IN THE SUPREME COURT OF FLORIDA

MARK ANTHONY POOLE,

Appellant,

v. **CASE No. SC05-1770**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

A. Trial

The State generally accepts the statement of the case and facts set forth in appellant's brief, but adds the following.

Dawn Brisendine was acquainted with the appellant, Mark Poole, and lived in the Orangewood trailer park with her husband and children. She lived close to the victims' trailer, 4-L, but thought that no one lived there at the time. (XIX, 2314-15). At approximately 11:30 pm, on the evening of October 12, 2001, she stepped outside of her trailer to look around and "make sure everything was quiet." (XIX, 2316). When she did, she observed Mark Poole walking at the end of her neighbor's trailer, heading in the direction of trailer 4-L. (XIX, 2317). After seeing appellant, Brisendine testified: "I stood there for a minute, and I watched to see where he was going. And when I didn't see him come out anywhere, I started feeling nervous, and I went in my house." (XIX, 2318).

The next morning she heard activity in the area, got dressed and heard something had happened in trailer 4-L. (XIX, 2319). She went over to the law enforcement officers present at the scene, and told the officers what she had seen the night before. (XIX, 2320). Later, a detective took her statement

wherein she related seeing appellant around the trailer the previous evening. (XIX, 2320).

Loretta White testified that in October of 2001 she resided with her fiancé, Noah Scott, in the Orangewood Mobile Home Park. They had only lived in the mobile home park for two or three weeks. She was in her senior year in high school but also worked in the Lakeland Mall. (XIX, 2401-02). Noah was 24 and worked two jobs, one at Touch of Fame and at a place called Highlander. (XIX, 2402). She was pregnant with Noah's child at the time who has since been born. She described him as "a perfect little boy." (XIX, 2403).

On the evening of October 12th, they went to bed at approximately 11:30 or 12:00 p.m. (XIX, 2404). They slept on a double bed on the floor with a mattress and box spring. (XIX, 2405). Noah slept closest to the wall while she slept closer to the door. (XIX, 2406). Loretta awakened with a pillow over her face and "felt like I couldn't breathe." (XIX, 2406). Loretta testified: "I kept hollering not to hurt me; I was pregnant." (XIX, 2407). She could only see a black arm and observed "Noah already on the ground." (XIX, 2407). Noah was at the foot of the bed, on the ground right next to it. Loretta recalled being struck by something hard on the "back" of her head. (XIX, 2408). The individual striking Loretta kept asking her "where

the money was." (XIX, 2408). The person striking her rolled her over on her stomach and "buried" her face in the pillow. (XIX, 2408-09). He told her not to move and kept asking where the money was. Loretta said that she did not know: "We didn't have any money." (XIX, 2409).

When asked what Noah was doing, Loretta testified: "He kept trying to get up to stop the person. And every time he did, he would get hit in the face." (XIX, 2409). Loretta heard Noah yell "stop." Loretta testified that Noah was very thin, only "five-eight, five-nine, and 130 or 140 pounds. (XIX, 2411).

Loretta kept telling the individual not to hurt her because she was pregnant. (XIX, 2409). The attacker put his weight on top of her, straddled her, and pulled her legs apart. This individual put his penis inside of her. She told him not to do it. (XIX, 2410). Her attacker was a lot larger than her, she could not tell his height, but "he was big." (XIX, 2411). She was face down on the mattress. (XIX, 2411). Loretta testified that her attacker hit her "repeatedly." She did not know how many times Noah was hit either, but testified: "Just repeatedly. Just solid. I didn't count." (XIX, 2412). Loretta testified that she was struck in the head after the rape. (XIX, 2416). During the rape, Loretta testified Noah

continually kept getting up but that her attacker "would pick up whatever object he had and he would hit Noah across the face, and he would fall back down." (XIX, 2416-17). She heard Noah "moaning in pain." (XIX, 2419).

Loretta believed her attacker ejaculated inside of her but was not sure, because she kept "going in and out of consciousness." (XIX, 2412-13). She did not know how long the attack took place. She looked at her clock one time and recalled seeing "3:30" after a "lot of this had already happened." (XIX, 2413). She thought her attacker came back into the room, touched her vaginal area, and said "thank you." (XIX, 2414). Loretta testified: "And then the next thing I know, my alarm is going off at 8:00." (XIX, 2413).

When the alarm went off, Loretta testified, she was on the side of the bed, her head at Noah's feet. (XIX, 2418). Loretta recalled: "I would go to pull on Noah, and then I would get sick and throw up on the side of the bed. Then I would pass back out." (XIX, 2418). Loretta pulled on Noah, pulled on his hand. (XIX, 2419). She could hear him breathe and try to sit up. (XIX, 2420). She recalled getting up after the alarm went off, saw her face, washed her hands and then fell backwards. She got a cell phone in the living room and stood in the doorway, but collapsed again. She was confused and tried

calling her boss twice. But her boss did not answer and Loretta realized what happened, and called 911. (XIX, 2422). After making the call, she walked to the bedroom and then collapsed again. (XIX, 2423). She was finally able to crawl and call 911. (XIX, 2423).

Loretta's 911 call was played for the jury. In this call, Loretta said: "Somebody broke into my house last night, and now I keep passing out. And I don't know if my fiancé is alive or not." (XIX, 2425). She said that there's blood everywhere. (XIX, 2426). Loretta told them she had a head injury and had been raped. (XIX, 2427). Loretta did not know who attacked her, and "there was one in the bedroom and I think there was one in the living room." (XIX, 2430-31). When asked if one had a weapon, she said that "all I know is one had a belt." (XIX, 2433).

Loretta testified that she was taken to the hospital and said that she was still missing the top of one finger and a fingernail which was knocked off during the attack. (XIX, 2438). She also had lacerations on the top of her head and had to remain in the hospital for several days. (XIX, 2438).

Loretta could not identify her attacker except for noting he was a black person and older, from the tone or sound of his voice. (XIX, 2415). Before that night, Loretta had never met

Mark Poole. (XIX, 2415). When she went to bed that night, they had locked the only door that opened to the outside. (XIX, 2421).

Noah owned video game systems, a Sega Genesis, Sega Dreamcast, and Super Nintendo, all attached to the TV in the bedroom. (XIX, 2439). At the time of the attack there were also boxes of games in the trailer. (XIX, 2440). She did not go back to the trailer after the attack, but went to live with her aunt. Her uncle and her father recovered her belongings from the trailer. (XIX, 2440). The games were missing for the most part from the items they collected. (XIX, 2441).

Lee Paxton, a Polk County EMS paramedic, responded to White's 911 call. (XIX, 2297). When he entered the trailer he observed White sitting on the floor in the rear bedroom of the trailer. Paxton noticed bruising to her face, and the left side of her face around her eye was swollen. (XIX, 2298). White's middle finger on her left hand was missing from the tip to the first joint. (XIX, 2298). Also, the very top of her ring finger "the very tip of it was missing." (XIX, 2298). She was covered in blood and appeared "shocky." (XIX, 2298-99).

Although White could answer questions, she seemed "incoherent" about knowing exactly what had happened. (XIX, 2299). "[S]he was confused as to some of the events of what was

going on. She couldn't tell me exactly what happened." (XIX, 2302). Paxton testified: "And she started off telling me that someone or one person - - I - - from the way she said it, it's kind of hard to ascertain whether she was talking about one person or two persons had actually broken into the mobile home." (XIX, 2302). She did not know what happened to her boyfriend or fiancé, "all she kept repeating is to take care of him, you know, what happened to him, is he okay…" (XIX, 2303). When asked how she sustained her injuries, White responded that she might have been "hit, possibly with a belt." (XIX, 2303). White's consciousness was not "100 percent, so I really couldn't determine what was correct and what was incorrect." (XIX, 2303). Paxton noticed White's belly was "distended" and asked White about being pregnant. White confirmed that she was pregnant. (XIX, 2305).

Dr. Ransom Simmons, an emergency physician for Lakeland Regional Medical Center, treated Loretta White when she was admitted as a trauma patient on October 13, 2001. (XVIII, 2247-75). White was in a "concussed" state of consciousness, that is suffering from some memory impairment due to blows to the head.[1]

[1] Registered Nurse Robert Jacques treated Loretta White in the emergency room. (XVI, 1885). White was responding, but she was disoriented according to her "Glasgow coma scale." (XVI, 1895). She was in a "confused" response state, and not fully oriented to person, place or event. (XVI, 1896).

(XVIII, 2252). However, White was able to recall she had been assaulted and that she was pregnant. (XVIII, 2253).

White was suffering from "[m]ultiple severe facial and scalp lacerations to the bone. She was also missing part of one of her fingers." (XVIII, 2253). Dr. Simmons noted a total of eight "palpable open wounds" to White's head. (XVIII, 2254). Dr. Simmons explained: "In other words, the wounds were so severe that they penetrated to the bone." Id. She suffered an occipital skull fracture from the injury. Id. The injury was in the back portion of the victim's head. (XVIII, 2267). White lost significant tissue from her ring finger and a fracture and laceration of the phalangeal, which is the middle finger." (XVIII, 2254). The flesh on her ring finger was missing and the bone was exposed. (XVIII, 2255). The injuries to White were caused by a blunt object with an edge to it, and would be consistent with a tire iron. (XVIII, 2257). White's injuries, in particular the skull fracture, required the administration of a "large amount of force." (XVIII, 2259).

White suffered an "acute blood loss, and required fluid resuscitation immediately." (XVIII, 2258). Her injuries were "life-threatening" and she may very well have died from her wounds. (XVIII, 2258). The head lacerations ranged in size from half a centimeter to 8 centimeters [about 6 inches] toward

the front to the back of White's head. (XVIII, 2260). "A total of nine lacerations were cleaned and sutured." (XVIII, 2261). White remained in the hospital for four days. (XVIII, 2261).

White was permanently disfigured, she lost part of her ring finger, "once the tissue has been taken off the bone like that, if you can't cover the bone, the bone dies. You must remove it." (XVIII, 2262). In addition to the loss of a finger tip, the nail on the other finger was injured, and missing, "had been torn off." (XVIII, 2264).

Dr. Stephen Nelson, Chief Medical Examiner for Polk, Hardee, and Highlands Counties, was called to the scene of the homicide. (XIX, 2462-63). He later performed an autopsy of 24-year-old Noah Scott. Dr. Nelson described the various injuries sustained by Scott and resulting contusions, abrasions, and bruises. All of Scott's injuries occurred prior to his death based upon bruising and blood which seeped through: "So he is definitely alive when these injuries are made by the fact that they have bleeding out into the soft tissue there that's made because of damage to the blood vessels because his heart is still beating." (XX, 2469). Scott's face revealed evidence of blunt force trauma consistent with a motor vehicle crash or a wound inflicted by a pipe or pole. (XX, 2477).

On the top of his head, Scott suffered a laceration that went down through the skull bones. "The underlying skull bones have a number of fractures." (XX, 2477). There was also a fracture at the base of his skull. (XX, 2478). The right side of his face showed lacerations under both eyes. They were from separate blows on each side of the face. (XX, 2478). The wounds have a "linearity to them" which would be consistent with a tire iron. (XX, 2478-79). Scott had a basilar skull fracture which is associated with blood coming from the victim's ear. (XX, 2480). Scott also had an area of bruising on the inside of his mouth and a tear from a blow to the mouth, having your face "pushed against your teeth and jaws there." (XX, 2481).

It was not possible to say specifically how many skull fractures were suffered by Scott. The blows caused "the sutures, the actual skull bones themselves, have come apart." (XX, 2484-85). However, there were at least 13 separate blows inflicted. These blows reflected 13 "separate areas of injury" documented by Dr. Nelson. (XX, 2486). Those injuries "produced bleeding to the outside of the brain, bleeding to the brain surface, and they've also produced bruises to the brain itself." (XX, 2486). Noah Scott died from "[b]lunt force head trauma." (XX, 2486).

Pamela Johnson, who lived with the Poole, testified that in the late evening of October 12th, Poole stepped out around 10:00 or so. (XX, 2528-29). Poole was supposed to bring her back cigarettes, and she tossed and turned "wondering where he was at." (XX, 2530). He did not come back until nearly 5:00 in the morning. (XX, 2531). Johnson "got onto him" and Poole explained that he was "out, you know, trying to help a lady." (XX, 2531). He went to bed. Later that morning she heard sirens and woke up, worried about her son who lived nearby. Poole walked down the road, and when Poole returned he assured her that her son was fine. (XX, 2531-32). Poole told her that "some guy got killed, yeah." (XX, 2541-42).

When she opened her trailer door that day she noticed a "little game thing" on the step. She had never seen it before, and Poole picked it up and put it in the night stand. (XX, 2532). Johnson identified the controller recovered by police from the nightstand. Neither Poole nor Johnson had a game system for the controller. (XX, 2534). Poole left shortly after that day and did not take any of his belongings. (XX, 2535).

In October 2001, Melissa Nixon was with her boyfriend Ventura Rico, on the porch of his house, in a trailer off North Florida Avenue. (XX, 2595, 2601-02). A black man approached

them around midnight and offered to sell them some video games.[2] (XX, 2595). The individual was asking $60.00 for the games. Her boyfriend countered with an offer of $50.00, which was accepted by the individual, after he "stood there for a minute thinking about it." (XX, 2596). Her son went through the bag and found one with what he said had "blood on it, and he threw it to the ground." (XX, 2597). Her boyfriend said he didn't think it was blood and she took it and put it in the trunk. (XX, 2598). Police confiscated the games a couple of days later. (XX, 2598).

Nixon got a very good look at this individual in the ten minutes he was in her presence. (XX, 2597). The police showed her a group of photographs on October 17, 2001, and she picked appellant's photograph out of the lineup. Appellant was the individual who sold her boyfriend the video games. (XX, 2600). Nixon testified that when she saw the photograph, "I recognized him." (XX, 2614).

Appellant left the area shortly after selling video games belonging to the victims. Detective Grice was able to locate Poole through a caller ID system, tracing calls made by appellant to Johnson from the Orlando area. Specifically, they

[2] Nixon testified that she did not specifically remember the day this occurred: "I don't remember it being Friday. I just remember it was around midnight." (XX, 2618).

traced the calls to pay phones. (XX, 2553-54). Grice traveled to Orlando and, with the assistance of local detectives, arrested Poole on a warrant. (XX, 2559).

The State presented blood and serological evidence linking appellant to the charged offenses. FDLE crimes analyst Robin Ragsdale testified that she is technical leader of the biology discipline which "involves overseeing the technical operations of five case-working DNA laboratories, as well as the DNA database." (XXI, 2657-58). Ragsdale tested evidence recovered from a rape kit from victim White, which included vaginal and cervical swabs. (XXI, 2673). From the vaginal swab, she found a mixture, with the male contributor matching appellant's profile at 8 loci. The possibility of anyone randomly matching this profile was 1 in 350 trillion Caucasians, 1 in 84 trillion African-Americans, and 1 in 550 trillion Southeastern Hispanics. (XXI, 2700-01). Ragsdale admitted that there are only about 6 billion people on the face of the earth. (XXI, 2701). DNA recovered from the vaginal and cervical swabs were only consistent with appellant and Loretta White or a mixture of the two. (XXI, 2701).

A blue polo shirt belonging to the appellant, recovered from the trailer he had been living in with Johnson, had a blood stain on the shirt sleeve. This stain revealed a DNA profile

matching White's at 7 loci. The statistical probabilities for this DNA profile were "approximately 1 in 7.4 million Caucasians, 1 in approximately 40 million African-Americans, and 1 in approximately 9.3 [sic] Southeastern Hispanics." (XXI, 2690). A swab from the Genesis black game box matched the blood profile from Noah Scott at 12 of 13 STR loci which rendered a frequency of "1 in 1.6 trillion Caucasians," 1 in 50 trillion African Americans and 1 in 1.7 trillion Southeastern Hispanics. (XXI, 2692-93). A swab taken from a Super Nintendo game also matched Scott's profile with the same population frequency. (XXI, 2693). The same profile appeared on the Sega Dream Master controller and the box. (XXI, 2694). The tire iron contained a mixture stain but yielded a profile consistent with Scott as the major contributor, with population frequencies of "1 in 21,000 Caucasians, 1 in 134,000 African-Americans and 1 in 11,000 Southeastern Hispanics. (XXI, 2696).

FDLE crime analyst supervisor Mary Bryie, an expert in footwear examination, (XX, 2499), compared a footwear impression taken from the victim's trailer. (XX, 2500). The impression was made on a vinyl notebook and she compared it to a pair of shoes belonging to the appellant. (XX, 2501). She first compared class characteristics [shoe size, type, etc.] and then looked to "individual characteristics" which "are random nicks

and cuts that are placed on the bottom of the shoe during the normal course of wear." (XX, 2501). The size 13 Vans shoe [recovered from appellant] exactly matched the impression left on the vinyl notebook. The other foot impression on that notebook "could have been made by the same left Vans shoe." (XX, 2520). In addition to general characteristics [size, style], Bryie found six individual characteristics, including a void area on the impression corresponding with a chunk of rubber missing, "as well as the measurable wear." (XX, 2516, 2519).

Susan Komar, Senior Crime Laboratory Analyst in FDLE's firearm and tool marks section, testified that the tire tool, marked as State Exhibit 192, was the implement or was consistent with being the implement which made pry marks on the safe recovered from the victim's trailer. (XX, 2591).

B. Penalty Phase

Ms. Williams, appellant's former girlfriend, identified photographs of appellant's son, Tay, which were admitted into evidence during the penalty phase. (XXIV, 3228). Ms. Williams testified that appellant talks to Tay from prison several times a week on the phone. (XXIV, 3230).

On cross-examination, Ms. Williams testified that appellant only saw their child once from the time he was born until he was four years old when appellant was arrested on the instant

offenses. (XXIV, 3236). Appellant never sent Ms. Williams any support for Tay. (XXIV, 3236).

Ms. Williams testified that when she was with appellant she did not recall him having any problem with drugs or alcohol. (XXIV, 3234). He worked in construction and did not have any problems dealing with his paycheck or doing anything else that she could think of. (XXIV, 3234).

Clinical Psychologist William Kremper was called on behalf of the defendant. He testified that he received three different versions of events from appellant based upon three different interviews. On the first interview, appellant claimed not to know anything about the offenses, that he did not go to the "person's residence or anything." (XXIV, 3266). On the second interview, appellant admitted to Dr. Kremper that he went to the residence "and it was related to taking some tapes." (XXIV, 3266). During the third interview appellant admitted "that, in fact, that he entered the residence, saw the woman and, in fact, had intercourse with her." (XXIV, 3266).

When the doctor mentioned a report from a defense investigator he had reviewed, the prosecutor objected on the basis of a discovery violation and requested a Richardson hearing. (XXIV, 3270). The prosecutor noted, in part: "I don't know what they're talking about. I already have problems

here, as I have in every case because the defense seems to think they don't have to give discovery until we get to penalty phase, and I have managed to get some every day. I haven't made a complaint, but now this doctor just referred to a paper that I have never seen, and I don't know what is about to come out of his mouth." (XXIV, 3271). The trial court did find an intentional discovery violation on the part of the defense and gave the prosecutor time to review the documents and depose the witness. (XXIV, 3281-82). After the recess, the prosecutor advised the trial court that the defense reached an agreement on use of the undisclosed report or witness statement. (XXIV, 3287).

Dr. Kremper received information from Ms. Wood that appellant uses cocaine and that he becomes violent. According to Dr. Kremper: "It indicates that he as also violent with her sister. She mentioned that several times, and she was scared of him." (XXIV, 3294). Also, appellant was known as a "B and E guy." "He breaks and enters to steal stuff, which he then sells to get money which is used for drugs." (XXIV, 3295). In Dr. Kremper's opinion appellant was under an extreme mental or emotional disturbance based on his cocaine abuse at the time of the offenses. (XXIV, 3287). It did not matter whether appellant was actually using at the time of the offenses: Drug

use primes the pump, they are hypersensitive, and the brain is less able to put on the brakes. However, Dr. Kremper stated that "I'm not blaming the drug use so to speak." (XXIV, 3299). The crime scene photos were "horrific" and it would suggest "an individual who is in a violent rage kind of state and is clearly emotionally overreacting and going overboard in a situation." (XXIV, 3299). He said the rape was impulsive and opportunistic. (XXIV, 3300). He went in there to rob them and told Dr. Kemper that "he was told there was some video games or something or other there, and that he was told by another individual." (XXIV, 3301).

Dr. Kremper testified that most of appellant's family was not aware of his drug and alcohol use. He admitted that "most of the alcohol and drug information that I got was directly from Mr. Poole, as well as some of the records." (XXIV, 3302).

Dr. Kremper testified that although appellant had a low IQ, he was able to get a driver's license, buy two cars, and run a business. (XXIV, 3318). Appellant's verbal IQ was 78 and his performance IQ was 74. (XXIV, 3325). Dr. Kremper tested appellant's frontal lobe functioning and he "pretty much fell within the normal range." (XXIV, 3326-27). The frontal lobe measures an individual's ability to reason, profit from mistakes and correct behavior. (XXIV, 3327). Most of the screening

tests were in the normal range with the exception of delayed memory which was in the borderline range. (XXIV, 3328). In his opinion, the data would not strongly support a diagnosis of dementia. But, Dr. Kremper stated, he did not do a full neuropsychological evaluation. (XXIV, 3341).

Dr. Kremper did not consider appellant to have an antisocial personality disorder. However, appellant did have antisocial traits; "he has been doing burglaries and this sort of stuff." (XXIV, 3339). Dr. Kremper agreed that appellant did not suffer from any serious mental disorders and was in complete touch with reality. (XXIV, 3346). Appellant voluntarily chose to use alcohol and drugs. (XXIV, 3348).

Dr. Kremper reviewed jail records and they showed that appellant has been in trouble since being incarcerated on the instant offenses, a location where he presumably does not have access to drugs or alcohol. (XXIV, 3359). Appellant got in trouble for fighting on at least two occasions. (XXIV, 3359). During one fight, he hit someone or something so hard that he broke his hand. (XXIV, 3359). Moreover, he has been in trouble for disrespecting authority. (XXIV, 3359).

On cross-examination, the prosecutor took Dr. Kremper through the conversations appellant and he had about the charged offenses. Appellant initially told Dr. Kremper he was not

there, didn't do it, what he told the police. Next, Dr. Kremper admitted, appellant told him he didn't do anything but take the games from inside the trailer. Finally, Dr. Kremper testified that, pending trial, appellant told him he broke in looking for something to steal, but found a half conscious woman, and decided to rape her. (XXIV, 3364-65). Dr. Kremper stated that he did not believe appellant when he said he did not commit the murder. (XXIV, 3365). Dr. Kremper agreed that appellant was probably not the most accurate reporter when it comes to details of his crimes. (XXIV, 3365).

Dr. Kremper agreed that the sequence of events, raping a woman while beating someone with a tire iron, and obtaining or maintaining sexual arousal is a "little different" from an "opportunistic" rape. (XXIV, 3366). But, Dr. Kremper stated: "What I'm saying is he has problems controlling that behavior. That he knows what he is doing, yes. His ability to stop what he is doing, I'm saying is impaired. I'm not saying it is totally obliterated, I'm saying that it is impaired." (XXIV, 3371). Dr. Kremper stated that appellant told him he was using crack cocaine the day of the offense, earlier that day. Appellant was the only source of that information and Dr. Kremper admitted appellant's reliability as a reporter is "somewhat" suspect. (XXIV, 3374). Dr. Kremper reviewed a taped

statement from Ms. Nixon who indicated that appellant did not appear to be under the influence of intoxicating substances at the time he was trying to sell Ventura Rico the video games. (XXIV, 3375).

It is possible that since appellant entered the trailer with a tire iron and apparently kept it, he intended to use it as a weapon. (XXIV, 3377). Dr. Kremper agreed that appellant has antisocial traits and that his review of the records revealed "brushes" with the law. He had been "arrested" for various things and he was a "burglar." (XXIV, 3385). "He apparently has been involved in doing a lot of breaking and entering." (XXIV, 3386).

Neuropsychologist Dr. John Sesta testified that he did not do an MRI or CAT scan on the appellant. However, he did administer [or, his assistant administered] about "8 hours" worth of tests to look at the functioning of appellant's brain. (XXV, 3407). Dr. Sesta testified that he had a more limited role than Dr. Kremper; to answer the question about possible brain damage. (XXV, 3418).

Dr. Sesta testified that he found evidence of "moderate" brain damage. (XXV, 3419). He found that appellant "can't smell hardly at all." (XXV, 3422). This represents evidence that the front part of the brain is not working as well as the

back. (XXV, 3422). Dr. Sesta testified that appellant had a history of sustaining head injuries. Dr. Sesta tested appellant's IQ and obtained a full scale IQ of 76. (XXV, 3424).

Dr. Sesta was aware that appellant got into a couple of fights in jail and in one of them he "popped someone hard enough to break his hand." (XXV, 3425). Appellant also was a boxer or competitor in tough-man competitions and he was knocked down "which is not a good thing for the brain." (XXV, 3427). The motorcycle injury where appellant was knocked unconscious was probably the most significant head injury. (XXV, 3434-35).

In his opinion, Dr. Sesta testified, appellant's trigger or threshold to become violent is really low. (XXV, 3453). When asked if appellant was acting under an extreme emotional or mental disturbance at the time of the crimes, Dr. Sesta said he would have to leave that to the jury. He also declined to state that appellant was "substantially" impaired in his ability to conform his conduct to the requirements of the law at the time he committed the offenses. (XXV, 3477). He did find he had difficulty with brain function due to brain damage and difficulty putting the brakes on. (XXV, 3476).

Dr. Sesta did not ask appellant any questions about the offenses. (XXV, 3492). However, in speculating about what happened during the murder, he thought that appellant was the

aggressor based upon the pictures that he saw of the crime scene. (XXV, 3486). He did not think the victims provoked appellant's attack at all. (XXV, 3486).

Dr. Sesta testified that while appellant did not have full-blown antisocial personality disorder he certainly has some of those traits: "I mean, he is obviously not opposed to violating the rights of others." (XXV, 3446-47). Dr. Sesta continued: "Is he lacking in some empathy, yeah, he is. Is it full-blown psychopathy, a psychopath? Is he Ted Bundy, John Wayne Gacey? No, no, he is not. But we have some traits that we see in antisocial personality disorder." (XXV, 3447).

Dr. Sesta agreed that, on the accident where appellant reported he was rendered unconscious, there are no hospital records to verify that and other people have said or reported that he did not lose consciousness. (XXV, 3489-90). On appellant's IQ score, the five or six point swing works both to add or subtract from IQ. So, on the upper level, he would be within the low average range and just four points lower than the average African-American IQ. (XXV, 3490). In other words, there is a 95 percent chance that his IQ falls between 71 and 81. (XXV, 3490).

Dr. Sesta agreed that appellant never supported his child and apparently only saw the child "once" before he went to

prison. (XXV, 3491). The child was four years old when appellant went to prison. (XXV, 3491).

After the jury returned its 12 - 0 recommendation, appellant had the opportunity to address the court during the Spencer hearing. Appellant testified that he was not happy with the jury which heard his case, that the prosecutor committed various misconduct, including mischaracterizing the weapon used as a "crowbar" rather than a "tire iron." (VI, 991-92). He also complained that his attorney, Mr. Dimmig, did not do a good job of cross-examining the victim. Appellant testified: "Mr. Dimmig did not do a good job on cross-examining the victim, Ms. White. Ms. White was uh, a main witness here in this. I feel like he did not do a good job at all cross-examining her." (VI, 992). He complained about the hearsay statement or question regarding a "Thug Life" tattoo, about DNA, about his prior record being revealed, and that "there was favoritism toward the victim here." (VI, 993).

The State agrees with the appellant's summary of the sentencing order, with one exception. Appellant incorrectly asserts that the trial court found both statutory mental mitigators. While the court did find some impairment to appellant's ability to conform his conduct to the requirements of the law, it did not find that he was "substantially

impaired." (VI, 1028). The trial court did consider the "emotional distress" suffered by appellant, as a mitigator, and gave it moderate weight. (VI, 1027). It is unclear from the court's order whether the trial court considered it "extreme" as required for the statutory mitigator to apply.

SUMMARY OF THE ARGUMENT

ISSUE I—Prosecutorial misconduct did not taint the verdict in this case. The single objected-to comment in closing was made in response to defense counsel's argument that appellant admits to committing the burglary, robbery and sexual battery, but not the murder of Noah Scott. The prosecutor was entitled to point out that the jury had heard "no evidence" that appellant admitted to committing any offense in this case. In any case, given the overwhelming evidence of appellant's guilt, there is no possibility that the prosecutor's comment contributed to the verdict.

ISSUE II—-The prosecutor did not engage in misconduct during the penalty phase. The defense opened the door to the prosecutor's questions which tested the witness's knowledge of appellant's character and the witness's own credibility. There was no defense objection regarding any question posed to his character witnesses on remorse and the issue is therefore not preserved for review.

ISSUE III—-In closing, the prosecutor properly addressed the evidence and the weight to afford that evidence in making its recommendation. The prosecutor did not tell the jurors that it was their sworn duty to impose the death penalty in this

case. The remaining comments appellant takes issue with on appeal were not preserved for appeal by an objection below.

ISSUE IV--This Court has consistently rejected appellant's challenge to Florida's capital sentencing scheme based on Ring v. Arizona, 536 U.S. 584 (2002).

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED UPON A SINGLE OBJECTED-TO COMMENT WHICH IMPLICATED APPELLANT'S RIGHT TO REMAIN SILENT. (STATED BY APPELLEE).

Appellant first claims that the prosecutor repeatedly commented upon appellant's right to remain silent in closing argument. However, appellant only objected to a single comment on this basis and the trial court denied defense counsel's request for a mistrial. The trial court's ruling should be affirmed on appeal.

A. Standard Of Review

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

B. The Trial Court Did Not Abuse Its Discretion In Denying A Motion For Mistrial Based Upon A Single Objected-To Comment Which Allegedly Commented Upon Appellant's Right To Remain Silent

First, the State notes that while appellant takes issue with several comments during closing, only one comment was preserved for review on appeal by an objection below. The prosecutor argued: "[If the defendant] wants to tell the State and the Detective somebody else helped him commit the crime, then let him come forward…". This comment was interrupted by an objection by the defense. The prosecutor agreed to rephrase his argument "and not take that any further…" (XXII, 2842). The additional comments mentioned in appellant's brief, referring to "fantasy;" noting that appellant talked to police and that "there's no evidence;" "there is absolutely no evidence that Mr. Poole ever said, hey, somebody else was there before me and those people's heads were bashed in;" were not the subject of an objection below. (Appellant's Brief at 32). See Sims v. State, 681 So. 2d 1112, 1116-17 (Fla. 1996)(claimed errors when prosecutor referred to the defendant as a liar, accused defense counsel of misleading the jury, and bolstered his attacks on Sim's credibility by expressing his personal views and knowledge of extra-record matters, not properly before the Court on appeal without an objection)(citing Craig v. State, 510 So. 2d 857, 864 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988)).

As this Court noted in Card v. State, 803 So. 2d 613, 622 (Fla. 2001), a contemporaneous objection is required to preserve an issue surrounding a prosecutor's comments in closing argument. This Court stated:

> As a general rule, the failure to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review. *See, e.g.*, Brooks v. State, 762 So. 2d 879, 898 (Fla. 2000); McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999). A timely objection allows the trial court an opportunity to give a curative instruction or to admonish counsel for making an improper argument. *See* Nixon v. State, 572 So. 2d 1336, 1341 (Fla. 1990). The exception to the contemporaneous objection rule is where the unobjected-to comments rise to the level of fundamental error, which has been defined as error that reaches down into the validity of the trial itself to the extent that a verdict of guilty or jury recommendation of death could not have been obtained without the assistance of the alleged error. *See* McDonald, 743 So. 2d at 505 (quoting Urbin, 714 So. 2d at 418 n.8); Chandler v. State, 702 So. 2d 186, 191 n.5 (Fla. 1997) (holding that for an error to be raised for the first time on appeal, the error must be so prejudicial as to vitiate the entire trial). Having reviewed the unobjected-to comments made by the prosecutor in this case, we conclude that none of these comments constitute fundamental error.

Appellant's single objected-to comment does not serve to preserve the numerous other comments which he now takes issue with on appeal. See Teffeteller v. State, 495 So. 2d 744, 747 (Fla. 1986)(stating that "[a]ppellant cannot bootstrap this concern over" [revealing the defendant's prior death sentence] in voir dire "to alleviate the requirement of a contemporaneous

objection.")(citing Steinhorst v. State, 412 So. 2d 332 (Fla. 1982)). A timely objection puts the trial court and the prosecutor on notice that a line of argument is objectionable or is breaching the bounds of propriety. It also provides the trial court the opportunity to admonish the prosecutor or remedy the situation through a curative instruction. See Card, 803 So. 2d at 622 ("A timely objection allows the trial court an opportunity to give a curative instruction or to admonish counsel for making an improper argument.")(citing Nixon v. State, 572 So. 2d 1336, 1341 (Fla. 1990)).

In Nixon v. State, 572 So. 2d 1336, 1341 (Fla. 1990), rev'd on other grounds, 543 U.S. 175 (2004), this Court addressed a similar situation, where the defendant made a motion for mistrial at the close of the prosecutor's argument but failed to make a contemporaneous objection. This Court stated a contemporaneous objection was required to preserve the "Golden Rule" issue, stating:

> Nixon argues that under Cumbie, his motion for mistrial at the close of argument, absent a contemporaneous objection, was sufficient to preserve this issue for appeal. We do not construe Cumbie to obviate the need for a contemporaneous objection. The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system. A contemporaneous objection places the trial judge on notice that an error may have been committed and thus, provides the opportunity to correct the error at an early stage of the proceedings. Castor v. State, 365 So. 2d 701, 703

> (Fla. 1978). While the motion for mistrial may be made as late as the end of the closing argument, a timely objection must be made in order to allow curative instructions or admonishment to counsel. As noted by defense counsel in this case, in many instances a curative instruction at the end of closing argument would be of no avail. Accordingly, defense counsel's motion for mistrial at the end of closing argument, absent a contemporaneous objection, was insufficient to preserve this claim under our decision in Cumbie. Even if the issue were properly preserved, we agree with the trial court that taken in context the comments complained of did not amount to a Golden Rule argument.

Nixon, 572 So. 2d at 1341.

This case provides an example of the utility of the contemporaneous objection rule. Upon learning of defense counsel's objection to his comment, the prosecutor agreed to rephrase his argument "and not take that any further…" (XXII, 2842). No further comments arguably implicating appellant's right to silence were made by the prosecutor after the defense objection.

In any case, none of the comments mentioned in the defendant's brief, either alone or collectively, rise to the level of fundamental error. As noted in more detail below, the State presented absolutely overwhelming evidence of appellant's guilt. Moreover, the theme of the prosecutor's rebuttal argument was undeniably proper: Asking the jury to base its decision in this case upon the evidence at trial, not simply the unsupported argument of defense counsel. Further, the

unobjected-to comments were not egregious or inflammatory. Consequently, appellant has not come close to carrying his heavy burden of establishing the comments at issue rise to the level of fundamental error. Fundamental error is error that "reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Archer v. State, 934 So. 2d 1187, 1205 (Fla. 2006)(citing Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1997)); D'Oleo-Valdez v. State, 531 So. 2d 1347 (Fla. 1988)(For an error to be considered fundamental, "the error must be basic to the judicial decision under review and equivalent to a denial of due process.")(citing Ray v. State, 403 So. 2d 956 (Fla. 1981)).

Turning now to the single comment preserved by an objection below, the State acknowledges this Court has stated the "very liberal rule" that "any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." Rodriguez v. State, 753 So. 2d 29, 37 (Fla. 2000). However, as noted in Rodriguez, this Court has attempted to draw a distinction between impermissible comments on silence and permissible comments on the evidence. Id.

In this case, it can be argued the prosecutor's comment was invited by defense counsel's argument. In closing, defense counsel asserted: "Mr. Poole acknowledges that he went in the trailer, 4-L, and committed a crime therein. That's a burglary. Mr. Poole acknowledges that he had sexual contact with Loretta White against her will, and that's a sexual battery. And Mr. Poole acknowledges that he had possession of those games and he went down the road and he sold them, and that's a robbery." (XXI, 2795). Later, while urging the jury to acquit on the murder and attempted murder, defense counsel again asserted, "remember, he did the burglary, he did the sexual battery, he did the robbery." (XXI, 2823).

The prosecutor's argument rebutted the unsupported statement, made for the first time in closing by defense counsel, that appellant now admits committing the burglary, rape, and robbery of the victims; but, that he was innocent of the murder and attempted murder charges. Certainly, the prosecutor was entitled to point out, that there was no **evidence** introduced during trial that Poole admitted to committing some offenses, but not others. Moreover, despite appellant's attempts to clothe defense counsel's argument in the evidence admitted at trial, there was not a scintilla of credible evidence introduced to suggest that anyone other than appellant

assaulted the victims in this case.[3] The prosecutor argued: "And there's no evidence that Mr. Poole ever said, well, I went in there and raped her and left her and then somebody else came in and beat their heads in. There's no evidence of that either. That's argument." (XXII, 2840).

The prosecutor was entitled to point out, in response to defense counsel's argument, that there was simply no evidence to show that there was anyone else at the scene of the crime other than the appellant. See Caballero v. State, 851 So. 2d 655, 660 (Fla. 2003)(while it is not permissible to comment on the defendant's right to remain silent, "it is permissible for the State to emphasize uncontradicted evidence for the narrow purpose of rebutting a defense argument since the defense has invited the State's response."). Nonetheless, even if the prosecutor crossed the line of propriety when he pointed out that if appellant "wants to tell the State and the Detective somebody else helped him commit the crime, then let him come forward…", this comment was interrupted by an objection by defense counsel. The prosecutor agreed to rephrase his argument "and not take that any further…" (XXII, 2842).

[3] White suffered severe head injuries, was "concussed" and her confused 911 call, wherein she referred to "they," did not in any way establish there was another assailant.

In the instant case, even if this Court finds that the prosecutor's comment was "fairly susceptible" of being interpreted as a comment on appellant's right to not testify, the error is clearly harmless under the facts of this case.[4] In light of the strong and uncontradicted evidence against appellant, it cannot be said the error contributed to the verdict. Furthermore, when instructing the jury on the applicable law, the trial judge informed the jury that the burden rested with the State and that "[t]he defendant is not required to present evidence or prove anything." (XXII, 2875). The Court also instructed the jury that appellant had the right not to testify and that they must not hold it against him in deciding this case. (XXII, 2877-78).

This was simply not a close case. The State presented absolutely overwhelming evidence of appellant's guilt. Appellant was identified heading in the direction of the victim's trailer immediately prior to the attack. Appellant sold video games like those taken from the victims immediately after the murder and attempted murder. One video game was left

[4] As this Court made clear in State v. Murray, 443 So. 2d 955, 956 (Fla. 1984), prosecutorial misconduct is the proper subject of bar disciplinary action, not reversal and mistrial. See also Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (stating that "it is appropriate that individual professional misconduct not be punished at the citizens' expense, by reversal and mistrial, but at the attorney's expense, by professional sanction.").

on the porch of Johnson's trailer where appellant had been living at the time the victims had been attacked and robbed.

In addition to eyewitness testimony connecting appellant with the charged offenses, the State presented compelling and uncontradicted physical evidence to link appellant to the crimes. This evidence included DNA consistent with the appellant found on appellant's shirt matching or consistent with victim White's DNA, and, DNA from the rape kit, matching appellant's genetic profile. Three of the games or game controllers possessed by appellant after the offenses had blood on them matching victim Scott's DNA profile. In addition, a tire iron found in the vicinity of the victims' trailer had blood stains on it which were consistent with victim Scott's DNA profile. Appellant's footprint was found next to the bed where the attacks occurred.

Given the overwhelming weight of the evidence against the appellant, it cannot be said that the comment or comments complained of on appeal, had any impact upon the verdict in this case. See Fitzpatrick v. State, 900 So. 2d 495, 517 (Fla. 2005) (finding witness's comment on the defendant's silence was harmless where the evidence was "overwhelming" and included the fact the defendant was identified as the source of semen recovered from the victim and that the victim was last seen

alive with the defendant.); Caballero, 851 So. 2d at 660 (stating that erroneous comments on defendant's failure to testify require reversal only "where there was a reasonable possibility that the error affected the verdict" and finding that given the confession, fingerprint and DNA evidence, the alleged error was harmless). Consequently, appellant is not entitled to any relief from this Court.

ISSUE II

WHETHER THE PROSECUTOR ERRED IN CROSS-EXAMINING DEFENSE CHARACTER WITNESSES ON THE DEFENDANT'S TATTOOS, PRIOR ARRESTS, AND, LACK OF REMORSE. (STATED BY APPELLEE).

Appellant next complains that the prosecutor impermissibly impeached defense character witnesses with his prior criminal history, tattoos, and lack of remorse. He contends that the "cumulative" impact of the alleged prosecutorial misconduct violated his right to a fair penalty phase. The State disagrees.

Appellant first takes issue with a question posed by the prosecutor to Joe Poole, Jr., appellant's older brother, regarding appellant's criminal history. The problem for appellant is that he clearly put his character in issue through the testimony of his older brother. As the prosecutor noted below in response to the defense objection: "It's entirely appropriate. They're putting on his whole reputation, what his reputation is as a man, what this man knows about him. Well, if he knows so much about him, let's see what he knows." (XXIII, 3187). The record supports the prosecutor's recollection of Poole, Jr.'s penalty phase testimony.

Just after telling the jury his brother went to church with the girl he was living with, Poole, Jr., described his brother as a loving person and couldn't believe he could commit such a

crime. Poole, Jr. testified: "That he just a kind, loving person that - - to be here today wouldn't nobody from the Louisiana area believe this, that he's here in this situation. Because I - - it still hasn't dawned on me, and I still don't believe that I'm here." (XXIII, 3185). On cross-examination, the prosecutor asked Poole, Jr., since he claimed he was close to his brother, whether he knew if this was the first time appellant had been arrested. (XXIII, 3186). Poole, Jr. answered that he was aware his brother had been arrested before. Id. The prosecutor then asked if he knew his brother had been "arrested in Georgia, South Carolina, Texas." This is the comment which drew defense counsel's objection.

Of course, as appellant acknowledges in his brief, a trial court's ruling on the scope of cross-examination is subject to an abuse of discretion standard. McCoy v. State, 853 So. 2d 396, 406 (Fla. 2003). Moreover, this Court has recognized that cross-examination is not confined to identical details of matters testified to on direct examination. In Boyd v. State, 910 So. 2d 167, 185 (Fla. 2005) this Court stated:

> Section 90.612(2), Florida Statutes (2001), states, "Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in its discretion, permit inquiry into additional matters." The permissible bounds of cross-examination are defined as follows:

> [W]hen the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts … or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief….
>
> Coco v. State, 62 So. 2d 892, 895 (Fla. 1953) (quoting 58 Am. Jur. ***Witnesses***, § 632, at 352 (1948)).

The State recognizes that, in general, it is improper to question a penalty phase witness about a defendant's prior arrests. See Gore v. State, 784 So. 2d 418, 433 (Fla. 2001); Hildwin v. State, 531 So. 2d 124, 127 (Fla. 1988)).

Nonetheless, the State maintains that the defense in this case opened the door for the prosecutor to explore appellant's prior criminal history and arrest record. Since Poole, Jr. testified that appellant was kind and loving and that not only he, but others back in Louisiana would be shocked ["wouldn't nobody from the Louisiana area believe this, that he's here in this situation"] by the murder and rape charges, the prosecutor was entitled to test the brother's opinion and his knowledge of appellant's criminal past. See Gore v. State, 784 So. 2d 418, 433 (Fla. 2001)(defendant opened an inquiry into his prior acts of violence against women on cross-examination by presenting

evidence of his allegedly non-violent character). Moreover, the prosecutor was entitled to ask the question because it touched on Poole, Jr.'s credibility: "Well, what it has to do with what this witness really knows about his brother and how much the jury should believe this witness." (XXIII, 3188).

In addition to testing how close Poole, Jr.'s relationship really was to his brother, the point legitimately being questioned on cross-examination was the portrayal of appellant as a church-going, kind, loving individual who either did not commit these offenses or, for whom, these offenses are out of character. In effect, appellant's brother was attesting to appellant's good reputation back in Louisiana. Consequently, a question concerning appellant's history of arrests in several states tests Poole, Jr.'s, knowledge of that reputation or character. See Cornelius v. State, 49 So. 2d 332, 335 (Fla. 1950)(observing that the "true purpose of such cross-examination is to enlighten the jury as to whether the witness actually – as a matter of fact -- knows the general reputation of the defendant and to place the jury in a better position to pass upon the credibility of the witness's testimony.").

In Greenfield v. State, 336 So. 2d 1205, 1206-1207 (Fla. 4th DCA 1976), the Fourth District addressed an analogous

situation where the defendant opened the door by placing his character in issue. The court stated:

> Defendant's position on appeal is that the trial court erred in permitting the state to ask defendant's character witnesses if they had heard of the arrest of the defendant, for a different charge, *after* the date of the offense for which defendant was on trial.
>
> The general case law and text writings on the subject seem to agree that the state has the right to cross-examine a character witness as to his having heard of specific acts of defendant. The purpose of this examination is to enable the fact finder to judge whether the witness actually knows the reputation of the defendant. This inquiry is not limited to actual convictions but may include arrests and other alleged conduct or misconduct. See, for example, United States v. Canniff, 521 F.2d 565 (C.A.2, 1975); United States v. Prevatt, 526 F.2d 400 (C.A.5, 1976); United States v. Bermudez, 526 F.2d 89 (C.A.2, 1975); Frazier v. State, 56 Ala.App. 166, 320 So.2d 99 (1975); Jiminez v. State, 545 P.2d 1281 (Okl.Cr.App.1976); McElroy v. State, 528 S.W.2d 831 (Tex.Cr.App.1975) and the annotation and cases collected in 47 A.L.R.2d 1258. See also, McCormick, *Evidence*, Section 191; and Wharton, *Criminal Evidence*, Section 237.
>
> Florida cases dealing with this subject also seem to follow the general rule. In the early case of Cook v. State, 46 Fla. 20, 35 So. 665 (1903), the Florida Supreme Court held that a character witness may be cross-examined regarding specific facts in order to test the soundness of the witness' opinion and to elicit the data upon which it was founded. In Cornelius v. State, 49 So.2d 332 (Fla.1950), the Florida Supreme Court held that a witness who testifies to the general reputation or character of a defendant may be cross-examined as to whether he had heard of specific acts of violence
>
> > ". . . because the true purpose of such cross-examination is to enlighten the jury as to whether the witness actually - as a matter of fact - knows the general reputation of the defendant and to place the jury in a better position to pass upon the credibility of the witness' testimony." 49 So.2d at 335.

Based upon this record, it can be argued the prosecutor was entitled to elicit the details of his prior arrests and convictions. However, after inquiry by the trial court, the prosecutor agreed not "to go into any details of any particular crimes." (XXIII, 3188). When the prosecutor continued questioning Poole, Jr., he did not ask the same question regarding his knowledge of appellant's arrests in three states. Consequently, the witness never actually answered the question which was the subject of the defense objection. (XXIII, 3189). When the prosecutor continued, he asked Poole, Jr., when appellant began getting into trouble with the law. (XXIII, 3189). Poole, Jr. answered that he was aware appellant began getting into trouble with the law as an adult. Id.

Under the circumstances of this case, the trial court did not abuse its broad discretion in allowing the prosecutor to briefly explore Poole, Jr.'s knowledge of appellant's prior arrests. Like the situation in Greenfield, the defense opened the door to this line of inquiry. See Gunsby v. State, 574 So. 2d 1085, 1089 (Fla. 1991)(The trial court did not commit error in allowing cross-examination of a witness's knowledge of the defendant carrying guns. Given "the fact that this was impeachment of a defense character witness, examining the witness about a specific act of misconduct by Gunsby that was

known by the witness was proper cross-examination and was not a violation of the Williams rule.").

Appellant also contends that the question was improper because the prosecutor insinuated impeaching facts "without evidence to back up those facts." (Appellant's Brief at 44-45). However, appellant did not object to the question below on this basis. It has long been the law in this state that "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.". Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Consequently, this particular argument has not been preserved for appeal. See Blackwood v. State, 946 So. 2d 960, 967 (Fla. 2006)(defendant "failed to present the trial court with an opportunity to rule upon the specific arguments now raised and the claim is therefore procedurally barred.")(citing Steinhorst).

Of course, had defense counsel lodged a specific objection below, the prosecutor could have provided the factual predicate for his question regarding the defendant's arrests. It is unfair to make such an argument for the first time on appeal because the state has no opportunity at this late date to place the factual basis for the question on the record. Indeed, it appears the prosecutor had ample support for his question. As

noted by the trial court in its sentencing order, appellant's history of criminal activities "range from Texas to Louisiana, to Mississippi, to Georgia, to South Carolina, and to Florida." (VI, 1028). Moreover, Dr. Kremper, appellant's mental health expert, acknowledged that appellant had a history of arrests and committing offenses. (XXIV, 3295; 3339; 3385; 3386). Thus, appellant's unpreserved allegation that the prosecutor did not have a factual basis for the question is clearly without merit.

In any case, even if the trial court abused its discretion in allowing the prosecutor to ask a general question about appellant's prior arrests, the error was harmless in this case. The witness never answered the question posed by the prosecutor regarding his knowledge that appellant had been arrested in three different states. Moreover, the fact appellant had been in trouble or arrested was entirely cumulative to that elicited by defense counsel through his mental health expert Dr. Kremper. On direct examination, Dr. Kremper revealed that appellant was "known as a B and E guy" (XXIV, 3295), that in Florida this "guy is doing lots of burglaries and this kind of stuff." (XXIV, 3338). On cross-examination, Dr. Kremper revealed, without objection, appellant has had "brushes with the law," been "arrested" for various things, and involved in a "lot of breaking and entering." (XXIV, 3385; 3386). Finally, the

prosecutor did not mention appellant's previous arrests in his closing argument. Zack v. State, 911 So. 2d 1190, 1209 (Fla. 2005)(finding mention of the defendant's hatred of women through its rebuttal witness was proper but, if error, was harmless where the prosecutor did not argue the issue in closing and the jury was properly instructed on the aggravating circumstances that they may consider). Consequently, any error in questioning Poole, Jr. about his brother's previous arrests was clearly harmless under the facts of this case. See Mendoza v. State, 700 So. 2d 670, 678 (Fla. 1997)("erroneously admitted evidence concerning a defendant's character in the penalty phase is subject to a harmless error review under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986)").

Appellant next contends that the trial court erred in overruling his motion for mistrial when the prosecutor questioned Poole, Jr. about his knowledge of appellant's tattoos. Appellant contends that a single question regarding a "Thug" tattoo was so prejudicial, that it warranted a mistrial in the penalty phase. Once again, the State disagrees.

"A motion for mistrial should be granted only when it is necessary to ensure that the defendant receives a fair trial. See Goodwin v. State, 751 So. 2d 537, 547 (Fla. 1999). This Court has held that a trial court's ruling on a motion for

mistrial is subject to an abuse of discretion standard of review. Id. at 546." Schoenwetter v. State, 931 So. 2d 857, 872 (Fla. 2006). The prosecutor's question regarding appellant's "Thug" tattoo was proper cross-examination and certainly did not warrant the drastic remedy of a mistrial in this case.

The prosecutor asserted his question was meant to test Poole, Jr.'s knowledge of his brother and rebut the image the defense was attempting to portray of the defendant:

> Well, Ms. Jester can do what she sees fit, but they're the one trying to paint this man as an angel after this brutal murder. This guy has got A Thug Life tattooed all across his belly. And I think when you talk about somebody, he's up here telling how good a guy he is, he's a professional, he's a good concrete person, he's a compassionate man, he raised his son and all of this stuff, well, there's another side to this man.
>
> They want - - they chose to put this on, they were going to do the same thing with the psychologist. You can't have it both ways. You are going to put on and try to paint this picture, then it's going to get painted the opposite way if I can do it."

(XXIII, 3202).

Again, the defense was trying to portray the defendant as a stellar character, kind, smart businessman, for whom the instant crime was completely out of character. Certainly, a "Thug Life" tattoo across his belly tends to counter the defense portrayal. This line of questioning properly tested how close Poole, Jr. was to the appellant and suggests that appellant might have

another side to his character, a side of which his brother was unaware. Consequently, the trial court did not abuse its broad discretion in overruling defense counsel's objection. See Brooks v. State, 918 So. 2d 181, 188 (Fla. 2005)(A trial court's admission of evidence will not be disturbed on appeal absent a clear abuse of discretion.").

In any case, the defendant's brother claimed to have knowledge of only one tattoo on his brother, one that states "MP." He denied any knowledge of a "Thug Life" tattoo. (XXIII, 3204). Under the circumstances of this case, the trial court was under no obligation to grant the appellant's motion for mistrial based upon a single question about appellant's tattoos. It was simply not so prejudicial that it served to vitiate the entire penalty phase in this case. The question was at the very least unanswered and the prosecutor never again broached the subject, either in examining the remaining witnesses or in closing argument.

Appellant finally contends that the prosecutor impermissibly questioned his character witnesses on lack of remorse. However, not a single question from the prosecutor on remorse drew an objection from the defense. Indeed, remorse or lack thereof, was mentioned in the testimony of the very first defense witness in the penalty phase, appellant's mother. On

direct examination, when defense counsel asked if appellant "ever apologize" to her on the phone from prison, Ms. Poole responded: "Well, he just told me - - you know, that he was sorry for anything that he'd done to hurt me - - because he know I wanted him to finish at least high school." (XXIII, 3018). On cross-examination, the prosecutor made the following inquiry:

> Q. Okay. The last area, or next to last area that Ms. Jester covered with you, was she asked you did Mark apologize. And you said he apologized for what he had done to you by his actions. Did I understand you correctly when you said that?
> A. Yes.
> Q. Did he ever apologize for murdering a boy?
> A. No.
> Q. Did he ever apologize for raping a pregnant girl?
> A. No.

(XXIII, 3028). There was no objection from the defense.[5] Certainly, the prosecutor was entitled to explore on cross-examination the issue of appellant's apology and whether it extended to harming the victims' in this case.

The second witness, appellant's sister, testified on cross-examination that she has seen appellant in jail but that he did not express remorse for killing this young man. (XXIII, 3071-

[5] On redirect, defense counsel attempted to show that appellant had little opportunity while incarcerated to talk freely about the instant charges. (XXIII, 3029). Upon questioning by defense counsel, Ms. Poole stated that it was her understanding that appellant was told not to talk about the charges by his defense attorneys. (XXIII, 3029). Indeed, defense counsel interjected: "I mean, when I came to see you, didn't I ask you not to talk about the charges if he called?" (XXIII, 3029).

72). Later, when asked if appellant ever stated he was sorry for what he had done, his sister stated: "No. We didn't talk about it, no." (XXIII, 3074). Again, these questions did not draw an objection from the defense.

Similarly, Arry Moody, the defendant's nephew, testified on cross-examination that he had a chance to talk to appellant at the jail but that appellant did not express remorse for killing the young man or raping the pregnant girl. (XXIII, 3091). Once again, this question and answer did not elicit an objection from the defense.[6] (XXIII, 3091).

After the penalty phase reconvened the next day, defense counsel addressed the court, and stated, in part: "We are not going to be raising remorse as a mitigator, and it isn't proper for him to be asking questions at this point, given that we are not asking for remorse as a mitigator." (XXIII, 3106). Defense counsel stated that he spoke to the appellant about this and "he is in agreement that we would ask that Mr. Aguero not ask any more questions pertaining to remorse, and certainly that he's not making any sort of argument as to remorse in closing." (XXIII, 3106). In response, the prosecutor noted that the

[6] Again, defense counsel on redirect minimized the opportunity that appellant had in prison to express his remorse. Arry Moody testified that they did not talk about the charges and just talked about old times and told him about the good things that had been happening. (XXIII, 3098).

defense was free to object to his questions when he asked them on cross-examination and did not know whether either Poole or the very last witness would come in and say "Mark told me he was sorry for everything he'd done and so forth." (XXIII, 3107). However, the prosecutor continued that based upon Mr. Fisher's [one of appellant's three appointed attorneys] representation as an officer of the court that he is not going to argue remorse or present a witness on remorse, he would refrain from asking any further questions on that issue.[7] The prosecutor concluded: "so I think both sides are in agreement, so long as representation [of] Mr. Fisher holds true, and that doesn't come up at all in their case." (XXIII, 3107-08).

Appellant incredibly asserts that this Court should forgive the lack of an objection below on remorse because when the issue was finally raised by defense counsel, the trial court displayed a "lack of concern." Appellant speculates that any prior objection would have been "fruitless." (Appellant's Brief at 50). Appellant completely misconstrues the record. It was the

[7] The prosecutor was clearly under the impression that the defense either had or would be arguing remorse or rehabilitation during the penalty phase. See Singleton v. State, 783 So. 2d 970, 978 (Fla. 2001) (holding "that lack of remorse is admissible to rebut evidence of remorse or other mitigation such as rehabilitation").

defense which showed a lack of concern and, indeed, never lodged an objection to a single question of any witness on remorse.[8]

When the defense did raise the issue it was not by an objection, but simply in the form of a concern or discussion. Significantly, the defense failed to request any remedy other than to ask the prosecutor not to raise the issue with any further witnesses. If the trial court expressed any lack of concern on this issue, it is because the defense showed a lack of concern. The trial court accurately summed up the colloquy between the prosecutor and defense counsel below: "Okay. Sounds like y'all talked your way into a stipulation." (XXIII, 3108).

It appears that the defense was considering presenting evidence of remorse and even discussed that matter with appellant prior to finally raising the issue with the trial court. Even when one of appellant's three defense attorneys raised the issue, he again had to consult with the defense team to make sure that they all agreed on this strategy. When the prosecutor agreed to stop questioning witnesses on remorse based upon defense counsel's assertion that they would not raise it, defense counsel Fisher stated: "And let me just confirm with

[8] Arry Moody had already been excused from testifying and the defense only raised this issue with the trial court and prosecutor the next morning.

Ms. Jester, who has shepherded through the lay witnesses in this case that we're not going to be presenting evidence regarding that." (XXIII, 3108).

Although the defense never raised a contemporaneous objection to questions on remorse, the record demonstrates the efficacy of the contemporaneous objection rule. When the defense finally raised the issue, the prosecutor agreed not to question any witnesses on lack of remorse or argue the issue in closing. See Card, 803 So.2d at 622 ("A timely objection allows the trial court an opportunity to give a curative instruction or to admonish counsel for making an improper argument.")(citing Nixon v. State, 572 So.2d 1336, 1341 (Fla. 1990)). Thus, had the defense expressed a concern or even objected to the first question on remorse, it appears the issue could have been averted altogether.

Of course, since the issue was not preserved, appellant bears the burden of establishing fundamental error in order to obtain relief on appeal. This high hurdle cannot be overcome in a case with such weighty aggravation and comparably insignificant mitigation. Indeed, appellant does not even attempt to meet his burden of demonstrating fundamental error in this case with a 12 to 0 jury recommendation.

Perhaps recognizing the futility of showing fundamental error based upon this record, appellant attempts to bundle this unpreserved claim with the issues raised about arrests and tattoos. While the state contends that each issue should be individually assessed, even if this court were to view the three issues raised together, it is clear that no relief is warranted.

Appellant was sentenced to death because he broke into a home occupied by a sleeping young couple and murdered Noah Scott in a heinous, atrocious and cruel manner. As the trial court found below: "This is the sort of death suffered by Noah Scott from repeatedly being hit in the head and body with a tire iron by Mark Anthony Poole, while he, Noah Scott, continuously tried to defend and protect Loretta White and their unborn child." (VI, 1027). The accompanying crimes of violence which comprise the prior violent felony aggravator in this case are also particularly weighty. Appellant mercilessly raped and attempted to murder Loretta White who was begging him not to hurt her and her unborn child. He left her for dead after repeatedly hitting her in the head with a tire iron. His blows left her permanently disfigured. Appellant's callous criminal behavior is shockingly cruel and heinous and was the reason he received a unanimous death recommendation in this case, not the fact he had

a tattoo, had been previously arrested, or failed to express remorse.[9]

[9] In giving appellant's proposed mitigator of religiousness little weight, the trial court noted:

> At the Spencer hearing the defendant offered no apology, showed no repentance, and demonstrated no remorse. The Defendant did testify at the Spencer hearing, but only complained and negatively commented on the jury selection process; the assistant state attorney, John Aguero; the attorneys that represented him; and the detective involved in the case. He complained that the weapon should not have been called a crowbar because it was only a tire iron, and he complained that the victim, Loretta White, was provided tissues while on the witness stand. His comments and complaints at the Spencer hearing were not the statements that would be associated with a religious person. (VI, 1030).

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING A MISTRIAL BASED UPON AN ALLEGED COMMENT ON THE JUROR'S DUTY TO RECOMMEND THE DEATH PENALTY. (STATED BY APPELLEE).

Appellant next complains that various prosecutorial comments rendered his penalty phase trial unfair or unreliable. Appellant utilizes a shotgun approach, taking portions of the prosecutor's argument during the penalty phase, to contend that he was denied a fundamentally fair trial. However, with one exception, the comments he complains about on appeal were not objected to below. Further, the various comments appellant complains about were not improper and do not warrant the drastic remedy of a new penalty phase in this case.

A. Appellate Review of A Prosecutor's Comments

A mistrial is appropriate only where a statement is so prejudicial that it vitiates the entire trial. A trial court's ruling on a motion for mistrial is within the sound discretion of the court and will be sustained on review absent an abuse of discretion." Ford v. State, 802 So. 2d 1121, 1129 (Fla. 2001) (footnotes omitted). However, where the allegation of prosecutorial misconduct has not been preserved for review, a different standard of review is applied. "As a general rule, the failure to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning

such comments for appellate review." Id. This Court has stated that for an error to be so fundamental "that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993)(citing D'Oleo-Valdez v. State, 531 So. 2d 1347 (Fla. 1988); Ray v. State, 403 So. 2d 956 (Fla. 1981)).

B. The Prosecutor Did Not Tell Jurors It Was Their Sworn Duty To Return A Death Recommendation

In Franqui v. State, 804 So. 2d 1185, 1194-1195 (Fla. 2001), this Court noted that it will largely defer to the trial court's handling of prosecutorial comments. This Court stated:

> This Court has held that wide latitude is afforded counsel during argument. *See* Moore v. State, 701 So. 2d 545, 550 (Fla. 1997); Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. *See* Thomas v. State, 748 So. 2d 970, 984 (Fla. 1999). The standard jury instructions contain cautions that while the arguments of counsel are intended to be helpful and persuasive, such arguments are not to be taken as sources of the law or evidence. Further, the control of comments made to the jury is within the trial court's discretion, and an appellate court will not interfere unless an abuse of discretion is shown. *See* Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990).

The only comment which drew an objection below was when the prosecutor reminded the jurors that they had taken an oath in connection with arguing his view of how they should weigh the evidence and make their recommendation. (XXV, 3519). There was

nothing improper about the prosecutor's argument in this case. The prosecutor did not state that it was the jurors' sworn duty to recommend death in this case or that they must send the community a message through their sentencing decision. See Orme v. State, 896 So. 2d 725, 739 (Fla. 2005)(finding prosecutorial comments were not error where they did not implore jurors to "do their duty" for the community or "send a message" through their sentencing recommendation). In context, the prosecutor was asking the jurors to weigh the evidence in aggravation and mitigation:

> ….This is about heinous, atrocious and cruel. And this is about a robbery, and this is about a rape, and this about a burglary, and this is about whether a man with a limited IQ should pay the ultimate price for what he did. That's what this is all about.
>
> I don't think when you look at it from that perspective that this decision is any more difficult than the other. I'm only thinking that when you go back in that room and make that vote and you head for your car this afternoon, you're not going to find yourself feeling the same way. You're just going to find that you did your job just like you promised to do when you raised your right hand and swore to that oath. [objection].

(XXV, 3519).

Simply reminding the jury that they took an oath and asking them to do their job is not improper. For example, in Davis v. Kemp, 829 F.2d 1522, 1529 (11th Cir. 1987), cert. denied, 485 U.S. 929 (1988), the Eleventh Circuit did not find a much more blatant appeal to the jury to do its duty improper:

> What this case comes down to is a question of duty. You must do your duty as you see fit as the citizens of this country. And I – - this is a difficult thing to do at times. Everyone else has had a duty in this case. The other people have done their duty as well as they saw fit. … I have attempted to do my duty by trying to bring the truth out to you and let you know what happened. It's your duty and nobody else's you can't delegate it to anyone else. No one else but you and your duty is clear, and to not find – - not recommend the death penalty is to leave you duty undone and only halfway complete in this case.

The Davis Court noted "[i]t certainly was not improper to argue that the jury should return a verdict of death in this particular case." 829 F.2d at 1530.

Similar to the situation in Davis, it was certainly not inappropriate for the prosecutor in this case to ask the jury to return with a death recommendation. Under the circumstances of this case, the trial court did not abuse its broad discretion in denying the motion for mistrial. See e.g. Spencer v. State, 133 So. 2d 729, 731 (Fla. 1961)(Prosecutors' "discussion of the evidence, so long as they remain within the limits of the record, is not to be condemned merely because they appeal to the jury to 'perform their public duty' by bringing in a verdict of guilty.").

In any case, this was not a close case as reflected by the 12-0 death recommendation. It simply cannot be said the prosecutor's brief comment at issue had any impact on the outcome. See Fennie v. State, 855 So. 2d 597, 609 (Fla. 2003)

(finding that the defendant could not demonstrate the unanimous death recommendation was improperly tainted by comments characterizing the victim as pleading for her life and inciting the jury to "send a message" to, or "do their duty" for, the community by sentencing the defendant to death)[rejecting an ineffective assistance of counsel claim].

C. The Unpreserved Comments

Appellant next takes issue with a number of comments which did not draw an objection from any of appellant's three defense attorneys. Appellant has not shown that these comments were improper, let alone demonstrate they were so prejudicial that they rose to the level of fundamental error.

First, appellant asserts that the prosecutor once again told the jurors that they must do their duty and recommend death in this case. That is not a fair reading of the prosecutor's comment. In context, the prosecutor was clearly asking the jury to follow the "oath" they took to "follow those instructions," which will lead to an "inescapable" conclusion. (XXV, 3520-21). The prosecutor was simply asking the jurors to follow the instructions and if they did, they would recommend death. If such an argument is prohibited, then, a prosecutor might as well stand mute and not act as an advocate during the penalty phase. There is nothing unfair or improper about reminding the jurors

that they took an oath to follow the instructions provided by the trial court.

Similarly, the prosecutor's comments about the heinous, atrocious and cruel aggravator were a fair comment upon the evidence. The prosecutor was certainly entitled to argue that the heinous, atrocious, and cruel aggravator in this case warranted significant, indeed, "overwhelming" weight and alone outweighed the defense case in mitigation. (XXV, 3512). As an advocate, the prosecutor was entitled to ask the jury to give the case in aggravation more weight than the defense case in mitigation. The prosecutor did not misstate the law concerning the weighing of aggravating and mitigating circumstances.

As for the prosecutor's comments on the defense photographs of appellant as a child, this was a proper comment on the evidence. The defense admitted photographs of appellant as a child. The prosecutor did not denigrate the defense case, he simply offered a fair comment on the evidence. Certainly, the prosecutor can remind the jury that everyone was a child at one time and that appellant was "39" when he decided to murder the victim in this case. (XXV, 3515). See Mann v. State, 603 So. 2d 1141, 1143 (Fla. 1992)(prosecutor's comments addressing defense expert's testimony, that because he is a pervert or child molester his actions are "more excusable" than a person

who is not a pervert was not improper where it is clear the prosecutor made these statements to rebut the psychologist's conclusion that the statutory mitigators applied). While the prosecutor did mention Ted Bundy in reference to the photograph, it was the defense expert, Dr. Sesta, who first mentioned Ted Bundy in this case during the penalty phase.[10] The prosecutor's isolated reference did not compare appellant's conduct to that of Ted Bundy's.

Contrary to appellant's argument, the prosecutor did not misstate the law concerning brain damage as a mitigating circumstance. (Appellant's Brief at 55). Moreover, the evidence of brain damage in this case was not, as appellant seems to believe, uncontroverted. Defense expert Dr. Kremper testified that he did not find evidence of frontal lobe damage or any significant evidence to support a dementia diagnosis.[11] The prosecutor did not argue that brain damage is not mitigating

[10] Dr. Sesta testified: "Is he Ted Bundy, John Wayne Gacey? No, no, he is not. But he does have some traits that we see in antisocial personality disorder." (XXV, 3447).

[11] Dr. Kremper admitted that appellant's frontal lobe functioning "pretty much fell within the normal range" based upon his testing. (XXIV, 3326-27). Most of the screening tests were in the normal range with the exception of delayed memory which was in the borderline range. (XXIV, 3328). The data he reviewed or compiled did not strongly support a diagnosis of dementia. (XXIV, 3341). Moreover, although appellant quit high school, he worked and "had two cars and a motorcycle." (XXIII, 3044). Lay witnesses established that appellant ran his own successful business, knew how to figure workers hours and how to pay them. (XXIII, 3047).

as a matter of law, simply that they were free to accept or reject its existence as a mitigator in this case. Indeed, the clear thrust of the prosecutor's argument was that the jury was free to find brain damage but that it should be given little if any weight. The prosecutor argued:

> What does it weigh, folks? When you sat and listened to Dr. Kremper and Dr. Sesta, what did you really find out? You found out that you got a guy with an IQ smart enough to do whatever he was doing in the concrete business. I didn't say he was a CEO, but whatever. He was functioning in life. He was functioning well enough to go about his normal everyday affairs, have children, have relationships with woman, make money, carry on a job. And he chose to go beat somebody's head in.
>
> So you have that he has some brain damage from somewhere. We don't know where, but it is uncontroverted that he has it. The question is not, do you consider that as a mitigating circumstance. You - - you are free to reject it if you want and say I don't think brain damage mitigates against the death penalty.
>
> But if you find there is some evidence and it is not contradicted and the state did not contradict it, I suggest you take it as proven. But, decide what weight it deserves compared to what he did.
>
> Are we getting this scale any further from down here because he has brain damage? Are we moving this scale at all because he chose to use illegal drugs or drink alcohol? Are we moving it? We're not moving it, folks, this scale is staying right here.

(XXV, 3516-17).

Arguing the weight the jury should give to mitigating and aggravating factors and commenting upon evidence admitted during the penalty phase is certainly proper. See Jones v. Butler, 864 F.2d 348, 360 (5th Cir. 1988)(finding no error in the

prosecutor's closing, noting that "[r]ead in context, she [the prosecutor] was arguing not that the jury could not find mercy and intoxication mitigating circumstances, but that they should not do so here."). Consequently, the prosecutor's remarks did not constitute error, let alone fundamental error which would excuse the lack of an objection below.

In sum, none of the comments either alone or in combination denied appellant the right to a fair penalty phase trial. Appellant's case stands in stark contrast to Brooks v. State, 762 So. 2d 879, 905 (Fla. 2000), wherein this Court noted numerous "overlapping improprieties in the prosecutor's penalty phase closing argument comments including: impermissibly inflaming the passions and prejudices of the jury with elements of emotion and fear by using the word 'executed' or 'executing' at least six times; engaging in pejorative characterizations of the defendant; urging jurors to show the defendant the same mercy shown the dead victim; impermissibly arguing 'prosecutorial expertise' in stating that the State had already determined this was a genuine death penalty case; misstating the law regarding the merged robbery and pecuniary gain aggravating circumstances; personally attacking defense counsel; and characterizing the mitigating circumstances as 'flimsy,'

'phantom,' and 'excuses.' Moore v. State, 820 So. 2d 199, 208 n. 9 (Fla. 2002)(discussing Brooks).

Appellant's crimes clearly established two of the most weighty of aggravators under Florida law, HAC and prior violent felony [armed burglary, armed robbery and sexual battery]. See Maxwell v. State, 603 So. 2d 490, 493 (Fla. 1992); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). The 12 to 0 vote was not gained by sleight of hand or prosecutorial misstatements. It was simply the jury's recognition of the overwhelming weight of the aggravation in comparison with the mitigation presented. Appellant broke into a young couple's home, armed with a tire iron, and, in a heinous and atrocious and cruel manner, murdered a young man who attempted to fend the appellant off to protect his pregnant fiancée. Appellant raped victim White in her own bed and left her for dead despite her pleas for mercy. She was lucky to survive with serious head wounds and was left permanently disfigured. Appellant stole items of value from the home, which, shortly after the offenses, he moved to sell for financial gain. The defense case in mitigation pales in comparison.

D. Proportionality

Although appellant did not challenge proportionality in his brief, the State will provide a brief analysis of this issue.

Of course, this Court has stated that its proportionality review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). A review of the aggravating and mitigating evidence established in the instant case clearly demonstrates the proportionality of the death sentence imposed. See Singleton v. State, 783 So. 2d 970 (Fla. 2001)(this Court found the death sentence proportionate for a single murder based upon aggravators of prior violent felony conviction (attempted murder, kidnapping) and stabbing/HAC balanced against both statutory mental health mitigators and non statutory mitigation); Duest v. State, 855 So. 2d 33 (Fla. 2003) (aggravators included HAC/stabbing; prior violent felony conviction, robbery/pecuniary gain); Rogers v. State, 783 So. 2d 980 (Fla. 2001)(two aggravators of pecuniary gain and stabbing/HAC).

In Spencer v. State, 691 So.2d 1062, 1063 (Fla. 1996), cert. denied, 522 U.S. 884 (1997) this Court affirmed a death sentence where the defendant murdered his estranged wife based upon prior violent felony convictions [contemporaneous convictions for aggravated battery, and attempted second degree murder] and that the murder was HAC. The sentence was

proportional based upon these two aggravators even though the court found both statutory mental mitigators applied and significant non-statutory mitigating factors in Spencer's background, including drug and alcohol abuse, paranoid personality disorder, sexual abuse by his father, honorable military record, and ability to function in a structured environment that does not contain women." Spencer, 691 So.2d at 1063.

The instant case offers more aggravating evidence and much less mitigating evidence than that presented in Spencer. While Spencer had been abused as a child, here appellant had a loving and supportive family. Moreover, in Spencer the court found both statutory mental mitigators applied. While the trial court in this case found appellant has an emotional disturbance and an impairment in ability to conform his conduct, the impairments were not described by the court as "extreme" or "substantial" as set forth in the statute. Consequently, appellant's sentence is proportional and should be affirmed by this Court.

ISSUE IV

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL. (STATED BY APPELLEE).

Appellant finally asserts that Florida's capital sentencing statute is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). As this is a purely legal issue, appellate review is de novo. Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002).

Appellant's argument has been consistently rejected by this Court. See Marshall v. Crosby, 911 So. 2d 1129 (Fla. 2005) (noting that this Court has rejected Ring claims in over fifty cases); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002). Additionally, Appellant's Ring claim is without merit in the instant case given his prior felony convictions. Since the defect alleged to invalidate the statute - lack of jury findings as to an aggravating circumstance - is not even implicated in this case due to the existence of the prior felony convictions, appellant has no standing to challenge any potential error in

the application of the statute.[12] See Marshall v. Crosby, 911 So. 2d 1129 (Fla. 2005) (citing the numerous cases wherein this Court rejected Ring arguments when the defendant had a prior felony conviction); Winkles v. State, 894 So. 2d 842 (Fla. 2005) (rejecting Ring claim when defendant has prior felony conviction and rejecting argument that aggravating factors must be charged in the indictment). Accordingly, this Court should deny Appellant's Ring claim.

[12] Moreover, the fact the jury recommended death by a vote of 12 - 0 places this Court beyond those cases in Florida that Ring might conceivably apply.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State asks this Honorable Court to affirm the convictions and sentences imposed below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Paul C. Helm, Assistant Public Defender, P. O. Box 9000, Drawer PD, Bartow, Florida 33831, this 18th day of June, 2007.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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