IN THE SUPREME COURT OF FLORIDA

RODNEY TYRONE LOWE,

Petitioner,

vs. Case No. SC05-2333

JAMES MCDONOUGH,
Secretary, Florida Department
of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

Leslie T. Campbell
Assistant Attorney General
Florida Bar No.: 0066631
1515 North Flagler Drive
9th Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108

Counsel for Respondent

TABLE OF CONTENTS

AUTHORITIES CITED

Cases Cited

Other Authorities

PRELIMINARY STATEMENT

Petitioner, Rodney Tyrone Lowe, was the defendant at trial and will be referred to as the "Defendant" or "Lowe". Respondent, James McDonough, Secretary for the Department of Corrections as well as the prosecuting authority at trial, the State of Florida will be referred to as the "State." References to the appellate record in Florida Supreme Court case number SC60-77972 will be by the symbol "ROA" and the record in the related postconviction case number SC05-663 will be noted as "PCR" followed by the appropriate page number(s). The direct appeal briefs in case number SC60-77972 will be noted as "DA" followed by the document title. Any supplemental records will be designated by the symbol "S" preceding the type of record. Lowe's petition will be referred to as "P."

STATEMENT OF THE CASE AND FACTS

On July 25, 1990, Lowe was indicted for the July 3, 1990 murder and attempted robbery of Donna Burnell as she was working at the Nu-Pack convenience store. Lowe was convicted as charged on April 12, 1991, and on May 1, 1991, sentenced to death for the murder and received 15 years for the attempted robbery.

In Lowe's direct appeal, he raised the following 17 issues,

three which are relevant to this cause.[1] This Court affirmed Lowe's conviction and sentence. Lowe v. State, 650 So. 2d 969 (Fla. 1994). In so doing, the Court found:

> On the morning of July 3, 1990, Donna Burnell, the victim, was working as a clerk at the Nu-Pack convenience store in Indian River County when a would-be robber shot her three times with a .32 caliber handgun. Ms. Burnell suffered gunshot wounds to the face, head, and chest and died on the way to the hospital. The killer fled the scene without taking any money from the cash drawer.
>
> During the week following the shooting, investigators received information linking the defendant, Rodney Lowe, to the crime.
>
> One week after the murder, two investigators ... learned that Lowe and his girlfriend had gone to the Vero Beach Sheriff's Office to discuss a matter unrelated to the instant case. ... Kerby and Green went to the sheriff's office where they separated Lowe and his girlfriend and, after Lowe had waived his *Miranda* rights, began to question him concerning the murder of Donna Burnell. Lowe denied any involvement in the murder ... Throughout the interrogation, Lowe's girlfriend had been sitting in a nearby room and had overheard much of the conversation. She became emotional and was moved to another room. After Kerby and Green left Lowe, they went to the room where the girlfriend was waiting and, at her request, explained to her the extent of the evidence they had compiled against Lowe. The girlfriend stated to the investigators that she wanted to speak to Lowe to find

[1](IX) - Appellant's objections to the prosecutor's improper argument in closing were erroneously overruled and the denial of his mistrial motion on these grounds were (sic) also error; (XI) The trial court erred in denying the defendant's requested instruction that the presence of the child could not be considered in the penalty recommendation; and (XII) It was error to instruct on the heinousness and coldness aggravating circumstances when the evidence did not support them. (DA - initial brief #60-77972).

> out what happened....
>
> The girlfriend succeeded in convincing Lowe to speak to the police. When Kerby returned to the interrogation room to get the girlfriend, Lowe, without prompting, told Kerby that he wanted to speak with him again. Lowe then gave the investigators a statement in which he confessed that he was the driver of the getaway car involved in the crime but denied any complicity in the murder, which he blamed on one of two alleged accomplices. Lowe's confession to Kerby ended when Lowe once again asked for an attorney. Following this statement, Lowe was arrested and indicted for first-degree murder and attempted robbery.
>
> ... among other things, Lowe's fingerprint had been found at the scene of the crime, his car was seen leaving the parking lot of the Nu-Pack immediately after the shooting, his gun had been used in the shooting, his time card showed that he was clocked-out from his place of employment at the time of the murder, and Lowe had confessed to a close friend on the day of the shooting. The State also presented, over defense objection, the statement Lowe gave to the police on the day of his arrest. Lowe advanced no witnesses or other evidence in his defense. After closing arguments, the jury returned a verdict finding Lowe guilty of first-degree murder and attempted armed robbery with a firearm as charged.
>
> In the penalty phase, the State introduced a certified copy of Lowe's previous conviction for robbery. Lowe presented testimony in mitigation ... At the conclusion of the penalty phase, the jury, by a nine-to-three vote, recommended the imposition of the death penalty.
>
> The judge followed the jury's recommendation and imposed the death penalty. . . . The trial judge also sentenced Lowe to fifteen years' imprisonment for the attempted robbery conviction.

Lowe, 650 So.2d at 971-72.

On July 20, 1995, Lowe sought certiorari. Such review was

denied on October 2, 1995. Lowe v. Florida, 516 U.S. 887 (1995).

Lowe filed a shell motion for postconviction relief on March 19, 1997 (PCR 1-42) and on September 20, 2000 filed his Amended Motion to Vacate Judgments of Conviction and Sentence. (PCR 549-764). On April 30, 2001, Lowe filed his Second Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Evidentiary Hearing and Leave to Amend. (PCR 1005-1216). After several amendments to the motion for postconviction relief, and the Case Management/Huff[2] Hearing in this cause, the postconviction court entered an order on September 11, 2002, denying 12 of the 33 claims and setting a four-day evidentiary hearing for early January, 2003. (PCR 1575-77). Later, leave was granted to add a claim under Ring v. Arizona, 122 S.Ct. 2428 (2002). On August 11, 2004, postconviction relief was denied. (PCR 2041-74). This prompted requests for rehearing and successive motions re-alleging Dwayne Blackmon was the actual shooter. Following further evidentiary hearings, the court, on March 18, 2005, reaffirmed its denial of postconviction relief on guilt phase issues, but granted a new penalty phase arising from the claim involving Dwayne Blackmon claim. (PCR 2579-90). Both parties appealed and the matter is pending in case number SC05-663.

[2]Huff v. State, 622 So.2d 982 (Fla. 1983).

ARGUMENT

ISSUE I

APPELLATE COUNSEL RENDERED EFFECTIVE ASSISTANCE DURING HIS REPRESENTATION OF LOWE ON DIRECT APPEAL (restated).

Lowe asserts appellate counsel rendered ineffective assistance for failing to raise on appeal issues asserting: (1) prosecutorial misconduct during the guilt and penalty phases of the trial; (2) that the instructions and consideration of the unconstitutional aggravators of: (a) felony murder, (b) heinous, atrocious or cruel, (c) cold, calculated, and premeditated, and (d) prior violent felony; and (3) insufficient evidence to support the conviction. He claims counsel's failures prejudiced him necessitating a new direct appeal. The State disagrees.

A habeas corpus petition is the appropriate vehicle to raise claims of ineffectiveness of appellate counsel. See Downs v. Moore, 801 So.2d 906, 909 (Fla. 2001); Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000); Groover v. Singletary, 656 So.2d 424, 425 (Fla. 1995).

In Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000), this Court reiterated the burden a petitioner must meet in order to prove ineffective assistance of appellate counsel:

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a

> postconviction motion. In evaluating an ineffectiveness claim, the court must determine
>
> > whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
> >
> > ... The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. ... "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." ... In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy....

Freeman, 761 So.2d at 1069 (citation omitted). See Armstrong v. State, 862 So.2d 705, 718 (Fla. 2003); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993).

Appellate counsel cannot be deemed ineffective for failing to raise issues "that were not properly raised during the trial court proceedings," or that "do not present a question of fundamental error." Valle v. Moore, 837 So.2d 905, 907-08 (Fla. 2002). See Owen v. Crosby, 854 So.2d 182, 191 (Fla. 2003) (affirming "counsel cannot be considered ineffective for failing to raise issues that were unpreserved and do not constitute fundamental error); Johnson v. Singletary, 695 So. 2d 263, 266

(Fla. 1996). Fundamental error is error that reaches "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." Spencer v. State, 842 So. 2d 52, 74 (Fla. 2003). Further, appellate counsel is not ineffective for failing to raise nonmeritorious claims on appeal. Id. at 907-08 (citations omitted). "If a legal issue would in all probability have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." Armstrong. See also Jones v. Barnes, 463 U.S. 745, 751-753 (1983); Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990). Additionally, a habeas corpus petition "is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial. Moreover, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal." Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987). See Jones v. Moore, 794 So.2d 579, 586 (Fla. 2001) (reiterating "[t]his Court previously has made clear that habeas is not proper to argue a variant to an already decided issue.")

Allegations of Prosecutorial misconduct - Lowe points to

four areas of prosecutorial misconduct: (1) referring to facts not in evidence (P7-8); (2) vouching for a witness' credibility (P 8); (3) improperly impeaching defense penalty phase witness Brandes (P 8-10); and (4) giving an inaccurate/misleading description of Lowe prior robbery conviction (P 10-11). This issue should be denied. In part, it is plead insufficiently, is procedurally barred, and the unpreserved comments do not rise to the level of fundamental error, thus, appellate counsel was not ineffective in not presenting the claims on appeal.

With respect to the allegations that the prosecutor referred to facts not in evidence and improperly vouched for a witness' credibility, Lowe's claims are conclusory and insufficiently pled. Trial defense counsel did not object to the comments Lowe identifies in his habeas petition. In order to be deemed ineffective where appellate counsel fails to raise an unpreserved issue, fundamental error must be shown. See Valle, 837 So.2d at 907-08. Yet, in both instances of alleged guilt phase prosecutorial closing argument impropriety, Lowe fails to argue with specificity, that fundamental error occurred to establish deficiency and prejudice. A conclusory allegation is insufficient to allow the court to examine the specific allegations. Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998). Likewise, a conclusory allegation is insufficient for appellate purposes. Patton v. State, 878 So.2d 368, 380 (Fla. 2004).

The claim is procedurally barred. On direct appeal, Lowe challenged the prosecutor's closing argument, albeit, different statements were identified as reversible error. See Lowe, 650 So.2d at 975, n.5. (DA - briefs Points IX and XI). "[C]laims raised in a habeas petition which petitioner has raised in prior proceedings and which have been previously decided on the merits in those proceedings are procedurally barred in the habeas petition." Porter v. Crosby, 840 So.2d 981, 984 (Fla. 2003). See Zack v. State, 911 So.2d 1190, 1207 (Fla. 2005) (finding habeas corpus may not be used for second appeal of questions which could have/were raised on appeal and claims of ineffective appellate counsel may not be used to circumvent this rule).

Because claims of prosecutorial misconduct were raised and rejected on direct appeal, Lowe may not use his habeas petition to obtain a second appeal of the matter. It is improper to use a claim of ineffective assistance of appellate counsel to relitigate an appellate issue. Jones, 794 So.2d at 586; Blanco, 507 So.2d at 1384. Should this Court find this issue pled sufficiently and not barred, the following is presented.

Generally, wide latitude is permitted in addressing a jury during closing argument. Breedlove v. State, 413 So.2d 1, 8 (Fla.), cert. denied, 459 U.S. 882 (1982). Logical inferences may be drawn and legitimate arguments advanced by prosecutors within the limits of their forensic talents to effectuate law

enforcement. Spencer v. State, 133 So.2d 729 (Fla. 1961). In order to require a new trial, the improper comment must:

> either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise.

Spencer v. State, 645 So.2d 377, 383 (Fla. 1994). In State v. Murray, 443 So.2d 955 (1984), this Court opined:

> ... prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." *Cobb*, 376 So.2d at 232. The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and its progeny. We agree with the recent analysis of the Court in *United States v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless … it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.

Murray, 443 So.2d at 956.

In order to preserve a claim of prosecutorial misconduct "the defense must make a specific contemporaneous objection at trial." San Martin v. State, 717 So.2d 462, 467 (Fla. 1998). Absent a contemporaneous objection, an appellate court will not review closing argument comments unless they constitute fundamental error. See Kilgore v. State, 688 So.2d 895, 898

(Fla. 1996); Wyatt v. State, 641 So.2d 355, 360 (Fla. 1994). Where alleged misconduct is unpreserved, the conviction will not be overturned unless a prosecutor's comments are so prejudicial they vitiates the entire trial, Murray, 443 So.2d at 956 or "so prejudicial as to taint the jury's recommended sentence." Peterka v. State, 890 So.2d 219, 243-44 (Fla. 2004) (citations omitted). In the absence of fundamental error, appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue. Peterka, 890 So.2d at 243-44; Schwab v. State, 814 So. 2d 402, 414 (Fla. 2002).

Taking each prosecutorial comment in turn, this Court will find most were unpreserved, and none rise to the level of fundamental error. Relief must be denied. Groover, 656 So.2d at 425 (acknowledging appellate counsel cannot be ineffective for failing to raise an unpreserved issue which is not fundamental error); Hildwin v. Dugger, 654 So.2d 107, 111 (Fla. 1995); Breedlove v. Singletary, 595 So.2d 8, 11 (Fla. 1992).

Allegation of referencing facts not in evidence - Lowe points to the following guilt phase closing argument and asserts the prosecutor was referencing facts not in evidence and counsel should have raised the matter on direct appeal.

> The Defendant ... by the video taping that you saw, ladies and gentleman, easily have driven to the store, walked into the store like the Detectives did, gone back to the back cooler, pulled out the hamburger pretending you were a customer. Walked up, placed it

> in the microwave, walk up to the cash register, commit the robbery. The robbery goes bad for whatever reason. Donna panics, she **slams the cash drawer**, "**I'm not gonna give you cash**." Defendant, bang, bang, bang, "**Well, then you're dead**." Runs around bangs on the cash register. Remember what Mr. Mike Desai, the manager, said. That if you hit the improper buttons that alarm – the buzzer goes off. That doesn't work, it sets off the buzzer. He panics. He shoots the cash register. Still can't get it to open. He leaves the store without getting a red cent or as he said to Dwayne Blackmon, "An F-ing pack of Newport Cigarettes."

(ROA 1084-85). In addition to the highlighted portions above, which he claims were not supported by facts in evidence, Lowe complains that the prosecutor's entire sequence of events was not supported by the facts and was an emotional, inflammatory description which appellate counsel failed to challenge.

In Rose v. State, 787 So.2d 786 (Fla. 2001), the defendant argued the prosecutor's closing argument was improper as he commented on what he believed the victim might have said to her attacker.[3] This Court held:

[3]At closing, the prosecutor commented: ["So] you know who the last person to see Lisa alive was, as shown by the evidence? James Franklin Rose. And he takes this little eight-year-old girl in his van to somewhere. And don't you know, drawing on your own human experience and common sense, she probably wanted to know where are we going? My mother's at the bowling [alley."] (Record on Appeal, Vol. XIV, at 1410-11). Defense counsel immediately objected and the trial court sustained the objection. Trial counsel did not seek a mistrial. We conclude these comments are not so egregious or fundamental as to warrant reversal. We conclude the prosecutor's remarks were harmless. See James v. State, 695 So. 2d 1229, 1234 (Fla. 1997) ("We conclude that the prosecutor's poorly phrased comment was a

> While we have cautioned against arguments "imagining" what may have happened to a victim, we have held that wide latitude is afforded counsel during arguments. *See Moore v. State*, 701 So. 2d 545, 550 (Fla. 1997). In order to get a new trial on this ground, the comments "must either deprive the defendant of a fair and impartial trial . . . or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." *Spencer*, 645 So. 2d 377, 383.

Rose, 787 So.2d at 797.

In the instant case, the prosecutor drew the inference from the known facts. Given the fact that Lowe had taken a hamburger, approached the counter, and the cash register was unopened in spite of it being hit be several bullets, (ROA 465-67, 594, 615, 626, 867, 934, 981, 991-92) the prosecutor reasonably argued that the victim refused to give Lowe any money and in return Lowe killed her. While we do not have the victim's actual words, or a statement that she slammed the cash drawer, it is clear she did not open the register drawer for Lowe, and if it were open, she shut it. Likewise, while we do not have testimony that Lowe said, "Well, then you're dead", it is clear that such was the result of his encounter with Donna Burnell. The prosecutors comments were based on facts and evidence adduced at trial and he did not state additional facts, not in evidence, which were necessary to prove the elements of

---

harmless error as there is no possibility that it contributed to the outcome in this case."). Rose, 787 So.2d. at 797.

first-degree felony murder.

This Court should find that the prosecutor's comments were logical inferences from the record and proper argument within his forensic talents to effectuate law enforcement. See Spencer v. State, 133 So.2d 729 (Fla. 1961). As such, there was no basis to raise a challenge on direct appeal to this unpreserved comment, and counsel may not be deemed deficient. Kokal v. Dugger, 718 So.2d 138, 143 (Fla. 1998) (recognizing counsel is not deemed ineffective for not raising meritless claim). Moreover, even if the inferences drawn were improper, under Rose, 787 So.2d. at 797, they would not be fundamental error. Again, appellate counsel is not ineffective. Peterka, 890 So.2d at 243-44; Schwab, 814 So. 2d at 414.

Contrary to Lowe's assertions, the comments were not so inflammatory and prejudicial to the point where the jury could not follow the judge's instructions. In both his preliminary and final charges prior to deliberations, the court instructed:

> This case must be decided only upon the evidence that you have heard from the answers of the witnesses and have seen in the form of the exhibits in evidence and these instructions. This case must not be decided for or against anyone because you feel sorry for anyone or are angry at anyone.

(ROA 448, 1128). "Feelings of prejudice, bias or sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way." (ROA 449, 1129). Moreover, prior to

closing arguments the judge told the jury: "And the attorneys are now going to present their final arguments to you. Please remember that what the attorneys say is not evidence."[4] (ROA 1050)(emphasis supplied). Thus, the jury was instructed to rely upon the evidence and not to be swayed by sympathy. Any taint from the comment was removed and is harmless beyond a reasonable doubt, thereby, supporting the State's assertion that counsel was not ineffective for not having raised this issue on appeal.

Allegation of vouching for witness - Lowe's second sub-claim of ineffectiveness arises from counsel's failure to raise the issue of improper vouching for witness, Stephen Leudtke ("Leudtke"). Lowe claims this violated Rule 4-3.4 (e) of the Rules Regulating the Florida Bar. He points only to the prosecutor's comment: "He's (Leudtke) doing the best he can to recollect and tell the truth..." (ROA 1077, P 8). The State disagrees that failure to raise this issue on appeal was ineffective assistance. The comment was neither improper, especially when read in context, nor has Lowe shown prejudice.

The Prosecutor's entire statement provides:

> What does Mr. Leudtke tell you. Mr. Leudtke tells you, "Look I didn't know a murder had been committed there." Mr. Leudtke's up on the stand shaking,

[4]It is presumed jurors followed the court's instructions absent evidence to the contrary. Valle v. State, 474 So.2d 796, 805 (Fla. 1985), vacated on other grounds, 476 U.S. 1102 (1986) (announcing jury presumed to follow judge's instructions).

> nervous. **He's doing the best he can to recollect and tell the truth** and he's saying, "Look, I know it was a black guy. I know he was wearing a tan shirt, maybe it had things on it or not, I didn't notice." "What about the hat?" "Well, I know it was a dark color. I don't know if it had the emblem on it or not." He didn't say it did, he didn't say it didn't. He wasn't paying attention to that because he didn't know a murder had been committed at that time. If he had known there had been a murder he probably would have taken notes or something. He says, "Yeah, I thought the guy had a beard. I thought it was a scraggly beard. I thought the man wore glasses."

(ROA 1078) (emphasis supplied)

Lowe's claim of error is meritless. Initially, the jury would have seen Leudtke sworn in by the Court Clerk, and would have observed his demeanor on the stand. The prosecutor was merely commenting on the witness's nervousness and demeanor, which would have been visible to the jurors, and summarizing Leudtke's account[5] and obvious explanation why he did not memorize the clothing and other attributes of the man he saw leaving the store just after the victim had been shot. Such is proper argument well within the prosecutor's forensic acumen.

Miller v. State, 2006 Fla. LEXIS 486 (Fla. 2006), supports a finding that the comment at issue was proper. In Miller, the following argument was challenged as improperly vouching for the

[5]Leudtke explained that he saw a black man "high stepping" it from the store to his white car, Patricia White's car, and that he was between 5'8" and 5'10" tall weighing between 150 to 165 pounds. The man was wearing a dark cap and light-colored shirt and pants. Entering the store, Leudtke saw Donna Burnell lying on the floor behind the counter. (ROA 551-59, 565).

credibility of a witness:

> You heard from Jimmy Hall. Now I'm not here to tell you that Jimmy Hall is the kind of guy that you want to move in next door to you or that you want to date your daughter. He's a convicted felon, and he admitted that to you. **But he's come here, and he's told you the truth**. He told you he doesn't know anyone involved in this. He doesn't know either the victim or the defendant, but he had the courage to respond to Linda Fullwood's cries for help.

Id., 2006 Fla. LEXIS at 486. This comment was found to be proper as an attorney is allowed to argue reasonable inferences from the evidence and to argue credibility of witnesses or any other relevant issue so long as the argument is based on the evidence. See Craig v. State, 510 So.2d 857, 865 (Fla. 1987) (noting when counsel refers to witness or defendant as being a 'liar,' and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing which can be drawn from the evidence. It was for the jury to decide what evidence and testimony was worthy of belief and the prosecutor was merely submitting his view of the evidence to them for consideration.)

Lowe's citation to Kelly v. State, 842 So.2d 223 (Fla. 1st DCA 2003) offers him no support as it is wholly distinguishable from the instant case. In Kelly the prosecutor, in closing argument, "guaranteed the jury" that the defendant, who tried to make her teenage son responsible for the second fatal shot of

the victim, could not look her son in the eye. The appellate court reasoned: "The prosecutor's statement offering a guarantee that the defendant could not look Levi [defendant's son] in the eye was the equivalent of the prosecutor guaranteeing that the defendant was lying. Accordingly, it directly violates Rule 4-3.4(e)." The matter was reversed after other comments were found to be improper for referring to the defendant in derogatory terms.[6] Here, Lowe's prosecutor neither "guaranteed" nor vouched for Leudtke's credibility. Likewise, he did not denigrate Lowe nor elevate the witness.

Had this unpreserved issue been presented on direct, it would have been rejected as meritless. As such, appellate counsel may not be deemed deficient for not raising the claim. Kokal, 718 So.2d at 143 (recognizing appellate counsel is not

[6]That court found that a very large portion of the prosecutor's remarks appeared calculated to generate hatred and ill will towards the defendant. For example, the prosecutor stated:

"[you heard the defendant] finally admit that she doesn't care about Levi Brown because with her words today, ladies and gentlemen, she put murder and responsibility for murder on her teenage son and, ladies and gentlemen, **that all by itself ought to convince you that she deserves to be convicted of second degree murder**."(emphasis added). The emphasized portion of the quoted comment is an express suggestion that the jury should convict the defendant because of her bad character. It is improper for a prosecutor to refer to the accused in derogatory terms, in such a manner as to place the character of the accused in issue. Pacifico v. State, 642 So. 2d at 1183."

Kelly, 842 So.2d at 227.

deemed ineffective for not raising a meritless claim).

Allegation of improper impeachment of penalty phase witness

Lowe claims the prosecutor's cross-examination of Catherine Brandes ("Brandes"), Lowe's co-worker, was improper in that he questioned her about her knowledge of Lowe's prior conviction. Lowe claims he was denied effective assistance as he did not raise this preserved issue on appeal. The claim is meritless.

Section 90.608, Florida Statutes (1997), provides: "Any party, including the party calling the witness, may attack the credibility of a witness by: ... (2) Showing that the witness is biased ... (4) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified...." As an evidentiary principle, the concept of "opening the door" allows for the admission of otherwise inadmissible testimony to "qualify, explain, or limit" testimony or evidence previously admitted. Tompkins v. State, 502 So.2d 415, 419 (Fla. 1986). The concept of "opening the door" is "based on considerations of fairness and the truth-seeking function of a trial." Bozeman v. State, 698 So.2d 629, 631 (Fla. 4th DCA 1997). This Court has found admissible testimony concerning specific acts committed by the defendant to rebut a witness's testimony describing the defendant as benign or to show motive or premeditation where the defendant has committed prior acts of violence against the same

victim. See Butler v. State, 842 So.2d 817, 826 (Fla. 2003) (finding cross-examination of defense witness regarding prior acts of domestic discord and violence proper where witness testified relationship between defendant and victim had been free of discord); Hildwin v. State, 531 So. 2d 124 (Fla. 1988) (finding the State could introduce rebuttal evidence of defendant's prior specific acts of misconduct and violence to rebut expert testimony that defendant would be a good prisoner).

On direct examination, Brandes testified she worked with Lowe and found him to be “a good person” and “very friendly” (ROA 1204-05). She also indicated he was a “reliable employee” (ROA 1205). On cross-examination, Brandes’ assessment of Lowe in these areas was tested, resulting in her acknowledging she was only talking about him as a good person because of her association with him as an employee, not based on the crime for which he was charged or his previous robbery. She also had no association with Lowe other than at work. (ROA 1209-10). Because the defense opened the door to Lowe’s character, the prosecutor properly questioned the extent of Brandes’ association with Lowe and her knowledge of his criminal history so the jury could properly assess and weigh Brades’ opinion as to Lowe being a “good person.”

Moreover, at the time Brandes testified, the jury was aware of Lowe’s previous robbery conviction and was well-acquainted

with the facts of the case, particularly the circumstances of the victim's death. The mere fact of reminding the jury of the prior conviction during the cross-examination of Brandes was harmless as defined by State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). Consequently, Lowe is unable to show prejudice arising from appellate counsel's performance.

Allegation that the prosecutor misrepresented the facts in his penalty phase closing - Lowe complains the State, in its closing argument, misrepresented the facts surrounding Lowe's prior robbery conviction and that appellate counsel should have presented the matter on appeal. He points to the following comment as error: "You heard the testimony from Deputy Scully....that the sharp object could have, in fact, been a five inch long piece of plastic. Maybe there was a knife that was thrown out of the window during the chase that night." (ROA 1274). Not only is Lowe's claim pled in a conclusory fashion, in that he does not identify how he has been prejudiced as required under Strickland, but the matter was not objected to at trial, rendering unpreserved for appellate counsel to raise on direct appeal. Also, the comment was a proper discussion of the evidence and/or inference there from, thus, neither deficiency nor prejudice has been shown and relief must be denied.

Lowe's claims are conclusory and insufficiently pled as he makes no argument with respect to the prejudice he must show,

nor does he argue that the unpreserved matter rose to the level of fundamental error. A summary or conclusory allegation is insufficient to allow the trial court to examine the specific allegations against the record." Ragsdale, 720 So. 2d 203, 207 (Fla. 1998) Likewise, such a conclusory allegation is not sufficient for appellate purposes. Patton, 878 So.2d at 380.

As noted above, when an issue is not preserved for appellate review, and it does not rise to the level of fundamental error, appellate counsel cannot be deemed ineffective. Likewise where the underlying claim is without merit, counsel in not ineffective for failing to raise meritless claims. Schwab, 814 So.2d at 414; Kokal, 718 So.2d 138, 143 (Fla. 1998); Groover, 656 So.2d at 425; Hildwin, 654 So.2d at 111; Breedlove, 595 So.2d at 11.

Contrary to Lowe's assertions, the prosecutor's comments were neither highly inflammatory nor prejudicial. They did not enhance the prior violent felony aggravator with additional facts not in evidence. In actuality, the prosecutor's comments were in complete concert with the testimony offered by the victim and the investigating officer at the penalty phase hearing, or drew reasonable inferences from the evidence.

Lowe was convicted of a robbery in 1987. At the penalty phase, the robbery victim, Thomas Crosby ("Crosby"), and the investigating officer, Michael Scully ("Scully"), testified.

Crosby testified that Lowe had secreted himself in his van and remained concealed during the trip home. Arriving at Crosby's house, Lowe **placed a knife or some other sharp object to his victim's neck, told him "not to turn around" - "I don't want to hurt you", demanded money, and took Crosby's van** (ROA 1155-57)[7] Scully testified he received a call for a van and, upon seeing the stolen vehicle, a chase ensued ending in Lowe crashing the van into a chain link fence (ROA 1162, 1165). During Lowe's arrest, Scully recovered a small piece of plastic approximately five inches long with a sharp edge. He was unsure where he

[7]Again, Lowe has not put the challenged comment in its full context. The State's argument below was:

"Now he placed to the neck of Mr. Crosby what Mr. Crosby believed a knife or some other sharp object. You heard the testimony from Deputy Scully of the Brevard Sheriff's Office that that sharp object could have, in fact, been a five inch long piece of plastic. Maybe there was knife that was thrown out to the window during the chase that night. But what is important, ladies and gentlemen, is that Mr. Crosby as he sat behind the steering wheel of his van in his own driveway that night in the dark felt and believed that he had a knife at his neck as result of this Defendant holding that object to his neck. Threatening him as he could feel it against his neck, "Give me your wallet, give me the van."

(ROA 1274). Later the prosecutor stated: "In 1987, the Defendant committed a robbery of Mr. Crosby. Either using a deadly weapon or pretending he had a deadly weapon. The fact was that Mr. Crosby believed he had a knife or sharp object at his throat and he gave him the wallet and van in order to save his life." (ROA 1278) "And in this case it wasn't a knife or a sharp instrument." (ROA 1279). Together, the arguments show the State was referencing facts in evidence or reasonable inferences from those facts.

found the object and since then misplaced it (ROA 1166) These testimonies allowed the prosecutor to discuss the knife or other sharp object which were facts in evidence, and to infer that the knife may have been discarded during the chase of the van. Such arguments are within the prosecutor's forensic ability to effectuate law enforcement. See Breedlove, 413 So.2d at 8; Spencer, 133 So.2d at 729.

Moreover, the court instructed the jury that its sentencing recommendation had to be based on the facts heard at trial (ROA 1306). It is presumed jurors followed the court's instructions absent some evidence to the contrary, Valle, 474 So.2d at 805, thus, it is presumed the jury relied upon the facts it heard from the witness stand and not from counsel. Clearly, reference to a knife rested on the victim's testimony, thus came from facts in evidence.[8] To the extent the State was drawing an inference regarding the knife being thrown from the car, and that such was improper, it is found harmless, and would

[8]At sentencing, as to the aggravating circumstances, the court found as follows: "Number one, the Defendant was previously convicted of a felony involving the use of threat of violence to the person. The evidence established the Defendant previously committed and was convicted of a robbery in Brevard County. The fact[s] show the Defendant entered the victim's van while it was vacant and hid in the van until the victim returned. The Defendant remained hidden in the van as the victim drove eight miles to the victims home. At that point the Defendant put a weapon to the throat of the victim and demanded money." (T 1319). This aggravator was upheld in light of a direct appeal challenge. Lowe, 650 So.2d at 976-77.

have been found so if the matter were raised on appeal. Hence, there is neither deficiency nor prejudice.

Allegation that prejudice resulted from appellate counsel's representation - Lowe makes a prejudice argument, not based on the individual comments/arguments, but upon the alleged cumulative effect of them. (P 13) Also, he claims his conviction and sentence violated due process under the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Lowe's prejudice argument, either singularly or cumulatively, is insufficiently pled and lacks merit. Lowe has not specifically alleged how, in light of the evidence against him, he was prejudiced to the point where fundamental error occurred necessitating the presentation of a direct appeal issue. A summary, conclusory claim is insufficient to allow the court to examine the specific allegations.

The State maintains the individual underlying claims are procedurally barred, legally insufficient, or meritless, *a fortiori, Lowe* has suffered no cumulative prejudicial effect from appellate counsel's representation. Cf. Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984) (opining "[i]n spite of Zeigler's novel, though not convincing, argument that all nineteen points should be viewed as a pattern which could not have been seen until after the trial, we hold that all but two

of the points raised either were or could have been, presented at trial or on direct appeal. Therefore, they are not cognizable under rule 3.850."), sentence vacated on other grounds, 524 So.2d 419 (Fla. 1988); Wike v. State, 813 So.2d 12, 22 (Fla 2002); Rose v. State, 774 So.2d 629, 635 n. 10 (Fla. 2000); Downs v. State, 740 So. 2d 506, 509 (Fla. 1999) (finding where allegations of individual error are found to be without merit, a cumulative error argument must likewise fall); Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998).

Further, the cases cited by Lowe are distinguishable from the alleged misconduct referred to above. Unlike the prosecutors in the cases cited by Lowe, the instant prosecutor, discussed facts in evidence or drew reasonable inferences from the record facts. The prosecutor did not make personal attacks upon the defendant or his defense, he did not give his personal opinions or misrepresent the facts, he did not withhold relevant facts, he did not insinuate a racial basis for the crime when there was none, and did not suggest the defendant should be executed based on future dangerousness. See Gore v. State, 719 So.2d 1202 (Fla. 1998) (reversed for new trial due to cumulative effect of prosecutors closing where he improperly asked jury to determine whether Gore was lying as the sole test for determining guilt, engaged in vituperative or pejorative characterizations of defendant or witness, expressed personal

belief about defendant's guilt, and improperly admitted prejudicial collateral crimes evidence); Nowitzke v. State, 572 So.2d 1346 (Fla. 1990)(defendant denied fair trial which was permeated by prosecutorial misconduct - prosecutor stated personal opinions, deliberately mis-led witnesses, insulted witness by casting aspersions on home city, and ignored court's rulings by persisting in irrelevant lines of questioning after sustained objections, and led jury to believe that if defendant were found not guilty by reason of insanity, he would be out on the streets within eight months); Garcia v. State, 622 So.2d 1325 (Fla. 1993)(remanded for new sentencing based on withholding Brady material coupled with improper arguments obfuscating relevant facts); Robinson v. State, 520 So.2d 1, 6-77 (Fla. 1988) (finding racial comments was a deliberate attempt to insinuate defendant had habit of preying on white women and could easily have aroused jury's bias and prejudice); Teffeteller v. State, 439 So.2d 840, 845 (Fla. 1983) (finding prosecutor's urging of death on grounds defendant may be paroled and would kill again required new sentencing).

Instead of Lowe's cases, Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985) is instructive. Even though the prosecutor in Bertolotti commented on the defendant's right to remain silent, committed a "Golden Rule" violation by inviting the jury to imagine the victim's final pain, terror, and defenselessness,

and urged the jury to send a message to the community as a whole, a new trial was not required; fundamental error was not found. The Bertolloti prosecutor's comments were much more egregious than those by the instant prosecutor. On this ground alone, relief should be denied.

Lowe cites Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985) as a comparative case. He is mistaken. In Wilson, this Court granted habeas relief where the appellate attorney raised only five issues on appeal; did not raise sufficiency of the evidence regarding premeditation where such issue was apparent from the 'cold record'; failed to properly brief an argument on proportionality after being requested to by this Court; and, demonstrated a lack preparation and zeal on behalf of his client's cause at oral argument.[9] Id., at 1164. Here, counsel raised seventeen guilt and penalty phase issues on direct appeal. There is no indication in this Court's opinion that counsel was unprepared or lacked zeal in advocating the appeal.

Likewise, Lowe's reliance on Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986) is misplaced. In Fitzpatrick, 490 So.2d at

[9]In Wilson, 474 So.2d at 1164, the following was cited:

THE COURT: Well, let me ask a question. Do you feel that death is the appropriate punishment if he is guilty.

CONNER: It's, it's quite possible, yes sir. Uh, there was sufficient evidence in this case for the jury to find premeditation and they did find premeditation.

940, appellate counsel failed to raise on appeal a specific act which this Court had found to be reversible error in Maggard v. State, 399 So.2d 973 (Fla. 1981). Unlike the prosecution in Fitzpatrick, the State did not resort to non-statutory aggravation which had been declared reversible error previously.

Further, Lowe contends that if counsel had raised these issues on appeal, they would have buttressed Points IX and XI on direct appeal. He argues their cumulative would have entitled him to relief. However, he does not elucidate this point any further. A defendant may not reference a pleading from another case and expect to obtain review. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal"- notation to issues without elucidation is insufficient and issue will be deemed waived); Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990).

Moreover, as noted above, the claims raised on appeal were unpreserved, with the exception of one sub-claim. In fact, on the preserved issue in Point IX and the one in Pont XI, no error was found. Lowe, 650 So.2d at 975, n. 5 and 977, n.9. Here, the challenged comments also were unpreserved, with the exception of one. As analyzed above, there was no fundamental error shown. Lowes' argument that more allegations of unpreserved errors would enhance his previously rejected claims is unsupportable.

This Court should find appellate counsel's representation was neither deficient nor prejudicial.

Allegations of appellate counsel's ineffectiveness regarding aggravating factors - Lowe claims counsel deficiently failed to challenge on direct appeal the trial court's jury instructions and consideration of: (1) prior violent felony; (2) felony murder; (3) cold, calculated, and premeditated ("CCP"); and (4) heinous, atrocious or cruel ("HAC") on the grounds they were unconstitutional as vague and over broad. The claims are either procedurally barred or lack merit.

Here, the jury was instructed on the four aggravators (ROA 1309). The court's independent analysis apparently rejected HAC and CCP resulting in a sentence based on the prior violent felony and felony murder aggravators (ROA 1319-20).

Challenge to the prior violent felony and felony murder aggravators - Lowe's claims regarding the jury instructions and the trial court's application of the prior violent felony and felony murder aggravating circumstances lacks merit. Appellate counsel is not deemed ineffective for not raising meritless claims. Kokal, 718 So.2d at 143; Groover, 656 So.2d at 425; Hildwin, 654 So.2d at 111; Breedlove, 595 So.2d at 11. In Mills v. State, 476 So.2d 172, 178 (1985) this Court rejected the argument that felony-murder was an automatic aggravator, wherein this Court concluded that the legislature had reasonably

determined that a first-degree murder committed in the course of another dangerous felony was an aggravated capital felony. See Blanco v. State, 706 So.2d 7, 11 (Fla. 1997) (containing citation to numerous cases in which this Court has upheld and applied the murder in the course of a felony aggravator); Banks v. State, 700 So.2d 363, 367 (Fla. 1997) (finding felony murder aggravator is not an automatic aggravator). This Court has also rejected the claim that the prior violent felony aggravator is unconstitutionally vague. Hudson v. State, 708 So.2d 256, 261 (Fla. 1998). The State will individually address the CCP and HAC jury instructions.

Challenge to CCP aggravator - Lowe contends the CCP instruction given in his case was vague, overbroad, and invalid. Preliminarily, the State suggests that Lowe has mis-stated the record when he contends: "Pre-trial, defense counsel had requested the court to define both the HAC and CCP aggravators in its jury instructions (R-12) pursuant to Jackson v. State, 648 So.2d 85, 90 (Fla. 1994)". (P 19). There is mo mention of Jackson in defense counsel's comments; in fact, the case was not decided until well after Lowe had been convicted and sentenced. Moreover, counsel did not suggest any specific instruction to be given by the trial court.(ROA 12)

In direct appeal Point XII, Lowe claimed that both CCP and HAC aggravators should not have been presented to the jury for

consideration. This Court held this issue to be non-meritorious not warranting further discussion. Lowe, 650 So.2d at 977, n.9. As such, Lowe is not entitled to a second review of the claim, nor may he use a claim of ineffective assistance to overcome the procedural bar. See Porter, 840 So.2d at 984; Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995); Rutherford, 774 So.2d at, 645; Blanco, 507 So.2d at 1384.

Furthermore, on direct appeal, this Court held that the CCP instruction was sufficient for jury consideration, any error in allowing the jury to consider the matter is harmless. This Court has held that it is not error to instruct a jury on a factor even if it is not found by the trial court, and appellate counsel cannot be deemed ineffective for failing to raise the claim. Pace v. State , 854 So.2d 167, 181 (Fla. 2003) (reasoning "fact that the state did not prove this aggravator to the trial court's satisfaction does not require a conclusion that there was insufficient evidence . . . to allow the jury to consider the factor"); Stewart v. State, 558 So.2d 416 (Fla. 1990)(held even though court did not make finding of CCP, court is required to instruct on all aggravating and mitigating circumstances "for which evidence has been presented").

In Davis v. State, 915 So.2d 95 (Fla. 2005), there was a challenge to a pre-Jackson CCP jury instruction. Finding the issue unpreserved, this Court went on to hold:

> In Jackson, this Court found the CCP instruction to be unconstitutionally vague but did not find that this was fundamental error. See 648 So. 2d at 90. Moreover, in Davis's direct appeal we found that the facts supported the finding of cold, calculated, and premeditated. See Davis, 586 So. 2d at 1040. Therefore, we conclude that there is no reasonable possibility that the constitutionally infirm CCP instruction given at Davis's trial contributed to the sentence.

Davis, 915 So.2d at 98. (emphasis added). Lowe cites Kearse v. State, 662 So.2d 677 (Fla. 1995) for the proposition that even though the court did not find CCP, that finding did not change the fact that the jury instruction was unconstitutionally vague and should not have been considered by the jury because, citing Espinosa v. Florida, 505 U.S. 1079 (1992) "if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." However, as this Court implicitly held, the CCP aggravator was valid as it had been sufficiently proven for jury consideration. Because the instruction was given to the jury, Lowe has failed to show where counsel's performance was either deficient or prejudicial.

Challenge to HAC aggravator - Lowe contends the HAC instruction is facially unconstitutional as vague and overbroad. He maintains the instruction does not properly instruct the jury on specific intent. These challenges are without merit.

The State submits Lowe's counsel did not preserve the issue

for appellate review, thus, appellate counsel may not been declared ineffective for having failed to raise the matter on direct appeal. Lowe suggests that the jury required further instruction on the "specific intent" element of wicked, evil, atrocious or cruel manner. This is the first time Lowe raises this issue. In both his pre-trial motions and argument on the motion, Lowe maintained the HAC aggravator was unconstitutional only for vagueness as to its terms. (ROA 13, 1537). Appellate counsel cannot be ineffective for failing to present claims which were not preserved due to trial counsel's failure to object. See Johnson, 695 So.2d at 266 (noting "[a}ppellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object."); Ferguson, 632 So.2d at 58 (same).

Lowe has not presented to this Court any case which has found the HAC jury instruction unconstitutional for omitting the element of specific intent. Lowe's reliance on Omelus v. State, 584 So.2d 563, 566 and Stein v. State, 632 So.2d 1361, 1367 (Fla. 1994) are mis-placed. In both cases, unlike the instant matter,[10] this Court found there was **insufficient** evidence to support the HAC aggravator. Moreover, unlike the case at bar, Omelus involved a contract killing.

[10]Lowe, 650 So.2d at 977.

The jury instruction, specifically repudiated in Espinoza v. State, 505 U.S. 1079 (1992), was not given here.[11] The court in the instant case instructed the jury as follows:

> The factor of wicked, evil, atrocious or cruel is proper only in torturous murders those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

(ROA 1305). This instruction meets requirements announced in Stewart v. State, 558 So.2d 416 (Fla. 1990)(held even though court did not make finding of CCP, trial court is required to instruct on all aggravating and mitigating circumstances "for which evidence has been presented").

The State submits the above instruction was proper in light of Espinoza and subsequent Florida case law. In Hall v. State, 614 So.2d 473, this Court held the *post*-Espinoza jury instruction given in the case sufficiently defined the terms to save both the instruction and the aggravator from vagueness challenges.[12] Hall, 614 So.2d at 478. See Damren v. State, 830

[11]The HAC instruction in Espinoza characterized this aggravator as "especially wicked, evil, atrocious or cruel" without defining any of those terms. Here, it is noteworthy that the trial court was compelled to further define the terms of “wicked, evil, atrocious or cruel”, *pre*-Espinoza.

[12]Six, the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means that designed to inflict a high degree of pain with utter indifference to, or

So.2d 512, 520 (Fla. 2003) (appellate counsel held not ineffective for not challenging HAC instruction where terms were defined sufficiently as in Hall); Randolph v. State, 853 So.2d 1051, 1064 (Fla. 2003)(where instruction given was substantially similar to the standard instruction approved in Hall even though judge did not state at end of instruction the "additional acts" language 'the kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim').

However, even if it was error to omit this language from the instruction, the error was harmless beyond a reasonable doubt. See Randolph v. State, 853 So.2d 1051 (Fla, 2003; State v. Breedlove, 655 So.2d 74 (Fla. 1995)(held bad instruction given ten years prior to Espinoza was harmless error where evidence established fact that murder committed in heinous, atrocious and cruel manner); Dougan v. Singletary, 644 So. 2d 484, 486 (Fla. 1994) (concluding jury could not have been misled by inadequate instruction because crime was especially HAC under any standard); Davis v. State, 620 So.2d 152, 152-53 (Fla. 1993)

---

even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim. Hall, 650 So.2d at 478.

(finding instructional error harmless where "facts are so indicative of the aggravating factor 'heinous, atrocious, or cruel' that we are convinced upon review that there is no reasonable possibility that the faulty instruction contributed to the sentence").

Sufficiency of the evidence challenge - Lowe asserts appellate counsel was ineffective for failing to raise the issue of the sufficiency of the evidence. Even though counsel did not raise a sufficiency of the evidence issue, counsel's performance was neither deficient nor prejudicial, There was no deficiency because the evidence is sufficient to support the verdict. No prejudice arose from counsel's omission, as this Court, as it identifies its duty, independently reviews all capital cases for sufficiency of the evidence irrespective of whether the parties raise the issue; and in this case, the conviction was affirmed. See, Hardwick v. Wainwright, 496 So.2d 796, 798 (Fla. 1986) (rejecting claim of ineffectiveness of appellate counsel for failing to raise the issue of the sufficiency of the evidence because the Court independently reviews each conviction and sentence to ensure they are supported by sufficient evidence).[13]

[13]See Taylor v. State, 28 Fla. L. Weekly S439 (Fla. June 5, 2003)(explaining that while defendant did not challenge sufficiency of the evidence, this Court has obligation to independently review record for sufficiency of evidence); Mora v. State, 814 So.2d 322, 331 (Fla. 2002)(explaining that even if Mora had not raised issue, we would have still reviewed record

Appellate counsel is not ineffective for failing to raise an insufficiency issue that has no merit. Suarez v. Dugger, 527 So.2d 190, 193(Fla. 1988) (rejecting an ineffective assistance of appellate counsel for failing to raise the denial of his motion for judgment of acquittal on direct appeal because the evidence was legally sufficient). Here, there is sufficient evidence of Lowe's guilt of both first-degree murder and attempted armed robbery. As this Court found on direct appeal:

> At trial, the State presented witnesses who testified that, among other things, Lowe's fingerprint had been found at the scene of the crime, his car was seen leaving the parking lot of the Nu-Pack immediately after the shooting, his gun had been used in the shooting, his time card showed that he was clocked-out from his place of employment at the time of the murder, and Lowe had confessed to a close friend on the day of the shooting. The State also presented, over defense objection, the statement Lowe gave to the police on the day of his arrest.[14]

Lowe, 650 So.2d at 971. The trial testimony, as this court necessarily found based on its independent review, Sexton, 775 So.2d at 933, established Lowe was in possession of the murder

---

under our independent duty to ensure sufficiency of the evidence); Sexton v. State, 775 So.2d 923, 933 (Fla. 2000)(noting that although parties did not specifically raise issue of whether there was sufficient evidence, "it is this Court's independent obligation to review the record for sufficiency of evidence"); Brown v. State, 721 So. 2d 274, 277 (Fla. 1998)(citing § 921.141(4), Fla. Stat.(1997)).

[14]Lowe gave the investigators a statement in which he confessed he was the driver of the getaway car involved in the crime but denied any complicity in the murder, which he blamed on one of two alleged accomplices. Lowe, 650 So.2d 969, 972.

weapon and was the sole perpetrator of the robbery/murder at Nu-Pack store.[15] Based on the above and this Court prior affirmance, Lowe, 650 So.2d at 969, Lowe's counsel was not deficient for failing to raise a meritless sufficiency of the evidence claim. Likewise, the affirmance precludes a finding of prejudice. Hardwick, 496 So.2d at 798. Relief must be denied.

---

[15]**Steven Leudtke**, see footnote 5 (ROA 548, 550, 552, 554-58, 571). **Mary Burke**, Gator Lumber office manager, reported Lowe punched out of work at 9:58 a.m. and punched back in at 10:34 a.m. (ROA 665-67). **Sergeant Green** averred that the 911 call was made at 10:13 a.m. by Leudtke. Burnell was shot with a .32 caliber gun. He collected the murder weapon from Dwayne Blackmon (ROA 819, 822-24, 830-31). **Ronald Sinclare**, found a cold 7-Up soda can and a hamburger wrapper in the microwave at the crime scene. The last sale had been at 10:07 a.m. It took 22 minutes to drive from Gator Lumber to the Nu-Pack, to Lowe's home, and back to Gator Lumber. (ROA 450, 452, 464-66, 469, 490, 503-04, 512-15). **Gary Rathman** opined that bullets taken from the victim's body came from Lowe's gun (ROA 969-70, 976-77). **Deborah Fisher** reported Lowe's fingerprints were on the hamburger wrapper recovered from the scene (ROA 991-92). **Patricia White** ("White") was Lowe's girlfriend. She owned a white Mercury Topaz which Lowe drove to work on July 3, 1990. That day, Lowe picked up White between 10:00 a.m. and 11:00 a.m. and she took him back to his work. After dropping Lowe off, White went to the Blackmon residence where she met with Victoria Blackmon ("Vickie") and saw Dwayne Blackmon ("Blackmon"). White knew Lowe had a .32 caliber revolver which she identified. (ROA 852, 854-61, 863, 876). **Victoria Blackmon** was married to Dwayne Blackmon. On July 3, 1990, White stopped by the Blackmon home and awakened Vickie and Blackmon who were asleep together in bed. Shortly thereafter, when driving in White's white Topaz, Vickie and White were stopped by an officer who was checking all white cars because of a recent murder. After being released by the police, White and Vickie arrived at Gator Lumber near 11:00 a.m. where they met Lowe. (ROA 892, 895-98, 909-13). **Dwayne Blackmon** purchased a .32 caliber gun for Lowe's June 1990 birthday. On July 3, 1990, during the time of the robbery/murder, Blackmon was home sick in bed. Vickie was with him. (ROA 918-19, 921, 923-24, 931-32, 943-44).

ISSUE II

FLORIDA CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL (restated)

Lowe contends that Florida's capital sentencing procedure violates due process and the Eighth Amendment. This claim has been waived as Lowe gives an insufficient legal argument to address the matter on appeal. Duest, 555 So.2d at 852 Moreover, even if pled sufficiently, the matter is procedurally barred as challenges to section 921.141, Florida Statutes could have been raised on direct appeal, and habeas petitions are not to be used to obtain a second appeal. Blanco, 507 So.2d at 1384 (reconfirming that habeas corpus may not be used to obtain a second review, nor may an ineffectiveness claim be used to circumvent that rule). Moreover, Lowe has not presented any new law[16] which would call into question this Court's, as well as the United States Supreme Court's, well settled determination that Florida capital sentencing meets constitutional muster.

In presenting this claim, Lowe points to trial counsel's pre-trial motions regarding section 921.141, as well as various motions "challenging the constitutionality of enumerated aggravating factors: (5)i,d,h and (5)a,b,c,e,f,g,j,k. (ROA.4, 9-13, 1471-1512, 1537-1565)." Lowe's incorporation by reference

[16]Questions of law, on direct appeal, are reviewed *de novo*. Elder v. Holloway, 510 U.S. 510, 516 (1994).

of the issue he claims to have presented in a motion below, without further clarification or argument in his habeas corpus petition is insufficient to present the matter to this Court and the issue should be deemed unpreserved and waived. See Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.". See Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990).

Moreover, the matter is procedurally barred. A direct challenge to Florida's capital sentencing, without any argument that there has been a change in law of constitutional dimension which has been held to apply retroactively, may not be raised in a habeas petition. A petition for "habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in rule 3.850 proceedings" White v. Dugger, 511 So.2d 554, 555 (Fla. 1987). If, as Lowe suggests, the matter was preserved by trial counsel, it could have been raised on direct appeal, and is now procedurally barred here.

In any event this Court has repeatedly upheld 921.141 as

constitutional. Knight v. State, 2005 Fla. LEXIS 2124 (Fla. 2005); Provenzano v. State, 739 So. 2d 1150 (Fla. 1999); Jones v. State, 748 So. 2d 1012 (Fla 1999). Lowe has challenged specific sections and aspects of section 921.141.[17] (P 26), This Court has upheld the constitutionality of all of Lowe's instant challenges. See Chandler v. State, 534 So. 2d 701 (Fla. 1988) (holding admission of hearsay in the penalty phase to be constitutional); Barnhill v. State, 834 So. 2d 836, 844 (Fla. 2002) (held juror is only unqualified based on his views of capital punishment, if he expresses an unyielding conviction and rigidity toward the death penalty). This Court has repeatedly found the murder in the course of a felony aggravator to be constitutional. See Arbaleaz v. State, 898 So.2d 25, 46, 47(Fla. 2005); Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997) (containing citation to numerous cases in which this Court has upheld and applied the murder in the course of a felony aggravator). Also rejected by this Court were the challenges to the felony murder aggravator based on equal protection, due process, and cruel and unusual punishment. See Clark v. State, 443 So.2d 973, 978 (Fla. 1983); Menendez v. State, 419 So.2d 312, 314-15 (Fla. 1982).

[17]Section 921.141, Fla. Stat., is unconstitutional in that it allows hearsay during penalty phase; allows exclusion of jurors for their views on capital punishment; and, the death penalty may be imposed under the felony murder without finding that the Defendant intentionally caused the death of the victim.

ISSUE III

ROPER[18] DOES NOT PRECLUDE COURT FROM USEING CONVICTIONS LOWE OBTAINED BEFORE HE WAS EIGHTEEN YEARS OF AGE TO SUPPORT THE PRIOR VIOLENT FELONY AGGRAVATOR (restated)

Citing Roper v. Simmons, Lowe asserts it was improper for the trial court to find and apply the prior violent felony aggravator to his case, thus, rendering his sentence unconstitutional. He claims that the convictions upon which the court relied were committed when he was seventeen years old and that Roper precludes "reliance upon criminal acts committed before the age of eighteen from serving as a basis for the imposition of a sentence of death." (P 28). The State disagrees as Roper has no impact on Lowe's situation. This Court should find that Lowe's attempt to expand Roper is meritless and deny habeas corpus relief.

Of import to this issue, Lowe was **twenty (20) years old** on July 3, 1990, the day he committed the first-degree murder in this case, and although offered as mitigation, the age factor was rejected. Lowe, 650 So.2d at 976. However, on December 21, 1987, he was under eighteen (18) years of age when he committed which was used to support the prior violent felony aggravator.[19]

[18]Roper v. Simmons, 543 U.S. 551 (2005).

[19]In its sentencing Order, the trial court found the prior violent felony aggravator proven beyond a reasonable doubt.

In Roper, the United States Supreme Court determined that it was a violation of the Eighth Amendment to execute a defendant who had committed first-degree murder before he turned eighteen years old. Roper, 543 U.S. at 569-579 (determining "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed"). Lowe attempts to expand this bright line ruling to preclude the State from using a conviction for a crime committed by the defendant before his eighteenth birthday to support an aggravating factor in sentencing the defendant to death. He points to no authority to expand Roper in this fashion. In fact, even in Roper, the Supreme Court implicitly recognized juvenile activities may be taken into account for determining later adult classification when it noted a diagnosis of antisocial personality disorder could not be made until the person had reached the age of majority. Id. at 573-74.

> The Defendant was previously convicted...of a felony involving the use of threat or violence to the person. The evidence established that the Defendant previously committed and was convicted of a Robbery in Brevard County. The facts showed that the Defendant remained hidden in the van as the victim drove eight miles to the victim's home. At that point the Defendant put a weapon to the throat of the victim and demanded money. The Defendant then let the victim out and fled in the victim's van. This crime was committed on December 21, 1987. The Defendant was sentenced to serve 4 years incarceration.

(ROA 1852)

Here, we have a defendant who continued his violent behavior even after he became an adult. It is the recidivist behavior that the prior violent felony aggravator considers. See Witte v. United States, 515 U.S. 389, 400-401 (U.S. 1995) (noting consideration of prior convictions in sentencing "is not to be viewed as either a new jeopardy or additional penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one"); Moore v. Missouri, 159 U.S. 673, 677 (1895) (stating under a recidivist statute, "the accused is not again punished for the first offense" because " the 'punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself'").

The State submits that the expansion of Roper suggested by Lowe has been rejected in Moreno v. Dretke, 2005 U.S. Dist. Lexis 5165 (W.D. Tex., March 17, 2005) and Hill v. State, 2006 Fla. Lexis 8 (Fla.), stay denied, Hill v. Florida, 2006 U.S. Lexis 1072 (U.S. Jan. 24, 2006), cert. denied, 2006 U.S. Lexis 1909 (U.S. Feb. 27, 2006). In Moreno, the petitioner argued that while he committed the murder after he was eighteen years of age, the *mens rea* to commit the murder was formed when he was seventeen, therefore subject to the holding in Roper. The Texas Federal District Court refused to extend Roper's holding noting that the United States Supreme Court had drawn a bright line in

ruling that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed." Roper, 125 S.Ct. 1183, 1200 (2005). The Court further ruled that "[d]espite the fact that Petitioner may have engaged in certain preparatory acts while he was seventeen years of age, the undisputed fact remains that that he committed the murder when he was eighteen years of age...and would eviscerate the bright line drawn by the Supreme Court." Moreno, 2005 U.S. Dist. LEXIS 5165.

Likewise, in Hill, the attempt to expand the Roper decision to a consideration of the defendant's mental age at the crime was denied. This Court refused to apply Roper to Hill; it declined to considered anything other than the defendant's chronological age at the time of the first-degree murder. In so ruling, this Court reasoned:

> *Roper* does not apply to Hill. Hill was twenty-three years old when he committed the crimes at issue. ***Roper* only prohibits the execution of those defendants whose chronological age is below eighteen**. *See* 125 S. Ct. at 1197-98 (recognizing that the rule prohibiting the death penalty for juveniles was necessary even though the mental and emotional differences separating juveniles from adults may "not disappear when an individual turns 18"), *see also Rodriguez v. State*, 2005 Fla. LEXIS 1169, Nos. SC00-99 & SC01-2864, slip op. at 16-19 (Fla. May 26, 2005) (affirming the trial court's denial of a motion for postconviction relief even though a mental health expert testified that the defendant's mental age was seven years).

Hill, 2006 Fla. LEXIS at 8 (emphasis supplied). Read together,

Roper, Witte, Moore, Moreno, and Hill establish that the death penalty may not be imposed on a person who commits the first-degree murder before his eighteenth birthday, but the defendant's juvenile and adult criminal activities, where material to an aggravator or mitigator, are relevant sentencing considerations. Roper does not preclude use of a defendant's juvenile activities to assess the appropriate penalty for a first-degree murder committed as an adult.

Also argued here is that the prosecutor turned Lowe's age into a non-statutory aggravator. (P 29). Use of a non-statutory aggravator is a matter, with or without Roper, which could have been raised on appeal. It is not before this Court properly and should be rejected. Blanco, 507 So.2d at 1384 (confirming "habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial. Moreover, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal.").

Furthermore, the prosecutor was not relying upon a non-statutory aggravator when commenting about Lowe's age and the basis for rejecting the age mitigator. The prosecutor stated:

> The Defense will argue, ladies and gentlemen, his tender age of twenty is something that should be considered by you in mitigation. Something that you

> should consider as appropriate for a life sentence. I submit just the opposite. A person that robs and puts an object to a man's throat and threatens to kill at seventeen and then who robs as twenty with a gun and kills in the manner that he killed in is not deserving in a civilized society to live. That is a man that has become more dangerous, more evil, more wicked by his daily acts.

(ROA 1280). When read in context, the prosecutor was arguing against the age mitigator and noting that Lowe merely became more violent as he aged. Based on Lowe's violent history, his age was not mitigating. Rather than this being his first violent act, this was a progression from a robbery with violence to a robbery where the victim was killed. Clearly this was not an argument for non-statutory aggravation, rather it was one asking the jury to discount the age mitigator based on Lowe's criminal actions even after he was punished for the first robbery. Lowe is not entitled to habeas relief.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court deny Petitioner habeas corpus relief.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

LESLIE T. CAMPBELL
Assistant Attorney General
Florida Bar No.: 0066631
1515 N. Flagler Dr 9th Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Rachel Day, Esq. and Caroline Kravath, Esq., Office of the Capital Collateral Regional Counsel - South, 101 N.E. 3rd Ave., Suite 400, Fort Lauderdale, FL 33301 on April 3, 2006.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on April 3, 2006.

LESLIE T. CAMPBELL