IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC06-730

GABBY TENNIS

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR ST. LUCIE COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

WILLIAM McCOLLUM
Attorney General
Tallahassee, FL

Lisa-Marie Lerner
Assistant Attorney General
Florida Bar No.: 698271
Jason Pollack
Assistant Attorney General
Florida Bar No.: 0022862
1515 N. Flagler Dr.; Ste. 900
West Palm Beach, FL 33401
Telephone (561) 837-5000
Facsimile (561) 837-5108

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

PRELIMINARY STATEMENT

Appellant, Gabby Tennis, was the defendant at trial and will be referred to as the "Defendant" or "Tennis". Appellee, the State of Florida, the prosecution below, will be referred to as the "State". References to the record on appeal will be by the symbol "R", to the transcripts will be by the symbol "T", to any supplemental record or transcripts will be by the symbols "S" preceding the type of record supplemented, and to Tennis's initial brief will be by the symbol "IB", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On August 6, 2003, the grand jury returned an indictment of Tennis and co-defendant Sophia Adams ("Adams")charging them with the May 31st, 2003 first-degree murder while engaged in the aggravated abuse of an elderly or disabled person, and/or the robbery and/or burglary of Albert Vassella ("Vassella"). (R.1 10-11). The court denied certain parts of his motion to suppress his confession, statements, and/or admissions on August 19, 2005. (R.2 286-91). Jury selection began on August 22, 2005 and on August 31, 2005 the trial commenced. (T.1 16; T.6 486). On September 19, 2005, the jury found Tennis guilty for first degree felony murder, as charged. (T.12 1098). The

penalty phase began on November 14, 2005, resulting in an eight to four jury recommendation of death. (T.15 1373). On April 6, 2006, the court sentenced Tennis to death. (T.33 1661).

On Monday, June 2, 2004, Maria Sklar ("Sklar") entered the home of Vassella where she found his body laying on the floor in the living room. (T.6 509-511). Sklar had known Mr. Vassella for about three years (T.6 503), and since she lived four blocks away, their friendship had developed to the point where she joined Vassella for lunch about three to four times a week. (T.6 504). Vassella was a peaceful man, and despite him being in his nineties, was relatively healthy and somewhat active. In fact, it was not uncommon for Maria (an elderly lady herself) to ride her bicycle to Vassella's house, where he would, in turn, drive them to lunch. (T.6 504-06). She last saw Vassella alive on Saturday, May 31, 2003, around 1p.m. or 1:30p.m., when she left his home after what would be their last customary lunch date. (T.6 (505-06). Sklar returned to Vassella's house the next day, Sunday, June 1st, for their next lunch date, when Vassella didn't answer the front door. Noticing his newspaper was still on the driveway, she knocked on his window as well, but this was to no avail. (T.6 506-508). Figuring he was out to lunch with his family, she placed the newspaper by his door and returned to her own residence. (T.6 508-509).

Because it had now been close to 48 hours since she last heard from Vassella, Sklar returned to his residence the following day, Monday, June 2nd, at noon to check on him. (T.6 509). She remembers seeing his beige car still in the driveway, and noticed the newspaper had not yet been moved from the doorway, the same place she left it when she placed it there the day before. Now legitimately concerned, Sklar knocked on the door, yet there was no answer. She then tried to open the doors, and they gave way; first the screen door, then the wooden door. When the wooden door swung open, Sklar saw Vassella's body laying on the living room floor. (T.6 509-11).

After seeing the body, Sklar immediately entered the house wanting to call the police. She went over to the desk on the far side of Vassella's body to try the phone, but it didn't work. It appeared as if the phone wasn't working. In addition to the house looking as if it had been ransacked, there was an overriding foul odor to the home. Sklar immediately left to return to her own residence, where she instructed her son-in-law to call the police. (T.6 512-13).

Around the same time that Vassella came to know Sklar Sklar, he became acquaintances with Liza Boltos ("Boltos") while hosting a yard sale. Boltos, an ethnic gypsy, offered him companionship, and he in turn would pay her to clean his

residence. (T.7 648-50). Although testifying on defense cross examination that gypsy women are raised to take advantage of the elderly (T.7 688), Boltos says to have only borrowed small amounts of money, not amounting to more than five or ten dollars at a time. (T.7 650). While cleaning his house a number of months prior to his murder, Boltos introduced her daughter, Adams, to Vassella. (T.8 722).

According to Boltos, it is customary for gypsy families to allow their daughters to elope with gypsy men for an arranged price. (T.7 652-53). In line with this custom, Boltos arranged for Sophia, then fourteen years of age, to elope with Dominick, a teenager himself, following his family's payment of a six-thousand dollar dowry. At this point, Adams had already been pulled out of school because of a familial desire for the women to only marry within their own culture and not assimilate with Americans. (T.7 652; 683). Even though their relationship was somewhat amicable at the start, things eventually deteriorated due to Dominick's abusiveness and disloyalty. Within seven or eight months of eloping, Adams had moved back into Boltos' residence and separated from Dominick. (T.7 654). Because of this separation, Boltos had to return half of the settled six thousand dollar amount, having only paid twelve-hundred dollars at the time of her testimony. (T.7 655).

Having returned home, Adams, now fifteen years of age, resumed her life by telling fortunes and selling flowers on the streets of Hollywood. (T.7 656; T.8 777-78). Two to three months prior to the murder, Adams was with Boltos and a friend at Hollywood Beach when she first met the appellant, Gabby Tennis. (T.7 658; T.8 715-16). Instantly sensing that there was more than simple friendship between them, Tennis and Adams soon became quite close, meeting up everyday within the first two weeks of their relationship. Tennis would soon start staying over at the Boltos house, often times sleeping in his black Ford F-150. (T.7 660; T.8 717-18; T.11 956). Adams testified that Tennis always drove this truck and often times would park the truck alongside Boltos' house. (T.8 718).

Initially, Boltos was unaware of any sort of relationship developing between Adams and Tennis. In fact, it was not until one of Boltos' friends mentioned it while visiting her in the hospital that Boltos had any knowledge of their relationship at all. Now aware of their relationship, when Adams and Gabby did visit her in the hospital, Boltos demanded payment of a dowry. (T.7 668). Upon leaving the hospital, Boltos immediately called Tennis's father, Lawrence Tennis, and demanded payment. (T.7 665; T.8 718-19; T.11 960). Having not received a satisfactory response, Boltos became more insistent, regularly demanding

payment. Although only asking for between three and five thousand dollars, Lawrence was vehemently opposed, with conversations regularly becoming quite heated.(T.7 666). Because of the increasing tension growing between them, Boltos stopped calling Lawrence, resorting instead to demand that Tennis get the money from his father. Conversations between Tennis and his father often went nowhere, but persisted up until the time of the murder. (T.7 666) Boltos expected to be paid for Adams, and it became apparent that Tennis was not going to receive any help from his father in curing this debt. (T.7 665-67; T.8 719-20; T.11 960-61). At one point during the weeks leading up to the murder, Tennis promised Adams that he would work doing roofing for his father and save his money for her, yet he remained unemployed all along.(T.8 720). Instead, the pressure continued to mount as Boltos insisted on receiving some sort of payment.

A few days before Vassella was murdered, Boltos testified that she needed to borrow some money, so she asked Tennis to drive her to Vassella's home. (T.7 667-68). Along the way, Boltos explained to Tennis that Vassella was an old man who would occasionally give her money. When they arrived at Vassella's home, Tennis dropped Boltos off, and departed within a short period of time. Unsure of how long the stay would be,

Boltos returned home by bus. Vassella lent Boltos between ten and fifteen dollars that day.

Adams testified that the morning of the murder, May 31, 2003, she and Tennis became involved in an argument. In effort to work things out, the two decide to go for a walk. (T.8 723-24). The walk eventually would lead to Vassella's front door. (T.8 724). Upon opening the door, Tennis informed Vassella that he was in need of a phone book so that he can see about getting a new alternator for his truck. Vassella invited him into his home. Adams testified that when Vassella came to the door, he greeted Tennis as if he knew him. (T.8 725). She further testified that Vassella recognized her as being Boltos's daughter. (T.8 728). Although Adams and Boltos both deny that Boltos called to ensure Vassella would be home, phone records show that Boltos called the Vassella residence eight times the day of May 31, 2003, the day that he was murdered. (T.7 692-95; T.8 728; R.4 568).

At some point in time soon after they entered his home, Tennis got up from the rocking chair he had been seated on and punched Vassella in the forehead, demanding that Vassella turn over whatever money and valuables he had. (T.8 729). Tennis picked up Vassella and threw him into the bookshelf. (T.8 729) As Tennis continued to demand his valuables, he began to stomp

on Vassellas's face with the heel of his sneakers. She further testified that she saw Tennis strike Vassella with his sneakers seven or eight times. (T.8 732). During her testimony, Adams claimed that they were Tommy Hilfiger sneakers.[1] (T.8 740-41). Although he attempted to resist, despite being rather healthy for a man of his age, he was no match for the strength of Tennis, some seventy years younger than he. At this point Vassella was bleeding profusely, yet still trying to muster whatever strength he had left to ward off Tennis' blows. Between threats to kill Vassella, and stomping on his head, Tennis would run around the house looking for valuables. (T.8 736). After a little while, it became evident that Vassella had little of value worth taking. As he lay on the floor, prone and literally bleeding to death, Tennis informed Adams that it was time to go. (T.8 738-39). As they left the residence, Tennis had blood on his pants and sneakers. (T.8 739). Joshua Perper, chief medical examiner of Broward County, performed the autopsy on Vassella.(T.10 898). Although he could not conclusively state that stomping would cause the injuries to Vassella, he testified

[1] At trial, the State called Detective Thomas Hill, an expert in the recognition and analysis of shoe sole patterns. Hill testified that after reviewing the shoeprint pattern found in an impression left on Mr. Vassella's thigh he conducted his investigation and determined the pattern to be that of a Tommy Hilfiger brand shoe. (T.9 855) He further explained that his opinion was rooted in the fact that this specific shoe pattern was only made by Tommy Hilfiger. (T.9 870-71).

that Vassella died as a result of blunt force trauma to the head and neck, which, in his opinion, had to have been sustained during an assault. (T.10 916). Vassella endured broken vertebrae in his neck, a cracked rib, and hemorrhaging throughout his upper region. (T.10 903-908).

Upon leaving the residence, Tennis and Adams went to a nearby Publix where they called a taxi to return to the Boltos residence. (T.8 741). Although they spent the next few hours hiding in Tennis's black F-150 (T.8 742), Tennis decides that he needs to change vehicles. They decide to meet with Adams's friend Monica, where Tennis negotiates a trade of the Ford F-150 for a white Plymouth Acclaim that belonged to Monica's brother, Kevin Petro. (T.8 744-746). After spending the night at Monica's house, Tennis decides that it's time to leave the area, stopping by the Boltos residence only to pick up some items for Adams. (T.8 746-47). Upon their return, Adams quickly packed her belongings and informed Boltos that she and Tennis were leaving together. (T.7 675). At no point did Adams indicate that she was in any harm, or was being threatened in any way. (T.8 747) In fact, during her testimony, Boltos admitted Adams left with Tennis under her own free will. (T.7 676-77).

Making their way to Columbus, Ohio, where Tennis' biological mother lived, they were stopped momentarily in

Georgia by a Tifton Police Department Officer Adam Storey. (T.8 702). Officer Storey was called out to a Holiday Inn parking lot, where he found Tennis and Adams asleep inside a white Plymouth Acclaim. (T.8 703). Upon requesting identification, Tennis claimed to be Tony Adams but had no identification with him. Adams produced an identification card with the name Chestina Adams. (T.705-06). Although Officer Storey ran their information through N.C.I.C., there was nothing outstanding under either name, so he let them go. (T.8 708).

With only a few hundred dollars between them, Adams called home, asking Boltos to send her some money. (T.8 747). After spending the night in with his biological mother in Ohio, Tennis and Adams headed towards Chicago to meet with Tennis's brothers. (T.8 750). After eating dinner with his family and spending the night with his brother Sam, Tennis decided to change his appearance by shaving his head. (T.8 753). Tennis and Adams eventually checked into a hotel room booked by his brother leaving the white Plymouth Acclaim along the same street as that which his brother resides on. (T.8 754). Fearing that their location would be compromised due to Adams and Gabby's brother both sharing the "Adams" surname, Tennis's brother made arrangements for them to stay in a different hotel under his employee's name. (T.8 755). An FBI task-force arrested them at

the hotel two days later. (T.8 757). Upon this evidence, the jury convicted Tennis of first-degree felony murder. (R.3 381).

The penalty phase was conducted on November 14, 2005 wherein both Norma Avantino and Barbara Hertel gave a victim impact statement and the defense called a private investigator, Dr. Patsy Cerose-Livingston[2], and family to report on Tennis's history. This, in conjunction with the guilt phase, resulted in an eight to four death recommendation. The court found: (1) that the felony murder was committed during the course of a burglary or robbery; (2)for pecuniary gain; (3)heinous, atrocious, or cruel ("HAC"); (4) the victim was especially vulnerable due to advanced age or disability. The first two aggravators were merged, and all were given great weight. For mitigation, the court found no statutory mitigation, and 4 non-statutory mitigators: (1) suffers from a mental disease or defect (little); (2) suffered from a deprived childhood (some);

[2] Dr. Cerose-Livingston testified that Tennis, though 19 at the time, had the intellectual capacity as that of someone who is 12. (T.14 1242). She also reviewed a number of records from school systems in which Tennis has been enrolled. Dr. Cerose-Livingston testified that the numerous behavior problems could be attributed to some sort of learning disability, which is often the case. (T.14 1227). Those records indicated that Tennis scored in the low to mid 70s on various IQ tests that were given. (T.14 1220-22). There was also a report from Dr. Wilmoth, submitted by Lawrence Tennis after the conclusion of the penalty phase, in which it was found that Appellant is functioning adaptively as one who is 10.9 years old. (R.3 459). Dr. Wilmoth reported that Tennis's IQ at 67. (R.3 458).

(3) family who loves him (some); (4) has shown remorse (little). (T.33 1662-65; R.3 523-27). Upon the court's weighing, in addition to the information presented at the Spencer hearing, Tennis was sentenced to death.

SUMMARY OF THE ARGUMENT

Issue I – Thomas Hill was properly qualified as an expert in the recognition and analysis of shoe sole patterns.

Issue II and IX – There was no abuse of discretion in refusing the admission of the State's factual proffer given during Sophia Adams's plea colloquy into evidence as an impeachment device and the State's position as to Adams's truthfulness was consistent throughout the record.

Issue III and VIII – The trial court's Nelson hearing was adequate and there was no error in not holding a Faretta hearing where Appellant's request to proceed pro se was equivocal.

Issue IV – Tennis was not entitled to a competency hearing where there was never a finding by the trial court of incompetency.

Issue V –Tennis's is not entitled to a jury instruction of felony murder in the third degree with grand theft as the underlying felony since there was no evidence adduced at trial that would support it.

Issue VI – Both Fitzpatrick and Delgado have been overruled by legislative enactment making the jury's general verdict legal.

Issue VII – A claim of ineffective assistance of counsel is not cognizable on direct appeal.

Issue X – There was no abuse of discretion by the trial court in allowing the use of the term "gypsy" when discussing facts that were material to establishing the motive.

Issue XI – The death sentence is proportional.

Issue XII – There was no double jeopardy violation for applying the aggravating circumstance that the victim was vulnerable due to advanced age or disability because it is neither a conviction nor a sentencing enhancer.

Issue XIII – The trial court gave due consideration to the jury's death recommendation.

Issue XIV – There was no abuse of discretion by the trial court when it properly rejected age as a mitigating circumstance.

Issue XV – The jury is not required to make unanimous finding as to death eligibility nor does Ring call into question Florida's capital sentencing scheme.

Issue XVI – Because only the trial court can sentence defendant's to death, Tennis's right to a trial by jury was not chilled by his decision to not accept the State's plea offer.

Issue XVII - The HAC aggravator is supported by the evidence and was found properly.

Issue XVIII – The court conducted the required analysis and made the finding required to impose the death penalty.

ARGUMENT

Point I

THE TRIAL COURT PROPERLY ALLOWED HILL TO TESTIFY AS AN EXPERT (RESTATED)

Tennis asserts that the court erred by allowing Hill to testify as an expert in the recognition and analysis of shoe sole patterns. He further alleges error when Hill impermissibly testified to "hearsay" evidence which formed a partial basis for his expert opinion. Contrary to Tennis's assertion, Hill properly qualified as an expert so the court did not err in allowing the testimony of his expert opinion, which was not "something a layperson could do" absent substantial experience and training.

The standard of review for a court's decision to allow a witness to testify as an expert is abuse of discretion. See

Floyd v. State, 913 So. 2d 564 (Fla. 2005); Ramirez v. State, 542 So. 2d 352 (Fla. 2003). A trial court has broad discretion in determining the range of subjects on which an expert witness can testify and, absent a clear showing of error, the court's rulings on such matters will be upheld. Brown v. State, 894 So. 2d 137 (Fla. 2004); Pagan v. State, 830 So. 2d 792 (Fla. 2002); Finney v. State, 660 So. 2d 674, 682 (Fla. 1995). The record clearly shows Hill was well qualified to testify as an expert in his field of shoe identification and pattern recognition. The trial court neither erred nor abused its discretion by permitting this testimony.

Hill testified that he is a forensic analyst with the Broward Sheriff's Office, specifically assigned to their Crime Scene Investigation Unit. Prior to joining the Sheriff's Office, Hill spent twenty-one years as a Ft. Lauderdale Police Department detective assigned to their Crime Scene Investigation Unit. Over the course of his career, Hill accumulated between seventeen and eighteen hundred hours of continued training, including time spent training new investigators within this field. Hill further testified that his specializations are in footwear comparison analysis, collection of footwear, blood pattern analysis, and crime scene investigation as a whole. Over the course of his career, Hill has accumulated around three

to four hundred hours of specialized training in footwear comparison. In addition, he became certified through the International Association of Identification as a footwear examiner in 1997. Hill now teaches within this specialization. He has been declared an expert in footwear comparison and identification nineteen times in Broward County and once within the state of Washington. (T.9 844-46).

Contrary to Tennis's claim here, admission of Thomas Hill's opinion as a qualified expert witness was proper under the Florida Evidence Code. Section 90.702, Florida Statutes (1999), provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

The State laid the proper foundation to qualify Hill as an expert who could render an opinion on which specific shoe pattern was consistent with the impression left on Vassella's body. To the extent that Tennis takes issue with Hill's remark that "[o]vertime you could sit and do the same thing," such a comment speaks directly to the level of experience required to perform such an analysis properly. Consequently, the trial court

did not abuse its discretion in allowing Hill to render an opinion in this case.

Tennis's claim that Hill was used as a conduit for hearsay is equally without merit. Tennis argues that the court should not have allowed Hill to relay what the Tommy Hilfiger representative told him. Tennis acknowledges the general proposition that an expert may rely upon facts or data which are not otherwise admissible in forming his opinion, so long as the testimony does not become a conduit for hearsay opinions from other experts. Linn v. Fossum, 946 So. 2d 1032 (Fla. 2006). The Tommy Hilfiger representative was not an expert but rather a spokesman who provided manufacturing information to the real expert, Hill. At no point did the State assert this person was anything to the contrary. Hill was merely testifying about a routine part of his investigation.

> Q: Well, with regard to the, to the information provided by say Tommy Hilfiger to you, did you take that information and consider it in coming up with your opinions about this case?
> A: Yes.
> Q: And the information, the type of information that Tommy Hilfiger provided to you, is that typically relied upon in the field of footprint or footwear identification in your field?
> A: Yes.
> Q: What type of information, you indicated you asked Tommy Hilfiger if they supplied these soles to any other makers of shoes, correct?

A: Yes, sir.
…
Q: …Did you find this sole print on any other brand of shoe or even something very close to it other than Tommy Hilfiger?
A: No, sir.
Q: Based on your conversations with Tommy Hilfiger did you have any reason to look at any other manufacturers other than Tommy Hilfiger?
A: No.

(T.9 869-71). Clearly, the Tommy Hilfiger representative only acted as an agent of the company when he provided Hill with the information that no other shoe manufacturer used the same soles. There is no merit to this claim.

Even if it were error to admit Hill's testimony, the error is harmless in this case. The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So.2d 1129, 1139 (Fla.1986). Hamilton v. State, 547 So.2d 630 (Fla. 1989).

> ... The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." [c.o.] The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth in Chapman v. California, 386 U.S. 18 ... and its progeny.... Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.

State v. Murray, 443 So.2d 955, 956 (Fla.1984). In determining whether an error is harmless, the court must determine beyond a reasonable doubt that the comment did not contribute to the guilty verdict. Id. "In order for the prosecutor's comments to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." Spencer v. State, 645 So.2d 377, 383 (Fla. 1994).

The evidence here overwhelmingly placed Tennis inside Vassella's residence at the time of the murder. Tennis himself did not deny he was present for the crime. He made self-implicating comments about his presence at the crime scene to detectives from the Hollywood Police Department, although he later denied the truthfulness of these statements. (T.11 997-999). Adams, his girlfriend and co-perpetrator, detailed how Tennis viciously used the heel of his shoe to repeatedly stomp on Vassella's face and neck. (T.8 730-36). The medical examiner's testimony confirmed that the trauma to the neck and head by the shod foot caused Vassella's death. Given the

abundance of the evidence linking Tennis to the foot print on the victim's body, the error, if any, is harmless beyond a reasonable doubt.

Points II & IX

THERE WAS NO ERROR WHERE TRIAL COURT DENIED ADMITTING THE STATE'S FACTUAL PROFFER OF SOFIA ADAM'S GUILTY PLEA NOR DID THE STATE TAKE INCONSISTENT POSITIONS WHEN DISCUSSING NATURE OF THE PLEA.

Tennis argues that the trial court erred by allowing the State to elicit Adams's guilty plea while denying him the opportunity to impeach her with the factual proffer she made at the time of her plea. Furthermore, he argues it was reversible error for the State to take inconsistent positions about Adams's truthfulness when discussing it at her sentencing and then in front of the jury here. The record shows, however, that the trial court's actions were appropriate and there is no merit to Tennis's claim. Additionally, Tennis failed to object to the State's position on Adams so this issue is not preserved. Since Tennis cannot prove any fundamental error took place, he is not entitled to relief.

The standard of review for a court's ruling on the admissibility of evidence is whether it was an abuse of discretion. The admissibility of evidence is within the sound

discretion of the court and its ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So.2d 604, 610 (Fla.2000); Zack v. State, 753 So.2d 9, 25 (Fla.2000); Cole v. State, 701 So.2d 845, 854 (Fla.1997); Jent v. State, 408 So.2d 1024, 1039 (Fla.1981); General Elec. Co. v. Joiner, 522 U.S. 136(1997) (stating that all evidentiary rulings are reviewed for “abuse of discretion”).

Under this standard, the Court’s ruling will be upheld “unless ... no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla.1980); See Ford v. Ford, 700 So.2d 191, 195(Fla. 4th DCA 1997); Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla.2000), citing Huff v. State, 569 So.2d 1247, 1249 (Fla.1990). The trial court did not abuse its discretion by refusing the admission of the factual proffer into evidence as an impeachment device because this proffer cannot be considered Adams's statement. As a general rule, it is error to permit a witness to be impeached with prior statements made by someone other than that witness. Instructive is Gross Builders, Inc. v. Powell, 441 So. 2d 1142, 1143 (Fla. 2d DCA 1983), in which the Second District Court of Appeals commented "We know of no authority, nor has any been cited to us, which supports the proposition that a witness may be impeached by the contradictory statements of someone else

which cannot, under any theory, be attributed to the witness." Such a proffer is merely an assertion that, were the case to proceed to trial, the State would be able to prove the proffered facts. While Adams agreed to the proffer in order to secure the agreed upon plea arrangement, neither she nor the State made any representation that the proffer was her words. The trial court, thus, did not abuse its discretion.

Defendant's reliance on the general proposition that a co-defendant's guilty plea is not admissible when the defendant and co-defendant are alleged joint actors in the crime[1] is misplaced because it fails to acknowledge how this information was actually used in this trial. Here, Adams's guilty plea was relevant because it went to her credibility as a witness, not because it went to Tennis's guilt. From a tactical standpoint, the State chose to explain Adams's motives for testifying against him, a point that Tennis most certainly would have made during cross examination.

> Q: And did you plead guilty in this case?
> A: Yes.
> Q: And what did you plead guilty to?
> A: Second degree murder.
> Q: And who was your prosecutor in your case? Who prosecuted your case?
> A: You.

---

1 United States v. Baez, 703 F. 2d 453, 455-456 (10th Cir. 1983).

Q: So were the charges reduced to second degree murder?
A: Yes.
Q: And was there any condition based on the reduction of the charge, what, what promises, if any, were made to you?
A: No promises. You didn't promise me anything.
Q: Are you required to do anything in your case or any other case? What are you required to do for the change of charge or reduction of charge?
A: Testify in this case.
Q: And have you been sentenced?
A: No.
Q: Who is the judge in your case?
A: Judge Lebow.
Q: And is your sentencing still pending?
A: Yes.
Q: Until after you testify for the judge to hear you testify?
A: Yes.
Q: And can you tell the jury what you are looking, what's your understanding about what you are looking at in terms of a possible sentence in your case?
1. I know that Mr. Scheinberg is going to give a recommendation to Judge Lebow and --
Q: Do you know what that's going to be?
A: Eight to ten years.
Q: And do you know what, what you're looking at in total, how much time you may be looking at? Do you know what the maximum penalty for second degree murder is?
A: Life.
Q: Life in prison. And how old were you when this all took place?
A: Sixteen.
Q: Have I ever told you what to say in this case?
A: No, sir.

(T.8 758-759). Tennis has not demonstrated any error by the trial court. The court did not abuse its discretion.

As mentioned above, Tennis's argument that the State took inconsistent positions in order to obtain his conviction and subsequent death is not preserved. He never specifically objected at the time the State allegedly took an inconsistent position. Because this issue is not preserved, the matter becomes a question of fundamental error, a standard that is clearly not met here.

"We first review the principles underlying the requirement to preserve error for review and the requisites for determining fundamental error, which may be raised for the first time on appeal. In general, to raise a claimed error on appeal, a litigant must object at trial when the alleged error occurs." J.B. v. State, 705 So. 2d 1376, 1378 (Fla. 1998). "Furthermore, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). This Court has explained that:

> [t]he requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a

> failure to cure early that which must be cured eventually.

Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). The requirement of contemporaneous objection thus not only affords trial judges the opportunity to address and possibly redress a claimed error, it also prevents counsel from allowing errors in the proceedings to go unchallenged and later using the error to a client's tactical advantage. See J.B., 705 So. 2d at 1378.

The sole exception to the contemporaneous objection rule applies where the error is fundamental. Id. This Court has stated that "in order to be of such fundamental nature as to justify a reversal in the absence of timely objection the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown v. State, 124 So. 2d 481, 484 (Fla. 1960) (holding that the alleged error "did not permeate or saturate the trial with such basic invalidity as to lead to a reversal regardless of a timely objection"). Thus, an error is deemed fundamental "when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process." J.B., 705 So. 2d at 1378; see also State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993)(stating that "for an error to be so fundamental that it

can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process"). "The doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." Smith v. State, 521 So. 2d 106, 108 (Fla. 1988); see also Hopkins v. State, 632 So. 2d 1372, 1374 (Fla. 1994)(noting that "this Court has cautioned that the fundamental error doctrine should be used 'very guardedly'"). Fundamental error is error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Kilgore v. State, 688 So.2d 895, 898 (Fla. 1997) (quoting State v. Delva, 575 So.2d 643, 644-45 (Fla. 1991)).

Despite Defendant's assertions to the contrary, the State's case turned on a singular issue, his guilt. At no point did the State waiver from that stance; it consistently maintained throughout the trial that the victim's death came as a direct result of the actions by the Defendant. The crux of Adams's testimony was that Defendant killed Vassella.

During her sentencing hearing, the State voiced its concern that Adams was not being as forthright as she had promised about her mother's culpability.

> And I have great concern that Sofia Adams is not telling the truth about the role her mother played in this crime. And it wasn't just a coincidence. And this Court has sat through the evidence and the case, generally. And Sophia Adams had an obligation to tell the truth. The whole truth. And some power over her is I believe preventing her from giving that full truth about who set this up and motivated these younger defendants to go and attack and kill – I'm not saying her mother wanted them to kill him, but certainly the evidence and everybody believes, I believe, that this defendant's mother was a great motivating factor in them going to this 91 year old man's house. And I think the court respectfully should consider that that lack of candidness on that factor is important.

(T.32 1645-46). The State expressed this suspicion not out of a desire to adversely impact Defendant's case, but out of a desire to have Adams adhere to her side of the plea bargain to tell the complete truth. Additionally, regardless of whether the State's suspicions were relevant to Tennis in particular, its position never changed about Boltos's involvement. During her testimony, the State repeatedly asked Adams if she was lying to protect her mother:

> Q: Ms. Adams, I want to ask you about how -- again, I want to go back to how it is that you and the defendant found yourselves at Al

Vassella's, okay? Did your mother direct you there?
A: No, sir.
Q: Are you sure?
A: Yes.
Q: Was there any discussions with your mother about where, where a place is that you and Gabby could go to get money to, for Gabby to pay your mother for you?
A: No.
Q: Are you protecting your mother?
A: No.
Q: Are you sure?
A: Yes.
Q: If your mother was calling Mr. Vassella numerous times the day, the afternoon even up until 2 o'clock in the afternoon the same day that this happened, if she was calling him were you, were you there when she was making those calls?
A: No.
Q: Did you know that your mother would, would call first Mr. Vassella before she went and visited him, did you know that's how it worked with her and Mr. Vassella?
A: No.
Q: Did your mother make that phone call while you're there and, and to make sure Mr. Vassella was there at the house so you and Gabby could go over and do this?
2. No.
Q: Are you sure?
A: Yes.
Q: Are you trying to protect your mother?
A: No.

(T.8 759-60)(emphasis added). The prosecutor preserved a similar line of questioning with Boltos during her testimony. (T.7 668, 671, 689). There clearly is no error here.

Even if this Court were to find that the State took inconsistent positions relative to Boltos's culpability, that point is wholly irrelevant to the matter at hand. Reincorporating the harmless error analysis at the end of Point I, there is no disputing the fact that Tennis killed Vassella. There is no fundamental error here. This Court should deny relief.

Points III & VIII

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS HIS ATTORNEY AND A FARETTA HEARING WAS NOT NECESSARY ON THE FACE OF THE RECORD. (restated)

In Point III, Tennis argues that the trial court erred in refusing to allow Defendant to represent himself. He explains that despite making numerous requests of the court, it either ignored Defendant's motions or simply rejected them without giving these requests due consideration. Likewise, in Point VIII, Tennis further argues that the trial court should have held a more adequate Nelson[1] hearing in order to fully investigate these claims. To the contrary, the trial court acted well within its discretion since no reasonable grounds

[1] Nelson v. State, 274 So.2d 256 (Fla. 1973)

existed to merit dismissing Defendant's counsel. The Court's Nelson inquiry was not inadequate. Tennis was not entitled to a Faretta[2] hearing because he did not unequivocally to represent himself.

When a defendant seeks discharge of court-appointed counsel, the court must conduct a Nelson inquiry into the nature of the complaint to see if it is about counsel's competency or another issue. Where there is a clear allegation challenging counsel's competency, the court must determine whether adequate grounds exist for discharge. Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Nelson, 274 So.2d at 256. An inquiry into complaints of incompetence can be only as specific and meaningful as the complaint. Lowe v. State, 650 So.2d 969 (Fla. 1994). If the court finds counsel's representation effective, it must advise the defendant he is not entitled to substitute counsel upon the discharge of current counsel and that, if he cannot afford to hire an attorney, he will be exercising his right to represent himself. Hardwick, 521 So.2d at 1074. Jones v. State, 449 So.2d 253 (Fla. 1984). If the defendant persists, the court must decide whether his waiver of counsel is knowing and intelligent. Faretta, 422 U.S. at 806.

---

[2] Faretta v. California, 422 U.S. 806 (1975)

As a result of defendant's request for new counsel, the court held a Nelson hearing on June 10, 2005. (SR.3 355). At this hearing, the court gave Tennis every opportunity to offer some sort of substantiated reason or argument that would justify a change in counsel under Nelson.

> THE COURT: What is it that you wish to bring to my attention regarding the matters alleged in that motion?
>
> THE DEFENDANT: Your Honor, I have tried to speak to my lawyer several times about, about my case and what do you think is the best possibility of what I should do. And he, he told me if I were you, I would cop out to life because I know you're a murderer, I know you're a murderer because Sophia told me so. I felt like that was like a pop-quiz question or something, understand? I felt like I asked him a question, I asked, sir, are you working with the prosecutor. I don't know if thinks [he] it's a joke or not, but he said yes.
>
> THE COURT: Before you go any further, I have been present in the courtroom on many occasions when Mr. Rastatter has advised you of what he believes would be in your best interests. So if you are telling me he has not advised of…Then I know that it is not correct. What else do you want to tell me?
>
> THE DEFENDANT: I'll take a lie detector test. This man told me that I'm a murderer. I killed that old man because Sophia told him so; and he will see to it if I don't take the life sentence, I'll get the death penalty. I refuse to go to trial with him. I would like to go pro se instead of having two prosecutors against me, I'll do it

> myself. Even though I don't know what I'm doing, I will have a better fighting chance.
>
> THE COURT: MR. Tennis, what is it you can show me that would support your allegations?
>
> THE DEFENDANT: I have allegations that the man that you appointed to me, Pat Rastatter, my father and my cousins have talked to him. There was verbal confrontations of I don't know, of cursing and this and that. It was very, very, a lot of things that is going on that's outside of the courtroom you're not seeing.
>
> THE COURT: There are many things I'm not supposed to see. I find nothing within the record of this case –-
>
> THE DEFENDANT: Excuse me. Sir –-
>
> THE COURT: Sir, you cannot talk. Within any of the things you have said, you have complained before. As I said, I'm present. I'm familiar with Mr. Rastatter's communications to you. He has communicated to you in open court. And there is nothing about his representation of you that is incompetent or does not meet the highest standards –- of professional responsibility.

(SR.3 357-59). Although the Court repeatedly asked Defendant to specify **any** sort evidence that would substantiate his claims, he was unable to do so. Subsequently, the Court was left with little choice but to proceed based on its own observations of Defendant's counsel. The Nelson inquiry was adequate.

Despite his claims to the contrary, Tennis's request to represent himself was illusory, at best, as simply part of a

larger plan to disrupt the court proceedings. In not granting his requests, the Court balanced defendant's right to self-representation with the state's right to an orderly and timely trial. Jones, 449 So.2d at 258. Furthermore, as the United States Supreme Court noted, courts have long required that a request for self-representation be stated unequivocally. Chapman v. U.S., 553 F.2d 886, 892 (5th Cir. 1977). See Faretta, 422 U.S. at 835-36. No such unequivocal request existed here. Tennis was given the opportunity at the Nelson hearing to make his case for a new attorney, which is what he was doing when he mentioned acting as his own counsel.

Defendant never unequivocally requested to proceed *pro se.* He simply stated his apparent frustration with his counsel because, as he argued, his attorney must be working for the prosecution because he told Tennis there was substantial evidence of his guilt. It is clear from the record that Defendant went out of his way throughout the trial to disrupt the process in any way he could. It is also clear that the trial court was losing patience with Defendant's antics. These antics, in and of themselves, were not enough to merit a Faretta hearing. Bowden v. State, 588 So. 2d 225, 230 (Fla. 1991) (finding no further inquiry necessary when defendant merely

expressed dissatisfaction with counsel's performance). There was no error here. Tennis is not entitled to a new trial as this issue is wholly without merit.

Point IV

NO ERROR EXISTED WHERE THE TRIAL COURT DID NOT HOLD A COMPETENCY HEARING.

Tennis claims that the court was on notice that Defendant was incompetent because it refused to accept his guilty plea and it was error to not hold a competency hearing prior to proceeding to trial. The State contends that the trial court acted well within its discretion because no reasonable grounds existed to merit a competency hearing. This claim is meritless.

A court is not required to order a competency evaluation or hearing **unless** it has reasonable grounds to believe the defendant may be mentally incompetent. Fla.R.Crim.P. 3.210(b). This is true whether the defendant specifically requests one or not. Gibson v. State, 474 So. 2d 1183 (Fla. 1985); Christopher v. State, 416 So. 2d 450, 452 (Fla. 1982); State v. Green, 395 So. 2d 532 (Fla. 1981). The test Florida courts use to determine a defendant’s mental competency to stand trial “is whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational

understanding, and whether he has a rational, as well as factual, understanding of the proceedings against him." Hill v. State, 473 So.2d 1253, 1257 (Fla. 1985) quoting Dusky v. United States, 362 U.S. 402 (1960). See Mora v. State, 814 So.2d 322, 327 (Fla. 2002).

It is simply not the case, as Tennis claims, that the trial court found him to be incompetent when it refused to take his plea. At no point did the court indicate that it rejected the plea on the grounds of mental defect or incompetency. To the contrary, Defendant's medication, along with his generally disruptive behavior, caused the court to act as it did. This is evidenced by Defendant's own admission that he would be of clear mind if he could simply stay off the medication for two more days.

> THE COURT: Is anyone forcing you to do this against your will?
>
> THE DEFENDANT: I've been told because if I don't --
>
> THE COURT: Let me stop you. You need to use whatever information you have been told and you make your decision based upon information from whatever sources you want to use. You make that decision. Has anyone threatened you with anything to get you to enter into this plea?
>
> THE DEFENDANT: Not really.

THE COURT: I need to know if someone has threatened you in some way.

THE DEFENDANT: They said if I don't do this that maybe I would get the death penalty. I would be on death row and they would kill me.

THE COURT: Do you understand that that is a possibility if you go to trial, which I've told you is a possibility?

THE DEFENDANT: Sure. Just like there is a possibility of me getting found not guilty.

THE COURT: Yes, sir, there is. But you have to take all of that information and decide what is in your best interest. So the fact that, yes, you may face a death sentence is a possibility, but no one has said to you --

THE DEFENDANT: That for sure I'm going to get that.

THE COURT: Exactly…And is there anyone else who has threatened you or promised you anything or in any way forced you to give up your rights and to enter into these pleas?

THE DEFENDANT: The only problems I have by entering into these pleas is that I won't be killed.

THE COURT: You still need to answer my question. Is there anyone who has forced you to give up your rights and enter into these pleas?

THE DEFENDANT: No.

…

THE COURT: Are any of these medications that you've taken interfering with your ability to make this decision?

THE DEFENDANT: I know a lot of people if they were looking at the death penalty and copping out they would think it's crazy, but it hasn't hit me yet. Maybe it's the medication. I don't know what it is, but like it's calm. I don't know.

THE COURT: Let me ask you again. Are any of the medicines interfering with your ability to make the decision as to whether you want to go to trial or enter this plea in your best interest?

THE DEFENDANT: A little bit.

THE COURT: Well, if you feel that the medication is interfering with your ability to make this decision then we will go to trial, because I can't accept a plea from you unless I know that you are able to understand and that your reasoning is not –-

THE DEFENDANT: There is no way that I can stay off the medication for a couple of days?

THE COURT: Mr. Sheinberg has indicated that the plea will be withdrawn and the Court does not have the ability to offer a plea.

THE DEFENDANT: So I'm right back to death?

MR. SHEINBERG: judge, I have to, as an officer of the court, tell you that at this point in time I don't believe that there is an adequate record of his answers to sustain a plea.

THE COURT: I'm ending it now. I can't take this plea. He's indicated that the medication is interfering with his judgment

> and I've asked him numerous times and he's not been able to respond, so I cannot accept the plea.

(SR.2 215-18).

As reasoned in Point III and VIII, the trial court was apparently growing impatient with Defendant's antics. He seemingly took every opportunity to delay or otherwise to disrupt the overall integrity of trial process. Defendant's behavior during his plea colloquy, where he generally avoided directly answering the Court's questions whenever possible, clearly demonstrates this. Indeed, his inability or unwillingness to respond directly to the Court's inquiries, in addition to the State's expiring one-time life offer, caused the Court to dismiss the plea. Although the Court noted his allegation that the medication was interfering with his judgment, at no point did it find him incompetent. Based upon its on-going interactions with Tennis (as noted throughout this brief), the trial court never questioned whether he had a "reasonable degree of rational understanding, and whether he has a rational, as well as factual, understanding of the proceedings against." The record clearly indicates that Tennis knew and understood both the proceedings and how to work the process.

Nothing in this, or any other episode, necessitated a competency hearing, and consequently, there is no merit to this claim.

Point V

THE TRIAL COURT PROPERLY REJECTED A JURY INSTRUCTION THAT WAS NOT SUPPORTED BY THE EVIDENCE. (restated)

In Point V, Tennis claims the trial court erred by failing to instruct on the lesser included offense of murder in the third degree with grand theft as the underlying felony. He urges this Court to take into account the sizable sum of the dowry at stake and the fact that, despite the minimal value of the valuables taken, the defendants entered the Vassella residence with the intent to steal thousands. The State counters that Defendant adduced no evidence at trial which would support such an instruction. This issue is without merit.

The standard of review applied to a court's decision to give or to withhold a jury instruction is abuse of discretion. "Decisions regarding jury instructions are within the sound discretion of the trial court and should not be disturbed on appeal absent prejudicial error." Coday v. State, 946 So. 2d 988, 994(Fla. 2006)citing Goldschmidt v. Holman, 571 So. 2d 422, 425 (Fla. 1990); See Parker v. State, 873 So.2d 270, 294 (Fla.

2004); James v. State, 695 So. 2d 1229, 1236 (Fla. 1997) (noting court has wide discretion in instructing jury). A court ruling will be upheld "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris, 382 So.2d at 1203. See Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla. 2000). Furthermore, it is a long standing rule that a particular jury instruction will not be given absent some sort of evidence adduced at trial that would support it. See Herrington v. State, 538 So. 2d 850 (Fla. 1989). (The judge shall not instruct on any degree as to which there is no evidence.) See also Green v. State, 475 So. 2d 235 (1985). (If there is no evidence to support a third-degree felony murder conviction, an instruction on the crime is not required.)

Although Tennis argues that he intended to steal thousands from Vassella, the ***actual*** value of the property taken in an element of the crime of theft under the Florida statute, not the value of what the criminal hoped or dreamed to get.

> **812.014 Theft**
> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

> (a) Deprive the other person of a right to the property or a benefit from the property.
>
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.
>
> …
>
> (2)(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in §775.082, §775.083, §775.084, if the property stolen is:
>
> 1. Valued at $300 or more, but less than $5,000…

§812.014, Fla. Stat. (1997). According to the statute, it is the value of what was **actually** taken that determines the level of theft crime.

At the charge conference, the Court made it clear that Tennis's theft did not cross the three-hundred dollar threshold that the theft statute requires for a conviction of grand theft.

> MR. RASTATTER: Put in for murder three, grand theft as the underlying felony --
>
> MR. SCHEINBERG: Okay.
>
> MR. RASTATTER: -- manslaughter.
>
> THE COURT: We'll have a problem with grand theft, no value's been established other than a box of coins, there's been no evidence of value that would exceed three-hundred dollars.
>
> MR. SCHEINBERG: But it can be simple aggravated battery.
>
> THE COURT: Correct.

> MR. SCHEINBERG: As a murder three, I would rather have theft since there's been, there's been evidence that something was taken but not of its exact value.
>
> THE COURT: Then it is petty theft.
>
> MR. SCHEINBERG: That wouldn't be even a felony third degree murder.
>
> THE COURT: Correct, because under the jury instructions the jurors cannot find a value greater than three hundred dollars if there's no evidence of it, they can only find that it is of value.
>
> MR. RASTATTER: Well, then I guess agg assault.

(T.9 875-76). The complete record clearly shows that no value was determined and, thus, there was no evidence of grand theft here. Consequently, the trial court based its decision upon the evidence brought out at the trial and, therefore, did not abuse its discretion in rejecting this instruction. This issue has no merit.

Even if this Court were to find merit to this issue, any error committed is harmless. Tennis's felony murder conviction was predicated on the jury finding that Vassella died as a direct result of the aggravated battery committed by Tennis. As detailed in the first point, abundant evidence presented at trial proved Tennis's guilt. Considering the totality of the evidence, were the jury to have received this lesser-included

third degree felony murder with grand theft underlying instruction, there is no reasonable possibility that their verdict would not have been different. Tennis is guilty of first degree felony murder for brutally beating Vassella to death while engaged in a burglary. Any error is harmless and relief should be denied.

Point VI

THE JURY'S GENERAL VERDICT WAS LEGAL.

Tennis next argues that he was denied due process and a fair trial because the jury's general verdict may have been based on a legally invalid theory. Since the court instructed the jury on felony murder with both burglary and robbery as possible underlying felonies, the jury was faced with two conflicting provisions of the burglary statute. Under sec. 810.02 of the Florida Statutes, one is guilty of burglary when he continued to remain in a location after the owner withdrew permission. Tennis argues that this is in direct conflict with the jury instruction here which defines burglary as the commission of an offense regardless of whether permission had been withdrawn. In support of this claim, Tennis relies on Fitzpatrick v. State, 859 So. 2d 486 (Fla. 2003). This point is

erroneous, however, the legislature changed the law in 2004, a year before this case went to trial.

The Fitzpatrick decision was premised on the case of Delgado v. State, 776 So. 2d 233 (Fla. 2000). Delgado was superseded by section 810.015, Florida Statutes, on May 21, 2004. In that statutory section, the legislature also overruled Fitzpatrick, finding that it was "decided contrary to the Legislative intent expressed in this section." The new statute reads:

> (1) The Legislature finds that the case of Delgado v. State, Slip Opinion No. SC88638 (Fla. 2000) was decided contrary to legislative intent and the case law of this state relating to burglary prior to Delgado v. State. The Legislature finds that in order for a burglary to occur, it is not necessary for the licensed or invited person to remain in the dwelling, structure, or conveyance surreptitiously.
>
> (2) It is the intent of the Legislature that the holding in Delgado v. State, Slip Opinion No. SC88638 be nullified. It is further the intent of the Legislature that s.810.02(1)(a) be construed in conformity with Raleigh v. State, 705 So. 2d 1324 (Fla. 1997); Jimenez v. State, 703 So. 2d 437 (Fla. 1997); Robertson v. State, 699 So. 2d 1343 (Fla. 1997); Routly v. State, 440 So. 2d 1257 (Fla. 1983); and Ray v. State, 522 So. 2d 963 (Fla. 3rd DCA, 1988). This subsection shall operate retroactively to February 1, 2000.
>
> (3) It is further the intent of the Legislature that consent remain an

affirmative defense to burglary and that the lack of consent may be proven by circumstantial evidence.

(4) The Legislature finds that the cases of Floyd v. State, 850 So. 2d 383 (Fla. 2002); Fitzpatrick v. State, 859 So. 2d 486 (Fla. 2003); and State v. Ruiz/State v. Braggs, Slip Opinion Nos. SC02-389/SC02-524 were decided contrary to the Legislative intent expressed in this section. The Legislature finds that these cases were decided in such a manner as to give subsection (1) no effect. The February 1, 2000, date reflected in subsection (2) does not refer to an arbitrary date relating to the date offenses were committed, but to a date before which the law relating to burglary was untainted by Delgado v. State, 776 So. 2d 233 (Fla. 2000).

(5) The Legislature provides the following special rules of construction to apply to this section:

(a) All subsections in this section shall be construed to give effect to subsection (1);

(b) Notwithstanding s. 775.021(1), this section shall be construed to give the interpretation of the burglary statute announced in Delgado v. State, 776 So. 2d 233 (Fla. 2000), and its progeny, no effect; and

(c) If language in this section is susceptible to differing constructions, it shall be construed in such manner as to approximate the law relating to burglary as if Delgado v. State, 776 So. 2d 233 (Fla. 2000) was never issued.

(6) This section shall apply retroactively.

sec. 810.015, Fla. Stat. (2004). The new statute by the legislature essentially nullifies Tennis's argument. This claim has no merit and Tennis's conviction and sentence must be affirmed.

Point VII

CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE NOT COGNIZABLE ON DIRECT APPEAL. (restated)

Tennis argues that he was denied a fair trial and due process of law when, despite his pleas for him to do so, his counsel refused to participate in his testimony beyond asking him to give his narrative to the jury. Tennis claims that counsel disagreed with his decision to risk admitting previously suppressed exculpatory statements given to the Hollywood Police Department detectives by taking the witness stand and this disagreement was the impetus behind his decision to not assist Tennis's testimony. This disagreement was the reason, and not the fear of suborning perjury, was the driving force behind the resistance from counsel. The State contends this issue is actually a claim of ineffectiveness of counsel and, therefore, not cognizable on direct appeal.

The general rule is that a claim of ineffective assistance of counsel may not be raised on direct appeal. See Bruno v. State, 807 So. 2d 55 (Fla.2001); see also Wuornos v. State, 676 So.2d 972, 974 (Fla. 1996) ("We find that this argument constitutes a claim of ineffective assistance of counsel not cognizable on direct appeal, but only by collateral challenge."); Kelley v. State, 486 So.2d 578, 585 (Fla. 1986) ("Generally, such claims [of ineffectiveness] are not reviewable on direct appeal but are more properly raised in a motion for post-conviction relief."). In fact, a claim of ineffectiveness can properly be raised on direct appeal only if the record on its face demonstrates ineffectiveness. See Bruno, 807 So. 2d at 63; Wuornos, 676 So.2d at 974.

Towards the end of the State's case in chief, Tennis announced he wished to testify. In open court, counsel repeatedly advised him of the danger involved in that decision as, at the very least, he would be subjecting himself to unnecessary cross-examination on inculpatory statements he made to the police which the defense had sought mightily to suppress.

> MR. RASTATTER: And therein comes the issue as to whether Mr. Tennis should testify or not. It is my advice to him that he not testify in that I would hate to think that all the effort I put into excluding his statements to the police would now come back in, at least in impeachment fashion, if he

> testifies. I've been unable to make him understand that. Therefore, he's indicated to me that he wants to testify and I've told him, **even aside from his statements, it still would be in my mind a very, very bad idea based upon how I believe he would be perceived by the jury.** And how he likely would not hold up under any cross examination by the prosecutor. But consistent with his not listening to me a lot, Mr. Tennis has made the decision that he does want to testify.

(T.10 932-33). Tennis, however, insisted on testifying; he explained his wish to do so as a means of getting the court to release his father, who was in custody for failing to appear to testify in this case. The Court corrected Tennis informing him that Tennis's decision to testify had no bearing on his father's status. Defense counsel again voiced his concerns about Tennis's tactics.

> MR. RASTATTER: MR. Tennis should also understand, Judge, if he takes the stand I will not participate with him in any question or answer narrative.
>
> THE DEFENDANT: As my lawyer, your Honor…
> THE COURT: Wait.
>
> MR. RASTATTER: I will not participate in any question and answer narrative with him, I will only ask him to tell his side of the story, that I will not question him and will not participate in what he purposes that I do.
>
> THE COURT: Okay, Mr. Tennis, **Mr. Rastatter, under his oath by indicating that he cannot**

> **call you to the stand and inquire anymore of you than as he said,** you can state whatever it is you want to state under oath to these jurors, do you understand that?
>
> THE DEFENDANT: So, your honor, basically what that means is that whether, no matter what I'm saying on the stand he don't want to have no part?
>
> THE COURT: He's going to ask you to tell the jurors in your words what happened on this occasion and that's it and then you can say whatever you wish it is in response and then Mr. Scheinberg will be prepared to cross examine you on that…

(T.10 937-38). Clearly, counsel anticipated that Tennis might lie on the stand and was concerned with suborning perjury.

Although Tennis frames his argument as a constitutional due process and right to a fair trial issue, his contentions are garden-variety ineffective assistance of counsel claims. This issue is not cognizable on direct appeal and, thus, not properly raised here. Bruno v. State, 807 So. 2d 55 (Fla.2001). Furthermore, there is no demonstrable ineffectiveness by defense counsel apparent on the face of the record. Counsel obviously "still represented" Tennis during his testimony. Counsel insisted on Tennis not taking the stand; he repeatedly advised Tennis of this both behind closed doors and in open court. Despite his client refusal of his legal advice, trial counsel spent a fair amount of time after the direct testimony reviewing

his client's direct testimony with him to prepare him for the coming cross examination. (T.10 938-39). Counsel did not abandon his client and his representation was clearly effective.

In support of his argument, Tennis only cites to Jennings v. State, 413 So. 2d 24 (Fla. 1982). There the defense counsel took no part in the cross-examination of a crucial and material state witness. That situation is substantially different from, and inapplicable to, the matter at bar here. As the Jennings Court recognized, the United States Supreme Court has long held that the opportunity for a full and complete cross-examination of critical witnesses is fundamental to a fair trial. Pointer v. Texas, 380 U.S. 400 (1965). It is an entirely different matter when counsel does not prevent his client from testifying but rather conducts the direct examination in the form of a narrative. The jury heard what Tennis had to say. He was not deprived of due process or a fair trial since that jury could then consider his testimony along with all the other evidence from the trial in reaching its verdict. Tennis was not prejudiced by his attorney's tactics nor is there error. Finally, since it claim of ineffective assistance of counsel, this claim is not ripe for appeal and should be denied.

Point X

THERE WAS NO UNDUE INJECTION OF RACE OR ETHNICITY BY THE PROSECUTION. (restated)

Defendant claims that the State's injection of this ethnic background into the trial denied him due process, a fair trial, and a fair penalty phase. Tennis claims that the term "Gypsy" has inherent negative connotations that prejudice the jury's perception of him. However, because of the particular factual circumstances surrounding this case, and because of actions taken by Tennis himself, the issue of Defendant's "Gypsy" heritage was unavoidable. This issue is without merit.

Essentially Tennis takes issue with the court allowing the State to introduce this information. The standard of review for a court's evidentiary ruling is abuse of discretion. A court has discretion in admitting evidence and its ruling will not be reversed absent a clear abuse of that discretion. Ray, 755 So.2d at 610. The court properly exercised its discretion by allowing the testimony. Furthermore, Tennis did not preserve this issue by making a timely objection at trial when these references were made. The "objections" Tennis mentions in his brief were to *pro se* comments pre-trial and at the opening of the penalty phase in response to his own counsel's stated strategy. This issue is unpreserved. Steinhorst, 412 So.2d at 338; Castor, 365 So. 2d at

703; Brown, 124 So. 2d at 484; J.B., 705 So. 2d at 1378. Since it does not rise to the level of fundamental error, he is not entitled to relief. Kilgore, 688 So.2d at 898.

Defendant's ethnicity was material to establishing motive. The facts show that both Defendant and Adams are ethnic Gypsies. At trial, explaining how Adams first left home, Boltos testified that it is gypsy tradition for the parents of the man to pay the daughter's family a dowry when they elope.

> Q: Up until May of 2004, did you ever give your approval for Sophia to elope with a man?
> A: No.
> Q: Did she ever elope with a man?
> A: She eloped with Gabby.
> Q: Before Gabby did she ever elope or marry another man?
> A: Yes, she married a man name Dominick.
> Q: Okay. How old was she when she, according to you, married this man?
> A: Fourteen.
> Q: And who was she living with when she married or --
> A: With, with Dominick's mother, the grandmother, two sisters, and Dominick.
> Q: If you can, just let me finish my question. When she, at age fourteen, went to live with Dominick was she living with you when she went there? In other words, was she living with and then she eloped with Dominick and moved in with him?
> A: No, they actually came at, to the house and they wanted her. It is hard to kind of explain that.
> Q: Okay.
> A: **And they paid for her, that's our culture.**
> …

> Q: So when they came to your house -- so Dominick came to you and said they wanted Sophia when she was fourteen?
> A: Not Dominick, it was the grandmother.
> Q: And in order for either Dominick or his family to have Sophia what did they have to do with you?
> A: They have to pay me.
> Q: And did they pay you?
> A: Yes, they did.
> Q: How much did they pay you for Sophia?
> A: Six thousand.
> Q: Six thousand dollars?
> A: Ah-huh, yes.

(T.7 651-53). There is no disputing the fact that Adams and Defendant were engaged in a romantic relationship, one where he "eloped" with her. (T.7 664). The facts also reveal that Adams's mother, Boltos, in accordance with the Gypsy tradition, required Tennis or his family to pay a dowry priced in the thousands before he would be allowed to have Adams. (T.7 666). When Tennis's father continually refused to pay any money for Adams, Boltos pressured Tennis to come up with the money. (T.7 665-67; T.8 719-20; T.11 960-61).

Ethnicity was a material element in this case and was necessary to explain the crime. The evidence demonstrated that Defendant went to Vassella's house with the intention of using extreme amounts of violence to extract money for the dowry. The State only brought out the Gypsy custom of marriage and dowry to explain the two defendants' motives and actions. It bears noting

that if any prejudicial statements were inserted into the trial, the Defense was responsible. Defense counsel brought out negative comments about Gypsy's preying upon the elderly and so forth as a means of attacking the State's witnesses.

Tennis's reliance on Robinson v. State, 520 So.2d 1 (Fla. 1998) and State v. Davis, 872 S.2d 250 (Fla. 2004) is inapposite. In Robinson the prosecutor conducted a line of questioning with the medical examiner designed to paint the defendant as hostile and prejudiced against all white people, thus appealing to the bias and prejudice of the jury. Here, neither the defense nor the prosecutor sought to appeal to any jury prejudice or bias by eliciting the information about gypsy customs; such testimony went to the motives behind the crimes or to specific witness credibility and criminal responsibility. Unlike Robinson, the references to Gypsies were relevant to the remainder of the trial and the issue at bar. Davis involved an all white jury to which defense counsel appealed to as "white" people. He went on to describe his feelings of hatred and anger toward blacks, emphasized the racial aspect of a black man killing a white woman, and then proceeded not to call necessary black witness who would have supported the defense theory or who would have presented mitigating evidence at the penalty phase.

This court found trial counsel ineffective and remanded for a new guilt trial. The entire Davis trial was suffused with racial themes and prejudice, a situation clearly different from the one in this trial.

Unlike the cases Defendant cites, none of the testimony or arguments appealed to any latent jury prejudice but rather were directed at specific, relevant elements of the trial, be they motive for the crime or the criminal involvement of the State's main witnesses. Tennis has been unable to show how he was harmed in any prejudicial way by this relevant testimony. This testimony did not reach "down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Kilgore, 688 So.2d at 898. This Court should deny this claim.

POINT XI

THE DEATH PENALTY IS PROPORTIONATE.

Tennis alleges that his sentence of death is disproportionate for several reasons. Specifically he alleges the following: (1) the disparate treatment of co-defendant Sofia Adams, who was convicted of third degree murder and received a sentence of ten years; (2) Tennis had a chronological age of 19,

yet possessed an emotional age of 12; (3) Tennis has been diagnosed with mental disabilities including mental retardation; (4)the murder was unintentional; (5) Tennis' cultural background as that of a gypsy, precluded him from understanding American values; (6) the jury recommended death 8-4. A review of the trial court's sentencing order and the overall facts of this case clearly establish that Tennis's sentence of death is proportional.

This Court has stated repeatedly that the purpose of proportionality review is to consider the totality of the circumstances in a case compared with other capital cases. Urbin v. State, 714 So.2d 411 at 416-417 (Fla. 1998); Terry v. State, 668 So.2d 954 (Fla. 1996). Additionally, the task has been explained as follows:

> "We later explained: 'Our law reserves the death penalty only for the most aggravated and least mitigated murders.' Kramer v. State, 619 So.2d 274, 278 (Fla.1993).(FN21) Thus, our inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders."

Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999). Furthermore when reviewing the relative weight attached to either aggravating or mitigating factors, this Court will not disturb

the conclusions of the trial court absent an abuse of discretion. See, Alston v. State, 723 So.2d 148, 162 (Fla. 1998)(finding where detailed sentencing order identified mitigators, weight assigned each is within court's discretion); Bonifay v. State, 680 So.2d 413, 416 (Fla. 1996)(same); Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995)(same); Cole v. State, 701 So.2d 845, 852 (Fla. 1997)(deciding mitigator's weight is within judge's discretion, subject to abuse of discretion standard). Gordon v. State, 704 So. 2d 107, 118 (Fla. 1997)(same); Larzelere v. State, 676 So. 2d 394 (Fla. 1996)(same). And finally, when reviewing the evidence in support of the aggravating and mitigating factors, this Court will not disturb the findings of the trial court as long as there is substantial and competent evidence in the record to support their existence. Stephens v. State, 787 So. 2d 747 (Fla. 2001). Applying the facts of the instant case to these legal principles and standards of review, it becomes clear that jury's eight to four recommendation for death coupled with the trial court's sentence of death was proper and must be affirmed on appeal.

The victim, no match for his killer, was a helpless and defenseless elderly man (four and half times older than

appellant) who suffered a slow and painful death literally at the hands of the strong and fit defendant. The sanctity of the victim's home became the his death chamber simply because of the greed of Gabby Tennis and the vulnerability of the victim. The trial court found the following aggravating factors: the crime was committed while the Tennis was engaged in the commission of a robbery and/or burglary; the capital felony was especially heinous, atrocious and cruel; and the victim was particularly vulnerable due to advanced age or disability. (ROA 524-525).

The trial court's factual findings with regards to the "HAC" factor including the following. Albert Vassella, a ninety-one year old mad was brutally beaten and left to die bleeding profusely. His injuries included broken and separated ribs, bruises and cuts to his face, mouth, legs and head. The attack became more vicious over time as Tennis became more frustrated when he was unable to find any money. His frustration was taken out on the helpless elderly victim as Tennis inflicted more and more kicks to the victim. In fact the victim's upper dentures where lying in pieces near the body when the police arrived. Mr. Vassella was conscious throughout most of the attack, sustaining defensive wounds to his arms and hands. He became physically disabled which left him unable to

protect himself throughout this ordeal with one savage blow that separated his spinal column. (ROA 524-525). Regardless of his futile attempts to protect himself, he suffered multiple attacks over a period of time which was painful. The trial court concluded that the facts established, "[t]his was a deliberate vicious infliction of pain and injury upon a helpless old man." (ROA 525).[1]

The trial court's factual findings with regards to the victim's vulnerability were as follows: Vassella, was a frail man at ninety-one years of age and was suffering from debilitating arthritis. He became completely incapacitated following the first strike by Tennis. At that point he was defenseless to the repeated attacks of his killer. (ROA 525-526).

Relying on Cooper v. State, 739 So. 2d 82 (Fla. 1999); Hawk v. State, 718 So. 2d 159 (Fla. 1998); Neibert v. State, 574 So. 2d 1059 (Fla. 1990) and Crook v. State, 908 So. 2d 350 (Fla. 2005) in conjunction with the mitigating factors of his age; disparate treatment; 8 to 4 death recommendation; and mental

[1] In further support of his claim of disproportionality, appellant advances a self serving and incredible assertion that he did not intend for Mr. Vassella to die. The facts completely belie that assertion.

mitigation his sentence of death is disproportionate. Appellant's argument is neither supported in fact or law.

First, appellant's claim that because the co-defendant Sophia Adams received a ten year sentence for her role in the murder of Albert Vassella, his death sentence is disproportional. Tennis is incorrect as Adams was convicted of **third degree murder** which makes her **less culpable** as a matter of law. This Court has explained that a proportionality assessment is not applicable between cases where there has not been a finding of equal culpability. Herein, based on her conviction for a crime evincing far less than culpability than first degree murder, there can be no finding of disparate treatment relative to a proportionality assessment. See Shere v. Moore, 830 So. 2d 56, 60-61 (Fla. 2002)(explaining that a co-defendant's conviction of a crime less than the first degree murder, amounts to a finding of less culpability making a proportionality assessment inapplicable). Therefore his claim of disparate treatment must be rejected.[1]

Appellant's proportionality argument is focused on the alleged existence of the mitigation. The cases in support of

[1] Appellant argues that he was not allowed to plead guilty and therefore his sentence of death is disproportionate. This argument is without merit. Foster v. State, 778 So. 2d 906, f.n. 9 922-923 (Fla. 2001).

his claim all deal with "overwhelming" or "un-refutted" mitigation and therefore are all distinguishable. For instance, in Neibert, supra, this Court a "large quantum of uncontroverted mitigating evidence." Id, at 1062. Similarly in Cooper, this Court noted that the mitigation was not one of the least mitigated cases based on the trial court's finding of two statutory mitigators and several nonstatutory mitigators. Those findings were based on the brutal nature of his childhood, brain damage, schizophrenia, and mental retardation. Id at 85-86. Likewise in Crook, and relying on Cooper, this Court noted the combination of un-refutted and overwhelming mitigation. Crook, 908 So. 2d at 358; Robertson, 699 So. 2d at 1347(explaining that murder was unplanned and was committed by a nineteen year old with a long history of mental illness, who was under the influence of alcohol and drugs at the time)(emphasis added); Morgan v. State, 639 So. 2d 6, 13-14(Fla. 1994) (finding death sentence disproportionate based on the uncontroverted evidence of statutory mitigation, the trial court's incorrect standard when assessing the existence of mitigation; defendant was sixteen; the defendant suffered from brain damage);Hawk,(finding death sentence disproportionate based on overwhelming evidence of brain damage, documented history of mental health intervention, finding of two statutory mitigators); Livingston;

(same). None of these cases offer any support to Tennis because there was very little mitigation established. Herein, the trial court applied the correct standard when assessing the existence *vel non* of mitigating evidence and its findings are supported by the record. (ROA 526-527). Additionally, the trial court's sentencing order explicitly detailed its rationale for its finding which is supported by the record.

The trial court either **rejected** in toto or gave little to some weight to ten non-statutory mitigators. (ROA 527-530). With regard to mitigation relating to appellant's mental status including IQ, learning disability, mental defect/disease, the court determined that the existence of any of these factors is severely limited by appellant's many capabilities. He is "street smart", cunning, manipulative and possess survival skills. In fact the court founds that Appellant possess highly developed functioning skills. The court detailed examples of its own observations of appellant's deliberateness and cunning. (ROA 527-528).

The court's rejection or minimization of appellant's mitigation is amply supported by the record. Moreover, based on the facts of this senseless, cruel, and brutal murder motivated by nothing but greed, the record establishes that this murder is one of the most aggravated and warrants the death penalty. See

Douglas v. State, 878 So., 2d 1246, 1262 (Fla.2004); Jones v. State, 652 So. 2fd 346 (Fla. 1995); (upholding death sentence for violent death and robbery of an elderly couple countered against little mitigation) (finding proportionality where victim with no ability to escape or protect herself is beaten to death); Chandler v. State, 532 So. 2d 701, 704 (Fla. 1988)(upholding death sentence were victims were elderly couple who were beaten to death in front of each other during robbery).

Point XII

THE APPLICATION OF THE AGGRAVATING CIRCUMSTANCE THAT THE VICTIM WAS VULNERABLE DUE TO ADVANCED AGE OR DISABILITY DID NOT VIOLATE DOUBLE JEOPARDY. (restated)

Tennis claims that the trial court erroneously instructed on, and ultimately found, the "vulnerability due to advanced age or disability circumstance" aggravator thereby violating the Double Jeopardy Clause of the United States Constitution. The State contends that no such error occurred. The assignment of an aggravator is not a conviction nor a sentencing enhancer. There could be no double jeopardy. This matter is simply without merit.

Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test.

When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So.2d 148, 160 (Fla. 1998) reiterated the standard of review:

> [I]t is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt--that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.

Willacy v. State, 696 So.2d 693, 695 (Fla.) (footnote omitted), cert. denied, 522 U.S. 970, 118 S.Ct. 419, 139 L.Ed.2d 321 (1997).

Despite Tennis's argument, no violation of the Double Jeopardy Clause has occurred. An aggravator is neither an element of a crime nor is it a sentencing enhancer. Indeed, it is settled Florida law that the death penalty attaches at the time of conviction. Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (rejecting the defendant's argument that "under Florida law, a life sentence is the maximum penalty under section 775.082, Florida Statutes (1985), and therefore aggravating circumstances necessary for an enhancement to a death sentence are elements of the crime.") Mills v. Moore, 786 So.2d 532, 536-

37 (Fla. 2001); see also Mann v. Moore, 794 So.2d 595, 599 (Fla. 2001). Consequently, double jeopardy cannot attach.

Additionally, although the Court's erroneous dismissal of the aggravated battery of an elderly or disabled person charge on judgment of acquittal, this does not preclude the Court from finding the particular aggravator at issue. Furthermore, Tennis never alleges that there was not substantial competent evidence in support of this aggravator. Albert Vassella, although in very good health for a man of his age, was nevertheless an elderly man of ninety-one years. There is simply no comparison between the strength of Tennis, twenty-three at the time of the murder, and that of Vassella. Indeed, during the penalty phase closing statements, Tennis admitted as much:

> And of course, Mr. Vassella was of advanced age and it would take a pretty innate lawyer to stand up here and suggest anything else. And that's even going beyond what the neighbor testified to that, that he was in great health and very active. I don't dispute anything in that regard and it is what it is.

(T.15 1347). In its sentencing order, the Court expressed concern over Vassella's frail nature and advanced age.

> During his life, Mr. Albert Vassella would probably have been insulted to be described as vulnerable. He was a remarkable man, who, despite suffering from debilitating arthritis linked to his twenty years of service in the United States Navy, continued

> to live alone and be self sufficient at the age of ninety-one. However, the reality was that Mr. Vassella had become frail with advanced age, and certainly was no match for the young, physically fit Defendant.

(R.3 525).

Even if this Court were to find error, any such error must be deemed harmless. This was a heavily aggravated case in which the Court found three significant aggravators.[1] Furthermore, there was very little mitigation found in this case. Indeed, the trial court stated in its sentencing order that any one of the established aggravators alone would be sufficient to outweigh the mitigation. (R.3 530). There is no merit to this claim.

Point XIII

THE TRIAL COURT PROPERLY CONSIDERED THE JURY'S DEATH RECOMMENDATION. (restated)

Tennis claims that it was error for the trial court to, in essence, "rubberstamp" the jury's death recommendation where Defendant made certain pleas to the jury to give him death and

---

[1] (1) The crime … was committed while he was engaged, or an accomplice, in the commission of, or an attempt to commit, robbery and/or burglary and the crime … was committed for financial gain. (2) H.A.C. (3) The victim … was particularly vulnerable due to advanced age or disability.

limited the amount of mitigation evidence presented to the jury. This claim is clearly refuted by the record, and specifically, the trial court's sentencing order, and is thusly without merit.

Regardless of the jury's recommendation, the trial judge must conduct an independent review of the evidence and make his or her own findings regarding aggravating and mitigating factors. Sireci v. State, 587 So. 2d 450, 452 (Fla. 1991). In contrast to Tennis's claim, the trial court did not simply agree with the jury's recommendation, but, as evidenced by the court's sentencing order, it came to specific independent findings. Not only did the court consider all of that which was presented to the jury, the court also heard additional mitigation testimony at not only the Spencer hearing, but because of unavailability at that time, the court heard additional testimony at a later date so as to give Tennis additional opportunities to present mitigation.

> A Spencer hearing was thereafter scheduled and conducted on December 27, 2005, wherein the court heard additional testimony and considered additional evidence. Thereafter, on February 27, 2006, this Defendant appeared before the court on another matter, but at that time advised the Court that his sister who was unable to appear at the Spencer hearing would like to appear and testify. Because the consequences of this Court's decision literally involve life and death, this court permitted additional witnesses to come forward on March 3, 2006

> and heard the testimony of the Defendant's sister, Cynthia Tennis and Mona Tennis, his stepmother and the woman who raised him since he, the Defendant was two years old.

(R.5 523-24). The court then proceeded to discuss, in detail, each aggravator and mitigator (statutory or otherwise) that the court was considering or rejecting in deciding on Defendant's sentence.

In support of his claim, Tennis relies on Muhammad v. State, 782 So. 2d 343 (Fla. 2001), a case in which the trial court specifically relied on the jury's recommendation when sentencing Muhammad to death. As noted by Tennis, this Court ruled that such reliance was error because Muhammad refused to present ANY mitigation evidence to the jury. It is this waiver, however, that sets Muhammad apart from the case at hand. Tennis did present mitigation evidence to the jury. In addition, the trial court heard additional mitigation evidence after the Spencer hearing so that the court would have an opportunity to consider ALL information when coming to a sentence decision. Each aggravator and mitigator was independently weighed, and it was the court's own decision to sentence Defendant to death. So great was the aggravation in this case that the court noted, "[e]very one of the aggravating factors in this case, standing

alone, would be sufficient to outweigh the mitigating circumstances." (R.5 530). This issue is without merit.

Point XIV

THE TRIAL COURT PROPERLY REJECTED AGE AS A MITIGATING FACTOR. (restated)

Tennis argues that it was error for the trial court to reject age as a mitigating factor despite him being 19 years and 3 months old at the time of the offense. The court did not give proper credence to findings by two experts in this case that Tennis's mental capacity and intellect was functioning as would someone who is still a minor. Despite Defendant's urging to the contrary, the trial court was not bound to accept this mitigating factor where he found no evidence to support it. The trial court properly considered, and gave no weight to this mitigator, and as a result, Tennis suffered no constitutional harm.

Whether a defendant's age constitutes a mitigating factor is a matter within the trial court's discretion, depending on the circumstances of each individual case. Morton v. State, 789 So. 2d 324, (Fla. 2001); Sims v. State, 681 So. 2d 1112, (Fla. 1996); Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1988), cert. denied, 490 U.S. 1037, 109 S. Ct. 1937, 104 L. Ed. 2d 408

(1989). This Court has permitted trial courts to assign "little or no" or "little to no" weight to such factors. See Trease v. State, 768 So. 2d 1050 Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990); Wike v. State, 698 So. 2d 817, 819 n.1, 823 (Fla. 1997) (little or no), cert. denied, 522 U.S. 1058, 118 S. Ct. 714, 139 L. Ed. 2d 655 (1998); Sims, 681 So. at 1119 (Fla. 1996) (little to no). The weight assigned to a mitigating circumstance is subject to the abuse of discretion standard." Morton,789 So. 2d at 331, (Fla. 2001); Elledge v. State, 706 So. 2d 1340, 1347 (Fla. 1997).

A trial court may reject a claim that a mitigating circumstance has been proven provided that the record contains competent substantial evidence to support the rejection. This court also explained that uncontroverted expert opinion testimony may be rejected where it is difficult to square with the other evidence in the case. Morton v. State, 789 So. 2d 324, (Fla. 2001); Mansfield v. State, 758 So. 2d 636, 646 (Fla. 2000); Foster v. State, 679 So. 2d 747, 755 (Fla. 1996). In declining to assign any weight to the statutory mitigator at issue, the trial court ruled that there was no credible, uncontroverted evidence to support the claim.

While there is no question that this mitigator cannot stand alone without being accompanied with some sort of evidence

supporting it, the psychological conclusions cited by Tennis proved wholly unconvincing to the trial court when reconciled with Defendant's own behavior during the trial:

> However intellectually deficient the Defendant may appear to be as reflected in the tests that were administered by both psychologists, it is clear that the Defendant functions extremely well and relies on what has been referred to as "street smarts". This young man has developed exceptional survival skills, and there is no doubt that he is cunning and manipulative. The surprise second psychologist's (Dr. Wilmoth's) report certainly reflects that Mr. Tennis learned from the first series of tests generated privately through the Defendant's father AFTER the guilt and penalty phases of the trial were complete. Gabby Tennis is not stupid. He has, in the Court's opinion, exercised poor judgment by relying upon information and advice from his fellow inmates, and in many instances during the trial it has become readily apparent he has been "educated" by his friends on the various ways in which he might inject error into the proceedings. At those times, he will spout legal axioms and use vocabulary someone with his supposed intellectual deficits would never know. Dr. Wilmoth's test results were not based upon all the testing Dr. Ceros-Livingston did, and the Defendant has had ample time to figure out that he needed to achieve even lower scores on the second set of tests to help his case.

(R. 527-28). It is clear from the sentencing order that the trial court did not believe the validity of the psychological

reports nor in the applicability of this mitigator. It cannot be said that the trial court abused its discretion in anyway.

Even if this court were to find error, it cannot be said that such error is so harmful that it demands reversal. Even if this mitigator were to have been given some amount of weight, it would not unbalance the significant aggravation in this case. Any error, if at all, is harmless in nature, and thus, the integrity of the sentence should remain intact.

Point XV

JURY IS NOT REQUIRED TO MAKE UNANIMOUS FINDINGS AS TO DEATH ELIGIBILITY AND RING V. ARIZONA DOES NOT CALL INTO QUESTION THE CONSTITUTIONALITY OF FLORIDA'S CAPITAL SENTENCING (RESTATED)

Tennis contends his sentence violated Ring v. Arizona, 536 U.S. 584 (2002). He maintains that under Ring, the jury must make an unanimous determination of death eligibility, an unanimous finding of the aggravators and whether they are sufficient, and a finding that the aggravators outweigh the mitigators be beyond a reasonable doubt. According to Tennis, the jury proceedings fail because the jury renders a non-unanimous advisory sentencing recommendation which does not require proof of death eligibility beyond a reasonable doubt, the normal rules of evidence did not apply, and no notice is

given. He submits that death eligibility does not occur until there has been a finding of sufficient aggravation and insufficient mitigation. The State disagrees.

Repeatedly, this Court has rejected Tennis's arguments. Questions of law are reviewed *de novo*, Elder v. Holloway, 510 U.S. 510, 516 (1994)(holding issue of law is reviewed *de novo* on appeal). Tennis has offered nothing new to call into question the well settled principles that death is the statutory maximum sentence, death eligibility occurs at time of conviction (Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001)), and that the constitutionally required narrowing occurs during the penalty phase where the sentencing selection factors are applied to determine the appropriate sentence. See Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (noting repeated finding that death is maximum penalty and repeated rejection of arguments aggravators had to be charged in indictment, submitted to jury and individually found by unanimous jury). See also Perez v. State, 919 So.2d 347, 377 (Fla. 2005) (rejecting challenges to capital sentencing under Ring and Furman); King v. Moore, 831 So.2d 143 (Fla. 2002). Florida's capital sentencing is constitutional. See Proffitt v. Florida, 428 U.S. 242, 245-46, 251 (1976)(finding Florida's capital sentencing constitutional under Furman); Hildwin v. Florida, 490 U.S. 638 (1989)(noting Sixth

Amendment does not require case “jury to specify the aggravating factors that permit the imposition of capital punishment in Florida”); Spaziano v. Florida, 468 U.S. 447 (1984); Parker v. State, 904 So.2d 370, 383 (Fla. 2005); Jones v. State, 845 So.2d 55, 74 (Fla. 2003).

The issue before this Court deals with the level of unanimity necessary in the penalty phase of a capital case. The penalty phase is a pure sentencing matter and resolution of this issue rests with the judge. Walton v. Arizona, 497 U.S. 639 (1990); Hildwin, 490 U.S. 638; and Spaziano, 468 U.S. 447. Noting constitutional challenges to Florida’s capital sentencing have been rejected repeatedly the United States Supreme Court opined:

> Walton's first argument is that every finding of fact underlying the sentencing decision must be made by a jury, not by a judge, and that the Arizona scheme would be constitutional only if a jury decides what aggravating and mitigating circumstances are present in a given case and the trial judge then imposes sentence based on those findings. Contrary to Walton's assertion, however: "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." Clemons v. Mississippi, 494 U.S. 738, 745, 110 S.Ct. 1441, 1446, 108 L.Ed.2d 725 (1990).
>
> We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. Hildwin v. Florida, 490 [497 U.S. 648] U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (per curiam); Spaziano v. Florida, 468 U.S.

> 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In Hildwin, for example, we stated that "[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," 490 U.S., at 638, 109 S.Ct., at 2056, and we ultimately concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Id., at 640-641, 109 S.Ct., at 2057.

Walton, 497 U.S. at 647-48. Based upon this, there is no constitutional impediment to Florida's capital sentencing procedure and no need for juror unanimity for aggravators, mitigators, or the ultimate penalty. This Court has repeatedly held that jury unanimity is not required. Card v. State, 803 So. 2d 613, 628 n. 13 (Fla. 2001) (rejecting claim Apprendi requires unanimous jury recommendation; "capital jury may recommend a death sentence by a bare majority vote"); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001) (same); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001) (same); Brown v. Moore, 800 So. 2d 223 (Fla. 2001) (rejecting argument aggravators must be found by unanimous jury); Mills, 786 So. 2d at 538 (finding statutory maximum sentence for first degree murder is death). See Way v. State, 760 So. 2d 903, 924 (Fla. 2000) (Pariente, J., concurring) (noting jury's death recommendation need not be unanimous); Thomson v. State, 648 So. 2d 692, 698 (Fla. 1984)

(holding simple majority vote of death is constitutional. The issuance of Apprendi and Ring has not altered this position.

Moreover, Tennis has a contemporaneous felony conviction (home invasion robbery). This Court has rejected challenges under Ring where the defendant has a contemporaneous felony conviction. See Robinson v. State, 865 So.2d 1259, 1265 (Fla.2004) (announcing that "a prior violent felony involve[s] facts that were already submitted to a jury during trial and, hence, [is] in compliance with Ring"); Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (denying Ring claim and noting that "felony murder" and the "prior violent felony" aggravators justified denying Ring claim).

Even if a jury finding of an aggravating factor were to be deemed necessary for a jury conviction of a death-eligible offense, Tennis's death sentence satisfies the Sixth Amendment. His contemporaneous conviction for robbery permitted the judge to impose a capital sentence, even without further jury involvement. See Almendarez-Torres v. United States, 523 U.S. 224 (1998)(prior conviction properly used by judge alone to enhance defendant's statutorily authorized punishment). The record reflects that Tennis's original jury convicted him of a contemporaneous felony, namely the robbery of the homicide victim. Hence, the jury determined, beyond a reasonable doubt,

that at least one aggravating factor existed. Consequently, the underlying factual premise for the finding of the aggravator was made by the jury at the guilt phase. Thus, to the extent Ring would be applicable to Tennis, the requirements of same have been met.

Finally, Tennis's reliance on out-or-state cases and federal cases is misplaced as those courts were interpreting foreign statutes dissimilar to Florida's. Relief must be denied and Tennis's convictions and sentences affirmed.

Point XVI

DEFENDANT'S SENTENCE WAS A DIRECT CONSEQUENCE OF HIS ACTIONS, NOT OF HIS DECISION TO FOREGO PLEADING GUILTY. (restated)

As his next claim, Tennis argues that he was forced to choose between pleading guilty for a life sentence or exercising his constitutional right to a trial by jury and receiving the death penalty. Tennis asserts that such a choice violates his rights under the state and federal constitutions. The State counters that Tennis misconstrues the procedures currently in place under Florida's sentencing scheme and there is no constitutional issue at bar. The sentence should be affirmed.

Tennis suggests that defendants are discouraged from taking their case to trial by the threat of death which hangs over them should they be convicted of first degree murder. Since those who plead guilty are guaranteed to have their life spared, this system creates a chilling effect on the right to trial by jury. Indeed, Tennis directly correlates his capital sentence to his decision to not plead guilty.

To support his argument, Defendant cites United States v. Jackson, 390 U.S. 570 (1968), a case involving the Federal Kidnapping Act, 18 USC §1201(a)(1), which, at the time, specifically stated that *only* a jury is authorized to return a verdict of death. The Jackson court noted that because of this exclusive authority that rests in the hands of the jury, defendants were faced with the problem Tennis asserts; a defendant could save his life by pleading guilty or risk death by exercising a constitutional right. However, Florida's capital sentencing scheme does not fall under the Jackson-type issue.

Florida's capital sentencing scheme specifically notes that the power to sentence a capital defendant to death rests exclusively in the court. This is not to diminish the position of the jury, which serves an important advisory role, however, the same punishments are available to the court regardless of

whether that defendant is convicted by a jury or the court itself. Therefore, defendant's who plead guilty are no more likely to avoid the death penalty than a defendant who exercises their right to a jury trial. Tennis cannot be successful on this claim.

Point XVII

THE FELONY MURDER AGGRAVATOR IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED. (restated)

Defendant claims that the felony murder aggravating circumstance is unconstitutional. Both this Court and the federal courts have repeatedly rejected claims that the "felony-murder" aggravator is unconstitutional because it constitutes an "automatic" aggravating factor. See Banks v. State, 700 So.2d 363, 367 (Fla. 1997); Mills v. State, 476 So.2d 172, 178 (1985) (concluding that the legislature's determination that a first-degree murder committed in the course of another dangerous felony was an aggravated capital felony was a reasonable determination); Lowenfeld v. Phelps, 484 U.S. 231 (1988); Blystone v. Pennsylvania, 494 U.S. 299 (1990); Johnson v. Dugger,932 F.2d 1360 (11th Cir. 1991).

Relying upon the North Carolina, Wyoming and Tennessee state supreme courts, Defendant raises essentially the same

argument, which should be rejected. Even if Defendant's argument is read as based upon the constitutional guarantees of the Eighth and Fourteenth Amendments, this Court has already rejected those arguments in Clark v. State, 443 So.2d 973 (1983), cert. denied, 104 S.Ct. 2400, 467 U.S. 1210, 81 L.Ed.2d 356 ("felony-murder" aggravator comports fully with the constitutional requirements of equal protection and due process as well as the prohibition against cruel and unusual punishment).

Point XVIII

THE REQUISITE FINDINGS TO SUPPORT THE DEATH SENTENCE WERE MADE (restated)

Tennis claims the court failed to find "sufficient aggravating circumstances exist" to justify death. The State disagrees, and submits the requisite findings were made for the sentencing factors and the judge completed the appropriate analysis. The death sentence should be affirmed.

Under §921.141(3), Fla. Stat, notwithstanding the jury's recommendation, the court must weigh the aggravation and mitigation, and if it finds death the appropriate sentence, put in writing its finding as to the facts "(a) That sufficient aggravating circumstances exist as enumerated in subsection (5),

and (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Tennis has not cited a case where this Court has overturned a death sentence because the sentencing court failed to include the phrase "sufficient aggravating circumstances exist" to justify the death sentence. Rather, he offers Rembert v. State, 445 So.2d 337 (Fla. 1989) and Terry v. State, 668 So.2d 954 (Fla. 1996). Neither supports his claim as both are proportionality decisions, not decisions on the sufficiency of order.

Review of orders imposing death sentences have not been for talismanic incantations, but for the content outlining the factual findings as to aggravation and mitigation, the weight assigned each, and the reasoned weighing of those factors in determining the sentence. This Court explained that to comply with §921.141(3), the judge "must (1) determine whether aggravating and mitigating circumstances are present, (2) weigh these circumstances, and (3) issue written findings." Layman v. State, 652 So.2d 373, 375 (Fla. 1995). As provided in Bouie v. State, 559 So.2d 1113, 1115-16 (Fla. 1990) the written order provides for meaningful review, and must contain factual findings and show the sentencing court independently weighed the aggravators and mitigators to determine the appropriate sentence of life or death. This Court requires each statutory and non-

statutory mitigator be identified, evaluated to determine if it is mitigating and established by the evidence, and deserved right. Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995). See Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000) (holding court may assign mitigator no weight). The sentencing order in Ferrell was found lacking because the court had not set forth its factual findings/rationale in other than conclusory terms. Ferrell, 653 So.2d at 371. Such is not the case here. The order meets the dictates of Campbell v. State, 571 So.2d 415 (Fla. 1990); Bouie and §921.141 as each aggravator and mitigator was discussed, weighed, and factual findings set out. (R.3 523-30). Only then did the court balance the factors before imposing the sentence (R.3 530). The proper analysis was completed.

Furthermore, it is presumed the court follows the instructions given the jury. See Groover v. State, 640 So.2d 1077, 1078 (Fla. 1994); Johnson v. Dugger, 520 So.2d 565, 566 (Fla. 1988). Here, the court instructed the jury properly regarding its sentencing duty including: "If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole." Also, "Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh

the aggravating circumstances" (R.15 1364). The judge is presumed to have found sufficient aggravator existed to justify death. This Court should reject Tennis's claim for a talismanic phrase of "sufficient aggravating circumstances."

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm Defendant's conviction and sentence of death.

Respectfully submitted,

WILLIAM McCOLLUM
ATTORNEY GENERAL

_____
LISA-MARIE LERNER
Assistant Attorney General
Florida Bar No.: 698271

_____
Jason Pollack
Assistant Attorney General
Florida Bar No.: 0022862

1515 N. Flagler Dr 9th Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Jeffrey L. Anderson, Esq. Office of the Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on November 19, 2007.

_____
LISA-MARIE LERNER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on November 19, 2007.

_____
LISA-MARIE LERNER