IN THE SUPREME COURT OF FLORIDA

COREY SMITH,

Appellant,

v.

Case No. SC05-703
Lower Tribunal No. F00040026A

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, FLORIDA

AMENDED ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Corey Smith[1] was charged, along with seven other individuals, under a seventeen count indictment, which alleged a number of drug-related crimes committed between 1994 and 1999 (V1/70-94). He was alleged to be the leader of the "John Doe" organization, which operated as a criminal enterprise, distributing marijuana and cocaine in Miami-Dade County. Smith was named in fourteen of the counts, including the first-degree murders of Leon Hadley (Count 6), Cynthia Brown (Count 10), and Jackie Pope (Count 12), along with the conspiracy to commit each of these murders (Counts 5, 9, and 11, respectively). He was also charged with the first-degree murder of Melvin Lipscomb (Count 7), conspiracy to commit the first-degree murder of Anthony Fail (Count 15), the first-degree murder of Angel Wilson (Count 16), and the second-degree murder with a firearm of Marlon Beneby (Count 13).

Numerous witnesses testified that Corey Smith was the leader of John Doe, an organization that conspired to sell cocaine and marijuana in a number of "drug holes" located in the Liberty City area of Miami (V37/1831; V42/2532, 2586; V43/2611;

[1] Smith is also known as "Bubba." Many of the witnesses, victims, John Doe members, and other individuals referenced in the testimony presented below were known by nicknames. In this brief, individuals will be referenced by their given names for purposes of consistency; the nicknames are shown on a list attached as an exhibit for the Court's convenience (Ex. A).

V44/1289; V48/3283; V51/3900; V52/3772,3889; V57/4300; V58/4307-08, 4310-12). At its peak, John Doe operated seven holes, the top two of which could bring in up to $8000 on a good night (V37/1892; V52/3886; St. Ex. #74). One of Smith's girlfriends, Trisha Geter, estimated that over the year John Doe was processing drugs in her apartment, they distributed at least three kilos of cocaine and fifteen pounds of marijuana each week (V58/4314). Each hole employed a "bombman" that sold the drugs, a "watchout" that looked out for police and helped marketing by yelling slogans to potential customers; a "gunman" to keep peace and enforce the rules; and a "street lieutenant" that was in charge of dropping off drugs and collecting money (V37/1865, 1896; V42/2527-29; V52/3885-92; V58/4310).

In addition to the workers at the holes, John Doe employed "tablemen" that cooked, processed, and packaged the crack, powder cocaine, and marijuana for street level sales (V37/1878; V40/2107; V43/2606-08; V52/3891 V58/4310), "turnover" lieutenants that tracked the money to provide a count for paying the workers (V37/1877; V48/3342; V52/3890), and "enforcers" that carried out whatever violence was deemed necessary to keep the business thriving (V37/1874-76; V42/2534; V58/4311; V52/3891). Latravis Gallashaw was the first lieutenant, second in charge of John Doe and Smith's right hand man; Julian Mitchell was the

second lieutenant, third in charge and the highest level member of John Doe to testify at the trial (V37/1872-73, 1879, 1895; V39/2116, 2146; V42/2531-33, 2585; V43/2607; V52/3889). An organizational chart was admitted into evidence, showing the structure of the John Doe enterprise, which was confirmed by a number of witnesses (V37/1874-75; V44/1290-91; V52/3889-92; V54/4013; St. Ex. #75).

Smith was recorded discussing drug transactions and other John Doe business in a number of phone conversations admitted into evidence (V65/5256-58, 5292, 5308-11, 5318-21; V66/5434-5540). Documents including phone records, receipts, pictures, and ledgers also directly connected Smith to John Doe and John Doe to illegal drug trafficking (V58/4418; V59/4435-36; V61/6180, 6184). Searches of houses of several John Doe members resulted in the confiscation of numerous guns, assault rifles, ammunition, two homemade grenades, bulletproof vests, and drugs (V54/4033; V58/4379-89, 4412, 4418-24; V59/4434, 4452, 4454, 4468-69, 4479, 4481-82, 4488-90; V61/4656-65). A search of one of Smith's residences led to the discovery of a phone guard, a radio frequency detector, and a small amount of marijuana; in his bedroom was $185,724 in cash (V61/6171, 6178-79, 6195).

Several homicides were committed for the good of the business. Leon Hadley was killed on August 21, 1995 (V40/2302-

05). Hadley was a drug dealer; his brother's hole was taking business away from John Doe (V37/1851; V40/2280-81; V54/3998; V58/4315). Hadley was angry about being taken over by a group of younger drug dealers (V37/1857; V40/2283). Smith and Kelvin Cook shot Hadley in front of a corner store, momentarily jumping out of a car driven by Phil White (V41/2381, 2383, 2386-87). White testified and described the events before, during, and after Hadley's murder firsthand (V41/2377-88). Geter testified that Smith told her he was going to kill Hadley, then later came back to her, excited and nervous, telling her he had done it; he called his mother and Roundtree with admissions as well (V58/4316-20). Smith was also implicated in the murder by Carlos Reynolds (V40/2300-2317), Julian Mitchell (V37/1862-63), Herbert Daniels (V43/2612-14), Eric Mitchell (V44/1276-77), Anthony Fail (V48/3271-72), and Antonio Allen (V54/3998-4009).

Smith's mentor in the drug business, Mark Roundtree of the Lynch Mob organization, went to jail for Hadley's murder (V37/1850, 1858, V39/2114; V40/2278, 2318; V41/2388; V43/2612; V58/4322). Smith paid for an attorney and paid Roundtree's family every week for some time in exchange for Roundtree taking responsibility (V37/1862-63; V39/2115; V43/2613-14; V58/4323). Roundtree's murder conviction was later reversed due to witness recantation (V75/130; V76/89, 103, 105).

Melvin Lipscomb was killed on August 27, 1995 (V39/2153). Lipscomb was a John Doe customer that violated the rule against talking during a drug hole transaction (V37/1907). He was shot by Antonio Godfrey, an indicted co-defendant and the gunman at the hole, in charge of keeping order (V37/1913-15; V58/4327). Julian Mitchell witnessed the murder and described the circumstances firsthand (V37/1901-16). His account was corroborated by Jevon Bell; Bell was not a member of John Doe but had gone to the hole with Lipscomb that night to purchase drugs (V38/2079-83). Trish Geter also testified to Smith's complicity in Lipscomb's murder (V58/4326-27).

Cynthia Brown was killed on July 24, 1997 (V49/3438). Brown had been an eyewitness to the killing of Dominique Johnson in November, 1996, and had identified Smith as one of the shooters (V52/3797). Demetrius Jones and Shaundreka Anderson also observed the murder and had advised Brown to keep quiet about what she had seen (V52/3798-99). Brown was the only cooperating witness, and without her, the State was unable to proceed against Smith on the Johnson murder case (V50/3602-15; V58/4333). The State, which had been seeking the death penalty against Smith on the Johnson charge, was forced to drop the charge rather than go to trial as scheduled on July 28, 1997 (V50/3612-15).

Smith had discussed with his mother the best way to kill Brown without arousing suspicion (V37/1922-24). He had solicited Anthony Fail to commit the murder, but Fail wanted to shoot her, and Smith was concerned that such a shooting could be tied back to him (V48/3282-88). Fail had advised Smith he should get someone close to Brown to take care of her (V48/3286). He had also discussed with Geter needing to kill Brown and procuring some heroin to do so (V58/4330-31). Other witnesses testifying to Smith's involvement in Brown's murder were Julian Mitchell (V37/1924-25), Walker (V52/3905-13 [heard Smith direct Chazre Davis that he wanted the victim strangled or suffocated, leaving no bullets or evidence at the scene]), Jones (V52/3810), Daniels (V43/2613-18), and Danny Dunston (V39/2124-25). Brown was actually killed by her boyfriend, Davis, who smothered her with a pillow, leaving her in a motel room; she had also been stabbed in the neck post-mortem (V49/3460, 3463, 3503-05; V51/3664-76). Davis came to see Smith after Brown was killed, wanting his payment (V58/4332-33).

Jackie Pope was killed on March 31, 1998. Pope was a watchout for John Doe (V42/2543-44; V44/1309). On New Year's Eve, 1996, Pope and other people were shot when numerous weapons were fired to celebrate the holiday, but they survived (V37/1927-29; V43/2621). A responding police officer was shot

in the head, resulting in a swarm of law enforcement in the area and the shutting down of drug holes (V43/2621; V58/4324). A good friend of Smith's was arrested for shooting the officer (V37/1930). Smith paid for an attorney for his friend and learned that Pope was a cooperating witness in the prosecution (V37/1931-32; V52/3900-04; V58/4325). The night he was killed, Pope had just completed a shift at a John Doe drug hole (V42/2544-52). He was shot in the back by a John Doe enforcer. Smith's complicity in Pope's murder was demonstrated by Julian Mitchell (V37/1931-32), Walker (V52/3900-04), Fail (V48/3283-84), Charles Clark (V42/2544-52).

Marlon Beneby was shot on July 23, 1998; he spent about a month in the hospital before dying of his injuries (V44/1351-52). Beneby was another John Doe employee, a lieutenant on the weekends (V52/3913). Beneby tried to make some extra money by selling some of his own drugs along with the John Doe brand (V39/2120-22, V52/3914). Beneby was shot by Latravis Gallashaw, the John Doe first lieutenant, for violating John Doe rules (V52/3914-16). Antonio Allen and Tyree Lampley were witnesses who testified to the circumstances of Beneby's killing (V46/3131-39; V54/4016-24). In addition, Dunston (V39/2120-22), Clark (V42/2552-55), Daniels (V43/2617-18), Walker (V52/3913-16), and Eric Mitchell (V44/1311-13), discussed actions and

statements demonstrating Smith's responsibility for Gallashaw's actions in shooting Beneby.

Angel Wilson was killed on December 1, 1998 (V36/1674; V52/3918). Wilson was the girlfriend of Anthony Fail (V37/1942; V43/2624; V52/3918). Fail had been a member of John Doe, but he and Smith had several disagreements; among other things, Fail had shot an individual that Smith asked him to kill, but the shooting was not fatal (V39/2125-27; V43/2621-22; V58/4335). Fail had been permitted to have money from a John Doe hole, but then that privilege was cut off (V42/2556-57; V54/4024-25). Fail ultimately opened his own drug business and began robbing and shooting the employees and customers at the John Doe drug holes (V58/4335). Smith was in jail at that time but directed John Doe hitmen to kill Fail (V48/3378-80; V58/4335-39). Several hitmen opened fire on Fail's car, but Wilson was the only one in the car, and she was killed instead (V44/1319; V54/4064-66). In addition to Fail's testimony, the jury also heard evidence about Smith's responsibility for Wilson's death from Julian Mitchell (V37/1935, 1941, 2004), Clark (V42/2556-57), Geter (V58/4335-39), Eric Mitchell (V44/1318-19), Walker (V52/3918-22), and James Harvey (V54/4060-66).

On December 3, 2004, the jury rendered a verdict finding Smith guilty of the lesser included crime of manslaughter on

Counts 7 (Lipscomb) and 13 (Beneby), and otherwise guilty as charged (V20/2694-98).[2]

The penalty phase was conducted February 8-9, 2005 (V75-V76). The State presented victim impact witnesses and the medical examiner on the Brown homicide (V75/33-73, 74-90).

The defense presented five witnesses in mitigation (V75/104-V76/100). Richard Moore, a criminal defense attorney, had been court appointed to represent Smith on his federal drug charges in 1999 and testified to Smith's good behavior during that six-week trial (V75/104-122). Phil White reiterated his guilt phase testimony about Leon Hadley's murder, noting that Smith's gun had jammed and it was actually Cook that shot Hadley with an AK-47 (V75/123-132). White also acknowledged that he had not told the State that he had been driving the car until a few months before Smith's October 2004 trial (V75/132). Det. Alfonso testified about Julius Stevens's legal status and admissions Stevens had made (V75/151-162).

Smith's mother, Willie Mae Smith, testified extensively about Smith's childhood, adolescence, and family relationships (V76/10-76). She recounted that Smith had been raised in a loving home and had a good relationship with his siblings

[2] The verdict form reflects the jury found that Smith did not use a firearm in the commission of the Lipscomb, Pope, Beneby and Wilson murders (V20/2694-98).

(V76/11-13). Smith's brother had been robbed and killed when Smith was twelve years old, and his father died of a heart attack the following year (V76/11-14). He has three sisters (V76/13). Smith was an above-average student and graduated from high school in 1990 (V76/14). Smith was robbed and stabbed one time at school, and Willie Mae had been seriously injured when stabbed by one of her brothers in 1991 (V76/15-16). Another of Smith's uncles was robbed and killed in Liberty City in April, 1992, and another uncle was killed in a fire in November, 1992 (V76/17-18). Smith helped take care of his grandmother until her death in 1998 (V76/19-20). He had been exposed to chronic drug dealing and gang violence growing up in Liberty City (V76/21). Smith also had a seven year old son, Christopher, with whom Smith had a good and loving relationship (V76/22).

The last mitigation witness was George Slattery (V76/79-89). Slattery was self-employed and had taken statements from Mark Roundtree regarding the murder of Leon Hadley (V76/79-88). In two different statements taken on January 25, 2001, Roundtree told Slattery that he had been the one to kill Hadley with an AK-47 (V76/79-84). In other statements given in 1996 and 2004, Roundtree denied being involved in Hadley's murder (V76/86-87).

In rebuttal, the State presented Det. Alfonso and Trish Geter. Alfonso testified that he met Roundtree for the first

time in December, 2000; he went to state prison to interview Roundtree because he had learned during a federal investigation that Roundtree may be innocent of the Hadley murder (V76/101-102). The only witness against Roundtree recanted (V76/103). Roundtree denied any involvement and corroborated other information they had received in interviews as to who the actual perpetrators were (V76/104). Roundtree's murder conviction for Hadley's killing was later vacated (V76/109). Geter testified that Smith loved his grandmother but was too busy taking care of his business to take care of her (V76/124).

Following the penalty phase, the jury recommended life sentences for the murders of Leon Hadley and Jackie Pope, and death sentences for the murders of Cynthia Brown (by a vote of 10-2) and Angel Wilson (by a vote of 9-3) (V78/23-24). The court sentenced Smith consistent with the jury recommendations. The sentencing order reflects that, as to the murder of Cynthia Brown, the court gave great weight to three aggravating factors: prior violent felony convictions; murder committed to disrupt or hinder law enforcement; and murder committed in a cold, calculated and premeditated manner (V23/3081-91). As to the murder of Angel Wilson, the court also gave great weight to three factors: prior violent felony convictions; pecuniary gain;

and murder committed in a cold, calculated and premeditated manner (V23/3100-07).

The court made the same findings on mitigation in both cases, allocating little weight to the lack of significant criminal history; extreme disturbance; and age (V23/3092-95). The court addressed the proposed nonstatutory mitigation as follows: Smith was not the actual killer but only a minor participant (rejected); Smith was born and raised in a crime-infested neighborhood (little weight); Smith was raised in a gang controlled community (little weight); Smith was a good family man (some weight); Smith's good behavior in his federal trial and in this trial (little weight); Smith was exposed to chronic and systematic violence in his childhood and adolescence (little weight); and Smith graduated from high school (little weight) (V23/3096-3100, 3108-15). The court concluded that the aggravating factors "clearly and convincingly" outweighed the mitigation found (V23/3117).

SUMMARY OF THE ARGUMENT

1. The trial court did not abuse its discretion by permitting additional courtroom security throughout Smith's trial. None of the measures disputed by the defense were inherently prejudicial; most did not reflect personally on Smith, but

involved screening of spectators, jurors, and attorneys. Even if a showing of necessity were required, the facts of this case offer ample support for the trial court's approval of the challenged measures.

2. The trial court did not err in refusing to strike the prospective jury panel after Smith's mother greeted the panel in the hallway. The judge conducted an extensive colloquy and insured that the jurors' ability to be fair and impartial had not been compromised.

3. The trial court did not err in allowing a State witness to explain the meaning of code words used in recorded conversations. This claim was not preserved for appellate review. In addition, it is without merit as the witness was competent to testify as a lay witness in light of his familiarity with the terms and usage.

4. The trial court did not err in allowing a police report regarding the murder of Dominique Johnson to be admitted into evidence. The court properly found, as the State represented, that this report was not offered for the truth of the matter contained therein, and therefore was not hearsay.

5. The trial court did not abuse its discretion in limiting the cross examination of State witnesses. Two of the three rulings challenged in Smith's brief are procedurally barred; all

three are also meritless. The defense was permitted to question the medical examiner about an accidental death during sex, and to the extent further testimony was desired, the court properly determined they would need to present their own witness. In addition, the court properly limited the cross examination of State witnesses Fail and Jones, as Florida law precludes the use of prior bad acts for impeachment purposes. The court properly determined that these witnesses were not under actual charges or any threat of prosecution for these crimes, and impeachment was not available on that basis.

6. The trial court did not err in denying a mistrial after the State posed a hypothetical question to the medical examiner. This issue is again barred and meritless. Smith's current claim that the hypothetical was not based on the facts in evidence is refuted by the record.

7. The trial court properly denied Smith's motion for a new trial premised on the failure to disclose that Mark Roundtree had made inconsistent statements. The defense was aware that Roundtree had made different statements prior to trial and Roundtree was not presented as a witness.

8. The trial court did not err in failing to conduct a hearing on an alleged discovery violation after State witness Carlos Walker testified inconsistently with his pretrial deposition.

This argument is barred and without merit. In addition, no possible procedural prejudice has been identified.

9. The trial court properly denied Smith's motion for new trial premised on prosecutorial misconduct. This argument is also procedurally barred. In addition, the record does not support Smith's claim that prejudicially improper statements were made and, individually and collectively, no error has been shown.

ARGUMENT

ISSUE I

SECURITY MEASURES.

Smith first challenges the security measures imposed during his trial. He claims the trial court failed to make the requisite finding of necessity and the additional security measures were prejudicial to his defense and violated his right to a fair trial. However, the particular security measures in effect were not inherently prejudicial and therefore no finding of necessity was required. Extra security was warranted by the facts of this case, including the nature of the charges and sworn testimony establishing Smith's prior attempts to interfere with the judicial process. Smith has not alleged or shown any actual prejudice, and no due process violation can be discerned.

The trial court's authorization for the use of restraints and other security measures is reviewed for an abuse of discretion. Weaver v. State, 894 So. 2d 178, 193-96 (Fla. 2004). In addition, this issue compels strong deference for the trial court's exercise of its discretion. See United States v. Childress, 58 F.3d 693, 705 (D.C. Cir. 1995) ("The trial court's choice of courtroom security procedures requires a subtle reading of the immediate atmosphere and a prediction of potential risks –- judgments nearly impossible for appellate courts to second-guess after the fact").

The particular security measures at issue are outlined in Smith's brief as follows: the use of a second magnetometer for all potential jurors, spectators, and attorneys entering the side of the building housing the courtroom used for trial; subjecting individuals, including jurors, to police-supervised searches; the presence of visibly armed Miami-Dade police officers both inside and outside the courtroom; Smith's wearing a stun belt; Smith's attorneys being searched and "wanded" in front of the jurors; spectators being forced to provide identification before being allowed into the courtroom "at some point" during the trial; and the appearance of two State witnesses in red jumpsuits, stenciled with "DCJ" and wearing handcuffs (Initial Brief of Appellant [I.B.], pp. 46-47). No

abuse of discretion has been demonstrated with regard to any of the measures adopted in the court below.

As to the alleged failure to make findings of necessity, case law establishes that none of the measures employed were inherently prejudicial, and therefore no particular findings were required. In Holbrook v. Flynn, 475 U.S. 560 (1986), the United States Supreme Court held that the deployment of extra security personnel was not inherently prejudicial, and therefore no essential State interest need be shown. Smith attempts to distinguish Flynn by noting that it involved the presence of four armed guards, whereas there were six guards noted in his courtroom, in addition to other security measures employed. However, Flynn was not concerned with the particular number of officers involved as much as the fact that the officers were positioned on the front row of the spectator section, immediately behind the defendant. In fact, there were more than four guards in the courtroom; the security force in that case consisted of "four uniformed state troopers, two Deputy Sheriffs, and six Committing Squad officers." Flynn, 475 U.S. at 570-71.

The test espoused in Flynn requires a determination of whether "an unacceptable risk is presented of impermissible factors coming into play." Flynn, 475 U.S. at 570. Smith has

not demonstrated that any of the measures he contests would create such a risk. To the contrary, inherent prejudice has been rejected for many of these measures. See Hopkinson v. Shillinger, 866 F.2d 1185, 1218 (10th Cir. 1989) (security measures including armed and unarmed guards and magnetometer were not inherently prejudicial), cert. denied, 497 U.S. 1010 (1990); Allen v. Montgomery, 728 F.2d 1409, 1414 (11th Cir. 1984).

The only measure which potentially reflected personally on Smith was the use of the stun belt. While Smith notes defense counsel's comment that the jury "could not help but see" the belt, the judge repeatedly found that the jury could not see it: "It is not visible under his clothing in any way, shape or form, when he is standing up or sitting down." (V28/274-75); "And it is in no way prejudicial, because it is not visible to anyone" (V37/1958). Defense counsel did not disagree or correct the judge at any time this finding was made on the record.

Even if some finding of necessity were required, the court below articulated sufficient reasons into the record to support the security measures now challenged. Specifically, the court stated the need for extra security was obvious given the allegations involved (V35/1547); noted testimony that Smith had ordered a murder to eliminate a witness, and was continuing to

direct members of his organization from jail (V37/1955); found that the screening and wanding of jurors and attorneys were less intrusive than going to the airport and that alternative measures were not appropriate (V37/1957); and commented repeatedly that the measures were not prejudicial to the defense (V35/1547, V37/1832, 1954-55 [noting fact that State witness appeared in jail jumpsuit, if prejudicial at all, would prejudice the State[3]], V37/1958).

To the extent that Smith suggests the court's findings were inadequate because no evidentiary hearing was conducted at that time, his claim is not preserved for appellate review. Although counsel complained at one point that no sworn testimony had been offered to support the measures, the court indicated its willingness to conduct such a hearing, during the next break in court proceedings (V37/1833). Following this comment, the State presented the testimony of Julian Mitchell. Mitchell testified to, among other things, Smith's statements and actions indicating that Smith had secured the murder of Cynthia Brown in order to eliminate the only cooperating witness against Smith in a prior murder (V37/1917-26), and Smith's ability to conduct his business and issue orders even while in jail (V37/1940-41).

[3] Defense counsel must have agreed with this assessment, since they emphasized on cross examination that the witness was incarcerated, and specifically elicited testimony that "DCJ" stood for Dade County Jail (V37/1961-62).

When a lunch break was taken during Mitchell's testimony, the court returned to the security issues. The court noted these aspects from Mitchell's testimony along with other reasons for permitting the procedures objected to by the defense (V37/1948-58). The defense did not controvert the court's findings or request that any further evidence be taken. Since counsel acquiesced in proceeding without further inquiry at that point, any current claim that an evidentiary hearing should have been held is not preserved for appellate review. Finney v. State, 660 So. 2d 674, 682-683 (Fla. 1995).

Even if counsel had preserved the issue, no evidentiary hearing was required. See Weaver, 894 So. 2d at 193 ("A separate evidentiary hearing was not required. The court articulated on the record why the stun belt was necessary"); United States v. Theriault, 531 F.2d 281, 285 (5th Cir.) ("when district court implements unusual visible security measures, it is required to state reasons for doing so on the record and give counsel an opportunity to respond; a formal evidentiary hearing is not required"), cert. denied, 429 U.S. 898 (1976).

Further, even if the defense could potentially be prejudiced, the court's articulated findings, along with the trial testimony presented, clearly established any requisite necessity. See United States v. Deluca, 137 F.3d 24, 31 (1st

Cir. 1998) (in considering propriety of district court's use of anonymous jury, court noted "Our review takes into account not only the evidence available at the time the anonymous empanelment occurred, but all relevant evidence introduced at trial"); Diaz v. State, 513 So. 2d 1045, 1047 (Fla. 1987) (defendant's prior record of murder, violence, and escapes sufficient to support trial court's determination that extra security personnel and shackles were necessary). In fact, the security measures employed below are fairly typical in cases involving allegations of racketeering, violence, and witness tampering. See United States v. Carson, 455 F.3d 336 (D.C. Cir. 2006). Case law demonstrates that the facts of this case could warrant the much more drastic measure of empaneling an anonymous jury. United States v. Darden, 70 F.3d 1507, 1532-34 (8th Cir. 1995) (upholding anonymous jury, large number of security personnel in courtroom, two magnetometers at courtroom entrance, inspections of defense counsel's belongings, assembling jury in secret location, transporting jurors and defendants to and from courthouse in U.S. Marshal vans and using armed guards along street, convoy of police vehicles, helicopter surveillance and rooftop snipers); United States v. Ross, 33 F.3d 1507, 1520 (11th Cir. 1994) (anonymous jury warranted upon showing "some combination" of five separate factors: defendant's involvement

in organized crime; defendant's participation in a group with the capacity to harm jurors; defendant's past attempts to interfere with judicial process; potential that, if convicted, defendant will suffer lengthy incarceration and substantial monetary penalties; and extensive publicity).

The record also demonstrates the reasonableness of requesting identification from courtroom spectators. This measure was not undertaken until specific problems were brought to the trial court's attention. Danny Dunston was the first witness to testify on October 28 (V39/2103). There were several intervening witnesses, and the day concluded with testimony from Carlos Reynolds (V40/2246-2321). After Reynolds and the jury were excused, ASA Frank-Aponte advised the court of two threats that had been made to state attorney staff: Smith's sister, Todra, had approached Frank-Aponte in an aggressive and threatening manner, pointing her finger and asking her name, and a secretary assisting with trial had been threatened by a friend of Smith's with his sister (V40/2331-32). In another incident, a spectator had been inquiring as to the identity of another prosecutor (V40/2333). A state attorney investigator confirmed the threat made to the secretary (V40/2332). Without objection, the judge agreed to sign an order banning Todra from coming to

court, just as he had done after the incident with Smith's mother approaching the jury (see Issue II).

Trial resumed on Monday, November 1. ASA Chokalis related for the record a discussion that had been held in chambers (V41/2341). The prosecutors had learned Friday of additional security concerns from Thursday relating to two individuals sitting directly behind Smith. During Dunston's testimony, one of the individuals had asked a corrections officer to identify one of the prosecutors; the officer had not responded to the inquiry (V41/2342). Also while Dunston was testifying, Smith was observed making a stretching motion, putting his hands behind his back and using a hand motion as if he were pulling the trigger of a gun (V41/2342-43). A couple of spectators had witnessed the gesture and a corrections officer overheard them discussing it (V41/2343).

In addition, prosecutors received two phone calls on Friday, one from Dunston and another from a witness that had heard about the situation but had not yet testified. Both witnesses were very concerned for their safety based on the identity of two people in the gallery (V41/2343). Prosecutors Miller and Chokalis met on Friday with a Miami detective and one of their in-custody witnesses. The in-custody witness confirmed the information that had been received in the phone calls and,

based on the rap sheets of the individuals identified, there had been a discussion in chambers about tightening security (V41/2343). The parties had met following that discussion, as requested by the court, and all agreed to have a camera placed by the magnetometer to use in order to identify people coming into the courtroom (V41/2344). The court directed that a camera be used, and that if anyone had a problem with the mechanics involved, they should bring it up for additional discussion (V41/2347). Smith stated at that point that he had not made any inappropriate gesture, that he had merely been massaging his temple to relieve a headache; he wanted to know where this lie was coming from (V41/2347). The court indicated that he was not finding Smith had done anything wrong, but that he wanted the matter to be investigated (V41/2347-49). Further, since everyone had agreed to using a camera and wanted the least restrictive way to deal with the concerns, that would be done (V41/2347-49).

Phil White then testified (V41/2363-2416). Following his testimony, another witness was called, but was soon interrupted and the prosecutor advised the court at sidebar that a Miami detective had just been told by the last witness (White), that there was a man sitting in the gallery that White knew to be a killer (V41/2418, 2422-23). White had related that he was

scared for his family, that he did not realize the man had any ties to this trial. The court cleared the courtroom for further discussion (V41/2423).

A state attorney investigator related that they had been running autotrack on the spectators, and had noted several people had records for serious offenses including murder and kidnapping (V41/2425). The State again requested that spectators be required to show identification in order to enter the courtroom (V41/2425). Det. Tamayo addressed the court and related he had been escorting many of the witnesses, had observed they were "legitimately scared," and that a spectator today had "scared the living daylights out of Mr. White" (V41/2428-29). White was visibly shaken and had indicated that the man was "Dewey," that he was a killer (V41/2428-29). The witnesses had been concerned for the safety of their families that still lived in the neighborhood, since there were resources out on the street (V41/2429). The court directed the State to try to identify Dewey's real name, in case he needed to be barred from the courtroom (V41/2429). The prosecutors noted that as soon as they had approached for the sidebar conference, "Dewey" left the room (V41/2430). The judge noted this was the third identified individual to cause a problem and requested research on his authority to close the courtroom (V41/2430-31).

As for this individual, the judge directed that he not be permitted to enter the courtroom; if Det. Tamayo saw him again, he was to instruct him he could not be in the courtroom or in the hallway outside the courtroom (V41/2431).

At the end of the day, the prosecutor advised the court that security was checking for identification at the magnetometer (V41/2509). There was a concern because there were two state witnesses that did not have formal identification, and the prosecutor wanted the court to address that in any written order. The judge at that point ordered that anyone coming through the magnetometer produce a government issued picture ID (V41/2510). If there was a state witness without ID, security was to allow that person to be escorted in by a lawyer or investigator (V41/2511-13). The defense objected to this procedure, and the objection was overruled (V41/2511-12).

Tuesday morning, November 2, Lt. Denson related for the record that he had investigated and confirmed that a corrections officer had reported overhearing two spectators had observed Smith making a gesture like pulling a trigger; the officer had not seen the gesture (V42/2520). Later in the day, the prosecutor requested that the court exclude James Anthony Parks from the court (V43/2627). The defense objected that Smith's presumption of innocence "was gone" (V43/2628-29). The court

noted that the security measures had been the same since the beginning of trial; the only thing new, as of today, pursuant to yesterday's order, was that anyone coming through the magnetometer was requested to show identification (V43/2629). The judge related that, as represented to him, Mr. Parks was one of the two people to whom Smith had been observed making hand signals on Thursday; the defense again denied that Smith had made any hand signals or attempted to communicate with Parks, and requested an evidentiary hearing so that they could call Parks as a witness (V43/2629-30). The court agreed to exclude Parks and denied a hearing (V43/2630-31).

This record clearly supports the court's determination to use the security measures challenged in this issue. See generally United States v. Brazel, 102 F.3d 1120, 1158 (11th Cir. 1997) (affirming court's *sua sponte* order requiring spectators to show identification for entry into courtroom). The judge was presented with direct representations[4] that witnesses were intimidated and state attorney personnel had been threatened, and was reasonably concerned about insuring the safety of court personnel and all trial participants. The record does not establish that the jury was aware of the

[4] The representations made to the court were not under oath, but the defense did not request that state attorney investigator Miller or Det. Tamayo be sworn.

requirement that identification be produced for entry to the courtroom, so this measure could not possibly have prejudiced the defense.

Smith's reliance on Deck v. Missouri, 544 U.S. 622 (2005), to establish a due process violation in this case is misplaced. Deck reiterated that visible shackles are forbidden by the Constitution unless "'justified by an essential state interest' -- such as courtroom security -- specific to the defendant on trial." Deck, 544 U.S. at 624. However, this case did not involve the use of visible shackles, which have been repeatedly recognized as inherently prejudicial. Although the defense indicated at one point that jurors had observed Smith handcuffed in the hall, the judge directed that officers take the jurors out through a back hallway or whatever was necessary to ensure that they not see Smith out of the courtroom (V35/1546). This isolated inadvertent encounter was not unduly prejudicial. Allen, 728 F.2d at 1414 (brief encounter with a handcuffed defendant is not inherently prejudicial).

Deck noted that judicial hostility to visible shackling emphasized the importance of three fundamental principles which are undermined by the jury's awareness of the restraint: the defendant's presumption of innocence, the meaningful right to counsel, and the need to maintain the formal dignity of

courtroom proceedings. Deck, 544 U.S. at 630-32. Although the defense below asserted that Smith's presumption of innocence was being diminished, there was never any suggestion that the security measures interfered with his right to counsel or detracted from the dignity of the trial.

Smith's assertion that the jury would be aware that the security measures employed were unusual and beyond the normal trial is not persuasive. His claim that the jury would perceive that the use of the second magnetometer was directed particularly at this trial is refuted by the record. The judge specifically noted that the magnetometer screened anyone entering that side of the seventh floor, which included two courtrooms as well as the Office of the Court Administrator (V37/1957). Smith's claim that the jurors needed only to "take the escalator up" to the seventh floor to observe that other courtrooms did not have a second magnetometer (I.B., p. 57), offers no record cites, and does not indicate that any jurors actually did use an escalator for the seven-story climb.

The security measures complained of in this case cannot compel the finding of a due process violation, either individually or collectively. Furthermore, any possible violation would be harmless in this case. The jury was not unduly prejudiced but in fact convicted Smith of the lesser

offense of manslaughter in two of the six charged homicides, and recommended death sentences for only two of the four convictions for first degree murder. As the measures employed were not inherently prejudicial, and were supported by the record and the findings articulated by the judge even if potentially prejudicial, no relief is warranted.

ISSUE II

OUT-OF-COURT COMMENT BY SMITH'S MOTHER.

Smith next contends that the trial court erred reversibly in failing to strike the entire jury panel after Smith's mother had walked by in the hallway and stated "God bless you all. Have a blessed day." This claim is without merit. Appellate courts review a trial court's ruling on issues involving the jury's exposure to comments or evidence that was not presented in the courtroom for an abuse of discretion. Hutchinson v. State, 882 So. 2d 943, 956 (Fla. 2004); Street v. State, 636 So. 2d 1297, 1301 (Fla. 1994); Larzelere v. State, 676 So. 2d 394, 403-404 (Fla. 1996); Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990) (no abuse of discretion to deny motion for mistrial after spectator told prospective juror that she thought defendant was guilty). The lower court *sub judice* did not abuse its discretion.

When apprised of the incident, the court initially informed counsel of the need to discuss the matter with juror number 62 Escandon, and juror 61 Cromer, alone (V33/1126). Cromer and Escandon related that a woman had passed by in the hall and stated "God bless you all. Have a blessed day." or words to that effect. Later, Escandon was told it was the defendant's mother (V33/1127-36). The court then interviewed juror number 1 Mederos, juror 2 Bonilla, juror 4 Jacobs, juror 6 Nunez, juror 10 Service individually (V33/1142-60). Although the prosecutor and defense suggested that individual inquiry be made of the remainder, the court opted for examining in groups of about five (V33/1161-62). The court observed that the important issue was whether the remark would affect their decision in any way (V33/1161). The court then called jurors 1 through 7 and all responded that the mother's remark would not affect their decision-making in any way (V33/1167-71). The panel of jurors 8 through 14 were called and they too indicated it would not influence them in any way. The court allowed questions by the lawyers (V33/1173-80). Jurors 15 through 21 were called and they all indicated it would not affect their decision-making in any way, although juror Compana expressed the view that he thought the comment was out of place and juror Lutz opined that it seemed inappropriate (violating the separation of church and state) (V33/1180-89). Jurors 22 through 26 did not hear the

comment at all and it would have no effect on them (V33/1189-91). Jurors 27 through 36 were called - about half of them had heard the comment - and it would not affect their decision-making (V33/1191-98). Jurors Iguina and Smith thought it was a normal salutation. Jurors 37 through 41 also answered they would not be affected by the remark (V33/1199-1204). Jurors 42 through 51 had not heard anything (V33/1206-07). The court then called the remainder of the jury panel(V33/1209-39). The jurors answered they would not be affected by the incident. Prospective juror Johnson thought the comment was a "good thing" since she was polite and "said hello to everybody" (V33/1212). Others opined it was neither good nor bad (V33/1213-15). Prospective juror Hector thought the comment was inappropriate, thinking she wanted to meet her agenda, and thought he would be less likely to believe her testimony if she testified (V33/1217). He would follow the court's instructions to treat the witnesses the same prior to hearing their testimony (V33/1217-18). All who were asked indicated it would not influence their decision-making (V33/1209-39). Prospective juror Hector opined that she "had a presence about her," looked "like an angel" and felt she had an agenda in saying it (V33/1230). Jurors Sanchez and Gonzalez were then questioned after the other jurors were removed from the courtroom (V33/1232). Juror Sanchez thought the speaker had an agenda,

that a mother would protect her son but that he had no problem with it since he understood a mother would be protective; he could set aside the view and he would not likely disbelieve her testimony because of the comment (V33/1233-35). Prospective juror Gonzalez also thought she had an agenda and she neither won his favor nor aggravated him into disliking her; he could render a verdict based on the evidence (V33/1236-37).

The court declined to strike the entire panel (V33/1247). While the defense expressed a concern that juror Hector expressed the belief that the comment was inappropriate (V33/1240), the court concluded that it was unnecessary to impose that harsh remedy. Indeed, the defense did not voice any objection to those that were excused at the subsequent discussion, including jurors Hector and Sanchez (V34/1259-1272). After the court made its inquiry and after considering the requests and objections by the State and defense, the court excused a number of jurors; the defense did not offer any complaint to these excusals (V34/1259-67, 1271-72).

This Court has repeatedly explained that 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. Green v. State, 907 So. 2d 489, 496 (Fla. 2005); White v. State, 817 So. 2d 799, 806 (Fla. 2002);

Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000). Smith cannot satisfy this standard. In Street, 636 So. 2d at 1301-02, this Court addressed a similar complaint about a comment by an outsider, and concluded that the inquiry conducted was sufficient to determine that the jurors were not improperly influenced by the comment. The denial of a mistrial was also upheld in Hutchinson, *supra*, based on a complaint that three jurors were unable to be impartial due to a comment made by a restaurant patron. 882 So. 2d at 957. And in Larzelere, *supra*, this Court concluded that a mistrial was not required where, after learning of an incident in which a woman had threatened to blow up a juror's car, the trial court questioned the jurors individually in the presence of counsel and determined the jurors were not prejudiced by the incident. 676 So. 2d at 403.

As in Street, Hutchinson, and Larzelere, the trial court in the instant case conducted a painstaking interview of the panel - and allowed questions by both prosecutor and defense counsel. While Smith argues here that the entire panel must have been intimidated, the record does not support that contention. A few prospective jurors may have thought the comments to be intrusive or inappropriate, others thought otherwise and virtually all agreed that they would have no impact on their decision-making ability. Moreover, Smith does not - and cannot - point to a single juror who improperly was allowed to sit in judgment on

the case and the record reflects that even those who may have harbored some suspicions concerning the incident were removed with the approval of the defense.

The instant claim is meritless and no abuse of discretion has been demonstrated in the trial court's handling of this matter. Relief must be denied.

ISSUE III

MEANING OF TERMS IN RECORDED CONVERSATIONS.

Smith also challenges the trial court's ruling to permit a state witness, Julian Mitchell, to testify as to the meaning of terms used in recorded conversations that had been admitted into evidence. According to Smith, the trial court abused its discretion because Mitchell was not qualified to serve as an expert and was not a party to the conversations. As will be seen, no abuse of discretion has been shown in allowing Mitchell to explain the coded terminology and jargon used by John Doe to thwart law enforcement.

The principle is well-settled that "[I]n 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). Moreover, a trial judge's "ruling on the admissibility of evidence will not be disturbed absent an abuse

of discretion." Globe v. State, 877 So. 2d 663, 672 (Fla. 2004); see also Brooks v. State, 918 So. 2d 181 (Fla. 2005) (admissibility of evidence is within the sound discretion of the trial court).

The record reflects that Smith's current claims are procedurally barred and without merit. Julian Mitchell was a member of John Doe when the federal wiretaps were implemented (V64/5082). Prior to trial, Mitchell listened to the intercepted telephone calls, which covered a two-month time period, from September to November of 1998 (V64/5082). Mitchell also reviewed the transcripts relating to those wiretaps (V64/5083; 5135). Mitchell was familiar with the voices of the speakers because they were his "homeboys." Mitchell was also familiar with the different codes used on a daily basis during the cryptic calls (V64/5083). The codes were used to "keep the police from knowing our business" (V64/5083). Mitchell testified for a full day on Wednesday, November 24, 2004, and Mitchell's explanations of the codes used by the John Doe organization were introduced that day *without objection*.

Travis Gallashaw handled Smith's day-to-day operations (V64/5084, 5086). In Call #13 (State's Ex. #75), Gallashaw telephoned Harrison Riggins (V64/5089). Gallashaw told Riggins to bring the "macaroni and cheese, grilled" (V64/5089).

Mitchell explained that this term meant the drugs packaged in the yellow baggies (V64/5090). In Call #26, Gallashaw told Riggins that he had the "collard greens" (V64/5092). In Call #37, Gallashaw and Ketrick Majors, a John Doe member responsible for cutting and bagging the marijuana, also used the term "collard greens" (V64/5094-5095; 5097; V65/5317). Mitchell explained that the term "collard greens" actually meant marijuana, and that the bricks of marijuana would then "get broken down" at Gallashaw's house (V64/5093). In Call #40, Gallashaw called Winston Harvey. Harvey supplied John Doe with the bricks or pounds of marijuana (V64/5098-99; 5100). Harvey was strictly a marijuana supplier (V64/5102). During that call, Gallashaw asked Harvey, "What's up with the license?" (V64/5099). Mitchell explained that this meant, "Do you have the stuff that we need" (V64/5101). Mitchell agreed that if the parties already knew what the caller was talking about, they could use any word to substitute (V64/5101-02). Call #63 was between Gallashaw and Lockette, who supplied the "keys" of cocaine. Lockette was strictly a cocaine supplier (V64/5102; 5149). During this call, Gallashaw's reference to "Nautica pants" meant cocaine (V64/5103). Call #112 was between Gallashaw and Herb Daniels, one of the John Doe "tablemen" (V64/5105). The discussion of whether there was any more "food"

laying around meant whether there was any more dope available and the term “dodo stuff” meant bad dope that wouldn’t cook properly (V64/5107-08).

Call #197 was also between Gallashaw and Herb Daniels. Gallashaw told Daniels “there’s nineteen (19) dollars in that drawer, get one of them dollars out of there . . . and give it to K for me” (V64/5114). This meant that there was $19,000.00 in cash, likely broken down into rubber-banded stacks of $1,000.00 each, and to give $1,000.00 to Ketrick Major, the tableman (V64/5115). Call #198 was between Gallashaw and William Austin, Corey Smith’s brother-in-law (V64/5116). Austin was responsible for bagging up all of the marijuana (V64/5116). In Call #198, Gallashaw and Austin discussed Jeffrey Bullard, another member of the table crew, bringing Austin’s pay to 58th, which was Smith’s house on 58th street (V64/5117-18).

Call #236 was between Gallashaw and Julius Stevens, a John Doe “hitman” who kept the organization running under Corey Smith’s direction when Smith was incarcerated in November of 1998 (V64/5118; 5194). In Call #236, Stevens’ request to bring the “toys” was a code term used for big guns, like machine guns, AK’s or 22’s (V64/5119-21; 5133). In Call #239, between Gallashaw and Riggins, the reference to a guy named “OP” meant Hopipher Bryant, a lieutenant in the John Doe organization, and

"skittles" was the code name used for crack cocaine (V64/5122-23; 5128). In Call #252, between Gallashaw and Stevens, the request for a dollar actually meant a thousand dollars (V64/5124). In Call #262, Gallashaw's direction to Dunston to "tighten me up on the skittles" was an request for Dunston to cook up and package some crack cocaine (V64/5125-26).

In Call #269, the reference to 4½ meant 4½ ounces of cocaine powder (V64/5134; 5136). A defense objection that Mitchell was just "reading from the book," while Mitchell was "supposed to be interpreting the tapes for the jurors" was overruled; thereafter, Mitchell confirmed that he'd previously listened to the entire wiretap, he'd listened to each call four or five times each, and he'd reviewed all of the transcripts in conjunction with listening to the calls (V64/5135).

Call #330 was between Gallashaw and Riggins on September 4, 1998 (V64/5136-37). The references to "New Balance" or NB, and Nautica Pants, or NP, were codes for nickels, or $5 baggies of crack cocaine (V64/5138-39). The reference to 20-inch rims meant a bigger bag of powder, which sold for $200 on the streets (V64/5139). In Call #359, between Gallashaw and Austin, Smith's brother-in-law, the reference to "ghetto bird" meant police helicopters (V64/5141-42).

In Call #363, between Gallashaw and Riggins, the reference to “knocking out” Eight-Ball meant Riggins was doing his final count for the night with Eric Mitchell, a street lieutenant (V64/5142-45). Gallashaw and Chauncey Lockette discuss getting a “pair of shoes,” (Call #467) which was a code term for a kilo of cocaine, in a brick or square form (V64/5148-49; 5200).

In Call #471, between Gallashaw and Daniels (V64/5105; 5149), Gallashaw’s instruction to “don’t take that chicken out of the water” referred to the cocaine being cooked in the water (V64/5150-51). Gallashaw then reminds Daniels to use cold water (Call #472) (V64/5151). Mitchell explained that the cold water was necessary to make the cocaine “freeze up” into crack (V64/5151-52).

Mitchell noted several calls between Gallashaw and Winston Harvey relating numbers referring to pounds of marijuana (V64/5167-68, 5189-91, 5202-03). In Call #1206, between Gallashaw and Austin, the discussion of eight plates meant eight pounds of marijuana (V64/5216-17). In Call #1020, between Gallashaw and Daniels, the direction to get a “quarter” out of the drawer meant 2,500 dollars (V64/5183-5184). In Call #1374, between Smith and Stevens, Smith’s complaint about the “Big Tuna” who ran off with 50 dollars actually meant “Fat Keith” (Keevan Rolle) who stole $50,000 from Smith (V65/5256-57).

In Call #1385, between Gallashaw and Riggins, the term skittles actually meant crack cocaine and "hog head cheese" meant the money (V65/5263-64). In Call #1386, also between Gallashaw and Riggins, the request for a half gallon of milk meant "20 sent [sic] powder" (V65/5266-67).

Julian Mitchell continued to testify throughout that day, without defense objection (V65/5234; 5266-96). Shortly after 4:00 p.m. on Wednesday, November 24, 2004, the trial court released the jury for the Thanksgiving holiday (V65/5397). Thereafter, the court admonished the State that the publication of wiretap evidence was repetitive and cumulative; the State would be allowed only one hour on the following Monday in order to complete the testimony concerning the tapes (V65/5399-5402). Clearly, no challenge to any of the testimony up to this point has been preserved for appellate review.

Mitchell was recalled the following Monday (V66/5419). He confirmed that he'd reviewed Call #949, a collect call from Charles Brown, who was in jail, to Smith (V66/5421; V67/5556). When Mitchell began to address this call, the defense objected that the "call speaks for itself" (V66/5422). The court overruled this objection, noting that Mitchell was "just commenting on the call" (V66/5422). Thereafter, when Mitchell continued to explain what they were talking about on this call,

the defense raised two new objections: (1) “assuming facts not in evidence” and (2) [Mitchell] “has not been properly qualified as an expert in the field in which he’s been asked to give an opinion” (V66/5422). The trial court overruled (V66/5422). Shortly thereafter, the defense objected to the question “Who was speaking in Call Number 1952?” on the ground that it assumes “facts not in evidence” and this objection was overruled (V66/5425). Throughout the remainder of Mitchell’s testimony that Monday morning, the defense sporadically raised a few perfunctory objections on various grounds, including lack of personal knowledge (V66/5427; 5541), summarization (V66/5436), violating the “best evidence” rule (V66/5436), and violating the “doctrine of completeness” (V66/5445-46; 5453). At this point, the defense requested, and received, publication of the entirety of these telephone calls, despite the trial court’s specific admonishment to the State to limit their presentation (V66/5445-5446; 5453).

On cross-examination, Mitchell agreed that there were a “huge number” of calls where Gallashaw was negotiating for marijuana and cocaine (V67/5553-54). Mitchell further agreed that they were all dealing marijuana, cocaine, and crack (V67/5554-55). Not everyone in John Doe was considered equal; Smith was at the top of the hierarchy (V67/5565).

Smith admits that witness Julian Mitchell testified for a full day (Wednesday, November 24, 2004), and it was not until the following trial day (Monday, November 29, 2004), that defense counsel objected to Mitchell's testimony interpreting the coded terminology and calls. According to Smith, the defense objected "on the basis of hearsay and that he [Mitchell] was not qualified as an expert witness" (I.B., p. 67, citing V66/5422). However, this is not entirely correct. At V66/5422, the defense did not object on the grounds of "hearsay," but, instead, objected on the ground that "the call speaks for itself" (See V66/5422). Contrary to Smith's appellate conclusion, the defense objection on the ground that the "call speaks for itself"[5] is not the equivalent of a specific "hearsay" objection. In order to preserve an issue for appeal, counsel must preserve the issue by making a specific objection to the admission of evidence on the same grounds as raised on appeal.

[5] The objection that the "call speaks for itself" is more akin to a "best evidence" objection. See Martinez v. State, 761 So. 2d 1074, 1088 (Fla. 2000) (Anstead, J. specially concurring, noting that the tape recording "speaks for itself," and is the best evidence of what it says.") § 90.952, Fla. Stat., provides that "except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph." The "best evidence rule" allows a duplicate to be admitted in evidence to the same extent as an original, so long as the duplicate "was produced by a method which insured accuracy and genuineness." Charles W. Ehrhardt, *Florida Evidence*, § 953.1, at 1080 (2006 Ed.).

See Reynolds v. State, 934 So. 2d 1128, 1150 (Fla. 2006), citing Archer v. State, 613 So. 2d 446, 448 (Fla. 1993).

On Monday, the defense did object once to Mitchell's testimony on the ground of "summarization" (V66/5435-36). However, as the prosecutor explained, the calls necessarily were summarized only because the State had "been given a limited amount of time" (V66/5435); and the trial court overruled the defense "summarization" objection (V66/5436).

Smith now argues on appeal that the trial court erred in allowing Mitchell to explain the coded drug terminology because (1) the State did not first request that Mitchell be qualified as an expert and (2) Mitchell allegedly was not qualified to give a lay witness opinion because he was not a party to the conversations and was not present when they occurred (I.B., pp. 65-66).

On Monday morning, the defense did object once on the ground that that Mitchell "has not been properly qualified as an expert in the field in which he's been asked to give an opinion" (V66/5422). However, Smith's current allegations of improper "lay witness opinion" and "predicate of reliability" complaints (I.B., pp. 67-68) were never raised at trial and, therefore, are procedurally barred. Moreover, Smith's belated objections at trial based, *inter alia*, on "assuming facts not in evidence,"

that Mitchell had not been "properly qualified as an expert," lack of personal knowledge, and violating the "best evidence" rule, all of which were raised for the first time when Smith's trial resumed on Monday, November 29, 2004, are insufficient to fairly preserve any of his current complaints on appeal. *All* of the transcript pages now cited by Smith as alleged error occurred during Mitchell's preceding *unobjected-to* testimony on Wednesday, November 24, 2004 (See I.B., pp. 64-66, citing V64/5086, 5103, 5114, 5101, 5141). *None* of the transcript pages now cited by Smith as alleged error pertain to any of the testimony presented on Monday morning, *i.e.,* after the defense objections at V66/5422 (See I.B., pp. 64-68). Accordingly, Smith's current appellate complaints, based solely on the *unobjected-to* testimony presented on Wednesday, November 24, 2004, are undeniably procedurally barred.

Smith's current complaints are also without merit. Significantly, Smith properly concedes that the "courts have held that law enforcement and others may testify about codes used by drug dealers to thwart detection" (I.B., pp. 65, citing United States v. Brown, 872 F. 2d 385 (11th Cir. 1989)). In Brown, the intercepts contained references to "paper," "candy," "dresses," certain numbers and "the full house" and certain real estate terms. In finding that the trial court did not abuse it

discretion in admitting testimony to explain these terms, the Eleventh Circuit noted that "[c]o-defendant Walker stated, and agent Queener gave his opinion that, these terms related to the sales of cocaine." Brown, 872 F.2d at 392. In other words, witness Julian Mitchell in this case is like the co-defendant in Brown, who was properly allowed to state the meaning of the coded terms. Thus, it was not a necessary prerequisite for Mitchell, an integral member of the John Doe hierarchy, to be first qualified as an expert in order to explain the coded terminology used by the John Doe organization. See also United States v. Novaton, 271 F.3d 968, 1007-09 (11th Cir. 2001) (affirming the trial court's decision to allow agents to give *non-expert* opinion testimony based on their perceptions and experiences as police officers about the meaning of code words employed by the defendants); Antone v. State, 382 So. 2d 1205, 1209 (Fla. 1980) (noting that defendant Antone advised witness Haskew by telephone that he was looking for someone to perform five "installations," which Haskew defined as murders); United States v. Delpit, 94 F.3d 1134, 1145 (8th Cir. 1996) ("There is no more reason to expect unassisted jurors to understand drug dealer's cryptic slang than antitrust theory or asbestosis"); United States v. Flores, 63 F.3d 1342, 1359 (5th Cir. 1995) (witness's testimony on meaning of code phrases was essential to

jury's understanding); Perez v. State, 856 So. 2d 1074, 1077 (Fla. 5th DCA 2003) (trial court did not err in allowing undercover officer to define "street" terminology and explain visual images such as locations where drug transactions occurred with Perez).[6]

In support of his unpreserved "lay witness" complaint, Smith cites to Nationwide Mutual Fire Ins. Co. v. Vosburgh, 480 So. 2d 140, 143 (Fla. 4th DCA 1985), and he also notes that "acceptable lay opinion testimony typically involves distance, time, size, weight, and identity" (I.B., p. 66). Smith's reliance on Vosburgh is misplaced. In Vosburgh, a personal injury case, the court held that Vosburgh's testimony concerning salaries for various jobs should have been excluded as inadmissible hearsay. Vosburgh's testimony was based on information obtained from an undisclosed third party and she did

[6] Although not cited by Smith, the State is not unmindful of this Court's decisions in Thorp v. State, 777 So. 2d 385, 399 (Fla. 2000) and Martinez v. State, 761 So. 2d 1074, 1080 (Fla. 2000). However, both decisions are readily distinguishable. In Thorp, a jailhouse informant testified that Thorp admitted that he "did a hooker." The admission of the jailhouse informant's testimony interpreting the meaning of the term "did her" was error, because it effectively turned Thorp's admission of involvement in a crime into a confession of murder. In Martinez, it was an impermissible invasion of the province of the jury for the lead detective to express his opinion that after he listened to statements made by Martinez to Martinez' ex-wife, which were also recorded on surveillance tape, the detective had "no doubt" that Martinez committed the murders. Martinez, 761 So. 2d at 1080.

not testify that she had any personal knowledge concerning the starting salary for these occupations. Therefore, the Court held that Vosburgh's testimony should have been excluded as inadmissible hearsay because lay witness testimony could not be based solely upon information furnished by a third party. Here, Smith raised no objection to any "lay witness" opinion under §90.701, Florida Statutes, and Vosburgh does not preclude the testimony of a lay witness based on his own personal observations and knowledge. Accordingly, it was not error for Mitchell to explain the coded terminology which was otherwise unfamiliar to the average juror. See Novaton, *supra*, at 1009 (holding that the trial court did not err in admitting, as lay witness testimony, law enforcement agents who testified about the meaning of code words used in taped conversations and also noting that "[u]nder these circumstances, the appellants' objections go to the weight, rather than the admissibility, of the agents' testimony").

In support of his unpreserved "predicate of reliability" complaint, Smith now cites to Poulin v. Fleming, 782 So. 2d 452 (Fla. 5th DCA 2001) (I.B., p. 68). In Poulin, the Fifth District ruled that the trial court correctly excluded expert medical opinion testimony because it did not meet the standard for admissibility of novel scientific evidence under Frye v.

United States, 293 F. 1013, 1014 (D.C. Cir. 1923). Smith has not attempted to establish any relevant link between the exclusion of novel scientific evidence addressed in Poulin and the explanation of coded jargon used by members of John Doe in this case.

Even now, Smith does not seriously contend that Julian Mitchell was not exceedingly well-qualified, based on his own criminal record and integral association with these same drug dealers, to explain the meaning of the coded terminology used during the calls between the John Doe members (See I.B., p. 67). Mitchell initially testified in this case on October 27, 2004 (V37/1830; 1827A). At the time of Smith's trial, Mitchell was 29 years old (V37/1835). Mitchell testified at length regarding his extensive personal drug dealing experience in Liberty City, which began when he was 17, working with the "Lynch Mob." (V37/1840-1879). He related his personal experience with "John Doe," where Mitchell was the third highest ranking member (V37/1850, 1879, 1895). He was familiar with their accounting system and he recognized the street books and the big books, which kept track of the money and drugs (V37/1880-85; 1888; 1893). Coded initials and abbreviations were used in the books (V37/1884; 1887). The letter B meant crack cocaine, P was the middle "pooch," with smaller pieces of cocaine, D was dime ($10)

powder; and half meant a bigger size of crack (for $20) (V37/1884-85; 1887).

Mitchell was keenly familiar with the coded jargon and he explained it during his unobjected-to testimony on Wednesday, November 24, 2004. Smith's belated objections on Monday, November 29, 2004, were insufficient to fairly preserve any complaint now raised on appeal. Furthermore, Mitchell was undeniably qualified to testify based on his own personal observations and experience and, if necessary, to give his opinion, as both an expert and lay witness. See also Brooks v. State, 762 So. 2d 879, 892 (Fla. 2000) (Trial court did not err in allowing an experienced crack cocaine dealer to express opinion testimony regarding the identity and approximate weight of substance). Lastly, error, if any arguably exists, which the State strongly disputes, is clearly harmless under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE IV

INTRODUCTION OF POLICE REPORT.

Smith next argues that the lower court erred in allowing the State to introduce a police report concerning the homicide of Dominique Johnson which was found on a nightstand in Corey Smith's bedroom. (V44/1212) The State introduced the police

report to show that Smith knew Cynthia Brown was pointing to him as the shooter and, therefore, had a motive to murder the victim Brown. (V44/ 1214) Smith contends that this stated purpose was merely a pretext and that the State was actually introducing the police report to establish that Smith killed Johnson. This claim is without merit for the following reasons.

Out-of-court statements offered for the truth of the matter asserted are inadmissible as hearsay. § 90.801(1)(c), Fla. Stat. As this Court has recognized, however, a statement may be offered to prove a variety of things besides its truth. Foster v. State, 778 So. 2d 906, 914-915 (Fla. 2000); Breedlove v. State, 413 So. 2d 1, 7 (Fla. 1982); Escobar v. State, 699 So. 2d 988, 997 (Fla. 1997) (motive); Colina v. State, 570 So. 2d 929, 932 (Fla. 1990) (knowledge); State v. Freber, 366 So. 2d 426, 427 (Fla. 1978) (identity). As long as the alternative purpose for which the statement is offered relates to a material issue in the case and its probative value is not substantially outweighed by its prejudicial effect, an out-of-court statement is admissible. See State v. Baird, 572 So. 2d 904, 907 (Fla. 1990). Accordingly, in the instant case, the fact that the police report was not admissible for the truth of the matters asserted within it, i.e., that Corey Smith killed Dominique

Johnson, does not render it inadmissible to establish Smith's knowledge and motive.

In Foster v. State, 778 So. 2d 906, 914-915 (Fla. 2000), this Court rejected a similar argument and found that hearsay statements regarding victim Mark Scwhebe's statements about reporting Foster to authorities was properly admitted to establish both knowledge and motive. Similarly, in Koon v. State, 513 So. 2d 1253 (Fla. 1987), this Court upheld the admission of evidence that at a preliminary hearing on Koon's federal counterfeiting charges, the U.S. magistrate stated in Koon's presence that "she would have dismissed the charge against him had there been only one witness." This Court found no error because the statement was not hearsay in the first place. Explaining that an "out-of-court statement is admissible to show knowledge on the part of the listener that the statement was made if such knowledge is relevant to the case," this Court found "that the testimony was not offered to prove the truth of the magistrate's statement but rather to show that having heard the statement, Koon could have formed the motive for eliminating one of the two prosecuting witnesses." Koon, 513 So. 2d at 1255. See also Blackwood v. State, 777 So. 2d 399, 407 (Fla. 2000) (holding that victim's statements admissible where appellant's knowledge of the victim's past abortions, pregnancy,

and intention not to see him anymore were material to the issue whether appellant possessed a motive to kill the victim).

In the instant case, the State established through a number of witnesses that Smith knew there was only one witness who could identify him as the shooter in the Dominique Johnson murder. Prior to the admission of the police report regarding the Dominique Johnson murder which was found on Smith's nightstand in his bedroom, (V8/978, V44/1212), Det. Alfonso testified that he arrested Smith and told him that an unnamed witness had identified him as the shooter in the Dominique Johnson murder. Alfonso stated that Smith was shocked, he became very nervous and "was like, no way." (V44/1204-05).

Alfonso then described executing a search warrant of Smith's residence and finding a copy of his police report and his deposition in the Johnson case taken by Corey Smith's defense counsel. (V44/1206, 1209, 1211-12) The report summarized Brown's statement to Alfonso concerning the Johnson murder. (V8/978-995) Portions were redacted at the request of defense counsel. (V44/1213-1228) The unredacted portions provided to the jury in the report were to the effect that Ms. Brown saw two black males stop the victim and one of them shot the victim. Ms. Brown stated that she could identify the shooter. She heard them make a statement then get into a

"primer colored Chevy with a vinyl top and tinted windows." (V8/980, 983, 985) She recognized the shooter by his voice, nose and the way he ran. She had known him for approximately seven years from the neighborhood; his street name was "Baba" and he ran the "John Doe drug hole." (V8/990) Ms. Brown stressed that the shooter was a very dangerous man and she was afraid for her safety and that of her family. She identified the second offender as Antonio Cotton. Subsequently, after initially stating that her family did not want her to become involved, she identified a single photograph of Corey Smith as the person she saw shoot and kill Dominique Johnson (V8/991).

This evidence clearly establishes that Smith knew Brown's identity related to a material issue in the case and its probative value was not outweighed by any potential prejudice with regard evidence establishing Smith's guilt for the Johnson murder.

Smith also asserts that it was error to admit the portions of the report which referred to Ms. Brown's concern for her safety. Although Smith asserts that he objected to the admission of statements concerning safety, the record does not support any contention that a specific objection was raised concerning the admission of evidence in the report that Ms. Brown was concerned for her safety. (V44/1224-27). Defense

counsel merely objected to all of the information on pages 14, 15 and 16. (V44/1225-26) This is not sufficient to preserve this claim for review. Moreover, even if this claim was properly preserved, the admission of this evidence, as well as the other evidence contained in the report is harmless as the jury heard from several witnesses that Ms. Brown saw the murder, could identify the shooter and that she was concerned for her safety. This claim should be denied.

ISSUE V

LIMITATION OF CROSS EXAMINATION OF THREE WITNESSES.

Smith next asserts that he was denied a fair trial when the trial court limited his cross examination of three State witnesses. According to Smith, the trial court's restriction of his attempts to impeach Anthony Fail and Demetrius Jones about uncharged crimes they had committed, along with prohibiting him from questioning Dr. Emma Lew further about autoerotic asphyxia, violated his Sixth Amendment right to confront the witnesses against him. These evidentiary rulings are reviewed for an abuse of discretion, Geralds v. State, 674 So. 2d 96, 100 (Fla. 1996), and no abuse has been demonstrated in this case.

Smith failed to preserve the challenged ruling on Anthony Fail by proffering the particular answers which he sought to

elicit. It is not even clear what particular questions Smith was attempting to ask. Fail testified on direct examination that he met Smith when Fail was released from prison in July, 1996 (V48/3269). Fail had been in prison for seven years (V48/3269). He acknowledged that he had eight prior convictions, and at the time of trial was serving two life sentences, plus a thirty year sentence with a fifteen year minimum mandatory (V48/3267-68).

Prior to starting cross examination, defense counsel requested clarification on a pretrial ruling, granting the State's motion in limine to preclude the defense from exploring the facts behind Fail's prior convictions (V48/3330). Counsel asserted that the State had opened the door to testimony about the particulars of the prior convictions, by asking Fail about having been in prison and about the sentences he was currently serving (V48/3330-32). The judge ruled the door had not been opened for such testimony (V48/3332). Defense counsel explained that he wanted to be able to explore the fact that Fail had been involved in shootings and other crimes, and the judge advised that no one had suggested counsel could not explore those areas (V48/3332). The judge indicated that he could not rule in advance but would have to hear the question asked and would rule on any objection offered at that time (V48/3335).

Defense counsel elicited testimony that Fail had helped Smith earn a reputation for violence, by doing whatever Smith wanted him to do, including shooting people, hurting people, beating people up (V48/3342). When Fail was asked if he had shot someone named Carlton Tanner after Fail got out of jail, the State's objection was overruled, and Fail acknowledged that he had (V48/3343). Fail was asked if he and Rashad Ward had shot Tanner, and again Fail responded affirmatively (V48/3343). Counsel then inquired about the State having asked if Fail knew Ward; the State objected to improper impeachment and a sidebar conference ensued (V48/3343). The State asserted that the defense was bringing up an entirely unrelated incident, and the court requested more information on Tanner (V48/3344). The defense stated that Tanner had been shot by Fail, and Fail had never been charged with the killing (V48/3344). The court ruled that Tanner's killing did not appear to be related to the case against Smith, and therefore Fail's involvement in his death was not relevant (V48/3348). The court noted that the defense had been able to bring out that Fail had been a murderer for hire (V48/3348).

Defense counsel then asked Fail if he had ever been charged with a crime; the State's objection was sustained (V48/3349). Defense counsel indicated to the court he had a document to show

the court, but would continue with his questioning first (V48/3349). Counsel then asked what Fail did in addition to shooting and beating people, and Fail acknowledged that he sold drugs (V48/3349). A few transcript pages later, defense counsel asked Fail why Smith would offer him $50,000 to kill someone, and Fail responded that was his line of work (V48/3355). Fail acknowledged again that he killed people for money, but only when asked by Smith (V48/3356). Counsel then explored an incident where Fail shot Martin Lawrence in the back of the head, as Fail, Lawrence, and Harrison Riggins were sitting around smoking a joint (V48/3360). Fail testified that he was arrested for the shooting a few months later, but was released on bond with an ankle bracelet (V48/3361).

Defense counsel also inquired as to Fail's normal fee for killing someone, exploring why Smith had offered him $50,000 to kill Cynthia Brown but only $25,000 to kill Jackie Pope (V48/3367). Counsel asked how many other people Fail had killed for money, to which Fail responded "not many," noting Booby Dread had not died and Martin Lawrence had not died (V48/3367). Counsel continued with the theme, saying "You get paid to kill, how many did you actually kill?" (V48/3367) and "You missed twice, how many did you actually kill?" (V48/3368); objections were sustained both times. Fail was then asked if the State had

ever asked how many people Fail had killed, and Fail testified that the State had asked him to identify any shooting he had been involved in, and that he had done so (V48/3368). He was asked if he had been charged in any of the shootings he had been involved in, and he responded that he had not been charged (V48/3369). When counsel asked again how many people Fail had killed, the State's objection was again sustained (V48/3369).

At sidebar, the defense argued that the fact that a witness is under actual or threatened charges is always relevant (V48/3369-70). The court agreed, but noted that the defense had already secured testimony that Fail was involved in a number of shootings, had admitted such to the State, and had not been charged (V48/3370). The court noted that at that point, the only pending question was how many people Fail had killed (V48/3370). The defense indicated they also wanted to ask about Tanner, as Fail had previously admitted being involved in that murder (V48/3370). The judge ruled that the jury would not hear it, and the defense motion for mistrial was denied (V48/3370).

On this record, there is no particular ruling for this Court to review. Smith's brief does not identify any specific question he was precluded from asking, his argument is offered only with conclusory generalities. To the extent that he was seeking something more specific than the "not many" response he

initially got to the question of how many people Fail had killed, he did not proffer an answer to the question for this Court's consideration, precluding appellate review. Finney, 660 So. 2d at 684 (failure to proffer precludes appellate review of issue). Similarly, to the extent that he wanted to question Fail further about Carlton Tanner, he did not specify what he wanted to ask or how Fail would respond; the jury heard Fail twice admit that he had shot Tanner (V48/3343). Because this claim was not adequately developed below, review of this issue is barred.

To the extent that any claim can be discerned, no error is presented. The court agreed that Fail could be questioned about uncharged crimes, and the defense was granted wide latitude to demonstrate that Fail had committed numerous serious offenses for which he had never been charged. Smith's appellate argument suggesting that this was not permitted is refuted by the transcript. In addition, the trial court's ruling that particular acts of misconduct are not admissible as impeachment is well supported by case law. Rogers v. State, 511 So. 2d 526, 532 (Fla. 1987); Fulton v. State, 335 So. 2d 280, 282-84 (Fla. 1976). As to the argument that actual charges pending or threatened may be proper impeachment, there was no indication

that such was the case herein, or that Fail believed that he was under any threat of prosecution for these offenses.

Finally, any potential error would necessarily be harmless in this case. While Fail's testimony was damaging to the defense, it was substantially corroborated by a number of other witnesses. The jury was well informed about Fail's past violence and the fact that he appears to have gotten away with murder. The defense was able to use this ruling effectively in their closing argument, reminding the jurors that he had not been allowed to ask Fail how many other people Fail had killed, and repeating the point even after the State's objection was sustained (V69/5921-22). No harm can be shown. See Mobley v. State, 409 So. 2d 1031, 1038 (Fla. 1982) (improper limitation on cross examination harmless where testimony was corroborated by other witnesses and jury was aware witness was awaiting sentencing).

Smith's claim with regard to witness Demetrius Jones is also without merit. Jones testified on direct examination that he dropped out of high school in tenth grade and started selling drugs in order to support his mother and family (V52/3770). He admitted that he had eleven prior felony convictions, which arose from six different cases, including a federal case (V52/3770-71). He was currently serving a federal sentence of

fifteen years, and acknowledged that he had made plea agreements with both federal and state prosecutors, which required his truthful testimony in this case (V52/3771).

On cross examination, defense counsel brought out that Jones was not charged in the Indictment in this case, and had never been indicted for any drug offenses in federal court (V52/3816). His federal sentence was imposed on a carjacking conviction which had nothing to do with the John Doe organization (V52/1816). The court sustained the State's objection when counsel attempted to elicit the factual basis for the carjacking arrest (V52/3816). Counsel elicited that the maximum sentence Jones faced without the plea bargain was twenty years, but then counsel suggested it was actually twenty years to life (V52/3817). Jones indicated his understanding was twenty years, and counsel asked if it didn't include a firearm charge (V52/3817). When the State's objection to that question was sustained, defense counsel was granted a sidebar (V52/3818).

The court explained that counsel was not permitted to explore the underlying charges when impeaching with prior convictions (V52/3819). Defense counsel mentioned at that point, "might as well get it out now," that Jones had admitted to shooting four people before he was ever a member of John Doe, and counsel wanted to ask him about those shootings (V52/3819).

The State asserted that counsel could not bring out specific bad acts, and defense counsel represented that Jones had been granted immunity on those acts to testify in this case (V52/3819).[7] The judge ruled that the nature of specific charges was not admissible (V52/3819).

Cross examination continued, and Jones testified that his federal plea bargain did not require his truthful testimony, but that his state plea bargain did (V52/3821). Jones also acknowledged that he "already committed perjury to the people who offered [] this plea bargain" (V52/3821). Counsel then explored Jones' drug dealing and drug use since Jones was about fourteen or fifteen years old (V52/3822-28).

At a later sidebar, defense counsel wanted to explore how to ask about Jones having shot and killed people during the time he was with John Doe (V52/3851-52). The court ruled that information could not be used to impeach (V52/3819). Defense counsel reminded the judge of his previous argument, when the issue was raised in Anthony Fail's testimony, that the fact a witness is under actual or threatened charges is always relevant (V52/3852-53). The court then asked the State whether Jones was under actual or threatened charges and the prosecutor responded

[7] Defense counsel stated that Jones had already been asked what he had been given immunity for, but the record does not reflect any such question.

he was not, because a subpoena had been issued for his deposition, and therefore he was immunized for anything discussed in the deposition (V52/3853). The State was not investigating any of those charges (V52/3853-54). The court ruled that impeachment by actual or threatened charges was not available on these facts (V52/3854). Defense counsel then suggested that, because Jones had shot seven people in different drug altercations or incidents, that it was just as logical that Jones had shot Dominique Johnson as it was that Smith had shot Johnson (V52/3855).[8] The judge instructed counsel not to go into that area, as there was no evidence of that, "other than fabricated in your own mind" (V52/3855).

Defense counsel continued his cross examination, asking Jones whether he had informed the State of crimes that he had committed as a John Doe member, and Jones stated that he had not (V52/3856). Jones did not believe his failure to offer this information violated his plea agreement (V52/3857).

Smith's current argument describes the facts for consideration of this issue in three sentences, citing to the first bench conference, then asserts it was necessary for the jury to hear exactly what Jones was receiving in exchange for his testimony in order to accurately assess Jones' motivation to

[8] Jones had testified that he witnessed Smith shoot and kill Johnson (V52/3783-92).

lie (I.B., p. 78). The record reflects that defense counsel was permitted to impeach Jones beyond the strict limits of the law. More importantly, the record refutes Smith's suggestion that there was some sort of immunity agreement which absolved Jones of responsibility for these particular acts in exchange for his testimony. In fact, the prosecutor noted that the immunity was a result of Jones having been subpoenaed for a deposition; therefore, immunity was conferred by statute without regard to any testimony in this case. See § 914.04, Fla. Stat.

Once again, no error is shown. Rogers, 511 So. 2d at 532. In addition, any possible error would be harmless. Jones's testimony was corroborated by other witnesses, including Shaundreka Anderson, and Jones was extensively impeached by his criminal history.

Finally, Smith's assertion that his cross examination of the Deputy Chief Medical Examiner, Dr. Emma Lew, was improperly restricted also fails due to the lack of a proffer or adequate objection. Smith claims that he should have been permitted to have Dr. Lew "explain" autoerotic asphyxiation (I.B., p. 80). At trial, Dr. Lew testified that Cynthia Brown died from asphyxiation, and she discussed several mechanisms by which asphyxia could occur (V49/3469-71). Based on the scene, she was able to determine that this was not a case of strangulation,

drowning, positional asphyxia, carbon monoxide poisoning, or asphyxia during sex (V49/3471, 3551-54). All of the physical evidence was consistent with Brown having been smothered with a pillow, including small blood smears on the pillow corresponding with scrapes on her lip from having been pressed into her teeth (V49/3462-63, 3466). Dr. Lew explained why she did not believe it was likely that Brown had died accidentally during sex, although she ultimately acknowledged that it was possible Brown had died during sex and her body then staged to hide the fact (V49/3567-68).

The State's objection when defense counsel asked if Dr. Lew could explain autoerotic asphyxia was sustained (V49/3556). At sidebar, defense counsel indicated that he wanted the doctor to explain the practice, and the court ruled that counsel could ask whether it applied in this case, but if he wanted it explained, he would need to call his own witness (V49/3557). Counsel responded by indicating he would recall Dr. Lew later, which the court indicated would be fine (V49/3557).

Defense counsel's affirmative acquiescence to the court's ruling precludes appellate review of this issue. Counsel failed to put the court on notice that he did not agree with the court's ruling, but instead agreed to handle the issue as directed by the judge. The requirement of a contemporaneous

objection has not been satisfied, and appellate review is precluded. Finney, 660 So. 2d at 682-683.

In addition, no error is presented because this claim is affirmatively refuted by the record. Smith claims only that the jury "should have been allowed to hear that accidental death from asphyxiation could occur during a sex act," (I.B., p. 81), but in fact they did hear this (V49/3568). Dr. Lew extensively discussed her reasons for concluding that Brown was smothered to death, and for excluding other causes of death, including an accidental death during sex. The primary defense theory was that Brown died of an accidental drug overdose. Moreover, overwhelming evidence established that Smith paid Davis to eliminate Brown as a witness to the Johnson murder.

A motion for mistrial should only be granted where the error is so prejudicial as to vitiate the entire trial. Cole v. State, 701 So. 2d 845, 853 (Fla. 1997). That standard has not been met with regard to any aspect of this issue. As no Sixth Amendment violation has been demonstrated, no relief is warranted on this claim.

ISSUE VI

HYPOTHETICAL QUESTION TO THE MEDICAL EXAMINER.

Smith next disputes the trial court's ruling to permit the prosecutor's hypothetical question to Dr. Lew. According to Smith, the trial court properly sustained two objections to the same question, but then permitted an answer when the same question was repeated. This is again an evidentiary ruling, reviewed on appeal for an abuse of discretion, but again no abuse has been demonstrated.

This issue presents another claim which has not been preserved for appellate review. Although defense counsel did object to the prosecutor's hypothetical question when first asked, and even a second time when the question was reframed, there was no objection to the question which was actually asked and answered (V49/3592-93). There was a motion for mistrial after the witness had been excused, but that motion offered different grounds than the argument now asserted on appeal, and was therefore insufficient to preserve the issue. Reynolds, 934 So. 2d at 1150; Steinhorst, 412 So. 2d at 338.

Smith characterizes the hypothetical as "improper" in his framing of the issue, but the entire legal argument presented in his brief merely asserts "Assumptions of fact in a hypothetical question asked of an expert witness must be based upon facts

established by competent, substantial evidence," citing Fekany v. State Road Department, 115 So. 2d 418 (Fla. 2d DCA 1959), Young v. Pyle, 145 So. 2d 503 (Fla. 1st DCA 1962), and Roberts v. State, 189 So. 2d 543 (Fla. 1st DCA 1966) (I.B., p. 83). That argument was never presented below and, in fact, would not have been offered because the defense had just asked several hypothetical questions which were inconsistent with the evidence (V49/3551-54).

The actual objection initially lodged below was "This is not a hypothetical, Your Honor. We object to this." The judge asked for legal grounds, and counsel stated, "Legal grounds, this is no hypothetical. Legal grounds that these are the facts of the case and I don't want to make a speaking objection, but we also have a motion, Your Honor" (V49/3587). The court directed a sidebar and admonished both parties against making speaking objections, but noted the necessity of identifying the legal basis for any objection at the time it is made (V49/3587-88). When asked at that point for legal grounds, defense counsel responded, "It is a hypothetical question" (V49/3588). The judge asked again, and counsel responded it was an improper question, then stated it was an inappropriate question, at which time the judge asked counsel to refer specifically to the evidence code (V49/3588). Counsel continued to struggle to

identify the legal grounds, but ultimately the court sustained an objection that the question was compound and was a narrative (V49/3589-90). The prosecutor offered a shorter version and asked if "Based on your training and your expertise and analysis of that hypothetical, are the physical findings of asphyxia consistent with that scenario?" (V49/3591-92). The defense objected, "this is not a proper basis for this expert's opinion," which the court sustained (V49/3592).

The prosecutor then told Dr. Lew to assume the facts outlined in the hypothetical, and asked, "Are those facts consistent with the manner of death, asphyxia?" (V49/3592). There was no objection to that question, and Dr. Lew responded that the facts were consistent with the cause of death of asphyxia (V49/3592-93). No further objection was offered until after the witness was excused, at which point the defense made a motion for a mistrial, "based on the improper and inappropriate hypothetical question that had to do exactly with the facts of the case they asked of a witness that they knew could not give such an opinion, Your Honor" (V49/3594).

No abuse of discretion has been shown in the denial of Smith's motion for mistrial. As to the argument presented on appeal which was not asserted below, no error can be demonstrated. The question posed was not based on facts

unsupported by the evidence, as is clear from the defense objection below that this was not a hypothetical but "had to do exactly with the facts of the case." Fekany, Young, and Roberts are easily distinguished on that basis.

As to the argument presented below which is not asserted on appeal and therefore has been abandoned, mistrial was again not warranted. The evidence code does not prohibit the use of hypothetical questions; rather, such questions are common, particularly when directed at medical examiners and other expert witnesses. State v. Hickson, 630 So. 2d 172, 173 (Fla. 1993) (discussing proper scope of expert testimony); Chavez v. State, 832 So. 2d 730, 744, n. 20 (Fla. 2002) (noting use of hypothetical question to expert); Jennings v. State, 583 So. 2d 316, 321 (Fla. 1991) (same).

Smith's primary complaint in this issue appears not to challenge the propriety of the question asked and answered, but the fact that the State would attempt to ask any related question in light of the initial objections being sustained. This argument is not persuasive since the same question was not asked three times; there were three different questions, modified based on two different objections. The prosecutor's changing the question in order to avoid the legal grounds previously ruled upon did not warrant a new trial.

Smith's brief makes a perfunctory argument that the alleged error contributed to the verdict because there was no physical or eyewitness testimony connecting Smith to the physical act of killing Cynthia Brown (I.B., p. 84). Certainly the jury was well aware that Smith did not physically commit this murder; the State's position consistently portrayed Smith as having hired Brown's boyfriend, Chazre Davis, to kill Brown. That position was amply supported by the evidence and no doubt served as the basis for the jury verdict on the murder and conspiracy charges for Brown's death. The defense theory was that Brown was not murdered at all, but that she died accidentally either from a drug overdose, a heart attack during sex, or autoerotic asphyxiation (V35/1521-28; V49/3512, 3551-54, 3567-68; V69/5906-09, 5917-18). Smith claimed the medical examiner refused to conclude that Brown's death was an accident due to pressure placed on the medical examiner by law enforcement and/or the State Attorney's Office (V35/1521-28; V49/3520-21; V69/5906-09, 5915-17). In that regard, the hypothetical did no more than affirm Dr. Lew's consistent testimony from direct, cross, and rebuttal as to the cause of death. Dr. Lew did not endorse the State's claim that Smith had been ultimately responsible, but indicated only that the physical evidence in this case was consistent with her determination that the cause of death was

asphyxia. Any possible error could not have been harmful, and relief must be denied.

ISSUE VII

FAILURE TO DISCLOSE A WITNESS STATEMENT.

Smith next argues that the trial court erred in denying his motion for a new trial based on the State's disclosure of a potential witness' statement prior to the penalty phase. Mark Roundtree, a witness listed by the State for the guilt phase, did not testify at Smith's trial or penalty phase. During the discovery process, the State disclosed to the defense statements made by Roundtree regarding the Hadley murder. On April 24, 1996, Roundtree gave a statement to George Slattery denying his involvement in the Hadley murder and Roundtree failed a polygraph given to him by Slattery (V74/6-8). After he was convicted for Hadley's murder and had exhausted his appeals and postconviction proceedings, Roundtree gave another statement to Slattery (V74/8-10). On January 25, 2001, Roundtree claimed that he, Smith, Phillip White and Kelvin Cook were involved in Hadley's murder. Roundtree claimed in this statement that he shot Hadley with an AK-47 and that Smith shot him with a nine millimeter (V74/11-12; V1/124,#47). Slattery took another

polygraph on Roundtree after this statement and some of his answers indicated deception (V74/7; V23/2858).

Smith listed Slattery as a penalty phase witness and called him to testify about Roundtree's statements (V76/78-91). Prior to the penalty phase, the State provided defense counsel with an Amended Discovery Exhibit:

> Mark Roundtree made statements to George Slattery in July, 2004. He denied committing the homicide of Leon Hadley. He stated that Corey Smith committed the homicide of Leon Hadley. He stated that he previously implicated himself in the homicide so that he could serve as a witness in proceedings against Corey Smith.

(V21/2797). Based on this disclosure, Smith moved for a new trial and argued that the State had committed a Brady violation by failing to disclose this statement (V21/2856-59). After argument, the trial court denied the motion. (V74/2-19).

A motion for new trial is directed to the sound discretion of the trial court and its ruling will not be disturbed absent a clear showing of abuse. Woods v. State, 733 So. 2d 980, 988 (Fla. 1999). In the instant case, the trial court acted within its discretion in denying the motion for new trial. The trial court denied the motion because the defense was well aware that Roundtree had perjured himself numerous times in giving his multiple sworn statements.

Contrary to Smith's assertion, Roundtree's statement does not constitute Brady material. In Brady v. Maryland, 373 U.S.

83, 87 (1963), the United States Supreme Court held that the State violates a defendant's due process rights when the prosecution fails to disclose evidence favorable to an accused that is material to either guilt or punishment. This duty encompasses exculpatory evidence, as well as impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985). The Bagley Court further stated that "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id. at 682.

In this case, Mark Roundtree did not testify at trial as to either guilt or penalty. His prior statements, disclosed to the defense prior to trial, were that he did not have any involvement in the Hadley murder and knew nothing about it (September 1996), and after he was convicted of the murder, he gave another statement indicating that he participated in the murder along with Smith and both individuals shot and killed Hadley (January 2001). Roundtree's subsequent statement in July, 2004, to Slattery denied any involvement in the murder, but continued to claim that Smith was responsible. Roundtree explained that he had implicated himself in the murder so that

he could be a witness against Corey Smith. Clearly, Roundtree's latest statement was not exculpatory to Smith, but indicated that Smith was responsible for the murder; a fact established beyond a reasonable doubt at Smith's guilt phase trial. Furthermore, Roundtree's 2004 statement was not impeachment evidence because he was never called as a witness.

Although Roundtree's statement does not constitute Brady evidence, this Court has recently held that the State has a duty to disclose a potential witness' oral statement when the witness is listed as a potential witness by the State and the oral statement materially changes a prior statement. See Scipio v. State, 928 So. 2d 1138 (Fla. 2006) (holding that State committed a discovery violation when it failed to disclose a material change in the medical examiner's investigator's deposition testimony because the State was fully aware that the defendant intended to rely heavily on the investigator's testimony and would be taken by surprise given the changed testimony); but see Scipio, 928 So. 2d at 1155-59 (Cantero, J., dissenting) (noting that the State had not violated the written discovery rules by failing to disclose the oral changes to the witness' deposition testimony). Even assuming *arguendo* that the State had a duty to

timely disclose Roundtree's oral statement,[9] the late disclosure did not prejudice Smith's defense.

In Scipio, this Court held that the proper inquiry when dealing with a discovery violation is "whether there is a reasonable possibility that the discovery violation 'materially hindered the defendant's trial preparation or strategy.' . . . [O]nly if the appellate court can determine beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless." Scipio, 928 So. 2d at 1150 (quoting State v. Schopp, 653 So. 2d 1016 (Fla. 1995)). In this case, despite defense counsel's representations to the trial court that Roundtree's statement was "a smoking gun" and validated their entire defense, there is no reasonable possibility that Roundtree's statement would have materially altered Smith's trial strategy.

Smith asserts that had he known of Roundtree's 2004 statement denying involvement in the Hadley murder, he would have called Roundtree as a witness during the guilt phase and established his defense that the State's witnesses were willing to testify falsely in order to secure favorable treatment or reduced sentences while incarcerated. However, Smith has not

[9] The prosecutor noted at the hearing on the motion for new trial that the State was not in possession of any written documents or reports detailing Roundtree's July, 2004 statement to George Slattery. (V74/7-8).

identified a different strategy he would employ, he simply would have used Roundtree, an inherently unreliable witness, to bolster the same defense his jury rejected. Moreover, the fact that one witness was willing to lie about his own involvement in order to implicate Smith is not competent evidence to show that other witnesses were lying at trial. Finally, the defense used the belief that Roundtree was still in prison at the time of Smith's trial, serving a life sentence for Hadley's murder, to impeach State witnesses with the suggestion that they were lying at Smith's trial in order to help Roundtree get out of jail (V40/2318; V41/2414). On these facts, no harmful error can be shown, and relief on this issue must be denied.

ISSUE VIII

WITNESS TESTIFYING INCONSISTENTLY WITH HIS DEPOSITION.

Smith next asserts that the trial court erred in failing to conduct a Richardson[10] inquiry when a state witness testified inconsistently with his pretrial deposition. According to Smith, the differences between the testimony given at trial by state witness Carlos Walker and the statements made in his deposition violated due process because the defense had not been notified of the change.

[10] Richardson v. State, 246 So. 2d 771 (Fla. 1971).

State witness Carlos Walker testified on direct examination regarding his role as a lieutenant in Smith's drug organization and implicating Smith in the murders of Dominique Johnson and Cynthia Brown (V52/3880-3925). After Walker had fully testified on direct examination, defense counsel moved for a mistrial based upon the state calling a "witness to the stand without telling us or giving us an opportunity to tell us the man is a perjuror [sic] saying I was a perjuror [sic]." (V52/3923). Defense counsel continued: "And we feel like, number one, they should have never called a perjuror [sic] and, number two, they should have noticed in advance of the perjury so we could at least find out what is going on." Id. In response, the prosecutor noted the following: "He knows what the issues are. He also has the witness's prior statement where he gave the same testimony." (V52/3923). The court said that the defense could impeach the witness and denied the motion for mistrial. Id.

It must be noted initially that this issue is not preserved for review. The defense counsel in this case asked for a mistrial, but did not seek an inquiry into the circumstances or even allege that there had been a discovery violation. Reynolds, 934 So. 2d at 1150 (issue on appeal must be the same specific claim raised below). Although Smith now asserts the trial court failed "to give the Defense the opportunity to show

how their trial preparation was hindered by the State's failure to disclose the witness's recantation of his discovery statement" (I.B., p. 96), the defense made no such request below. Counsel did not assert that his preparation or strategy would have been different and he never requested a Richardson inquiry. See generally Suggs v. State, 644 So. 2d 64 (Fla. 1994)(noting that [pre-Schopp] "failure to conduct a Richardson hearing in the face of a discovery violation is per se reversible error once the violation has been brought to the court's attention *and a Richardson hearing has been requested.*") (emphasis added); Copeland v. State, 566 So. 2d 856, 858 (Fla. 1st DCA 1990) (no "magic words" required to necessitate inquiry, only the fact that a discovery request has not been met). Thus, the instant claim should be deemed waived on appeal. In any case, Smith is clearly not entitled to relief.

First, the defense was fully aware of Carlos Walker's initial statements to the police implicating Smith in the murders of Cynthia Brown and Dominique Johnson. Indeed, on redirect, Walker testified that he told homicide detectives the same information he provided at trial (V53/3961-62). The record reflects that several of Walker's pretrial statements were disclosed, including Walker's taped statement (V1/128), and sworn statements of 14 pages (V1/131), 26 pages (V1/131), and 22

pages (V1/133). Smith has not identified any statement by Walker that was not disclosed to the defense. Under these facts, Smith has failed to show any discovery violation by the State. See Materno v. State, 766 So. 2d 358, 359 (Fla. 3d DCA 2000) (no discovery violation where statement was included in the detective's written report turned over to the defense). Consequently, the trial court did not abuse its discretion in denying Smith's motion for a mistrial. See Pender v. State, 700 So. 2d 664, 667 (Fla. 1997) (when "a trial court rules that no discovery violation occurred, the reviewing court must first determine whether the trial court abused its discretion").

Smith's reliance on Scipio v. State, 928 So. 2d 1138 (Fla. 2006) is misplaced. In Scipio, this Court found a discovery violation by the State when it failed to disclose to the defense a material change in the medical examiner's investigator's deposition testimony where the State was aware the defendant intended to rely upon the investigator's earlier testimony and would be taken by surprise at trial. The defense in Scipio was never informed that the investigator had reviewed a photograph after the deposition and determined that the object under the victim's body was a pager, not a gun. The claim of self-defense was predicated, in part, upon the investigator's deposition testimony that he observed what appeared to be a gun under the

victim's body, so the change in testimony prejudiced the defense.

In this case, the defense was fully aware of Carlos Walker's statements to the police implicating Smith in the murders as well as his deposition wherein he denied such knowledge. There was certainly no surprise to the defense; Walker's trial testimony simply mirrored his earlier statements which had been turned over to the defense. Thus, Scipio provides no support for reversing Smith's convictions.

Similarly, State v. Evans, 770 So. 2d 1174 (Fla. 2000), provides little support for Smith's argument on appeal. In Evans, a witness told the police in a pretrial statement that she did not see or hear anything relevant to the murder. In a pretrial deposition, the witness also testified that she did not see the defendant shoot the victim. Evans, 770 So. 2d at 1176. At trial, however, the witness called by the State testified not only that she heard the defendant threaten to kill the victim but that she actually saw the defendant shoot the victim. Id. This Court determined that "the State committed a discovery violation in this case by withholding from the defense the fact that Green had changed her original police statement to such an extent that she transformed from a witness who 'didn't see anything' into any eyewitness-indeed, apparently the only

eyewitness-to the shooting." Evans, 770 So. 2d at 1182. In reversing the defendant's conviction, this Court observed that Florida's discovery rules are designed to "prevent surprise by either the prosecution or the defense." Id.

In Evans, both the witness's pretrial statement to the police and pretrial deposition indicated that she did not see the shooting and had no relevant information about the offense. Thus, the defense was truly surprised by her trial testimony directly implicating the defendant in the murder. *Sub judice*, the defense was clearly not surprised by Walker's testimony. Walker testified consistent with his pretrial statements to the police which had been turned over to the defense. Consequently, this Court's concern in Evans about surprise to the defense and trial by "ambush" are simply not implicated in the present case.

Even assuming, *arguendo*, the defendant has shown a discovery violation by the failure to disclose Walker had retracted his deposition testimony and readopted his earlier sworn statements to the police, the error was harmless in this case. In Scipio this Court noted that a harmless error analysis in this context focuses on "whether there is a reasonable possibility that the discovery violation 'materially hindered the defendant's trial preparation or strategy.'" 928 So. 2d 1138, 1149-1150 (quoting Schopp, 653 So. 2d at 1020). Only "if

the appellate court can determine beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation" the error can be considered harmless. Id. at 1150. The defense has articulated no plausible basis to find procedural prejudice in this case. That is, there is no reasonable possibility that Walker's statement [consistent with statements already in defense counsel's possession] would have materially altered Smith's trial strategy.

The defense was fully aware of Walker's sworn statements to the police implicating Smith in a large scale drug ring and at least two murders. See Armstrong v. State, 862 So. 2d 705, 715 (Fla. 2003) (no reasonable probability of a different result where "Armstrong was in fact in possession of the same information he would have had if he had received the actual transcripts of Noreiga's investigation statements."); State v. Muhammad, 866 So. 2d 1195, 1202-1203 (Fla. 2003) (defendant failed to show prejudice based upon written statements of prison personnel which were not turned over to the defense where "there has been no demonstration that the allegedly withheld documents contained any information not already disclosed to Muhammad by other means"). The record reflects that defense counsel was clearly prepared to cross-examine Walker at the time of trial. Defense counsel extensively cross-examined Walker regarding his

inconsistent deposition testimony and the plea agreement he reached with the state (V53/3925-3956). Indeed, Smith fails to identify any potential area of cross-examination not covered as a result of the alleged non-disclosure.

Smith fails to assert how his trial strategy would have changed if he had been notified of Walker's intended testimony. Moreover, Walker's testimony was cumulative to the testimony of numerous witnesses that implicated Smith in the charged offenses. Consequently, the record establishes beyond a reasonable doubt that the alleged discovery violation and failure to conduct a Richardson inquiry was harmless in this case. See Cox v. State, 819 So. 2d 705, 713 (Fla. 2002).

ISSUE IX

PROSECUTORIAL MISCONDUCT.

Smith's final issue challenges the trial court's denial of his motion for a new trial based on alleged prosecutorial misconduct. However, his claim that the cumulative effect of several instances of improper comment denied him a fair trial has not been preserved for appellate review. Although the individual complaints were brought to the trial court's attention during the trial, Smith never claimed below that these incidents had to be considered cumulatively. His motion for a

new trial presented only two of the six particular complaints he raises in this issue, and made no assertion that individual trial errors needed to be considered for any collective effect (V23/3061-68). The purposes of the contemporaneous objection rule would be thwarted by any consideration of this issue, since the trial court was never urged to cumulatively assess the errors alleged. Castor v. State, 365 So. 2d 701, 704 (Fla. 1978).

As previously noted, the standard of review for the denial of a motion for new trial is for an abuse of discretion. Woods, 733 So. 2d at 988. A new trial is only required for prosecutorial misconduct where "it is reasonably evident that the remarks may have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done." Thomas v. State, 748 So. 2d 970, 984 (Fla. 1999). That standard has not been met on the facts of this case.

A review of the particular comments in the context of the arguments made and in light of the evidence presented below clearly demonstrates that no new trial is warranted in this case. Smith identifies six specific complaints, over the course of a trial spanning a five-month period,[11] which he asserts

[11] Jury selection commenced on Oct. 4, 2004, and voir dire was completed on October 15 (V26-V34). The guilt phase lasted from October 25 until December 3, 2004 (V35-V72). The penalty phase

combined to deprive him of a fair trial (I.B., pp. 94-95). One comment was made during voir dire; one comment was made to begin State's opening argument; one comment was made during testimony by State witness Det. Alfonso; one complaint relates to the State's asking a hypothetical question of a medical examiner (presented as Issue VI herein); one complaint simply relates to "numerous" unspecified objections to the State's guilt-phase closing argument; and the last comment was made during the State's rebuttal guilt-phase closing argument. As will be seen, none of these complaints, individually or collectively, compel a new trial in this case.

The first allegation of misconduct is premised on a defense objection to ASA Cholakis's characterization of the charges as stemming from "drug wars" during voir dire (V32/929-930). The record reflects that, on the sixth day of jury selection, five individual panels that had been culled from hundreds of prospective jurors were combined into one large prospective panel of 70 people (V31/826, V32/840). Up to that day, all questioning had been conducted by the court, posing only preliminary questions designed to identify prospective jurors that could be excused due to information based on their

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began on February 7, 2005, with the jury's recommendation returned on February 10 (V73-V78). Sentence was imposed March 17, 2005 (V79).

questionnaires, their opinions about the death penalty, their familiarity with the facts of the case or attorneys or witnesses involved, and any other reason demonstrating an inability to serve on what was recognized to be a lengthy trial. The State had its first opportunity to address the prospective panel on October 13, 2004 (V32/841-47). ASA Novick initially questioned the panel about their opinions on the death penalty (V32/847-921). Following a lunch recess, questioning resumed by ASA Chokalis, exploring pretrial publicity and any knowledge of the case (V32/922). The attorneys had been warned to avoid characterizing the John Doe organization as a "gang," since an entire preliminary panel, panel #4, had been stricken when a prospective juror indicated his understanding that John Doe was a "gang" (V29/564-571).

Chokalis was attempting to describe the allegations in the Indictment in an effort to determine whether the jurors were familiar with the crimes charged. He initially stated that, in 1998, a drug war developed between members of the John Doe group – to which the defense objected as outside the allegations of the indictment. The prosecutor asked for a sidebar discussion and agreed to avoid use of the term "drug wars" (V32/929-931). Returning to the panel, Chokalis rephrases and states that, in 1998, there were several shootings and homicides that occurred

between John Doe and another group, sort of led by Anthony Fail (V32/931-32). The defense objection was again sustained, and the prosecutor asked the court to review the Indictment, which the court declined to do (V32/932-33).[12] The prosecutor attempted to rephrase the question, asking the panel if the names or facts sounded familiar (V32/933-36). When he again mentioned shootings and homicides between two groups, the defense objected and moved for a mistrial (V32/936-37). The defense proposed that counsel should only be asking about specific individual incidents and the court instructed Chokalis to avoid any reference to rival gangs or there being two groups, as this language was not in the Indictment (V32/937). The motion for mistrial was denied, no further relief was requested, and no further objection to Chokalis's questioning was lodged.[13]

Smith asserts that this incident was improper because the State was creating an impression that the case was the result of drug wars, a "highly inflammatory and prejudicial description" which "was not supported by the evidence" (I.B., p. 96). However, it is clear on this record that the prosecutor was

[12] The Indictment did allege two conspiratorial acts based on the murders of "rival drug dealer[s]" and another act based on a murder "over a dispute concerning profits from drug sales" (V1/73).

[13] There was additional discussion on the issue the following morning, when the defense renewed its motion to strike the panel, but the court's ruling remained the same (V33/1007-09).

simply attempting to describe the offenses charged in a manner that would assist the prospective jurors in recognizing whether they were familiar with the case being tried. A juror is more likely to recall media accounts of the charged offenses if the facts are described in a manner similar to those accounts than to remember a particular victim's name as an unrelated incident. Most importantly, the evidence thereafter presented at trial clearly established that several of the crimes alleged were in fact the result of the drug wars in which John Doe engaged in the late 1990s. The trial court's sentencing order expressly notes that several witnesses described the relationship between Smith and Anthony Fail as a "war," and that Angel Wilson was an innocent victim of that war (V23/3104). In light of the extensive evidence presented at trial confirming the prosecutor's description of these crimes, no prejudice could have resulted from the comments in voir dire.

Similarly, no prejudice can be attributed to the prosecutor's opening remarks that "If you" compete with me, steal from me, or snitch on me "you will be killed" (V35/1488). These comments were again proven to be well-founded based on the evidence presented. In fact, the prosecutor offered similar sentiments during closing argument, without objection (V69/5879). While the defense objection to the comments in

opening was sustained, Smith never requested a mistrial, a curative instruction, or a new trial based on this comment; it is therefore barred from consideration (V35/1488-89; V23/3061-68). In addition, the isolated comment would not be prejudicial because evidentiary support was thereafter provided.

The prosecutor's reference to a newspaper belonging to Smith as a "souvenir" is similarly innocuous. The comment was made during the direct questioning of Sgt. Alfonso. Alfonso was discussing the items recovered when a search warrant was executed at the home of Smith's sister, Todra, and her husband, William Austin (V59/4471-72, 4493). Austin was a John Doe member and had been heard in intercepted phone conversations arranging to deliver marijuana to other members (V59/4475-76; V64/5116-18; V65/5216-17). Among the evidence confiscated were several five gallon buckets filled with marijuana, a loaded semiautomatic pistol, envelopes and Ziploc baggies for packaging marijuana for street sales, and other drug sale paraphernalia (V59/4479-82). In the kitchen, there was another scale for weighing the marijuana, Ziploc baggies, ammunition, and more marijuana and paraphernalia (V59/4489-90).

Also found in the kitchen was a newspaper article about the Cynthia Brown murder (V59/4490). The search was conducted on November 2, 1998, but the article was not current, it was dated

back to the time Brown was killed, in July, 1997 (V59/4491, 4493). Without objection, Alfonso noted it appeared someone had saved the article from an older paper (V59/4491). The State moved to admit the article into evidence, and the defense objected, based on hearsay; the court found it was not offered for the truth of the matter asserted, but because the newspaper had no "premise of accuracy," sustained the objection because the probative value was outweighed by its prejudicial effect (V59/4491-93). Alfonso was then asked and reiterated that it was an older article, to which ASA Novick stated, "Souvenir in the kitchen, right?" (V59/4493). The defense objected and moved for a mistrial due to the prosecutor's use of the word "souvenir" (V59/4493). The court sustained the objection, but denied the motion for mistrial; the court agreed to give a curative instruction and thereafter advised the jury "to disregard the word souvenir" (V59/4495). This claim was not included in the motion for new trial argued below (V23/3061-68).

The prosecutor's reference to the article as a souvenir could not have been prejudicial, particularly in light of the previous testimony which was not objected to indicating that the article was old and appeared to have been saved (V59/4491). Any minimal prejudice that could have occurred would be rendered harmless by the immediate curative instruction.

The State's hypothetical question of Dr. Lew is fully explored in Issue VI, and did not warrant a mistrial or improperly contribute to the verdict. The State's theory of how and why Cynthia Brown was killed was well known to the jury, and the fact that the physical evidence was consistent with this theory is neither surprising nor unfairly prejudicial. The defense consistently maintained that Brown's death was accidental and entirely unrelated to Smith's efforts to avoid a trial on his charge of killing Dominique Johnson.

Finally, no prejudicial error can be ascribed to the prosecutor's closing argument. As to the conclusory complaint that "numerous" objections were sustained, the record reflects that the prosecutor's initial closing argument comprises 95 pages of transcript (V69/5788-5883). Eight of the 21 objections posed were sustained. The defense closing is transcribed in 46 pages, with six of eleven objections sustained (V69/5883-5929). There were seven objections sustained in the State's rebuttal argument of 29 pages (V69/5929-5958). The majority of objections sustained throughout all arguments were based on arguing facts not supported by the evidence. As to many, the

comment was clarified and substantially repeated without further objection.[14]

The only particular comments which Smith discusses in this complaint relate to suggestions that, if law enforcement wanted to frame Smith for Brown's murder, they could have built a more persuasive case. These comments, however, were clearly invited by the defense argument that Dr. Lew and forensic toxicologist Dr. Hearn has ignored evidence of a drug overdose and bowed to pressure from law enforcement to conclude that Brown had been murdered (V69/5906-09, 5916-17).

The final allegation of misconduct concerns the statement in the prosecutor's rebuttal closing that "nobody knows better, who killed Leon Hadley, than Mr. Smith" (V69/5954). While Smith's objection was sustained, this comment does not appear, in the context in which it was offered, to reasonably be interpreted as a comment on silence. The prosecutor was addressing attorney Handfield's lack of concern for the defense in the Dominique Johnson case, and noted that it was Smith's concern that mattered. Observing that Smith was aware that

[14] In addition, several of the objections sustained as not supported by the evidence were in fact established by the testimony. For example, the prosecutor stated that Carlos Walker had heard Smith direct Chazre Davis to kill Cynthia Brown by suffocation or strangulation, leaving no bullets or evidence at the scene; three of the sustained objections arose from this comment (V69/5735), but Walker did testify to this (V52/3911).

Roundtree had been convicted even though Roundtree was innocent, her comment about Smith knowing who actually killed Hadley was a reference to the fact he was aware of Roundtree's innocence, and was not a comment on his silence about his own guilt.

Even if the comment is interpreted as an improper comment on silence, it was not prejudicial on these facts. The comment was isolated and Smith's presumption of innocence had been fully explained. Since Smith did not testify, his jury was instructed again that his silence could not be considered (V70/6034). Dessaure v. State, 891 So. 2d 455, 464-466 (Fla. 2004) (mistrial not required for isolated comment that "only two people knew what happened" in the victim's apartment); Heath v. State, 648 So. 2d 660, 663 (Fla. 1994) (similar comment held harmless).

No new trial was compelled on these facts. As this Court has repeatedly recognized, attorneys are permitted wide latitude in their closing arguments. See Thomas v. State, 748 So. 2d 970, 984 (Fla. 1999); Breedlove v. State, 413 So. 2d 1, 8 (Fla.), cert. denied, 459 U.S. 882 (1982). A prosecutor is clearly entitled to offer the jury his view of the evidence presented. Shellito v. State, 701 So. 2d 837, 841 (Fla. 1997), cert. denied, 523 U.S. 1084 (1998).

This Court has routinely denied relief on comments more egregious than those challenged in this case. Compare Knight v.

State, 746 So. 2d 423, 433 (Fla. 1998); Chandler v. State, 702 So. 2d 186, 201 (Fla. 1997), cert. denied, 523 U.S. 1083 (1998); Crump v. State, 622 So. 2d 963, 971 (Fla. 1993).

None of the particular instances of alleged misconduct in this case were egregious; they did not denigrate the defense, allude to inadmissible evidence or collateral crimes, or inject inflammatory considerations. On this record, any impropriety was harmless, and did not require a new trial.

STATEMENT REGARDING PROPORTIONALITY

Although Smith presents no legal claim of a disproportionate sentence, the following is offered to assist the Court in its mandated proportionality review. See Rimmer v. State, 825 So. 2d 304, 331 (Fla. 2002). The trial court's sentencing order outlines the findings to support the death sentences. As to the murder of Cynthia Brown, the court found three aggravating factors: prior violent felony convictions, based on the contemporaneous convictions; murder committed to disrupt or hinder law enforcement; and CCP (V23/3081-91). Each factor was allotted great weight. The court found that the pecuniary gain aggravator applied, but did not consider or weigh that factor in order to avoid any improper doubling (V23/3083-85). The court also considered the HAC factor, but rejected it

as too speculative, despite noting the medical examiner's undisputed testimony that Brown would have been aware of her impending death, and would have suffered pain and terror for the several minutes it would take to die (V23/3087-89).

In mitigation, the court gave little weight to the statutory mitigating circumstances of (1) no significant criminal history; (2) extreme disturbance, despite noting that there was no evidence to support it and that, in fact, testimony from Smith's mother refuted it; and (3) age, noting that Smith was in his mid-20s at the time of these events (V23/3092-95). The court specifically rejected the minor participant and under substantial domination of another factors, finding the evidence affirmatively refuted this mitigation (V23/3093-95). The court addressed the proposed nonstatutory mitigators as follows: Smith was only a minor participant (rejected); Smith was born and raised in a crime-infested neighborhood (little weight); Smith was raised in a gang controlled community (little weight); Smith was a good family man (some weight); Smith's good behavior in his federal trial and in this trial (little weight); Smith was exposed to chronic and systematic violence in his childhood and adolescence (little weight); Smith graduated from high school (little weight) (V23/3096-3100).

As to the murder of Angel Wilson, the court gave great weight to three aggravating factors: prior violent felony convictions, based on the contemporaneous convictions; pecuniary gain; and CCP (V23/3100-07). The court made the same findings in mitigation that had been made with regard to Cynthia Brown's murder (V23/3108-15).

The court also addressed the issue of proportionality. Comparing the case to other reported cases and sentences, the court found that, "With four first degree murder convictions and two manslaughter convictions, with multiple victims dying in a hail of bullets, and with eyewitnesses executed to circumvent judicial prosecution, this cases [sic] presents facts at least as disturbing, if not more so, than any this Court has ever considered" (V23/3116). The court considered proportionality between the co-defendants, finding that, as to each murder, Smith was at least as culpable, if not more so, than the actual killers (V23/3116-17). The court concluded that the mitigation "pales in comparison to the enormity of the circumstances in this case," and that the aggravating factors "clearly and convincingly" outweighed the mitigation (V23/3117).

The outrageous facts of this case make finding a factually comparable case difficult. In Johnson v. State, 696 So. 2d 317 (Fla. 1997), this Court affirmed a death sentence for Ronnie

Johnson, who orchestrated and participated in the murder of victim targeted for his anti-drug efforts in the community. Johnson was hired to commit the murder, recruited accomplices, and secured semiautomatic weapons, opening fire on the victim and several others around a neighborhood store. See also Koon v. State, 513 So. 2d 1253 (Fla. 1987) (upholding death sentence in witness elimination murder); Lara v. State, 464 So. 2d 1173 (Fla. 1985) (same). The instant facts are more egregious than any of these cases and clearly warrant the death sentences imposed.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court affirm the convictions and sentences imposed on Corey Smith by the trial court below.

Respectfully submitted,

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_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Teresa Mary Pooler, 1481 N.W. North River Drive, Miami, Florida, 33125, this _____ day of March, 2007.

_____

COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

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

_____

COUNSEL FOR APPELLEE

Corey Smith v. State of Florida, Case No. SC05-703

Charged in Indictment:

Corey Smith “Bubba”
Latravis Gallashaw “Trav”
Antonio Godfrey “Garhead”
Julius Stevens “Judog” or “J’rizm”
Eric Stokes “Crazy E”
Jean Henry “Haitian Jean”
Chazre Davis “Crip”
Eddie Harris “Eddie Bo”

Victims:

Melvin Lipscomb “Short”
Marlon Beneby “Big Shorty”
Cynthia Brown “Cookie”

Others:

Julian Mitchell “Manny Bo”
Eric Mitchell “Eight Ball” “E”
Anthony Fail “Little Bo”
Harrison Riggins “Worm”
William Austin “Dred”
Winston Harvey “Dred”
Kelvin Cook “Caine”
Shaundreka Anderson “Dreka”
Demetrius Jones “Meet”
Dominique Johnson “Mann”
Herb Daniels “Hurricane” “Cane”
Charles Clark “CB” “Charlie Boy” “Charlie Bo”
Charles Brown “CB” “Charlie Boy”
Ketrick Majors “K” “Sporty K”
Jeffrey Bullard “Tank”
Hopipher Bryant “O.P.”
Keevon Rolle “Fat Keith”