IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-748

RUSSELL SCOTT HUDSON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY,
CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

On August 29, 2001, Lance Peller reported to the police that his apartment had been burglarized. (T. 942-43) One of the items that Peller reported had been stolen during the burglary was his .9mm Smith and Wesson pistol. (T. 943-44)

About three weeks before October 20, 2001, Felipe Mejia asked Defendant to take care of Peller and provided Defendant with a gun. (T. 1356, 1480) Defendant claimed that he told Mejia that he would not kill Peller. (T. 1480) However, Jeff Stromoski, Defendant's roommate, noticed that Defendant had a gun in a banking bag in their apartment. (T. 1000-02, 1009-11) The gun appeared to be the same gun that was stolen from Peller. (T. 1015-16)

On October 19, 2001, Fizzuoglio was supposed to meet Peller at a party, but Peller did not show. (T. 1653) Fizzuoglio attempted to call Peller but was told by Ernesto Gonzalez that Peller was ill and she should stay at the party. (T. 1653-54)

Around 7:00 p.m. On October 20, 2001, Robert Pritchard received a phone call from Peller, with whom he had been friends for four years. (T. 698-703) Peller asked Pritchard for a gun and explained that he needed the gun because someone was in his apartment who had been sent to kill Peller. (T. 705) Peller indicated that person was someone that Peller had previously bonded out of jail but did not given Pritchard the name of the person. (T. 705-06) Pritchard suggested that Peller leave or contact the police. (T. 705) Peller indicated that the reason why he was supposed to be killed was that he was involved in a dispute about underselling another drug dealer. (T. 706) Peller stated that the person was not going to kill him because they were friends. (T. 706) From the sound of a vent fan in the background, Pritchard believed that Peller was making the call from his bathroom. (T. 707-08) After speaking to Peller for about 15 minutes, Pritchard ended the call. (T. 708)

Around 7:30 p.m., Fizzuoglio finally reached Peller by phone. (T. 1656, 1729) Fizzuoglio and Peller agreed that Fizzuoglio would stop by Peller's apartment before going to work, which started at 8:00 p.m. (T. 1655-66) Between 8:00 and 8:30 p.m., Fizzuoglio went to Peller's apartment in her red Mustang, and Peller let her in. (T. 1657-59) When Fizzuoglio entered, she saw that Defendant was there, and Defendant shook his head no. (T. 1660) Peller received a phone call from Brandon Webb, who was with Jonathon Faley, and sat down in the living room area to take it. (T. 719-21, 754-55, 1660) Peller told Webb to call him back later. (T. 721-22, 755) While Peller was talking on the phone, Fizzuoglio and Defendant also sat down in the living room area, and Defendant made small talk with

Fizzuoglio. (T. 1660)

As Peller was hanging up, Defendant got up and started toward the bathroom. (T. 1661-62) However, Defendant suddenly turned around, crouched in front of the coffee table and produced a gun. (T. 1662-63) Both Peller and Fizzuoglio were shocked by the gun and freaked out. (T. 1663) Peller asked Defendant how he got Peller's gun. (T. 1665) Defendant told Peller to tell him what he wanted to hear. (T. 1666-67) Defendant then picked up a cell phone and made a call. (T. 1667-68) Fizzuoglio heard Defendant ask if he could do it another time and use the name Justin. (T. 1668) Defendant then sat down and attempted to set up line of cocaine while still holding the gun. (T. 1668-69) When he was unable to do so, Defendant told Fizzuoglio to do it. (T. 1669) Once Fizzuoglio did so, Defendant did one line of cocaine and told Peller and Fizzuoglio to each do a line of cocaine. (T. 1669)

After doing the cocaine, Defendant started to claim that there were people outside who would kill all of them if Defendant did not act. (T. 1670) Defendant looked out the windows and peep hole for these people while Fizzuoglio cried and Peller hyperventilated. (T. 1670-71) Peller then went into the bathroom, and Fizzuoglio went into the bedroom. (T. 1671) Peller then asked to make a phone call, and Defendant kicked a phone toward Peller. (T. 1672-73) At 9:13 p.m., Peller called his father's cell phone and left a message. (T. 1443) While Peller was on the phone, Fizzuoglio went to the kitchen and knelt on the floor. (T. 1674) Defendant came into the kitchen and asked Fizzuoglio if she was going along with this. (T. 1674) Fizzuoglio told Defendant she had a baby and wanted to see him. (T. 1674) Defendant then walked to the front door and banged his head against it. (T. 1675) After doing do, Defendant grabbed a Dolphins blanket, walked into the bathroom and shot Peller. (T. 1675, 1709)

Fizzuoglio freaked out at the sound of the shot and went to the bedroom. (T. 1676) Defendant then walked up to Fizzuoglio and told her she would be next if she did not calm down. (T. 1676-77) Defendant pulled out a pair of latex gloves, put them on and searched Peller's closet, dresser and their contents. (T. 1679-80) After taking some things, Defendant went to Peller's body and took things from Peller's pockets. (T. 1680) Among the things that Defendant took were a scale and all of the keys and cell phones in the apartment. (T. 1683)

Defendant and Fizzuoglio then went to the kitchen and did more cocaine on the mirror on the kitchen counter. (T. 1681) Defendant then motioned for Fizzuoglio to go to the front door with him and put the gun back in his pants. (T. 1684) As they went toward the front door, Fizzuoglio dropped one of the things that Defendant had removed from the apartment and given her to hold. (T. 1682) Defendant reached to pick it up, and Fizzuoglio noticed that Defendant had removed the gloves. (T. 1682) Defendant then walked Fizzuoglio to her car and claimed that they need to use it because he had lost his keys. (T. 1686-87) Defendant put Fizzuoglio in the passenger’s seat, got in the driver’s seat and pulled out. (T. 1687-88)

Defendant, who had placed the gun under his left leg, drove west on 10th Street. (T. 1688-90) As he did so, Defendant placed another cell phone call during which he was getting directions. (T. 1691) When he hung up the phone, Defendant told Fizzuoglio he was sorry but he has to do it. (T. 1691) Fizzuoglio then jumped out of the moving car and ran into a ditch. (T. 1692-93) Defendant apparently turned the car around and drove past where Fizzuoglio was hiding. (T. 1693-94) Once Defendant past her, Fizzuoglio ran across the street and started banging on cars and asking for help. (T. 1696) As she did so, Fizzuoglio heard Defendant yelling that he was not going to kill her. (T. 1696)

Fizzuoglio ran into the path of a car occupied by Thomas Dunn and his wife Lois. (T. 1584-86) When Dunn stopped the car, Fizzuoglio came to the opened driver’s window and stated in a hysterical manner that someone was trying to kill her. (T. 1586-

87) She asked Dunn to get her out of there but he refused. (T. 1587) Fizzuoglio then jumped onto the back of a tow truck. (T. 1696) However, Defendant pulled up next to her and started screaming. (T. 1696) Fizzuoglio jumped off the tow truck and saw a police car. (T. 1696)

At approximately 10:10 p.m., Dep. Kimberly Bauer was on her way to work when Fizzuoglio ran up to her car as she was stopped at a light at 10th Street and Newport. (T. 1045-50, 1697) Fizzuoglio was screaming and crying, trying to get in the backseat of Dep. Bauer’s car and asking Dep. Bauer to get her out of there. (T. 1050-52, 1698) Dep. Bauer pulled over and attempted to determine what was wrong. (T. 1051-53) However, Fizzuoglio was hysterical, and all Dep. Bauer could understand was that Fizzuoglio was saying that someone was trying to kill her, that her first name was Jennifer and that she had seen a friend shot at Tivoli. (T. 1051-54, 1067, 1077, 1079-80, 1095-96, 1699) Dep. Bauer called for backup and allowed Fizzuoglio to sit in the back of her car. (T. 1053-54, 1698-99) Because Fizzuoglio remained hysterical and crying and started having trouble breathing, an ambulance was called, and Fizzuoglio was taken to the hospital. (T. 1054-56, 1077-78, 1096-98, 1699)

After Peller had been shot and while Fizzuoglio was driving with Defendant, Webb attempted to call Peller back several times but was unable to contact Peller. (T. 722, 736, 755-56) As a result, Webb and Faley decided to go to Peller's apartment. (T. 723-24, 756) Upon arrival at Peller's apartment, Webb went to the apartment while Faley waited in the car. (T. 725, 757-58, 776) Webb found the door to the apartment ajar. (T. 759) He knocked and called for Peller but received no answer. (T. 759) Webb entered the apartment and saw Peller on his bathroom floor. (T. 761) After a couple of minutes, Webb returned to the car and stated that Peller was passed out in his bathroom. (T. 725) Both Faley and Webb then returned to Peller's apartment, and Faley noticed that the TV and lights were on in the living room and bathroom of the apartment. (T. 726, 738) The apartment was a mess and appeared to have been ransacked. (T. 739, 762-63) Peller was lying in a large pool of blood. (T. 726, 762) After they left the apartment and Faley dropped Webb off, he called the police and told them of the murder. (T. 729-32, 765-66)

After 10:00 p.m., Robert Moreau left his apartment to purchase drinks from a gas station around the corner. (T. 951-52) Around this same time, Webb decided to take his mother's car and return to Peller's apartment. (T. 766) He shook Peller in an attempt to arouse him. (T. 766) In the process of doing so, Webb got blood on himself and his clothing. (T. 767) Webb used some of the cocaine left at the scene. (T. 767) As Webb exited the apartment, Dep. Vincent Kearney and Dep. Michael Verneuille, who had been dispatched in response to Faley's call, arrived. (T. 768, 788-91, 800-03) They detained Webb. (T. 769, 792-93, 807-08)

As Moreau returned from purchasing drinks, he noticed the police presence around Peller's apartment. (T. 952) About 15 minutes after Moreau returned, Bianchi received a phone call. (T. 955) Bianchi asked Moreau to pick up Defendant from a Dairy Queen in the area of Copans and Federal Highway. (T. 955-56) Moreau did so and found Defendant across the street from the Dairy Queen. (T. 959)

Around 10:45 p.m., Dep. Bauer arrived at the station. (T. 1057) She informed her supervisor of her encounter with Fizzuoglio. (T. 1057) He directed her to accompany him to the hospital to speak to Fizzuoglio. (T. 1058) When they arrived at the hospital, Fizzuoglio was still crying. (T. 1058-59)

Around 11:00 p.m., Denver Wilson noticed a red Mustang parked in the First Presbyterian Church parking lot in the area of Copans and Federal Highway with its engine running. (T. 828-29, 1037) One of the Mustang's windows had been left opened, and there was no one in the car. (T. 829-30)

After midnight, Det. Ray Carmody went to the hospital to speak to Fizzuoglio. (T. 1310-13, 1700-01) At the time, Fizzuoglio was still upset and crying but Det. Carmody obtained some basic information from her and arranged to speak to her the following day. (T. 1313-16) Among the information that Det. Carmody obtained was the assailant's first name was Russell. (T. 1328-29, 1704)

Between 5:30 p.m. and 6:00 p.m. the next day, Fizzuoglio paged Det. Carmody and arranged to meet him for an interview. (T. 1324-26, 1702-03) By this time, Fizzuoglio had calmed down, and Det. Carmody was able to obtained a taped statement. (T. 1326-28, 1703-04) After the statement, Det. Carmody showed Fizzuoglio photographs of 12 white males whose first names were Russell. (T. 1328-30, 1705) When Fizzuoglio saw Defendant's photo, she began to crying and identified Defendant as the assailant. (T. 1330-34, 1705-06)

After Fizzuoglio identified Defendant, Det. Glenn Bukata had a records check run on Defendant and learned Defendant drove a Black Nissan and its tag number. (T. 1403-04) He then had Det. Towsley check the Tivoli parking lot for the car, which was found parked in the parking lot. (T. 919, 1405-06) Det. Bukata set up a stakeout of the car and directed that anyone entering the Nissan be stopped. (T. 1406-07)

At 11:34 p.m., Dep. James Feick was watching the Nissan when a car pulled up next to it. Dep. Feick exited his car and walked over to get a better view of the Nissan. (T. 1108-13, 1119) Defendant got out of the car, entered the Nissan and started to back out. (T. 1112-13, 1118) Dep. Feick radioed for backup, drew his weapon, ran toward the Nissan and shouted for it to stop. (T. 1113-14) As Dep. Feick got next to the driver’s door, Defendant went to put the car in drive so Dep. Feick ordered him to stop and opened the driver’s door. (T. 1114) Defendant stopped, and Dep. Feick ordered him out of the Nissan and handcuffed him. (T. 1115) Dep. Feick asked Defendant for identification, and Defendant handed Dep. Feick his wallet. (T. 1115) Dep. Feick looked in the wallet for identification and found Defendant’s driver’s license and two other driver’s licenses. (T. 1115-16)

Shortly thereafter, Det. Carmondy arrived, and Dep. Feick gave him the wallet and Defendant. (T. 1117-19, 1336) Det. Carmody handed the wallet to Det. Bukata, who looked inside and found Defendant’s driver’s license, Peller’s driver’s license and Fizzuoglio’s driver’s license. (T. 1409-10, 1413)

Thereafter, Defendant and Catleen Dilger, the person who drove Defendant to get the Nissan, were taken to the sheriff’s office. (T. 1336-38, 1415) Det. Bukata and Det. Carmody advised Defendant of his right, Defendant waived those rights and Det. Bukata interviewed Defendant. (T. 1340-45, 1417-25)

During the interview, Defendant indicated that he and Peller were friends, that Peller had recently bonded him out of jail and that he arrived at Peller’s apartment around 4:00 p.m. on the day of the murder. (T. 1345-46, 1425-26, 1434) Peller gave Defendant $700 worth of marijuana to sell. (T. 1346, 1428) Defendant asserted he wanted to use Fizzuoglio’s Mustang because he had never driven a manual transmission car. (T. 1346, 1429) As a result, Defendant claimed that he and Fizzuoglio drove to the area of Copans and Federal Highway so that Defendant could sell the drugs. (T. 1347, 1372, 1429-30) Defendant averred that he told Fizzuoglio to leave him there and return in 20 minutes but that Fizzuoglio simply left him there. (T. 1347, 1430) Defendant asserted that he then used a pay phone in a Dairy Queen parking lot to call Moreau for a ride. (T. 1347-48, 1430) After Moreau picked him up, Defendant asserted that he and his friends went to a club around 9:30 p.m. and remained there until 4:30 a.m. (T. 1430) Defendant claimed that he went to a house party and spent the night at Catleen Dilger’s home. (T. 1426, 1430, 1434)

Defendant denied taking Fizzuoglio from Peller’s apartment by force and denied taking her car. (T. 1431, 1350) When told that someone had seen him with Fizzuoglio at the intersection of Newport Drive and SW 10th Street, Defendant stated that the tow truck driver could not have seen him because the car had tinted windows. (T. 1431-32) When asked how he knew a tow truck driver was involved, Defendant smiled and claimed he had guessed. (T. 1432) Defendant also denied having killed Peller. (T. 1434, 1350) Defendant also stated that Peller owed Mejia $4,000 as a result of a drug transaction and that Mejia might be involved. (T. 1347-48, 1426, 1434)

On October 31, 2001, Det. Bukata decided to interview Defendant again. (T. 1471) As a result, he and Det. Ricky Libman went to the jail and asked Defendant if he was willing to give another interview. (T. 1278-81, 1471-72) After Defendant agreed to do so, the officers took Defendant back to the sheriff’s office. (T. 1281-82, 1472)

Once at the office, Defendant was again read his rights and again waived them. (T. 1281-88, 1472-76) During this interview, Defendant stated that Peller had been underselling Mejia, another drug dealer, which made the other dealers angry. (T. 1292-93, 1356, 1477) As a result, Mejia and Justin Dilger had asked him to kill Peller. (T. 1293, 1477-48) Defendant admitted that he had been at Peller’s apartment on the night of the murder with Fizzuoglio. (T. 1478) Defendant claimed that he called Mejia at that time and attempted to negotiate a different solution to their disagreement. (T. 1293, 1478-79) However, Mejia insisted that Peller had to be killed. (T. 1293, 1479)

As a result, Defendant was charged by indictment, filed on November 14, 2001, with (1) the first degree murder of Peller, and (2) the armed kidnapping of Fizzuoglio. (R. 4-5) The murder was charged alternatively as felony murder and premeditated murder. *Id.*

Prior to trial, Defendant filed several motions based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). (R. 107-14, 356-59, 407-16, 472-80) None of these motions mentioned the rule of lenity or that the jury had to find sufficient aggravators and insufficient mitigators. In the last motion, Defendant did argue that the trial court had to find sufficient aggravators and insufficient mitigators. (R. 407-16) The record reflects that Defendant had the initial motions heard and denied. (T. 7-8, 12-13) However, it does not reflect that the last motion was heard.

The matter proceeded to trial on April 24, 2004. (R. 690) After the jury had been selected and sworn, the State asked the trial court to consider the issue of whether the content of the phone call Peller made to Pritchard was admissible. (T. 566-67) In support of the request, the State presented Pritchard's testimony about the content of the call, including that the sound of the bathroom fan was audible during the call. (T. 569-

72) Pritchard also stated that Peller sounded like himself during this call and that the call lasted 15 minutes. (T. 575, 577) Based on this testimony, Defendant argued that the content of the phone call was inadmissible because it was hearsay and did not qualify as an excited utterance because Pritchard stated that Peller sounded like himself. (T. 649) The State responded that it was not necessary for a person to have excitement in his voice if the totality of the circumstances under which the statement was made showed excitement and that the totality of the circumstances here met the requirements for admission as a spontaneous statement and excited utterance. (T. 649-52) The trial court stated that it was denying Defendant’s motion to suppress the content of the call. (T. 672)

When the State began to ask Pritchard about the content of the phone call, Defendant renewed his prior objection, which was again overruled. (T. 704) Pritchard again stated that Peller did not seem nervous during the call. (T. 705) Pritchard indicated that he was not surprised that Peller did not seem nervous because Peller had always acted as if he thought he could talk his way out of any difficulty. (T. 709) Pritchard also testified that Peller had contacted him prior to the night of his murder, indicated that a friend had been arrested and asked about how to bond a person out of jail. (T. 708)

Webb indicated that he had been drinking and using three to four grams cocaine on the night of the murder. (T. 760, 765) As a result, his memory of that night was not good. (T. 760) He stated that his purpose in contacting Peller was to obtain more cocaine. (T. 760) Webb stated that he was released to his mother after the police took his clothing, spoke to him and tested his hands for gunshot residue. (T. 770-72, 778, 809, 1321, 1392)

Wilson testified that the Mustang remained in the parking lot all day Sunday. (T. 831) On Monday, the police located the car. (T. 830) At the time Dep. David Cofalk and Dep. Matthew Palmieri found the car, the keys were still in the ignition, the ignition was in the on position, the car was not running and the passenger's side window was opened. (T. 838-41, 844-45) There were a pair of high heeled women's shoes on the passenger's floorboard and a duffle bag in the car. (T. 845-46)

Dep. William Hodges testified that he was the lead crime scene investigator in this case. (T. 848-49) After going to the murder scene after midnight on October 21, 2001, Dep. Hodges went to North Broward Hospital. (T. 850-51) There, he swabbed Fizzuoglio's hands for gunshot residue, took her fingerprints and took a DNA sample from her. (T. 853) He also impounded her clothing. (T. 853) After leaving the hospital, Dep. Hodges proceeded to the location of the payphone used by Faley to call the police. (T. 854) He photographed the scene and processed the phone for fingerprints, finding three prints. (T. 855-56)

Dep. Hodges then returned to the murder scene. (T. 857) By the time Dep. Hodges returned, his partner Dep. Kinny had photographed and videotaped the apartment. (T. 859) Dep. Hodges then videotaped the parking lot. (T. 873) In processing the apartment, Dep. Hodges recovered a pair of latex gloves, a pad of post-it notes, a pair of black leather flip-flops and a pack of Marlboro Light cigarettes from the living room floor, a circular glass mirror and a beer bottle from the kitchen counter, a Dolphins blanket from the hallway in front of the bathroom, a single post-it note that had been rolled into a straw from the coffee table in the living room and 12 cigarette butts from an ashtray that was on the coffee table. (T. 880-84, 896) The blanket had three bullet hole in it. (T. 904) He found a box for an electronic scale in the bedroom closet. (T. 896-97)

He also processed a pill bottle and ashtray found on the coffee table, the top of the table, the smooth surfaces in the kitchen, glasses, a pitcher and the mirror found in the kitchen and the walls in the hallway near the bathroom for fingerprints. (T. 895, 909, 910-12) A total of 19 prints were lifted. (T. 928)

A blood stain was found on the front of the refrigerator. (T. 909) The tile floor and hallway carpet were processed for shoe prints. (T. 909-10) The arms of a chair in the living room was swabbed for DNA, and a paper towel from the living room floor was impounded for DNA testing. (T. 920)

Around 11:40 p.m. on October 21, 2001, Det. Bukata brought Dep. Hodges a wallet, which Dep. Hodges photographed and processed for fingerprints without success. (T. 862-64) The wallet contained identification cards of Peller, Fizzuoglio and Defendant. (T. 906) On October 22, 2001, the Mustang was brought to the impound lot at the Sheriff's Office, where Dep. Hodges photographed it, processed it for fingerprints, swabbed the steering wheel and gear shift lever from DNA testing and swabbed a red stain on the seat belt for analysis. (T. 865) He lifted 5 latent prints from the car, 4 from the interior of the passenger door window and 1 from the seat belt clip for the passenger's seat. (T. 867, 877)

Dep. Hodges also assisted in the execution of a search warrant on a black Nissan that had been impounded. (T. 868) In doing so, he photographed the car and impounded a post-it note, a live bullet and two packs of Marlboro Lights from it. (T. 868-70, 884-86, 1469-70) The post-it note had the words "Lance Romance" and two phone numbers on it. (T.. 1469) He also stated that the Nissan had a manual transmission. (T. 926)

Moreau testified that Defendant appeared normal when he picked him up after the crime. (T. 960) However, he admitted that he told the police that Defendant seemed out of it. (T. 960) He explained that he and Defendant "got messed up all the time," such that seeming out of it was normal. (T. 962) Moreau stated that he and his friends normally used drugs on Saturday night. (T. 970)

During cross examination, Defendant attempted to elicit hearsay statements indicating that Moreau had been told by Gonzalez that Peller was dead and that Defendant had killed him. (T. 977-80) Defendant indicated that he planned to elicit numerous hearsay statements in an attempt to show that his friends framed Defendant. *Id.* However, due to the State's objection, Defendant decided to present this evidence during his case. *Id.*

Stromoski testified that he once dropped Defendant off at Moreau's apartment. (T. 1011-12) As Stromoski drove away to take his children to the beach, Defendant called Stromoski and said that he had left something in the car. (T. 1012-14) Stromoski looked in the bag Defendant had left in the car and saw the gun he had previously seen in his apartment. (T. 1014)

James Nix testified that he was doing landscaping work at the First Presbyterian Church in 2002 when he discovered a gun in a rock area. (T. 1026-30, 1034) Nix called the police. (T.

1032) Dep. Steven Bill met Nix at the church and impounded the gun on July 20, 2002. (T. 1037-44) The gun appeared to have been outside for a considerable period of time. (T. 1030-31, 1038) There was a clip containing 5 rounds in the gun, and another live round in the chamber. (T. 1031, 1038-39) The serial number from the gun matched the serial number from the gun stolen from Peller's apartment. (T. 944, 1042)

Dep. Dennis Shinabery testified that he attended Peller's autopsy. (T. 1126-29) He impounded the bullet recovered from Peller's body and Peller's clothing and took elimination prints from the body. (T. 1130-33) He also took hair and blood samples. (T. 1133) Sandra Yonkman, a latent fingerprint examiner, testified that she examined 38 latent prints submitted by Dep. Hodges and determined that 24 were of comparison value. (T. 1137-50) None of the prints matched Faley or Webb. (T. 1154) Three matched Peller, six matched Fizzuoglio and four matched Defendant. (T. 1155-57) Defendant's prints were found on a glass from the kitchen and on a pack of Marlboros and a pair of sunglasses from the Nissan. (T. 1157) Eleven prints of value were not identified. (T. 1159-60) Dr. Robin Gall, a trace evidence analyst, testified that she compared fibers found on the bullet removed from Peller to the Dolphins blanket found at the crime scene. (T. 1171-86) The fibers were consistent with the blanket. (T. 1187-90) Steven Yuresko, a crime scene technician, testified that he swabbed the grips of the gun for DNA. (T. 1198) He attempted to lift fingerprints from the gun and bullets found in it without success. (T. 1193-99)

Christopher Comar, a DNA analyst and serologist, testified that he conducted DNA tests on swabs from the latex gloves found at the crime, from the steering wheel, gear shift lever and seat belt of the Mustang, from the front door and light switches from the apartment and from the gun. (T. 1209-20) DNA from the seat belt match Fizzuoglio. (T. 1220) A mixture of Dep. Hodges' DNA and an incomplete profile was found on the gear shift lever. (T. 1221-22) Defendant's DNA was found on the steering wheel of the Mustang. (T. 1223) The odds of the DNA matching anyone else were one in 120 billion. (T. 1223-24) Comar stated that he would not expect Defendant's DNA profile to have remained on the steering wheel for very long if the Mustang was not his car. (T. 1224-25) The gloves revealed DNA evidence consistent with at least three different people. (T. 1228-31) Comar could not exclude Defendant, Peller, Fizzuoglio, Faley or Webb as having contributed to this mixture. (T. 1231) However, he could say that there was at least one unidentified contributor to the mixture. (T. 1231) The gun produced no DNA profile. (T. 1233-34)

Comar also analyzed swabs from the front door, a pair of

Nike sneakers and a pair of black boots for the presence of blood. (T. 1226) No blood was found on any of these objects. (T. 1226-28) Comar also stated that he also conducted DNA analysis on a blood stain extracted from Fizzuoglio's shirt. (T. 1234-35) The profile did not match Defendant, Peller, Fizzuoglio, Faley or Webb. (T. 1235)

Alan Greenspan, a firearms examiner, testified that he examined the gun and the bullet recovered from Peller's body. (T. 1252-61) At the time the gun was received, it was inoperable because the trigger spring and frame were rusted. (T. 1261) The condition of the gun was consistent with it having been outside for 8 months. (T. 1273) Six live rounds of four different makes were with the gun. (T. 1267, 1276) To test it, Greenspan placed the barrel and slide on the frame of another gun. (T. 1261-62) The tests revealed that the gun had fired the bullet. (T. 1265) The live round found in Defendant's car was consistent with the gun. (T. 1272)

After Defendant informed Det. Bukata that he and Fizzuoglio had been in the area of Copans and Federal Highway on the day of the murder, Det. Bukata had officers check the area for the Mustang. (T. 1437) As a result, the Mustang was located in the church parking lot. (T. 1437-38)

Det. Bukata stated that he also found Peller's credit cards in Defendant's wallet when he searched it. (T. 1454) Det. Bukata checked the activity on the credit cards. (T. 1455) As a result, he obtained the credit card receipt for a purchase on one of Peller's card at the Exxon station the morning after the murder. (T. 1456-65) Erica Orbegoso and Jose Bedell identified a receipt for a credit card purchase from the Exxon station on Hallendale Beach Boulevard from the morning after the murder. (T. 987-1000)

Det. Bukata testified that Defendant claimed that he was afraid he would be killed if he spoke to the police during a break in the October 31, 2001 interview. (T. 1480) Defendant did not object to this testimony. (T. 1480) Det. Bukata and Det. Carmody further testified, without objection, that when he pressed Defendant for information about Mejia, Defendant insisted that he would accept the charges and spend the rest of his life in prison because he would otherwise be killed on the street. (T. 1356, 1481-84)

After the October 31, 2001 interview, Det. Bukata and Det. Carmody took Defendant back to the jail. (T. 1358, 1485) During the trip, Det. Bukata secretly recorded their conversation. (T. 1358, 1485-90) During this conversation, Det. Bukata urged Defendant to implicate Mejia, but Defendant refused. (T. 1499-1501, 1504-05, 1510) Defendant also claimed that he agreed to handle the situation with Peller for Mejia because he planned to convince Peller to leave or make amends. (T. 1501-04)

After speaking to Defendant, Det. Bukata contacted Mejia and obtained consent to search Mejia's car. (T. 1523) In the car, Det. Bukata found a man's black bag that contained a note about sending money to Defendant in the jail. (T. 1523-25)

During cross, Det. Bukata stated that he was still investigating Peller's murder at the time of trial but no one else had been charged. (T. 1530-31, 1563) Defendant elicited that Mejia had been deported because Det. Bukata had contacted immigration authorities. (T. 1531) He also brought out that Defendant had been cooperative in giving statements. (T. 1558)

On redirect, Det. Bukata testified that the reason the investigation was ongoing was that he knew Defendant had spoken to someone on the phone during the crimes and was attempting to discover information about this person. (T. 1564) After this testimony, Defendant objected that the testimony was a comment on his right to remain silent and moved for a mistrial. (T. 1564-65) The State argued that the testimony was a proper in response to Defendant's questioning about the ongoing investigation. (T. 1565) The State also argued that it could not be considered a comment on Defendant's right to remain silent as evidence had already been presented that Defendant made statements about to whom he spoke and why he refused to provide more information about Mejia. (T. 1567) The trial court overruled the objection and denied the motion, finding that Defendant had opened the door to questions about why the investigation was ongoing. (T. 1566) The State then elicited that Det. Bukata was continuing to investigate because he believed that Mejia and Justin Dilger were co-conspirators. (T. 1568) Det. Bukata had this belief based on Defendant's statements. (T. 1568-74)

Dr. Michael Bell, the deputy chief medical examiner, testified that he went to the crime scene and observed Peller lying in the bathroom in a pool of blood with a smear of blood on the wall behind his head. (T. 1591-95) It appeared that Peller had been shot in the top of the head. (T. 1595-96)

Once the body was taken to the medical examiner's office, Dr. Bell performed an autopsy. (T. 1596-97) He observed that Peller was 6"3', weighed 180 pounds and the only external sign of injury was a gunshot wound to the top of his head. (T. 1597) Dr. Bell took hair and hair samples, scraped Peller's fingernails and swabbed his hands for gunshot residue. (T. 1598) The toxicology analysis of Peller's blood revealed concentrations of cocaine, cocaine metabolites, nicotine and lidocaine. (T. 1602) Peller's urine showed evidence of ecstasy use. (T. 1602) Alcohol was not present. (T. 1603, 1609)

After shaving Peller’s head, Dr. Bell found that the gunshot wound was slight right and behind the midline of the top of the skull. (T. 1599) On internal examination, Dr. Bell found the bullet had traveled straight down through the brain stem, severed the spinal cord and lodged in the spinal canal. (T. 1600) Peller died as a result of this gunshot wound within a minute of its infliction. (T. 1601, 1607) Dr. Bell recovered the bullet and found foreign material on it. (T. 1600)

John Coyne testified that he was told that Peller had been murdered a couple days after the murder by his friend Ernesto Gonzalez. (T. 1617-20) About a week after Coyne learned of the murder, he received a phone call from Defendant. (T. 1621-23) Coyne asked Defendant why he killed Peller, and Defendant responded that if he had not done it, somebody would have killed Defendant. (T. 1623-24) Defendant called Coyne about 2 or 3 times a month until Coyne’s phone was disconnected. (T. 1634) During one of these conversations, Defendant asked Coyne to go to Jennifer’s address and see if there was a red Mustang. (T. 1625) Coyne agreed to do so but did not. (T. 1625-26) Defendant spoke to Coyne about arranging an alibi for the murder through women named Gina, Dana, India and Lacy. (T. 1626-27)

Fizzuoglio testified that she usually kept her driver’s license in a cup holder in the Mustang. (T. 1707-08) It was there the night of the murder but not after the Mustang was returned. (T. 1708) Fizzuoglio denied being at Peller’s apartment on the afternoon of the murder. (T. 1710) The only time that Defendant drove her car was after the murder. (T. 1711)

After the State rested, Defendant called Justin Dilger. (T. 1770, 1813) Dilger spent the day of the murder moving into a new apartment. (T. 1817-19) Dilger stated that he recalled going to party at a friend’s house after the clubs closed but did not believe he had been to a club earlier. (T. 1821-22) Dilger stated that he saw Defendant at the after hours party and that Defendant had stopped by his apartment on the afternoon of the murder. (T. 1823) Dilger denied discussing Peller with Defendant or telling anyone that he planned to harm Peller. (T. 1823) He also denied discussing Peller making Mejia angry because Peller was underselling Mejia but stated that the issue was common knowledge. (T. 1824) He denied telling others that they should stay away from Peller because something was going to happen to Peller or ever hearing Mejia make any statements. (T. 1824-25) He also denied speaking to Defendant on the phone on the day of the murder. (T. 1825)

On cross, Dilger testified that Defendant appeared intoxicated when he stopped by Dilger’s apartment around 2:00

p.m. on the day of the murder. (T. 1826-27, 1836) Defendant appeared to be alone and was unsuccessfully seeking money for Dilger. (T. 1827) Dilger admitted that he had attempted to call Peller several times the day of the murder unsuccessfully. (T. 1834-35)

Wayne Womack testified that he was friends with Fizzuoglio and met Peller through her. (T. 1840-41) Womack claimed that he had planned to go clubbing with Peller on the night of the murder but could not reach him by phone. (T. 1845-46) As a result, Womack claimed that he bought drugs from Dilger at his apartment that night. (T. 1846) Womack claimed that he later went to Club Stereo and met Dilger, Mejia, Bianchi, Moreau and Gonzalez there. (T. 1848) Womack asserted that Dilger told him Peller had been killed at the club. (T. 1848) Womack averred that Dilger had told him 3 or 4 days before the murder that he should stay away from Peller because something might happen to him. (T. 1849) He also acknowledged that he arranged to meet at Dilger’s apartment in Boca around 9:30 p.m. and met Dilger in Boca around 10:00 p.m. on the night of the murder. (T. 1853-54)

Ray Castano testified that he was Dilger’s roommate at the time of the crime. (T. 1855-57) Castano claimed that Dilger had indicated that there was a problem with Peller taking customers away from others. (T. 1865-66) However, Dilger never told

Castano of any plan to do anything about the problem. (T. 1865)

On the night of the murder, Castano arrived home from work somewhere around 7:30 or 8:30 p.m. and found Dilger and Womack at the apartment. (T. 1861) He later went out to Club Stereo and saw Dilger and Mejia there but not Defendant. (T. 1862-63) Castano heard from the group generally that Peller had been killed and heard Dilger state “It’s done.” (T. 1864)

On cross, Castano stated that Dilger remained in their apartment from the time Castano got home from work until after Castano left around 9:00 or 9:30, as such he could not have killed Peller. (T. 1867, 1870) Moreover, Castano admitted that Dilger never claimed that he killed Peller and was not the only one to make statements about Peller having been killed. (T. 1868)

Richard Post, a seven time convicted felon, testified that he was at Peller’s apartment in the early afternoon of the murder. (T. 1887) They planned to go to Club Stereo later that night. (T. 1888) Post went to the club around 11:00 p.m. (T. 1888) He saw Defendant, Dilger and Mejia at the club, and they seemed panicked. (T. 1888-89) Defendant was very pale and looked like he had seen a ghost. (T. 1906) He left the club around 4:30 a.m. with Castano, who told him that Peller was dead. (T. 1890-91)

Post stated that he saw Fizzuoglio around 3:00 or 4:00 p.m. the day after the murder when she was brought to his house. (T. 1885, 1893) He spoke to Fizzuoglio and then called Dilger while she was there. (T. 1893) He claimed that Fizzuoglio told him that someone named Mitch had been outside looking through the window and that Gonzalez had been somewhat involved. (T. 1895)

Post stated that the night before the murder, he and Peller had gone to a club together without anyone else. (T. 1898-99) When they returned from the club, Post stayed at Peller's apartment for about an hour, and Defendant was not there. (T. 1900-01)

Post admitted that he had difficulty understanding what Fizzuoglio was saying when he spoke to her because she was hysterical and hyperventilating. (T. 1909) He acknowledged that Fizzuoglio identified Defendant as the killer at that time. (T. 1909-10)

Defendant testified that he was friends with Peller, Bianchi, Moreau, Mejia, Dilger, Gonzalez, Womack and Post. (T. 1918-21) The group would have parties on Friday night and go to clubs on Saturday nights. (T. 1921) They all used and sold drugs. (T. 1921) Defendant testified that Dilger was originally the drug supplier. (T. 1923) Defendant claimed that he eventually started to sell drugs to defer the cost of his own habit. (T. 1923-24) He asserted that Dilger set him up to be a dealer for Mejia. (T. 1924-25) He averred that Peller was also a dealer for Mejia until Peller started dating Fizzuoglio, who alleged had been Mejia's girlfriend. (T. 1926) Defendant claimed that he had introduced Peller and Fizzuoglio, whom he allegedly knew well. (T. 1927-29)

He asserted that he had lost his cell phone at a party at Moreau's apartment the Thursday before the murder. (T. 1931) He also averred that he, Peller and Fizzuoglio had met at Peller's apartment the night before the murder and gone to a club together. (T. 1930-33) Peller had allegedly ordered drinks and gotten out wallet to pay for them when Peller knocked into the waitress, spilling a tray of drinks. (T. 1936) Defendant claimed that he picked up Peller's wallet and took out it contents to dry them when they were thrown out of the club. (T. 1936) As such, Defendant asserted that he took Peller's wallet, which he asserted contained Fizzuoglio's driver's license because Peller was holding it for her. (T. 1937-38)

According to Defendant, Fizzuoglio then went out on her own while he and Peller went to another club and then to Peller's apartment, where Defendant spent the night. (T. 1938-39) He claimed he woke up the next day around 12:30 p.m. and went home for a couple of hours before going to Dilger's apartment to collect money owed him as a result of a drug deal. (T. 1939-40, 1942) Defendant asserted that Mejia arrived and made threats about Peller invading Mejia's territory and Defendant and his friends needing to watch themselves.[1] (T. 1942-44) As a result, Defendant left, contacted Peller and went to Peller's apartment to convince Peller to leave. (T. 1942-47)

When Defendant allegedly arrived at Peller's apartment around 4:30 p.m., Peller and Fizzuoglio were arguing, so Defendant waited. (T. 1947-48) Defendant asserted that after waiting an hour, he told Peller of the alleged threats and suggested that Peller leave but Peller went back to arguing with Fizzuoglio. (T. 1948-50) Defendant asserted that after listening to Peller and Fizzuoglio argue for another hour, Peller asked him to conduct a drug transaction for him and that he asked Fizzuoglio to go with him to break up the argument. (T. 1953)

Defendant claimed that he drove Fizzuoglio's car because he liked driving different cars and Fizzuoglio was upset. (T. 1953-54) When the customer was not at the spot for the transaction, Defendant asserted that Fizzuoglio said she needed to go to the bank and left. (T. 1956) Defendant averred that the customer

[1] Defendant averred that Mejia had threatened to kill Peller about three weeks prior to the murder. (T. 1944-45) According to Defendant, Mejia had offered to provide a gun to him and he had declined. (T. 1945) Defendant claimed that he had warned Peller. (T. 1945)

finally arrived after 9:00 p.m., he completed the transaction and he then called Moreau for a ride. (T. 1957-58) He asserted that Moreau drove him back to Moreau's apartment, where Defendant showered and changed clothes, before going to Club Stereo. (T. 1958-59) Defendant claimed to have seen Mejia, Dilger, Gonzalez and their friends at the club but not to have spoken to them. (T. 1960-61)

After leaving the club, Defendant stated that he went to a house party, where he heard of Peller's murder and got in a fight with Dilger. (T. 1960-61) Defendant asserted that he then left the party with Catleen Dilger, Dilger's wife with whom Defendant claimed to be having an affair. (T. 1941, 1962) Defendant asserted that he and Catleen then went to a club in Miami, stayed until the morning and then stopped at the Exxon station to get a drink and cigarettes on the way home. (T. 1962) Defendant claimed that accidentally used Peller's credit card, which he asserted he still had from the night before the murder, to pay for his purchase. (T. 1962-64) Defendant asserted he realized his mistake when he saw the receipt and decided to just sign Peller's name because it was easier than attempting to explain to the cashier. (T. 1964)

Defendant claimed he then went to a friend's apartment and slept until 10:00 p.m. (T. 1965) He and Catleen then decided to pick up his car and go to his apartment. (T. 1965-66) Defendant claimed that he and Catleen stopped at Moreau’s apartment to get his car keys and then went to get his car. (T. 1966) Defendant averred that he saw the police in the area when he went to his car and had heard of the murder but had not realized that they were connected until after he was arrested. (T. 1967-69)

Defendant claimed that he did not tell the police about his belief that Mejia and Dilger had killed Peller because he was afraid of them. (T. 1970) He asserted that Dilger had told him he was next when he told him Peller had been killed. (T. 1969-70) He also claimed that Gonzalez had visited him in jail and threatened him if he did not keep his mouth shut. (T. 1971) He claimed that he was now blaming Dilger and Mejia because Mejia had been deported. (T. 1976)

Defendant denied committing these crimes. (T. 1972) He claimed that Peller had not bonded out of jail. (T. 1973) He admitted that he had spoken to Coyne but denied admitting the crime and stated that he simply wanted to know why Fizzuoglio was blaming him. (T. 1973-74)

During cross, the State inquired if Defendant had ever seen the murder weapon, and Defendant acknowledged that he had but denied that he ever had the gun when he lived with Stromoski. (T. 2010-11) The State inquired if Defendant had ever left a gun in Stromoski’s car, and Defendant admitted he had but claimed it was a different gun. (T. 2011) Defendant stated that he had seen Peller’s gun before at Peller’s apartment and knew it had been stolen. (T. 2011) The following colloquy then occurred:

> Q No idea who stole that gun?
> A I have ideas.
> Q Do you know?
> A Um –
> Q Do you know?
> A Now I do.
> Q Now you do? Who stole the gun?
> A Ernesto Gonzalez
> Q How do you know that?
> A Through reading his discovery, his statement.
> Q His statement? Ernesto Gonzalez admits to stealing that gun in his statement.
> A He admits to burglarizing Lance’s apartment.
> Q With who?

(T. 2011-12) Defendant objected, the trial court overruled the objection and Defendant responded that Gonzalez had claimed that Defendant was involved but lied to avoid a prison sentence. (T. 2012-13) Defendant then moved for a mistrial, which the trial court denied because Defendant had opened the door to the question by stating that he knew who stole the gun. (T. 2013)

When the State inquired about the extent of Defendant’s efforts to warn Peller about Mejia’s threats on the day of the murder, Defendant asserted that Peller had asked him to contact Mejia to settle their dispute. (T. 2020-21) He admitted that he had told the police he had made such a call. (T. 2021)

In rebuttal, the State presented the testimony Jodi

Teitelbaum, Ernesto Gonzalez’s girlfriend, that they had a party at the townhouse she shared with Gonzalez on the night before the murder. (T. 2032-36) Defendant arrived at the party around 10 or 11 p.m. and left before midnight. (T. 2038) Fizzuoglio arrived at the party between midnight and 2 a.m. and stayed until after the sun was up. (T. 2039)

During its initial closing argument, the State asserted that the jury should not concern itself with the people Defendant spoke to on the phone during the crime because they were not on trial. (T. 2059) The State averred that Defendant’s testimony was not credible and that his claim that he did not tell the police the truth because he was scared was inconsistent with his provision of information implicating Mejia. (T. 2060) It also pointed out that Defendant’s statement about Peller having bonded him out of jail to the police on the night of his arrest was inconsistent with his testimony and that the police could not have fed this information to Defendant because they did not know of the significance of the statement based on Pritchard’s statement at the time. (T. 2061-62) The State also asserted that Fizzuoglio’s testimony was consistent with her emotional state both at the time of the crime and on the stand and the other evidence. (T. 2075-81) Moreover, Fizzuoglio’s version of the events was consistent with the physical evidence and Defendant’s discussions with the police while Defendant’s was not. (T. 2064-82)

The State argued that Det. Bukata had surreptitiously recorded his conversation with Defendant in his car in the hopes of identifying the person Defendant spoke to on the phone during the crime. (T. 2082-83) It pointed out that Defendant’s statement to Coyne and his inculpatory statements to the police were consistent with the other evidence. (T. 2084-85) It asserted that witnesses had been unwilling to provide everything they knew to the police because they knew the environment in which the murder occurred. (T. 2085) The State then noted that Defendant had accepted responsibility for the crimes in his statements to the police but refused to identify the person on the other end of the phone and to have his statement taped. (T. 2086-88) When the State mentioned Defendant’s refusal to provide the name of the person with whom he spoke, Defendant objected that the statement was a comment on his right to remain silent and moved for a mistrial. (T. 2086-87) The trial court found the comment to be a fair comment on the evidence and denied the motion. (T. 2087)

During its rebuttal argument, the State asserted that Defendant’s claim of fear of Mejia did not explain why Defendant had not informed the police that he had Peller and Fizzuoglio’s licenses and Peller's credit card because of a spilled drink. (T. 2134-35) Defendant requested a sidebar, which the trial court denied. (T. 2135) After closing arguments finished, Defendant moved for a mistrial, asserting that the State had commented on his right to remain silent. (T. 2154) The trial court denied the motion. (T. 2155)

After considering the evidence and arguments of counsel, the jury found Defendant guilty as charged on both counts. (R. 686-88, T. 2199-2200) The trial court adjudicated Defendant guilty in accordance with the verdicts. (R. 800-01, T. 2202)

Prior to the penalty phase, Defendant submitted two special jury instructions regarding HAC. (R. 729-30) In the first, Defendant asked that the jury be instructed:

> In determining whether the killing was especially heinous, atrocious, or cruel, you are considering only the effect of the defendant's actions had upon the victim, and not the effect the actions had upon other people who were present but were not killed.

(R. 729) In the second, Defendant asked that the jury be instructed:

> The aggravating circumstance of heinous, atrocious, or cruel, may only be applied in tortuous murders. Torturous murders are those that show extreme and outrageous depravity as exemplified either by:
> a.) the desire to inflict a high degree of pain, or
> b.) utter indifference to, or enjoyment of, the suffering of another.

(R. 730) During the charge conference, Defendant asserted that he has asked for the first instruction because he did not “want any type of overlapping to” Fizzuoglio. (T. 2920) The State argued that the first requested instruction was already covered by the standard jury instruction and asserted that it was only seeking HAC regarding Peller’s suffering. (T. 2920-21) The trial court denied the first special instruction but granted the second. (R. 729-31)

Fizzuoglio testified that after Defendant pulled out the gun, Peller looked like be was having an anxiety attack and was hyperventilating. (T. 2242) Fizzuoglio tried to calm Peller, and he eventually stopped hyperventilating but still appeared scared. (T. 2243) When asked if Peller ever said anything about Fizzuoglio’s safety, Fizzuoglio responded that when Defendant started to claim there were people outside, Peller knew that he was going to die but begged Defendant to let Fizzuoglio go. (T. 2243-44) Defendant objected, claiming the testimony was speculative, and the trial court overruled the objection. (T. 2244) When it became clear that Defendant would not respond to this plea, Peller asked Defendant if he could call his father to say goodbye. (T. 2244-45) Defendant responded by kicking a phone to Peller. (T. 2245) A minute or two after Peller finished the call, Defendant shot him. (T. 2245)

On cross, Fizzuoglio stated that the portion of the conversation that she did not understand occurred immediately after Defendant pulled out the gun. (T. 2246-47) This conversation occurred when she had been in the apartment for only a few minutes. (T. 2251) They were in the apartment for more than an hour. (T. 2249)

Det. Bukata testified that he confirmed through phone records that Peller had called his father shortly before his murder. (T. 2253-54) He also obtained a recording of the message Peller left his father on his father's cell phone. (T. 2254-55) In the message, Peller stated:

> Hi, Dad, it's your son. I love you. I just want to tell you and Mom that I love you both much. I'm about to die. I love you both. Bye.

(T. 2257)

Det. John Butchko testified that the police received an anonymous phone call that there was a dead body in an apartment in Miami on February 22, 1987. (T. 2261-63) When they responded, they found Lloyd William Rosenbrock dead in his bed as a result of 35 stab wounds. (T. 2262-64) Defendant, who was 17 years old at the time, was in the apartment and initially claimed that he had simply found the body. (T. 2263-64) After being taken to the police station and read his rights, Defendant stated that he had lived with Rosenbrock, who was 55 years old for 3 weeks. (T. 2264-69) On the night of the murder, Defendant stated that he and Rosenbrock had been at a bar and that Rosenbrock had suggested that Defendant have sex with another man for money. (T. 2274) Defendant got mad, and they left the bar. (T. 2274)

When they got home, Rosenbrock shouted at Defendant that if he did not want to do what Rosenbrock asked, Rosenbrock would kick Defendant out of his apartment. (T. 2275) After a 15 minute argument, Rosenbrock went to bed while Defendant went into the kitchen and drank 3 rum and cokes. (T. 2275) After drinking the drinks, Defendant got a butcher knife from the kitchen, went into Rosenbrock's bedroom, walked up to the side of the bed to which Rosenbrock's back was facing and turned on a bedside lamp. (T. 2276-77) When Rosenbrock saw the knife, he grabbed an ashtray and struck Defendant on the thigh. (T. 2278-79) Defendant then repeatedly stabbed Rosenbrock even though Rosenbrock dropped the ashtray after the first stab wound and was just lying there. (T. 2279) After Rosenbrock was dead, Defendant went into the bathroom and washed the blood off of his body, the knife and the ashtray. (T. 2280-81) As a result, Defendant was convicted of second degree murder on August 10, 1987. (T. 2285)

On cross, Det. Butchko stated that he found no arrest history for Rosenbrock involving prostitution or any type of sex crime. (T. 2288) In fact, Defendant did not claim that he had ever had sex with Rosenbrock or been raped or touched by Rosenbrock. (T. 2292)

Dr. David Kramer, a psychiatrist, testified that people who had been abused as children can develop post traumatic stress disorder, which can lead to depression, anxiety, substance abuse, feeling of isolation, the inability to trust others and violence. (T. 2301-10) The substance abuse can be a form of self-medication. (T. 2310) The degree of psychological damage is increased if there were multiple perpetrators, the perpetrator was a family member or care taker, the abuse was long term and the abuse was greater. (T. 2311) However, he had never met Defendant. (T. 2313-14) He had been told that Defendant was involved in a prostitution ring between the ages of 12 and 17 but had seen no corroboration of this report. (T. 2317)

George Rabakozy testified that he and Defendant were classmates and friends between the ages of 13 and 16. (T. 2323-24) Rabakozy lived with a man named Robert Williams, who molested him and allowed others to do so. (T. 2324-26) Defendant did not get along well with his father and step-mother. (T. 2325) As such, Defendant would spend time at Rabakozy’s house. (T. 2326) Rabakozy believed that Williams molested Defendant but never saw any molestation occur. (T. 2327) He also believed that Williams had Defendant engage in acts of prostitution because he saw Defendant leave his house with other men a few times a week. (T. 2328, 2329) He believed that Williams was paid for providing the boys. (T. 2331) Rabakozy stated that this situation lasted for a year and a half to two years. (T. 2329)

Rabakozy stated that Rosenbrock was one of the men who frequented Williams' home. (T. 2323) He assumed that Defendant had a relationship with Rosenbrock. (T. 2331) He stated that Defendant was staying at Rosenbrock's from about the age of 14 or 15. (T. 2331) During this time, Rabakozy assumed that Rosenbrock was giving Defendant money because Defendant had money and clothes. (T. 2332) Rabakozy claimed that Williams gave them cocaine. (T. 2328) He had no knowledge of whether Rosenbrock gave Defendant drugs. (T. 2332)

James Hudson, Defendant's father, testified that he divorced Defendant's mother when Defendant was about two years old. (T. 2335-36) Defendant's mother then lived across the street from them. (T. 2336) At times, Defendant would see his mother, and at other times, she would not allow him to come to her house. (T. 2336-37) After Defendant turned 6, his mother quit seeing him. (T. 2338)

Before he started using drugs, Defendant was a good child who did well in school. (T. 2338-39) When Defendant started using drugs, Hudson tried to get Defendant help through South

Florida Hospital and counselors. (T. 2340) However, Defendant became a run-away around the age of 13 or 14. (T. 2338) Hudson heard Defendant was living with Rosenbrock and that Rosenbrock sold children so he confronted Rosenbrock and threatened him. (T. 2338, 2340-41)

Hudson believed that Defendant had an IQ of 151 and was smart. (T. 2344) He got along with Hudson’s children with his second wife when they were younger. (T. 2343) Hudson loved his son and believed that Defendant’s problem was drugs. (T. 2338, 2342) When Defendant got out of prison, Hudson’s wife got Defendant a job at a Mobil station. (T. 2344) Eventually, Defendant worked as a technical support person in the computer field. (T. 2344)

On cross, Hudson admitted that Defendant was a charmer, who could get people to believe anything he said. (T. 2346) He admitted that he had been unaware that Defendant had married. (T. 2346-47) He admitted that he had taken Defendant away from Rosenbrock and brought Defendant back home. (T. 2347) However, Defendant stole his car and ran away again. (T. 2347)

George Lagogiannis testified that he met Defendant when they were both working at a computer support company, and he was assigned to train Defendant. (T. 2348-49) Lagogiannis stated that Defendant had no training in computers when he started but learned the area well and quickly. (T. 2350) Eventually, Defendant left the company where they were working for a better job. (T. 2351) Lagogiannis considered Defendant a friend and a nice and trustworthy person. (T. 2349, 2351-52) Defendant had told Lagogiannis that he had a prior conviction for murder, but Lagogiannis believed Defendant had been rehabilitated. (T. 2352-53)

Gloria Squartino testified that she dated Defendant for about a year when Defendant was 16. (T. 2357-58) At the time, Defendant lived with Rosenbrock, and Squartino thought in retrospect that something might be going on between them. (T. 2360-61) On cross, Squartino admitted that she and Defendant stayed in Rosenbrock's apartment partying while Rosenbrock lay murdered in his bed for a period of time. (T. 2362)

Kim Hurtado testified that she met Defendant when she was the manager of a Mobil station, and he was employed by Mobil. (T. 2364) She stated that Defendant was a sufficient employee who was beloved by customers and coworkers. (T. 2365) She considered Defendant a friend and a kind, gentle and reliable person. (T. 2365-66) Hurtado fell in love with Defendant, and Defendant told her he had been molested as a child and had lived on the streets. (T. 2366-67) Defendant claimed he adored his father but hated his step-mother because she placed him in mental health treatment facilities. (T. 2367-69)

At one point, Defendant and his brother lived with Hurtado and her children. (T. 2369) Hurtado was injured in an accident at work, and Defendant took custody of her son Sean because Sean was defiant and his father could not handle him. (T. 2370-71) Defendant and Sean developed a parental bond. (T. 2371-72) Hurtado believed that Defendant was good to her other children and his sister and would buy them things. (T. 2373-74) Defendant was hurt by the loss of his relationship with his father and step-mother but did not seem terribly bothered by the lack of relationship with his mother because he did not really remember her. (T. 2375-76)

On cross, Hurtado admitted that Defendant took custody of Sean at the beginning of the school year in 2001, about 3 month before the murder. (T. 2376-77) Hurtado thought Defendant took good care of her son and saw that Sean kept to a regular schedule even though Defendant would leave Sean alone to go out at night. (T. 2378)

Sean Lee, Hurtado’s son, testified that he met Defendant when he was about 13 and Defendant started working for, and dating, his mother. (T. 2379-81) They became good friends. (T. 2380) Sean stated that he lived primarily with his step-father, with whom he got along well. (T. 2381) Defendant took Sean to visit his mother and help Sean with his homework. (T. 2382) Sean went to live with Defendant at one point, and Defendant saw that Sean got to and from school on time, fed and clothed him and gave him money. (T. 2383-86)

Rosemary Hudson, Defendant's wife, testified that she married Defendant in May 2000, and lived with him off and on in 2000 and 2001. (T. 2387-89) Defendant helped her with school when she was training to be a nursing assistant. (T. 2389-90) Defendant had left her before the crime because of his drug use, but she still visited him while he was incarcerated. (T. 2390, 2395) Defendant had written a letter to her son from a prior relationship and told Defendant to think carefully about the decisions he made to avoid trouble with the law. (T. 2391-93)

Renee Smith, Defendant's mother, testified that she last saw Defendant when he was 10 years old. (T. 2396-97) She had divorced Defendant's father when Defendant was 2 and rarely saw Defendant after that even though she had lived across the street from him at one time. (T. 2397-98)

During its closing argument, the State asserted HAC applied despite Defendant's claim that the murder was quick and Peller did not fear his death. (T. 2406) It asserted that Peller's call to Pritchard showed that Peller knew he was going to die for more than two hours. (T. 2406-07) Further, Fizzuoglio's testimony about Defendant hyperventilating around 8 and the content of the phone message to Peller's father showed that he knew he would die. (T. 2407-08) It asserted that Defendant's actions of running around the apartment claiming that people were outside and making a phone call were designed to heighten the victims' anxiety and make them suffer because Defendant had decided to kill Peller weeks earlier when he discussed the issue with Mejia and accepted the gun. (T. 2409)

After commenting on CCP, the State returned to the issue of HAC:

> And now I'm going to read this to you. The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> Heinous means extremely wicked or shockingly evil.
>
> Atrocious means outrageously wicked and violent.
>
> Cruel means designed to inflict high degree of pain with utter indifference or even enjoyment of the suffering of another.
>
> If I can stop right there for a second. With the utter indifference to and even the enjoyment of the suffering of another.
>
> That part right there, describing heinous, atrocious and cruel – that's what I talked to you about when he is running around saying there's people outside, and there's nobody there.
>
> The minutes of anguish these folks are going through at that time, that's what we're talking about. That's what it's about.
>
> You want to call your dad to say good-bye? Why not. Here is the phone.
>
> That's what it's about. The kind of crime intended to include which heinous, atrocious and cruel is one accompanied by additional facts to show the crime was consciousless and pitiless and unnecessarily torturous to victim.

> Torturous murder are those that show extreme an outrageous deprative [sic] as exemplified by desire to inflict high degree or pain and or – see, folks, right there or – or B the utter indifference to the enjoyment of the suffering of another. That's heinous and atrocious and cruel, the mental anguish that he put these folks through – Lance Peller and his family.
>
> That's the third aggravator of heinous, atrocious and cruel. They can say quick all they want with this one bullet, and it probably was and he said it was.
>
> But I'm asking you to look beyond that, and look at the facts of him being there from 7:00 to 9:15, 9:20 – whenever that trigger was pulled.
>
> That fact is not ignored in the law, and that's why I bring it to your attention.

(T. 2411-13) Defendant did not object to these comments. *Id.*

After the jury was instructed, Defendant renewed his prior objections to the instructions without elaboration. (T. 3016) After considering the evidence, the jury recommended that Defendant be sentenced to death by a vote of 7 to 5. (R. 747, T. 3023)

At the Spencer hearing, Tracie Hudson, Defendant's sister, testified Defendant encouraged her when she was in school and in the army. (T. 2966-68) She also believed that Defendant was friendly with their brother. (T. 2969) Defendant's father reiterated his testimony that Defendant was a good kid until he started using drugs. (T. 2971-72) He further asserted that he did not believe there was sufficient evidence of Defendant's guilt to justify imposition of the death penalty and stated that Defendant could do well in prison and help other inmates. (T.

2972) Defendant's wife asked the judge to spare him. (T. 2975-76) The State presented victim impact testimony through David Kyriakos, Peller's friend, Fizzuoglio and Allan Peller, Peller's father. (T. 2976-90)

The trial court agreed with the jury's recommendation and sentenced Defendant to death. (R. 778-92, T. 2936-62) In doing so, the trial court found that 4 aggravators: (1) prior violent felony, based on the prior conviction for second degree murder – great weight; (2) during the course of a kidnapping – great weight; (3) HAC – great weight; and (4) CCP – great weight. ***Id.*** The trial court found no statutory mitigation, after considering and rejecting Defendant's age of 32 and his claim that he acted under extreme duress or substantial domination of Mejia. ***Id.*** However, it found 12 nonstatutory mitigators: (1) abandonment by his birth mother – little weight; (2) mental abuse by step-mother – little weight; (3) history of substance abuse – little weight; (4) limitations on contact with his siblings – little weight; (5) inappropriate sexual contact as an adolescent – little weight; (6) good prisoner – little weight; (7) ability to excel at work – little weight; (8) cares for others – little weight; (9) positive relationships with others - little weight; (10) good courtroom behavior – little weight; (11) Defendant's ability with computers – little weight; and (12) use of drugs during crime – little weight. *Id.* The trial court found that Defendant had not proven that he had a history of drug addiction and ADD or that he had an extensive history of sexual abuse. *Id.*

The trial court also sentenced Defendant to life imprisonment with a 10 year minimum mandatory term for the armed kidnapping. (R. 790) The sentences were ordered to be served consecutively. (R. 790-91) This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in admitting Pritchard's testimony about his conversation with Peller. It also did not abuse its discretion in permitting cross examination about matters to which Defendant had opened the door and invited any error. There was no improper comment on Defendant's exercise of his right to remain silent as he was not exercising his right to remain silent. The trial court did not abuse its discretion in denying a special jury instruction on HAC. There was no fundamental error in the State's penalty phase closing argument. Fizzuoglio's testimony about Peller knowing he would die was properly admitted. The trial court properly found HAC and CCP and did not abuse its discretion in weighing the aggravators and mitigators. The trial court's sentencing order made the proper findings to support Defendant's death sentence. Moreover, there was no error under *Ring* because both the prior violent felony and during the course of a felony aggravator were present. The evidence was sufficient to sustain Defendant's convictions, and his sentence is proportionate.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING PRITCHARD'S TESTIMONY.

Defendant first asserts that the trial court abused its discretion in allowing Pritchard to testify about the contents of a phone call he received from Peller on the evening of the murder. However, the trial court did not abuse its discretion[2] in finding the statement admissible.

To be admissible as a spontaneous statement, (1) the statement must have been made at the time of the event it describes and explains is occurring and (2) the statement must be spontaneous. *Garcia v. State*, 492 So. 2d 360, 365 (Fla. 1986); *Williams v. State*, 198 So. 2d 21, 21-23 (Fla. 1967); *State v. Adams*, 683 So. 2d 517, 519 & n.2 (Fla. 2d DCA 1996); *McDonald v. State*, 578 So. 2d 371, 373-74 (Fla. 1st DCA 1991). To be considered spontaneous, the statement must be made before there is time to reflect. *McGauley v. State*, 638 So. 2d 973 (Fla. 1994). However, statements have been routinely admitted as spontaneous statements when they are made in response to a

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

question.[3] *Garcia*, 492 So. 2d at 365; *Williams*, 198 So. 2d at 21-23; *McGauley*; *McDonald*, 578 So. 2d at 373-74. Further, the statement must explain or describe an event. *Ibar v. State*, 938 So. 2d 451, 467 (Fla. 2006).

Here, the statement was made at the same time as the event. Peller called as Defendant was in his home, asserting that he was there to kill Peller. Moreover, the statement did explain or describe the event. It described that a person had come to Peller's home to kill Peller, explained why the person was there and gave information to identify the assailant. Further, the statement was a spontaneous cry for help from a friend. Under these circumstances, the trial court did not abuse its discretion in admitting the statement. It should be affirmed.

While Defendant contends that Peller was not under the influence of a startling event, the record supports the trial court's determination that he was. Peller was calling because Defendant had arrived at his apartment and announced that he was there to kill Peller. Certainly, having someone appear at one's home and declare an intention to kill the person is a startling

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[3] Neither *Mariano v. State*, 933 So. 2d 111 (Fla. 4th DCA 2006), nor *J.A.S. v. State*, 920 So. 2d 759 (Fla. 2d DCA 2006), support Defendant's assertion that a statement has to be blurted out to be considered spontaneous. Each of these cases concern statements admitted as excited utterances that were made after the event concluded and in circumstances showing an opportunity to reflect.

event. As such, Defendant's assertion that the trial court abused its discretion in finding the statement admissible should be rejected.

Defendant also appears to suggest that the statement was allegedly "a rambling inconclusive discussion with a friend." However, calls for assistance during the commission of a crime are routinely considered admissible as spontaneous statements. *Bartee v. State*, 922 So. 2d 1065, 1070 (Fla. 5th DCA 2006); *Viglione v. State*, 861 So. 2d 511, 513 (Fla. 5th DCA 2003). Here, the statement at issue was such a call for help during the commission of a crime. Defendant was standing in Peller's apartment, telling Peller he was there to kill him, and Peller was seeking a means of defending himself against this threat as he cowered in a bathroom. Moreover, while Defendant attempts to portray the portions of the discussion about Peller's drug dealing and bonding a person out of jail as irrelevant to explaining or describing the event, the record belies this portrayal. Peller was explaining the reason the person was there and describing the person. As such, there was no rambling inconclusive discussion but a cry for help during a criminal episode. The trial court did not abuse its discretion in finding this statement admissible as a spontaneous statement.

To be admissible as an excited utterance, (1) there must have been a startling event, (2) the statement must have been made before the declarant had time to contrive or misrepresent and (3) the statement must have been made while the declarant is still under the stress of the starting event. ***Stoll v. State***, 762 So. 2d 870, 873 (Fla. 2000); ***State v. Jano***, 524 So. 2d 660, 661 (Fla. 1988). The determination of whether the state of mind necessary to support the admission of such a statement exists, a court must consider the totality of the circumstances, including the age of the declarant, his mental or physical state, the characteristics of the event and the subject matter of the statement. ***Jano***, 524 So. 2d at 661. When a statement is made contemporaneously with the event, "courts have little difficulty finding that the excitement prompted the statement." ***Jano***, 524 So. 2d at 662. When there is a time lapse between the event and the statement, the proponent of the statement is required to show that there was no ability to engage in reflective thought. ***Id.***

Here, the circumstances surrounding the statement shows the trial court did not abuse its discretion in finding the statement admissible. Here, the evidence showed that Peller was calling Pritchard as Defendant was in Peller's apartment informing Peller that he was there to kill him. As such, there was no time lapse between the event and the statement. Moreover, Peller was sufficiently startled by the statement to call Pritchard and attempt to obtain a means of defending himself from the threat posed by Defendant. (T. 705) Peller was also sufficiently threatened by the statement to make the call to Pritchard from his bathroom and to avoid mentioning Defendant's name. (T. 707-08) Further, the content of the statement showed that Peller was seeking help to extricate himself from the situation. Under these circumstances, the trial court did not abuse its discretion in admitting this statement.

Despite these facts showing that Peller was under the stress of a startling situation, Defendant insists that the trial court abused its discretion in finding that he was because Pritchard testified that he did not notice any stress or disturbance in Peller's voice. However, as the Second District has stated, "'excitement' for purposes of an utterance is not a matter that is determined exclusively by tone of voice. Some people remain calm of voice when under stress; others can be excited of voice when fully capable of misrepresentation." *Tucker v. State*, 884 So. 2d 168, 175 (Fla. 2d DCA 2004). Moreover, as this Court noted in ***Williams v. State***, 32 Fla. L. Weekly S347, S350 (Fla. Jun. 21, 2007), simply because some evidence might support a conclusion different than the one made by the trial court in determining whether to admit an excited utterance is not grounds to find that the trial court abused its discretion. Given the other factors that showed that Peller was in a stressful situation, the trial court did not abuse its discretion in admitting the statement.

Defendant also insists that the fact that Peller had the presence of mind to realize that he needed assistance in dealing with the threat to his life, his statements could not be considered as a spontaneous statement or excited utterance because the ability to realize that one is in need of assistance shows that one was engaged in reflective thought. However, this assertion flies in the face of existing case law. Anyone calling 911 does so because they had sufficient presence of mind to realize they need assistance. However, this Court and the other courts of this State routinely admit 911 calls as exicted utterances and spontaneous statements. ***E.g.***, ***Sliney v. State***, 699 So. 2d 662, 669 (Fla. 1997); ***Davis v. State***, 698 So. 2d 1182, 1189-90 (Fla. 1997); ***Evans v. State***, 834 So. 2d 954, 954-55 (Fla. 3d DCA 2003); ***Allison v. State***, 661 So. 2d 889, 894 (Fla. 2d DCA 1995). Thus, the mere fact that Peller had the presence of mind to realize he needed help and to seek such assistance does not show that the statement was not admissible.[4]

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[4] While Defendant mentions the Confrontation Clause, he did not object on confrontation grounds in the trial court. As such, the issue is not preserved. ***Schoenwetter v. State***, 931 So. 2d

Even if the trial court had abused its discretion in admitting the statement, any error would be harmless. Pritchard's statement did not identify Defendant as Peller's killer. Instead, Pritchard merely stated that Peller had described his attacker as someone he had bonded out of jail. The only connection between this description and Defendant's identity as Peller's killer was Defendant's own statement to the police that Peller had bonded out of jail. Moreover, there was amply other evidence that Defendant was the killer. Fizzuoglio gave an eyewitness account of the last hour of Peller's life and how Defendant spent that hour holding her and Peller at gunpoint, with a gun Defendant had with him, as Peller tried to convince Defendant not to kill him or Fizzuoglio. Moreover, Defendant's car was found in the parking lot at the murder scene, with a live bullet consistent with the murder weapon in it, and Defendant had Fizzuoglio and Peller's IDs, and Peller's credit cards, one of which he had used the morning after the murder. Further, Defendant admitted that he had been contracted to kill Peller. Further, Defendant was seen with the murder weapon twice around the time the contract was made. Fizzuoglio's car and the murder weapon were recovered from a church right next to where Defendant was picked up after the murder.

857, 871 (Fla. 2006). Moreover, the claim is without merit. *Davis v. Washington*, 126 S. Ct. 2266 (2006).

Descriptions of Defendant's appearance after the murder were consistent with his having committed the murder. Additionally, Defendant made inculpatory statements to the police after his arrest, including indicating a knowledge of how Fizzuoglio got away from him and accepting responsibility for the crime. Further, Defendant made inculpatory statements to Coyne and attempted to create a false abili.[5]

Defendant's defense was that he had been by Peller's apartment on the afternoon of the murder, warned Peller of the threat against him and left. Dilger then came to the apartment and killed Peller and Defendant's friends were framing him for the murder because he was sleeping with Dilger's wife. Defendant himself rebutted this defense by presenting evidence that Dilger could not have committed the murder because he was at home at the time. Moreover, Defendant provided testimony inconsistent with his own prior statements to the police. Defendant's attempt to explain the inconsistencies by claiming that he was afraid of Mejia was inconsistent with his attempts to inculpate Mejia in the statements he made after his arrest.

Given the weakness of the connection between Pritchard's testimony and Defendant's guilt, the ample other evidence of

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[5] This evidence shows that the evidence was more than sufficient to sustain his convictions. *Green v. State*, 715 So. 2d 940, 943 (Fla. 1998)(quoting *Holton v. State*, 573 So. 2d 284, 289 (Fla. 1990)).

Defendant’s guilt and the weakness of the defense, any error in the admission of Pritchard’s testimony cannot be said to have affected the jury’s determination that Defendant was guilty. As such, any error in the admission of this testimony was harmless at the guilt phase. ***State v. DiGuilio***, 491 So. 2d 1129 (Fla. 1986). The convictions should be affirmed.

In an attempt to make it seem as if the error was harmful, Defendant asserts that this case boiled down to a credibility contest between he and Fizzuoglio. However, the record does not support this assertion. Defendant’s trial testimony was inconsistent with his own pretrial statements to the police and Coyne. Moreover, Defendant’s account of how he came to be in the possession of Fizzuoglio and Peller’s property was contradicted by the testimony of Post and Teitelbaum. (T. 1898-1901) Defendant’s statement that he did not accept the murder weapon from Mejia was contradicted by Stromoski’s testimony that he saw Defendant with the gun twice. Defendant’s claim about how his car came to be left at the murder scene required the jury to believe that Defendant spent about many hours hanging around a shopping center next to where Fizzuoglio’s car and the murder weapon were left. Further, his account of his actions after the murder was inconsistent with the testimony of a number of other witnesses. Thus, the record shows that this matter did not boil down to a credibility contest between Fizzuoglio and Defendant. Defendant’s claim that it did does not show that any error was harmful. Defendant’s conviction should be affirmed.

Further, the evidence was also not harmful in the penalty phase. As Defendant admits, the State only used the evidence at the penalty phase for Peller’s state of mind. However, hearsay statements showing a declarant’s state of mind are admissible if the declarant’s state of mind is in issue. *Peede v. State*, 474 So. 2d 808, 816 (Fla. 1985). As this Court has held, HAC focuses on the victim’s perception of the circumstances surrounding the murder. *Hutchinson v. State*, 882 So. 2d 943, 959 (Fla. 2004). Thus, Peller’s state of mind was at issue, and this evidence would have been admissible at the penalty phase under *Peede*. As such, any error in the premature admission of this testimony was harmless. *Garcia v. State*, 949 So. 2d 980, 993 (Fla. 2006); *Valle v. State*, 581 So. 2d 40, 46 (Fla. 1991).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOW THE STATE TO EXPOSE DEFENDANT’S MISLEAD TESTIMONY.

Defendant next asserts that the trial court abused its discretion in allowing the State to question him regarding his involvement in the theft of the murder weapon from Peller during a prior burglary. Again, there was no abuse of discretion.[6]

Defendant testified on direct that he had been asked to kill Peller and had been offer a gun to accomplish the killing but had not accepted the job or gun. (T. 1944-45) When questioned about the murder weapon, Defendant acknowledged having seen it and knowing that it had been stolen from Peller but denied ever having it. (T. 2010-11) When questioned about the inherent contradiction between his testimony that he never had the murder weapon and Stromoski's testimony that he had seen the murder weapon in Defendant's possession on at least two occasions, Defendant insisted that the gun Stromoski had seen was a different weapon. Asking Defendant about the inherent contradiction between Stromoski's testimony and his own direct testimony was proper cross examination. *Geralds v. State*, 674 So. 2d 96, 99-100 (Fla. 1996); *Tompkins v.* State, 502 So. 2d 415, 419 (Fla. 1987); *McRae v. State*, 395 So. 2d 1145, 1151-52 (Fla. 1981); *Mosley v. State*, 739 So. 2d 672 (Fla. 4th DCA 1999). Because Defendant chose to answer this legitimate subject of cross examination falsely, he opened the door to the presentation of evidence contradicting his testimony. *Izquierdo v. State*, 890 So. 2d 1263, 1266 (Fla. 5th DCA 2005). As such, the trial court did not abuse its discretion in allowing the

[6] A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Ray*, 755 So. 2d at 610.

testimony.

The case relied upon by Defendant does not compel a different result. In ***Robertson v. State***, 829 So. 2d 901, 911-13 (Fla. 2002), this Court found that the defendant had not opened the door to the presentation of evidence of his prior assault because cross examination regarding the prior assault was improper. ***See also Ousley v. State***, 763 So. 2d 1256, 1256-57 (Fla. 3d DCA 2000)(same). Here, the question on cross was not improper. Instead, it went direct to issues Defendant had raise on direct: his denial of taking the murder weapon and his denial of the commission of the crime. Since ***Robertson*** and ***Ousley*** rely on the cross examination that led to the contradiction being improper, they are inapplicable here.

Further, interpreting these cases in the manner Defendant suggests would lead to an absurd result. Under Defendant's interpretation of these cases, a defendant could open the door to cross examination regarding a subject by creating a false impression or by denying involvement in a crime. When the State attempted to engage in the proper cross examination, the defendant could simply lie about a material fact with impunity. Given that the purpose of cross examination is to determine the truth, allowing such a result would be absurd. ***See California v. Green***, 399 U.S. 149, 158 (1970). As such, Defendant's interpretation of these cases should be rejected.

Moreover, any error in the admission of this testimony was invited. ***San Martin v. State***, 705 So. 2d 1337, 1348 (Fla. 1997). When the issue of who stole the gun was first broached, Defendant neither objected nor gave an answer consistent with his alleged personal knowledge. Instead, Defendant chose to offer hearsay condemning Ernesto Gonzalez. Doing so was entirely consistent with Defendant's plan for his defense. As Defendant acknowledged, he planned to present hearsay statements in an attempt to show that his friends had framed him. (T. 977-80) Because Defendant intentionally presented the jury with half of Gonzalez's statement about the burglary, the trial court did not abuse its discretion in finding that Defendant had invited the admission of the other half of the statement. ***See Izquierdo v. State***, 890 So. 2d at 1266. It should be affirmed.

Even if the trial court had abused its discretion in permitting the testimony, any error was harmless. ***State v. DiGuilio***, 491 So. 2d 1129 (Fla. 1986). Defendant's testimony that Gonzalez stated that he stole the gun was brief. The State did not mention the testimony at all during its lengthy initial closing argument. (T. 2058-95) Only after Defendant discussed the gun in his closing argument did not State briefly mention the testimony about stealing the gun (T. 2146) and only in the context of Defendant’s lack of credibility. (T. 2137-46) Moreover, as noted in Issue I, the evidence of Defendant’s guilt was overwhelming, Defendant’s credibility was already in shambles given its inconsistency on almost every material issue with other evidence, including evidence Defendant himself presented. Defendant’s possession of the murder weapon was confirmed by Stromoski’s testimony that he saw Defendant in possession of the gun shortly after Mejia arranged for Defendant to kill Peller, and the discovery of the gun next to where Defendant was after the crime. Additionally, any concern that the jury might have considered Defendant a bad person already arose from Defendant’s acknowledgement that he was a drug dealer and being groomed as Mejia’s second in command. Under these circumstances, any error in allowing the State to show that Defendant was attempting to mislead the jury did not contribute to his conviction. Thus, any error was harmful at the guilt phase. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

Moreover, the theft of the gun was not mentioned at the penalty. Instead, the arguments for CCP were based on the facts that Defendant agreed to kill Peller on Mejia’s behalf 3 weeks before the murder, that Defendant announced his intention to kill Peller hours before doing so and that Defendant eventually executed Peller with a shot to the top of his head only after muffling the shot. Moreover, by that point, the jury knew that Defendant was not only an admitted drug dealer but also a two time convicted murderer. Under these circumstances, any error in the admission of Defendant's testimony that Gonzalez said Defendant participated in stealing the gun cannot be said to have contributed to Defendant's death sentence. As such, any error in the admission of this evidence would be harmless at the penalty phase. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING A COMMENT IN CLOSING.

Defendant next asserts that the trial court abused its discretion by allegedly permitting the State to comment on his alleged silence without record support. However, the trial court did not abuse its discretion in permitting the comment.[7]

This Court has held that for the State to have improperly commented on a defendant's exercise of his right to remain silent, it is necessary for the defendant to have actually remained silent. *Hutchinson*, 882 So. 2d at 955; *Downs v. Moore*, 801 So. 2d 906, 911-12 (Fla. 2001); *Valle v. State*, 474 So. 2d 796, 801 (Fla. 1985), *vacated on other grounds*, 476 U.S. 1102 (1986). Here, Defendant had not exercised his right to remain

[7] A trial court has broad discretion over the scope of closing argument and the parties are allowed to draw fair inferences from the evidence. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982).

silent at any point prior to the comment. Defendant spoke to the police after waiving his *Miranda* rights at the time of his initial arrest on the charge of kidnapping Fizzuoglio. (T. 1340-50, 1417-34) He again waived his rights and spoke to the police on October 31, 2001. (T. 1278-88, 1471-79) Moreover, Defendant testified during the guilt phase of trial. (T. 1918-2021) In fact, the comment about which Defendant complained directly concerned the content of one of Defendant's statement to the police. (T. 2086) Since the comment was about one of Defendant's statements and Defendant had not exercised his right to remain silent to that point, the comment was not an impermissible comment on Defendant's right to remain silent. The trial court did not abuse its discretion in overruling the objection.

To the extent that Defendant is asserting that the comment was not supported by the record, the issue is not preserved. Defendant's only ground for objection was that both the comment and the testimony that supported it allegedly reference to exercise of the right to remain silent. (T. 2086-87) As Defendant did not assert that the comment was not supported by the evidence below, this issue is not preserved for review. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). The issue should be rejected.

Even if the issue had been preserved, the issue should still be rejected because it was a proper comment on the evidence. Det. Bukata testified that Defendant informed him while they were still in the police station that Mejia was involved in killing Peller and that Defendant had called Mejia while he was at Peller’s apartment to see if a reparations less than Peller’s death would satisfy Mejia. (T. 1477-79) The State also presented a tape of a conversation between Det. Bukata and Defendant during the subsequent ride back to the jail during which Defendant again implicated Mejia as having planned and directed the murder of Peller. (T. 1498-1510) During this conversation, Defendant indicated that he was “talking about it now [] because it’s kind of an unofficial thing.” (T. 1499) In response, Det. Bukata repeatedly urged Defendant to provide evidence to prosecute Mejia. (T. 1500-10) As Defendant had already provided information to Det. Bukata about Mejia’s involvement, it was a reasonable inference that the discussions urging Defendant to cooperate in prosecuting Mejia asked him to testify. As comments based on reasonable inferences from the evidence are proper, the trial court did not abuse its discretion in allowing the comment. *Breedlove*, 413 So. 2d at 8.

Even if the comment could be considered erroneous, any error was harmless. As argued in Issue I, the evidence against Defendant was overwhelming, Defendant’s credibility was nil and this case was not a credibility contest between Fizzuoglio and Defendant. Moreover, a review of the State's closing argument as a whole shows that it was not asking the jury to convict Defendant because he was refusing to testify against Mejia. Instead, the State was urging the jury to ignore Defendant's attempts to deflect blame onto Mejia and Dilger. Under these circumstances, any error in the comment cannot be said to have contributed to Defendant's conviction or sentence. As such, any error was harmless. ***State v. DiGuilio***, 491 So. 2d 1129 (Fla. 1986).

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO EXPAND THE JURY INSTRUCTION ON HAC.

Defendant next asserts that the trial court abused its discretion in refusing to give a special jury instruction on HAC. However, the trial court did not abuse its discretion.[8]

This Court has repeatedly held that the standard jury instruction regarding HAC is sufficient to apprise the jury of how to apply the aggravating factor. ***Hoskins***, 32 Fla. L. Weekly at S163; ***Hall v. State***, 614 So. 2d 473, 478 (Fla. 1993). This Court has held that "not every court construction of an aggravating factor must be incorporated into the jury instruction defining that aggravator." ***Davis v. State***, 698 So.

[8] A trial court's decisions regarding the content of jury instructions are reviewed for an abuse of discretion. ***Hoskins v. State***, 32 Fla. L. Weekly S159, S163 (Fla. Apr. 19, 2007).

2d 1182, 1193 (Fla. 1997). Thus, the trial court did not abuse its discretion.

Moreover, the trial court did not abuse its discretion in denying the requested instruction because the subject matter of the instruction was already covered by the standard instruction. Defendant stated that his purpose in asking for the instruction was to limited the jury's consideration to Peller's suffering. The trial court instructed the jury:

> Members of the jury it is now your duty to advise the court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree.
>
> * * * *
>
> Third, the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> Heinous means extremely wicked or shockingly evil.
>
> Atrocious means outrageously wick and vile.
>
> And cruel means designed to inflict a high degree of pain and utter indifference to or even enjoyment of the suffering of others;
>
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional facts that show crime was conscienceless or pitiless and was unnecessarily tortuous to the victim.
>
> Tortuous murders are those that show extreme and outrageous depravity as exemplified by desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

(T. 2999-3000, 3001-02) This instruction informed the jury it was the murder that had to be heinous, atrocious and cruel and that to be heinous, atrocious and cruel, the murder had to be unnecessarily tortuous to the murder victim. As Peller was the only murder victim, the instruction already addressed Defendant’s concern about the suffering of Fizzuoglio. Thus, the lower court did not abuse its discretion in denying the requested instruction. It should be affirmed.

Moreover, the trial court also did not abuse its discretion in denying the requested instruction based on its potential to confuse the jury. This Court has held that HAC can be properly found based on a victim’s awareness of a defendant’s actions directed toward another. *Hutchinson*, 882 So. 2d at 958-59; *Francis v. State*, 808 So. 2d 110, 135 (Fla. 2001); *Farina v. State*, 801 So. 2d 44, 53 (Fla. 2001); *Henyard v. State*, 689 So. 2d 239, 252-53, 254 (Fla. 1996). Thus, the effect that a defendant’s actions have on another person present may heighten the murder victim’s fear and contribute to a finding of HAC. However, the requested instruction may have confused the jury about the relevance of such evidence as it told the jury to ignore it. Since the instruction was confusing, the trial court did not abuse its discretion in denying the instruction. *See Stephens v.* State, 787 So. 2d 747, 757 (Fla. 2001); *Trepal v. State*, 621 So. 2d 1361, 1366 (Fla. 1993).

V. THE COMMENTS REGARDING HAC DO NOT CONSTITUTE FUNDAMENTAL ERROR.

Defendant next asserts that the State’s comments about the suffering of other in the penalty phase closing argument constitute fundamental error. However, any issue regarding the comments was not preserved and is not fundamental error.

In order to preserve an issue regarding a comment in closing, it is necessary for a defendant to make an object to the comment contemporaneously. ***Castor v. State***, 365 So. 2d 701 (Fla. 1978). Here, Defendant did not object to the comments in closing at any point. As such, any issue is not preserved.

Because the alleged error is not preserved, this Court cannot grant relief unless Defendant demonstrates that the alleged error was fundamental. As this Court has states, "Fundamental error is error that 'reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" ***Kilgore v. State***, 688 So. 2d 895, 898 (Fla. 1997)(quoting ***State v. Delva***, 575 So. 2d 643, 644-45 (Fla. 1991)). In an attempt to meet that standard, Defendant principally relies on the fact that the State discussed the suffering that Peller and Fizzuoglio shared. He asserts that these comments might have directed the jury's attention away from Peller's fear and mental anguish about realizing that he would be killed to Fizzuoglio's concern for her child. However, the State never mentioned Fizzuoglio's child, any actions Defendant took toward Fizzuoglio alone outside of Peller's conscious presence or any reaction of Fizzuoglio outside Peller’s conscious presence. As noted in the last section, actions taken toward others in a murder victim’s presence and concern for the safety of those others that those actions engender in a murder victim are properly considered as part of HAC. *Hutchinson*, 882 So. 2d at 958-59; *Francis*, 808 So. 2d at 135; *Farina*, 801 So. 2d at 53; *Henyard*, 689 So. 2d at 252-53, 254. In fact, here, the evidence showed that Peller’s mental anguish was enhanced by Fizzuoglio’s presence, Defendant’s actions toward her and their effect on her. Once Defendant had placed the call and informed Peller that there would be no reprieve, Peller begged Defendant to let Fizzuoglio go. (T. 2244) As such, the comments about Defendant’s actions in the presence of both Peller and Fizzuoglio were not improper, much less fundamental error. *Breedlove*, 413 So. 2d at 8.

Moreover, any error in the reference to the suffering of Peller’s family cannot be deemed fundamental. The reference itself was brief. No evidence of the family’s suffering had been presented to the jury. There was amply evidence of Peller’s fear of impending death. Further, the jury heard that Defendant had already been convicted of one murder, how this murder occurred during the kidnapping of Fizzuoglio and how Defendant committed this murder based on a request from Mejia made 3 weeks earlier in an execution style. Little was presented to rebut these aggravators including no evidence of any mental problems suffered by Defendant. Under these circumstances, it cannot be said that the jury would not have recommended death had the brief mention of Peller's family not be allowed. As such, any error was not fundamental. The trial court should be affirmed.

In an attempt to convince this Court that the fundamental error occurred, Defendant relies on *Tape v. State*, 661 So. 2d 1287 (Fla. 4th DCA 1995), *Mills v. Maryland*, 486 U.S. 367 (1988), and *Yates v. United States*, 354 U.S. 298 (1957). However, none of these cases concern assertions of fundamental error based on comments in closing. Instead, *Tape* and *Yates* concern whether the submission of an incorrect theory of a crime about which there are several possible methods of proving the crime is harmless error. *Mills* found error in a jury instruction that could have been misconstrued by the jury. As none of these cases show that comments in closing are fundamental error, the trial court should be affirmed.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING FIZZUOGLIO'S TESTIMONY.

Defendant next asserts that the trial court abused its discretion[9] in allowing Fizzuoglio to testify during the penalty phase that Peller knew he was going to die after Defendant claimed that there were other people outside. However, the trial court did not abuse its discretion in admitting this testimony.

This Court and other courts of this state have held that a witness may testify regarding another conduct, demeanor or manner in words that amount to a characterization. ***Zack v. State***, 753 So. 2d 9, 23 (Fla. 2000); ***Branch v. State***, 118 So. 13, 17 (Fla. 1928); ***State v. Santiago***, 928 So. 2d 480, 481-82 (Fla. 5th DCA 2006); ***Jones v. State***, 908 So. 2d 615, 620-22 (Fla. 4th DCA 2005); ***Shiver v. State***, 564 So. 2d 1158, 1159-60 (Fla. 1st DCA 1990). The rationale behind this allowance is that it can be "practically impossible to describe another's appearance in such a manner as to convey to the jury an accurate picture of the emotions shown." ***Shiver***, 564 So. 2d at 1160.

Here, Fizzuoglio had been dating Peller for a couple of months, saw Peller almost every day during that time and spoke to Peller every day. (T. 1647-48) As such, she had amply opportunity to observe how Peller behaved. She was attempting to describe at what point in the hour she spent in Peller's apartment Peller expressed concern for her safety. (T. 2243-44)

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[9] A trial court's decision to admit evidence is reviewed for an abuse of discretion. ***Ray***, 755 So. 2d at 610; ***Zack***, 753 So. 2d at 9.

Instead of say that it was after Defendant pulled out a gun, Defendant and Peller had a conversation Fizzuoglio did not fully understand, Peller hyperventilated, Fizzuoglio calmed Peller, Defendant called someone at Peller’s request to ask if Peller had to die, Defendant had received a negative response and the group had each done a line of cocaine and before Peller asked to use a phone to say goodbye to his parents and did so, Fizzuoglio simply described the timing as when Peller knew he was going to die. Moreover, Fizzuoglio was describing how Peller was pleading with Defendant not to harm Fizzuoglio while accepting his fate. (T. 2244-45) Under these circumstances, the trial court did not abuse its discretion in allowing Fizzuoglio to testify as she did. It should be affirmed.

Even if the trial court did abuse its discretion in allowing the testimony, any error was harmless. ***State v. DiGuilio***, 491 So. 2d 1129 (Fla. 1986). The only inference that the evidence permitted was that Peller knew he was going to die at that time. Peller had called Pritchard for help while cowering in his bathroom because Defendant had announced his intention to kill Peller about two hours earlier. When Defendant produced the gun, Peller had hyperventilated. After calming down and having Defendant call the person who sent him, Peller then begged Defendant to spare Fizzuoglio. When the pleas for

Fizzuoglio failed, Peller called his parents to say goodbye and stated that he knew he was going to die. Under these circumstances, allowing Fizzuoglio to testify to the inescapable inference that Peller knew he was going to die as he begged Defendant to spare Fizzuoglio could not have affected the jury's verdict. In fact, given that the inference was inescapable that Peller knew he was going to die, the State would have been permitted to make the same statements in closing argument that Defendant claims demonstrates the harm of this testimony. *Breedlove*, 413 So. 2d at 8. Moreover, the trial court would have been permitted to make the same finding in support of HAC even without Fizzuoglio's direct statement. *Banks v. State*, 700 So. 2d 363, 366 (Fla. 1997). As such, it cannot be said Fizzuoglio's statement contributed to Defendant's death sentence. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The trial court should be affirmed.

VII. HAC WAS PROPERLY FOUND.

Defendant next asserts that the trial court erred in finding that HAC was established in this case. However, the trial court properly found HAC and should be affirmed.

This Court's review of a trial court's finding regarding an aggravator is limited to whether the trial court applies the correct law and whether its finding is supported by competent, substantial evidence. ***Willacy v. State***, 696 So. 2d 693, 695 (Fla. 1997); ***see also Cave v. State***, 727 So. 2d 227, 230 (Fla. 1998). In finding HAC, the trial court stated:

> In order for a crime to be especially heinous, atrocious or cruel it must be both conscienceless or pitiless and unnecessarily tortuous to the victim. Richardson v. State, 604 So.2d 1107 (Fla. 1992); Hartley v. State, 686 So.2d 1316 (Fla. 1996); Nelson v. State, 748 So.2d 237 (Fla. 1999). This aggravating factor can be applied when fear and emotional strain precede a victim's instantaneous death or the victim suffers before the death. The victim's mental state may be evaluated for the purpose of such determination in accordance with common sense inferences from the circumstances. Swafford v. State, 533 So.2d 270 (Fla. 1988); Preston v. State, 607 So.2d 404 (Fla. 1992); Hannon v. State, 638 So.2d 39 (Fla. 1994).
>
> The evidence adduced at trial established that the Defendant arrived at Lance Peller's apartment at approximately 7:00 PM the night of the murder. Mr. Peller called Robert Prichard and told him that someone was going to kill him. At approximately 8:00 PM, Jennifer Fizzuoglio arrived at the apartment. Ms. Fizzuoglio testified that, shortly thereafter, the Defendant pulled out the gun and Lance just sat there and looked like he was hyperventilating and having an anxiety attack; he just kept breathing deep and was shallow breathing. She tried to calm him to down so that they could figure something out because they were both scared. Ms. Fizzuoglio testified that she was crying and trying to help find a way out of the situation when the Defendant picked up a cell phone and made a call. She testified that when the Defendant hung up the phone he came over to the table and said he wanted to do Cocaine and made her cut three lines, one for each of them. After each did a line of Cocaine, the Defendant started to freak out telling Ms. Fizzuoglio and Mr. Peller that there were people outside and if he did not kill Mr. Peller, all three of them would be killed. *Penalty Phase Transcript dated June 24, 2004, p. 2243.* Ms. Fizzuoglio testified that "Lance knew at that point that he wasn't going to make it out of there alive." *Transcript, p. 2244*. She

> testified that Mr. Peller tried to get the Defendant to let her go. The State provided evidence that Mr. Peller called his father's cell phone at 9:13 PM and stated, "Hi Dad. It's your son. I love you. I just wanted to tell you and Mom that I love you both much. I'm about to die. I love you both. Bye." Within a few minutes of this call, the Defendant executed Mr. Peller.
>
> Counsel for the Defendant argues that the Defendant tried to find another way to resolve the drug debts. Jennifer Fizzuoglio testified that she did not think that the Defendant wanted to kill Mr. Peller. *Transcript*, p. 2248. However, the fact remains that Lance Peller anticipated his death for approximately two hours and fifteen minutes. Mr. Peller initially had an anxiety attack which Ms. Fizzuoglio calmed. The Defendant led him to believe there might be a way for Mr. Peller to live then dashed his hopes several times. Mr. Peller's fear and panic must have grown with the passage of every minute. The Defendant heard Lance Peller's heart-rending farewell to his father and ignored it. Even though he was absolutely no threat, Russell Hudson murdered Lance Peller without conscience or pity.
>
> There can be no doubt that Lance Peller suffered immeasurable fear and terror during the protracted period of confinement leading up to his death. This Court finds that this aggravating factor has been proven beyond a reasonable doubt and it was accorded great weight in determining the sentence.

(R. 780-81)

As seen above, the trial court correctly stated the law regarding HAC. *Hutchinson v. State*, 882 So. 2d 943, 958-59 (Fla. 2004); *Parker v. State*, 873 So. 2d 270, 287 (Fla. 2004); *Lynch v. State*, 841 So. 2d 362, 368-39 (Fla. 2003). Moreover, its findings are supported by competent, substantial evidence. Pritchard did testify that Peller called him around 7 p.m. saying that someone was in his apartment to kill him. (T. 698-

705) Fizzuoglio’s testimony, Defendant’s statements to the police and the tape of the phone message support the findings regarding what happened in between the time that Fizzuoglio arrived at the apartment and the time Peller was actually executed. (T. 1293, 1478-79, 1657-75, 2242-45, 2254-57) Thus, the findings are supported by competent, substantial evidence. Since the trial court applied the correct law and its findings are supported by competent, substantial evidence, it determination that HAC applied should be affirmed. *Willacy*, 696 So. 2d at 695; *see also Cave*, 727 So. 2d at 230.

While Defendant insists that the trial court erred in finding HAC because HAC allegedly requires a finding of intent to torture, intent to torture is not an element of HAC. *See also Hoskins*, 32 Fla. L. Weekly at S163; *Buzia v. State*, 926 So. 2d 1203, 1212 (Fla. 2006); *Francis v. State*, 808 So. 2d 110, 135 (Fla. 2001). As such, Defendant’s complaint is baseless.

Defendant next suggests that a defendant must abduct a victim to a remote location, sexually battery the victim, inflict non-fatal wounds on a victim or witness the murder of another for HAC to apply. However, this Court has only required that the State present some evidence of either mental or physical torture accompanying the murder for HAC to be properly found in a shooting death. *Hutchinson*, 882 So. 2d at 958. In fact, this Court has directly stated, "fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997). As such, Defendant's claim that other factors other than a prolonged period of awaiting one's death in fear must be present is incorrect.

Defendant also suggests that this Court has struck HAC where there was more evidence of mental anguish. However, this is not true. None of the cases upon which Defendant relies involve a situation where a defendant announced his intention to kill a victim two hours before the murder, spent the last hour before the murder holding the victim at gun point as the victim hyperventilated, begged the defendant not to kill another person close to the victim and finally called his family to say goodbye. *See Hartley v. State*, 686 So. 2d 1316 (Fla. 1997); *Green v. State*, 641 So. 2d 391 (Fla. 1994); *Wyatt v. State*, 641 So. 2d 355, 360 (Fla. 1994); *Reaves v. State*, 639 So. 2d 1 (Fla. 1994); *Street v. State*, 636 So. 2d 1297 (Fla. 1994); *Robertson v. State*, 611 So. 2d 1228 (Fla. 1993); *Maharaj v. State*, 597 So. 2d 786 (Fla. 1989); *Cook v. State*, 542 So. 2d 964 (Fla. 1989); *Santos v. State*, 591 So. 2d 160 (Fla. 1991). Thus, none of these cases show that the trial court erred in finding HAC.

Defendant also suggests that the trial court should not have found that Peller was in fear of his life from the time of the call to Pritchard because Pritchard did not sense anxiety in Peller’s voice. However, as noted in the response to Issue I, the lack of showing of anxiety in one’s voice does not negate a finding of fear when, as here, other facts show fear. Under these circumstances, the trial court properly determined that Peller was in fear for his life from 7 p.m.

Defendant also contends that Peller’s anxiety attack did not support a finding of HAC because anxiety from having a gun pointed at one is not the same as fear of death. However, this Court has found that evidence that a victim, whom a defendant had previously threatened to kill, was in fear when the defendant pulls out a gun did support HAC. *Pooler v. State*, 704 So. 2d 1375, 1378 (Fla. 1997). Thus, the trial court properly considered Peller’s anxiety attack as evidence of HAC.

Defendant next suggests that Peller may have been hyperventilating because of his use of cocaine. However, Fizzuoglio testified that Peller looked like he was having an anxiety attack when Defendant produced the gun. (T. 2242) She also testified that the group did not use cocaine until later. (T. 1668-69) Moreover, the mere fact that there was drug residue in the apartment did not show that Peller’s anxiety attack was based on the use of cocaine. The trial court's finding of HAC was proper.

Defendant next asserts that the use of Fizzuoglio's testimony about Peller's knowledge of his death was improper. However, as argued in response to Issue VI, not only was the testimony properly admitted but it was the inescapable inference from the facts. Moreover, Fizzuoglio's testimony showed that Webb's call was made before the gun was produced and the lack of noticeable anxiety in one's voice does not indicate a lack of anxiety. As such, the trial court's reliance on it did not render its finding of HAC improper.

Defendant next asserts that there is no support for the assertion that he heard Peller's call because Fizzuoglio did not hear the call. However, the trial court properly made a common sense inference that Defendant did here the call. Defendant was waiting for Peller to complete the call before he killed him. Moreover, the call was placed in a small apartment from the room next door. Under these circumstances, the trial court properly drew the inference that Defendant heard the call. *Henyard*, 689 So. 2d at 252-53; *Banks*, 700 So. 2d at 366. Further, any error in the finding that Defendant heard the call would not affect the finding of HAC. As this Court has held, HAC concerns the victim's perspective about the crime; not the defendant's.

Hutchinson, 882 So. 2d at 959. Whether Defendant heard the call and ignored it would not change Peller's perspective. As such, any error in this irrelevant finding would not negate HAC. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The trial court should be affirmed.

Defendant next contends that the trial court erred in finding that Peller's hopes were dashed. However, the record does support this finding. Pritchard testified that Peller expressed his hope that he could convince Defendant not to kill him. (T. 706) However, about an hour later, Defendant produced a gun. Moreover, Defendant admitted in his statements to the police that he placed the phone call during which he inquired about whether the murder had to occur at that time at Peller's request. (T. 1293, 1478-79) However, Defendant also admitted that he had been asked to kill Peller 3 weeks before the murder. Under these circumstances, it was proper for the trial court to find that Defendant raised Peller's hopes and dashed them.

Defendant finally asserts that the finding that Peller's fear heightened over time is unsupported. However, the record again supports the finding. Peller was originally able to maintain a veneer of calm when he spoke to Pritchard as he cowered in his bathroom. However, when the gun was produced, Peller started to hyperventilate. Peller then begged Defendant to spare Fizzuoglio. Finally, Peller asked to call his parents to say goodbye. Under these circumstances, the fact that Peller’s fear was growing was an appropriate common sense inference from the evidence. *Hutchinson*, 882 So. 2d at 959. As such, the finding of HAC should be affirmed.

Moreover, any error in the finding HAC would be harmless. The trial court found three other powerful aggravators: CCP, prior violent felony, based on prior conviction for murder, and during the course of a kidnapping. Each of these aggravators was assigned great weight. No statutory mitigation was found, and no evidence that Defendant suffered from any mental disabilities was presented. As noted in Issue IX, the trial court properly assigned minimal weight to the nonstatutory mitigation based on the weak evidence presented. Under these circumstances, any error in the finding HAC cannot be said to have affected Defendant’s death sentence. As such, any error would be harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

VIII. THE FINDING OF CCP WAS PROPER.

Defendant next asserts that the trial court erred in finding CCP. However, the trial court should be affirmed because it properly found CCP.

This Court’s review of a trial court’s finding regarding an aggravator is limited to whether the trial court applies the correct law and whether its finding is supported by competent, substantial evidence. ***Willacy v. State***, 696 So. 2d 693, 695 (Fla. 1997); ***see also Cave v. State***, 727 So. 2d 227, 230 (Fla. 1998). In finding CCP, the trial court stated:

> Florida case law requires that four elements must exist to establish cold calculated premeditation. Walls v. State, 641 So.2d 381 (Fla. 1994). The four elements are (1) the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy; (2) the murder is the product of a careful plan or prearranged design to commit murder before the fatal incident; (3) there is heightened premeditation over and above what is required for unaggravated first degree murder, and (4) the murder must have no pretense of moral or legal justification.
>
> In this case, the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy. Evidence was adduced at trial that the Defendant talked about killing Lance Peller several weeks before the killing. The evidence clearly shows that Defendant arrived at Lance Peller's apartment with a loaded firearm. For the following two hours and fifteen minutes, the Defendant discussed the impending murder with his victim. Evidence was adduced at trial that Lance Peller offered no resistance, then was shot in the head, execution style, by the Defendant.
>
> Counsel for the defense argues that because Jennifer Fizzuoglio described the Defendant as "freaking out" at one point, the killing was impulsive. The Defense further argues that the Defendant was merely collecting a drug debt. This Court disagrees. This murder was not spontaneous or impulsive. In Gordon v. State, 704 So.2d 107 (Fla. 1997) the Florida Supreme Court considered this aggravating factor and found it to be applicable in a situation, as here, where under either of two different theories, it was "evidence that the killing was not something that occurred on the spur of the moment."
>
> This case involves heightened premeditation over and above what is required for unaggravated first-

> degree murder. Execution style murder as described by the evidence is clearly heightened premeditation. The Defendant's "degree of deliberate ruthlessness" can be seen when, after letting Lance us[e] a phone to call his family to say goodbye, he shot Lance, an unarmed victim, in the head. There is nothing in the evidence that depicts the murder to have been spontaneous, hasty or impulsive. Additionally, there was no pretense of moral or legal justification.
>
> All of the above combined factors prove this execution style killing qualifies under this aggravating factor. McCary v. State, 416 So.2d 804 (Fla. 1982); Gordon v. State, 704 So.2d 107 (Fla. 1997); Farina v. State, 801 So.2d 44 (Fla. 2001).
>
> The above sequence of events in this case demonstrate the calculation and planning necessary for the heightened premeditation required to find the cold, calculated and premeditated aggravator. This Court finds this aggravating factor has been proven beyond a reasonable doubt and it was accorded great weight in determining the appropriate sentence.

(R. 782-83)

As seen from the foregoing, the trial court properly set forth the test that this Court established in *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994). As such, the trial court applied the correct law.

Moreover, its factual findings are supported by the evidence. Defendant admitted in his statement to Det. Bukata that he had been asked to kill Peller for Mejia 3 weeks before the murder. (T. 1356, 1480) Stromoski observed Defendant with the gun around this time. (T. 1000-02, 1009-11, 1015-16) Defendant arrived at Peller's apartment around 7 p.m. and informed Peller that he had been sent to kill him. (T. 698-706)

Fizzuoglio arrived at Peller’s apartment between 8 and 8:30 p.m., and within minutes of her arrival, Defendant produced a gun. (T. 1657-59, 1661-63, 2246-47, 2251) The gun produced had been stolen from Peller’s apartment approximately two months before his murder. (T. 942-44) There was no evidence presented that the gun was loaded at the apartment or that ammunitions for the gun was found in the apartment. However, a live bullet that was consistent with the gun was found in Defendant’s car. (T. 868-70, 884-86, 1272) This evidence supported the inference that the gun was loaded when Defendant arrived at Peller’s apartment.

Over approximately the next hour, the parties discussed the murder of Peller. (T. 2242-49) Prior to shooting, Defendant permitted Peller to make a phone call to say goodbye to his parents. (T. 2244-45) After Peller finished his call, Defendant grabbed a blanket, went into the bathroom where Peller was sitting and shot Peller once though the top of his head through the blanket. (T. 904, 1171-90, 1591-97, 1599-1601, 1675, 1709) The medical examiner testified that there was no evidence of any other injury to Peller except the gunshot wound. (T. 1597) Fizzuoglio did not describe seeing or hearing a struggle.

This evidence supports the trial court’s finding regarding CCP. Since the trial court applied the correct law and its findings are supported by the evidence, it determination that

CCP applied in this matter should be affirmed. ***Willacy***, 696 So. at 695; ***see also Cave***, 727 So. 2d at 230.

Despite this evidence, Defendant insists that because he claimed that he merely went to Peller's apartment to warn Peller, he did not intend to kill Peller. However, the only evidence that Defendant merely went to Peller's apartment to warn Peller was Defendant's own self-serving statement. As noted in Issue I, Defendant was not credible. As such, the trial court was not required to accept Defendant's self-serving statement. ***Walker v. State***, 32 Fla. L. Weekly S201 (Fla. May 3, 2007).

Defendant also argues extensively that there was no evidence to support that the murder was discussed for more than 2 hours. However, the testimony of Pritchard and Fizzuoglio showed that the murder of Peller had been the subject of discussion starting around 7 p.m., becoming the sole topic of discussion shortly after Fizzuoglio arrived and continuing until Peller was executed around 9:15. Moreover, as this Court has stated, evidence of a victim's mental state is irrelevant to a defendant's mental state. ***See Taylor v. State***, 855 So. 2d 1, 18 (Fla. 2003). As such, Defendant's assertion that Peller was calm and unconcerned does not show that Defendant did not have a careful and prearranged intent to kill Peller as part of his employment in Mejia's drug business. Thus, it is irrelevant to whether the trial court properly found CCP. As noted above, the trial court properly did so and should be affirmed.

Defendant also appears to assert that because Fizzuoglio described Defendant as “freaking out” shortly before he finally executed Peller, CCP was negated. However, in *Evans v. State*, 800 So. 2d 182 (Fla. 2001), this Court affirmed the finding of CCP. There, evidence was presented that the defendant had become angry at the victim as a result of the victim’s interference in the defendant’s plan to commit other criminal activity. *Id.* at 185. Immediately before the murder, the defendant had been “acting agitated and strange.” *Id.* at 186. Moreover, the defendant had a history of mental illness and had been found incompetent to stand trial. *Id.* at 187-88. Despite this evidence, this Court rejected the defendant’s assertion that evidence of his mental state negated CCP, stating that “[w]hile the events leading up to the murder may have made Evans emotionally charged, his actions do not suggest a frenzied, spur-of-the-moment attack.” *Id.* at 193. Here, the evidence in support of CCP was stronger than in *Evans*. Peller’s dispute was with Mejia; not Defendant. Moreover, the dispute was not hours old; it was at least a month old. Even after allegedly “freaking out,” Defendant did not immediately kill Peller. Instead, he acceded to Peller’s request to call his parents to say goodbye before he executed Peller. Further, Defendant picked up the blanket and used it to muffle the sound of the shot before he finally executed Peller. Before leaving the apartment, Defendant searched it and removed the phones from which calls had been made during the crime. Additionally, there was no evidence presented that Defendant suffered from any mental disability. Under these circumstances, the trial court properly determined that the evidence Defendant "freaked out" before actually killing Peller did not show that the killing was a frenzied, spur-of-the-moment action but instead was part of a pre-planned contract killing. It should be affirmed.

Defendant also appears to assert that the fact that he brought a loaded gun to commit the murder, that Peller offered no resistance and that he killed Peller by a single gunshot to the top of his head delivered execution style do not support a finding of CCP because this factor has been rejected where each of these individual factors were available to support a finding of CCP. However, this Court has stated that a determination of whether CCP is present is properly based on a consideration of the totality of the circumstances. ***Wike v. State***, 698 So. 2d 817, 823 (Fla. 1997); ***see also Lynch v. State***, 841 So. 2d 362, 372 (Fla. 2003); ***Rodriguez v. State***, 753 So. 2d 29, 46 (Fla. 2000); ***Occhicone v. State***, 570 So. 2d 902, 905 (Fla. 1990).

Thus, Defendant's assertion that the individual factors might not be sufficient in themselves to support a finding of CCP does not show that the trial court erred in finding CCP based on the totality of the circumstances. Moreover, the totality of the circumstances here shows that Mejia directed Defendant to kill Peller 3 weeks before the murder, that he accomplished the murder by shooting Peller once through the top of the head execution style and that a note found in Mejia's possession indicated that Mejia was paying Defendant. (T. 1523-25) This Court has consistently held that CCP applies to contract killing and executions. *Lynch v. State*, 841 So. 2d 362, 372-73 (Fla. 2003); *Philmore v. State*, 820 So. 2d 919, 934 (Fla. 2002); *Looney v. State*, 803 So. 2d 656, 678-79 (Fla. 2001); *Sexton v. State*, 775 So. 2d 923, 934-35 (Fla. 2000).

Moreover, any error in the finding CCP would be harmless. The trial court found three other powerful aggravators: HAC, prior violent felony, based on prior conviction for murder, and during the course of a kidnapping. Each of these aggravators was assigned great weight. No statutory mitigation was found, and no evidence that Defendant suffered from any mental disabilities was presented. As noted in Issue IX, the trial court properly assigned minimal weight to the nonstatutory mitigation based on the weak evidence presented. In fact, the trial court specifically stated that it would have still sentenced Defendant to death even without CCP. (R. 790) Under these circumstances, any error in the finding CCP cannot be said to have affected Defendant's death sentence. As such, any error would be harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

IX. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ASSIGNING WEIGHTS TO THE AGGRAVATORS AND MITIGATORS.

Defendant next asserts that the trial court abused it discretion in assigning weights to the aggravating and mitigating circumstances. However, Defendant is entitled to no relief as the trial court did not abuse its discretion in assigning weight to the aggravators and mitigators.

Once a trial court has been determined to have properly found and considered aggravating and mitigating circumstances, the determination of the weight to be accorded to each circumstance is "within the province of the sentencing court." *Campbell v. State*, 571 So. 2d 415, 420 (Fla. 1990). As a result, this Court reviews a trial court's decision regarding the weight assigned to an aggravating or mitigating circumstance is limited to whether the trial court abused its discretion. *Rogers v. State*, 783 So. 2d 980, 995 (Fla. 2001). As this Court has held, discretion is only abused if "no reasonable person would take the view adopted by the trial court." *Peede v. State*, 955 So. 2d

480, 489 (Fla. 2007).

With regard to HAC and CCP, Defendant asserts that his factual attacks to the sufficiency of evidence to support these aggravators shows that the trial court abused its discretion in according these aggravators great weight. However, as argued in Issue VII and VIII, the trial court properly found both of these aggravators and properly rejected Defendant's arguments against them. Moreover, this Court has noted that these aggravators are among the most weighty. *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999). As such, the trial court did not abuse its discretion in assigning great weight to these aggravators. It should be affirmed.

Defendant next asserts that the trial court abused its discretion in assigning little weight to his allegedly being under the influence of drugs at the time of the crime because it allegedly ignored testimony about his use of drugs. While Defendant insists that the trial court ignored the effect of the cocaine he used in Fizzuoglio's presence on him, this is untrue. The trial court expressly considered this evidence as part of its findings on HAC and CCP. (R. 781, 782) Further, while Defendant asserts that the testimony of Dilger and Moreau showed that he was under the influence at the time of the crime, this is not true. Dilger saw Defendant hours before the murder. (T.

2245, 2253-55, 1823, 1836) Moreover, Dilger stated that even at that time, Defendant was merely drinking. (T. 1833) Moreau testified that he did not see Defendant until around 11 p.m., about 2 hours after the murder. (T. 956-60) Moreau did not testify that he observed Defendant using drugs and stated that he appeared normal. (T. 960-62) He explained that he had previously said Defendant was "out of it" because "we got messed up all the time." (T. 962) Thus, neither Dilger nor Moreau establish that Defendant was under the influence of drugs at the time of the murder.

Moreover, the evidence established that Defendant was capable of driving a car. It showed that Defendant had the presence of mind to don gloves before searching Peller's body and the apartment. It showed that Defendant was able to remember phone numbers and place calls. It showed that Defendant realized the need to abandon Fizzuoglio's car and did so away from the crime scene and his residence. It also showed that Defendant had the presence of mind to take the phones used to make the calls, the keys to the cars, the drug paraphernalia he found and Fizzuoglio with him when he left the apartment.

This Court has upheld the complete rejection of the intoxication as mitigation, where the evidence of intoxicant used did not concern the time the crime was committed and there was evidence of purposeful action. ***Douglas v. State***, 878 So. 2d 1246, 1259 (Fla. 2004); ***Banks v. State***, 700 So. 2d 363, 368 (Fla. 1997); ***Johnson v. State***, 608 So. 2d 4, 13 (Fla. 1992); ***Preston v. State***, 607 So. 2d 404, 411-12 (Fla. 1992). In ***Bowles v. State***, 804 So. 2d 1173, 1181-83 (Fla. 2002), this Court found no abuse of discretion in giving little weight to intoxication where there was evidence of Defendant's deliberate behavior in committing the crime and of Defendant's use of intoxication as an routine excuse for his violent behavior. As such, the trial court did not abuse its discretion in according little weight to intoxication as mitigation. It should be affirmed.

Defendant next asserts that the trial court abused its discretion in assigning little weight to his alleged history of substance abuse because it allegedly ignored the testimony of Robokozy, Squartino and Rosemary Hudson. However, this assertion is unsupported by the order. In finding Defendant's alleged drug abuse mitigating, the trial court specifically relied on the fact that "[s]everal witnesses during trial and the penalty phase referred to the Defendant's drug abuse." (R. 785) As the trial court specifically referenced the testimony, it did not ignore it. Moreover, the testimony of Rabokozy, Squartino and Rosemary amount to little more than statements that Defendant had used drugs. (T. 2328, 2359, 2395) Given the trial court expressed acknowledgement of this testimony and the limited nature of the testimony, the trial court did not abuse its discretion in assigning little weight to this mitigating factor.

Defendant next complains that the lower court assigned little weight to the assertion that he was sexually abused as a teenager. Defendant claims that it ignored the testimony of Rabokozy, Defendant’s father and evidence the State allegedly presented about Rosenbrock because it only expressly mentioned the testimony of Dr. Kramer. However, in making this assertion, Defendant ignores that the trial court expressly mentioned the testimony of other witnesses when it readdressed this issue on the very next page of the sentencing order. (R. 788) Moreover, Dr. Kramer’s testimony could not have been the basis of the trial court’s finding that Defendant was sexual abuse since did not testify that Defendant was sexually abused. (T. 2301-11, 2313-14, 2320) Additionally, the testimony upon which Defendant relies was vague and limited. Rabakozy testified that he had no actual knowledge of whether Defendant had been sexual abused or involved in prostitution but assumed that he was. (T. 2327, 2328, 2329) Defendant’s father’s testimony was merely that he had heard that Rosenbrock sold children. (T. 2338, 2340-41) Moreover, despite Defendant’s claim, the State presented no evidence that Defendant was sexually abused or involved in prostitution. Instead, the State presented evidence that Defendant had claimed that he had killed Rosenbrock because Rosenbrock had threatened to kick Defendant out of his house for allegedly refusing to have sex with a man for money. (T. 2274-75) Rosenbrock had no arrest history for prostitution or sex crimes. (T. 2288) Moreover, Det. Butcko testified that Defendant never claimed to have any form of sex contact with Rosenbrock. (T. 2292) Given that the trial court did expressly state that it was considering other testimony later in the order, that consideration of Dr. Kramer's testimony alone would not have even supported a finding of sexual abuse and that the evidence about sexual abuse was vague and limited, the lower court did not abuse its discretion in according this mitigator little weight.

Defendant finally argued that the trial court abused its discretion by giving little weight to sexual abuse and the ability to form positive relationships because these mitigators were not connected to the commission of the crime. However, this Court has held that a trial court may consider the connection between the alleged mitigation and the crime in determining the weight to be given to mitigation. *Boyd v. State*, 910 So. 2d 167, 192-93 (Fla. 2005); *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000). As such, Defendant's argument is without merit. The trial court should be affirmed.[10]

X. THE CLAIM THAT THE SENTENCING ORDER IS DEFECTIVE SHOULD BE REJECTED.

Defendant next asserts that his sentence of death should be reversed because the trial court allegedly did not make required findings in its sentencing order. However, Defendant is entitled to no relief, as the order is proper.

In *Williams*, 32 Fla. L. Weekly at 355, the defendant raised this same argument, and this Court rejected it. This Court reasoned that there was no single formula for a sentencing order and that by considering and weighing the aggravators and mitigators and finding that the latter outweighed the former, the trial court had found sufficient aggravators even if it had not said so. Here, the sentencing court considers and weighs the aggravating and mitigation circumstances and determines that aggravation outweighed mitigation. (R. 778-91) Moreover, it

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

should be remember that the trial court explicitly found that the "aggravating circumstances in this case are overwhelming." (R. 790) By finding that the aggravators were "overwhelming," the trial court clearly found that the aggravators were sufficient. As such, the issue is without merit and should be rejected.

XI. *RING* WAS NOT VIOLATED.

Defendant finally asserts that his death sentence must be reversed because the jury allegedly did not find there were sufficient aggravators and insufficient mitigators, which allegedly violates *Ring v. Arizona*, 536 U.S. 584 (2002). He further asserts that this Court rejection of *Ring* claim based on the fact that death is a possible penalty for first degree murder indicates that Florida's capital sentencing scheme violates *Furman v. Georgia*, 408 U.S. 238 (1972). However, Defendant is entitled to no relief as his arguments are not preserved and they lack merit.

Defendant's arguments are not preserved. While Defendant filed several motions based on *Ring*, he never argued about the rule of lenity, *Furman* or jury findings of sufficient aggravators and insufficient mitigators. (R. 407-16) Further, the record does not reflect that Defendant ever had the motion in which he argued the trial court was required to find sufficient aggravators and insufficient mitigators heard or otherwise obtained a ruling regarding it. Because he did not so the issues are unpreserved. ***Steinhorst v. State***, 412 So. 2d 332, 338 (Fla. 1982); ***Richardson v. State***, 437 So. 2d 1091, 1094 (Fla. 1983).

Even if the issue had been preserved, Defendant would still be entitled to no relief. In ***Williams***, 32 Fla. L. Weekly at 357, this Court just rejected this very claim, holding that ***Ring*** is not violated where the prior violent felony aggravator was found and that Florida's capital sentence scheme is not unconstitutional. Here, the trial court found both the prior violent felony and during the course of a felony aggravators. As such, the claim is without merit. Defendant's sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **Gary Lee Caldwell**, 421 Third Street, West Palm Beach, Florida 33401, this 13th day of July 2007.

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