finding that the State failed to prove that Defendant intentionally, and from a premeditated design, murdered the Rodriguezes. Since this Court did not find that the evidence was insufficient to show premeditation, collateral

estoppel did not bar Defendant’s reprosecution for first degree premeditated murder. Defendant’s convictions should be affirmed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS RULINGS REGARDING COMMENTS IN THE STATE'S REBUTTAL CLOSING.

Defendant next asserts that his convictions and sentences must be reversed because the State allegedly made improper comments. Defendant appears to assert that the State's comments about Defendant's concession during his closing argument that the crime was premeditated shifted the burden of proof. Defendant also asserts that the State made impermissible attacks on defense counsel in certain specified comments during a sidebar and unspecified comments during closing. However, the lower court did not abuse its discretion in overruling any objections and denying motions for mistrial.

With regard to the majority of comments that Defendant appears to raise, the only issue preserved is the denial of a motion for mistrial. In order to preserve an issue regarding a comment in closing, it is necessary for a defendant to object to the comment contemporaneously and obtain an adverse ruling on the objection. *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983); *Castor v. State*, 365 So. 2d 701 (Fla. 1978). Here, Defendant objected to the comment on his concession and moved for a mistrial. (T. 2243-44) However, Defendant never obtained a ruling on his objection. (T. 2246) The trial court also did not distinctly rule on Defendant's objection to the comment

concerning the lack of presentation of the business records. (T. 2255-58) The trial court sustained the objection to the comment regarding the defense never being satisfied and the comment regarding the unreasonableness of Defendant's hypothesis of innocence. (T. 2248, 2264) The only adverse rulings that Defendant obtained regarding the State's closing argument were the denial of motions for mistrial and the overruling of one objection to a comment that the State had shown that Defendant had an interest in the success of the business purchased from the Rodriguezes. (T. 2253) As such, the issues that are preserved are the propriety of that one comment and the denial of the motions for mistrial regarding the others.

With regard to the one comment to which the trial court overruled the objection, Defendant is entitled to no relief. A trial court has broad discretion over the scope of closing argument and the parties are allowed to draw fair inferences from the evidence. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). When the State commented that it had proved that Defendant had an interest in the business, Defendant objected that the State was arguing facts not in evidence. However, the State presented evidence that the business had been sold to the Llamelases and that Barbara Llamelas and Defendant, her boyfriend, ran the business. (T. 1851-54, 1862) It presented

evidence that Defendant had complained to Maria Hernandez that the Rodriguezes had cheated **him**. (T. 1858-60, 1870) This evidence supported the inference upon which the State commented during its closing. Thus, while the trial court was correct that no single witness testified exactly as the State phrased its comment, the trial court properly overruled the objection. *Breedlove*. It should be affirmed.

With regard to the other comments, Defendant is again entitled to no relief. "A motion for mistrial is addressed to the sound discretion of the trial judge and '. . . should be done only in cases of absolute necessity.'" *Ferguson v. State*, 417 So. 2d 639, 641 (Fla. 1982)(citing *Salvatore v. State*, 366 So. 2d 745, 750 (Fla. 1978), *cert. denied*, 444 U.S. 885 (1979)). Such absolute necessity is demonstrated when the granting of a mistrial "'is necessary to ensure that the defendant receives a fair trial.'" *Gore v. State*, 784 So. 2d 418, 427 (Fla. 2001)(quoting *Goodwin v. State*, 751 So. 2d 537, 547 (Fla. 1999)). Here, the trial court did not abuse its discretion in denying the motions for mistrial as there was no absolute necessity.

With regard to the comment about the concession, there was no absolute necessity because the comment was proper as a fair response to Defendant's argument. The theme of Defendant's

closing argument was that while the murders were clearly premeditated, the State had failed to prove that Defendant committed the murders and was presenting evidence about the nature of the crime scene to convince the jury to rely on its emotional reaction to the horrible nature of the crime to convict. (T. 2212-39) In response to this argument, the State commented that it had the only burden of proof and had presented the evidence to prove premeditation, an element of the crime that Defendant had not suggested was not in dispute until his closing, and not to inflame the jury. Given Defendant's argument, the State's comment was proper as a fair response. *See Pace v. State*, 854 So. 2d 167, 179 (Fla. 2003); *Garcia v. State*, 644 So. 2d 59, 62-63 (Fla. 1994); *Ferguson v. State*, 417 So. 2d 639, 642 (Fla. 1982). The lower court properly denied the motion for mistrial.

Moreover, the fact that the State was responsing to Defendant's argument and not commenting on Defendant's right to remain silent or shifting the burden of proof was driven home by the State's remarks before and after the objection to this comment. The State asserted that it had the only burden of proof and had presented the crime scene evidence to meet its burden of showing premeditation. (T. 2243, 2247) Since the comments were fair reply and given the comments that occurred

before and after the sidebar, there was no absolute necessity for a mistrial based on the comment. The trial court did not abuse its discretion in denying one. *Ferguson*.

With regard to the comment about the business records, it too was a fair reply. During his closing argument, Defendant suggested that the State should have called Barbara or Horatio Llamelas. (T. 2220) The State objected that Defendant was improperly commenting on the failure to present witnesses who were at best equally available to both sides and at worse in Defendant's control as Mr. Llamelas was dead and Defendant had a spousal relationship with Barbara. (T. 2221-24) Defendant was allowed to rephrase this comment to assert that the State had failed to prove its case by not presenting the evidence that he claimed the State should have presented from these witnesses. (T. 2225) In response, the State asserted that the evidence was not presented because it would have been in Barbara Llamelas' control and she had a spousal relationship with Defendant. (T. 2255) Given Defendant's comment, the State's assertions concerning why the evidence was not presented was a fair response. As such, it was proper. *See Pace v. State*, 854 So. 2d 167, 179 (Fla. 2003); *Garcia v. State*, 644 So. 2d 59, 62-63 (Fla. 1994); *Ferguson v. State*, 417 So. 2d 639, 642 (Fla. 1982). Thus, this brief response did not create an absolute necessity

for a mistrial. *Ferguson*. The motion was properly denied.

With regard to the comment about Defendant's hypothesis of innocence, the comment was again not improper. Defendant had suggested during his closing argument that he had no reason to be upset with the Rodriguezes, as he had no interest in the dry cleaning business and no relationship with them. Having thus eliminated the sole reason presented at trial why he would have been in the Rodriguezes' home, Defendant asserted that he might have bleed, left his palm and fingerprints, which were on the phone in a mixture of his and the victims' blood type, and used their phone to call the Llamelases' home at a time other than the time when the victims were murder, particularly before the murders occurred. As can be seen, this hypothesis of innocence left unexplained why Defendant would have been in the home of people with whom he had no relationship. It also suggested that the Rodriguezes would have allowed their home to remain in bloody state even though the investigation of the crime scene showed that the house was immaculate, other than the areas disturbed by the commission of the crimes.

Given the nature of this hypothesis, the State's comment about it was simply a proper comment that Defendant's hypothesis of innocence was not reasonable. *See Pace*. Further, the trial court admonished the State for the comment in the presence of

the jury. (T. 2264) Moreover, the State then commented that if the jury believed Defendant's hypothesis, it should find Defendant not guilty. (T. 2264) Under these circumstances, there was no absolute necessity for a mistrial. *Ferguson*. The trial court did not abuse its discretion in denying one.

With regard to the comment about the defense never being satisfied, the trial court did not abuse its discretion in denying the motion for mistrial. The comment was brief, and the trial court sustained the objection. The State presented overwhelming evidence that the murders were premeditated, a point about which Defendant agreed during his closing. Blood of Defendant's type was found at the crime scene. Defendant's finger and palm prints were found in a mixture of his blood type and the victims' blood type on a telephone at the scene. The last number dialed from that phone was Barbara Llamelas' number. Defendant's hypothesis of innocence was completely unreasonable, as it did not explain this physical evidence. Under these circumstances, there was no absolute necessity for a mistrial. *Ferguson*. As such, the trial court did not abuse its discretion in denying one.

To buttress his claim that a mistrial should have been declared, Defendant relies upon comments the State made at sidebar, outside the hearing of the jury. However, these

comments could not possibly denied Defendant a fair determination of his guilt by the jury. The jury did not hear the comments.[6] As such, they do not provide a basis for a mistrial. *Gore*; *Ferguson*.

To the extent that Defendant is asserting that the cumulative effect of the comments created an absolute necessity for a mistrial, this is untrue. The majority of the comments were fair responses to comments Defendant had made in its closing or reasonable inferences from the evidence. Despite the propriety of the comments, the State was admonished for the comments and a curative instruction was given. Further, after several of the comments, the State placed the comments in the proper context. Moreover, the evidence of Defendant's guilt was overwhelming. Under these circumstances, the State's comments during its rebuttal closing did not create an absolute necessity for a mistrial. *Ferguson*. The lower court did not abuse its discretion in denying one.

[6] The State's emotional response is understandable. Defendant had claimed in his first trial that he killed the Rodriguezes in self defense after they shot him during a business discussion at their home. The first time Defendant indicated that he was changing his version of the events was during his closing argument, which occurred after the State had already presented its initial closing argument.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE PEN REGISTER TAPE.

Defendant next asserts that the trial court abused its discretion in admitting the tape produced by a pen register. Defendant asserts that the State failed to lay a proper foundation for the admission of the tape. However, the trial court did not abuse its discretion in admitting the pen register tape.[7]

Defendant asserts that before it was permissible for the printout from the pen register to be admitted, testimony from an expert witness who actually connected the pen register to the phone line and could testify to the procedure employed in it use and it accuracy was necessary. However, no such expert testimony was required to lay a predicate for the admissibility of the pen register.

In *Smith v. Maryland*, 442 U.S. 735 (1979), the United States Supreme Court determined that the installation of a pen register was not a search within the meaning of the Fourth Amendment. The Court reasoned that a defendant could not have a reasonable expectation of privacy in the numbers he dialed on his phone because the phone company used pen registers and similar devices to prepare phone bills. *Id.* at 742. Phone

[7] A trial court's ruling on the admission of evidence is reviewed for an abuse of discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000).

bills are routinely admitted without the necessity of expert testimony concerning the manner in which they are complied. Based on this analogy, the Ninth Circuit has held that pen register tapes are admissible in the same manner as phone records. *United States v. Walt*, 1997 U.S. App. LEXIS 16374, *11-13 (9th Cir. Jul. 1, 1997). Moreover, it has been recognized that Caller ID units are similar devices. *See Ohio Domestic Violence Network v. Public Utilities Commission of Ohio*, 638 N.E.2d 1012, 1019 (Ohio 1994). The Fourth District has held that it is permissible for a witness who observed a Caller ID unit printout to testify regarding what was on the printout. *Bowe v. State*, 785 So. 2d 531 (Fla. 4th DCA 2001). As such, expert testimony is not necessary to admit a pen register tape.

Here, Det. Reyes testified that he observed the installation and functioning of the pen register. (T. 1692-93) He verified that the paper tape the State was presenting was produced by the pen register, was impounded and was in the same condition that it had been in when it was produced. (T. 1673-75, 1692-93, 1688) This was a sufficient predicate to admit the tape. Defendant's convictions should be affirmed.

Contrary to Defendant's suggestion, neither of the cases upon which he relies mandate expert testimony on the use of pen

registers before the tape produced by the pen register may be introduced. In *People v. Medure*, 683 N.Y.S.2d 697 (N.Y. Sup. Ct. 1998), the issue before the court was whether it would exempt a defense expert on pen registers from the rule of witness sequestration at a hearing on a motion to suppress. The motion to suppress was based on the defendants' assertion that the pen registers used in that case were "in fact fully operational 'eavesdropping' devices." *Id.* at 698. Under New York law, a court could issue an order authorizing a pen register on a showing of only reasonable suspicion but could only authorize installation of an eavesdropping device if probable cause was shown. Additionally, New York treats equipment that had the ability to function as both a pen register and an eavesdropping device is treated as an eavesdropping device even when the eavesdropping capacity is disabled. *People v. Bialostok*, 610 N.E.2d 374 (N.Y. 1993). As such, the nature of the equipment at issue was central to decision of whether the court order authorizing use of the device in question was proper. *Id.* at 698-99.

Here, there was no issue concerning the nature of the pen register and whether it was actually an eavesdropping device. As such, the technical functioning of a pen register was not at issue, and there was no reason for the presentation of expert

testimony on the issue. As such, the dicta from *Medure* does not compel the conclusion that expert testimony is a necessary predicate for the admission of the tape produced by the pen register.

In *United States v. Kohne*, 358 F. Supp. 1053, 1059 (W.D. Pa. 1973), the issue concerned the admissibility of an officer's opinion on the accuracy of a pen register. Here, Det. Reyes was never questioned regarding his opinion of the pen register. As such, there was no reason to qualify him to give such an opinion. Thus, *Kohne* is inapplicable.

Even if *Kohne* applied, the lower court would still not have abused its discretion in admitting the pen register tape. There, the court found that the officer had sufficient expertise to offer an opinion on the accuracy of pen registers generally because:

> Agent Meek was a college graduate; he had one month of specialized training by the Federal Bureau of Investigation in electronic surveillance, and eight months practical experience in such work; he had read books dealing with the pen register; and he had used the pen register when working on two other wiretap cases.

Id. at 1059. Here, the record established that Det. Reyes was both a college and law school graduate. (T. 1634) He had received training in electronic surveillance techniques, including the use of pen registers. (T. 1638-40) He had used

pen registers in two prior cases and had monitored pen registers in a dozen or two dozen cases. (T. 1643, 1695) He had worked in the area of electronic surveillance for several years. (T. 1638-40) Given the similarity between the experience and training of Det. Reyes and the agent in *Kohne*, the trial court would not have abused its discretion in admitting the pen register tape through Det. Reyes if it were necessary for expert testimony to have been presented. Defendant's convictions should be affirmed.

While Defendant appears to assert that Det. Reyes was unqualified to testify because he did not personally connect the pen register and did not know how to do so, the trial court would still not have abused its discretion in finding Det. Reyes qualified if such qualification was required. In the area of DNA evidence, this Court has held that testimony of a qualified expert is necessary to admit the calculations of the frequencies with which a DNA profile would appear in the population. *Murray v. State*, 692 So. 2d 157, 160-64 (Fla. 1997). However, this Court has held that an expert can be qualified to give such testimony even if the expert did not personally compile the data used in making the calculation or have specialized training in statistics if the expert had experience and training in the calculation and its source or had studied literature about the

calculation and its source. *Everett v. State*, 893 So. 2d 1278, 1281-82 (Fla. 2004); *Butler v. State*, 842 So. 2d 817, 827-29 (Fla. 2003). Here, Det. Reyes had received training in electronic surveillance, including the use of pen registers, and had experience in their use. He was able to explain the functioning of a pen register and how it was used in this case. (T. 1643, 1668-69) As such, the trial court would not have abused its discretion in finding Det. Reyes qualified to testify regarding the pen register tape if such testimony was necessary to admit the tape. The judgment of the lower court should be affirmed.

Even if the lower court had abused its discretion in allow Det. Reyes to testify regarding the pen register tape, Defendant would still be entitled to no relief. Any error in the admission of the pen register evidence through Det. Reyes was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). In addition to Det. Reyes, Det. Smith testified regarding the use of the pen register and how it produced the results it did, without objection. (T. 1765) He had worked with pen registers on 50 to 60 occasions. Moreover, Maria Hernandez testified that Defendant was angry with the Rodriguezes over the sale of the business. Defendant's prints were found on the phone in a mixture of blood, consistent with his type and the type of the

victims. Drops of blood consistent with Defendant's type and only 1% of the population was found near the bodies. The nature of the weapons used, the type and location of the wounds on the victim and the location of the victims' bodies demonstrated conclusively that the murders were premeditated. Under these circumstances, any error in admitting the pen register tape through Det. Reyes did not contribute to the jury's verdict. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The trial court should be affirmed.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN INSTRUCTING THE JURY.

Defendant next asserts that the trial court erred in re-reading the instructions on first degree murder. Defendant appears to be attempting to raise two separate issues. The first concerns whether the trial court abused its discretion in instructing the jury separately on each count of first degree murder. The second concerns whether the trial court abused its discretion in reading the jury instructions completely after closing arguments had concluded, where the trial court had read part of the instructions to the jury before closing arguments began. However, the lower court did not abuse its discretion in instructing the jury.

The State is entitled to have the jury instructed fully. *Marshall v. State*, 747 So. 2d 1045, 1045 (Fla. 4th DCA 2000); *Diggs v. State*, 489 So. 2d 1228, 1228 (Fla. 5th DCA 1986). Further, a trial court has broad discretion in instructing the jury, and its decision regarding the appropriate jury instructions is reviewed with a presumption of correctness on appeal. *Carpenter v. State*, 785 So. 2d 1182, 1199-1200 (Fla. 2001). Jury instructions are considered improper if there is a reasonable likelihood that the jury misapplied them. *Victor v. Nebraska*, 511 U.S. 1, 6 (1994).

Here, the trial court did not abuse its discretion in

agreeing to instruct the jury separately on each count of the indictment. Defendant had been charged with two counts of first degree murder: one for the murder Tomas Rodriguez and a second for the murder of Violetta Rodriguez. (R. 44-47) The trial court instructed the jury separately on each of the count: once for the first degree murder of Tomas Rodriguez and once for the first degree murder of Violetta Rodriguez. (T. 2278-80) As part of the jury instructions, the jury was informed that:

> A separate crime is charged in each count of the indictment, and while they have been tried together, each crime and the evidence applicable to it must be considered separately and a separate verdict returned as to each. A finding of guilty or not guilty as to one crime must not affect your verdict as to the other crime charged.

(T. 2286) This was in accordance with the standard jury instructions. Fla. Std. Jury Instr. (Crim) 3.12(a). Given this instruction to consider the counts and evidence thereon separately, the trial court did not abuse its discretion in instructing the jury separately on each count. *Wilkinson v. Grover*, 181 So. 2d 591, 594 (Fla. 3d DCA 1965)(separate instruction regarding each parties' contributory negligence not unduly repetitious where each party had claimed other party guilty of such negligence); *see Marshall*, 747 So. 2d at 1045; *Diggs*, 489 So. 2d at 1228. It should be affirmed.

With regard to the claim regarding the re-reading of the

instructions, Defendant is entitled to no relief. In *Campbell v. State*, 571 So. 2d 415, 418 (Fla. 1990), the trial court repeated the jury instructions on felony murder, dangerous weapon and reasonable doubt. This Court rejected the claim that such repetition of the jury instructions was error because the instructions were correct, they did not unduly emphasize a particular aspect of the case and they were done in response to juror's expression of puzzlement. *See also United States v. Brown*, 49 F.3d 135, 137 (5th Cir. 1995); *Gebhard v. United States*, 422 F.2d 281, 288-89 (9th Cir. 1970); *Smith v. State*, 838 So. 2d 413, 450-53 (Ala. Crim. App. 2002); *Jones v. State*, 889 S.W. 706, 712-14 (Ark. 1994); *Jackson v. State*, 575 N.E.2d 617, 620-22 (Ind. 1991).

Similarly here, the instructions of the substantive charges were correct, they contained all of the substantive aspects of the case without any undue emphasis on any aspect of the crime. Moreover, the trial court explained that it was repeating the instructions because of a change Defendant had requested in the introduction to homicide. As such, there is no reasonable likelihood that the jury believed that the judge was emphasizing a particular aspect of the case. The lower court should be affirmed.

Lithgow Funeral Centers v. Loftin, 60 So. 2d 745 (Fla.

1952), does not compel a different result. In *Loftin*, the jury instructions commented on the evidence, repeatedly commented on one of the parties' duty of care and did so erroneously. Here, the instructions did not comment on the evidence and were correct. Moreover, the entire substantive portion of the charge was read and the trial court explained that it was doing so because of a change in the introduction to homicide that had been made at Defendant's request. Under these circumstances, *Loftin* is inapplicable. The trial court should be affirmed.

Even if the reading of the instruction could be considered error, any error was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The lower court made clear that it was reading the same instruction with regard to each count of first degree premeditated murder because there were two counts and two victims. The jury was told to consider each count separately. Moreover, the lower court explained that it was repeating the instructions that it read before closing argument because there had been a change in introduction to homicide instruction. Because instruction on lesser included offenses was waived, the instructions read before closing argument included all of the substantive offense instructions. The remainder of the instructions considered only reasonable doubt, presumption of innocence and the procedures for weighing testimony and

submitting the case. Moreover, the lower court repeatedly read the jury instructions on reasonable doubt and presumption of innocence in this matter, including no less than three times during voir dire. The defense presented in this matter was a reasonable doubt defense, based on an alleged lack of proof that Defendant committed the murders. However, the fact that Defendant committed the murders was overwhelmingly proven. Under these circumstances, it cannot be said that the reading of the first degree murder instruction separately for each count and at the beginning and end of closing arguments contributed to the verdicts. The lower court should be affirmed.

V. THE CLAIM REGARDING THE COMMENT ON MITIGATION SHOULD BE REJECTED.

Defendant next asserts that the trial court commented on his right to remain silent when it informed the jury that it would hear mitigation at the penalty phase. However, this issue should be rejected as Defendant did not preserve any error, he invited any error, there was no error and any error was harmless.

Initially, the State would note that Defendant is incorrect concerning the timing of the trial court's comment regarding the nature of a penalty phase. Contrary to Defendant's suggestion, the comment was not made after the jury was impaneled. Instead, the comment was made during voir dire. After two panels of the venire had been questioned, the State asked the trial court to explain the nature of a penalty phase to the venire to avoid some of the confusion that had been evidenced during the questioning of the first two panels. (T. 788) During voir dire of the remaining panels, the trial court provided an explanation of the nature of a penalty phase proceeding. (T. 804-05, 1036-37, 1233-34) After the jury was actually impaneled, the trial court's preliminary instructions made no mention of a penalty phase. (T. 1357-63)

Further, Defendant failed to preserve any issue regarding the trial court's voir dire comments. In order for a defendant

to preserve an issue regarding a trial court's comments during voir dire, it is necessary for the defendant to object to the comments at the time they are made. *See State v. Wilson*, 686 So. 2d 569, 570 (Fla. 1996). Here, Defendant did not object to the trial court's voir dire comments on the nature of the penalty phase. As such, any issue regarding them is not preserved, and this issue is not properly before this Court.

Not only does the record reflect that Defendant did not preserve the issue, it reflects that he invited any error. As such, it is not entitled to reversal. *See Mansfield v. State*, 758 So. 2d 636, 643 (Fla. 2000); *Roberts v. State*, 510 So. 2d 885, 890 (Fla. 1987); *Pope v. State*, 441 So. 2d 1073, 1076 (Fla. 1983).

When the State asked the trial court to explain the nature of a penalty phase proceeding to the third venire panel, Defendant affirmatively stated that he had no objection to the trial court providing such an explanation. (T. 788) The trial court then instructed the parties to agree to the form of the explanation that it would give. (T. 788-91) The record does not reflect that Defendant did not follow the trial court's instruction to agree to the form of the explanation, as Defendant never objected to the form of the explanation.

While Defendant suggests that he had no reason not to have

agreed to the explanation because he would not have made the decision to waive mitigation at that point in the trial, the record contradicts this assertion. When the trial court conducted the colloquy regarding the waiver of mitigation, Defendant asserted that he had made the decision to waive mitigation when the case was remanded for a new trial and had been steadfast in his desire since that time. (T. 2328-29) As such, Defendant had every reason to have considered that a waiver of a mitigation would occur. However, at his first trial, Defendant presented mitigation. (T. 2316) In fact, Defendant claimed error in his first appeal in the trial court allegedly failing to appoint appropriate experts to present additional mitigation. Initial Brief of Appellant, FSC Case No. 88,638, at 47-51. As such, there was little or no reason for the State or trial court to have believed that mitigation would be waived.

Given these circumstances, by agreeing to the given of the explanation and its form, Defendant invited any error about which he now complains. *See Mansfield v. State*, 758 So. 2d 636, 643 (Fla. 2000); *Roberts v. State*, 510 So. 2d 885, 890 (Fla. 1987); *Pope v. State*, 441 So. 2d 1073, 1076 (Fla. 1983). As such, he should not be heard to complain about it now. The judgment of the lower court should be affirmed.

Even if the issue had been preserved and Defendant had not invited the portion of the explanation about which he complains, Defendant would still be entitled to no relief. First, the complained of explanation occurred during voir dire. It has been held that juries have no duty to follow such preliminary comments, particularly where the trial court indicates that further instructions will be given later during trial. *United States v. Dilg*, 700 F.2d 620, 625 (11th Cir. 1983). Here, the trial court informed the jury that it would provide such further instructions as part of the explanation about which Defendant complains. (T. 804-05, 1036-37, 1234-35)

Second, in determining whether a jury instruction was erroneous, the instruction must be considered in the framework of the totality of the instructions. *Higginbotham v. State*, 19 So. 2d 829, 830 (Fla. 1944)(emphasis added); *see also Esty v. State*, 642 So. 2d 1074, 1080 (Fla. 1994). Further, in determining whether the instruction is erroneous, "the proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." *Victor v. Nebraska*, 511 U.S. 1, 6 (1994)(emphasis in original, quoting *Estelle v. McGuire*, 502 U.S. 62, 72 & n.4 (1991)). Moreover, for a comment to be a comment on silence it must be fairly susceptible to

being a comment on silence and Defendant must not have a burden. *See Rodriguez v. State*, 753 So. 2d 29, 37-39 (Fla. 2000). The United States Supreme Court has held that it is constitutional to require that defendants establish mitigation. *Walton v. Arizona*, 497 U.S. 639, 649-51 (1990), *overruled on other grounds by*, *Ring v. Arizona*, 536 U.S. 584 (2002). Applying these principals here, the explanation was not erroneous.

Immediately before the complained of explanation, the trial court had explained the presumption of innocence and burden of proof. (T. 802-04, 1034-36, 1232-33) As part of this, the trial court had just told the jury that "Defendant in not required to present any evidence or prove anything." (T. 802, 1035, 1232) Moreover, the comment in question did not state that Defendant would be presenting any mitigation. It only stated that mitigation would be presented. Further, the constitutional scope of mitigation must include any aspect of the defendant's character and record and any of the circumstances of the offense. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). Because of this broad scope, a defendant's behavior during trial and the length of an alternative sentence, as well as any number of other factors, are considered mitigating. *See Simmons v. South Carolina*, 512 U.S. 154 (1994); *Beasley v. State*, 774 So. 2d 649, 672 (Fla. 2000). As such,

simply by being present, behaving himself and having an alternative sentence, mitigation was presented. This Court has placed the burden on the sentencer to consider mitigation found in the record even where mitigation has been waived. *See Farr v. State*, 621 So. 2d 1368, 1369 (Fla. 1993). In this matter, the record reflects that the jury did so, as it asked questions related to its consideration of the alternative sentence as mitigation. (T. 2436)

Under these circumstances, it cannot be said that the jury understood the voir dire explanation of how a penalty phase was conducted as improperly shifting the burden to Defendant. Moreover, it cannot be said that the comment was fairly susceptible to being considered as a comment on Defendant's silence when he had no burden. As such, the comment was not improper. The judgment of the trial court should be affirmed.

Even if the issue had been preserved, Defendant had not invited any error and the comments had been erroneous, Defendant would still be entitled to no relief. Any error in the explanation would be harmless. As previously mentioned, the explanation did not suggest who would be presenting mitigation. Moreover, the explanation was brief and was made during voir dire. Voir Dire occurred at the beginning of May. The matter did not proceed to the penalty phase until July 8, 2004. At

that time, the trial court did not repeat the language that Defendant now finds offensive. Moreover, the State presented overwhelming evidence of the aggravating circumstances found in this matter. The record amply reflects that Defendant brutally murdered the Rodriguezes in their own home as a result of a cold and calculated plan to exact revenge for his perception that they cheated his girlfriend's family in a business deal. Moreover, Defendant had previously been convicted of aggravated assault. Despite Defendant's waiver of mitigation, the record reflects that the jury did attempt to consider mitigation that had been presented. During deliberations, the jury inquired regarding the length of time Defendant would be required to serve if sentenced to life. (T. 2436) Under these circumstances, it cannot be said that the trial court's explanation of a penalty phase during voir direct affected the jury's recommendation. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Thus, the decision of the trial court should be affirmed.

VI. THE *RING* CLAIM WAS PROPERLY REJECTED.

Defendant next asserts his death sentences should be reversed because the jury did not unanimously recommend death, allegedly in violation of *Ring v. Arizona*, 536 U.S. 584 (2002). Defendant also appears to complain about the lack of special verdict forms at the penalty phase. Further, Defendant asks this Court to recede from its precedent affirming death sentences based on the prior violent felony aggravator. However, Defendant is entitled to no relief.

While Defendant asserts that *Ring* requires that the jury unanimously recommend death, this Court has repeatedly rejected this argument. *Zack v.* State, 911 So. 2d 1190, 1202 (Fla. 2005); *Parker v.* State, 904 So. 2d 370, 383 (Fla. 2005); *Ferrell v. State*, 30 Fla. L. Weekly S451, S456 (Fla. Jun. 16, 2005). To the extent that Defendant is suggesting that *Ring* requires the use of special verdict forms for the jury to specify the aggravating circumstances they found, this Court has also repeatedly rejected this claim. *Hernandez-Alberto v. State*, 889 So. 2d 721, 733 (Fla. 2004); *Gamble v. State*, 877 So. 2d 706, 719 (Fla. 2004); *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003). In fact, this Court has recently held that it is impermissible for a trial court to submit a special verdict form in the penalty phase. *State v. Steele*, 30 Fla. L. Weekly S677,

S678-80 (Fla. Oct. 12, 2005). Since this Court has rejected the premises on which Defendant makes his argument, the argument is without merit and should be rejected. Defendant's sentences should be affirmed.

Further, one of the aggravators found in this case was the prior violent felony aggravator, which was based both on Defendant's prior conviction for aggravated assault and the contemporaneous conviction for the murder of the other victim. (R. 345-55) This Court had repeatedly rejected *Ring* claims, where the sentence was supported by the prior violent felony aggravators. *Suggs v.* State, 30 Fla. L. Weekly S812, S819 (Fla. Nov. 17, 2005); *Holland v. State*, 30 Fla. L. Weekly S792, S794 (Fla. Nov. 10, 2005); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003). Defendant asks this Court to recede from this precedent. In doing so, Defendant appears to argue that *Ring* requires that the jury find all of the aggravators used to support a death sentence. However, this Court has repeatedly rejected this argument as well. *Winkles v. State*, 894 So. 2d 842, 846 (Fla. 2005); *Duest v. State*, 855 So. 2d 33, 48-49 (Fla. 2003). As such, Defendant is entitled to no relief upon his *Ring* claim. His sentences should be affirmed.

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SUSTAINING AN OBJECTION TO COMMENTS IN DEFENDANT'S CLOSING THAT WERE NOT SUPPORTED BY THE EVIDENCE AND WERE CONTRARY TO THE EVIDENCE PRESENTED.

Defendant next asserts that the trial court abused its discretion in sustaining an objection to his comment on the lack of DNA evidence in closing. However, the trial court did not abuse its discretion in sustaining the objection to comments about the reasons why DNA testing was not conducted, as the comments were not supported by the evidence and were contrary to the evidence that was presented.

A trial court has broad discretion in the control of comments in closing, and that discretion will not be disturbed on appeal unless it has been abused. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). In exercising its discretion, a trial court should permit counsel wide latitude and allow fair inferences from the evidence. *Id*. However, neither party is allowed to comment on matters that are not supported by the evidence or that are contrary to the evidence actually presented. *See Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999).

Here, the trial court did not abuse its discretion in refusing to allow Defendant to make comments that were contrary to the evidence presented and were not supported by the evidence, while allowing Defendant to comment on the fact that

the State had not presented DNA evidence. While Defendant appears to suggest that his comments were based on the evidence presented or were fair inferences from this evidence, this is untrue.

During his closing, Defendant commented:

> The blood and the other prints. The State needs to prove to you that there is only one conclusive explanation of this blood evidence beyond a reasonable doubt and they didn't. They even put on Technician Alpizar. By the way, there is no controversy as far as we're concerned to what he said. He said what he said. He is an expert. The controversy is there because he can't say that is Mr. Rodriguez's blood or Violetta's blood or [Defendant's] blood. All he can say is consistent with. All they can say is consistent with and they are the ones that have a controversy, not us.
>
> Blood groupings prove nothing. In 1990 that was all they could do. **You heard Alpizar say, well I guess we could but it was real expensive. That's fine. DNA in 2004, all they got to do is submit it to DNA.** You would know positively?
>
> [The State:] Objection. Objection.
>
> THE COURT: Sustained. Sustained. Not in evidence. The Jury will disregard it.
>
> [Defense Counsel:] They put on evidence of Detective Alpizar. He testified that this stuff was not tested for DNA. Their arrogance about this case is we don't need to do that, just like their prosecution of this case. They have a theory and nothing is getting in the way of our theory. They can only speculate on it.

(T. 2232-33)(Emphasis added) While Defendant suggested that Tech. Alpizar had stated that DNA testing was not conducted because it was too expensive at the time of the crime, this is not true. Tech. Alpizar testified that DNA testing was not conducted because it had not been validated for use in Dade

County at the time. (T. 2029-30) While Defendant's question mentioned the expense of DNA testing, Tech. Alpizar never mentioned the expense of DNA testing in his testimony. (T. 2029-30) As such, Defendant's comment that Tech. Alpizar had stated that DNA testing could have been done at the time of the crime but was not due to the expense not only commented on matters that were not in evidence but was contrary to the evidence actual presented. Thus, the trial court did not abuse its discretion sustained the objection. *See Garcia v. State*, 622 So. 2d 1325, 1331-32 (Fla. 1993).

Moreover, Defendant also suggested that DNA testing could have been done on the evidence before the trial. However, no evidence was presented that any evidence could have been DNA tested at that time. To the extent that Defendant is suggesting that he was presenting a fair inference from the evidence, this is not true. During the testimony of Tech. Fletcher, Defendant elicited that several of the containers that had held blood samples were now empty. (T. 1596-99) Further, during his testimony, Tech. Alpizar testified that it was not possible to conduct even all of the blood grouping testing because testing consumed part of the sample and not all of the samples were even large enough for all of the blood grouping tests. (T. 1949-51) Moreover, Tech. Alpizar stated that some of the blood grouping

testing was not able to obtain useful results because of deterioration of the samples. (T. 1949-51) As such, the record affirmatively reflected that evidence was not available to be DNA tested. Since the record so reflected, Defendant's comment that the State could have tested the evidence was not a fair inference from the evidence. Given the lack of any affirmative evidence and the lack of a fair inference, the trial court did not abuse its discretion in refusing to allow the comment. *Ruiz*. Defendant's convictions and sentences should be affirmed.

Even if Defendant had shown that the trial court abused its discretion in refusing to allow this comment, Defendant would still be entitled to no relief because any error in sustaining the objection was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Defendant was permitted to argue that the jury should have a reasonable doubt because the State did not present DNA evidence. In fact, he continued this argument without objection after the objection was sustained. Moreover, Defendant conceded that the State had shown that the killing of the Rodriguezes was premeditated and only argued that the State had failed to show that he committed the murders.[8] However, the

[8] Further, the State presented overwhelming evidence that the crimes were premeditated. Mr. Rodriguez was shot five times and stabbed five times. Ms. Rodriguez had been beaten over the head with the gun repeatedly and stabbed 12 times. The gun used to shot Mr. Rodriguez and beat Ms. Rodriguez had been equipped with

State presented overwhelming evidence that Defendant had committed the murders. Defendant's finger and palm prints were found in blood on a telephone at the murder scene. The last number called from that phone was the number of the home where Defendant's girlfriend and her family lived. The State presented evidence that Defendant was upset with the Rodriguezes over the condition of the dry cleaning business that the Rodriguezes had sold to his girlfriend's family. While Defendant suggested he may have left his prints at the home at a different time, he offered no explanation of when he would have been in the Rodriguezes' home for a legitimate purpose, as he denied having any connection to the Rodriguezes. Under these circumstances, any error in the trial court's refusal to allow Defendant to suggest that the State had not conducted DNA testing because of its expense at the time of the crime did not influence the jury's verdicts. As such, it was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Defendant's

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a homemade silencer and its serial number had been drill out of it. Evidence was presented that the gun was not consistent with any ammunition the Rodriguezes had and that the Rodriguezes' gun was in a closed case in a closed cart in a bedroom on the other side of the house from where the bodies were found and evidence of a struggle existed. Further, the Rodriguezes' bodies were found in the garage and that the door to the garage had been broken off its hinges so that Defendant could get to the Rodriguezes and kill them. Moreover, Ms. Rodriguez's body was found wedge in the far corner of the garage between the wall and her car.

convictions and sentences should be affirmed.

VIII. THE HARMLESS ERROR ARGUMENT SHOULD BE REJECTED.

Defendant finally engages in an extended discussion of the harmless error standard that this Court should employ. Defendant then appears to contend that this Court should not find any errors in this matter harmless. However, Defendant is entitled to no relief.

In *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), this Court adopted the harmless error standard to be applied. Under this standard, an error is considered harmless if the beneficiary of the error can show beyond a reasonable doubt that the error did not contribute to the jury's verdict. *Id.* at 1135. As this Court stated:

> Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even close examination of the impermissible evidence which might have possibly influenced the jury verdict.

Id. This Court has steadfastly adhered to this standard. *Knowles v. State*, 848 So. 2d 1055 (Fla. 2003); *State v. Lee*, 531 So. 2d 133 (Fla. 1988). As argued in the other issues, application of this standard leads to the conclusion that any alleged error did not affect the jury's verdict beyond a reasonable doubt. As such, any error was not harmful. The lower court should be affirmed.

To the extent that Defendant is suggesting that application of this test does not consider the strength of the State's case, this is not true. As the above quoted language suggests, the strength of the evidence against the defendant is properly considered in making the determination of whether an error was harmful. The United States Supreme Court has made clear that it is easier to affect a judgment that is only weakly supported than one that is overwhelmingly supported. *See Strickland v. Washington*, 466 U.S. 668, 695-96 (1984). As such, while the mere fact that the evidence overwhelming showed that a defendant was guilty is not sufficient to show that an error was harmless, it is not irrelevant to the inquiry either.

To the extent that Defendant is seeking a cumulative error review, he is again entitled to no relief. This Court has repeatedly held that where the individual errors are procedurally barred or without merit, the cumulative error claim fails as well. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999). As seen above, Defendant's individual claims are all procedurally barred, because they are unpreserved, or lack merit. As such, the cumulative error claim fails. The lower court should be affirmed.

IX. THE EVIDENCE WAS SUFFICIENT TO CONVICT DEFENDANT.

While Defendant has not addressed the sufficiency of the evidence to sustain he convictions, this Court has a duty to address the sufficiency of evidence in each capital case. *Ferguson v. State*, 417 So. 2d 639, 642 (Fla. 1982). As such, the State submits that the evidence was sufficient to support Defendant's convictions.

Evidence is insufficient "in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." *Orme v. State*, 677 So. 2d 258, 262 (Fla. 1996). "The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict," reversal is not required. *Darling v. State*, 808 So. 2d 145, 155 (Fla. 2002)(quoting *State v. Law*, 559 So. 2d 187, 188 (Fla. 1989). To meet this burden, the State is not required to "rebut conclusively, every possible variation of events;" it only has to present evidence that is inconsistent with Defendant's reasonable hypothesis. *Darling*, 808 So. 2d at 156 (quoting *Law*, 559 So. 2d at 189). Moreover, premeditation may be shown by evidence such as "the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between

the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." *Green v. State*, 715 So. 2d 940, 943 (Fla. 1998)(quoting *Holton v. State*, 573 So. 2d 284, 289 (Fla. 1990)).

Here, the State presented evidence that Mr. Rodriguez was repeatedly shot and stabbed and that Ms. Rodriguez was repeatedly bludgeoned and stabbed. The gun used to shoot Mr. Rodriguez and to beat Ms. Rodriguez was not consistent with having been in their possession before the crimes. The serial number on this gun had been drilled off and a home-made silencer had been attached. Moreover, the bodies were found in the garage of their home, the door to which had been broken down to get to the victims, and Ms. Rodriguez was found wedged in a corner of the garage. Three of the shots to Mr. Rodriguez were inflicted to the left side of his chest. His stab wounds were to the chest, neck and shoulders. Ms. Rodriguez had been beaten multiple times in the head, causing several skull fractures. She had also sustained 12 stab wounds to her neck, chest, back, shoulders and abdomen.

The only evidence of difficulties between Defendant and the Rodriguezes was that his girlfriend's family had purchased a business from them. Defendant believed that they had been cheated and was angry with the Rodriguezes. However, there was

no evidence that the Rodriguezes born any ill will toward Defendant. There was also no evidence of any altercation at the crime scene before the murderous attack.

Defendant's fingerprints were found on a telephone in the Rodriguezes' home in a mixture of his blood type and the victims' blood type. The last number dialed from that phone was Defendant's girlfriend's number. Drops of blood consistent with Defendant's blood type, and only 1% of the population, were found near the bodies. Moreover, several items in the home, including the gun used in the murder of both victims, had blood on it consistent with a mixture of Defendant's blood and that of the victims. While Defendant suggests that he and the Rodriguezes were eliminated as potential sources of an unidentified palm print on the back of Ms. Rodriguez's car, Tech. McQuay testified that he did not believe that he had elimination palm prints of the victims. As such, he did not testify that he eliminated them.

Defendant's hypothesis of innocence was that he might have been in the home before the crime and left his fingerprints and blood and used the phone at that time. However, Defendant also asserted that he had no relationship with the victims. As such, he did not offer a hypothesis of why he would have been in their home at any time. Moreover, Defendant's hypothesis required

that the victims have left his blood around their home if Defendant was there before the murders. Yet, the State presented evidence that the home was kept in immaculate condition, other than the disturbances caused by the murders.

Under these circumstances, the State presented sufficient evidence to show that Defendant was guilt of first degree premeditated murder. His convictions should be affirmed.

X. DEFENDANT'S SENTENCES ARE PROPORTIONATE.

While Defendant has not addressed the proportionality of his sentences, this Court is required to address the proportionality of each death sentence on direct appeal. *Green v. State*, 907 So. 2d 489, 503 (Fla. 2005). As such, the State will address the issue.

"Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." *Palmes v. Wainwright*, 460 So. 2d 362, 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990), *cert. denied*, 498 U.S. 1110 (1991).

Here, the trial court found three aggravators regarding each of the murders: (1) prior violent felony convictions, based on the contemporaneous murder of the other victim and a prior conviction for aggravated assault; (2) HAC and (3) CCP. This Court has recognized that prior violent felony, HAC and CCP are among of the weightiest aggravators available. *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999) (noting that HAC and CCP are "two of the most serious aggravators set out in the statutory sentencing scheme"); *see also Sireci v. Moore*, 825 So. 2d 882,

887 (Fla. 2002) (noting that the prior violent felony conviction and HAC aggravators are "two of the most weighty in Florida's sentencing calculus"). Defendant waived the presentation of mitigation and the only mitigators found were that Defendant had no history of substance abuse, had been physically and emotionally abused by numerous people, loved his family and behaved well at trial.

This Court has affirmed other death sentences in cases with comparable aggravation and mitigation. *Diaz v. State*, 860 So. 2d 960 (Fla. 2003)(aggravators: CCP and prior violent felony, mitigation: both mental mitigators, age, lack of significant criminal history, remorse, and history of family violence); *Dennis v. State*, 817 So. 2d 741 (Fla. 2002)(aggravator: prior violent felony; during the course of a burglary, HAC, and CCP; mitigation: extreme mental or emotional disturbance, not totality a criminal person, loved his family, behaved during trial, exhibited acts of kindness); *Bell v. State*, 699 So. 2d 274 (Fla. 1997)(aggravators: prior violent felony, CCP, and great risk of death to many individuals; mitigation: extreme mental or emotional disturbance); *Cummings-el v. State*, 684 So. 2d 729 (Fla. 1996)(aggravators: prior violent felony, during the course of a burglary, HAC, and CCP; mitigation: none). As such, Defendant’s sentence is proportionate.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **Roy Wasson**, Gables One Tower, Suite 450, 1320 South Dixie Highway, Miami, Florida 33146, this 20th day of December 2005.

_____
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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