IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2174

HARRELL FRANKLIN BRADDY,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

AMENDED BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

In May or June 1998, 22 year old Shandelle Maycock, whose family abandoned her when she was impregnated by a married man at age 16, stopped speaking to her friend Yolanda Ward. (T. 1658-69, 1787)[1] Cyteria Braddy and Defendant intervened, and Defendant offered to assist Maycock. (T. 1669-72) After this meeting, Defendant would stop by Maycock's home alone periodically to check on her and provided her assistance on occasion. (T. 1672-76) On one visit, Defendant placed his hand between Maycock's legs, she rebuffed his advance and Defendant later apologized for his behavior. (T. 1677)

In late October or early November 1998, Maycock rented an apartment at the home of David Lawyer for herself and Quatisha. (T. 1628-30, 1680-81) On the morning of November 6, 1998, Maycock took Quatisha to her paternal great-grandmother's home and went to work. (T. 1682, 1686) When she finished work, Maycock found Defendant waiting in his Dodge Neon to give her a ride home, as he frequently did. (T. 1687-88) After the 5 minute

[1] The first 29 volumes of the record contain the record on appeal and are consecutively paginated. This portion of the record will be referred by the symbol "R." The remaining volumes of the record on appeal contain the transcripts of proceedings. Volumes 132-55 are consecutive paginated with will be referred to a "T." The remaining volumes will be referred by the symbol "V" followed by the volume number and the page listed on the transcript. The supplemental record will be referred to by the symbol "SR."

ride, Defendant came into the apartment for briefly and then left. (T. 1689) Maycock then spoke to Quatisha's great-grandmother and was informed that she had to come and pick up Quatisha. (T. 1689) Maycock, who had no car, attempted to find someone to drive her to pick up Quatisha, and in doing so, paged Quatisha's paternal uncle and walked to a friend's home and back. (T. 1667-68, 1689-91) Around 10 p.m., Defendant arrived at Maycock's apartment driving a Lincoln and assisted her in getting Quatisha. (T. 1692-95) When they returned to Maycock's apartment, Defendant came inside as Maycock was putting Quatisha to bed and remained while she spoke on the phone with Quatisha's uncle, after which Ms. Maycock asked Defendant to leave, asserting that she was expecting company. (T. 1695-1702) Defendant responded by yelling at Maycock, grabbing her around the neck, flipping her to the ground and choking her while straddling her body and stating that he should kill her. (T. 1702-04, 1723) Maycock attempted unsuccessfully to get Defendant to stop before she passed out. (T. 1704) When Maycock regained consciousness, she was lying on the apartment floor, and Defendant was sitting on a sofa near her. (T. 1724) When Defendant saw her move, he straddled and choked her in unconsciousness again. (T. 1725-26)

Shortly before midnight on November 6, 1998, Lawyer came

home and saw the Lincoln in the driveway. (T. 1639-40) He went into his home and soon heard loud voices outside. (T. 1642) He stepped out his front door looking for the source of the voices but they had stopped so he went back into his house. (T. 1643) About 5 minutes later, Lawyer heard the voices again, so he looked out his windows but saw nothing and went to his kitchen. (T. 1643-44) There, Lawyer looked out the window and saw Defendant standing by the driver's door of the Lincoln and Quatisha, clad in pajamas, standing by the passenger's door. (T. 1645)

When Maycock again regained consciousness, she was in the backseat of the Lincoln, Quatisha was seated in the front passenger's seat, Defendant was in the driver's seat and the car was still in her driveway but had been turned around. (T. 1726-32) Defendant then pulled out of the driveway and proceeded west on Ives Dairy Road. (T. 1732-33) As they travelled along Ives Dairy, Maycock told Quatisha that they were going to jump from the car and pulled her into the backseat, as Defendant told her not to do so. (T. 1733-35) As she got the door opened, Defendant turned onto a residential street and started to speed up. (T. 1735-40) Maycock and Quatisha flew out of the car and Maycock landed on her stomach a few inches from Quatisha. (T. 174) Maycock sustained bruises and abrasions to her legs, stomach,

arms, hand and foot as the result. (T. 1741-44) Quatisha was crying and limping. (T. 1745-46) Defendant stopped the car, ran over, picked up Quatisha, walked her to the car, returned to Maycock and promised to take them back home. (T. 1746) However, after walking Maycock back to the car, Defendant opened the trunk, threw her into and closed the trunk. (T. 1749) Defendant then got back into the car and drove for what seemed like 30 to 45 minutes. (T. 1751-52) The car then stopped, Defendant opened the trunk, Maycock saw that they were on an isolated, dark dirt road, and Defendant tried to pull Maycock out of the trunk, while accusing her of using him. (T. 1752-55) When Defendant succeeded in pulling Maycock from the trunk, he slammed her to the ground and choked her again into unconsciousness while saying he should kill her. (T. 1755-57)

Around 2 a.m., Defendant returned to his home, and his wife came to the front door. (T. 1853-54) She observed Defendant wiping down the inside of the Lincoln, noticed the washing machine was running and found the clothes Defendant been wearing in it. (T. 1854) In the morning, Maycock awoke in bushes with her vision impaired, heard cars, walked out of the bushes with difficulty and flagged down a car. (T. 1757-68) The people in the car called the police and rescue, and Maycock was taken to the hospital. (T. 1768)

Det. Giancarlo Milito and Det. Juan Murias went to Maycock's apartment and spoke to Laywer. (T. 1898-1902) They then determined that Defendant had rented the Lincoln and proceeded to Defendant's home, arriving around 6 p.m. and finding the Lincoln in the driveway. (T. 1902-07) While they were waiting for uniformed backup, Defendant exited the house with his wife and daughter, got into the Lincoln and drove to a gas station. (T. 1907-09) Milito and Murias approached Defendant at the gas pump and asked to speak to him about a missing 5 year old. (T. 1919-11) Defendant denied knowledge, but when the officers informed him that Maycock had given a statement, he started to sweat profusely, shake and cry and claimed that he did not feel well. (T. 1911-12) Cyteria became hysterical. (T. 1914) Milito briefly checked the trunk and found it empty. (T. 1915)

Det. Otis Chambers and Det. Fernando Suco were involved in interviewing Defendant at the police station. (T. 1935-59, 2023-63) During the interview, there was no chair in the corner of the room, and Chambers did not notice anything wrong with the ceiling vents. (T. 1961-63) However, when they returned to the room after breakfast at approximately 11:30 a.m., there was a chair in the corner of the room, Defendant was standing barefoot on the chair, jumped off the chair and immediately offered to

take the police to Quatisha. (T. 2064-65) A ceiling vent over the chair was later found to be bent upward. (T. 1959-63, 1974, 1984, 2065-66, 2208)

On the morning of November 9, 1998, Willie Turner was fishing in an area near mile marker 32 to 34 of Alligator Alley and found Quatisha's body floating in a canal. (T. 2087-88, 2160, 2328-35, 2348-63) The body was missing an arm and had numerous antemortem, perimortem and postmortem injuries, including perimortem injuries caused by alligators and fish. However, the cause of death was a skull fracture consistent with have been thrown onto rocks in the canal. (T. 2500-40)

As a result, Defendant was charged by indictment, filed on November 25, 1998, with: (1) the first degree murder of Quatisha, (2) the attempted first degree murder of Maycock, (3) the kidnapping of Quatisha, (4) the kidnapping of Maycock, (5) burglary of Maycock's home with an assault or battery, (6) child neglect causing great bodily harm regarding Quatisha and (7) attempted escape. (R. 70-77) Almost immediately after his arrest, Defendant moved to require the State to return the Lincoln to the rental agency, which the State agreed to do so as soon the car was processed. (R. 87, 89, V93, V94) Shortly after his arraignment, Defendant began filing motions, claiming that the State had violated its discovery obligations with regard to

his statements to the police, photos and lab reports and continued to do so despite being informed that he had given no recorded statement and being provided with police reports documenting his informal statements and photos. (R. 99-101, 103-05, 107-11, V106. 3-10, V98. 3-32) During this same time, Defendant also started to complain that the public defender was not representing him properly because she did not accept his legal advice. (V106. 11-32, R. 112-13) When the trial court ruled in response to a motion to dismiss based on the alleged discovery violations that the State had provided discovery and that Defendant needed to begin deposing witnesses, Defendant responded by filing *pro se* motions to disqualify the judge and to discharge counsel. (R. 107-11, 114-19, V99, V100, SR. 203-04) As a result, the public defender withdrew and new counsel was appointed. (R. 129-34, V118, V60)

Over the next several years, Defendant repeatedly complained about his lawyers and was repeatedly given new counsel as a result. (R. 139-43, 145-49, 150-55, 170-87, 210-11, 215-22, 225-59, 277-79, 280-89, V48, V49, V68, V116, SR. 205-08) At a hearing May 10, 2006, Defendant was permitted over the State's objection to discharge another attorney. (V87) The trial court indicated that it would not entertain continual motions to discharge counsel. (V88. 4-7) However, when Defendant again

moved to discharge counsel, the trial court permitted to represent himself. (R. 914-24, V89)

Defendant then filed a series of motions regarding discovery and seeking a continuance, in which he complained about the discovery issues that had been resolved in 1999, sought medical records regarding Maycock, insisted that the 1999 motions regarding discovery had not been resolved and asserted that one of the reasons why he needed a continuance was that his counsel had not provided him with his file. (R. 859-63, 865-89, 890-909, 966-67, 984-88, 991-26) During the hearing on these motions, the State presented pleadings and documentation showing that it had complied with discovery and argued that it did not have additional records regarding Maycock in its possession or control, counsel confirmed that Defendant did not have his file and Defendant was permitted to argue each of his motions once before the trial court ruled on them. (V90, V91, V92) However, Defendant was informed that he was not permitted to reargue issues that had been ruled upon or to interrupt others and was admonished when he continued to do so. *Id.* Moreover than a month after these hearing, Defendant filed motions to disqualify the court, asserting, *inter alia*, that the trial court's admonitions to him evidenced bias, and the motions were denied as untimely and insufficient. (R. 1106-10, 1114-21, V54. 5-6, V111. 6-8) The

State was required to bring the physical evidence to court so that Defendant could view it, only to have Defendant withdraw his request to view most of the evidence. (V111, V37) During this inspection, Defendant brought up the Lincoln and was informed that it had been returned at his request years earlier. (V111. 34) During the hearing, Defendant was admonished again about rearguing issues, which again resulted in a motion for disqualification, which was again denied. (V111, V37, R. 1027-31)

Despite the fact that the trial court had resolved the discovery issues and that Defendant had been permitted to view the evidence he wanted, Defendant continued to file discovery motions about this evidence and even filed a motion for a hearing on his motion to inspect physical evidence, insisting the motion was never heard. (R. 1022-26, SR. 214, 1042-44, V38. 7) At the hearing on these motions, Defendant continued his practice of rearguing decided issues and was admonished again for doing so. (V38, V55) These admonitions prompted additional motion for disqualification, which was denied. (R. 1131-38, 1158-62, 1166-69, V55. 5)

When the trial court set a firm trial date of May 7, 2007, Defendant announced that he wished to have counsel reappointed, which was allowed. (V127. 54-58, V53. 5-12) Defendant then filed

3 version of a motion to suppress and numerous complaints about these pleadings. (R. 1403-70, SR. 132-200, 215-19) In the suppression motions, Defendant claimed his statements were the result of an illegal arrest, a *Miranda* violation and coercion. (R. 1403-70, SR. 132-200)

After the beginning of the suppression hearing, Defendant clarified that he was seeking to suppress not only his statements but also information about, and statements from, his family members and all tangible evidence obtained as a result of those statements except for one search of the Lincoln. (V51. 16-28) The trial court ruled that Defendant had no standing to seek the suppression of statements by anyone but himself. (V51. 10-14, 22-25) After the State admitted the search warrants and their affidavits, Defendant attempted to file a motion challenging the sufficiency of the warrants. (V51. 31-35) However, the trial court refused to permit the filing of such an untimely motion. (V51. 35-39) Defendant then sought to litigate his complaints about counsel, which the trial court summarily denied at that time. (V51. 41) It also ruled that the search warrants were valid. (V51. 41-43)

Murias testified that he received information indicating that Maycock and Quatisha had been kidnapped by Defendant November 6, 1998, that Maycock had been found along U.S. 27 in

Palm Beach County and that Quatisha was last seen with Defendant. (V51. 45-48) Murias went to Maycock's home and interviewed Lawyer who provided information corroborating this information. (V51. 48-50) He went to Defendant's home and saw the Lincoln, saw it drive away and followed it to a gas station where he approached Defendant. (V51. 50-55) He informed Defendant that they were attempting to locate a missing 5 year old, and Defendant claimed to know nothing about a missing child. (V51. 55-56) When Murias then informed Defendant that Maycock was alive and had reported the crimes committed again her and Quatisha to the police, Defendant dropped his head, started to cry and sweat, turned gray, claimed he felt faint and requested water. (V51. 56-57) Murias had his partner Milito get Defendant water from the gas station, told Defendant to calm down and asked Defendant to come to the police station, for leave to search the trunk of the Lincoln and for leave to take the Lincoln to the police station. (V51. 58) Murias stated that he made the request to come to the station despite believing he had probable cause to arrest Defendant and that the search of the trunk was motivated merely by a desire to locate Quatisha and yielded no evidence. (V51. 59-60) Murias told Defendant the police would take his wife and daughter home and would transport him to the station. (V51. 61) On cross, Murias admitted that

Milito patted Defendant down for weapons. (V51. 80) Murias stated that Defendant was not threatened and never requested an attorney. (V51. 90-91)

Milito corroborated Murias's testimony about being dispatched to Maycock's home, receiving information from the officers there, speaking to Lawyer, going to Defendant's home, waiting for backup, seeing Defendant leave the house with his wife and daughter, following them to the gas station, Defendant's reaction to hearing Maycock was alive and getting Defendant water. (V51. 99-107) Milito added that when he attempted to explain what was happening to Defendant's wife, she became hysterical and stated that she did not want to know what was happening. (V51. 107-08)

Chambers testified that he was present when Defendant was read his *Miranda* rights by Suco. (V52. 152-55) He stated that Defendant was asked about his education level and any physical ailments at the time, did not report any health issues and appeared healthy and calm at the time. (V52. 155-56) He stated that he witnessed Defendant sign the *Miranda* waiver form, that Defendant did not ask to speak to an attorney, stated that he did not wish to speak to the police without an attorney, express concern for his wife or daughter, ask to use a phone or mention the public defender. (V52. 157-59) After the waiver form was

signed, Defendant also executed a consent to provide physical samples and a consent to the search of his home without hesitation. (V52. 159-62) When provided with a consent to search his Lincoln, Defendant hesitated before signing it. (V52. 163) Because of the hesitation, the police decided to get a search warrant as well. (V52. 163-64)

Chambers stated that he was present for part of the interview of Defendant after the forms were signed and that Defendant did not ask for a lawyer, a phone call or a public defender while he was present. (V52. 164) He stated that Defendant did not report any physical ailments, that Defendant was not hit and that no one threatened to detain Defendant's wife and daughter. (V52. 164-65) He stated that Defendant was physically imposing, that he was apprehensive about Defendant, that he and Suco attempted to avoid a confrontation with Defendant and that no one spat in Defendant's face. (V52. 165-67) However, he admitted that voices were raised at times and that Defendant was told his parents were upset. (V52. 167) He denied that Defendant was beaten or manhandled or that his family was threatened. (V52. 168, 169-70) He stated that Defendant never refused to sign any of the forms or mentioned needing glasses. (V52. 168-69) He stated that this interview occurred between approximate 9:40 p.m. and 6 to 7 a.m., during

which time several breaks for up to 30 minutes at a time were taken. (V52. 170) He stated that Defendant was offered the use of the bathroom, food and drink during this time and accepted one Pepsi, which he drank completely. (V52. 171-72) He denied that Defendant ever said he felt faint and stated that he was not threatened or hit. (V52. 171, 173-74) During this time, Defendant was being responsive and answering some questions without requesting an attorney or cessation of the interview but refused to reveal the location of the child. (V52. 172-73)

In the morning, Suco and Chambers left Defendant alone in the interview room while they drove to McDonald's and purchased breakfast for themselves and Defendant. (V52. 174-75) When they returned and opened the door to the interview room, Defendant attempted to rush out of the room. (V52. 175-76) When the attempt was unsuccessful, Defendant offered to show the police where Quatisha was. (V52. 176-77) Before leaving, the officers obtained a security unit, which Chambers described as a strap around Defendant's waist that secured his hands and one leg. (V52. 177) Chambers, Suco and Defendant then got into a car, and Defendant directed Suco to drive to an area in Palm Beach County. (V52. 177-79) In this area, there were numerous officers from Palm Beach County and several officers from Dade County, including Smith, Diaz and Hoadley. (V52. 179)

Chambers believed that either Smith or Diaz took Defendant to another car and spoke to him. (V52. 179-80) He did not observe Smith push or manhandle Defendant, did not recall seeing Hoadley approach Defendant and did not hear most of the conversation. (V52. 180-81) He never heard Defendant ask to use a phone or mention his wife, boss or the public defender. (V52. 182) After several hours, Chambers was informed that the search was moving to an area off Alligator Alley in Broward County. (V52. 183-84) By the time the group arrived in Broward, it was dusk, and the conditions were not conducive to a search. (V52. 186-87) As a result, a decision was made to return to the station after an hour or two. (V52. 187) Throughout the trip, Defendant did not appear to be in pain, complain of pain or have trouble walking either at the beginning or end of the trip. (V52. 188)

On cross, he stated that Defendant never stated that he was tired during the interview, did not put his head down and did not refuse to speak. (V52. 210-11) Instead, Defendant would refuse to answer specific questions but continued conversing. (V52. 215) He admitted that at some point before the trip to Palm Beach County, Defendant mentioned not wanting to incriminate himself in connection with a request for a break. (V52. 231, 239) He denied that Defendant ever quit speaking to

the officers entirely. (V52. 232) He believed that Defendant slept for 40 or 50 minutes in the morning. (V52. 236)

Det. Ray Hoadley testified that he first came into contact with Defendant in Palm Beach. (V52. 244) He stated that after the police had been searching the area for a couple of hours, he got into the police car that Defendant was sitting in and spoke to Defendant for about 5 to 10 minutes. (V52. 245-47, 278) While he was with Defendant, he did not brandish his gun, threaten Defendant or heard Defendant mention the word attorney, ask to make a phone call or ask to contact the public defender. (V52. 250-51) During the 3 to 4 hours in Palm Beach, Defendant got out of the car and walked with the police as they searched for Quatisha, suggesting places to look. (V52. 252-53)

Later that evening, Hoadley and Diaz interviewed Defendant again. (V52. 256) During this interview, Defendant did not state that he wanted to stop talking, ask for a lawyer, ask to use the phone, ask for food or report any physical proble(V52. 257) Instead, he appeared alert, coherent and focused. (V52. 257-58) After this statement, Defendant was booked. (V52. 266) On cross, Hoadley stated that he did not see Smith use any physical force against Defendant but did hear him yell at Defendant. (V52. 273-75) Hoadley did not see any fear in Defendant and never heard or saw anything indicating that Defendant wet his pants. (V52. 275-

76) Instead, Defendant appeared to be acting freely and being cooperative. (V52. 278-79) He stated that Defendant was allowed to use the bathroom when he asked to do so. (V52. 285-86)

Suco corroborated Chambers account of the initial interview with Defendant and the signing of the waiver forms. (V30. 7-48) He added Defendant stated that he could not tell the officers what happened because his family would never speak to him again when confronted with Lawyer's statement. (V30. 45)He acknowledged that while in Palm Beach, Smith removed Defendant from the car, pushed him up against it and demanded Quatisha's location. (V30. 52) Smith did not hit Defendant, and Defendant did not appear to be injured by the shove. (V30. 52-54) Suco did not hear anyone threatening Defendant at the time but did know that Diaz gave Defendant food and that Defendant was fed again at the police station. (V30. 54-55, 58)

On cross, Suco testified that the notation in his report that Defendant gave no material responses around 3:55 a.m. meant that Defendant made denials but gave no information that furthered the investigation. (V30. 76-77) He acknowledged that before the break for breakfast, Defendant had stated he was tired of talking and wanted to go to jail. (V30. 75, 77-78) He stated that Defendant was given the opportunity to sleep for a few hours before the group left the police station. (V30. 103)

He stated that he did not speak to Defendant after Defendant jumped off the chair. (V30. 90-92) Suco stated that after Smith shoved Defendant against the car, they walked and chatted amiably together. (V30. 99) He stated the shove was not hard enough to cause Defendant's head to move violently and that Defendant did not wet himself. (V30. 97-98) He stated that Defendant did not become more cooperative after the incident. (V30. 100) On redirect, Suco stated that Defendant merely asked for 10 minutes alone before continuing the interview and expressed a desire not to incriminate himself. (V30. 106) However, Defendant never stated he wanted the interrogation to cease or ask for an attorney. *Id.*

Det. Greg Smith confirmed that he grabbed Defendant by the shirt, pulled him out of the car, pinned him against the car with his forearm and begged Defendant to tell them Quatisha's location. (V30. 112) When he did so, Defendant said he would provide the information but instead he just walked around the Palm Beach area with Smith. (V30. 113-14) Defendant did not appear afraid and did not wet himself. (V30. 114) As they walked, Defendant chatted with Smith about hunting, the Everglades, dogs and family. (V30. 115-16) At one point, Defendant asked Smith how long a body would stay submerged but when Smith inquired about the question, Defendant did not

answer. (V30. 117-18) After Smith walked away, Defendant told Diaz about Alligator Alley. (V30. 118-19) Det. Pat Diaz provided consistent testimony regarding what occurred in Palm Beach and Broward Counties. (V30. 145-57) He added that he and Sgt. Hawkins then interviewed Defendant at the police station after the searches. (V30. 158) At the beginning of the interview, Defendant stated that he knew his rights from having worked in a prison law library, that he was aware that he was not required to the speak to the police and that he wanted to tell his side of the story. (V30. 159) Defendant then provided Diaz with his account of his actions regarding Maycock and Quatisha and his explanation of his prior convictions. (V30. 159-67) During this interview, Hoadley entered the interview room and questioned Defendant. (V30. 167-68) Defendant did not ask for an attorney or cessation of the interview and did not appear to be tired or anything other than alert and intelligent. (V30. 168) He never complained of pain and did not appear to be in pain. (V30. 169-70)

When Defendant took the witness stand, he elected to swear to the facts in the second amended motion to suppress in lieu of providing direct testimony. (V31. 14) On cross, Defendant made a number of inconsistent statements and insisted that he had repeated invoked his rights and was repeatedly physically abused

but did acknowledge discussing hunting in Palm Beach. (V31. 18-104) After Defendant finished testifying, Defendant admitted his medical records. (V43. 10-11)

Based on this evidence, Defendant argued that his arrest at the gas station was illegal because the police did not have probable cause since law enforcement in Palm Beach County had provided insufficient information to identify him and that he had invoked his right to counsel at the gas station. (V43. 11-12) He asserted that his waiver and the consents were invalid because he was beaten and spat upon, that he was interrogated for 14 hours, that he was denied food and sleep, that he was forcibly taken to Palm Beach and that his statement about not incriminating himself was an invocation of his right to remain silent that was ignored. (V43. 12-14) He argued that Smith's actions in Palm Beach caused him to fear for his life and wet himself and coerced his statements. (V43. 15-17) He insisted that there was no break in the illegality between Smith's actions and the time he was taken to jail and that the police were required to obtain a new *Miranda* waiver when he was questioned again at the station. (V43. 19-24) After considering the evidence and arguments, the trial court denied the motion to suppress. (V43. 63-69)

During the course of the suppression hearing, Defendant

filed three additional complaints about counsel. (R. 1769-1800, 1809-52, 2432-2519) After the suppression hearing was completed, the State asked the trial court to address all of the motions regarding counsel, including the one it had summarily denied at the beginning of the hearing and denied them. (V43. 69-180)

Pretrial, Defendant filed a series of motions that argued that Florida's capital sentencing statute was unconstitutional. Defendant argued that the lack of requirement that the jury unanimously find each individual aggravator violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), and that the admission of hearsay that did not have particularize guarantees of truthfulness violated the Confrontation Clause. (R. 578-86, 733-65, 766-70, 1505-07) He made a series of motions regarding victim impact evidence, in one of which he indicated that he would not attempt to cross examine the victim impact witnesses if they were restricted to reading written statements. (R. 607-15, 724-32, 1511-20, 1531-35) At the hearing on the motions regarding the constitutionality, Defendant stood on his pleadings, and the trial court denied them. (V43. 167-71, 173-74)

At trial, Maycock testified that Garafalo came and spoke to her in the hospital on November 7, 1998, while she was woozy and under the influence of drugs. (T. 1768-70, 1840) On cross,

Defendant elicited that Maycock did not have a romantic relationship with McArthur but that he had previously battered her. (T. 1792-93) He also elicited that she did not hear Quatisha after she was placed in the trunk. (T. 1811-12, 1816) On redirect, Maycock testified that Defendant turned on the radio after he put her in the trunk loudly enough that she would not have heard Quatisha crying and that the sound of the air passing through the truck also prevented her from hearing Quatisha. (T. 1846-47) She stated that when Defendant opened the trunk, he attacked her and she was too busy defending herself to hear Quatisha. (T. 1847)

Det. Salvatore Garafalo testified that he met Maycock at Glades Hospital after 12:15 a.m. on November 8, 1998. (T. 1863-70) At the time, Maycock's eyes were swollen, her face was bruised and she had been given Demerol and was obviously sedated. (T. 1870-71) On cross, Defendant elicited that Maycock had informed Garafalo that the last time she heard Quatisha was when they jumped from the car. (T. 1895-96)

Milito testified that he decided to handcuff Defendant when his demeanor changed at the gas station for safety reasons and mentioned having a history about Defendant. (T. 1914) Defendant objected and reserved a motion. (T. 1914-15) After Milito's testimony concluded, Defendant moved for a mistrial, claiming

Milito has stated that Defendant had an extensive history, which indicated he had multiple prior convictions. (T. 1928) The trial court denied the motion, finding the comment unsolicited and ambiguous. (T. 1932-34)

Chambers testified Defendant appeared upset, apprehensive and angry when Maycock was discussed. (T. 1956, 1959) He stated that the area under the bridges Defendant took the police to on Alligator Alley had rocks jutting out. (T. 1973) While Chambers believed that Defendant had a belt around his belly that could have been attached to his handcuffs, he was not sure if the handcuffs had been attached to the belt. (T. 1987-88, 1993-94)

Before Suco's testimony, the State brought to the trial court's attention that Defendant had produced a towing receipt for the Lincoln that had a variation on the VIN number from the State's evidence, which lead Defendant to claim that there had been tampering with the evidence. (T. 2000-16, SR. 220-28) After listening to argument, the trial court found that there was no substantial likelihood of tampering. (T. 2017) After this ruling, the State indicated that it would seek the admission of the search warrant if Defendant attempted to raise this issue with the jury, and the trial court indicated it would consider the issue later. (T. 2017-18)

Suco testified that Defendant acknowledged driving Maycock

home from worked, stated that he then rented the Lincoln with his father's assistance, admitted that he had stopped by Maycock's apartment again for a visit, and claimed that he returned home at 9 p.m. (T. 2048-49) He asserted that the only other person at his home was his daughter, whom he did not see because her door was shut. (T. 2051) Suco stated that after a break, he informed Defendant that the information he had provided was not consistent with information from his family and other sources and accused Defendant of lying. (T. 2054) Defendant responded, "I can't tell you. Even if I'm found innocent, my family will not talk to me again." (T. 2054) Defendant then continued to provide the officers with the same story. (T. 2055) In the morning, Defendant stated that he had left Quatisha near her mother and then stated that if he was not going to be believed, he wanted to go to jail. (T. 2060-61)

Suco stated that he obtained the restraint used when Defendant was taken to Palm Beach, which was merely a leg brace. (T. 2070-71) He stated that he did not use a belly belt with Defendant because he could not find one. (T. 2071-72, 2123)

Suco also testified that the Lincoln was searched pursuant to a warrant on November 8, 1998. (T. 2094) It was then briefly returned the rental company and retrieved before it had been washed. (T. 2095) At the time the car was retrieved, the police

also obtained a copy of the rental agreement Defendant's father signed and a copy of the title to the car. (T. 2096-98) The rental agreement showed that the car had 12 gallons of gas in it and the odometer showed 9 miles when it was rented at 6:31 p.m. on November 6, 1998. (T. 2098) Suco stated that his department did not have equipment to take video statement from defendants at the time of Defendant's arrest. (T. 2132) Instead, his department used stenographers to record statements. *Id.* He averred that Defendant was repeatedly asked to give a recorded statement but refused to do so. (T. 2133-34)

Diaz explained that Defendant told him that he had met Maycock through his wife's church, that he had repeatedly done favors for him and that he did not believe she was appreciative. (T. 2212) Defendant expressed the belief that Maycock failed to provide for Quatisha properly and was promiscuous with inappropriate men. (T. 2212-13) He admitted that he drove Maycock home from work on November 6, 1998, left and then returned to her home. (T. 2213) He claimed Maycock was clad only in a towel when he returned, flashed him and threatened to call his wife. (T. 2213-14) He averred that she then threatened him with a 9" knife and that he was able to disarm her when the phone rang. (T. 2214) He claimed that he then choked Maycock into unconsciousness so that he could talk to her. (T. 2214-15)

He averred that he put Maycock into his car while she was unconscious so that they could talk away from the apartment and took Quatisha with them so she would not be left home alone. (T. 2215-16) He acknowledged that Maycock jumped from the car shortly after they drove away from her apartment and stated that he choked her again before he put her in the trunk. (T. 2216) He stated that Quatisha had bruises on her forehead and arm but was alive after jumping from the car without indicating whether she was unconscious.[2] (T. 2217-18) He acknowledged driving to Palm Beach and opening the trunk there. (T. 2219-20) He insisted that Maycock attacked him when he opened the trunk so he left her on the side of the road, asserting that he could have thrown her into a canal if he wanted to kill her. (T. 2220-21) He stated that he did not leave Quatisha with her mother because of her condition. (T. 2221) Instead, he claimed that he drove to Alligator Alley and left Quatisha by the side of the road. (T. 2221-22)

Det. Vic Chavez testified regarding the brief examination of the Lincoln in the late evening hours of November 7, 1998. (T. 2253-68) On cross, Chavez testified that Det. Luciano Sanchez was not with him when he processed the car. (T. 2268) Defendant was then permitted, over the State's objection, to

[2] Defendant did not object to this testimony. (T. 2217-18)

question Chavez regarding whether Sanchez processed the trunk of the car for hairs and fibers and whether he had seen other crime scene reports showing the interior of the car had been processed before the car was returned. (T. 2269-73) The State then recalled Suco and introduced a portion of the second search warrant affidavit through him. (T. 2277-81) Det. Anthony Wilson testified regarding the second search of the Lincoln. (T. 2286-93)

Sharon Hinz, a serologist, testified that she examined Maycock's jeans and the trunk liner from the Lincoln and found stains that tested presumptively positive as blood. (T. 2380-87, 2392-93) She then prepared samples of these stains, the stain from the guardrail, blood drawn from Maycock for DNA testing. (T. 2387-93) Toby Wolson, an expert in DNA analysis, testified that he received the samples from Hinz and conducted DNA testing on them. (T. 2400-08) The stains from Maycock's jeans, the guardrail and the truck liner matched her DNA. (T. 2406-07) The probability of a random match between Maycock and the stains was one in 1.78 trillion. (T. 2407-08)

Both at the end of the State's case and after he rested, Defendant moved for a judgment of acquittal on all count without presenting any argument in support of that motion, which the trial court denied. (T. 2555, 2558-59, 2600-01) Defendant then

announced that he would not be presenting evidence, and after he was colloquied by the trial court about that decision, rested. (T. 2559-80) However, at the charge conference, Defendant asserted that *Delgado v. State*, 776 So. 2d 233 (Fla. 2000), applied to the burglary charge because he had allegedly been invited into Maycock's apartment. (T. 2589-90) after considering argument on this issue, the trial court rejected it because Maycock had asked Defendant to leave before the attack. (T. 2590-92, 2619-23) However, at the request of the State, the trial court use only kidnapping as the predicate felony for the first degree felony murder conviction. (T. 2625-26)

During its initial closing argument, the State asserted reviewed the evidence and the law and mentioned Defendant's statements only to claim that they were false, not coerced and made to delay the investigation. (T. 2645-83) During his closing, Defendant asserted that the State's case called to mind the words "manipulation, maneuvered, misstated, misleading, and misrepresented," claimed Maycock and the police were all lying and asserted that Quatisha had died during the jump from the car after a lover's quarrel during a voluntary ride. (T. 2686-2717) During its rebuttal argument, the State pointed out that Defendant's argument was unsupported by the law and evidence and responded to his arguments about the witnesses lying. (T. 2718-

26)

After being instructed and deliberated, the jury found Defendant guilty as charged on all counts. (T. 2748-2802, R. 2947-53) The trial court adjudicated Defendant in accordance with the jury's verdict. (T. 2809, R. 3711-13)

During hearings before the penalty phase, Defendant stood on the motions regarding victim impact witnesses and reiterated that he would not seek to cross the victim impact witnesses if the trial court required that they only read prepared statement. (V125. 2815-20) After the State presented precedent, the trial court accepted Defendant's suggestion regarding the reading of prepared statement. (V125. 2820-25) In addressing a series of pretrial motions regarding his priors, the State indicated that it had Wallace and Summers available to testify as rebuttal witnesses regarding Defendant's marital fidelity if Defendant claimed to be a good husband. (R. 3321-22, 3325-26, 3361-79, 3380-95, V113. 63-64)

After Defendant received the written victim impact statement, Defendant moved to exclude the portion stating:

> My life will never be the same. For almost nine years I have been on an emotional roller coaster. I have had countless sleepless nights, loss of appetite, anxiety attacks, and nightmares thinking about what happened to my child. I am unable to hold a job. I have developed Crohn's disease from the stress of the event and reliving the events that took my child's life.

(R. 3417-19) He averred that this statement was not within the scope of permissible victim impact evidence and constituted nonstatutory aggravation because Maycock's loss was not a loss to the community. (R. 3417-19, V117. 19-20) The trial court overruled this objection. (V117. 20)

Immediately before the penalty phase commenced, Defendant moved to prevent the State from having Suco testify regarding the contents of the arrest report regarding his conviction for the home invasion robbery of the Coles, asserting it was hearsay. (T. 2844-45) The State responded that Defendant had stipulated to the facts in the arrest affidavit at the time he entered a plea to those charges, that the Coles had been 78 and 68 at the time of the crimes, that it had unsuccessfully attempted to locate them, that it believed they were now dead, that hearsay was admissible and that it would support the affidavit with certified copies of the conviction. (T. 2845-46) The trial court ruled that it would permit the testimony. (T. 2846)

During his opening statement, Defendant suggested that he had committed prior violent felonies in 1984 in a state of panic, argued HAC and CCP and asserted that Hoadley was lying and manipulating matters to create a basis for the death penalty. (T. 2890-95) He was repeatedly admonished to limit his

remarks to what he expected the evidence to show. (T. 2893-94, 2896-97, 2898)

During the penalty phase, the State presented victim impact statements from Jasmine Craig, Maycock's best friend and Quatisha's godmother, Alma Caswell, Quatisha's paternal great-grandmother and Maycock. (T. 2904-08) Maycock then read her prepared statement. (T. 2909-12) As Maycock was reading her statement, Defendant objected on the grounds that the trial court had excluded a portion of the statement, and the objection was overruled. Maycock was reading had been excluded. (T. 2910-14) Defendant made no attempt to cross examine Maycock. (T. 2914)

Suco then testified that he obtained copy of the certified convictions for robbery, two counts of kidnapping and burglary that Defendant committed against the Coles on September 25, 1984, and it was admitted without objection. (T. 2915-17) He also identified the certified copies of the plea colloquy and arrest affidavit from that case, and they were admitted over Defendant's renewal of his prior objection. (T. 2917-19) Suco testified that he had attempted to locate the Coles, that he was unable to locate either of them, that they had been elderly and in bad health in 1984, and that he presumed they were now dead. (T. 2919-20)

Griffin Davis, a pastor, testified that in 1984, regarding how Defendant stole his car and kidnapped him from a parking lot on October 5, 1984, how he escaped from Defendant by jumping from the car and how Defendant pursued him. (T. 2927-47) The State also admitted certified copies of Defendant's convictions for the armed burglary and armed kidnapping that Defendant committed against Davis, and of Defendant's convictions for the attempted first degree murder, robbery, kidnapping and escape Defendant committed against Jose Bermudez. (T. 2950-51)

Jose Bermudez testified regarding how Defendant attacked him, choked him, stole his clothing and keys and used those items to escape from custody in 1984. (SR. 34-54)

Defendant presented the testimony of his brothers Steven, Irwin, Thomas and Tyrone Braddy; his friends Jerry, Timothy and Shadrick Taylor; his parents Joe and Pinkie Braddy; and his children Alexis and Harrel Braddy, Jr.; and his wife (SR. 66-123, 229-69, 2961-65, 3014-3102, 3130-33, 3166-3248) These witnesses testified that Defendant was raised in a good family where all the other children had become successful adults, that they all attended church regularly, that Defendant performed in a musical group associate with the church, that he once prevented Shadrick from drowning and that they all considered him to be a good father, husband, brother, son and friend even

though none of them had spent much time with him in 20 years because Defendant had been incarcerated. *Id.*

Dr. Brad Fisher, a psychologist, also testified and opined that Defendant would adjust well to prison. (T. 2966-72) He was then asked to evaluate Defendant potential to adjust to imprisonment. (T. 2972-84) However, Dr. Fisher admitted that Defendant was an extreme escape risk, who had a tendency to become violent when he did not get his way outside of prison. (T. 2983-97)

Outside the presence of the jury and before Cyteria testified, Defendant asked the trial court to exclude evidence of his marital infidelity even if he presented testimony that he was a good husband on the basis that being a good husband was a matter of opinion, while basically acknowledging the State had evidence to show that Defendant had engaged in extramarital affairs. (T. 3144-47) The trial court indicated that it would consider the issue at the time of the testimony. (T. 3147-48)

After considering this evidence, the jury recommended that Defendant be sentenced to death by a vote of 11 to 1. (T. 3441-63, R. 3620) At the *Spencer* hearing, Defendant presented a letter from his daughter April and his own protestation of innocence. (V110. 6, 9) The State presented no additional evidence. (V110. 7)

The trial court followed the jury's recommendation and sentenced Defendant to death for Quatisha's murder. (R. 3695-3706) In doing so, it found 5 aggravators: victim less than 12 – great weight; during the course of a kidnapping – great weight; avoid arrest – great weight; CCP – great weight; and prior violent felony, based on the crimes against Bermudez, the Coles and Davis – great weight. *Id.* In mitigation, it found Defendant's prison record and potential for rehabilitation – little weight; the potential alterative of a life sentence – little weight; appropriate courtroom conduct – moderate weight; Defendant's relationship with his friends – little weight; Defendant's relationship with his wife and children – moderate weight; the impact of Defendant's execution on his family and friends – little weight; Defendant's relationship with his parents and brothers – little weight; and Defendant's religious activities – little weight. *Id.* It considered and rejected Defendant's age and the fact he did not commit additional criminal acts on Quatisha as mitigation. *Id.* It also sentenced Defendant to 30 years imprisonment for the attempted murder of Maycock, life imprisonment for the kidnappings and burglary, 15 years imprisonment for the child neglect and 5 years imprisonment for the escape. (R. 3715-19) All of the sentences are to be served consecutively. *Id.* This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court properly denied the motion to suppress on the grounds asserted in it. Defendant's other arguments regarding suppression are unpreserved and meritless. The disqualification motions were properly denied as untimely and meritless. The issue regarding venue has been waived. The trial court did not abuse its discretion in admitting a prior consistent statement to rebut a claim of recent fabrication. It also did not abuse its discretion in denying a mistrial based on a brief, ambiguous statement. Defendant did not preserve most of the comments about which he complains, the trial court did not abuse its discretion in ruling on the one preserved comment and the comments did not rise to the level of fundamental error. The evidence was sufficient to sustain the burglary conviction. Defendant did not preserve issues regarding the sufficiency of evidence regarding child neglect and attempted escape, and there was no fundamental error. The trial court did not abuse its discretion in sustaining an objection to an improper comment during penalty phase closing. The argument regarding the admission of evidence about one of Defendant's priors is unpreserved and meritless. The *Ring* and cumulative error claims are meritless. The evidence was sufficient to support Defendant's murder conviction and his sentence is proportional.

ARGUMENT

I. SUPPRESSION.

Defendant first asserts that the trial court erred in denying his motion to suppress his statements. However, this issue should be rejected because many of Defendant's arguments are unpreserved, and all of them are meritless.

A defendant must have raised a particular argument in support of a motion to suppress in the trial court for that argument to be preserved for appeal. *Perez v. State*, 919 So. 2d 347, 359 (Fla. 2005). Here, Defendant did not raise any issue regarding the adequacy of the *Miranda* warnings in his motion to suppress or at the suppression hearing. (SR. 132-200, V51., V52., V30., V31., V43.) While Defendant claimed that have made expressed invocations of his rights, the only equivocal statement or action that Defendant asserted constituted an invocation was his statement to Chambers about incriminating himself. (R. 132-200, V43. 11-13) Moreover, he never asserted that an equivocal statement or action was sufficient to invoke his rights. Having denied being on the chair, jumping down from it or offering to take the police to find Quatisha, Defendant did not argue that these actions were insufficient to reinitiate contact with the police. (SR. 132-200, V51., V52., V30., V31., V43.) Given circumstances, Defendant's present arguments

regarding these issues are unpreserved and should be rejected as such.

Moreover, the denial of the motion to suppress on the grounds that were preserved should be affirmed. In reviewing a trial court's ruling on a motion to suppress, this Court accepts the trial court's factual findings if they are supported by competent, substantial evidence. *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001). However, this Court reviews the application of the law to those facts de novo. *Id.*

Here, the trial court denied the motion to suppress finding that Defendant properly waived his rights, never invoked his rights and made statements in Palm Beach and Broward County that were not the result of custodial interrogation. He determined that any taint from Smith's actions did not affect the later statements, as Defendant's will was never overborn. (V43. 63-68) Since the factual findings made by the trial court are supported by competent, substantial evidence and its application of the law was correct, this ruling should be affirmed.

Defendant first attacks this ruling by insisting that the trial court should have found that he invoked his rights through the statement about incrimination and the statement about going to jail. However, this Court has held that once a defendant has waived his rights, an equivocal statement was not sufficient to

invoke the defendant's rights. *State v. Owen*, 696 So. 2d 715, 717-20 (Fla. 1997). This Court has described the finding that a statement was equivocal as a finding of fact. *Walker v. State*, 957 So. 2d 560, 574 (Fla. 2007).

Here, the record contains competent, substantial evidence to support the trial court's finding that Defendant's statement was equivocal. It shows that Defendant continually engaged in attempts to manipulate the officers during the interrogation as he sought a means of escape. At the beginning of the interview, Defendant insisted that the police had to obtain his waiver of his Fifth Amendment rights before he would discuss the consents to search. (V30. 14-15) When questioning began, Defendant made a crypt biblical reference and then proceeded to provide the information he wanted the police to have about Maycock and his assistance to her. (SR. 161-63) After requesting, and being permitted, to speak to Chambers alone for a period of time, Defendant asked for 10 minutes alone and used the phrase "incriminate himself" in connection with this request. (V52. 231, 238-39, V30. 47, 106) Moreover, Defendant used the time that he was alone in the interview room to attempt to remove a metal ceiling tile from the ceiling to obtain access to a crawl space. Given this context, the trial court properly viewed Defendant's use of the phrase "incriminate himself" not as an

attempt to end the interview but as an indication of a desire to collect himself before continuing to toy with the officers. *See Owen*, 696 So. 2d at 717 & n.4; *see also Walker*, 957 So. 2d at 573-74. The denial of the motion to suppress should be affirmed.

The same is true of Defendant's statement about being taken to jail. Defendant merely stated that if the police were not going to believe him, he was tired of talking and wanted to go to jail. (V30. 77-78, T. 2061) Given the conditional nature of this statement, the trial court's finding that it was not an unequivocal assertion of the right to remain silent is supported by the record. *Ford v. State*, 801 So. 2d 318, 319-20 (Fla. 1st DCA 2001). While Defendant insists that the trial court could not have made this finding because Suco stated that he decided to terminate the interview after this statement, this is not true. In *Walker*, 957 So. 2d at 573-74, this Court determined that a statement was equivocal even though the officers clearly interpreted the statement in a different manner as they started to leave the room after this statement was made. The denial of the motion to suppress should be affirmed.

Moreover, the United States Supreme Court has recognized that whether a coercive action resulted in a later statement being involuntary is a question of fact where, as here, there are factual disputes about what occurred. *Lyons v. Oklahoma*, 322

U.S. 596, 602 (1944). This decision is to be made based on the totality of the circumstances, and while advisement of rights is a factor to be considered, the presence or absence of such an advisement is not dispositive. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973); *see also Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).

Here, the lower court found that Smith's actions did not coerce his later statements in response to custodial interrogation. The record supports this finding. The testimony was that Smith's actions were not directed toward having Defendant provide the police with a confession but only to have him reveal Quatisha's location. (V30. 52, 112) The testimony of all of the officers was that Smith's actions did not cause Defendant to reveal the information that the police sought. (V30. 100, 113-14) Defendant himself acknowledged this during his testimony. (V31. 53-54) Moreover, the testimony showed that after being shoved by Smith, Defendant engaged in small talk with the officers about hunting and fishing as they walked around the Palm Beach area looking for Quatisha. (V30. 115-16, 148-49) While Defendant insists that the fact he did so is not credible, Defendant himself admitted that this was the conversation that occurred during the walk. (V31. 55-56)

Moreover, Defendant's next response to custodial

interrogation occurred only hours later and only after Smith was no longer with him when Defendant told Diaz that Quatisha was not in Palm Beach but off of Alligator Alley. (V30. 118-19, 149-50) Defendant felt free enough to demand that only a limited group of officers accompany him to where he had placed Quatisha in revealing this information. (V30. 150)

Moreover, Defendant's next statement was not made until many hours later after Defendant had been fed twice in the presence of Diaz and Sgt. Hawkins at the police station. (V30. 150-58) While Defendant insists that Hoadley was part of Smith's abuse of Defendant and was present when he decided to make his statement, the record shows that Hoadley was sufficiently removed from the area of Smith's actions that he did not even see it and that he was not present when Defendant decided to make his statement. (V52. 273-75, V30. 158, 167-68) While Defendant's rights were not read to him again, Defendant began his statement by acknowledging that he was aware of his rights but had decided to make the statement without exercising them. (V30. 159) Even during this statement, Defendant refused to implicate himself fully, asserting that his actions toward Maycock were in self defense, that he took Quatisha with them to protect her and that he never harmed her. (V30. 159-67) Given all of these circumstances, the trial court did not err in

finding that Smith's actions did not coerce Defendant's statements. *Lyons*, 322 U.S. at 504-05; *see also Stroble v. California*, 343 U.S. 181, 190-91 (1952); *Andrade v. State*, 564 So. 2d 238, 239 (Fla. 3d DCA 1990); *Leon v. State*, 410 So. 2d 201 (Fla. 3d DCA 1982). It should be affirmed.

In an attempt to avoid this result, Defendant insists that the State admitted statements that Smith had coerced from him against him. However, the record reflects that the only incriminating statement included on the pages cited to by Defendant was his question about a body floating. (T. 2143-48) However, the trial court found that this statement were Defendant's own spontaneous statement. Again, the record shows that this finding was proper. The testimony was that Defendant, without prompting, suddenly asked the officers how long a body would stay submerged. (V30. 117-18) Given these circumstances, the trial court did not err in refusing to suppress these statements. *Hayward v. State*, 24 So. 3d 17, 36 (Fla. 2009); *Johnson v. State*, 660 So. 2d 648, 659 (Fla. 1995). It should be affirmed.

Even if the unpreserved issues could be considered, Defendant would still be entitled to no relief. Defendant asserted that his alleged silence should have been found to be an invocation of his right to remain silent. However,

Defendant's assertion that he remained silent is contrary to the record. Chambers testified that Defendant never stopped responding during the interrogation. (V52. 172-73, 210-11, 215) Suco stated that Defendant continually participated in the interview and merely sat listening to the officers for a period of time around midnight. (V30. 44-45, 75-76) He stated that the notation in his report that Defendant gave no material responses around 3:55 a.m. meant that Defendant made denials but gave no information that furthered the investigation; not that he was silent. (V30. 76-77) Despite the fact that Defendant testified at the suppression hearing, he did not claim that he sat silently during the interview. (V31. 14-104) As such, Defendant's assertion that he made an unequivocal invocation of his right to remain silent by doing so should be rejected.

Defendant next seems to suggest that his statement about his family not speaking to him was an unequivocal invocation of his right to remain silent. However, this statement was also properly viewed as equivocal at best. The record shows that Defendant made the statement "I can't tell you. Even if I'm found innocent, my family will never talk to me again" only in response to being asked about Lawyer's statement that he had seen Defendant and the Lincoln at Maycock's apartment. This Court has previously found that such statement in response to

isolated questions during an interview was not an unequivocal invocation of one's rights. *Owen*, 696 So. 2d at 717 & n.4; *see also Valle v. State*, 474 So. 2d 796, 801 (Fla. 1985). Thus, the lower court would have properly rejected the argument that this statement was an invocation of Defendant's rights had Defendant made the argument.

Defendant next asks this Court to reconsider the application of *Davis v. United States*, 512 U.S. 452 (1994), based on a difference between the *Miranda* right to counsel and the right to remain silent. However, this Court expressly rejected this argument in *Owen*, 696 So. 2d at 715. The United States Supreme Court has just agreed that *Davis* applies to both rights. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259-60 (2010). As such, Defendant's request that this Court reconsider *Owen* should be rejected.

Defendant asserts that his actions in voluntarily agreeing to take the police to Quatisha should not have been seen as a valid reinitiation of contact with the police because he was not read his *Miranda* rights again. However, this argument depends on a determination that Defendant at some point invoked his rights. However, as argued above, the lower court properly determined that he had not done so. As such, this issue is meritless and should be rejected.

Even if any of Defendant's equivocal statements could be viewed as properly invoking his right to remain silent, the trial court would have properly determined that Defendant's actions showed that the police scrupulously honored that invocation. In *Mosley*, the Court held that an invocation of the *Miranda* right to remain silent imposed no barrier to the admission of a voluntary statement made without further interrogation. *Mosley*, 423 U.S. at 102. While Defendant insists that *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), required that a defendant must be read and waive his *Miranda* rights again after he had invoked his *Miranda* right to counsel when he reinitiated contact with the police, this is not true. *Bradshaw* actually held that the determination of whether a statement made after such an invocation was admissible required a two step analysis. *Id.* at 1044-45. During the first step, a court is required to determine if the defendant's conduct indicated a desire to speak to the police again without counsel, and the second step required the State "to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." *Id.* at 1044. The Court stated that the determination at the second step was to be made based on the totality of the circumstances and depended on the facts of a particular case. *Id.* at 1044, 1046. Moreover, the Court cited to

North Carolina v. Butler, 441 U.S. 369 (1979), in which it held that a waiver of rights could be inferred by a defendant's words, actions and course of conduct and his understanding of his rights, as support for the requirement that this decision be made on the facts of the case. *Bradshaw*, 462 U.S. at 1046; *Butler*, 441 U.S. at 373.

Applying these cases here, Defendant's claim is meritless. Defendant proclaimed that he knew his rights even before they were read to him and signed a waiver of those rights at the beginning of the interview. (V30. 14-15, 19-20, 21-22) The record reflects that Defendant spontaneously offered to take the police to Quatisha without the police uttering a word to him and without them questioning about the offer immediately thereafter. (V30. 49, 90-92) Moreover, it shows that Defendant then provide the police with directions to the search area in Palm Beach. (V30. 50-52) Once in Palm Beach, Defendant engaged in small talk with the officers about hunting and fishing and made spontaneous statements about a body floating. (V30. 115-18, 148-49, V31. 55-56) Moreover, at the beginning of his statement to Diaz and Sgt. Hawkins, Defendant reaffirmed that he knew his rights and was voluntarily speaking to them. (V30. 159) Under these circumstances, the trial court would have properly found that both steps of *Bradshaw* were met had Defendant presented this

argument to it. As such, the motion to suppress was properly denied.

Moreover, Defendant's unpreserved challenge to the *Miranda* waiver form is also meritless. This Court has repeatedly held that the *Miranda* rights form used by the Miami-Dade County Police are constitutionally adequate. *Chavez v. State*, 832 So. 2d 730, 750 (Fla. 2002); *Johnson v. State*, 750 So. 2d 22, 25 (Fla. 1999); *Cooper v. State*, 739 So. 2d 82, 84 n.8 (Fla. 1999). As such, this issue is meritless and should be denied. Moreover, the United States Supreme Court reversed this Court's decision in *State v. Powell*, 998 So. 2d 531 (Fla. 2008), finding that *Miranda* warnings given in that case were constitutionally adequate. *Florida v. Powell*, 130 S. Ct. 1195 (2010). Further, the warning given here did not have the temporal limitation that this Court found misleading in *Powell*, 998 So. 2d at 534-35, 541. Instead, they informed Defendant that "[i]f you want a lawyer to be present during questioning, at this time or anytime hereafter, you are entitled to have a lawyer present." (R. 2770) In fact, after the Fourth District first issued a holding similar to the one this Court reached in *Powell*, this Court accepted review of a case concerning the Miami-Dade warnings, only to dismiss review as improvidently granted after oral argument based on the difference in the warnings at issue.

Gillis v. State, 959 So. 2d 194 (Fla. 2007). Under these circumstances, there is no basis to reconsider the propriety of the warnings given here. The trial court should be affirmed.

Even if the trial court had committed some error in denying the motion to suppress, any error would be harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Here, the State did not argue that Defendant was guilt because he had confessed his guilt. (T. 2645-83, 2718-26) Instead, it argued that Defendant was guilt based on the testimony of Lawyer and Maycock, which was corroborated by the mileage on the Lincoln, the medical examiner's testimony about the condition of Quatisha's body and Defendant's physical reaction on being informed that Maycock had survived. *Id.* It only mentioned Defendant's course of conduct during the interview and trip to Palm Beach and Alligator Alley to assert that Defendant was attempting to manipulate the police. *Id.* In fact, Defendant made far more use of his statements to argue that the case was about the State manipulating the circumstances than did the State. (T. 2686-2717)

Moreover, the jury heard Maycock's eyewitness account of the crimes. Her testimony was corroborated by Lawyer's testimony, the DNA evidence from the trunk of the Lincoln and her physical condition after the crime. Quatisha's body, which

showed that she had died a violent death off of Alligator Alley and had sustained scrapes and bruises consistent with Maycock's account of the jump from the car, was found completely independently of the police and Defendant. Further, Defendant's own wife's testimony showed that he was trying to destroy evidence immediately after the crime, and the jury heard of Defendant's reaction upon being informed that Maycock survived.[3] Given all of these circumstances, it cannot be said that Defendant's exculpatory statements contributed to the verdict. As such, any error in the admission of these statements was harmless. The convictions and sentences should be affirmed.

II. DISQUALIFICATION.

Defendant next asserts that the trial court erred in denying his repeated motions to disqualify it.[4] According to Defendant, the trial court's actions in admonishing Defendant about speaking out of turn and rearguing motions were sufficient to show bias. However, most of the grounds for disqualification that Defendant asserted were not raised on a timely basis, and all of them are meritless.

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[3] This evidence provided competent, substantial evidence to support Defendant's murder, attempted murder and kidnapping convictions. *See Smith v. State*, 28 So. 3d 838, 874 (Fla. 2009); *Johnston v. State*, 863 So. 2d 271, 285-86 (Fla. 2003).

[4] This Court reviews the determination that a motion for disqualification was legally sufficient de novo. *Chamberlin v. State*, 881 So. 2d 1087, 1097 (Fla. 2004).

When a ground for disqualification is not raised until appeal, it is not properly presented. *Mungin v. State*, 932 So. 2d 986, 994 (Fla. 2006). Moreover, any grounds for disqualification must be raised in a motion for disqualification filed within 10 days of when the grounds became available. Fla. R. Jud. Admin. 2.330(e); *see also Asay v. State*, 769 So. 2d 974, 980 (Fla. 2000). When a ground for disqualification is not timely presented, it is deemed forever waived. *Asay*, 769 So. 2d at 980.

Here, Defendant asserts that the trial court should have been recused because he allegedly suggested Defendant was a liar at an October 3, 2006 hearing and because of actions the judge took at hearings on June 26, 2006, July 10, 2006, August 28, 2006, and October 3, 2006. However, in none of 8 Defendant's motions to recuse the judges who were assigned to his case, including 6 regarding the judge who was presided over his trial, did Defendant assert that any these judges had called him a liar. (R. 114-19, 225-49, 1027-31, 1106-10, 1114-21, 1131-38, 1158-62, 1166-69) While Defendant complained about the trial court's conduct and rulings on the deposition issue and its warning about revoking his *pro se* in the disqualification motions filed after the October 3, 2006 hearing, he did not complain about the ruling regarding stamps. (R. 1158-62, 1166-

69) Moreover, Defendant filed the first of the 6 motions regarding the trial judge on August 14, 2006, which was more than 10 days after the hearings on June 26, 2006 and July 10, 2006. As such, Defendant has waived these arguments.

Moreover, the grounds for disqualification that are not barred and waived were properly rejected. "A motion to disqualify will be dismissed as legally insufficient if it fails to establish a well-grounded fear on the part of the movant that he will not receive a fair hearing. *See Correll v. State*, 698 So. 2d 522, 524 (Fla. 1997). To determine if a motion to disqualify is legally sufficient, this Court looks to see whether the facts alleged would place a reasonably prudent person in the fear of not receiving a fair and impartial trial." *Arbelaez v. State*, 775 So. 2d 909, 916 (Fla. 2000). A "petitioner's subjective fears . . . are not 'reasonably sufficient' to justify a 'well-founded fear' of prejudice." *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986). Additionally, "[t]he fact the judge has made adverse rulings in the past, or that the judge has previously heard the evidence or 'allegations that the trial judge had formed a fixed opinion of the defendant's guilt, **even where it is alleged that the judge discussed his opinion with others**,' are generally legally insufficient reasons to warrant the judge's disqualification."

Rivera v. State, 717 So. 2d 477, 481 (Fla. 1998)(emphasis added). This is true even when the rulings are harshly worded. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). One of a trial court's duties is to control the conduct of the litigants and admonish them when they act improperly. *See Paramore v. State*, 229 So. 2d 855, 860 (Fla. 1969). This body of precedent is consistent with United States Supreme Court case law. *United States v. Liteky*, 510 U.S. 540, 555-56 (1994). In fact, the Court stated, "[n]ot establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as [] judges, sometimes display. A judge's ordinary efforts at courtroom administration-even a stern and short-tempered judge's ordinary efforts at courtroom administration-remain immune." *Id.* Applying this body of law here, the rejection of the disqualification motions was proper.

While Defendant insists that the trial court's admonishments to him reflect bias because he was doing nothing more than attempting to present arguments in a professional and courteous manner to a judge who was ruling summarily without support, the record reflects a far different picture. It shows that Defendant continually interrupted others, made false claims

that matters had not been heard[5] and reargued issues despite being told that reargruments and interruptions were improper by a judge who heard and read his arguments and who also admonished the prosecutor when she engaged in the same conduct. (R. 859-63, 865-89, 890-909, 966-67, 1022-26, 1053-56, 1150-55, 1063-70, V111. 5-40, V55. 9-26, V90. 5-51, V91. 12-13) In fact, Defendant's behavior was so bad at one point that he had to be removed from the courtroom. (V85. 8-9) Given these circumstances, the trial court's admonitions were merely proper rulings on courtroom behavior that provide no basis for disqualification. The trial court should be affirmed.

Defendant's complaints about the trial court warning him that his conduct could result in revocation of his *pro se* status are particularly meritless. In *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975), the Court held that "trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct," and cited to *Illinois v. Allen*, 397 U.S. 377 (1970), to support this assertion. In *Allen*, 397 U.S. at 341-43, the Court held that a

[5] While Defendant insists that he was correct that a 1999 motion to dismiss had not been ruled upon, the record reflects that the trial court had found discovery compliance at the original hearing on the motion and had ordered Defendant to schedule depositions, which implicitly rejected the request for sanctions. (V99.) Moreover, at a hearing the next day, both the trial court and Defendant indicated that they understood the trial court had ruled on the motion. (V100. 3)

defendant's conduct could result in a waiver of a Sixth Amendment right. However, based on the recognition that waivers of constitutional rights should not be lightly inferred, the Court required that a defendant be warned that his conduct would result in a waiver of a Sixth Amendment right if it continued before the conduct would constitute a waiver. *Id.* at 343.

Here, the trial court's admonishment to Defendant was entirely proper given Defendant's conduct. Throughout the October 3, 2006 hearing continually interrupted and attempted to reargue issues even when the trial court was ruling in his favor. (V55. 5-35) Yet, at the conclusion of the hearing, Defendant went on a tirade that since his family "paid for everybody's salary in this courtroom," he was being treated unfairly because his discovery request were being denied by "ludicrous" rulings. (V55. 38-40) Given these circumstances, it was entirely appropriate for the trial court to warn Defendant that if his conduct showed that he could not obtain a fair trial while representing himself, it would revoke his *pro se* status. (V55. 41-43) In fact, the trial court was required to do so under *Faretta* and *Allen.*

In an attempt to avoid this result, Defendant insists that his motions should have been deemed granted because the trial court allegedly did not rule on them in 30 days. However,

pursuant to Fla. R. Jud. Admin. 2.330(j), the 30 day period runs from service under Fla. R. Jud. Admin. 2.330(c), which requires that the motion be served on the trial court. When a motion is not service on the trial judge, a defendant cannot avail himself of time period. *Marquez v. State*, 11 So. 3d 975, 976 (Fla. 3d DCA 2009); *Hedrick v. State*, 6 So. 3d 668, 693 (Fla. 4th DCA 2009); *Harrison v. Johnson*, 934 So. 2d 563, 563-64 (Fla. 1st DCA 2006). Here, the record reflects that Defendant did not serve the trial judge with his motions. (R. 1158-62, 1166-69) Thus, this argument should be rejected.

III. VENUE.

Defendant next asserts that the indictment failed to allege venue properly regarding the murder and attempted murder charges. However, this issue has been waived.

To preserve a challenge to an indictment regarding venue, a defendant must file a pretrial motion challenging the indictment. *Tucker v. State*, 459 So. 2d 306, 306-09 (Fla. 1984); Fla. R. Crim. P. 3.190(c)(grounds for dismissal not presented at or before arraignment or within time allowed by trial court "shall be considered waived"). Here, Defendant made no motion to dismiss the indictment based on any allegedly defective allegations regarding venue at the time of arraignment nor within the 15 days the trial court granted Defendant to make

such motions at that time. (V33) He made no motion to dismiss based on any alleged defect in venue after the State filed a statement of particulars indicating that the crimes occurred in Dade, Broward and Palm Beach Counties. (R. 1130) Instead, Defendant waited and raised this issue for the first time in motion for arrest of judgment filed on September 24, 2007, more than two months after the jury had found Defendant guilty and almost a month after jury had recommended death. (R. 3645-53, 2947-53, 3620) Since the motion was not timely, the trial court properly denied this motion on the ground that it was waived.

That ruling was particularly correct here. As this Court had noted, the purpose of having a defendant preserve an issue on a timely basis is to permit the alleged defect to be cured. *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003). Pursuant to §910.14, Fla. Stat., venue is proper in any county in which a victim was taken or confined during the kidnapping, which is a continuing offense. *Stephens v. State*, 787 So. 2d 747, 754 (Fla. 2001). Moreover, pursuant to §910.05, Fla. Stat., venue is proper where the crime is committed in more than one count. *Copeland v. State*, 457 So. 2d 1012, 1016 (Fla. 1984); *Barclay v. State*, 343 So. 2d 1266, 1269-70 (Fla. 1977). Here, Defendant attempted to murder Maycock by strangling her twice in her apartment in Dade County and then taking her to Palm Beach

County and strangling her again. He kidnapped both Maycock and Quatisha from the apartment and did not release Quatisha before her death. Given these circumstances, the State would have readily been able to allege venue in Dade, Broward and Palm Beach Counties had Defendant raised the issue on a timely basis. As such, this issue has been waived by failing to raise it on a timely basis.

IV. ADMISSION OF SEARCH DOCUMENTS.

Defendant next asserts that the trial court abused its discretion in admitting a search warrant and the affidavit for that warrant into evidence because these documents were hearsay.[6] He also includes a conclusory assertion that the admission of these documents violated his right to confront witnesses. However, these arguments should be rejected as they are unpreserved and meritless.

Neither Defendant's assertion that the documents contained inadmissible hearsay nor that their admission violated the Confrontation Clause is not preserved. As this Court has held, the specific issue raised on appeal must have been the basis for an objection in the trial court for an issue to be preserved for review. *McWatter v. State*, 36 So. 3d 613, 639 (Fla. 2010).

[6] Trial ruling's regarding the admissibility of evidence are reviewed for an abuse of discretion. *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008).

Moreover, a defendant must make a specific objection that the admission of evidence would violate the Confrontation Clause for such an issue to be preserved. *Williams v. State*, 967 So. 2d 735, 747 n.11 (Fla. 2007). Here, Defendant never mentioned hearsay nor a Confrontation Clause violation in objecting to the admissibility of these documents. Instead, when the issue of the admission of the documents was first suggested, Defendant had just argued that certain scrivener's errors on certain documents indicated that the Lincoln had been tampered with and stated that he would object on this same basis when evidence was introduced. (T. 2003-19) When the documents were actually admitted, Defendant objected without stating any grounds whatsoever. (T. 2280) Since Defendant never objected on either hearsay or confrontation grounds, his present arguments are not preserved and should be rejected as such.

Even if the issue was preserved, the issue would still not be meritorious. Pursuant to §90.801(2)(b), Fla. Stat., a prior consistent statement is admissible to rebut a claim of recent fabrication. In *Chandler v. State*, 702 So. 2d 186, 197-99 (Fla. 1997), this Court held that this provision was applicable even if the prior statement was made after one reason for fabrication occurred if it was made before a second reason for fabrication occurred.

Here, during his initial testimony, Suco stated that after the Lincoln was searched brief when it was first impounded, it was returned to the rental car agency and was subsequently retrieved for further testing based on new information about the car. (T. 2094-96) During cross examination of Chavez, Defendant repeatedly asserted that Sanchez had thoroughly examined the car and impounded trace evidence. (T. 2268-73) Through this questioning, Defendant implied that the real reason why the police had impounded the car a second time was not because additional tests needed to be conducted but because the evidence found during the first search had not supported the State's case.[7] The record reflects that the laboratory analysis of evidence was not completed as late as July 8, 1999. (V98. 23-25) As such, if Sanchez had collected evidence as Defendant claimed, Suco could not have known on November 10, 1998, the date of the documents in question, that the evidence allegedly collected did not match the victi(R. 2818-22) As such, the presentation of the documents rebutted Defendant's implication that Suco had fabricated the need for a second search because the evidence obtained during the first search did not match the victim. Thus, the trial court did not abuse its discretion in admitted these

[7] In fact, Defendant went so far as to argue that the State had planted evidence in a different car during his argument about tampering and his cross examination of Wilson. (T. 2000-16, T. 2296-2302)

documents on this basis. *Chandler*, 702 So. 2d at 197-99.

Even if the admission of warrant and portion of the affidavit was error, the error was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The documents were not even mentioned during closing argument. (T. 2647-2726) In fact, the documents were never even published to the jury. (T. 2280-81) Instead, the only use the State made of these documents was to corroborate Suco's testimony regarding the retrieval of the Lincoln and to show that the VIN number on the Lincoln that was searched was the same during both searches. (T. 2280-81, 2289-90)

Moreover, Suco, Chavez, Wilson all testified that the searches of the Lincoln were conducted pursuant to search warrants without objection. (T. 2094, 2260, 2286-89) Defendant's wife testified that he had cleaned the car in the middle of the night after the crimes. (T. 1853-54) As such, the actual warrant and the inclusion of the fact that the car had been cleaned in the affidavit were cumulative to this testimony.

Additionally, Maycock testified that both she and Quatisha were injured in jumping from the car when trying to flee Defendant. (T. 1741-44) This testimony was corroborated by photographs of Maycock's injuries, and evidence from the medical examiner of Quatisha's injuries. (R. 2726, 2729-32, 2758, T.

2513-14, 2517-18, 2519-22) Maycock testified that both she and Quatisha were returned to the car after this event. (T. 1746, 1749) As such, the statement that the victim "may have bled" in the car was nothing more than a matter of common sense. Given all of these circumstances, the admission of the warrant and portion of the affidavit did not contribute to the jury's verdict. Thus, any error in the admission of these documents was harmless. The convictions and sentence should be affirmed.

V. DENIAL OF MISTRIAL.

Defendant next asserts that the trial court abused its discretion in denying a motion for mistrial after a detective mentioned the word history in explaining why he handcuffed Defendant. However, this is not true.

As this Court has held, "[a] motion for mistrial is addressed to the sound discretion of the trial judge and '. . . should be done only in cases of absolute necessity.'" *Ferguson v. State*, 417 So. 2d 639, 641 (Fla. 1982)(citing *Salvatore v. State*, 366 So. 2d 745, 750 (Fla. 1978)). Here, the trial court did not abuse its discretion in denying the motion for mistrial as there was no absolute necessity.

Defendant's basis this issue entirely on the fact that used the word history in discussing his decision to handcuff Defendant who had voluntarily agreed to come to the police

station after Defendant's demeanor changed when he was informed that Maycock was alive. He insists that the jury was "unmistakably told" that he had committed prior violent crimes. However, no mention was ever made of any crimes other than the ones he committed in this case. Instead, Milito stated that he decided to handcuff Defendant because of the change in Defendant's demeanor and explained to Defendant that he was being handcuffed even though he want not under arrest for everyone's safety. (T. 1914) Moreover, it should be remembered that Milito had previously testified that he received information about this crime from officers in Palm Beach County who were in contact with Maycock, who had testify about Defendant's sudden violence. (T. 1901-02, 1669-1704) Given these circumstances, it was entirely likely that the jury could have inferred that Milito was referring to this information about Defendant suddenly becoming violent through the use of the word history.

Additionally, Milito was not asked about any information regarding Defendant concerning any other crimes. Instead, Milito was merely asked to describe what he did during his encounter with Defendant and his wife at the gas station. (T. 1914) Thus, the trial court was correct in finding that nothing about Defendant's criminal past was intentionally elicited, and no

further references were made to this statement during trial. Under these circumstances, the trial court did not find that the brief, inadvertent use of the ambiguous word history did not create an absolute necessity for a mistrial. *Cole v. State*, 701 So. 2d 845, 853 (Fla. 1997). As such, it did not abuse its discretion and should be affirmed.

VI. GUILT PHASE CLOSING.

Defendant next contends that the prosecutor made improper comments in closing. However, Defendant is entitled to no relief. Defendant only preserved an issue regarding one comment, about which the trial court did not abuse its discretion. Moreover, the unpreserved comments were largely proper, and Defendant has not met his burden of showing that these comments constituted fundamental error.

In order to preserve an issue regarding a comment in closing, it is necessary for a defendant to object to the comment contemporaneously on the grounds asserted on appeal and obtain a ruling on the objection. *Gonzalez v. State*, 786 So. 2d 559, 568 (Fla. 2001); *Brooks v. State*, 762 So. 2d 879, 898-99 (Fla. 2000); *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983). Further, if a trial court sustains the defendant's objection, it is necessary for him to move for a mistrial to preserve an issue about the comment, which is then considered to

be the denial of the motion for mistrial. *Rose v. State*, 787 So. 2d 786, 797 (Fla. 2001). When a defendant simultaneously objects and moves for a mistrial and the trial court only rules on the motion for mistrial, the only issue that is preserved is the denial of the motion for mistrial. *Poole v. State*, 997 So. 2d 382, 391 n.3 (Fla. 2008). A motion for mistrial is only properly granted if the comment was such as to have deprived the defendant of a fair trial. *Salazar v. State*, 991 So. 2d 364, 371-72 (Fla. 2008). When an issue regarding a comment is not preserved for review, this Court will only consider the issue if the comment constitutes fundamental error. *Hayward*, 24 So. 3d at 40-41. In demonstrating fundamental error, a defendant has a "high burden" of showing that the error was such that it "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Id.* at 41.

Here, while Defendant complains about numerous comments during closing, he did not object to the majority of these comments. (T. 2648-49, 2656-57, 2659-61, 2662-63, 2667-68, 2674, 2683, 2718-19, 2720-21, 2724-25) Moreover, while Defendant now claims that the State's comments regarding his actions during his police interview were improper comments on his right to remain silent, his only objection to any of these comments was

to the use of the word "lie" to describe the statements he made. (T. 2660) The trial court sustained Defendant's objection to the State's comment regarding minimizing what occurred, and Defendant did not move for a mistrial. (T. 2682-83) While Defendant did object to the State's comment about the belly belt and an alligator biting Qutisha's head, the trial court did not ruling on these objections except to instruct the jury to rely on its own recollection of the evidence. (T. 2723, 2726) To the extent that those actions could be viewed as a ruling, it would be a sustaining of the objection, and Defendant did not move for a mistrial regarding these comments. As such, Defendant's complaints about these comments are unpreserved.

Moreover, the trial court did not abuse its discretion in overruling Defendant's objection to the one comment that is preserved.[8] Attorneys are permitted wide latitude in arguing the facts and law to the jury and may draw logical inferences in doing so. *Smith v. State*, 7 So. 3d 473, 509 (Fla. 2009). Moreover, this Court has recognized that comments made in fair reply to a defense argument are proper. *Pagan v. State*, 830 So. 2d 792, 809 (Fla. 2002). Here, the one preserved comment was merely a reasonable inference made in fair reply to Defendant's

[8] This Court reviews trial court rulings regarding the propriety of comments in closing for an abuse of discretion. *Salazar*, 991 So. 2d at 377.

argument.

During his closing argument, Defendant's major theme was that Maycock and all the police officers were lying to frame him after Maycock killed Quatisha in jumping from a moving car driven by someone with whom she was having a relationship. (T. 2686-2717) As part of this argument, Defendant suggested that James Shotwell and Dennis McArthur might have been the person driving even though there was no evidence of a romantic relationship with them. (T. 2696-97) During this rebuttal closing, the State merely pointed out that the lack of evidentiary support from the argument. (T. 2721-22) Given these circumstances, the comment was not a denigration of Defendant's counsel. It was merely a fair comment regarding the lack of evidentiary or logical support for Defendant's comments in closing. As such, the trial court did not abuse its discretion in overruling Defendant's objection to this comment.

Further, the unpreserved comments do not constitute fundamental error. Defendant first asserts that the State accused counsel of misrepresenting the evidence. However, when the comment is read in context, it did not do so. Defendant began his closing argument by stating the State's case called to mind the words "manipulation, maneuvered, misstated, misleading, and misrepresented." (T. 2686) He later suggested that the

police had not recorded his statement so that they could lie about what was said. (T. 2715-16) In its rebuttal, the State responded to this argument by pointing out that the evidence showed Defendant's statement were not recorded because of his refusal and that the refusal was consistent with the defense. (T. 2724) Thus, in context, the comment did not suggest that defense counsel was misrepresenting the evidence and could not rise to the level of fundamental error. *Wade v. State*, 35 Fla. L. Weekly S239, S242 (Fla. May 6, 2010).

Defendant next asserts that the State's comment about the belly belt denigrated his counsel. However, once again, the comment was a fair reply. During trial, Chambers testified that he believed Defendant wore a belly belt during the trip to Palm Beach but was did not know if Defendant's hands were attached to the belt. (T. 1987-88, 1993-94) All of the other officers, including Suco who attached the restraints to Defendant, stated that no belly belt was used. (T. 2071-72, 2123 2201-02) During his closing, Defendant mentioned this testimony and Smith's shoving of Defendant as grounds to disbelieve the police testimony. (T. 2699-2702) Thus, the State merely responded that Defendant was using the belly belt to claim that he was helpless even though there was a lack of evidence that Defendant was restrained by the belly belt and then pointed out that Defendant

was not coerced by anything the police did because he never revealed the location of Quatisha. As such, this comment was simply fair response to Defendant's argument, and not fundamental error. *Wade*.

The comment about Defendant blaming Maycock was also a fair response to Defendant's closing and the evidence. During his statements to the police Defendant repeatedly denigrated Maycock. There was no evidence that Maycock left her home with Defendant after midnight consensually, that she allowed Defendant to take Quatisha at that time or that she ever had a romantic relationship with Defendant. Moreover, the medical examiner testified that Quatisha received perimortem alligator bites, showing that she was alive while in the water. Yet, Defendant asserted during his closing that Maycock got into the car willingly and jumped out of the car as a result of a lover's quarrel, killing Quatisha. (T. 2691-99) During its rebuttal, the State merely pointed out that even though Defendant had repeatedly blamed Maycock, he still guilty of kidnapping because she did not consent to getting in the car or taking Quatisha and guilty of felony murder even if Quatisha died while attempting to escape the kidnapping. (T. 2719-20) As such, the comment was not improper. *Wade*.

Moveover, since Defendant's closing argument did lack

evidentiary support, it was not improper for the State to point out that Defendant's argument lacked such support. *Lumsdon v. State*, 29 So. 3d 390, 393 (Fla. 3d DCA 2010). As such, the State's comments on this issue did not constitute error. (T. 2725) Thus, this argument fails as well.

This Court has recognized that comments that might be considered a bolstering if made during the State's initial argument can properly be considered as a fair response when made after a defendant has attacked a witness's credibility in closing. *Pagan*, 994 So. 2d at 1013. Here, during his closing, Defendant repeatedly suggested that the police had invented their testimony. (T. 2699-2717) In fact, as noted above, he went so far as to suggest that the reason why Defendant's statements were not recorded was that the police always planned to lie. (T. 2715-16) Given these circumstances, the State's comment that began by reminding the jury that the reason why there was not recorded statement was because Defendant refused and concluded by suggesting that the officers who have invented a better statement was merely a fair response to Defendant's argument. As such, this argument too was not improper. *Pagan*.

As this Court has recognized, the defendant must have remained silent for the State to comment on such silence. *Hudson v. State*, 992 So. 2d 96, 111 (Fla. 2008). As such, where a

defendant has made a statement, the State may comment on the content of that statement. *Id.* Here, Defendant made statements about Maycock, Quatisha and the evening of the crime and voluntarily offered to take them to Palm Beach. Since Defendant did make statements and did not invoke his right to remain silent, it was proper for the State to comment on these statements and to offer its inference that Defendant was making these statements to delay the investigation and manipulate the police. (T. 2658-63) As such, these comments were also not improper.

Under similar reasoning, Defendant's claim that the State improperly commented on his invocation of his Fourth Amendment rights was not improper. Defendant did not invoke his Fourth Amendment rights. Instead, he signed consents to search his home and car and to obtain physical samples from his person. (T. 2043-45) Since Defendant did not invoke his Fourth Amendment rights, the State could not have commented on such an invocation.[9] *See Hudson*, 992 So. 2d at 111.

Moreover, the brief comment about the discussion of hunting being uncontradicted was also not fundamental error. While

[9] While Defendant insists that the comment had no purpose, this is untrue. The crime scene technician who looked at the Lincoln the first night explained that the reason they did not conduct a thorough search at that time was that they were waiting for a search warrant. (T. 2715-16) As such, the reason why the police decided to get a search warrant was pertinent to the case.

Defendant insists that he was the only person who could have contradicted this account, he himself elicited that there were several hundred people in the search area where this conversation took place. (T. 2125) Thus, Defendant was far from the only person who could have contradicted this statement. Yet, all of the evidence was that they did chat about hunting, and Defendant did not even suggest during cross that the conversation had not occurred.[10] (T. 2166-82) Moreover, Maycock provided an eyewitness account of the crime that was corroborated by evidence of her and Quatisha's injuries, DNA evidence and Lawyer's testimony. Under these circumstances, this brief comment was not fundamental error. *Doorbal v. State*, 837 So. 2d 940, 956-57 (Fla. 2003).

Moreover, this Court had noted that while motive is not an element of first degree premeditated murder, the presence of a motive does support the existence of premeditation. *Norton v. State*, 709 So. 2d 87, 92 (Fla. 1997). Here, the State argued that Defendant's motive for these crimes was that Defendant wished to have a sexual relationship with Maycock and that he became angry when he realized that she would not have such a relationship with him despite having accepted assistance from

[10] It should be noted that Defendant acknowledged this conversation had occurred during his testimony at the suppression hearing. (V31. 55-56)

him. (T. 2648-51) Moreover, it should be remembered that Maycock had testified that she had met Defendant and his family through church and accepted the assistance because he lead her to believe they were charitable acts. Defendant had made statements to the police disparaging Maycock as a manipulative and promiscuous woman. Given these circumstances, the State's comments that Defendant had used his charity toward Maycock as a means of coercing a sexual relationship with her were not attacks on his character nor appeals to religion. Instead, they were merely proper inferences regarding his motive for committing these crimes that were supported by the evidence. (T. 2648-51) As such, the comment was not improper.

While Defendant insists that the State comment about lesser included offenses were improper, this is not true. This Court has recognized that comments that merely urge a jury to follow its instructions are not improper. *Rodriguez v. State*, 919 So. 2d 1252, 1282-83 (Fla. 2005). Here, the State merely informed the jury of instructions regarding what instructions it would be receiving regarding the conduct of deliberations and consideration of lessers that were consistent with the standard jury instructions. (T. 2674); Fla. Std. Jury Instr. (Crim.) 3.7, 3. 10 & 3.12. It then reviewed the individual instructions for each offense and lesser, explained why the evidence supported

the greater offense and made an argument consistent with the jury instructions on why the lessers should be rejected. (T. 2674-83); Fla. Std. Jury. Instr. (Crim.) 3.10 & 3.12, this comment was nothing more than urging the jury to follow the law and not improper under *Rodriguez*.

Finally, while Defendant insists that it was improper for the State to suggest that Quatisha suffered some of her abrasions by being drug by an alligator was unsupported by the evidence, the comment was again a proper comment on the evidence. During his testimony, Dr. Perper outlined numerous antemortem, perimortem and postmortem injuries and abrasions to Quatisha. (T. 2509-37) Included in these injuries were perimortem and postmortem alligator bites and perimortem fish bites to her face and upper lip. (T. 2509-11, 2514, 2522, 2526-34, 2534-35) Given the postmortem abrasions and the perimortem fish and alligator bites, it was a proper inference for the State to assert that the postmortem abrasions were caused to dragging along the edge of the canal. (T. 2726) This is particularly true, as Dr. Perper's testimony that certain of the injuries were road rash was directed to a limited set of Quatisha's injuries. (T. 2517-18) Given all of these circumstances, the record does support that the State's argument about the abrasions and injuries as a whole. Defendant's

contrary argument should be rejected.

Since the vast majority of the State's comments were proper and the evidence was overwhelming, Defendant has not carried his heavy burden of showing that any impropriety in the comments, either individually or cumulative, deprived him of a fair trial.

VII. BURGLARY.

Defendant next asserts that the trial court erred in denying his motion for judgment of acquittal regarding the burglary charge. However, the trial court properly denied this motion.

At trial, it was undisputed that Maycock expressly asked Defendant to leave her apartment before he committed any criminal acts. (T. 1700-02) Despite this undisputed fact, Defendant insists that he was not guilty of burglary because he did not hide in Maycock's apartment before attacking her after she asked him to leave. He avers that *Delgado v. State*, 776 So. 2d 233 (Fla. 2000), compels this result. However, the issue in *Delgado* was not whether a person who had been expressly asked to leave a property could be guilty of a burglary. Instead, the issue was whether a withdrawal of a consent could be proven simply by evidence that a defendant committed a criminal act in a home after entering consensually. *Id.* at 237-40. As such, *Delgado* had no occasion to decide the effect of an expressed

revocation of consent.

Moreover, this Court recently addressed a situation in which a home owner had expressly told the defendant to get out before his criminal activity began. *Bradley v. State*, 33 So. 3d 664, 668 (Fla. 2010). As part of its ruling that the defendant never had a valid defense to the burglary in that case, this Court noted that any consent that the defendant might have had was expressly revoked before the criminal activity began. *Id.* at 683. This Court added that it never intend for consent to become irrevocable under *Delgado*. *Id.*

Moreover, it should be remembered that the definition of crimes and their defense is a legislative task. *See Reynolds v. State*, 842 So. 2d 46, 49 (Fla. 2002); *State v. Jackson*, 526 So. 2d 58, 59 (Fla. 1988); *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969). This Court's role is limited to interpreting the Legislature's intent.[11] *See McLaughlin v. State*, 721 So. 2d 1170 (Fla. 1998). Here, the Legislature defined the consent defense at issue here as requiring either that the premises be opened to the public or that the defendant be "licensed or invited to enter or remain." §810.02(1), Fla. Stat. (1997). Here, there was no evidence that Maycock's apartment was opened to the public.

[11] As such, Defendant's assertion that the Legislature committed a separation of powers violation by informing this Court that it had misconstrued the Legislature's intent is frivolous. *Munoz v. State*, 629 So. 2d 90, 98 (Fla. 1993).

As such, Defendant needed to be licensed or invited. Florida law has long recognized that a licensor or invitor has the power to revoke any license or invitation at will and that once such a revocation has occurred, the licensee or invitee is no long licensed or invited. *See Dance v. Tatum*, 629 So. 2d 127, 128-29 (Fla. 1993); *see also Byers v. Radiant Group, LLC*, 996 So. 2d 506, 509 (Fla. 2d DCA 2007). As such, any license or invitation that Defendant may have previously possessed no longer existed before his crimes. Given these circumstances, Defendant's actions did proper fit the intent of the burglary statute. This is particularly true, as the Legislature confirmed that it did intend to criminalize this conduct through the adoption of §810.015, Fla. Stat.[12] His argument to the contrary was properly rejected, and his burglary conviction should be affirmed.

Even if the evidence was insufficient to prove a burglary, the only relief to which Defendant would be entitled concern his burglary conviction. The jury was expressly instructed the

[12] Defendant's contention that recognizing the Legislature's true intent would be an ex post facto violation is also frivolous. As the United States Supreme Court has stated, "An ex post facto law is one which 'punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed.'" *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (quoting *Beazell v. Ohio*, 269 U.S. 167 (1925)). Here, Defendant's acts were not innocent when they were done.

predicate offense for the felony murder was limited to kidnapping. (R. 2916) Moreover, the attempted murder charge against Maycock was based on a premeditated murder theory only, and Defendant was convicted of this charge. (R. 2938, 2948) The State's theory of the kidnapping was that it occurred when Defendant removed Maycock and Quatisha from the home, which only occurred after the burglary was completed. (T. 2719-20) As such, any insufficiency of the burglary charge would only effect the burglary conviction. *See Steverson v. State*, 787 So. 2d 165, 167-68 (Fla. 2d DCA 2001).

VIII. CHILD NEGLECT.

Defendant next asserts that asserts that the evidence was insufficient to convict him of child neglect because the State allegedly failed to prove that he was a caregiver. However, Defendant is entitled to no relief, as this issue is not preserved and does not rise to the level of fundamental error.

An issue regarding the sufficiency of the evidence to sustain a conviction must have been raised as a specific ground for a judgment of acquittal to be preserved for review. *Brooks*, 762 So. 2d at 894-95. Merely making a boilerplate motion for judgment of acquittal is not sufficient to preserve the issue. *Victorino v. State*, 23 So. 3d 87, 103 (Fla. 2009). Here, Defendant merely made boilerplate motions for judgment of

acquittal both at the end of the State's case and after all of the evidence had been presented. (T. 2255, 2258-59, 2600-01) As such, this issue is not preserved for review and should be rejected.

In tacit recognition that the issue is not preserved, Defendant comments that an issue regarding sufficiency of the evidence may be deemed fundamental error. However, this Court has held that an argument regarding the sufficiency of the evidence is only fundamental error if "the evidence is totally insufficient as a matter of law to establish the commission of a crime." *F.B.*, 852 So. 2d at 231.. Here, that standard is not met. As Defendant acknowledges, a caregiver is defined by §827.01(1), Fla. Stat. as "a parent, adult household member, or other person responsible for a child's welfare." This Court has recognized that definitions from chapter 39 are instructive in defining terms in chapter 827. *Dufresne v. State*, 826 So. 2d 272 (Fla. 2002). In §39.01(47), Fla. Stat., the term "other person responsible for a child's welfare" includes such people as babysitters and individuals with custody of a child even on a temporary basis. In *Law v. Commonwealth*, 537 S.E.2d 6, 9-10 (Va. Ct. App. 2000), the court held, under a similar statutory provision, that an adult who voluntarily assumed custody of children could be considered responsible for the children's

welfare even without parental consent.

Defendant, by his own admission, took Quatisha from her home so that she would have someone to supervise her. (T. 2215-16) He also admitted that he kept Quatisha with him after leaving Maycock in Palm Beach County for this same reason. (T. 2221) Thus, Defendant voluntarily assumed the role of Quatisha's babysitter. Since baysitters are included in the definition of an "other person responsible for a child's welfare," it cannot be said that the State's evidence that Defendant was Quatisha's caregiver was so lacking that a crime was shown to have been committed. As such, Defendant's conviction for child neglect was not fundamental error. *F.B.*, 852 So. 2d at 231. The conviction should be affirmed.

IX. ESCAPE.

Defendant next asserts that the trial court erred in finding the evidence sufficient to sustain his conviction for attempted escape. However, this issue is unpreserved and meritless.

As noted above, a defendant must have moved for a judgment of acquittal on the specific grounds argued on appeal for the issue of the sufficiency of the evidence to be preserved and a bare bones motion for judgment of acquittal does not preserve a challenge to the sufficiency. *Victorino*, 23 So. 3d at 103. Here,

Defendant merely made boilerplate motions for judgment of acquittal both at the end of the State's case and after all of the evidence had been presented. (T. 2255, 2258-59, 2600-01) As such, this issue is not preserved for review and should be rejected.

Moreover, evidence is insufficient "in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." *Orme v. State*, 677 So. 2d 258, 262 (Fla. 1996). "The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict," reversal is not required. *Darling v. State*, 808 So. 2d 145, 155 (Fla. 2002)(quoting *State v. Law*, 559 So. 2d 187, 188 (Fla. 1989)). To meet this burden, the State is not required to "rebut conclusively, every possible variation of events;" it only has to present evidence that is inconsistent with Defendant's reasonable hypothesis. *Darling*, 808 So. 2d at 156 (quoting *Law*, 559 So. 2d at 189). As such, where a defendant did not present a particular theory of innocent in the trial court, the State is not required to rebut that theory. *Beasley v. State*, 774 So. 2d 649, 659 n.6 (Fla. 2000).

Here, Defendant never presented a theory in the trial court

that his actions regarding the ceiling grate was an attempt to commit suicide. Instead, he basically ignored the attempted escape charge in both his opening statement and closing argument. (T. 1615-21, 2685-2718) Since Defendant did not present this theory below, the State had no obligation to rebut it, and Defendant cannot now complain that it did not so. *Beasley*, 774 So. 2d at 659 n.6. The conviction should be affirmed.

Even if Defendant had presented a suicide theory below, the evidence would still have been inconsistent with this theory. A review of the pictures of the ceiling grate shows that Defendant did not pull them down in an attempt to hang himself. Instead, he bent both side of the grate upward was that the rivets connecting the grates were fractured, and the grate was in a position to allow access to the crawl space above it. (R. 2778, 2786-90, 2066) Moreover, Suco testified that Defendant did not appear emotional for most of the interview and that Defendant appeared to be surveying his surroundings when he was taken to the bathroom. (T. 2056-57, 2060) Since this evidence was inconsistent with Defendant being suicidal and with him actually attempting to commit suicide, the evidence was sufficient to support the attempted escape conviction. *Darling*, 808 So. 2d at 155. It should be affirmed.

X. PENALTY PHASE CLOSING.

Defendant next asserts that the prosecutor made improper comments during closing argument at the penalty phase. However, the comments provide no basis for relief, as many are unpreserved, the trial court's actions regarding the preserved comments was proper and the comments do not constitute fundamental error, either individually or cumulative.

To preserve an issue regarding a comment in closing, it is necessary for a defendant to object to the comment contemporaneously on the grounds asserted on appeal and obtain a ruling on the objection. *Gonzalez*, 786 So. 2d at 568; *Brooks*, 762 So. 2d at 898-99; *Richardson*, 437 So. 2d at 1094. Further, if a trial court sustains the defendant's objection, it is necessary for him to move for a mistrial to preserve an issue about the comment, which is then considered to be the denial of the motion for mistrial. *Rose*, 787 So. 2d at 797 (Fla. 2001). When a defendant simultaneously objects and moves for a mistrial and the trial court only rules on the motion for mistrial, the only issue that is preserved is the denial of the motion for mistrial. *Poole*, 997 So. 2d at 391 n.3. A motion for mistrial is only properly granted if the comment was such as to have deprived the defendant of a fair trial. *Salazar*, 991 So. 2d at 371-72. When an issue regarding a comment is not preserved for

review, this Court will only consider the issue if the comment constitutes fundamental error. *Hayward*, 24 So. 3d at 40-41. In demonstrating fundamental error, a defendant has a "high burden" of showing that the error was such that it "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Id.* at 41.

Applying this precedent here, the majority of the comments are unpreserved. Defendant did not object to a number of the comments at all. (T. 3314-15, 3355, 3357, 3359-60, 3361-63) Moreover, when Defendant objected to the comment that mentioned the legislature and the comments about his counsel yelling, the trial court only action was to admonish the prosecutor. (T. 3313, 3314, 3326) Thus, to the extent that this action can be considered a ruling, it sustained the objections. However, Defendant did not move for a mistrial based on these comments. (T. 3369)

Moreover, the trial court did not abuse its discretion in overruling Defendant's objections. Defendant first asserts that the State "vouched" for the death penalty. However, this is not true. In the portion of the comment to which the trial court overruled an objection, the State never mentioned its decision to seek the death penalty. Instead, it merely discussed the fact

that a death sentence depended on the facts of the case. In *Rodriguez*, 919 So. 2d at 1283, this Court found that a similar comment as a means of introducing the concepts of aggravation and mitigation was not improper. As such, the trial court did not abuse its discretion in overruling the objection to this comment.

While Defendant next asserts that the trial court abused its discretion in overruling a Golden Rule objection to a comment about HAC, this is not true. In *Wade*, 35 Fla. L. Weekly at 243, this Court just held that a comment by the State explaining the circumstances of the offense and asking rhetorical questions about events that heightened the victims' fear did not violate the Golden Rule. Similarly, here, the State comments merely explained the circumstances of the crime that would have caused Quatisha's fear and asked rhetorical questions about that fear. (T. 3330-32) As such, the trial court did not abuse its discretion in finding that this was not a Golden Rule argument.

The trial court also properly overruled Defendant's objection to the comment about his having been a good husband. During her testimony, Defendant's wife gave her definition of a good husband and good father. (T. 3239, 3242) Moreover, evidence was presented at the guilt phase that Defendant was attempted to

have a sexual relationship with Maycock and Defendant even argued that such a relationship existed during his closing. Based on this evidence, the State merely pointed to Cyteria's definition of a good husband and father and pointed out that his actions toward Maycock showed that he was not one. (T. 3351) Thus, this comment was merely a proper comment on the evidence.[13]

Moreover, the trial court also did not abuse its discretion in overruling the objections to the State's comments about his mitigation. As this Court has recognized, it is proper for a judge and jury to consider the unfavorable comparison between a defendant and his witnesses from a similar background in weighing mitigation. *Lugo v. State*, 2 So. 3d 1, 13 (Fla. 2008); *Williamson v. State*, 681 So. 2d 688, 698 (Fla. 1996). Moreover, this Court has held that it is proper for the State to argue that the jury should not be swayed by sympathy. *Ford v. State*, 802 So. 2d 1121, 1131-32 (Fla. 2001). Here, the State's comments about Defendant's mitigation were directed at a comparison between Defendant, who had spent most of his adult life in jail,

[13] Further, while Defendant suggests that it was improper to allow the State to question his wife about whether he had extramarital affairs, this is not true. A prosecutor may question a defense witness, particularly a defense character witness, where the prosecutor has a good faith basis to ask the question, particularly where it has demonstrated that basis to the court before asking the question. *Carpenter v. State*, 664 So. 2d 1167, 1168 (Fla. 4th DCA 1995); *Greenfield v. State*, 336 So. 2d 1205 (Fla. 4th DCA 1976). Here, the record reflects that the State did have a good faith basis. (T. 3144-48, V113. 63-64)

and his family members, who had all become productive members of society to minimize the weight and to assert that Defendant had presented numerous witnesses to testify to cumulative evidence merely to encourage the jury to feel sorry for the witnesses, which was not a proper consideration. (T. 3340-44) Given this context, the comments were not improper.

Further, the trial court did not abuse its discretion in denying a motion for mistrial based on the State's request that the jury think of fear for 5 minutes. (T. 3333) As soon as the comment was made, the trial court sustained Defendant's objection, admonished the prosecutor and instructed the jury to disregard the comment. Given these circumstances, it cannot be said that the mere mention of thinking about fear deprived Defendant of a fair penalty phase. *See Doorbal*, 837 So. 2d at 958-59. The trial court should be affirmed.

Moreover, the unpreserved comments did not rise to the level of fundamental error. While Defendant insists that the State suggested that it had screened the case and decided that it was worthy of the death penalty, this is not true. Instead, the State was merely describing to the jury the process through which it was to determine the appropriate sentence in this matter. (T. 3312-13) As this Court determined in *Rodiguez*, 919 So. 2d at 1283, such comments are not impressible. Moreover, the

comment itself was brief, the trial court instructed the State to move on and the State then discussed its burden of proof, the aggravators that had been found during the guilt phase and the qualitative nature of the weighing process. As such, this comment was not fundamental error.

Moreover, the State's comment that Defendant had earned the death penalty was also proper in context. The State had already reviewed the aggravators and mitigators. (T. 3315-52) In this comment was merely suggesting that the enormity of the aggravation that was based on Defendant's own conduct merited the imposition of the death penalty. (T. 3355) Given this context, the comment did not rise to the level of fundamental error. *Gonzalez v. State*, 990 So. 2d 1017, 1029 (Fla. 2008).

Moreover, the comments about the alternative life sentence also did not rise to the level of fundamental error. As this Court recently recognized in *Wade*, 35 Fla. L. Weekly at S243, a comment that uses the phrase "easy way out" without asserting that the jury had a duty to recommend death do not rise to the level of fundamental error. Here, the State made just such a comment. (T. 3355) Thus, this comment did not rise to the level of fundamental error either.

Further, this Court has recognized that where a defendant chooses to place his character at issue during the penalty

phase, the State is permitted to rebut the defendant's evidence. *See Gore v. State*, 784 So. 2d 418, 433 (Fla. 2001). Here, Defendant placed his character for nonviolent at issue. In his opening statement at the penalty phase, Defendant admitted that he had been convicted of a number of violent felonies but insisted that these crimes were not within his character and were the result of panic. (T. 2890, 2898-99) During his penalty phase presentation, Defendant had Dr. Fisher testify that Defendant would not be violent in prison. (T. 2983-84) Dr. Fisher based this opinion on the assertion that Defendant had allegedly not engaged in violent conduct during his previously imprisonment. *Id.* However, Dr. Fisher acknowledged that Defendant had engaged in violent conduct both in society and during pretrial incarceration. (T. 2987-88, 2997-98) Given these circumstances, Defendant placed his character for nonviolent at issue. Thus, there was nothing improper about the State arguing that Defendant's record of engaging in violent criminal conduct rebutted Defendant's assertion of nonviolence. (T. 3315-22)

The State's comments about the manner in which Defendant argued also did not rise to the level of fundamental error. During his opening statement, Defendant argued that HAC and CCP did not apply in a manner that provoked repeated objections and admonitions about the argumentative nature of the statements.

(T. 2890-98) Moreover, Defendant's counsel admitted that he tended to shout during his arguments and even apologized to the trial court for shouting at it during a legal argument. (T. 3288) Thus, the State's comment did little more than remind the jury of conduct they had observed. Moreover, the trial court did admonish the prosecutor for making these comments. (T. 3314, 3326) Given these circumstances, it cannot be said that the jury would not have sentenced Defendant to death had the prosecutor not mentioned the shouting. This is particularly true, given the strength of the aggravation and weakness of the mitigation. Thus, the comments did not rise to the level of fundamental error.

The arguments concerning Hoadley were made in fair response to Defendant's argument. During his guilt phase argument, Defendant accused the police of testifying falsely about him. In fact, he went so far as to assert that the police had not recorded his statements for the express purpose of being allowed to lie about them even though the evidence was that statements were not recorded because Defendant refused to give a recorded statement. During his opening statement at the penalty phase, Defendant continued on this theme. In fact, he argued that his cross examination during the guilt phase and evidence that the prosecutor allegedly directed the police to interview his family

members shortly after the crime would show that the State was manufacturing evidence and improperly preventing Defendant from having evidence to support a death sentence. (T. 2892-95) Given these circumstances, the State's comment that Defendant would be attacking Hoadley because he supplied evidence to support an aggravator and obtained evidence regarding Defendant's background for the purpose of preventing a mitigation case was unsupported by the evidence were a fair response to Defendant's argument. *Pagan*, 994 So. 2d at 1013. Thus, the comments provide no basis for reversing Defendant's sentence.

Given these circumstance, the State's comments, individually or cumulatively, deprived Defendant of a fair penalty phase. This is particularly true when one considers that Defendant attacked Maycock in her apartment and choked her repeatedly simply because she had rebuffed his sexual advances and asked him to leave her apartment. Rather than simply leaving after his attacks had rendered Maycock unconscious, Defendant chose to take Maycock and Quatisha with him and drive them to Palm Beach and Broward Counties. When they tried to escape his clutches by jumping from his car, he stopped, retrieved them, brutalized Maycock further and suffered her in the trunk while Quatisha was present and capable of perceiving Defendant's actions toward her mother. Once in Palm Beach, Defendant removed

Maycock from the trunk, choked her in the unconsciousness again and left her for dead. He then took Quatisha to Alligator Alley and threw her into a canal. Moreover, Defendant had a long history of violent criminal activity in which he kidnapped or attempted to kidnap people and attempted to avoid justice by engaging in violence to escape custody. This evidence fully supported the trial court's finding of 5 aggravators: victim less than 12; during the course of a kidnapping; avoid arrest; CCP; and prior violent felonies. Additionally, the mitigation was exceedingly weak, consisting largely of testimony that his family loved him and thought highly of him despite the fact that he spent almost no time with them and did not support them because of his criminal activity and the assertion that he was adjust well to prison despite being a continuing escape risk.[14] Thus, these comments do not rise to the level of fundamental error. The sentence should be affirmed.

[14] Given these circumstances, Defendant's sentence was proportionate. *Arbelaez v. State*, 626 So. 2d 169, 178 (Fla. 1993).

XI. DEFENSE COMMENT.

Defendant next asserts that the trial court erred by sustaining the State's objection to a portion of his penalty phase closing argument. He asserts that this ruling precluded him from fully arguing his mitigation. However, the trial court did not abuse its discretion in sustaining the objection to a comment that mislead the jury about the nature of the weighing process and the manner in which it was to be conducted. This is particularly true, as Defendant was permitted to argue that each proposed nonstatutory mitigator should be weighed separately and did so.

Defendant asserts that the trial court's decision on the propriety of his closing argument presented a question of law, which is subject to de novo review, and cites to *State v. Glatzmayer*, 789 So. 2d 297 (Fla. 2001). However, *Glatzmayer* did not concern a ruling concerning a comment in closing at all. Instead, the issue there was whether a confession was subject to suppression based on the officers' answer to the defendant's question about obtaining an attorney. *Id.* at 303-05. Instead, this Court has held that it reviews a trial court's ruling on the propriety of closing arguments for an abuse of discretion. *Bigham v. State*, 995 So. 2d 207, 214-15 (Fla. 2008).

Applying this standard of review, the trial court did not

abuse its discretion in sustaining the State's objection to Defendant's closing argument. As this Court has long recognized, the weighing of aggravators and mitigators is a qualitative process; not a quantitative one. *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973). Moreover, this Court has stated that the evaluation of aggravators and mitigators should proceed by considering the evidence presented to determine which aggravators and mitigators had been established, assigning weight to each of the factors found and comparing the weights to each other. *See Fennie v. State*, 855 So. 2d 597, 607-08 (Fla. 2003). Here, the trial court properly found that the manner in which Defendant was commenting about this process was misleading.

Defendant began his explanation of the weighing process by suggesting that the jury should attempt to quantify the qualitative weight process by assigning a monetary value to each of the aggravators and mitigators. (T. 3383-84) During this discussion, Defendant was permitted to suggest that there were 29 or 30 mitigators to be considered. (T. 3383) When the State objected to the quantitative analysis, the trial court instructed the jury on the quantitative nature of the weighing process. (T. 3384-85) Undaunted, Defendant continued to equate the weighing process with a numerical calculation. (T. 3386-87)

He then asserted that if this process did not result in a finding in his favor, that the jury should then reconsider a particular proposed mitigator. (T. 3386) It was at this point that the trial court sustained the State's objection and found that this argument was misleading. (T. 3386-88) Given that Defendant was suggesting that the jury should not only find and weigh a particular proposed mitigator but that the jury should do so twice if the result of the weighing process did not favor him, the trial court did not abuse its discretion in finding that the argument was misleading. Moreover, the trial court expressly told Defendant that he could argue that each aspect of his character and record and the circumstances of the offense could be found and weighed separately and the record reflects that he did so. (T. 3388, 3392) Since Defendant was actually permitted to argue that the nonstatutory mitigators could be considered and weighed and actually did so, his claim that the trial court prevented him for making this argument is meritless. *See Orme v. State*, 24 So. 3d 536, 544 (Fla. 2009). The trial court should be affirmed.

XII. VICTIM IMPACT.

Defendant next asserts that the trial court abused its discretion in admitting Maycock's testimony about the effect of Quatisha's death on her health. According to Defendant, such

testimony exceeded the permissible scope of victim impact evidence. However, this issue is unpreserved and meritless.

In arguing to exclude the portion of Maycock's pre-written statement that concerned her health, Defendant did not argue that this evidence was not admissible because the effect on her health was not foreseeable. Instead, Defendant argued that this evidence was not admissible because the loss Maycock suffered was not a loss to the community. (R. 3417-19, V117. 19-20) Since this is not the issue that Defendant is raising on appeal, this issue is not preserved. *Wheeler v. State*, 4 So. 3d 599, 606 (Fla. 2009). The sentence should be affirmed.

Even if the issue was preserved, Defendant would still be entitled to no relief, as the trial court did not abuse its discretion in admitting this evidence.[15] While Defendant insists that the Court allowed the admission of victim impact evidence in *Payne v. Tennessee*, 501 U.S. 808 (1991), because the evidence concerned the defendant's culpability and required that the harm the defendant caused to be foreseeable, a review of that decision shows that it actually held that evidence of the harm a defendant caused was admissible regardless of whether it was foreseeable. *Id.* at 819-21, 825. As such, Defendant's argument

[15] This Court reviews the admission of victim impact evidence for an abuse of discretion. *Deparvine v. State*, 995 So. 2d 351, 378 (Fla. 2008).

is meritless and should be rejected. *Franklin v. State*, 965 So. 2d 79, 97-98 (Fla. 2007); *Rose*, 787 So. 2d at 803; *Mansfield v. State*, 758 So. 2d 636, 649 (Fla. 2000). Moreover, while Defendant asserts that he had no way of rebutting this testimony, Defendant is still entitled to no relief. In making this argument, Defendant ignores that it was he who proposed having the victim's read prepared statements and stated that in exchange for this limitation of victim impact evidence, he would not seek to cross examine the victi(V125. 2819-20) Moreover, even after the trial court ruled that this portion of Maycock's statement was admissible, Defendant made no attempt to withdraw for his stipulation that he would not cross examine the victim impact witnesses. (V117. 19-20, T. 2904-14) Given that Defendant stipulated that he would not cross examine the witnesses in exchange for their being required to read prepared statements, he cannot now complain that he was unable to cross examine the witnesses. *Penalver v. State*, 926 So. 2d 1118, 1136 (Fla. 2006). The trial court should be affirmed.[16]

[16] As part of this argument, Defendant also suggests that the trial court abused its discretion in denying his request for discovery of Maycock's medical records and that Crohn's disease is a genetic defect. However, Defendant did not request the records to use to rebut penalty phase evidence and was informed that the State did not possess the records. Thus, the denial of the request was proper. *Sinclair v. State*, 657 So. 2d 1138, 1141 (Fla. 1995). Moreover, the cause of Crohn's disease is unknown and that stress, at least, exacerbates the symptoms of the

XIII. PRIOR FELONY.

Defendant next asserts that the trial court abused its discretion in admitting the arrest affidavit regarding his prior conviction during the penalty phase. However, this issue is unpreserved and meritless. Further, any error would be harmless.

As this Court has held, an issue is not preserved unless it was the specific basis of the objection below. *McWatter*, 36 So. 3d at 639; *Williams*, 967 So. 2d at 748 n.11. Here, the record does not reflect that Defendant ever objected to the admission of this evidence on the grounds that the documents constituted testimonial hearsay for witnesses who were not shown to be unavailable or who he lacked a prior opportunity for cross examination. Instead, it reflects that in moving to declare §921.141(1), Fla. Stat. unconstitutional, Defendant argued that his right to confrontation would be violated by the admission of hearsay that lacked sufficient indicia of reliability or did not fall within a firmly established hearsay exception, despite the fact that this motion was filed on June 2, 2006, and *Crawford v. Washington*, 541 U.S. 36 (2004), was decided on March 8, 2004. (R. 766-70) Further, when Defendant made a specific motion in limine regarding the documents in issue, Defendant did not

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disease. *Antonsen v. Ward*, 571 N.E.2d 636, 637 (N.Y. 1991); *Duos v. Evangeline Parish School Board*, 499 So. 2d 1067, 1068 (La. Ct. App. 1986); *Nezdropa v. Wayne County*, 394 N.W.2d 440, 445 (Mich. Ct. App. 1986).

mention the confrontation clause at all, objecting only that the evidence was hearsay. (T. 2844-45) When the State responded that he had stipulated to the facts, that the Coles were unavailable and that hearsay was admissible, Defendant stood mute. (T. 2845-46) Given these circumstances, it cannot be said that Defendant's present objections were ever specifically raised below. As such, the issue is not preserved and should be rejected.

Even if the issue was preserved, it should still be rejected. A defendant confesses to the all the facts of a crime by pleading guilty. *United States v. Broce*, 488 U.S. 563, 569 (1989); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *McCrae v. State*, 395 So. 2d 1145, 1154 (Fla. 1981). This Court has held that a defendant does not have a right to confront a declarant whose statements Defendant has adopted as his own admissions. *Globe v. State*, 877 So. 2d 663, 672-73 (Fla. 2004). Here, Defendant pled guilty to the crimes against the Coles and stipulated that the arrest affidavit provided the facts to support his plea. (R. 3463, 3468, 3470) As such, he confessed and admitted these facts. Having adopted these statements as his own admission, Defendant's confrontation claim is meritless. The trial court should be affirmed.

Further, any error would be harmless. This Court has

previously held that admission of certified copies of convictions renders the admission of hearsay testimony about them harmless. *Diaz v. State*, 945 So. 2d 1136, 1153-54 (Fla. 2006). It has also held that the improper consideration of convictions to support the prior violent felony aggravator was harmless, where the defendant had other prior violent felonies that were properly admitted. *Franqui v.* State, 699 So. 2d 1313, 1328 (Fla. 1997). Here, the State admitted certified copies of the convictions regarding the Coles and the prior violent felony aggravator was based not only on the crimes against the Coles but also on the crimes Defendant committed against Davis and Bermudez. (R. 3456-60, 3699) As such, any error in the admission of the arrest affidavit would be harmless. The trial court should be affirmed.

XIV. *RING.*

Defendant next asserts that his death sentence violates *Ring v. Arizona*, 536 U.S. 584 (2002). However, this Court has repeatedly rejected this claim, where the during the course of a felony aggravator and prior violent felony aggravator are present, as is true here. *Reese v. State*, 14 So. 3d 913, 920 (Fla. 2009); *Deparvine v. State*, 995 So. 2d 351, 379 (Fla. 2008). Thus, this issue is meritless.

XV. CUMULATIVE ERROR.

Defendant finally asserts that he is entitled to a new trial because of the cumulative effect of errors. However, this Court has repeatedly held that this claim is meritless were the individual allegations of error are unpreserved or meritless. *Victorino*, 23 So. 3d at 108; *Muehleman v. State*, 3 So. 3d 1149, 1165 (Fla. 2009). As argued above, this is true here. The trial court 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 Andrew Stanton, Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, FL 33125, this 16th day of August 2010.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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