IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-51

EUGENE W. McWATTERS,

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR MARTIN COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Eugene McWatters, Defendant below, will be referred to as "McWatters", Appellant, or defendant. Appellee, State of Florida, will be referred to as "State". Reference to the record on appeal will be by "R", to the transcripts by "T", to supplemental materials by "SR" or "ST", and to McWatters's brief will be by "IB", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On July 6, 2004, McWatters was indicted for first-degree murder of and sexual battery upon Jackie Bradley ("Bradley"), Christal Wiggins ("Wiggins"), and Carrieann Caughey ("Caughey") in three separate cases. He was also indicted for petit theft from Caughey. The defense agreed to consolidate the Wiggins and Caughey cases. The Bradley case was consolidated with the others after the State's Williams rule motion was granted. Voir dire commenced September 11, 2006 and a jury was seated on September 18, 2006. Opening statements immediately followed. On September 28, 2063 the jury found him guilty on all counts save the petit theft which had been dismissed (T.2979).

Following the October 3, 2006 penalty phase, the jury recommended death for all three murders by the following margins: 10 to 2 in the Wiggins murder; 9 to 3 in the Bradley murder; and 10 to 2 in the Caughey murder. (T.3870) The trial court held the Spencer v. State, 615 So. 2d 688 (Fla. 1993) hearing on December 4,

2006. The court found the following aggravating factors and gave each great weight: contemporaneous conviction of a violent felony; committed while engaged in sexual battery; committed in a cold, calculated, and premeditated manner ("CCP"); and was especially heinous, atrocious, or cruel ("HAC"). The court found the following ten non-statutory mitigating factors: early separation from mother (little weight); bad home life and used by aunt (little weight); unstable home life with physical abuse and neglect (moderate weight collectively); lack of parental support (little weight); childhood poverty (little weight); loved family member (little weight); learning disabilities with some emotional disturbances at school (moderate weight collectively); inability to adjust to emotional condition (little weight); history of substance abuse (little weight); and childhood emotional problems with no adult treatment (moderate weight). It imposed death for the three murders and sentenced McWatters to consecutive life sentences for the three sexual battery convictions. (R:498, 546-55, 4402-45).

The facts developed at the trial established that McWatters lived with his sister, Jessica Aleman, in Pt. Salerno, which was the last duplex on the street where Bradley's body was found. (T.2082) Aleman allowed him to live in the residence but refused to give him a key or to allow him to bring anyone to it. (T.2103-2229, 3613, 3912-13) He visited the homeless community in Pt. Salerno; the individuals in that community knew and recognized him. (T. 1905-2001)

Bradley was a member of a homeless community camping out in the Golden Gate area of Pt. Salerno. In March of 2004, she lived with Terry McElroy ("McElroy") in the woods and he saw her daily. On Sunday March 28, 2004, a number of individuals were hanging out together in the woods and everyone was drinking. Present were Thomas Field ("Field"), Austin Cottle ("Cottle"), Bradley, McElroy, and a number of others. McWatters appeared sometime around dusk and joined the group. McElroy got into an argument with another man and was beaten. After his beating, he and Bradley moved his camp over behind the bank building next to Field's camp. Later that night Bradley announced that she wished to shower and clean up. McWatters offered to take her to his sister's home, three blocks away, to use the bathroom. Despite Field and McElroy trying to dissuade her, Bradley left with defendant. (T. 1906-16, 1970-73, 1975-76). Field saw the pair pass Glenn Burbaugh ("Burbaugh") near the camp as they left.[1] Neither Field nor McElroy ever saw Bradley alive again. (T. 1947-48, 1977).

On March 31, 2004 Bradley's decomposing body was discovered floating in a drainage canal next to McWatters's home. (T. 2002-08, 2035-39, 2094). She was identified by her clothes by Field and her dental records. (T.2356-58) She was nude from the waist down and her shirt and bra were pulled up under her arm pits.

[1]After Bradley's body was discovered, Burbaugh commented that "revenge is best served cold." (T. 1967-68).

Her shoes were on the opposite side of the canal. (T.2040, 2325-26) On the canal bank next to the body, the grass was trampled. There was also a pile of 14 rocks next to the body on the bottom of the canal which had been used to weigh down and conceal it; the rocks were the same kind found in the runoff area further up the bank of the canal. There was no silt on the rocks. (T.2047-53, 2059) Her body was 100 feet from McWatter's house. (T.2082)

Martin County Sheriff Sergeant Sanford Shirk ("Shirk") qualified as an expert in rape-homicide cases. He testified that general hallmarks of a rape homicide are a female victim whose body is found partially clothed or nude in an isolated area, often having been moved after the killing in order to conceal it. (T. 2010-14). The condition and location of Bradley's body was consistent with a sexually motivated crime. (T. 2014-17). He said that her body could have been placed in the canal given the trampled grass near the top of the embankment where the body was floating. (T. 2021-30)

Charles Diggs ("Diggs"), the county medical examiner, determined that Bradley died from being manually strangled since her thyroid cartilage and hyoid bone were utterly crushed and there was hemorrhaging in the surrounding tissues which took considerable amount of force. (T. 2337-38, 2346-48) He found no evidence of a struggle although there was a tremendous level of decomposition. (T.

2367-68,2331-32) Condition and location of body consistent with a sexual homicide. (T. 2316-22)

In his April 2, 2004 interview McWatters denied socializing with folks from the neighborhood. (T. 2137, 2166-68) He also denied knowing Bradley or being with her the weekend of her disappearance. (T. 2160-62, 2235-36) He then admitted to being in camp the night McElroy was beaten, although Bradley was not there. (T. 2173-80, 2181, 2192) He denied ever being alone with her, having sex with her, or taking her to his sister's house that night. He denied that he ever blacked out from alcohol or drugs. (T. 2205, 2208)

On Sunday May 30, 2004 of Memorial Day weekend, Wiggins went to Donna Nicholson's home where Joseph Hebert, Cyndi Kaman and McWatters were. Her home was four to five houses from the Lil' Saints store. (T. 2606) They were partying, drinking and smoking dope. Hebert, Nicholson, and Kaman left to go to a motel around 10-11 PM. They attempted to get Wiggins to join them but she remained behind with McWatters. Last they saw her, she was walking down the street with defendant toward the Lil'Saints store. (T. 2388-92) They never saw Wiggins after she left with McWatters. (T. 2417-29).

McWaters appeared at the home a number of times after they returned from the motel, each time more fidgety and with fewer clothes. They refused to answer the door after the first time because he seemed "freaked out" and really high. He

did not have on his shirt or sneakers when he showed up after they returned; he had on flip-flops. (T. 2393-94, 2426-28) Jodie Janata ("Janata") also saw defendant at her home that night (early morning) of May 31, 2004. She lived 2 houses from the Lil' Saints store. (T. 2606) He tried to follow her into her house but had to be forcibly stopped. He was really hyper and sweaty. (T. 2410-11)

The police found Wiggins's on June 7, 2004 when he was canvassing the same park area for further evidence in the Wiggins murder, He followed circling vultures to a strong smell of decomposition where he saw light blue lingerie material, a sock, and then a body. (T.2562-67) It was in a very isolated area (T. 2586) and there were signs of a possible struggle with the dirt disturbed and a woman's underwear up in a tree. (T.2575, 2592) A pair of white sneakers were located 30 feet away in a palmetto bush. The body was decomposed to a skeletal state in the pelvic area. The bra and shirt were pulled up to the neck area and there were no clothes on the lower body. (T.2579-80, 2996-3000) The police identified the body based upon fingerprints. (T.2588-90,2594-97) The criminalist Earl Ritzline ("Ritzline") testified that the blue fabric turned out to be panties which were torn open in the front and along the crotch line indicating force was used to tear them. Her bra was torn and had bent closing hooks, again indicating force applied to it. (T. 2933-39)

Caughey was 18 years old living with her mother who last saw her wearing

jeans, a bathing suit top, sandals, and a shell necklace. (T. 2451) Caughey went to the Heritage Inn on May 30 where she smoked crack with Jerry Prevatt ("Prevatt"). The two left the hotel when Prevatt was robbed. Around 2 AM they went to the area where the Lil' Saints store was located where they saw McWatters on a bicycle. They spoke with him about getting more drugs. (T. 2464-68) They followed him to a trailer but he got no drugs. Caughey exited Prevatt's car at the Lil' Saints store saying she had friends in the area. Prevatt last saw her as she walked up Driftwood St. and saw defendant ride over to her and speak with her. That was the last time he saw her. (T. 2477-80)

The police found Caughey's body on June 3, 2004 when a deputy sheriff saw a pair of sandals next to some saplings near a pond and smelled a strong odor of decomposition.(T.2496-98) Her body was tucked into the brush in a secluded area of a park off of Lincoln street (T. 2587) and was nude below the waist with the shirt pulled up above the breasts. Shirk observed the similarities to the Bradley body, both having missing clothes, breasts exposed, and covered with vegetation. He opined that it looked like a sexually motivated murder. (T.2502-06,2967-69) The individual sandals were separated some distance from each other with one concealed from view. (T.2514-15) Her jeans were 12 feet from the body and had grass stains on them consistent with a struggle. The t-shirt was 20 to 30 yards away on the trail from the trailer to the woods. (T.2556-58) The body was 25-30 feet into

the woods and was covered with vegetation and debris in order to conceal it. The arms were outstretched and the legs were crossed. Surrounding trees and bushes were broken with the missing branches and foliage being on top of the body. (T. 2517-26) There was marked decomposition of the body which had been directly exposed to sprinklers and insects. There was a hole in the ground near the body with a sprinkler pipe in it. Shirk further opined that the body's position was consistent with someone dragging it into the woods by the arms and dropping it where it lay when the perpetrator stepped into the sprinkler hole. (T.2527-37) The police identified the body based upon fingerprints. (T.2588-90, 2594-97)

Diggs testified that the level of decomposition was consistent with death occurring four days earlier. (T.2962) There were high levels of cocaine in the body. The two styloid processes were broken, as was her hyoid bone, which often happens with manual strangulation. He said the cause of death was a homicide due to strangulation with unconsciousness within 15-30 seconds and death within 5 minutes.(T.2965,2970-72)The death was consistent with a rape homicide.(T. 2974)

Shirk testified that all three murders were similar in that all were partially clothed with missing clothing, all bodies were concealed, all were white women of similar builds, and all appeared to be sexually motivated homicides. (T. 2593)

Deputy sheriff Brian Bergen ("Bergen") fell into the sprinkler hole next to Caughey's body when he was investigating the crime scene, making him land right

next to the body. He also interviewed McWatters on June 7, 2004 and noted that he was on crutches, had a bandage or cast on his ankle, had bruises on his jaw, a cut on his eye, and scratch marks on the right side of his face. (T. 2597-2602)

In his June 7th statement McWatters admitted being at Nicholson's house Sunday night (May 30). (T.2687-92) Initially he maintained that he went home after that. Confronted with the many internal time and consistency conflicts in his statements, he vacillated as to when and how he broke his foot, going through a series of lies. (T.2708-2719, 2763-97, 2805) He eventually concedes that he stayed behind with a girl when Nicholson and her friends left for the motel, but said the girl got a ride with another man. (T.2732-44) He admitted to riding his bike around Lil'Saints and near the big pond on Lincoln Street. (T.2738-49) He denied knowing anything about the cases although he corrects the police when the deputy said the two cases were not related by saying "they're three." (T.2842) The detective said he did not mention finding the third body. (T.2856-57)

Convenience store clerk verified that McWatters showed up with a limp at 7 AM the day of the two murders and bought a beer. He returned three hours later on crutches. (T. 2811-14)

Michael Dougherty ("Dougherty") conducted the June 7th interview of McWatters. Defendant denied knowing Caughey when showed a picture of her. The detective spoke to him several times in the following days although not as

formal interviews. (T.2863, 2867-69) Charlotte Hurley ("Hurley") testified that she was a friend of Wiggins and that Christal and McWatters had smoked drugs together in 2002 in the woods behind Lil'Saints store. They used an area with mattresses near where the body was found. (T.2875-78)

Dr. Lillian Avner ("Avner") was an emergency room physician on duty the morning of May 31, 2004. She treated McWatters around 8:35 AM for a broken ankle. He had no strong odor of alcohol and was alert and oriented in a normal mental state. (T. 2884)

No forensic evidence linked McWatters to these three homicides. (T. 2944)

Roger Mittleman ("Mittleman") is the Medical Examiner for the 19th Judicial Circuit. He reviewed these three cases and determined that Wiggins was consistent with a rape homicide - remote location, clothing arrangement, on back, tox kit results. (T.2997, 3016) The sexual assault kit yielded no results due to the extreme decomposition of the body. (T.3005-08) There was a fracture of the Adam's apple which was typical for manual strangulation. (T.3010-11) Cause of death was from asphyxia from strangulation or possibly smothering with clear compression of the neck structures. Unconsciousness could happen within seconds if there was no struggle but might take a number of minutes if resistance. A person could regain consciousness if pressure eased. (T.3014-15) All three women were conscious when strangled. (T.3606-7)

McWatters inserted himself into police activity, repeatedly calling Dougherty and asking to work undercover. (T.3216-29) Eventually, Dougherty arranged for him to be arrested on June 23, 2004 by another officer, advised of his Miranda, and transported to the police station. At the station, the deputy placed him in the task force room where photographs and other evidence of the three homicides were. He remained for several minutes until he was escorted to the interview room past a number of witnesses in the three cases. (T. 3029-33)

Dougherty again interviewed McWatters on June 23, 2004. He did not readvise him of his Miranda rights. Defendant said that it was a mystery why he killed the three women. (T.3080-82) He said that he offered Bradley the use of his sister's shower and walked her over to the house; he took her because the opportunity presented itself. (T.3128-32) He said that it was possible he choked Bradley. It happened by the banana tree around 11:30 PM. He asked if he would get the death penalty. (T.3083-86) He admitted drinking with Bradley, walking along canal bank with her, then he tried to have sex with her. She resisted at first but then they had sex. Afterward, he saw what he had done but was unsure how it happened. He put her in the water, threw her clothes in and then threw rocks on top of her "trying to hide that bitch." (T.3099-3103, 3128-32) He put rocks on her to hide her because of what he had done. (T.3152)

He met Wiggins at Nicholson's earlier in the evening on May 30, 2004. He

left with her going into woods looking for drugs down Lincoln Street over next to the pond. (T. 3087, 3096, 3133-41) He said that Wiggins came to smoke dope and they went to have consensual sex on the path. He tore her panties off, took her shorts off, threw her shoes. Ripped her clothes off of her as part of "the game" but she did not get angry at him for doing so. She wanted him to pull out and as he started to get off, he "lost it" again. He does not know how he killed her. His hatred of his ex girlfriend came out during sex. He admitted to pulling her body by the arms across the ground into the woods. He hurt his ankle when he pulled "fucking what's her name" off the path. He tripped, dropped her, and fell right next to her. He also admitted to covering her with branches and leaves. This happened around 2 - 3AM. She was dead when he returned to Nicholson's house. (T. 3104-09, 3133-41)

McWatters stated that Caughey was looking for drugs and he had some. He saw her get out of Prevatt's car on Lincoln Street; he went over to her and told her about his drugs. He started having sex with her at the end of Lincoln. Wiggins was dead by then but it was the same night. He is responsible for her death although he cannot describe how it happened. He put her in the trees and tried to cover her up. He believes he killed her where they had sex. (T.3109-15, 3141-48)

McWatters admitted to hiding all three bodies because he knew what he had done and knew it was wrong. (T.3154,3165,3188) He admitted that he had already

killed Wiggins when he took Caughey into the woods to have sex. (T.3167-70) He changed clothes in the woods after the murders having borrowed clothes from the camp. (T.3173-75) He says he must have killed them with his hands but chooses not to think about how. (T.3178-3181)

McWatters accompanied Dougherty to the Wiggins crime scene and pointed to where he killed her and where he threw the panties. He correctly identified the tree area where the police had found the panties on June 7th. He then pointed across the pond to where he dumped Caughey's body.(T. 3191-97) In recorded telephone calls from the jail to his family, McWatters admitted to being with the three women and having sex with them. (T.3205-15)

McWatters presented numerous witnesses for mitigation evidence at the penalty phase. Michael Riordan, a psychologist, presented his life history, explaining that he lived with his aunt after his mother lost custody when he was 4. His aunt and her boyfriends physically disciplined and abused him to the point of leaving open wounds and bruises. At 9, he began drinking; at 13, he began living on the street. He became addicted to crack cocaine and had a history of depression. (T. 3653-3713)

Aileen Flanagan, his teacher, testified that McWatters was depressed, uncared for, and abused as a child and had a below average IQ. (T. 3628-37) Aleman was his cousin but was raised as his sister. She substantiated the abuse and

drug usage detailed by Riordan. (T.3719-56) Jenny Moore had a child with him but lost him to foster care due to her drug use. (T.3771-79)

Gregory Landrum, a psychologist, testified at the Spencer hearing that McWatters did not have a mental disorder and could distinguish right from wrong. (T.3917-36)

SUMMARY OF ARGUMENT

1. The police properly advised McWatters of his Miranda warnings which he voluntarily waived. The court properly denied the motion to suppress.

2. The court properly allowed Williams Rule evidence. The issue is unpreserved due to Appellant's waiver and motion to consolidate the cases.

3. The court properly allowed expert witness testimony on whether the crimes were consistent with rape-homicides.

4 & 5. There was sufficient evidence to prove premeditation, sexual battery and felony murder.

6. Neither defense attorney had a conflict of interest which prejudiced McWatters.

7. The court properly admitted photographs necessary to prove the case.

8. The court properly allowed nonhearsay statements in evidence.

9 & 10. The court did not abuse its discretion in disallowing a hearsay statement and allowing a witness to explain his behavior.

11. The court properly denied a motion to recuse the State Attorney's Office.

12 & 13. The court properly instructed on and found CCP.

14. The court properly instructed on and found HAC.

15. The Florida Death Penalty law is constitutional.

16. The Florida felony murder aggravator is constitutional.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED THE DEFENSE MOTION TO SUPPRESS DEFENDANT'S JUNE 23, 2004 STATEMENT.

In his first claim, McWatters argues the trial court erred in not suppressing his June 23, 2004 statement as being a surreptitious effort to circumvent Miranda thereby rendering it involuntary in violation of Miranda v. Arizona, 384 U.S. 436. This claim is without merit since the record shows McWatters knowingly and voluntarily waived his right to remain silent. The State asks this court to affirm the trial court's ruling.

The review standard is that "a presumption of correctness" applies to a court's determination of historical facts, but a *de novo* standard applies to legal issues and mixed questions of law and fact which ultimately determine constitutional issues. Smithers v. State, 826 So.2d 916 (Fla. 2002); Connor v. State, 803 So.2d 598 (Fla. 2001); Parker v. State, 873 So.2d 270, 279 (Fla. 2004). The trial court's ruling on the voluntariness of a confession should not be disturbed

unless it is clearly erroneous. Escobar v. State, 699 So. 2d 988, 993-994 (Fla. 1997); Davis v. State, 594 So. 2d 264, 266 (Fla. 1992). Where the evidence is conflicting, the trial court's finding will not be disturbed. Thomas v. State, 456 So. 2d 454 (Fla. 1984); Calvert v. State, 730 So. 2d 316, 318 (Fla. 5th DCA 1999). See Wuornos v. State, 644 So. 2d 1000 (Fla. 1994) (finding even though defendant's former lover encouraged defendant to confess, partly out of fear of prosecution as accomplice, as a whole, defendant's will not overborne by any official misconduct).

"When, as here, a defendant challenges the voluntariness of his or her confession, the burden is on the State to establish by a preponderance of the evidence that the confession was freely and voluntarily given." DeConingh v. State, 433 So.2d 501 (Fla. 1983). "In order to find that a confession is involuntary within the meaning of the Fourth Amendment, there must first be a finding that there was coercive police conduct." State v. Sawyer, 561 So. 2d 278, 281 (Fla. 2d DCA 1990), citing Colorado v. Connelly, 479 U.S. 157 (1986). "The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained." Sawyer, 561 So.2d at 281.

The trial court held an evidentiary hearing at the motion to suppress. McWatters testified that neither Lt. Cedric Humphrey nor the other officers read

him his Miranda rights. He conceded that he knew his rights from other arrests and convictions. (R:777-79) He also admitted that he had previously spoken with the police on these cases at least eight times before his June 23 statement and had done so freely and voluntarily. (R:782-93) On June 23 he did not even realize that he was under arrest. (R:794-97) The police never threatened him. He made a conscious decision to cooperate willingly to show them that he was innocent, just as he had done previously. (R:799-802)

> Q. I mean, because we've already went through a whole history of your cooperation with these guys, right?
> A. Right.
> Q. All right. And you continued in that vein of cooperation through the June 23rd statement, correct? You continued to cooperate?
> A. Yes, sir.
> Q. You continued to answer their questions without being forced to do so, correct?
> A. Well, there was -- it was -- I was under the opinion, you know, if I refused to cooperate, then they would -- would take it a step further. If I cooperated, then, you know what I mean, I could show them that I was innocent of the crimes.
> Q. I mean, you were hoping that you might be able to convince them that you didn't have anything to do with it; that's what you're saying?
> A. Yes, sir.
> Q. But that's a conscious decision you made on your own behalf to continue to talk and cooperate with them, right?
> A. Wouldn't you?
> THE COURT: Sir, if you could just answer the question.
> THE WITNESS: Yes, sir.

Id.

Dougherty testified that McWatters was cooperative and gave several interviews from April 2, 2004 through his interview on June 23, 2004. Dougherty

said that he made a plan to have Deputy Humphrey arrest defendant, read him his Miranda rights from a form card, and then transport him to the station, place him in a room with evidence in the three murders, and then let him see the witnesses sitting in the station. Dougherty did not re-read the Miranda warnings to him; he was concerned that McWatters might invoke his rights if he did so. (R:813-20, 834) Dougherty specifically verified that Humphrey indeed read him his rights. Dougherty never threatened or promised McWatters anything to get him to talk; the interaction was very similar to all the previous ones they had over the past several months. (R:831-34)

Humphrey testified that he personally arrested McWatters, placed him in handcuffs, and read him his Miranda rights from a form card he removed from his pocket. He asked him if he understood the rights and McWatters answered yes. McWatters specifically and repeatedly stated that he wanted to speak to Dougherty. (R:821-26) Deputy Dewayne Midgett heard Humphrey giving McWatters his Miranda rights. (R:837-41)

The record shows that police pursued this strategy in order to maintain a relationship Dougherty had developed with McWatters over the preceding two and a half months. It was not a plan to subvert his constitutional rights since they gave him the standard complete advisement. He acknowledged those rights and asked to

speak to a specific officer, thereby showing that he voluntarily waived his right to remain silent.

After the hearing the court made the following findings:

> The case involves the death of three women. The deaths occurred from late March 2004 through the end of May 2004. Beginning April 2, 2004, agents of the Martin County Sheriff's Office began speaking to the Defendant regarding his knowledge of the women and the homicides. There were many subsequent contacts between the Defendant and the detectives involved in this case. Some produced formal recorded statements, some did not. In each instance the Defendant met with the detectives voluntarily, was not in custody, was free to leave and spoke to the detectives freely and voluntarily without promises, threats or coercion.
>
> The Defendant appeared to be seeking to avoid connection to the deaths by appearing to be extremely cooperative with the detectives both in giving statements about the investigation and in volunteering to assist them in other matters. On the date of arrest, the primary detectives in this case learned there was an unrelated warrant for the Defendant. Detective Dougherty arranged for the Defendant to be arrested on the warrant. Detective Dougherty enlisted the aid of now Lieutenant, then Sergeant, Humphrey. The key instruction given by Detective Dougherty to Lieutenant Humphrey was to be certain to give a clean reading of Miranda to the Defendant at the time of arrest. On June 23, 2004, the Defendant was arrested by Lieutenant Humphrey.
>
> The Defendant's claim of extreme voluntary intoxication is not persuasive. Lieutenant Humphrey arrested the Defendant and gave him a thorough and accurate reading of his Miranda rights. The Defendant understood the rights. The Defendant repeatedly asked to be able to speak to Detective Dougherty. He was given that opportunity. There was no pressure, threats, intimidation, promises, inducements or coercion. The Defendant, as he had on many times on prior occasions, gave a free and voluntary statement upon a knowing and intelligent waiver of his rights.
>
> The law enforcement technique used on June 23, 2004 did not suffer from any factual or constitutional deficiencies.

(R:853-54)

The court's findings are supported by the record and its legal conclusions are proper. Moran v. Burbine, 475 U.S. 412 (1986) (finding constitution does not require suspect know and understand every possible consequence of Miranda waiver); Oregon v. Elstad, 470 U.S. 298, 316-17 (1985). Once Miranda warnings are given, official silence cannot cause a suspect to misunderstand the nature of his rights. See U.S. v. Washington, 431 U.S. 181, 188 (1977). As noted in Washington, a defendant who has been advised he has the right to remain silent is in a curious position to complain his statement was compelled. Id. There is no constitutional requirement a suspect be given all the information he may feel useful in making his decision or "might...affect his decision to confess." Moran, 475 U.S. at 422. The police have never been required to help a suspect decide whether or not to talk. Id. It has never been a constitutional requirement the police make sure the defendant's waiver was a prudent decision.

McWatters contends that the detectives engaged in gamesmanship to dilute the effectiveness of the Miranda warnings which resulted in an involuntary statement. The U.S. Supreme Court held that the deception of an officer posing as fellow inmate to get a confession insufficient to render the trial court's finding of voluntariness erroneous. Ill v. Perkins, 496 US 292(1990). In Colorado v. Spring, 479 US 564 (1986) the Court found a voluntary waiver even though the police did not advise defendant of all charges when he waived his rights. Police deception

does not automatically invalidate a confession especially where there is no doubt that the defendant was read and understood his Miranda rights. Frazier v. Cupp, 394 U.S. 731 (1969); see State v. Cayward, 552 So. 2d 971, 973 (Fla. 2d DCA 1989); Paramore v. State, 229 So.2d 855 (Fla. 1969); Burch v. State, 343 So.2d 831 (Fla. 1977); State v. Chavis, 546 So.2d (Fla. 5th DCA 1989)(police misrepresentation of facts did not vitiate a Miranda waiver.).

McWatters argues that the circumstances surrounding his statement are analogous to those in Missouri v. Seibert, 542 U.S. 600 (2004). The State disagrees. In Seibert the police deliberately did not give Miranda warnings in an interview where they sought and received a confession. Only after getting that confession did they give the required warnings in order to get a statement they could use at trial. Here Humphrey read McWatters his rights from a form as soon as he had contact with him. McWatters quickly waived them and asked to speak to Dougherty. Humphrey immediately transported him directly to the police station. Within minutes, McWatters was escorted to an interview room where Dougherty was, the very man to whom McWatters had asked to speak. No other officer interviewed or questioned him between the time Humphrey transported him and the time he entered the interview room. The interview took place under a half hour of McWatters receiving his rights. The police tactics here in no way undermined the effectiveness of the Miranda warnings. Additionally, no officer behaved as the

one in Almeida v. State, 737 So.2d 520 (Fla. 1999) where the defendant asked about getting counsel but the officer deliberately ignored it and conducted the interview. The trial court properly denied the suppression motion and this Court should affirm.

POINT II

THE COURT PROPERLY ADMITTED WILLIAMS RULE EVIDENCE BUT APPELLANT WAIVED THE ISSUE

In his next claim, McWatters argues that the trial court erred in granting the State motion to present Williams rule[2] evidence of the Bradley murder in the trial of the Caughey and Wiggins murders. After that ruling, McWatters and his counsel moved to consolidate all three murders into one trial. He further asserts that the issue was preserved for appeal despite the court taking an explicit waiver from McWatters and his attorney expressing his profound doubt about whether it would be. The State disagrees and maintains that McWatters waived this issue for appeal and, thus, it is unpreserved. Furthermore, the trial court did not abuse its discretion in granting the Williams rule motion.

McWatters, through his counsel, made a decision to try all three homicides at once. In fact, Udell stated that he had thought the three cases were already together when the court ruled on the motion and was proceeding that way. "I

[2]Williams v. State , 117 So.2d 473 (Fla.1960).

hadn't realized at the time that the Williams evidence was being heard that we had agreed to sever Jackie Bradley's murder from Crystal's and Carrie Ann. ... and I know now why – what our theory was ..." (SR 10) When the court warned Udell that consolidating the three would waive McWatters's appellate rights on the Williams issue, Udell acknowledged that but stated, "I'm going to try to have our cake and eat it too by making this announcement." (SR.15) Clearly the defense wanted all three cases together, presumably even before the court issued its ruling. To consolidate but then claim it was only doing so due to the court ruling is disingenuous and smacks of game playing.

The court then decided to get a waiver from McWatters himself, clearly specifying the issues involved.

> THE COURT: Sir, do you swear or affirm that the evidence you are about to give will be the truth, the whole truth and nothing but the truth?
> THE DEFENDANT: Yes, sir
> THE COURT: And, sir, I do need you to keep your voice up. Would you please state your name?
> THE DEFENDANT: Eugene McWatters.
> THE COURT: Sir, you've been sitting here as we've been talking about the subject of the Williams rule evidence and you were present for that hearing as well as our discussion today of whether the three cases should be tried separately or be tried together, correct?
> THE DEFENDANT: Yes, sir.
> THE COURT: Now, have you discussed this subject with your attorneys?
> THE DEFENDANT: Yes, sir.
> THE COURT: Have you discussed with them the potential benefits to the defense and the potential risk to the defense to taking one path or the other?

THE DEFENDANT: Yes, sir.
THE COURT: And have you discussed the benefits of separate trials, potential benefits of separate trials with defense counsel?
THE DEFENDANT: Yes, sir.
THE COURT: Have you discussed the potential risk of separate trials with defense counsel?
THE DEFENDANT: Yes, sir.
THE COURT: Have you also discussed the potential benefits of the consolidated trial, trying all individuals at once?
THE DEFENDANT: Yes, sir.
THE COURT: Okay. And, sir, do you understand what we've been talking about a moment ago; and that is, if you agree to the trial of the three ladies together, that that would likely waive your ability -- if you are convicted in the homicides, it would likely waive your ability to say on appeal that the order that I entered on the Williams rule evidence is wrong because you would have been agreeing or will have agreed to try all three together? Do you understand that; sir?
THE DEFENDANT: Yes, sir.
THE COURT: Did you discuss that with Mr. Udell and Mr. Akins?
THE DEFENDANT: Yes, sir.
THE COURT: Do you have any questions about that?
THE DEFENDANT: Not really.
THE COURT: Either from me or from Mr. Udell who is here with you? Any questions about that?
THE DEFENDANT: About -- all I want to know is you say it may bring up -- you're saying I may not be able to appeal on that if that happens to come about. Are we sure on if it -- you know what I'm saying, if I'm going to have the right or not is what I'm asking.
THE COURT: Well, let me pose it this way. Mr. Bakkedahl, do you agree that if I pursue this in questioning with Mr. McWatters, that he should assume that it's a waiver that that's the safe path?
MR. BAKKEDAHL: Right. I think that's the safest path. That the assumption should be that he would be waiving his right to object to your Williams rule.
THE COURT: And I agree with that. And, Mr. McWatters -- Mr. McWatters, I think in making this decision, you should consider that it would be a waiver. If it's not, that's fine. But you should think at this point that it would be a waiver, that by agreeing to try all three of the cases together, that you would not be able to claim on appeal, if you were convicted, that the judge was wrong in allowing the evidence in

because you've agreed to try them all together. Do you understand that, sir?
THE DEFENDANT: Yes, sir.
THE COURT: Does that answer that question for you?
THE DEFENDANT: Pretty much, yes, sir.
THE COURT: Do you have any other questions for me or for Mr. Udell?
THE DEFENDANT: No, sir.
THE COURT: Now, it's my understanding from Mr. Udell that this has been discussed and that you have decided that, yes, you want to try the cases involving Jackie Bradley, Christal Wiggins and Carrie Ann Caughey altogether in one trial?
THE DEFENDANT: Yes, sir.
THE COURT: Is that correct?
THE DEFENDANT: Yes, sir.
THE COURT: Okay. Any further inquiry, Mr. Udell?
MR. UDELL: Nothing sir.
THE COURT: And, Mr. Bakkedahl?
MR. BAKKEDAHL: Nothing from the State.
THE COURT: Okay. I'm convinced that Mr. McWatters is fully aware of what his options are in this regard. And, sir, has anybody pressured you, coerced you or threatened you in any way to get you to make one decision or the other?
THE DEFENDANT: No, sir.
THE COURT: And I'll also find that he is exercising his informed free will in making the choice.

(SR 18-22) From the foregoing, both the defendant and his counsel clearly decided to try all three homicides together. In the face of being told he was waiving his appellate rights, McWatters made an informed and conscious decision. This was indeed a waiver of the issue on appeal. The issue is unpreserved.

A failure to object at the time Williams rule evidence is presented waives the issue on appeal. “Even when a prior motion in limine has been denied, the failure

to object at the time collateral crime evidence is introduced waives the issue for appellate review. Phillips v. State, 476 So.2d 194 (Fla. 1985); German v. State, 379 So.2d 1013 (Fla. 4th DCA)." Correll v. State, 523 So.2d 562, 566 (Fla. 1988). See also Esty v. State, 642 So.2d 1074, 1078 (Fla. 1994)(contemporaneous objection rule applies to evidence about other crimes and failure to object waives appellate review); Hunter v. State, 779 So.2d 531 (Fla. 2nd DCA 2000)(same). In Perez v. State, 717 So.2d 605, 606 (Fla.3rd DCA 1998) the trial court allowed the state to introduce Williams rule evidence. The defense not only failed to object to the Williams rule evidence but then elicited additional Williams rule evidence on cross examination.

> We do not know and do not speculate as to why the defendant failed to object to the introduction of the collateral crimes evidence, or what strategic considerations may have led him to introduce some of this evidence himself. We are convinced, however, that it would be contrary to Florida law and grossly unfair to grant him relief for errors which he failed to properly preserve, and which he, himself, invited. See Pope v. State, 441 So.2d 1073, 1076 (Fla.1983)("A party may not invite error and then be heard to complain of that error on appeal"); Lentz v. State, 679 So.2d 866 (Fla. 3d DCA 1996); Buggs v. State, 640 So.2d 90 (Fla. 1st DCA 1994).

Id. It is undisputed that McWatters never objected at trial to the admission of any of the evidence of the Bradley homicide.

Joseph v. State, 447 So.2d 243 (Fla. 3d DCA 1983) presented a different scenario than that in this case. There the trial court suggested consolidating the two cases after it granted the State's motion to present William's rule evidence. The

defense attorneys only agreed to the consolidation because the court was going to try the cases together one way or another. Also, the defendant did not personally waive the issue as McWatters did. Here the defense obviously wanted the three cases consolidated or believed they were already; in fact, it stipulated to the consolidation of the Wiggins and Caughey killings and considered the strategy of trying all three together. (R:116, 194) Finally, Joseph did not address the rule of law requiring a contemporaneous objection outlined in Phillips and the subsequent cases. If merely objecting at the motion in limine were sufficient to preserve the issue, then this Court would not have issued the ruling it did in Correll.

Even if the issue is preserved, the trial court did not err or abuse its discretion in allowing the admission of Williams rule evidence of the Bradley homicide. See Ray v. State, 755 So.2d 604, 610 (Fla. 2000) (admissibility of evidence is within the sound discretion of the trial court, and standard of review on appeal is abuse of discretion); Zack v. State, 753 So.2d 9, 25 (Fla. 2000); Cole v. State, 701 So.2d 845 (Fla. 1997); Jent v. State, 408 So.2d 1024, 1039 (Fla. 1981). The evidence was properly admitted to prove Appellant's motive, intent, plan, knowledge, and the absence of mistake or accident. Finally, even if it were error to admit the evidence, it was harmless.

The court held an evidentiary hearing on the State's Williams rule motion on May 18, 2006. (R:581-667) The State argued that it had to prove lack of consent,

identity, intent, premeditation, and had to rebut a defense of mistake or accident. In order to prove it was a crime, the pattern of homicides committed by the defendant was relevant to show it was a criminal act, not an accident. Additionally, the State had to prove the degree of the crime, i.e., that Wiggins's and Caughey's killings were premeditated first-degree murders, not second-degree, or third-degree murders. The pattern of homicides was the best way to prove premeditation. (R:137-156) Based upon the testimony the trial court determined that the three women were white with roughly similar heights and weights. All were manually strangled. Each lived on society's fringes, had substance abuse problems, and had alcohol or drugs in their system when they died. All three were last seen late at night with McWatters who led them to dark secluded areas. All three had died violently during sexual activity and within a relatively short distance from each other. Their bodies were all actively concealed in isolated wooded areas and had the shirts and bras shoved up under the arm pit area. Their deaths occurred within a two month period. McWatters admitted that all three deaths happened in essentially the same circumstances. (R:546-47) The court ruled that the evidence was relevant for purposes other that bad character or propensity. That ruling should be affirmed.

The Williams rule is codified in section 90.404(2)(a), Florida Statutes (2001), as follows:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

"Similar fact evidence that reveals other crimes is relevant and 'admissible if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality' and should be admitted if 'relevant for any purpose save that of showing bad character or propensity.'" Schwab v. State, 636 So.2d 3, 7 (Fla. 1994). In Williams v. State, 621 So.2d 413 (Fla.1993), this Court explained that:

> As a general rule, such evidence is admissible if it casts light on a material fact in issue other than the defendant's bad character or propensity.... Evidence of other crimes or acts may be admissible if, because of its similarity to the charged crime, it is relevant to prove a material fact in issue. But it may also be admissible, even if not similar, if it is probative of a material fact in issue. Although similarity is not a requirement for admission of other crime evidence, when the fact to be proven is, for example, identity or common plan or scheme it is generally the similarity between the charged offense and the other crime or act that gives the evidence probative value. Thus, evidence of other crimes, whether factually similar or dissimilar to the charged crime, is admissible if the evidence is relevant to prove a matter of consequence other than bad character or propensity.

Id., at 414. Similarly, in Bryan v. State, 533 So. 2d 744, 746 (Fla. 1988), this Court explained that:

> Evidence of "other crimes" is not limited to other crimes with similar facts. So-called similar fact crimes are merely a special application of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence. The requirement that

> similar fact crimes contain similar facts to the charged crime is based on the requirement to show relevancy. This does not bar the introduction of evidence of other crimes which are factually dissimilar to the charged crime if the evidence of the other crimes is relevant.

Thus, evidence of a collateral crime need not be factually identical or uniquely similar to the charged offense when such evidence is relevant to prove the defendant's motive to commit the charged offense. See Finney v. State, 660 So.2d 674, 682 (Fla. 1995). Similar fact evidence of collateral crimes may be admitted as relevant even if it is not uniquely similar. E.g., Bryan, 533 So.2d at 744-46; Gould v. State, 558 So.2d 481 (Fla. 2d DCA 1990); State v. Ayala, 604 So.2d 1275 (Fla. 4th DCA 1992). Only where Williams rule evidence is offered to prove identity by modus operandi or common plan or scheme, must the evidence establish a high level of similarity and also uniqueness in nature. See Drake v. State, 400 So.2d 1217 (Fla.1981).

The defendant in Conde v. State, 860So.2d 930 (Fla. 2003) was tried for one of six homicides of prostitutes committed in a six month period. In each homicide, he picked up a prostitute, had sex, strangled them, and then disposed of the bodies along a road. In the trial for the last killing, the court allowed the State to introduce evidence of the first five killings. On review this Court upheld the ruling on the basis that the evidence went to proving identity, premeditation, intent to kill, and absence of mistake. Id. 944-45.

> As the first step of our analysis, we conclude that the collateral crimes evidence established the fact that Conde had committed substantially similar crimes on five prior occasions, which in turn was relevant to numerous material issues, such as identity, intent, and premeditation. *See , e.g. , Bradley v. State* , 787 So.2d 732, 741-42 (Fla. 2001) (Williams rule evidence of prior crime relevant to proving intent and premeditation); *Townsend v. State* , 420 So.2d 615 (Fla. 4th DCA 1982) (admission of Williams rule evidence upheld where defendant was on trial for strangulation of two prostitutes and State introduced six other murders as relevant to identity and motive). Although Conde argues that identity and intent were largely uncontested issues, we note that premeditation, defined as a "fully formed conscious purpose to kill," was the single most contested issue at trial and that the pattern of these crimes, together with the message Conde wrote on the back of his third victim indicating that she was the "third" and "[see] if you can catch me," was evidence of premeditated intent to kill. This evidence was clearly relevant given Conde's theory of defense that he killed in an "instantaneous combustion" of unexpected and unplanned emotions. See *Wuornos v. State* , 644 So.2d 1000, 1006 (Fla.1994) (finding evidence of six prior murders relevant to premeditation where accused's testimony portrayed her as the actual victim). Additionally, we note that even if lack of premeditation was the primary focus of Conde's defense, the State also had the burden of proving the material issues of identity and intent. Therefore, any evidence tending to prove those issues was relevant.

Id. 945-46.

In his statements to the police, as well as in the case arguments, McWatters tried to say that these killings “just happened.” He said that he just “lost it.”He also asserted that the sex was consensual with all three. (T.3043-3188,3322-50) In light of his stance, the Williams rule evidence was relevant to rebutting the defense of consent in the sexual conduct. In each, he lured a victim who knew him to an isolated area with the promise of something, be it a shower or drugs. The fact that

Bradley wanted a shower and wound up raped and strangled was relevant to show that Caughey and Wiggins did not consent to sex but were similarly lured, both ending up dead in isolated spots on the same night. He admitted that each died during sex. He concealed Bradley just as he later did with Caughey and Wiggins, using rocks or vegetation to hide the bodies from sight. Similar facts were used in Williams itself to prove lack of consent. Williams, 621 So.2d at 414. The similarity of the prior conduct makes it probative to demonstrate a common scheme or plan rebutting the defense of consent. Id.

Furthermore, the evidence went to prove that Caughey's and Wiggin's murders were premeditated. See Wuornos, 644 So.2d at 1006-07(holding that similar crime evidence, in the form of 6 other homicides committed by the defendant, was admissible to rebut the defendant's "claims regarding her level of intent and whether she acted in self-defense"; defendant testified that she was the actual victim in the circumstances leading up to the murder, which could have led the jury to conclude that she lacked the requisite intent had it believed her testimony); Hoefort v. State, 617 So.2d 1046, 1049 (Fla. 1993)(holding that similar fact testimony, from four (4) of defendant's prior victims, was relevant to the issue of motive and to counter the defense's contention that the absence of visible trauma negated asphyxiation as the cause of death) .

Appellant argued at trial and continues to argue here that the three deaths

were not premeditated. Instead, he argued, it was the result of him losing it, possibly because of flashbacks to his anger at the mother of his child.(T.3078, 3116, 3133-41, 59-62) The best evidence the State had to disprove his defense theory and to show that the killings were not committed during a fit of emotional rage was the fact that all three homicides, unfolded in the same manner, showing conclusively that McWatters planned and intended to kill Caughey and Wiggins just as he had done to Bradley, and that he did so with cool, calm reflection. The Williams rule evidence showed McWatters true intent and lack of mistake - there was no loss of control or emotional rage. Instead, his similar treatment of each victim showed a calculated pattern and foreknowledge that his strangling of each women would result in her death. The Bradley murder put the Caughey and Wiggins murders in a clear light, thereby refuting any contention that the deaths were accidental, perhaps the result of rough consensual sex. The trial court's ruling admitted evidence of the Bradley murder in to the Caughey/Wiggins trial, contrary to Defendant's argument. (IB 47) See Conde, 860So.2d 930[3].

The defense argument that the three strangulation deaths were actually dissimilar is absurd. Each corpse was in a state of advanced decomposition which

[3]Appellant notes that defendant in Townsend v. State, 420 So.2d 615 (Fla. 4th DCA 1982) was later exonerated by DNA evidence. The case, and specifically its legal analysis of Williams rule evidence, has not been overturned or receeded from by this Court. This Court favorably cited it in Conde in 2003, two years after the exoneration.

destroyed evidence; Caughey's was partially skeletonized. Bradley's neck was decomposed but showed a crushed hyoid bone caused by manual strangulation with a considerable amount of force. Younger people often do not get broken bones with manual strangulation since the bone is very pliable when young. (T.2334-38, 2346-48) Caughey, who was 18 at the time of her death, showed a lack of styloid process which happens when a bone breaks from strangulation. (T.2948-53, 2965) The styloid bone was missing which was consistent with the decomposition and maggot activity resulting from McWatters concealing the body. (T.2967-72) Wiggins was also strangled but had so much decomposition, again from McWatters concealing the body, that the spine was visible from the front of the throat area and the medical examiner could not conduct a tissue examination. Unsurprisingly, various body parts, including the hyoid bone, were missing. However, the cartilage in the thyroid was injured which was "typical" with manual strangulation. (T.2998-3011) Each was manually strangled after McWatters admittedly had sex with them. For the defense to now argue that the styles of strangulation were so dissimilar so as to render the trial court's decision on the Williams rule evidence an abuse of discretion is ridiculous. This court should affirm.

Even if the lower court erred, any error is harmless. All three women were last seen in the company of McWatters. He admitted to taking each one to an

isolated area where he had sex with them, overcoming their resistance, and killing them. He admitted to being responsible for each of their deaths. (T.3083-86, 3099-3103, 3104-15, 3141-48,3165) All three women were missing all clothing from the waist down and all had their tops and bras pushed above the breast area. He admitted that Bradley did not want to have sex with him but eventually did. (T.3099-3103) Wiggins wanted him to pull out when something happened and he killed her. (T.3109-15) He admitted to ripping Caughey's panties off her body although he claimed it was a game. (T.3133-41) Her ripped t-shirt was found 20 to 30 yards away from her body. (T.2536-37) There were signs of a struggle in the area were he admitted "having sex." (T.2575, 2592) McWatters had scratch marks on his face, bruises on his jaw, and injuries to his eye area a few days after Wiggins and Caughey were killed, indicating the women defended themselves and struggled against his attack. (T.2597-2602, 2607-11) Given McWatters's admissions any error in admitting the Williams rule evidence was harmless. Hamilton v. State, 547 So.2d 630 (Fla. 1989); State v. DeGuilio, 491 So.2d 1129 (Fla. 1986). This court should affirm.

POINT III

THE COURT PROPERLY ALLOWED EXPERT TESTIMONY ON THE CRIMES BEING CONSISTENT WITH RAPE-HOMICIDES.

McWatters asserts that the trial court erred in allowing expert witnesses to testify that the crimes were rape-homicides based on the circumstantial evidence.

He contends Diggs improperly acted as a 13th juror, his testimony was speculation, and failed to assist the jury in its fact finding. He adds that Digg's opinion went beyond his area of expertise. He makes similar claims about Shirk's testimony on the similarities between the three crimes. This claim is without merit and partially unpreserved. This court should affirm.

The standard of review for a court's ruling on the admissibility of evidence is whether it was an abuse of discretion. The admissibility of evidence is within the sound discretion of the court and its ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So.2d 604, 610 (Fla.2000); Zack v. State, 753 So.2d 9, 25 (Fla.2000); Cole v. State, 701 So.2d 845, 854 (Fla.1997); Jent v. State, 408 So.2d 1024, 1039 (Fla.1981); General Elec. Co. v. Joiner, 522 U.S. 136(1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion").

Under this standard, the Court's ruling will be upheld "unless ... no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla.1980); See Ford v. Ford, 700 So.2d 191, 195(Fla. 4th DCA 1997); Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla.2000), citing Huff v. State, 569 So.2d 1247, 1249 (Fla.1990).

Diggs opined during the proffer that the condition of Bradley's clothing indicated that she may have been exposed to rape. (T.2281,2286-88) Only the

absence of semen prevented him from making the determination of rape-homicide to a medical certainty, as opposed to a medical probability. The decomposition prevented any collection of semen and other forensic evidence. (T.2293) The defense objected to his testimony that the crime was a rape-homicide because it was speculation and did not assist the jury. (T.2300, 2304-05) Bakkedahl then outlined the factors the expert would use to render his opinion in addition to the clothing position: isolated area; presence of alcohol or drugs; strangulation with asphyxia; and partial or total nudity. (T.2302-03) The trial court allowed the testimony based upon evidence code sections 90.702, 90.703, 90.704 as well as State v. Ortiz, 766 So.2d 1137 (Fla.3d DCA 2000). Subsequently, Diggs established his credentials as an expert before the jury which the defense did not challenge. (T.2310-24)

> Florida Statute section 90.702 governs expert testimony.
>
> > If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

The annotated code specifically says it is "permissible for the expert to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts." Pure opinion testimony does not have to meet

the Frye test because it is based on the expert's personal opinion. Flanagan v. State, 625 So.2d 827, 828 (Fla.1993).

A general rule of law concerning the admissibility of expert witness testimony is that the expert, once qualified by the court as such, normally decides for himself whether he has sufficient facts on which to base an opinion. The exception to this rule is when the factual predicate submitted to the expert omits facts which are obviously necessary to the formation of an opinion. When the factual predicate is so lacking, the court may properly refuse to allow the testimony. Spradley v. State, 442 So.2d 1039 (Fla.2d DCA 1983); Johnson v. State, 314 So.2d 248 (Fla.1st DCA 1975); Nat Harrison Associates, Inc. v. Byrd, 256 So.2d 50 (Fla. 4th DCA 1971); Huff v. State, 495 So.2d 145 (Fla.1986).

As noted above, a witness qualified as an expert has latitude in testifying about his opinion as long as it is based upon the facts in evidence. An expert witness need not have personal knowledge of the events to render an opinion explaining the evidence based upon both his analysis and his experience as an expert in the field. Diggs was an expert in forensic medicine including sexually motivated homicides. Applying his specialized knowledge to the evidence from the crime scene and autopsy he reached an expert opinion on the nature of the crime which the juror could then use in its decision making. Based on the location and condition of Bradley, and later Caughey, he opined that the crimes were

consistent with rape-homicides. (T.2316-51, 2974)[4] The jury was free to accept or to reject Diggs's opinion. The court properly allowed him to testify about a matter within his expertise.

McWatters argues that the court improperly rested its decision on Ortiz. While the opinion focused the proper standard a court should use in deciding a motion to dismiss, it also agreed that the state's expert could render an opinion about the crime being a rape-homicide based upon the circumstantial evidence of the crime itself.

> [T]he state asserted that its proof of this count was based upon the circumstantial evidence of the location of victim with her shirt around her head and her shorts below her knees as well as the physical signs that she had been beaten...
> The state argues that the trial court erred in dismissing the count for attempted sexual battery because the circumstantial evidence in this case was sufficient to establish a prima facie case, and because reasonable minds could differ as to whether the deceased had been the victim of an attempted sexual battery. The state further asserts that in arriving at its conclusion, the trial court improperly weighed the evidence and the credibility of its witnesses. We concur.

Ortiz, 766 So.2d at 1141. As the trial court noted, the reviewing court could only consider those matters which would ultimately be admissible. (T.2305) The trial court properly rested its ruling to admit this evidence on Ortiz. Even if Ortiz did not supply an adequate basis for the decision, the court still properly admitted the

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[4]The defense did not challenge the expertise or testimony of Mittleman, the Wiggins medical examiner, thus his similar opinion is not before this court.

evidence given the record established at trial and Florida law. See Muhammad v. State, 782 So.2d 343, 359 (Fla. 2001) (opining "court's ruling on an evidentiary matter will be affirmed even if the trial court ruled for the wrong reasons, as long as the evidence or an alternative theory supports the ruling").

Likewise, Shirk was a Sergeant in the Martin County Sheriffs Office and a supervisor of the Forensic Science Unit. His training and experience qualified him as an expert in investigating rape-homicides. Again, the defense did not object or question his expertise. (T.2010-14) He stated that the evidence of the crime scene and condition of Bradley's body was consistent with a sexually motivated crime. Again, the defense did not object. (T.2014-17) He later testified that the Caughey body and crime scene was quite similar to Bradley's and that it looked like a sexually motivated murder. The defense did not object. (T.2502-06) The defense only objected when he continued this line of testimony in pointing out that the Wiggins killing was similar to the other two on which he had already testified. As noted, Shirk had already established his expertise in this area and had already testified about the Bradley and Caughey murders. The court properly allowed this testimony as expert opinion. Additionally, any error was harmless given that he had already given similar testimony on the other two killings. This Court should affirm.

Finally, the defense never objected to Diggs's testimony as being beyond the scope of his expertise. Consequently, a claim under that premise is unpreserved. For an issue to be reviewable on appeal, it must be properly preserved by a contemporaneous objection on the same grounds as raised on appeal or the error must be fundamental. Steinhorst v. State, 412 So.2d 332, 338(Fla.1982)(emphasis added); J.B. v. State, 705 So.2d 1376, 1378(Fla.1998). The contemporaneous objection requirement affords both trial judges the opportunity to address and possibly redress a claimed error and prevents counsel from allowing errors to go unchallenged and later using the error to a client's tactical advantage. See J.B., 705 So.2d at 1378; F.B. v. State, 852 So.2d 226 (Fla.2003).

"[I]n order to be of such fundamental nature as to justify a reversal in the absence of timely objection the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown v. State, 124 So.2d 481, 484 (Fla.1960);see State v. Johnson, 616 So.2d 1, 3 (Fla.1993) (stating that "for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process"). As discussed above, Diggs and Shirk established their expertise in this area and the trial court properly allowed the testimony as expert testimony. Again, this Court should deny this claim.

POINTS IV & V

THE TRIAL COURT PROPERLY DENIED THE MOTION FOR JUDGEMENT OF ACQUITTAL AND THE EVIDENCE WAS SUFFICIENT FOR CONVICTIONS OF PREMEDITATED MURDER AND SEXUAL BATTERY.

In Points IV and V McWatters alleges that there was insufficient evidence to support either premeditated murder convictions or the sexual battery charges. He claims that the facts do not negate all reasonable hypotheses of innocence nor prove beyond a reasonable doubt that sexual battery occurred. Further he argues that the trial court erred in denying the defense motion for judgement of acquittal ("JOA") on premeditation and sexual battery. These claims are without merit since there was competent substantial evidence to find McWatters guilty of three counts of murder and sexual battery.

In Pagan v. State, 830 So.2d 792, 803 (Fla.2002), this Court discussed the standard of review for the denial of a motion for judgment of acquittal:

> In reviewing a motion for judgment of acquittal, a *de novo* standard of review applies. ... Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. ... If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. ... However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence.

Pagan, 830 So.2d at 803 (citations omitted) (emphasis added). See Boyd v. State, 910 So.2d 167, 180-81 (Fla.2005); Conde v. State, 860 So.2d 930, 943 (Fla.2003); Crump v. State, 622 So.2d 963, 971 (Fla.1993)(question of whether evidence fails to exclude any reasonable hypothesis of innocence is for jury to determine, and if there is substantial, competent evidence to support jury verdict, verdict will not be reversed on appeal). "Proof based entirely on circumstantial evidence can be sufficient to sustain a conviction in Florida." Orme v. State, 677 So.2d 258, 261 (Fla.1996).

In considering a motion for a judgment of acquittal in a circumstantial evidence case,

> [i]t is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences.... The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. *See Toole v. State*, 472 So. 2d 1174, 1176 (Fla. 1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

State v. Law, 559 So. 2d 187, 189 (Fla. 1989) (footnote omitted). Thus, if the State's evidence creates an inconsistency with the defendant's theory of innocence, the trial court should deny the motion for judgment of acquittal and allow the jury to resolve the inconsistency. Woods v. State, 733 So. 2d 980, 985 (Fla. 1999); Boyd, 910 So.2d at 180-81.

A court should not grant a motion for judgment of acquittal unless "there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law." Taylor v. State, 583 So.2d 323, 328 (Fla.1991). McWatters argues that court and then the jury simply inferred or guessed premeditation without “real proof.” (IB 57) However, the evidence demonstrated that McWatters intentionally lured each woman to a dark isolated area away from other people. There was evidence of a struggle on the ground where Wiggins was attacked. (T.2575) Both Wiggins’s and Caughey’s clothes were ripped with enough force to actually tear the item apart. (T.2333-39, 2536-37, 2577-78, 3104-09) McWatters had facial injuries, including multiple scratches down his cheek and bruising, shortly after the killings of Wiggins and Caughey. (T.2597-2602) Each woman was manually strangled. Bradley was strangled with enough force to actually crush her entire hyoid process, a level of force beyond that necessary to actually kill by manual strangulation.(T.2337-38) McWatters had to apply that force for a number of minutes to cause her death. (T.2349-51) He admitted that he “may” have choked her. (T.3083-86)Wiggins was the first killed on the night of May 31, 2004 after she fought McWatters. McWatters had already killed Bradley when he chose to take Wiggins back in the park, presumably alerting him that her life was in danger with him. Caughey was killed shortly after he killed Wiggins and killed in exactly the same manner. Her thyroid cartilage was

damaged with an actual fracture to her Adam's Apple. (T.3002-11) Both Diggs and Mittleman testified that death by manual strangulation could take several minutes with the person losing and regaining consciousness over that time if there was a struggle or inconsistent pressure. (T.3014-15) There was competent, substantial evidence of premeditation in Bradley's murder given his statement, the considerable level of force used to manually strangle her, and the time it took to kill her. Her death is yet another piece of evidence supporting the premeditation in the deaths of Wiggins and Caughey outlined above. The court properly denied the JOA.

Likewise, there was sufficient competent, substantial evidence to support the jury verdicts of premeditated murder in each of these deaths. A jury verdict, like all other findings of fact, is subject to review on appeal by the competent substantial evidence test. See White v. State, 446 So.2d 1031 (Fla.1984). It is the jury's duty to determine whether the evidence presented is sufficient "to exclude every reasonable hypothesis of innocence beyond a reasonable doubt." Law, 559 So.2d at 189. Any question as to whether the evidence was sufficient to overcome all hypotheses of innocence is for the jury to decide. Washington v. State, 653 So.2d 362, 366 (Fla. 1994).

Under Florida law, premeditation can be formed in a moment and need only exist "for such time as will allow the accused to be conscious of the nature of the

act he is about to commit and the probable result of that act." Asay v. State, 580 So.2d 610, 612 (Fla.). The jury must determine whether a premeditated design to kill was formed before the killing. Id. Premeditation can be inferred from circumstantial evidence such as "the nature of the weapon used, ... the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." Sochor v. State, 619 So. 2d 285, 288 (Fla. 1993); Spencer v. State, 645 So.2d 377, 381 (Fla.1994); See Woods, 733 So.2d at 985; Gore v. State, 784 So.2d 418, 429 (Fla.2001); Conahan v. State, 844 So.2d 629 (Fla.2003).

"Premeditation is defined as 'more than a mere intent to kill; it is a fully formed conscious purpose to kill'" which must exist for enough time "to permit reflection as to the nature of the act to be committed and the probable result." Green v. State, 715 So.2d 940, 943-4 (Fla.1998)(quoting Coolen v. State, 696 So.2d 738, 741 (Fla.1997)); Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1998). However, premeditation may also "be formed in a moment and need only exist 'for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.' " DeAngelo v. State, 616 So.2d 440, 441 (Fla.1993). Circumstantial evidence, including the manner of killing and the nature of the wounds, can be sufficient evidence to show premeditation. Spencer, 645 So.2d at 381; See Woods, 733 So.2d at 985; Gore, 784 So.2d at 429;Conahan, 844 So.2d 629.

Strangulation, coupled with other evidence including testimony about the length of time needed to kill via this method, is sufficient to support a premeditation conviction. DeAngelo, 616 So.2d 440; See also Johnston v. State, 863 So.2d 271(Fla.2003)(sufficient evidence to support premeditation where victim manually strangled and scratched defendant during attack); Gore, 784 So.2d 418(sufficient evidence to support premeditation where victim manually strangled and stabbed);Blackwood v. State, 777 So.2d 399 (Fla.2000)(sufficient evidence to support premeditation death by asphyxiation and manual strangulation where death took minutes coupled with displaced household items indicating a struggle although no signs of forced sex or prior plan to kill). This Court found premeditation on facts similar to those here in DeAngelo. The jury was not required to accept DeAngelo's story that he argued with the victim, grabbed her chin, and the next thing he knew she was dead. DeAngelo, 616 So.2d at 441. McWatters lured Bradley with a shower he could not deliver. He took Wiggins and Caughey to the woods *on the same night* after he had previously killed Bradley. He manually strangled each woman which took a number of minutes to complete while he maintained such pressure to crush neck structures. A struggling victim could increase the time it took to render her unconscious and then dead. There was evidence that both Wiggins and Caughey struggled: ripped clothing, shoes strewn about far away from the bodies; disturbed dirt and vegetation; and stained pants.

The jury had sufficient evidence to find premeditation in the Bradley, Wiggins, and Caughey murders.

McWatters's reliance on Randall v. State, 760 So.2d 892 (Fla.2000) is misplaced since that case is distinguishable on its facts. In Randall the evidence showed that the defendant routinely used strangulation to heighten sexual arousal. He had used it numerous times in the past without killing. The evidence clearly presented the reasonable possibility that his intent when he began the strangling was not to kill but to arouse. Similarly the facts in Hoefert v. State, 617 So.2d 1046 (Fla. 1993) are distinguishable since Hoefert choked women during sex for the thrill and the State could not prove the manner the homicide was committed and the nature and manner of any wounds inflicted. McWatters's reliance on Carpenter v. State 785 So.2d 1182 (Fla. 2001) is also inapposite. The manner of death there was not by manual strangulation but rather by occlusion of the neck blood vessels by the gag tied on the victim.

Such is not the situation here. McWatters manually strangled with the intent to kill as evidenced by the extreme force he used to kill Bradley and then later to kill Wiggins and Caughey *on the same night*. "Losing it" does not preclude him from forming the intent to kill them before he actually began strangling them. The State submits that the evidence noted above is sufficient to prove that the

premeditated intent to kill happened before he strangled Bradley and well before he ever touched Wiggins and Caughey.

Medical examiners testified that Bradley, Caughey, and Wiggins each died from manual strangulation. Bradley and Caughey each had crushed bone and throat structures indicating that extreme force was applied to their throats, more than what normally happened with manual strangulation. The experts testified that unconsciousness could take from under a minute to several minutes to happen with the death occurring after that. McWatters admitted that he might have choked Bradley. Signs of struggle existed in the Caughey and Wiggins crimes with the shredded clothing, disturbed earth, and torn branches. McWatters also had claw like scratches to his face and bruising just after those deaths. Finally, the sequence of the deaths supported premeditation. Bradley was already killed when McWatters took Wiggins into the woods. Both Bradley and Wiggins were dead when he took Caughey. The confession, the testimony about the injuries and time strangling took to kill, and the evidence of a definite pattern provide competent, substantial evidence of premeditation. Conde, 860 So.2d at 943. The jury, as the trier of fact, determined that McWatters committed premeditated murder in each of these women's deaths. In doing so, the jury rejected McWatters's self serving statements vaguely denying he premeditated the killings. As detailed above, there was sufficient evidence on which they could rely in doing so. This Court should affirm.

The evidence presented on the sexual battery charges was both direct and circumstantial so the special standard outlined in Orme is inapplicable. Direct evidence came from McWatters himself in his statements, eyewitness statements placing him as the last person seen with each of the victims, and the signs of struggle from the last two crime scenes. See Pagan, 830 So. 2d at 803-04; Fitzgerald v. State, 900 So.2d 495, 506 (Fla. 2005). In Carpenter this Court analyzed its affirmance under the Orme standard although saying that the defendant's statement placing himself at the scene of the crime constituted direct evidence. Carpenter, 785 So.2d at 1194. Even if this Court finds it applicable, the evidence does create inconsistencies with hypotheses of innocence. McWatters lied to police in his very first statement saying he did not know Bradley and did not leave with her. He denied having sex with her. That statement is inconsistent with his later statement saying the sex was consensual. Even he admitted to police that "she wasn't willing at first, but then she finally did." He killed all three women during sex by his own admission. Any consent the individual women may have given, if they did at all, ceased when he started strangling them.

The crime scenes indicated these were sexually motivated homicides according to Diggs, Mittleman, and Shirk: isolated areas, partial clothing with tops pushed above breasts, efforts to conceal the bodies, and the presence of drugs or alcohol in the victims are all consistent with sexually motivated homicides

according to those experts. Similarities between the three homicides refute any claim of consensual sexual act and then accidental killing. With Wiggins, her panties were literally ripped off her body and her bra was forcibly yanked up as indicated by the rips and bent hardware. The disturbed earth where McWatters pointed out the spot he had sex with her indicated a struggle, as did the position of her shoes. Caughey's shoes were separated from each other and there were grass stains on her pants, both signs of struggle. McWatters's facial injuries are also evidence of a struggle with the women. The trial court properly denied the judgement for acquittal. Furthermore, the jury evaluated the evidence, including the three conflicting and self-serving statements given by McWatters. They discredited his contention that sex with each woman was consensual. Again, a jury verdict comes with a presumption of correctness and will be upheld where it rests on competent, substantial evidence.

This Court found competent, substantial evidence to support the sexual battery charge in Boyd where the State showed Boyd was the last person seen with the woman, his semen was on her body, her blood in his apartment, and she had bruising which was consistent with either consensual or nonconsensual sex. Boyd, 910 So.2d at 181. In Fitzgerald the court affirmed the denial of the JOA and verdict for sexual battery where: the expert said the body's and clothing's condition indicated sexual battery but was also consistent with consensual sex; Fitzgerald

also initially denied sex but later claimed it was consensual when confronted with evidence of his involvement; and eyewitnesses stated he was the last person seen with the victim shortly before her death. Fitzgerald, 900 So.2d at 507-8. In Carpenter the Court upheld the denial of the JOA, pointing to defendant admitted to being with the victim, he was larger and older than she, her death from neck compression, and his conflicting statements asserting consensual sex. This Court found that given the evidence, the jury rejected Carpenter's contention of consensual sex. Carpenter, 785 So.2d at 1195. See also Zack v. State, 753 So.2d 9 (Fla. 2000)(affirming JOA denial and sexual battery verdict where defense claimed consent but Williams rule evidence established predatory behavior and the crime scene indicated the victim was attacked upon entry).

In Ortiz, the Third District reversed the trial court order dismissing a charge of attempted sexual battery where "[t]he victim was found beaten and virtually nude in an isolated wooded area of a park with her shirt pulled up around her head and her shorts down around her ankles." The district court noted that the evidence was "admittedly circumstantial"; however, the court concluded that "the state's substantial and competent evidence in this case is sufficient to establish a prima facie case of guilt against the appellee." Ortiz at 1142-43; see also Geldreich v. State, 763 So.2d 1114, 1118-19 (Fla. 4th DCA 1999) (affirming denial of JOA motion on attempted sexual battery charge where the defendant "forcibly carried

[the victim] to the parking lot, threw her down, straddled her, and began to take her blouse off"); L.J. v. State, 421 So.2d 198, 199 (Fla. 3d DCA 1982) (denying motion to dismiss and noting that an attempted sexual battery "would certainly be facilitated by the overt act of attempting to remove the pants of the victim").

As detailed above, the State presented competent, substantial evidence to support the sexual battery convictions and, thus, the felony murder theory for first degree murder. Additionally, the State presented the numerous inconsistent and conflicting statements by McWatters to the police, three of which were taped. On April 2, 2004 he claimed to have been working the night Bradley disappeared, didn't know her, was never with her, never had sex with her, she was not at campsite while he was, and never went anywhere with her. He joked "Boy, what did I tell you about dumping bodies close to your house?" (T. 2103-2220) On June 7, 2004 he stated that he waited at Donna's house while she ran an errand. A girl showed up later and smoked with another man. Defendant left. He gave the ATV excuse for his broken foot then changed it to a man running it over while he sold dope. He then said that he waited with the girl while the others left. She then got in a car with some man. He placed himself on Lincoln street near where a body was found. He denied knowing Wiggins and said he never saw her in person. He denied having sex with drug addicts. He then said Wiggins was at the house with him. He denied knowing anything about her murder and denied killing her. He also

mentioned that there were three cases although the police had only spoken to him about two. He also claims to have punched himself in the face hard enough to leave a visible bruise. (T.2681-2809, 2815-47) In his written statement he claimed that Bradley's body was planted near his home because people were mad at him. He denied killing anyone. (T.2870-74) Finally in his June 23, 2004 statement, he admits to being with each woman, having sex with them, and then killing each of them. He demurred on providing details of the killings saying he would rather not think about it. He admitted that Bradley did not wish to have sex initially. He called the ripping and tearing of Wiggins's clothing as part of the game. He admitted to taking Caughey into the woods within a couple of hours of killing Wiggins in the very area. He asserted that sex with all three was consensual. He admitted to hiding each of the bodies by covering them with rocks or vegetation. "[G]etting rocks trying to hide that bitch." He admitted to feeling rage and hatred of women involved in substance abuse. Finally he admitted to lying to the police because he was afraid of going to jail and what might become of him. (T.3043-3188) Specifically, in light of the defendant's numerous conflicting statements to the police, the jury was free to reject the defendant's version of the events. Carpenter, 785 So.2d at 1195; Finney v. State, 660 So.2d 674, 680 (Fla. 1995); Bedford v. State, 589 So.2d 245, 250-51 (Fla. 1991). The trial court properly denied the JOA and this Court should affirm the sexual battery convictions.

POINT VI

THE COURT CONDUCTED A PROPER INQUIRY INTO THE EXISTENCE OF AN ACTUAL CONFLICT OF INTEREST AND PROPERLY ALLOWED COUNSEL TO REMAIN. (Restated)

McWatters next alleges that the court did not conduct an inquiry when his trial attorney Robert Udell ("Udell") indicated that he had a conflict. He contends that Udell did not disclose the extent of the conflict and that the court simply dismissed the matter by announcing there was no actual conflict. He also throws in a contention that the court should have removed Rusty Akins because he had worked for the Public Defender which conflicted out of the case. These actions allegedly violated his 5th, 6th, and 14th Amendments of the U.S. Constitution and Article I, sections 2, 9, 16, and 17 of the Florida Constitution. The record clearly refutes the accuracy of Defendant's factual assertions and does not support his claim. Furthermore, the Udell conflict issue was not preserved for appeal.

Neither Defendant nor his trial attorneys made any motion to disqualify Udell from representing him at trial. In fact, Udell brought the matter to McWatters's attention as well as to the attention of his co-counsel, the State Attorney's Office, and the court. Udell informed all that he had represented Prevatt in the past but was not currently representing him and had no plans to do so in the future, contrary to Appellant's assertions in his brief. Prevatt was, however, continually telephoning Udell. Udell informed the court that the representation was

in the past and that he was “staying away” from Prevatt and his requests. (T.160) The billing records cited by the defense are from Akins and merely reference the issue that Udell had represented Prevatt, not that the representation was current. The record is clear that Udell had discussed this potential issue with Akins, the State Attorney’s Office, and defendant before it was ever brought up in court. (T.159-160) Udell gave a detailed and complete disclosure to the court of his dealings with Prevatt.

> MR. UDELL: I don't know what's before the Court, and I don't know if someone is making a motion. Let's just advise you where we're at so you're not surprised. One of the State's witnesses, a gentleman name Jerry Prevatt, P-R-E-V-A-T-T. His name is listed as someone who has information relative to this case in the State's answer and demand for discovery. I represented Mr. Prevatt a number of times over the last six years in civil cases and criminal cases. I don't presently represent him in connection with anything. I can tell you, though, that I'm in touch
> with him because he calls me and writes me every two days asking me to send him money, which under the circumstances I'm clearly not gonna do. And he wants me to handle -- there's a warrant apparently in Martin County. He wants me to represent him on that.
> And there's a hold out of Palm Beach County for some crime he wants me to represent him on that. The point is I get a lot of calls from him. And because of this issue, I've sort of just stayed away.

Id. The court asked Akins and the State Attorney their stance on this possible conflict issue. Akins agreed there was no problem with Udell’s continued representation. McWatters stated that he wished Udell to continue as his counsel. All parties agreed that the court should take a waiver of the conflict.

> THE COURT: You are Eugene Wayman McWatters, Jr.?

THE DEFENDANT: Yes, sir.
THE COURT: You're still the same person?
THE DEFENDANT: Yes, sir.
THE COURT: Yes?
THE DEFENDANT: Yes, sir.
THE COURT: Can everybody hear? And how old are you, Mr. McWatters?
THE DEFENDANT: Twenty-seven.
THE COURT: Twenty-seven. And you -- we're not hearing him?
THE CLERK: Does he need to be sworn in?
THE COURT: No, I'm not intending to take sworn testimony. Was that what you all...
MR. BAKKEDAHL: I didn't know if in an abundance of caution you wanted to do that. It's up to the Court.
THE COURT: I don't think on something like this it has to be sworn testimony. I think we're just talking about a waiver issue. And I don't -- unless there's something I don't know about, I don't think it needs to be sworn.
MR. BAKKEDAHL: It can't hurt.
THE COURT: Any objection to Mr. McWatters being sworn in?
MR. UDELL: None.
MR. AKINS: No, sir.
THE COURT: The clerk will swear you in, sir.
(Whereupon, EUGENE WAYMAN McWATTERS, having been called as a witness, was duly sworn and testified as follows:)
EXAMINATION BY THE COURT: Q. You may be seated, sir. And tell me your complete name.
A. Eugene Wayman McWatters, Jr.
Q. And you're 27 years of age?
A. Yes, sir.
Q. And you're represented by two lawyers, Mr. Akins and...
A. Robert Udell.
Q. Mr. Udell. And the lawyer I think we're mainly concerned with here is Mr. Udell. Now, did you hear what he told me just a moment ago about Mr. Prevatt?
A. Yes, sir.
Q. Okay. And have you discussed this with him ahead of time before today?
A. Yes, sir.

Q. Okay. And do you see that there's any conflict in Mr. Udell's representing you because of his earlier relationship with Mr. Prevatt and his ongoing relationship with Mr. Prevatt?
A. No, sir. Mr. Udell has a better legal understanding than I do, and I accept his opinion on the fact that, you know, he advised me that there is no – there's not really a conflict so I -- I totally accept him being my attorney.
Q. Okay. Now, it goes a little bit further than what your lawyer's advised you.
A. Yes, sir.
Q. It is, how do you feel?
A. I feel -- I totally accept the agreement.
Q. Okay. So from your standpoint, tell me if this is true. Is it okay for him to be your lawyer?
A. Yes, sir.
Q. Considering --
A. The circumstances.
Q. -- what you know about him and Mr. Prevatt?
A. Yes, sir.
Q. Okay. And do you see any conflict in his being your lawyer considering the circumstances?
A. No, sir.
THE COURT: Anything further, then?
MR. UDELL: Do you want me to get more specific with him?
MR. BAKKEDAHL: Yeah.
CROSS-EXAMINATION BY MR. UDELL: Q. We've discussed this about ten times, correct?
A. Right.
Q. You know Jerry, right?
A. Yes, sir.
Q. And you know that the discovery -- assuming the discovery is true, it indicates that Mr. Prevatt apparently is prepared to say or has said in the past that he saw you on one of the occasions involving... Is it Jackie?
A. Carrie Caughey.
Q. About Carrie, right?
A. Yes, sir.
Q. He has given a report that he saw you at some time that evening and you walked away and she walked away, correct?
A. Yes, sir.

Q. And you understand he may come into court and say those same things. The State is assuming he's going to. You need to, for the purpose of this hearing, assume that he will. You understand that?
A. Yes, sir.
Q. Now, I understand we've talked about this and it may be that when we get to trial he'll tell the jury that what he's telling them is correct and he may be telling them that's incorrect; but either way, that's where the conflict comes in. You understand that?
A. Yes, sir.
Q. And I told you I felt that I could cross-examine Jerry on those issues notwithstanding my prior relationship with him, and I wouldn't hold back just because of my prior relationship with him. You understand that, correct?
A. Yes, sir.
Q. We also discussed another way of dealing with it is just have co-counsel cross-examine him?
A. Yes, sir.
Q. Okay. Knowing all of that now, do you have any problem, and you're not going to insult me, I have a lot of cases, do you want me to remain on the case?
A. Yes, sir, I want you to remain on the case.
MR. BAKKEDAHL: Nothing further from us, Judge. That's fine. We appreciate it.
THE COURT: And I don't have any more questions.
MR. UDELL: Nothing additional, Judge.

(T.162-67) This colloquy clearly shows that the court, and counsel, conducted an adequate inquiry into Udell's representation. Further, McWatters had discussed the issue numerous times with Akins and Udell and knowingly waived any issue of a conflict. This issue is without merit as well as unpreserved.

Defendant further argues that the trial court should have removed Akins due to a conflict. Mark Harlee was an attorney with the Public Defender's Office who conflicted on McWatters's cases because his office represented some of the

witnesses involved. Akins resigned from the Public Defender's Office before the conflict was declared. Additionally, he never worked in the Martin County office where the conflicts arose; consequently, he never personally represented or had contact with the individuals who were the basis for the conflict. Both of these attorneys gave sworn testimony to the court during its inquiry into the possible conflict .(T.371-84) Based upon that uncontradicted evidence, the court found no actual conflict existed and denied the motion. (T.390-91)

In order to show a violation of the right to conflict-free counsel, McWatters must "establish that an actual conflict of interest adversely affected his lawyer's performance." Hunter v. State, 817 So.2d 786, 791 (Fla.2002); see also Bouie v. State, 559 So.2d 1113, 1115 (Fla. 1990)(same). In Hunter, the Court explained that a lawyer suffers from an actual conflict of interest when he or she "actively represent[s] conflicting interests." Id. A defendant must identify specific evidence in the record that suggests that his interests were compromised in order to demonstrate an actual conflict. Mungin v. State, 932 So.2d 986 (Fla. 2006); see also Herring v. State, 730 So.2d 1264, 1267 (Fla.1998). "A possible, speculative or merely hypothetical conflict is 'insufficient to impugn a criminal conviction.' Cuyler, 446 U.S. at 350." Mungin at 1001. "'[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.' Cuyler at 350. If a

defendant successfully demonstrates the existence of an actual conflict, the defendant must also show that this conflict had an adverse effect upon his lawyer's representation." Hunter at 792; Cuyler v. Sullivan, 446 U.S. 335, 350 (1980).

In Hunter this Court rejected defendant's allegation that an actual conflict existed because a State witness was formerly represented by the same public defender's office that represented the defendant. Since trial counsel was unaware of the public defender's previous representation of the witness and did not even know about the witness's criminal background, there was no actual conflict. Id. at 791-793. In that decision the Court relied on McCrae v. State, 510 So.2d 874 (Fla.1987) where it concluded that counsel was not required "to make inquiry into the matter in order to be considered reasonably effective and within the range of normal, professional competence." McCrae at 877. In Bouie this Court found no conflict where the Public Defender's office represented the witness to Bouie's confession on the day he heard the confession but where that representation ceased before he testified at trial. Bouie at 1115.

The trial court's finding that no actual conflict existed with regard to Akins was supported by the record. The court heard from all the attorneys involved and fully vetted the factual underpinnings of the potential conflicts. Udell volunteered the detailed recitation of his dealings with Prevatt. Furthermore, McWatters specifically waived any appellate issue regarding the *potential* conflict of Udell's

representation. Steinhorst, 412 So.2d at 338(holding for issue to be cognizable on appeal, it must be specific contention asserted below). He has failed to demonstrate, as required by the case law, that there was either an actual conflict or that there was adverse performance by his counsel as a result. This claim should be denied.

POINT VII

THE TRIAL COURT DID NOT ERR IN ADMITTING A PHOTOGRAPH OF THE VICTIM'S FACE (restated).

McWatters claims the trial court erred when it admitted photographs depicting the victims' decomposing bodies. According to him, the danger of unfair prejudice outweighed the probative value because the photographs showed additional damage to the victim caused by exposure to the elements and insects. The state disagrees. The trial court did not abuse its discretion since the photographs were used by the medical examiner to explain what the wounds looked like, the specific damage inflicted upon the victims by manual strangulation, and why the State was prevented from presenting detailed forensic evidence. The probative value was not outweighed by the prejudicial effect.

The admission of photographic evidence is within the trial judge's discretion and a ruling on this issue will not be disturbed unless there is a clear showing of abuse. Pangburn v. State, 661 So. 2d 1182, 1187 (Fla. 1995). See Davis v. State, 859 So.2d 465, 477 (Fla.2003); Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack

v. State, 753 So. 2d 9 (Fla. 2000); Jent v. State, 408 So. 2d 1024 (Fla. 1981). Even gruesome photographs are admissible "[a]bsent a clear showing of abuse of discretion by the trial court." See Rose v. State, 787 So. 2d 786, 794 (Fla. 2001); Gudinas v. State, 693 So. 2d 953 (Fla. 1997).

In Doorbal v. State, 2008 WL 382742 (Fla.2008) this Court explained:

> "The test for admissibility of photographic evidence is relevancy rather than necessity." Crime scene photographs are considered relevant when they establish the manner in which the murder was committed, show the position and location of the victim when he or she is found by police, or assist crime scene technicians in explaining the condition of the crime scene when police arrived. This Court has upheld the admission of autopsy photographs when they are necessary to explain a medical examiner's testimony, the manner of death, or the location of the wounds.
>
> However, even where photographs are relevant, the trial court must still determine whether the "gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jur[ors] and [distract] them from a fair and unimpassioned consideration of the evidence." In making this determination, the trial court should "scrutinize such evidence carefully for prejudicial effect, particularly when less graphic photos are available to illustrate the same point."
>
> Douglas v. State, 878 So.2d 1246, 1255 (Fla.2004) (citations omitted) (alterations in original) (quoting Pope v. State, 679 So.2d 710, 713 (Fla.1996); Czubak v. State, 570 So.2d 925, 928 (Fla.1990); Marshall v. State, 604 So.2d 799, 804 (Fla.1992)). The admission of photographs will also be upheld if they are corroborative of other evidence. See Czubak v. State, 570 So.2d at 928.

Id. at 28-29.

Under the abuse of discretion standard, substantial deference is paid to the trial court's ruling which will be upheld "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris, 382 So.2d at 1203; Trease, 768 So.2d at 1053 n.2. This standard is one of the most difficult for an appellant to satisfy. Ford, 700 So.2d at 195.

Diggs averred in proffered testimony that he examined the photographs (State's 24-26) with another doctor to help him determine how Bradley died. Specifically, exhibit 24 depicted how the bra was pulled up thereby indicating a factor he would rely on for his expert opinion on whether or not the killing was a rape homicide. It also showed the level of decomposition. Exhibit 25 showed the right side of the neck and was taken to differentiate between the trauma caused by strangulation and that by the effects of decomposition. Exhibit 26 was a left side view focusing on the condition of the bones in the neck which prove the strangulation. He averred that the three photographs helped him determine both the cause of death and the circumstances surrounding it, including the extensive decomposition of the body which prevented the collection of forensic evidence like semen normally used to help prove a rape homicide. The photographs show the location of the relevant neck bones in Bradley and were necessary for a “complete” explanation of the cause of death. (T.2280-94)

The State asserted the photographs were relevant to show how the Medical Examiner arrived at the cause of death and why it could not present forensic evidence a jury might expect to prove a sexual battery and murder. The State selected only three of 48 available photographs, screening out those showing the dissected body, sexual organs, breasts, and so forth, unlike the facts in Almeida v. State, 748 So.2d 922 (Fla. 1999) relied on by McWatters. The three selected specifically assisted the medical examiner in making a determination about the death. (T.2295-96) The trial court found the photographs were highly relevant. In an abundance of caution, it proposed and gave an instruction advising the jury about the photographs. (T.2297, 2309)

The court again took a proffer from Diggs on exhibit 92 which showed the condition of Caughey's body *as it was found*. The State noted it had 26 photographs of the Caughey autopsy from which they selected only two. (T.2949) This particular photograph assisted Diggs in describing to the jury the condition of Caughey's body and the relative position of her clothing with respect to her breasts; it was the sole photograph clearly depicting that. He also relied on it in forming his opinion about the cause and time of death and whether this was a rape homicide. Again, the photograph clearly depicted the extreme decomposition which forestalled any collection of forensic evidence. (T.2948-57) The court found it more probative than prejudicial. Upon this record, the court did not abuse its

discretion in finding each photograph relevant to the case issues and admitting them into evidence.

"[P]hotographs will be admissible into evidence 'if relevant to any issue required to be proven in a case.'" Wilson v. State, 436 So. 2d 908, 910 (Fla. 1983); Adams v. State, 412 So. 2d 850 (Fla.); Welty v. State, 402 So. 2d 1159 (Fla. 1981). The fact a photograph is gruesome does not render it inadmissible. Such photographs are admissible if they fairly and accurately represent a fact at issue. Preston v. State, 607 So. 2d 404, 410 (Fla. 1992). Gruesome photos are admissible when they show the condition and location of the body when found or illustrate a witness' testimony, assist the jury in understanding the testimony, or bear on issues of the nature and extent of the injuries, the cause of death, nature and force of the violence used, premeditation or intent. Rose, 787 So. 2d at 794 (noting "autopsy photographs, even when difficult to view, are admissible to the extent that they fairly and accurately establish a material fact and are not unduly prejudicial."); Rutherford, 774 So. 2d 637; Pangburn, 661 So. 2d at 1188.

> Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.... It is not to be presumed that gruesome photographs will so inflame the jury that they will find the accused guilty in the absence of evidence of guilt. Rather, we presume that jurors are guided by logic and thus are aware that pictures of the murdered victims do not alone prove the guilt of the accused.

Henderson v. State, 463 So. 2d 196, 200 (Fla.).

Applying these principles, it is clear the photographs were relevant and admissible. They were used to describe the state of Bradley's and Caughey's clothing when the bodies were found, the location of Bradley's injuries, and each bodies extensive decomposition which prevented the State from submitting forensic evidence the jury might expect in the age of *CSI*. Where the court has viewed the evidence and determined it relevant and necessary for a complete understanding of the testimony, the ruling should not be overturned. Lott v. State, 695 So.2d 1239, 1243 (Fla. 1997)(finding no error where judge viewed prints and found them necessary and relevant to demonstrate manner of death, nature of injuries, and how they were inflicted); Larkins v. State, 655 So.2d 95, 98 (Fla. 1995)(same). Diggs's testimony demonstrated that he actually relied on these photographs, they were carefully selected from a far larger number of available photographs, and involved issues the State needed to prove; thus, none were gratuitous. The Court should find there was no abuse of discretion since the photographs were relevant to the case issues and their probative value outweighed any prejudicial effect.

POINT VIII

THE TRIAL COURT PROPERLY OVERRULED APPELLANT'S HEARSAY AND CONFRONTATION CLAUSE OBJECTIONS.

Appellant argues that the trial court erred by allowing, over objection, the introduction of certain portions of his statements into evidence. Specifically,

McWatters contends that not only was it error to admit certain hearsay statements into evidence, but that by allowing certain portions of Appellant's statement into evidence, the trial court violated his constitutional right to confront the witnesses against him. The state counters that the trial court properly admitted appellant's statement and therefore did not abuse its discretion. This issue is without merit.

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's determination will not be disturbed on appellate review absent a clear abuse of that discretion. Tanzi v. State, 964 So. 2d 106 (Fla. 2007). Under the abuse of discretion standard, "[d]iscretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court.'" Trease, 768 So.2d at 1053 n. 2.

Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered to prove the truth of the matter asserted. Banks v. State, 790 So. 2d 1094, 1097 (Fla. 2001). Central to this issue are certain statements made by the interrogating officers in order to elicit inculpatory responses from Appellant. The jury heard these statements as part of the recorded statement the State entered into evidence.

> MR. SILVAS: You saying we never - - you never saw her after that?
> MR. MCWATTERS: Never talked to her after that.
> MR. SILVAS: That's the problem we're having. We have all of these witnesses who saw you leave with her.

MR. MCWATTERS: See, I don't know what witnesses that you're talking about. You know what I'm saying?
MR. SILVAS: You know them all. The - - the Austins, both Austins, Senior and Junior.
MR. MCWATTERS: See, then again, I talked to the Austins, too, and the Austins told me the only reason why they told the Sheriff's Department that was because they were mad at me. I wish I had an audio.
MR. SILVAS: Well, I - - well, the Austins - - the last time I talked to the Austins they were going to beat you up.
MR. MCWATTERS: Yeah, I talked to them personally myself.
MR. SILVAS: So they - - they - - they - - they think you killed Jackie.
MR. MCWATTERS: Yeah. That's why I - - that's why Austin Junior got mad, because Senior was telling me the truth.
...
MR. SILVAS: What about Shep?
MR. MCWATTERS: What's he say? He said that I admitted fucking giving the girl a ride on the bicycle. I seen what the fuck it says on the goddamned - - on the wall in there. I read everything.
...
MR. SILVAS: What I was going to say is that you told Shep - -
MR. MCWATTERS: I didn't tell Shep shit.
MR. SILVAS: Well, you did.
MR. MCWATTERS: I'm reading it on the wall, though.
MR. SILVAS: But I'm just telling you, brother, you told Shep.
MR. MCWATTERS: I didn't tell Shep.
MR. SILVAS: He can testify in court. You told him that you gave her a ride home.
MR. MCWATTERS: Yeah, that's what (inaudible).
MR. SILVAS: You had her in the house.
MR. MCWATTERS: That's what I said - -
MR. SILVAS: That's what he is going to say.
MR. MCWATTERS: That's why I was (inaudible).
MR. SILVAS: You can call him a liar.
MR. MCWATTERS: That's why I was just (inaudible) - -
MR. SILVAS: Why don't you call him a liar?

(T.3047-55).

This exchange with the police is admissible since such questions are not hearsay and were not offered for the truth of the matter asserted. During interrogations officers often employ various strategies designed to elicit inculpatory responses. As this Court has recognized, the United States Supreme Court has often held that officers are permitted to deceive suspects regarding the evidence they have against them. See Frazier v. Cupp, 394 U.S. 731, 739(1969); Escobar v. State, 699 So. 2d 988, 994 (Fla. 1997); Grant v. State, 171 So. 2d 361, 363 n.1 (Fla. 1965). If these techniques actually do elicit an inculpatory response, it would be the pertinent portion of the statement, not necessarily the questions which serve as a backdrop. Should this statement be played for the jury, anything said by the interrogating officers would be included simply to place the defendant's inculpatory statements into context.

Although Appellant cites multiple cases to support his position, none of them directly deal with the issue at bar. In Sparkman v. State, 902 So. 2d 253 (Fla. 4th DCA 2005), the issue centered around a police interrogation where the court ruled that the detectives recitation of facts, and lack of actual questioning, was akin to testimony and therefore hearsay. The same issue is discussed in Pausch v. State, 596 So. 2d 1216 (Fla. 2d DCA 1992) and Newsome v. State, 735 So. 2d 546 (Fla. 4th DCA 1999). Indeed, the pervasive issue within all of Appellant's cases all miss the mark as they deal solely with a detective testifying for, rather than questioning,

the suspect. However, the Second District Court of Appeals did consider the exact issue at bar in Worden v. State, 603 So. 2d 581 (Fla. 2nd DCA 1992):

> The questions propounded and statements of the detectives were not offered for their truth, but were offered to place appellant's answers in context. For that reason, the questions were relevant. The only question is whether the probative value of the testimony is outweighed by the harm or prejudice to appellant. Since the questions were set forth in their proper context, interrogation of a suspected child abuser, we conclude that a rational jury would understand that law enforcement officers use many techniques to secure confessions and that the methods used here were indicative of that.

Worden, at 583. This Court should find the same logic applies here.

The officer's comments here were not used for the truth of the matter asserted and, thus, did not violate the confrontation clause. However, even if this Court finds the statements hearsay, Appellant has not demonstrated how he has been harmed in any way. The statement was played for the jury during the interrogating detective's direct testimony. The witnesses that were the subject of the detective's statements in issue testified as well. Appellant was given every opportunity to confront these witnesses on cross examination. It cannot be said that Appellant suffered any harm. This issue is without merit.

POINTS IX AND X

> THE TRIAL COURT PROPERLY RULED ON THE ADMISSIBILITY OF CERTAIN EVIDENCE. (restated)

Appellant argues in point IX that the trial court improperly excluded certain proffered testimony by Austin Cottle Jr. ("Cottle"). If allowed, Cottle would have

testified that Glen Burbaugh threatened to choke Bradley to death if she went back with John Powell. In point X, Appellant alleges that the trial court improperly allowed into evidence a certain statement made by Jerry Prevatt ("Prevatt"). Because this statement was admitted into evidence, Appellant argues that the State impugned his character. As both claims are procedurally barred, no relief will be granted. Furthermore, Appellant has not demonstrated in any way how these issues can be considered fundamental error. These issues are wholly without merit.

As addressed in the previous claim, the admissibility of evidence is within the sound discretion of the trial court, and the trial court's determination will not be disturbed on appellate review absent a clear abuse of that discretion. Tanzi, 964 So. 2d 106. See Thomas v. State, 748 So.2d 970, 982 (Fla. 1999)(trial judge is afforded wide discretion regarding the admissibility of evidence and a ruling admitting or excluding evidence will not, generally, be reversed unless there has been a showing of an abuse of discretion); Sexton v. State, 697 So.2d 833 (Fla. 1997).

The Cottle Jr. Statement

Initially Appellant's claim under point IX is entitled to no relief as it was waived at trial. For an issue to be reviewable on appeal, it must be properly preserved by a contemporaneous objection on the same grounds as raised on

appeal or the error must be fundamental. Steinhorst, 412 So.2d at 338; J.B., 705 So.2d at 1378. The of contemporaneous objection requirement affords both trial judges the opportunity to address and possibly redress a claimed error and prevents counsel from allowing errors to go unchallenged and later using the error to a client's tactical advantage. See J.B., 705 So.2d at 1378; F.B., 852 So.2d 226.

At trial, Appellant wished to introduce testimony by Cottle that Burgbaugh threatened to choke Bradley to death if he caught her with another man. (T.1952). Upon a hearsay objection by the State, defense counsel argued that the statement should be admissible as an exception to the hearsay rule under §90.803(3), as a statement of plan or intent. So as to fully understand the statement in question, the court requested to hear the proffered testimony. During that proffer, Cottle testified that he was not even present when the statement was originally made.

Q Mr. Cottle, Sr. , did you ever overhear Glenn Burbaugh threaten to kill Jackie Bradley?
A No, I did not.
Q You didn't?
A No. I did hear -- I did hear him threaten, though, if she went back with John Powell that he would choke her to death.
Q Okay. You heard that?
A I heard that.
Q And Glenn Burbaugh made that statement?
A Yeah, he said that statement.
Q And that was the issue that if she went with another man, in this instance being --
A He would choke her to death.
Q He would choke her to death?
A Right.
MR. AKINS: I have nothing further in the proffer.

MS. KIRKWOOD: May I?

Q Was Jackie Clark present when that statement was made? Was Jackie there when that statement was made?

A That was made in Atlanta, Georgia. Then when she -- when she came back to Port Salerno she told me about it.

Q So you didn't actually hear Mr. Burbaugh say that?

A No, I didn't actually hear him say it, I just said she told me what he said.

...

Q But the statement that Mr. -- that Burbaugh made to Jackie Bradley Clark was made in Georgia and you weren't there?

A No. But she told us about it when she come back home.

(T.1952-53). During the argument following this proffer, it was Appellant who acknowledged that the statement was inadmissible as hearsay within hearsay. In fact, counsel clarified that the hearsay argument did not apply to the statement at issue here, but in fact to a second statement made later during the proffer.

> THE COURT: Well, the first statement dealt with a threat of future action should Miss Bradley take certain action. The second statement, the one alleged to have been made in Florida, was an after-the-death statement dealing with feelings of revenge.
> MR. UDELL: Okay. Just want to take them one at a time. Give me a moment.
> **MR. AKINS: Your Honor, the first statement, let me put it on the record. I think it's pretty clear that the first statement is hearsay within hearsay and therefore there's not an exception to that.**
> THE COURT: And I appreciate the candor because I agree with you.

(T.1960-61). This issue was clearly waived by Appellant's own concession. However, even if this Court were to reach the merits of this issue, Appellant has not demonstrated any cognizable claim arising to the level of fundamental error for which relief should be granted.

"[I]n order to be of such fundamental nature as to justify a reversal in the absence of timely objection the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown v. State, 124 So.2d 481, 484 (Fla.1960);see State v. Johnson, 616 So.2d 1, 3 (Fla.1993) (stating that "for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process").

This court has previously held that vague and conclusory allegations on appeal are insufficient to warrant relief. Smith v. State, 931 So. 2d 790, 800 (Fla.), cert. denied, 127 S. Ct. 587, 166 L. Ed. 2d 436 (2006). see Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."); see also Simmons v. State, 934 So. 2d 1100, 1111 n.12 (Fla. 2006); Cooper v. State, 856 So. 2d 969, 977 n.7 (Fla. 2003); Randolph v. State, 853 So. 2d 1051, 1063 n.12 (Fla. 2003).

In addressing this issue, Appellant has merely alleged error by the trial court without showing how the verdict would have changed given the evidence against McWatters including his own confession to killing each of the three victims. In

explanation, Appellant offers only that the statement at issue would potentially assist in creating reasonable doubt by potentially inculpating Burbaugh.[5] Because this issue was waived and, in the alternative, insufficiently pled, this Court must find this issue to be without merit.

The Prevatt Statement

Turning to Point X, Appellant argues that the trial court erred in admitting, over defense objection, a statement by Prevatt made during the State's direct examination. Specifically, Appellant alleges that by permitting him to testify that he was afraid of McWatters, the trial court erroneously allowed the prosecution to impugn Appellant's character. However, McWatters mischaracterizes Prevatt's statement. Trial counsel objected on different grounds than those asserted here so this issue was not preserved and, therefore, is also waived.

Discussing an arrangement Prevatt made with Appellant to obtain drugs, the State asked whether or not he had given Appellant any money towards achieving that end. Prevatt replied that he had not, and when asked why, he stated that he was "afraid that [he] would get ripped off." Upon hearing this statement, defense counsel immediately objected.

MR. AKINS: Your Honor, I'm not sure if I recall a Williams rule notice for

[5] Although Appellant correctly states the proposition for which Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990) stands, he has not demonstrated the relevancy of the case to the issue at bar.

> any type of theft committed or a suggestion of committing a theft by Eugene Mcwatters. I suggest this is a collateral issue that should not have been put before the jury.
> THE COURT: Okay. As raised, overruled. Motion is denied.

(T.2468). Although defense counsel was concerned with a possible Williams rule violation, Appellant's contention at bar raises concerns about the impugning of his character. Because this issue was not specifically objected to below, it cannot be raised here.

Likewise, there can be no fundamental error here as Appellant misconstrued Prevatt's statement. Prevatt never testified that he was afraid of Appellant. He only stated that he was worried about Appellant stealing his money. In so doing, he was explaining his actions at the time defendant made contact with Caughey. As such, these issues do not constitute fundamental error. McWatters provides no reasoning on how this supposed error vitiated the jury's verdict. This Court must find them to be without merit.

POINT XI

THE TRIAL COURT PROPERLY DENIED THE MOTION TO DISQUALIFY THE STATE ATTORNEY'S OFFICE. (Restated)

In his next claim, McWatters argues that the trial court erred in denying his motion to disqualify the State Attorney's Office because the Assistant State Attorney ("ASA") listened to recorded telephone calls from the jail between him and his attorneys. He contends that this action violated his attorney-client privilege

despite the fact that he was repeatedly warned calls from the jail were recorded. He merely asserts without authority that such calls should be monitored only for security purposes. At no point does he allege any prejudice or harm. This court should deny relief on this claim.

The standard of review of a court's ruling on a motion to disqualify the State Attorney's office is abuse of discretion. Farina v. State, 680 So.2d 392, 395-96 (Fla.1996). In order to prevail on a motion to disqualify all members of the office from prosecuting a case, "the defendant must point to some prejudice to him which results from the office's participation in the prosecution." State v. Clausell, 474 So.2d 1189, 1190(Fla.1985). Actual prejudice is "something more than the mere appearance of impropriety." Meggs v. McClure, 538 So.2d 518, 519 (Fla. 1st DCA 1989). Disqualification of a state attorney is appropriate "only to prevent the accused from suffering prejudice that he otherwise would not bear." Id. at 519-20.

Here the trial court held an evidentiary hearing on the calls at issue to determine: if calls to his attorneys were recorded; if they were listened to by the ASA; and if they were used in the preparation of the case. Dougherty testified that all calls from the jail are routinely recorded and that there is a warning given at the beginning of each such call reminding the parties of that fact. Those warnings were contained in McWatters's recorded calls. (T.533-546) The detective gathering McWatters's calls did not target calls to his attorney nor did he listen to them.

(T.547) Bakkedahl was the lead ASA prosecuting these homicides. He testified that he listened to the four calls in question to determine if any was a three way call to a non attorney. He averred that the content of these calls did not alter his prosecution strategy in any manner, especially since the defense theories had already been exposed through normal discovery. (T.556-63) Erin Kirkwood, an ASA, testified that although she listened to two of the calls, neither affected her prosecution. (T.564-65)

Based on that testimony, the trial court found the following: that all inmate calls are recorded and stored; that all such calls contain a warning; and that McWatters had those warnings in all of his jail calls and clearly knew his calls were being monitored. The court stated:

> There is no evidence that this recording system was used to interfere with his right to counsel or his right to due process. ... There was no reasonable expectation of privacy in those calls and there was a voluntary waiver of privilege by Mr. McWatters in the face of that lack of reasonable expectation of privacy.
> ... There is no evidence here that the use of the recording system constitutionally infringed upon the actual ability of Mr. McWatters to effectively communicate with counsel.
> ... There is no evidence that the content of the calls was used to the substantial detriment or any detriment to Mr. McWatters.

(T.594-96)

In Rogers v. State, 783 So.2d 980 (Fla. 2001) investigators seized papers in defendant's cell relating to his murder trial and they did so at the behest of the State Attorney's office. This Court held that the trial court did not abuse its

discretion in denying his motion to disqualify the State Attorney's office because Rogers failed to point to specific prejudice that resulted from the State Attorney's participation in the prosecution. Similarly here, McWatters failed at the hearing of his motion to show that either there was a violation of his attorney-client privilege or that he suffered any prejudice from the State Attorney's actions. The trial court properly denied his motion to recuse and this Court should affirm that ruling.

POINTS XII & XIII

THE COURT PROPERLY INSTRUCTED ON AND FOUND THE KILLINGS COLD, CALCULATED, AND PREMEDITATED AND THE INSTRUCTION WAS NOT UNCONSTITUTIONAL.

In the next two points McWatters submits that the trial court erred in finding the aggravating circumstance that the crimes were committed in a cold, calculated, and premeditated ("CCP") manner. He then argues that the standard jury instruction given was unconstitutional in violation of the 5th, 6th, 8th, and 14th Amendments to the US Constitution and Art. I, secs. 9, 16, 17, 21, and 22 of the Florida Constitution. Both are without merit. This court should affirm the given instruction and the finding of CCP.

Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test with a determination if the right rule of law was applied. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review,

noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt—that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," quoting Willacy v. State, 696 So. 2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997). See Gore, 784 So.2d at 432; Boyd, 910 So.2d at 191; Conde, 860 So.2d at 953. "This Court has concluded that 'competent substantial evidence' is tantamount to 'legally sufficient evidence' and "[i]n criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt." Almeida v. State, 748 So.2d 922, 932 & n. 20 (Fla.1999) (quoting Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981))." Williams v. State, 967 So.2d 735, 761 (Fla. 2007).

In discussing CCP, this Court has stated:

> In order to establish the CCP aggravator, the evidence must show that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.
> ... While "heightened premeditation" may be inferred from the circumstances of the killing, it also requires proof beyond a reasonable doubt of "premeditation over and above what is required for unaggravated first-degree murder." ... The "plan to kill cannot be inferred solely from a plan to commit, or the commission of, another

> felony." ... However, CCP can be indicated by the circumstances if they point to such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.

Philmore v. State, 820 So.2d 919, 933 (Fla. 2002). "[T]he facts supporting CCP must focus on the manner in which the crime was executed, e.g., advance procurement of weapon, lack of provocation, killing carried out as a matter of course." Lynch v. State, 841 So.2d 362, 372 (Fla. 2003). In Guardado v. State, 965 So.2d 108, 117(Fla. 2007): this Court reasoned:

> ... that to support the CCP aggravator, a jury must find (1) that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage (cold); (2) that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) that the defendant exhibited heightened premeditation; and (4) that the defendant had no pretense of moral or legal justification. *(citations omitted).*

Picking an isolated location to commit the murder is evidence supporting CCP. See Wuornos, 644 So.2d at 1008. Evidence of the victim's lack of resistance or provocation has been held to support both the "cold" element of CCP and the requirement of a lack of any "pretense of justification" for the killing. See Williamson v. State, 511 So.2d 289 (Fla. 1987) (finding no pretense of justification for stabbing fellow inmate where victim had made no threatening acts toward defendant).

The murder in this case falls squarely within that definition. There is substantial, competent evidence supporting the CCP aggravator here. The killing

was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage. Appellant had a careful plan or prearranged design to murder each of the three women, beginning with a ruse to separate and isolate them by taking them to a remote secluded location where he followed his pre-determined scheme to rape and then murder them, thus exhibiting heightened premeditation.

The trial court's sentencing order provides abundant proof that the right rule of law was applied and sets forth the facts establishing CCP. It outlines the substantial, competent evidence in the record supporting its findings:

> As noted above, each of the defendant's three murder victims was living on the fringe of society due to poverty, or substance abuse problems, or both. In each homicide the defendant preyed upon their difficulties and lured each woman to a dark location to have forcible sex with each and to kill each.
>
> The murder of Jacqueline Bradley was the defendant's first homicide. The defendant preyed on the vulnerable Ms. Bradley and offered her what she wanted to lure her to a secluded spot. The defendant offered Ms. Bradley a hot shower, knowing that he could not take her, or anyone else to his sister's home. The offer was a conscious decision and plan to lure her to an isolated area where he could engage in his criminal behavior. The subsequent sexual battery homicides of Ms. Wiggins and Ms. Caughey add weight to the conclusion that Ms. Bradley's homicide was the product of a prearranged plan to lure her to her death. The facts demonstrate a careful plan or prearranged design as required to establish this aggravating factor.
>
> Although in his June 24, 2004 statement the defendant claimed that he "snapped," there is no credible evidence that the homicide of Ms. Bradley was committed in the heat of passion. The defendant's actions before and after the homicide reveal that this was a deliberate killing and was the product of cool and calm reflection and not an act prompted by emotional frenzy or panic. Further, although the

evidence was that the defendant acted out of anger, he did not act out of a fit of rage. The defendant's murder of Ms. Bradley was "cold."
The defendant walked with Ms. Bradley a distance of several blocks. During that time he had considerable opportunity to consider his actions, and where he felt it was best to engage in his criminal behavior to provide maximum concealment, keeping in mind that he needed to continue in the area of his sister's home based on the rouse he set up for Ms. Bradley. He selected an area that was dark and not easily seen from the adjacent residences, while at the same time close to the supposed purpose of their walk - the shower. According to the defendant's June 23, 2004 statement, once they arrived at the scene of the murder, he and Ms. Bradley talked, smoked cigarettes and drank beer for twenty to forty minutes, giving the defendant even more time to reflect.
Since he was unarmed, the defendant had to determine how he was going to murder Ms. Bradley. the only effective method under the circumstance was strangulation. The defendant had considerable time to reflect on all of this during the walk and during the time he spent at the scene with Ms. Bradley. In addition, due to the nature of a strangulation death, the defendant had additional time to continue to reflect on his actions as he slowly strangled the life out of ms. Bradley. According to the testimony of the medical examiner, Ms. Bradley would have been unconscious in as few as thirty seconds. had the defendant not intended to kill Ms. Bradley, he could have stopped at that point, and left. However, instead he continued to strangle her for as much as three more minutes, providing additional time for reflection until Ms. Bradley died. The evidence establishes heightened premeditation.
There was no evidence at trial of any suggestion that Ms. Bradley's murder was committed under the pretense of a moral or legal justification, nor has the defense raised that claim.
Christal Wiggins was sexually battered and murdered approximately sixty-five days after the sexual battery and murder of Ms. Bradley. At the time of Ms. Wiggins' murder, the defendant had been successful in his actions with Ms. Bradley. In selecting his second victim, the defendant again sought out an individual who was vulnerable. Preying upon Ms.Wiggins' vulnerabilities, the defendant lured her with the promise of drugs, to a dark and isolated area where he could force Ms. Wiggins to have sex and kill her without fear of detection. The facts of this sexual battery and homicide are strikingly similar to sexual

battery homicides of Ms. Bradley and Ms. Caughey and provide additional evidence of the defendant's careful plan and prearranged design. In fact, with this second homicide, the defendant learned from the first murder to do his killing further from his own residence, in a more secluded spot. A lesson learned that he will repeat in the third murder.

As in the Bradley homicide, there is no credible evidence that the murder of Ms. Wiggins was committed in the heat of passion or under a loss of emotional control. The defendant's self-serving statement that he "lost it" does not negate this factor. We are dealing with three homicides that occurred with substantial similarities. The defendant's actions before and after the homicide reveal that this was a deliberate killing and was the product of cool and calm reflection and not an act prompted by emotional frenzy or panic. Further, although the evidence was that the defendant acted out of anger, he did not act our of a fit of rage. the defendant's murder of Ms. Wiggins was "cold."

The defendant and Ms. Wiggins walked to the location of the murder. He lured her to an isolated area. During that walk of several blocks the defendant had the opportunity to reflect upon the manner in which he had murdered Ms. Bradley. he knew that he once again was going to need to use strangulation, a method that served him well with Ms. Bradley. As he did with Ms. Bradley, he strangled Ms. Wiggins. Once again, due to the nature of strangulation death, the defendant had additional time to continue to reflect on his actions as he slowly strangled the life out of Ms. Wiggins. According to the testimony of the medical examiner, Ms. Wiggins would have been unconscious in as few as thirty seconds. Had he not intended to kill Ms. Wiggins, he could have stopped at that point, and left. However, instead he continued to strangle her for as much as three more minutes, providing additional time for reflection until Ms. Wiggins died. These facts, coupled with the strikingly similar facts of Ms. Bradley's murder, establish "heightened premeditation."

There was no evidence at trial of any suggestion that Ms. Wiggins' murder was committed under the pretense of a moral or legal justification, nor has the defense raised that claim.

Incredibly, within a couple of hours of killing Ms. Wiggins, the defendant identified his third victim, Carrieann Caughey. At the time of Ms. Caughey's murder, the defendant had been successful in his murders of Ms. Bradley and Ms. Wiggins. In selecting his third victim, the defendant once again sought an individual who was

vulnerable. Preying upon Ms. Caughey's vulnerabilities, the defendant lured Ms. Caughey with the promise of drugs to a dark and isolated area where he could force her to have sex and kill her without fear of detection. the facts of this sexual battery and homicide are strikingly similar to sexual battery homicides of Ms. Wiggins and Ms. Bradley and provide additional evidence of the defendant's careful plan and prearranged design to commit the murder.

As in the Bradley and Wiggins homicides, there is no credible evidence that the murder of Ms. Caughey was committed in the heat of passion or under a loss of emotional control. The defendant's self-serving statement that he "lost it" does not negate this factor. We are dealing with three homicides that occurred with substantial similarities. The defendant's actions before and after the homicide reveal that this was a deliberate killing and was the product of cool and calm reflection and not an act prompted by emotional frenzy or panic. Further, although the evidence was that the defendant acted out of anger, he did not act our of a fit of rage. The defendant's murder of Ms. Caughey was "cold."

As in the prior two homicides, the defendant and Ms. Caughey walked to the location of the murder. He lured her to an isolated area. During that walk, the defendant had the opportunity to reflect upon his intended actions. He was again unarmed, and had the opportunity to reflect upon the manner in which he had murdered Ms. Bradley, and had murdered Ms. Wiggins only a couple of hours earlier. He knew that he once again was going to need to use strangulation, a method that served him well with Ms. Bradley and Ms. Wiggins. As he did with Ms. Bradley and Ms. Wiggins, he strangled Ms. Caughey. Once again, due to the nature of a strangulation death, the defendant had additional time to continue to reflect on his actions as he slowly strangled the life out of Ms. Caughey. According to the testimony of the medical examiner, Ms. Caughey would have been unconscious in as few as thirty seconds. Had he not intended to kill Ms. Caughey, he could have stopped at that point, and left. However, instead he continued to strangle her for as much as three more minutes, providing additional time for reflection until Ms. Caughey died. These facts, coupled with the strikingly similar facts of Ms. Bradley's and Ms. Wiggins' murders, establish the "heightened premeditation" element of CCP.

> There was no evidence at trial of any suggestion that Ms. Caughey's murder was committed under the pretense of a moral or legal justification, nor has the defense raised that claim.
> Each of these substantially similar homicides provides evidence of the CCP factor for the other. (citation omitted) In addition, the CCP factor is stronger with each successive murder. ... This man methodically killed two women by slowly choking the life out of them in less than two hours.
> With each of these victims, the defendant had to use his superior size, wight and strength to hold these women down as he was applying great pressure to their necks to keep them from breathing. He had to contend with their struggles to stay alive. He had to stare at each one face-to-face, eye-to eye, for 3 or 4 minutes as he choked the life out of them until their bodies went limp in death. With each successive victim he became more experienced in the process of murdering them. It is difficult to imagine a more cold, calculated or premeditated state of affairs.

(R:4416-22)

The court's finding that each killing was cold was based in part on McWatters's statement where he provided no reason for strangling these women other than some defused anger at the mother of his child and his statement that he just "lost it." The totality of his June 23 statement supports the court's determination that it was self serving since he continually refused to provide details of killing each woman, eventually saying he just preferred not to think about it. (T.3181) Defendant did admit that he was looking at them face to face when he killed them, further supporting the court's finding. (T.3151) Further, the court could properly reject the self-serving portions of the statement which was contrary to the facts that could be inferred from the other two similar crimes.

Wuornos, 676 So.2d 966; Conde, 860 So.2d at 953. In Hertz v. State, 803 So.2d 629, 650(Fla. 2001) this Court noted that "the 'cold' element is only not found if the crime is a 'heated' murder of passion, in which loss of emotional control is evident from the facts...." McWatters's confession reveals no such heat of passion in any of these killings.

The second element of CCP , a careful prearranged plan, was fully detailed in the court's sentencing order. Even McWatters told the police the three were all of the same "theory." (T.3114) Similarly, the court fully detailed the grounds for finding the third element of "heightened premeditation." Additionally, McWatters acknowledged or implied a calculated plan when he told the police he first realized he "messed up" when he saw the first dead girl in front of him. (T.3163) For the final element of no moral or legal justification, appellant does not even attempt to argue that he has a justification for these brutal murders. This court should affirm the CCP aggravator since there was competent, substantial evidence to support it.

Moreover, McWatters's overall challenge to CCP for failing to require the State to prove beyond a reasonable doubt an intent to kill before the crime began is without merit. As this Court has repeated, it is the overall facts of the crime when viewed in their entirely which renders support for the finding of CCP aggravation. He further argues the court should have found the CCP aggravator unconstitutional and erred in not amending the instruction to include the requirement that the State

prove premeditation to kill before the crime began. Contrary to his position, this Court has affirmed the constitutionality of the CCP aggravator and instruction repeatedly, and McWatters has not offered a valid basis for revisiting this matter. See Donaldson v. State, 722 So.2d 177, 187 n.12(Fla. 1998)(finding CCP a constitutional aggravator on its face); Walker v. State, 707 So.2d 300, 316 (Fla. 1997). The sentence should be affirmed.

POINT XIV

THE COURT'S FINDING OF THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATOR WAS PROPER AND SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE (restated)

McWatters contends that the court erred in finding the heinous, atrocious, or cruel ("HAC")aggravator, arguing it was based on speculations that each victim was conscious when strangled and knew she was going to die. Contrary to McWatters's position, the court had sufficient competent evidence supporting its findings.The HAC aggravating circumstance should be affirmed along with the death sentence imposed.

Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So.2d 148, 160(Fla.1998), reiterated the standard of review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating

circumstance beyond a reasonable doubt—that is the court's job. Rather, our task on appeal is to review the record to determine whether the court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," See Gore, 784 So.2d at 432.

The trial court's sentencing order provides abundant proof that the right rule of law was applied and sets forth the facts establishing HAC. It outlines the substantial, competent evidence in the record supporting its findings:

> The evidence established that Ms. Bradley was conscious when the defendant strangled her to death. She walked to the scene of her murder. According to the defendant, he and Ms. Bradley sat and talked, smoked cigarettes and drank beer for twenty to forty minutes before her murder. The defendant told the detective that he killed [Bradley] while they were engaged in the act of consensual sex. Depending on the degree of struggle she would have been conscious for thirty seconds or more during strangulation. In addition, there are not facts which would indicate that [she] was unconscious at the time of strangulation.
>
> The evidence established that Ms. Wiggins was conscious when the defendant strangled her to death. She walked to the scene of her murder with the defendant. This required her to walk a distance of several blocks. The scene of Ms. Wiggins' death indicated signs of a struggle. Ms Wiggins' panties were torn and her bra was also damaged as a result of forcible activity. The defendant told the detective that he killed the victim while they were engaged in the act of consensual sex. Depending on the degree of struggle she would have been conscious for thirty seconds or more during strangulation. In addition, there are not facts which would indicate that Ms. Wiggins was unconscious at the time of strangulation.
>
> The evidence established that Ms. Caughey was conscious when the defendant strangled her to death. She walked to the scene of her murder with the defendant. This required her to walk a distance of several blocks. Ms. Caughey's sandals were discovered in a manner which was consistent with a struggle. The defendant told the detective

> that he killed the victim while they were engaged in the act of consensual sex. Depending on the degree of struggle she would have been conscious for thirty seconds or more during strangulation. In addition, there are not facts which would indicate that Ms. Caughey was unconscious at the time of strangulation. ...
> ...In this case each of the victims suffered through the extreme anxiety of impending death. Each was conscious as their deaths began. It is difficult to imagine their fear and terror. Whether the sex was consensual or not, each victim was in the process of the most intimate of human behaviors as the larger, stronger defendant began to choke the life out of them. The fact that the sex was not consensual makes the fear and terror that much worse. Prior to their loss of consciousness they were face-to-face with the defendant as each was aware that the defendant was strangling them to death. The facts establish the extreme anxiety of impending death each suffered as well as the defendant's "utter indifference to such torture." These murders were conscienceless, pitiless and unnecessarily tortuous to each victim.
> The evidence established this aggravator beyond a reasonable doubt as to each of the murders.

(R:4422-24)

With regard to the HAC aggravator, this Court has stated:

> The HAC aggravating factor applies in physically and mentally torturous murders which can be exemplified by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. HAC focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death. Thus, if a victim is killed in a torturous manner, a defendant need not have the intent or desire to inflict torture, because the very torturous manner of the victim's death is evidence of a defendant's indifference.

Barnhill v. State, 834 So.2d 836, 849-50 (Fla.2002) (citations omitted). "The standard of review applicable to this issue is whether competent, substantial

evidence supports the trial court's finding." Conde, 860 So.2d at 953. In determining whether an aggravator has been proven, this Court has held that "the trial judge may apply a common-sense inference from the circumstances." Gilliam v. State, 582 So.2d 610, 612 (Fla.1991). This Court has also noted that "the fear and emotional strain preceding the death of the victim may be considered as contributing to the heinous nature of a capital felony." Walker v. State, 707 So.2d 300, 315 (Fla.1997); see also Adams v. State, 412 So.2d 850, 857 (Fla.1982) (noting that the victim was screaming prior to her death and concluding that "[a] frightened eight-year-old girl being strangled by an adult man should certainly be described as heinous, atrocious, and cruel").

This Court has repeatedly stated that fear, emotional strain, mental anguish or terror suffered by a victim before death is an important factor in determining whether HAC applies. See James v. State, 695 So.2d 1229, 1235(Fla.1997); Pooler v. State, 704 So.2d 1375, 1378(Fla.1997);Preston v. State, 607 So.2d 404,410 (Fla.1992). Further, the victim's knowledge of his/her impending death supports a finding of HAC. See Douglas v. State, 575 So.2d 165(Fla.1991); Rivera v. State, 561 So.2d 536, 540(Fla.1990). In evaluating the victim's mental state, common-sense inferences from the circumstances are allowed to be drawn. See Swafford v. State, 533 So.2d 270, 277 (Fla.1988)).

"[S]trangulation when perpetrated upon a conscious victim involves

foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." Sochor v. State, 580 So.2d 595, 603 (Fla.1991). In fact, this Court has held that death by strangulation is nearly per se heinous. See Bowles v. State, 804 So.2d 1173, 1178-79(Fla.2001); Mansfield v. State,758 So.2d 636, 645(Fla.2000); Hitchcock v. State, 578 So.2d 285, 692(Fla.1990).

Here, substantial, competent evidence supports the court's findings for the HAC aggravator. The evidence clearly showed that each woman was led to an isolated spot by McWatters. The crime scenes of the Wiggins and Caughey murders showed signs of struggle, indicating that each woman was conscious when attacked. No physical evidence existed indicating any injury to any of the victims which would have rendered them unconscious, nor did McWatters say they were so when he killed them. He told police that each woman was conscious having sex when he killed them. If they were conscious, they were indeed face to face looking at him when he strangled them thereby allowing them to realize and experience their deaths. The trial court's finding were not based on speculations but rather on the trial evidence and reasonable inferences from it. The record supports HAC. See Huggins v. State, 889 So.2d 743,770(Fla.2004)(upholding HAC aggravator where injuries would not cause unconsciousness, thus supporting reasonable inference victim was conscious when she was strangled).

Appellant's reliance on Zakrzewski v. State, 717 So.2d 488(Fla. 1999) is misplaced since it is clearly distinguishable where the evidence showed the victim may have been unconscious from head injuries inflicted by the defendant. The same it true in Rhodes v. State, 547 So.2d 1201 (Fla. 1989) and DeAngelo, 616 So.2d 440(victim had a head injury and drug use, indicating she was not conscious). Here, no victim had such head injuries and McWatters himself contended that they were conscious having sex with him when he began strangling them. The totality of the evidence shows each woman was conscious as the attack commenced and inferring such is reasonable. The law does not require that she be conscious at the moment of her death. Substantial, competent evidence support the court's finding Bradley, Wiggins, and Caughey each was conscious, struggling, and in fear at the time McWatters strangled her. The court did not speculate and its finding should be affirmed.

POINT XV

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

McWatters contends his sentence violated Ring v. Arizona, 536 U.S. 584 (2002). He maintains that under Ring, the jury must make an unanimous determination of death eligibility, an unanimous finding of the aggravators and whether they are sufficient, and a finding that the aggravators outweigh the

mitigators be beyond a reasonable doubt. According to McWatters, the jury proceedings fail because the jury renders a non-unanimous advisory sentencing recommendation which does not require proof of death eligibility beyond a reasonable doubt, the normal rules of evidence did not apply, and no notice is given. He submits that death eligibility does not occur until there has been a finding of sufficient aggravation and insufficient mitigation. The State disagrees.

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

Florida's capital sentencing constitutional under Furman); Hildwin v. Florida, 490 U.S. 638 (1989)(noting Sixth Amendment does not require case "jury to specify the aggravating factors that permit the imposition of capital punishment in Florida"); Spaziano v. Florida, 468 U.S. 447 (1984); Parker v. State, 904 So.2d 370, 383 (Fla. 2005); Jones v. State, 845 So.2d 55, 74 (Fla. 2003).

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

> Walton's first argument is that every finding of fact underlying the sentencing decision must be made by a jury, not by a judge, and that the Arizona scheme would be constitutional only if a jury decides what aggravating and mitigating circumstances are present in a given case and the trial judge then imposes sentence based on those findings. Contrary to Walton's assertion, however: "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." Clemons v. Mississippi, 494 U.S. 738, 745, 110 S.Ct. 1441, 1446, 108 L.Ed.2d 725 (1990).
>
> We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. Hildwin v. Florida, 490 [497 U.S. 648] U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (per curiam); Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In Hildwin, for example, we stated that "[t]his case presents us once

> again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," 490 U.S., at 638, 109 S.Ct., at 2056, and we ultimately concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Id., at 640-641, 109 S.Ct., at 2057.

Walton, 497 U.S. at 647-48. Based upon this, there is no constitutional impediment to Florida's capital sentencing procedure and no need for juror unanimity for aggravators, mitigators, or the ultimate penalty. This Court has repeatedly held that jury unanimity is not required. Card v. State, 803 So. 2d 613, 628 n. 13 (Fla. 2001) (rejecting claim Apprendi requires unanimous jury recommendation; "capital jury may recommend a death sentence by a bare majority vote"); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001) (same); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001) (same); Brown v. Moore, 800 So. 2d 223 (Fla. 2001) (rejecting argument aggravators must be found by unanimous jury); Mills, 786 So. 2d at 538 (finding statutory maximum sentence for first degree murder is death). See Way v. State, 760 So. 2d 903, 924 (Fla. 2000)(noting jury's death recommendation need not be unanimous); Thomson v. State, 648 So. 2d 692, 698 (Fla. 1984) (holding simple majority vote of death is constitutional. The issuance of Apprendi and Ring has not altered this position. Moreover, McWatters has a contemporaneous felony conviction (home invasion robbery). This Court has rejected challenges under Ring where the defendant has a contemporaneous felony conviction. See Robinson v. State, 865 So.2d 1259, 1265 (Fla.2004) (announcing

that "a prior violent felony involve[s] facts that were already submitted to a jury during trial and, hence, [is] in compliance with Ring"); Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (denying Ring claim and noting that "felony murder" and the "prior violent felony" aggravators justified denying Ring claim).

Even if a jury finding of an aggravating factor were to be deemed necessary for a jury conviction of a death-eligible offense, McWatters's death sentence satisfies the Sixth Amendment. His contemporaneous convictions for sexual-battery permitted the judge to impose a capital sentence, even without further jury involvement. See Almendarez-Torres v. United States, 523 U.S. 224 (1998)(prior conviction properly used by judge alone to enhance defendant's statutorily authorized punishment). The record reflects that McWatters's jury convicted him of three contemporaneous felonies, the sexual battery of all three homicide victims. Hence, the jury determined, beyond a reasonable doubt, that at least one aggravating factor existed. Consequently, the underlying factual premise for the finding of the aggravator was made by the jury at the guilt phase. Thus, to the extent Ring would be applicable to McWatters, the requirements of same have been met.

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

POINT XVI

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

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

Relying upon the North Carolina, Wyoming and Tennessee state supreme courts, Defendant raises essentially the same argument, which should be rejected. Even if Defendant's argument is read as based upon the constitutional guarantees of the Eighth and Fourteenth Amendments, this Court has already rejected those arguments in Clark v. State, 443 So.2d 973 (1983), cert. denied, 104 S.Ct. 2400, 467 U.S. 1210, 81 L.Ed.2d 356 ("felony-murder" aggravator comports fully with the constitutional requirements of equal protection and due process as well as the prohibition against cruel and unusual punishment). There is no merit to this claim.

CONCLUSION

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

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Jeffrey L. Anderson, Esq. Office of the Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on April 14, 2008.

_____
LISA-MARIE LERNER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately on April 14, 2008.

/s/Lisa-Marie Lerner, AAG
LISA-MARIE LERNER