IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-841

RICHARD KNIGHT

Appellant,

v.

STATE OF FLORIDA

Appellee.

****

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

****

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE AND FACTS

Richard Knight was indicted on August 15, 2001 and was arraigned on August 29, 2001 on two counts of first degree murder for the deaths of Odessia Stephens and Hanessia Mullings, mother and daughter. (ROA: 4-6) The case eventually came to trial on March 13, 2006. The jury was sworn in on March 22, 2006. (T 19:2137) Knight made a motion for mistrial and to disqualify the jury the next day on March 23 based on the contention that jury members may had seen him in handcuffs and shackles. The court held an evidentiary hearing and, thereafter, denied the mistrial motion. (T 44:213-311)

On April 26, 2006 the jury found Knight guilty of both counts of first degree murder. (T 35:3664-67) The penalty phase began on May 22, 2006. After a number of witnesses testified, the court granted the defense a continuance in the presentation of its case in order to secure another neuropyschologist. (T 53:913-945) The penalty phase trial recommenced on July 24, 2006. Later that day the jury returned a recommendation for death by a vote of twelve (12) to zero (0). (T 54, 55:1164-68)

The court held a Spencer hearing[1] on August 18, 2006. (T 31) The trial court then sentenced Knight to death on March 28, 2007. In its written order the court found two aggravating factors for the murder of Odessia Stephens in Count I: 1. A previous conviction of another violent capital felony and 2. The murder was heinous, atrocious, and cruel ("HAC"). For Count II involving the murder of Hanessia Mullings the court found three aggravating circumstances: 1. A previous conviction of another violent capital felony; 2. The murder was heinous, atrocious, and cruel; and 3. The victim was under 12 years of age since Hanessia was four years old at the time of her death. The court found no statutory mitigating circumstances but found eight non-statutory ones. These included: 1. The

[1]Spencer v. State, 615 So.2d 688 (Fla. 1993)

defendant had a good upbringing (slight weight); 2. Defendant loves his family (moderate weight); 3. Defendant went to high school and excelled in art (little weight); 4. Defendant was admired by the children in his neighborhood as a youth and was well regarded by the adults (little weight); 5. Defendant was a valuable employee in Jamaica (little weight); 6. Defendant had part-time employment at the time of the crime (little weight); 7. Defendant behaved well in court (little weight); and 8. Defendant is capable of forming loving relationships (moderate weight). (ROA 631-643)

The facts developed at trial establish that Knight was living at his cousin Hans Mullings's ("Mullings") apartment along with Mullings's girlfriend Odessia Stephens ("Odessia") and their four year old daughter Hanessia ("Hanessia"). (T 24:2589-92) Knight was only working part time and had stopped contributing to the rent or the other household expenses. Mullings bought Knight's clothes and he and Odessia paid for all the household expenses, including a window Knight broke to get in the house. (T 24:2600-01, 2606-7, 2699-2701) Mullings had asked Knight to leave several times with the final date for Knight to do so only a few days after the murders. The relationship between Knight and Odessia was particularly strained since she also disapproved of his young girlfriend who was over all the time. (T 23:2555-57, 2600-01)

On the night of June 27, 2000 Knight was at the apartment with Odessia and Hanessia while Mullings was at work organizing an upcoming event. Mullings spoke to Odessia around 9 P.M. and she said that she was going to bed. (T 25:2681-82, 2706-07) After he left his office, Mullings went to Kinko's to copy flyers for the event, leaving around in the morning. (T 24:2637-42) Knight was on the telephone for twenty minutes until 11:30 P.M. with a young teenage girl he was trying see. He was a bit rude to her when she told him not to call her anymore. (T 23:2524-45)

Sometime around midnight that night Rosemary Parisi ("Parisi") heard multiple thumping sounds on the walls and crying from the apartment directly below hers. (T 21:2241-42, 2263) She heard the voices of two females crying, one of which was a child's. The child's cries sounded frantic and frenzied although they were muffled. (T 21:2243-45, 2250) When she heard a very intense second round of thumping, about three minutes after she first heard the noises, she went into her living room to call 911, which she did at 12:21 A.M. on June 28, 2000. (T 21:2241-42, 2263) The child continued to cry, saying "Oh, Daddy" or "no no Daddy" intensely and repeatedly. She continued to hear the cries until moments before she heard the police outside. (T 21:2251, 2255, 2269) She never heard any

arguing or a male voice downstairs either preceding or during this disturbance. (T 21:2241-42)

The first police officer to respond to the call was Vincent Sachs ("Sachs") who arrived at 12:29 A.M.. He noted the lights were on in the master bedroom and hall area and that a second bedroom's window was open. (T 21:2274-75) He pounded on the door and heard nothing inside. He walked around the unit a second time and noticed that the light had been turned off and that the open window was now completely open and had the blinds hanging out of it. He saw blood inside when he shined his flashlight in through the dining room window. (T 21:2281-83) He also saw blood in the master bedroom on the blinds and the bed as well as the body of a small child curled into a fetal position against the closet door. (T 21:2291-92) Once inside, he saw the body of an adult woman in the living room area. (T 21:2301) All the doors were locked and there was no ransacking in the home. (T 21:2302)

Meanwhile, a second officer, Natalie Mocny ("Mocny") had arrived and walked around the unit. She noted the open window and saw a black man, Knight, on the other side of some hedges about 100 yards away from the building. She waived him over. He said that he lived in that apartment. He had beads of water on his hair and was wearing dress clothes and shoes although he had told her that he

had gone jogging and did not have a key to get inside. (T 21:2340-42, 2346) Sachs observed that the man appeared to have dressed while he was still wet, although it was not raining that night. His shoes were unbuckled as well. (T 21:2284-88) Knight was calm and cooperative. (T 21:2356, 27:2979) He had a scratch on his chest, a scrape on his shoulder, and fresh cuts on his hand. (T 25:2735-36, 26:2860, 27: 2943-46) He also had blood on the shirt he was wearing and blood on a ten dollar bill he was carrying. (T 27:2946, 2951)

The crime scene investigation revealed two wet towels in the northeast bedroom where Knight stayed. (T 22:2414, 2481) A shirt, boxers, and a pair of jean shorts were found under the sink in the bathroom near that bedroom; all had numerous bloodstains on them. Those clothes belonged to Knight. (T 22:2419-20, 24:2648-49) A knife blade was on the mattress in the master bedroom. (T 22:2422) Another blade was under Odessia's body and it was bent as was the bloody knife found in the master bedroom. There were blood stains all over the master bedroom, in the living room, the hall, the guest bath, and the kitchen. (T 22:2509, 26:2844) There were extensive blood stains in the master bedroom along the east side between the bed and the wall which were identified by DNA as Odessia's. (T 26:2849, 27:2992) The bloody hand prints on the master bedroom's blinds were Odessia's. (T 26:2835)

DNA analysis was conducted on a number of the blood samples found at the scene. One of the blood stains on the living room carpet was from Odessia. The knife handle in the living room and the knife in the master bedroom both had Odessia's blood on them. The knife holder in the kitchen also had her blood on it. (T 27:2992-94) The front of the boxers from under the sink had either one or both Hanessia's and Odessia's blood on them in a number of different locations. On the back, there were spots containing Knight's and Odessia's blood and then spots with the blood from the two females. These boxers were the same brand as those Knight was wearing when he was arrested. The shirt in the bathroom had Odessia's blood on both the front and the back. (T 27:3007-14, 3023, 31:3300-012) The jean shorts had both Odessia's and Hanessia's blood on them in various spots. (T 27:3016-19, 31:3313) All three knives had Odessia's blood on them and the third had Hanessia's blood on it. (T 27:3021) The clothes Knight was wearing when he was arrested also had blood on them. Inside the jeans the criminalist found Knight's blood. The t-shirt had three separate spots of blood on it. One of the spots had mostly Knight's blood but also had a profile consistent with Odessia's. The boxers he was wearing also had a spot with a mixture of his and Odessia's blood. (T 27:3023-30) The shower curtain in the guest bath had blood on it from Hanessia and Martino. A swab taken from Knight's hand showed a mixture of his and

Odessia's blood. The fingernail scrapings taken from Odessia showed DNA from Knight. (T 27:3031-34) The populations statistical analysis of the results by Martin Tracey ("Tracey") and Kevin McElfresh ("McElfresh")indicated that the DNA matches were generally 99.9 % accurate. (T 29:3131-81, 31:3322-3390)

The medical examiner Lance Davis ("Davis") went to the scene and observed the bodies. He also conducted the autopsies. Hanessia was four years old and was found on the floor next to the closet door in the master bedroom. There were broken knife pieces around her. She also had a bloody foam on her mouth which was the result of the knife wounds to her lungs causing internal bleeding which interfered with her breathing and resulted in the foam as she exhaled. She had a total of four knife wounds in her upper chest and neck, a fifth on her hand, and numerous bruises and scratches on her arms and upper body. She had defensive wounds on her hand. There were also bruises and marks on her neck which were consistent with manual strangulation with the release and reapplication of pressure. The bruises on her arms were consistent with being forcibly grabbed and held. (T 26:2831, 31:3395-97, 3415-19)

Davis found Odessia on the living room floor near the entrance with several broken knife pieces around her. (T 31:3394) She had 21 defined stab wounds, fourteen in the neck area, one on the chin, and a number on the back in the chest

area. She had over 24 puncture or scratch wounds as well as bruising and ligature marks on her neck. That latter mark was consistent with being made by a belt or some similar type of instrument. The puncture wounds could have been caused by a knife being flicked or pressed against the skin. Odessia had defensive wounds on both hands, wounds on the back on her leg, left side of her chest, her back, and neck. (T 26:2828-29, 31:3398-3405) One of the knife wounds to the neck went all the way through it. Several of the knife wounds were fatal although known would have resulted in an instantaneous death. She also had bruises from a punch on her scalp and mouth. (T 31:3406-14) Davis opined that Knight began the attack in the bedroom with Odessia fleeing to the living room where Knight reinitiated his attack on her. Davis estimated that Odessia was conscious for ten to fifteen minutes after the attack. He believed the time of death to be around midnight.

Stephen Whitsett ("Whitsett") testified about a statement Knight made to him while they were in jail together. He was in jail facing charges of his own at the time although he did not condition his speaking to Detective Williams on the State offering him anything nor did he ever receive any consideration for this information. He gave the police the drawing at that first meeting. No police officer gave him any information; the only person who gave him information on the murders was Knight. (T 29:3225-27, 30:3271-78)

Whitsett met Knight in jail on June 29, 2000. They were housed from that date through July 22, 2000. They both were early risers and Whitsett would study his legal materials; they began to chat about the law. (T 29:3200-07) Eventually Knight asked Whitsett for help in explaining away the blood evidence and ended up telling him about the case to see what could be done. (T 29:3208-10) Knight explained that he was living with his cousin, his girlfriend, and their daughter. Knight was unemployed and was not paying rent. The night of the murders Knight and Odessia argued. She told him that she did not want to support him like a child and that he would have to move. He asked for some more time since he had just gotten a job. She said no and that he would have to leave in the morning. After that he left the house to go for a walk at 12:30 A.M.. While walking he became increasingly angry. He returned and confronted her in her room and they argued. He went to the kitchen and got a knife. When he went back to the master bedroom, Odessia was on one side of the bed and Hanessia was on the other. He began by stabbing Odessia multiple times who initially tried to stop him with her hands but then gave up and balled up into a fetal position. He then turned to Hanessia who was only four years old. The knife broke while he was stabbing Hanessia so he returned to the kitchen to get another one. He heard a popping sound and saw

Hanessia had crawled to the closet door and was drowning in her own blood. (T 29:3210-12, 3215)

To explain the story, Knight also drew a diagram of the apartment and noted the locations of the rooms and bodies. Knight returned to the kitchen and accidentally cut himself on a broken knife. He grabbed another one and went back to stab Odessia some more but she had crawled to the living room and was lying in her own blood. He rolled her over and attacked her. He got her blood on his hands so he wiped them on the carpet. After he finished the attack, he went to the bathroom, took off the blood soaked shorts and t-shirt and tossed them under the sink. He showered and put on blue polo pants. He wiped down the knives in the living room. He heard a knock on the door and saw the police outside through the peep hole. He ran to his room and out the window. He eventually came back to the building to deflect suspicion away from him. When he returned he went to his bedroom window where a female police officer was. (T 29:3213-22, 30:3267-69) Knight said that he had a cut on his hand from one of the knives he used to stab Odessia and Hanessia.

At the penalty phase Knight presented several witnesses who testified about his childhood and upbringing in Jamaica. His teacher Joscelyn Walker ("Walker") told the jury that Knight was a respectful and loving boy raised in a very respected

family. He said that Knight did have a temper when provoked and would become extremely frustrated at times. Walker had to restrain him from time to time when Knight wanted to fight another child. (T 51:724-71) Knight's high school art teacher Joscelyn Gopie ("Gopie") described Knight as a pleasant, eager boy who was quite talented at art. Gopie explained that Knight was adopted as a toddler by his family. Knight left high school before he graduated. (T 51:779-92) Barbara Weatherly ("Weatherly") is the mother of a Jamaican girl who was affianced to Knight. She described him as a decent honorable guy who respected her rules regarding her daughter. He always helped her younger children with their drawing. He was a quiet and peaceful person who spent a lot of time alone. One night at her house he got sick; his eyes rolled back in his head and he frothed at the mouth before passing out. They took him to the hospital where the doctor said that he needed to see a psychiatrist. She last saw him in 1998 when he left to go to the United States. (T 51:794-809) A former boss and coworker of Knight's also testified. Stanley Davis ("Davis") told how Knight had been adopted into a well respected family and had a close loving relationship with his family members. Knight took over many of his father's duties when his father lost a leg. Knight worked with him at a construction company and was a good worker. Once he fell

from a height and blacked out, after which he had difficulty concentrating and became timid. (T 52:888-908)

Valerie Rivera was the defense investigator. She and the attorney journeyed to Jamaica to interview Knight's family and friends. Knight was abandoned by his mother and the Knight family found him at a hospital and took him home. He was a good brother and son. Knight's close friends and family said that he was a nice and good person. Knight's sister in law used to have Knight babysit her children but eventually stopped that because he was careless around the house. He blacked out on one other occasion. Knight's former boss Stedman Stevenson said that he was a hard worker and a quick learner. He took Knight to Florida and Knight decided to stay. (T 54:1037-89)

The defense also presented expert Dr. Jon Kotler "("Kotler") who practices nuclear medicine and specialized in PET scans of the brain. PET measures the brain's use of glucose to map brain activity. He explained that Knight's physical symptoms indicated that he might have a brain injury. The MRI done on him was normal. Kotler did a PET scan which he interpreted as showing asymmetrical brain activity indicating possible pathology of the brain, perhaps a seizure disorder. He could not say exactly what the pathology might be nor how it might manifest itself in Knight's behavior. Dr. Sfakianakis, a another nuclear medicine doctor, read the

PET results as showing only a mild difference between the brain hemispheres which was within the normal fluctuations of the brain. This test should be used in conjunction with neurological and neuropsychological testing in order to ascertain if there is brain damage and how it affects a person's behavior. (T 52: 811-884, 946-80)

At the Spencer hearing held on August 18, 2006, the defense submitted the report and deposition of neuropsychologist Mittenberg who examined Knight but refused to testify at trial. The State submitted the report and deposition of Dr. Lopickalo, another neuropsychologist.(314-316) The court sentenced Knight to death on March 28, 2007. At that hearing Mullings and Eunice Belan gave victim impact statements. The court found two aggravating factors for the murder of Odessia Stephens: a previous conviction of another violent capital felony and the murder was heinous, atrocious, and cruel ("HAC"). For the murder of Hanessia Mullings the court found three aggravating circumstances: a previous conviction of another violent capital felony, HAC, and the victim was under 12 years of age. The court found no statutory mitigating circumstances but found eight non-statutory ones. These included: 1. The defendant had a good upbringing (slight weight); 2. Defendant loves his family (moderate weight); 3. Defendant went to high school and excelled in art (little weight); 4. Defendant was admired by the

children in his neighborhood as a youth and was well regarded by the adults (little weight); 5. Defendant was a valuable employee in Jamaica (little weight); 6. Defendant had part-time employment at the time of the crime (little weight); 7. Defendant behaved well in court (little weight); and 8. Defendant is capable of forming loving relationships (moderate weight). (ROA 631-643; T 3700-30)

This appeal follows.

SUMMARY OF THE ARGUMENT

Issue I - The trial court properly denied a motion for mistrial regarding a witness's comment about Knight's violent background since it was unsolicited, isolated, and did not vitiate the fairness of the trial.

Issue II - The trial court did not abuse its discretion in denying a motion for a mistrial since the jury did not see Knight in shackles.

Issue III - The trial court properly found there was no discovery violation and that knight suffered no procedural prejudice when one of the State's statistical experts reevaluated his opinion when given the complete profile standards.

Issue IV - The trial court did not err in refusing to seat a new jury panel for purposes of the penalty phase of trial based on family witness Mullings's comment during the guilt phase proceedings that he knew Knight had a "violent background."

Issue V - Florida's capital sentencing statute is constitutional.

Issue VI - Knight's death sentence is proportional.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED A MOTION FOR MISTRIAL REGARDING A WITNESS'S COMMENT ABOUT KNIGHT'S VIOLENT BACKGROUND (Restated)

Knight argues that an isolated comment regarding his bad character made by his cousin Mullings during his testimony in the State's case was so prejudicial that the trial court abused its discretion in denying his motion for mistrial, instead giving a curative instruction to the jury to disregard the comment. He asserts that this one comment rendered the entire trial fundamentally unfair and that, since the State "cannot establish" the error was harmless, this Court should reverse. The State asserts that the trial court was correct to have sustained the objection and given a curative instruction for the jury to disregard it. It did not abuse its discretion in denying the motion for mistrial. This Court should deny relief on this ground.

During its case in chief, the State presented the testimony of Mullings who was the partner and father of the victims. He was also Knight's cousin who had allowed Knight to live with them when he had no other place to go. He explained that he was at Kinko's after midnight on the night of the murders getting some flyers made for his work. (T:24:2589-92, 2637-42)When he returned, he saw the

police and hesitated to approach the police tape and officers because he thought they were there to pick up Knight for traffic warrants. (T 25:2668-71) He then said on re-direct:

> Q: The call that you made from Publix, that was to a friend of your right before you went over to your house that morning when you learned of the news that there were two bodies in the house?
> ...
>
> Q: What happened, why did you say you got to go and rush back?
>
> A: I thought – I realized what I saw was not really hose. And I was thinking to myself, if – if they are questioning someone for warrants on TV, they don't usually have that much – that much cops out there. And I note that.
>
> I was just assuming that, truthfully, probably Odessia and Richard got into an argument or something because I know Richard's violent background.

(T 25:2708-09) The defense immediately objected and the court immediately instructed the jury to disregard the statement.[2] At sidebar, the defense moved for a mistrial because the statement placed Knight's bad character into evidence. The court sent the jury out and instructed the witness to answer only the questions asked and to say nothing about Knight's past or character. (T 25:2709-12) The court allowed the parties time to research the issue and heard argument the

[2]Juries are presumed to follow the instructions given them. Carter v. Brown & Williamson Tobacco Corp., 778 So. 2d 932 (Fla. 2000).

following day. The court then determined that the comment about Knight's "violent background" was general in nature and did not refer to any particular incident or criminal case nor did it even indicate whether the violence was Knight's or someone else's in his past. In denying the mistrial, the trial court found the statement was nebulous and speculative in nature and an isolated one, thereby not vitiating the entire trial. (T 25:2709-18, 26:2752-81)

A ruling on a motion for mistrial is subject to an abuse of discretion standard. Smith v. State, 866 So.2d 51, 58-59 (Fla. 2004); Anderson v. State, 841 So.2d 390 (Fla. 2002); Smithers v. State, 826 So. 2d 916, 930 (Fla. 2002); Gore v. State, 784 So.2d 418, 427 (Fla. 2001). A motion for mistrial should be granted only when necessary to ensure the defendant receives a fair trial. Cole v. State, 701 So.2d 845, 853 (Fla.1997); Goodwin v. State, 751 So.2d 537, 546 (Fla. 1999). "A motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial." England v. State, 940 So.2d 389, 401-2 (Fla.2006); see Hamilton v. State, 703 So.2d 1038, 1041 (Fla.1997) ("A mistrial is appropriate only where the error is so prejudicial as to vitiate the entire trial."). "Moreover, as this Court stated in Goodwin, the use of a harmless error analysis under State v. DiGuilio, 491 So.2d 1129 (Fla.1986), is not necessary where 'the trial court recognized the error, sustained the objection and gave a curative instruction.'"

Gore, 784 So.2d at 428. “Instead, the correct appellate standard of review is abuse of discretion.” Rivera v. State, 859 So.2d 495, 512 (Fla.2003).

Under the abuse of discretion standard, an appellate court will uphold a trial court's ruling unless the "judicial action is arbitrary, fanciful, or unreasonable.... [D]iscretion is abused only where no reasonable [person] would take the view adopted by the trial court." Trease v. State, 768 So.2d 1050, 1053 n. 2 (Fla.2000) (second alteration in original) (quoting Huff v. State, 569 So.2d 1247, 1249 (Fla.1990)). Thus, Knight is entitled to a new trial only if this one isolated comment about his “violent background” deprived him of a fair and impartial trial, materially contributed to the conviction, was so harmful or fundamentally tainted as to require a new trial, or was so inflammatory that it might have influenced the jury to reach a more severe verdict than that it would have otherwise. Spencer v. State, 645 So.2d 377, 383 (Fla.1994). That is clearly not the case in this instance.

This was a single comment made during a three week guilt phase trial. As noted above, the trial court immediately sustained the objection and gave a curative. Although a harmless error analysis is not required, the evidence of guilt was overwhelming so there is little or no chance that this error materially contributed to the verdict or the degree of the conviction. Knight was living in the apartment and had an ongoing disagreement with Odessia. (T 23:2555-57, 2600-

01; 24:2589-92, 2600-01, 2606-7, 2699-2701) He was in the home that night around 11:30 P.M. with Hanessia playing in the apartment as evidenced by the telephone call with Edmonds. (T 23:2524-45) The murders happened around midnight. Mullings was at Kinko's around the time Parisi heard the noise and crying in the apartment below hers; the time on both the video tape and register receipt verify this. Parisi's 911 call came in at 12:21 A.M. and the police arrived by 12:29 A.M.. (T 21:2240-72, 2274-75) Knight showed up at the scene within minutes with wet hair and clothes. (T 21:2340-42, 2346) Two wet towels were found in his bedroom which also had its window open and the blinds outside the window as if someone had exited the apartment that way. His clothes, covered in the blood of both victims as well as his own, were in a pile under the sink in the bathroom he used. He also had the same mixture of blood on the clothes he was wearing as well as a dirt mark on the back of his shirt consistent with rubbing against the window as he exited. He had cuts on his hand consistent with being injured while stabbing. Finally, he asked Whitsett to help him with his problems with the blood evidence. In seeking that assistance, he drew the diagram of the apartment including the locations of the attacks and the bodies while he explained how the murders occurred. (T 29:3208-122, 30:3267-69) Mullings's one comment

did not vitiate the entire trial and the court did not abuse its discretion in denying the motion for mistrial.

Knight's reliance on Henderson v. State, 789 So.2d 1016 (Fla. 2nd DCA 2000), Cooper v. State, 659 So.2d 442 (Fla. 2nd DCA 1995), and Brooks v. State, 868 So.2d 643 (Fla. 2nd DCA 2004) does not assist his argument since they are distinguishable. These cases involved the improper admission of evidence of a defendant's prior criminal history, unlike here where it was a general comment on the defendant's background which, at most, might reflect on his character rather than specific instances of criminal behavior. In Henderson, a retired chief of police with twenty years of experience was the victim. During his testimony he stated that Henderson looked like he had committed robberies before given the witness's observations of his behavior during this one. Henderson, 789 So.2d at 1017-18. In Cooper, the victim of the attempted murder volunteered that the defendant had raped his own daughter. Each of these cases involved the credibility of the defendant, each of whom gave exculpatory statements, as opposed to the credibility of the witnesses making the statements who presumably had knowledge the jury did not. In Brooks the victim was the former wife of the defendant and the charges were aggravated assaults. The defense was self-defense based upon statements Brooks gave the police. Thus the issue was the credibility of the victim

as compared to the defendant. The witness told the jury that Brooks had been to prison before for spousal abuse. That error attacked the defense and bolstered the witness's credibility so that no curative instruction could cure it. All the cases cited by Knight in support of his stance involve improper statements of specific acts of prior criminal conduct by the defendants and, thus, are very different from what happened in Knight's trial.

There are several cases with factual scenarios closer to this one and are consequentially more instructive. In Bacallao v. State, 513 So.2d 738 (Fla. 3rd DCA 1987) a witness made an unsolicited comment that the defendant was a "dangerous person" but the court held that the curative instruction given was sufficient and the motion for mistrial was properly denied. In Villanueva v. State, 917 So.2d 968 (Fla. 3rd DCA 2005) the defendant was charged with attempted second degree murder with a gun. During his testimony the victim said that the defendant liked to "scare people with his gun." The court sustained the objection and gave a curative instruction. Later, another witness said that the defendant was always looking for trouble. Again, the trial court gave a curative instruction. The appellate court held that the curative instructions were sufficient and that the trial court did not abuse its discretion in denying the motions for mistrial.

This Court has also tackled similar scenarios. In Cole a State witness, despite being instructed prior to testifying, volunteered her knowledge of Cole's prior criminal history. The trial court denied the motion for mistrial but offered a curative instruction. This Court found "the reference was isolated and inadvertent and was not focused upon" and, thus, the trial court did not abuse its discretion in denying the motion for mistrial. Cole v. State, 701 So.2d at 853. In Gore this Court held that the trial court did not abuse its discretion in denying the mistrial motion made when the State's thirteen year old witness volunteered that she had an intimate relationship with defendant, thereby bringing in evidence of bad character as well as a specific instance of criminal conduct. This Court reasoned that the curative instruction was enough since the comment was isolated and was not focused on by the State in the remainder of the case. Gore v. State, 784 So.2d 418 (Fla.2001). Similarly, here the statement which could possibly be construed as bad character evidence was equally isolated, not solicited, and not mentioned again for the rest of the trial. The curative instruction properly dealt with this error. The trial court did not abuse its discretion in denying Knight's motion for mistrial.

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A MISTRIAL SINCE THE JURY DID NOT SEE KNIGHT IN SHACKLES. (Restated)

Knight next argues that the trial court improperly denied his motion for mistrial based upon his allegation that the jury had seen him in handcuffs and shackles. In making this argument Knight assumes that the jury was indeed exposed to him in restraints despite the factual findings the trial court made to the contrary after conducting an evidentiary hearing. He asserts that this alleged error was so prejudicial because the jury may have believed that his behavior was uncontrollable and that he would be so dangerous in the future that death was the "only appropriate penalty." (IB 49) The State disagrees. The jury did not see Knight in shackles so there could be no error. The trial court did not abuse its discretion in denying the motion for mistrial.

On the last day of jury selection, after the jury had been empaneled, the bailiff led the panel into the jury deliberation room. While they were inside, the custody deputies took Knight from his holding cell along a back hallway to escort him back to the jail facility; he was in jail garb, was handcuffed, and had on leg shackles. The jury room opened into that same hallway. As the two deputies and Knight were passing the jury room door, the bailiff opened it briefly. At the time

Knight contended that a number of juror had seen him in handcuffs and leg shackles. (T 44:213-15)

The court decided to conduct an evidentiary hearing. Knight testified first. He stated that he was being taken out of the courtroom by two deputies, one behind him and the other on his side. They were in the back hallway just passing the jury room door when it opened and the bailiff came out. The bailiff saw him and tried to push the jurors back into the room and close the door. Two or three of the jurors were in the door area and Knight saw them only three or four feet away. He described two of the jurors. During a viewing, Knight described how a juror was holding the door open at a 45 to 65 degree angle as he passed in the middle of the hall. Knight immediately informed the deputies who denied that he had been seen by the jury. (T 44:216-52)

The bailiff Louis Oitzer ("Oitzer") testified next. He had just finished having the jurors do some necessary paperwork and he opened the door from the jury room to the back hall. One of the jurors was immediately behind him. Oitzer had the door open maybe 30 degrees and his body was actually in between the door and its jam. He saw Knight and immediately pushed the juror back and closed the door while blocking the opening with his body, which was large. He remained outside the door ensuring that it remained closed with the jury inside until Knight had left

the hallway. (T 44:252-66) The court reenacted the situation to see who could see what. Deputy Ronald Sheppard ("Sheppard"), taking the place of the juror next to Oitzer, could not see Knight at all from the position Oitzer said the door was in and could only see Knight's upper body (above any cuffs or shackles) from the door's position Knight recalled. In neither instance could Sheppard see Knight's lower arms, hands, waist, or legs. (T 44:267-73)

Next the two deputies escorting Knight testified. Allen Hollinger ("Hollinger") said that Knight had handcuffs on and leg shackles. When passing the door, he was in front of Knight facing backward since he was instructing the other deputy on the procedures used in the courthouse. The door opened as he stood parallel to the jam closest to the courtroom blocking the door to Knight who was between him and the other deputy. He said something to Oitzer who immediately closed the door. He could see one juror a few feet behind Oitzer and the rest were near the table back in the room. Hollinger did not believe any juror could possibly have seen Knight. (T 44:273-85) The other deputy Craig Deguiceis ("Deguiceis") testified that he never even saw the door to the jury room open although he heard it and heard Hollinger's comment. He was eye to eye with Hollinger when he heard the door open; Knight was about a foot and a half away from the door with Hollinger blocking his view of the door. The court reenacted

the situation again from Deguiceis's perspective; Knight would not have been able to see Oitzer or inside the room at all but could only see a portion of the door. (T 44:285-96)

The defense did not wish to question the jurors for fear of informing them of Knight's custodial status or highlighting the issue for them. (T 44:304) The trial court made the factual finding that the jury could not have seen Knight in the hallway and could not have seen his handcuffs or leg shackles. Based upon that, the court denied Knight's motion for mistrial. (T 44:305-9) Competent, substantial evidence supported the court's findings and the denial of the motion for mistrial was not an abuse of discretion.

Questions of fact in Florida are reviewed by the competent, substantial evidence standard. The standard of review for a trial court's determination of whether a juror saw a defendant in shackles is whether there is competent, substantial evidence in support of that finding. Bell v. State, 965 So.2d 48, 67 (Fla. 2007). Under that standard of review, the appellate court pays overwhelming deference to the trial court's ruling, reversing only when the trial court's ruling is not supported by competent and substantial evidence. If there is any evidence to support those factual findings, the lower tribunal's findings will be affirmed. The equivalent federal fact standard of review is known as the clearly erroneous

standard. When it comes to facts, trial courts have an institutional advantage. Trial courts can observe witnesses, hear their testimony, and see and touch the physical evidence. Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998) (Sitting as the trier of fact, the trial judge has the superior vantage point to see and hear the witnesses and judge their credibility.). An appellate court's review of questions of fact is therefore very limited. Elder v. Holloway, 984 F.2d 991 (9th Cir. 1993) (Kozinski, J., dissenting from the denial of a suggestion for rehearing en banc), adopted by Elder v. Holloway, 510 U.S. 510, 516 (1994).

While shackling a defendant before the jury is considered an "'inherently prejudicial practice' [that] must not be done absent some showing of necessity,' the facts must support that the jury actually saw the defendant in shackles." Bello v. State, 547 So. 2d 914, 918 (Fla. 1989) (quoting Holbrook v. Flynn, 475 U.S. 560, 568 (1986)). Knight did not meet that burden at the evidentiary hearing in the trial court and has failed to meet it here. All the evidence presented supported the court's findings, including Knight's own testimony. The most any juror would have see was his upper body.

Given that, the trial court did not abuse its discretion in denying the motion for mistrial. As discussed in detail in the first issue, the standard of review is abuse of discretion. Smith, 866 So.2d at 58-59. Mistrial motions should only be granted

if the fundamental fairness of the trial is completely vitiated Cole, 701 So.2d at 853; Goodwin, 751 So.2d at 546; England, 940 So.2d at 401-2. Knight suffered no prejudice since the jury did not see him in shackles in the back hallway and, therefore, the fairness of the trial was not jeopardized. This Court should deny relief on this issue.

ISSUE III

THE TRIAL COURT PROPERLY FOUND THERE WAS NO DISCOVERY VIOLATION AND THAT KNIGHT SUFFERED NO PROCEDURAL PREJUDICE. (Restated)

Knight next argues that the trial court erred, after a Richardson[3] hearing, in holding that there was no discovery violation when the State failed to disclose that its DNA expert changed his opinion once he had reviewed the complete DNA data, which the defense had before the trial. He further contends that the court should have granted a mistrial. He alleges that the State had a number of DNA comparisons made before trial and supplied those to the defense and that the State ordered additional comparisons made shortly before trial without notifying the defense or providing the results. By so doing, the State "ambushed" the defense since it relied on the report originally generated by the laboratory, prejudicing him

by making his counsel out to be a liar during his opening statement and by focusing his defense on the possibility that another had committed the murders given the original estimation that Knight was excluded from the samples in question. Knight is mistaken and confuses the DNA comparisons done between known samples and the samples taken from the crime scene to the statistical analysis done based upon the results of those comparisons. The State did provide all the comparisons, done by two different laboratories, to the defense before trial. The defense had all the information available upon which the State expert relied to make his observations. The trial court did not err in either finding no discovery violation or in denying the motion for mistrial. This Court should deny relief.

Once a defendant asserts a discovery violation, a trial court must conduct a hearing before it may conclude that the defendant was not prejudiced by the prosecution's alleged discovery violation. State v. Hall, 509 So.2d 1093, 1096 (Fla.1987). This inquiry must cover issues such as whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and what effect, if any, did it have upon the ability of the defendant to properly prepare for trial. Richardson v. State, 246 So.2d at 775(quoting Ramirez v. State, 241 So.2d 744, 747 (Fla. 4th DCA 1970)). Determining if there is prejudice to the defendant

[3] Richardson v. State, 246 So.2d 771, 775 (Fla. 1971).

is the paramount concern in a Richardson hearing. Reese v. State, 694 So.2d 678, 683 (Fla. 1997). In assessing the procedural prejudice, "the trial court must determine, first, whether the discovery violation precluded to aggrieved party from adequately preparing for trial, and second, what is the proper sanction to invoke for the discovery violation." Comer v. State, 730 So. 2d 769, 774 (Fla. 1st DCA 1999). "'Procedural prejudice,' as used in the context of a Richardson violation, results when there is "a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred." Reese v. State, 694 So. at 683 quoting State v. Schopp, 653 So. 2d 1016, 1020 (Fla. 1995). Only if the court determines that the violation impaired the defendant's ability to prepare for trial, will it reach the issue of a proper sanction. Id. at 682.

The court conducted an adequate hearing in accordance with Richardson by considering whether there was a discovery violation which was inadvertent or willful, whether it was trivial or substantial, and whether it affected Knight's ability to prepare his case. Richardson, 246 So.2d at 775. Since the court conducted a proper Richardson hearing, this Court merely reviews for abuse of discretion, not the standard of "presumed prejudice" noted in Cox v. State, 819 So.2d 705, 712 (Fla. 2002) and State v. Schopp, 653 So.2d at 1020 where there were violations and no hearings conducted. A court has broad discretion in determining whether a

defendant was prejudiced and in determining what measure would best remedy the situation. See State v. Tascarella, 586 So.2d 154, 157 (Fla. 1991); Lowery v. State, 610 So.2d 657, 659 (Fla. 1st DCA 1993); Poe v. State, 431 So.2d 266, 268 (Fla. 5th DCA 1989). The court has discretion to determine if a violation would result in harm or prejudice to the defendant. See Barrett v. State, 649 So.2d 219, 222 (Fla. 1994). The court found there not to be a discovery violation at all and, therefore, it could not prejudice the defense. The court did not abuse its discretion.

The police collected a number of samples of biological evidence from the crime scene, the victims, Knight, and the clothes he was wearing. Three items of clothing were recovered from under the sink in the bathroom that Knight used: a pair of jean shorts, a pair of boxers, and a shirt. They also seized the clothes he was wearing when arrested which consisted of a pair of jeans, a beige knit shirt, and another pair of boxers. Both pairs of boxers were the same brand and size. (T 27:3012-13) Kevin Noppinger "Noppinger"), a crime scene forensic analyst from Broward County Sheriff's Department, ran the DNA profile from these items of evidence as well as running the standards from the known relevant individuals. He then compared the sample profiles to those of the known standards to determine the source of the DNA from the items of evidence. (T 27:2981-3124) The stains from the items of clothes, the blood on Knight's hands when arrested, and the

scrapings from Odessia's fingernails are the pertinent DNA comparisons for this issue.

Noppinger analyzed the DNA from the blood swab from Knight's hands as well as the fingernail scrapings from Odessia's hands. The blood swab contained a combination of DNA with the major profile being Knight's and the minor one being Odessia's. (T 27:3032) The scrapings contained a combination of DNA with the major profile being Odessia's and the minor one being Knight's. (T 27:3034)

Noppinger turned to the DNA from the blood stains on the clothing collected. He determined that the shirt from the bathroom had Odessia's blood on it. (T 27:3014) The jean shorts had stains from the blood of Odessia and Hanessia. (T 27:3016-19) The boxers from the bathroom had stains from Odessia's and Hanessia's blood on the front and had stains from Hanessia and Knight on the back. (T 27:3012-13) He also tested samples from the clothing Knight was wearing. The jeans had Knight's DNA on them. His beige shirt had a blood stain which consisted of a combination of DNA with the major profile being Knight's and the minor one being Odessia's. The boxers, the same size and brand as those in the bathroom, also had the same mixture and proportions as the beige shirt did. (T 27:3023-30) Noppinger sent out samples taken from these items of clothing for further testing at the Bode laboratory. All of these comparisons were provided to

the defense as were the profiles taken from the known samples, including that of Martino.

Tracey, the FIU professor, did a statistical analysis of Noppinger's results. He did no testing of his own but only crunched the numbers using population statistics to calculate the probability of the results coming from the named people as opposed to strangers. For example, he testified that the stains on the beige shirt Knight was wearing contained the DNA profiles of Knight, Hanessia, and Odessia. It was forty-one million times more likely that the DNA came from those individuals than from Knight and two randomly selected individuals. Tracey also discussed the stain on the shower curtain and used Martino's profile in his analysis to exclude other individuals. (T 28:3152-53)

Faith Patterson ("Patterson"), a forensic analyst from the Bode Technology Group, then analyzed the samples sent by Noppinger. She looked at three cuttings from the boxers found in the bathroom. On one cutting she found the DNA profile from three people; neither Knight, Odessia, nor Hanessia could be excluded. (T 31:3300-02) The next cutting was for identification purposes and was from the boxer's waistband and was not a bloodstain. It contained a DNA mixture from *at least* two people; Patterson concluded that Knight could be excluded as a contributor. (T 27:3007-13, 31:3303-04) The third cutting from the boxers was

again for ownership determination, i.e. not a bloodstain. Knight again could not be excluded. (T 31:3305-06) She then looked at the two cuttings from the shirt Knight was wearing. One had a mixture of DNA with the major profile being Knight's, Odessia was not excluded, and Hanessia was excluded. The other cutting had a single source which was Knight. (T 31:3308-10) The swab from the bathroom shirt had a mixed DNA profile from which neither Knight nor Odessia could be excluded. (T 31:3312) Next was a cutting for ownership determination from the waist area of the jean shorts found in the bathroom; again, this was not a blood stain. That cutting had a DNA profile from *at least* two people from which both Hanessia and Knight were excluded. (T 31:3313-15) The defense had all these comparisons and reports.

McElfresh then did the same thing to Patterson's analysis and comparisons that Tracey did to Noppinger's. However, the State Attorney put up a chart containing the profiles from the various cuttings as well as the standards from known individuals; it contained Martino's standard. It turned out that Bode had not been supplied with her standard originally and had not had the opportunity to consider it when evaluating the cuttings' DNA profiles. McElfresh testified that if the cutting from the waist of the jean shorts was a complex mixture with partial profiles in it nor did it have much DNA. When analyzed in comparison to all four

of the standards, including Martino's, its profile showed a mixture of Hanessia and Knight with the partial profile (extra alleles) being accounted for by Martino. McElfresh testified that Bode had only received three standards when the cuttings were sent from Broward, despite the fact that Broward had Martino's and, in fact, had used it for the stain on the shower curtain. It turns out that the boxers and the shorts from the bath both had alleles consistent with Martino's on them. (3342-70) It was here that the defense objected. (T 31:3348-55) McElfresh did not do the comparisons or the DNA analysis. He simply looked at the cuttings' profiles next to the standards and saw the "extra" alleles were consistent with Martino's. The statistical information was not case specific, but was generally applicable in all DNA cases.

The defense, and presumably their DNA expert, had the bench notes, reports, profiles, standards, and analysis from Noppinger and Bode. (T 31:3351-53, 32:3445-47, 3456-58) Both sides agreed that the defense had this material. The State was just going to have McElfresh look at the graphs on the chart given the additional information he and his lab, not the defense, were missing when they did their original comparison and calculations. Based upon that, the trial court properly determined that there was not discovery violation. It was only a matter of interpreting the results of the DNA comparisons. (T 32:3348-55) Based upon this,

the trial court concluded that there was no new information being presented and no discovery violation.

The defense then raised the issue again when it asked for a mistrial. The court proceeded to go through the DNA evidence (detailed above) to ascertain whether Knight had suffered any prejudice from McElfresh's new insight. Counsel and the court went through the DNA evidence and the statistical probabilities associated with particular samples. The court determined that McElfresh had not done a report and that the defense had chosen not to depose him. Knight could not have relied on what it believed his testimony would be in preparing the defense. The trial court found that any nondisclosure, if it existed, was inadvertent, not willful, and was it not substantial. Finally, it reiterated its conclusion, based upon the record made by counsel and the experts, that there was no discovery violation.

A review of the evidence detailed above demonstrates both that Knight suffered no prejudice as a result of the State's action and that he had all the discovery before trial. Noppinger made three cuttings from the boxers in the bathroom, one from a blood stain and two from the waist area for ownership identification. Only one of those cuttings, one from the waist area, excluded Knight. The other two had profiles consistent with Knight's DNA. The only other cutting which excluded Knight according to Patterson was from the waist area of

the shorts found in the bathroom, again not a blood stain. McElfresh's "changed" opinion only concerned those two DNA profiles, neither of which were taken from blood stains. Knight was conclusively tied to the murders and the clothes found in the bathroom by the DNA evidence testified to by both Noppinger and Patterson. The *bloodstain* on the boxers from the bathroom had Knight's and the two females' DNA, a result reached by both Noppinger and Patterson which had nothing to do with McElfresh's altered opinion. The beige shirt worn by Knight had *bloodstains* on it having the DNA profiles from Knight and Odessia, again a result reached by both laboratories. The boxers he was wearing had a *bloodstain* containing both his and Odessia's DNA. Knight had Odessia's blood on his hand. She had his DNA under her nails. Knight knew all of this information before trial and his strategy was designed with that knowledge. The trial court did not abuse its discretion in either finding no Richardson violation nor in denying the motion for a mistrial. Even if this Court finds a discovery violation, Knight suffered no procedural prejudice and, therefore, is not entitled to relief. See Schopp, 653 So.2d at 1021.

The cases cited by Knight do not further his argument. In Brown v. State, 579 So.2d 760 (Fla. 1st DCA 1991) a police officer told the defense that he had no latents on defendant at station, leading the defense to believe that there were no

fingerprints taken from the scene. At trial, an officer took latents from Brown, compared them to those left on the scene, and said they were his. The State had not told the defense about any of this before the trial began. Since actual evidence seemed hidden and the trial court did not conduct a Richardson hearing, the appellate court reversed finding procedural prejudice. Brown did not receive copies of the prints found at the scene nor did he know the results of the comparison; Knight had the DNA profiles and all associated materials well before trial. A similar situation existed in Smith v. State, 499 So.2d 912 (Fla. 1st DCA 1986) where seven prints were found at the scene, five of which were Smith's. On the morning of the trial, the State matched the remaining two to a housemate of the victim. The defense only learned of the result when it cross examined the officer. The court found a discovery violation but no prejudice since the defense was not hurt in its trial strategy.

In Hasty v. State, 599 So.2d 186 (Fla. 5th DCA 1992) involved the State giving erroneous information to the defense on a key aspect of the case (nature of substance in drug case) and the court failed to conduct a Richardson hearing. In Raffone v. State, 483 So.2d 761 (Fla. 4th DCA 1986) the appellate court reversed where: the initial1st crime report said nothing about cocaine being in the house although it referred to drugs in a vehicle; the defense at trial was the State could

not prove constructive possession; a new report, turned over the day of trial, said cocaine in trafficking quantities was found in the house; and the State reneged on a promise not to use it. These are clearly distinguishable from the situation in Knight where the defense had the material which solidly linked him to the murders. Relief must be denied.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN REFUSING TO SEAT A NEW JURY PANEL FOR PURPOSES OF THE PENALTY PHASE OF TRIAL BASED ON FAMILY WITNESS MULLINGS'S COMMENT IN THE JURY'S PRESENCE DURING THE GUILT PHASE PROCEEDINGS THAT MULLINGS KNEW KNIGHT HAD A "VIOLENT BACKGROUND." (Restated)

Next Knight argues that the trial court erred in denying his motion to empanel a new penalty phase jury because the jury, which had just convicted him of two counts of first degree murder for the stabbing deaths of Odessia Stephens and Hanessia Mullins, had previously heard Hans Mullings's comment that he knew Knight to have a "violent background." (T 48:495-506) As the motion was essentially a renewal of the motion for mistrial made during the guilt phase, the standard of review is whether the trial court abused its discretion. A motion for a

mistrial should be “granted only when it is necessary to ensure that the defendant receives a fair trial.” Gore v. State, 784 So.2d 418, 427 (Fla.2001). The use of a harmless error analysis under State v. DiGuilio, 491 So.2d 1129 (Fla.1986) is not necessary where "the trial court recognized the error, sustained the objection and gave a curative instruction." Gore, 784 So.2d at 428. Instead, the correct appellate standard of review is abuse of discretion. See id.; Smithers v. State, 826 So.2d 916, 930 (Fla. 2002). The trial court did not abuse its discretion in denying the motion.

As previously noted, the objection to the comment[4] was sustained, the motion for mistrial was denied, and a curative instruction to the jury to disregard the statement was given during the guilt phase. (T 25:2709) Upon consideration of the subsequent defense motion to seat a new jury panel for the penalty phase, the court noted, "There was no indications to the violent nature of the testimony." (T 48:506) On appeal, Knight now contends that, although he can find no authority to support the proposition, that Mullings's single comment during the guilt phase of trial was prejudicial to him in the penalty phase of trial since it might have suggested that Knight had a longstanding violent character, thus, rendering

the penalty phase of trial fundamentally unfair. In fact, this Court has reviewed a number of similar cases and held that where comments that made reference to a prior history are isolated, inadvertent, and not focused upon, it is not an abuse of discretion to deny a motion for mistrial. Israel v. State, 837 So.2d 381, 388-389 (Fla. 2002)(no error where witness mentioned an additional murder case of the defendant's); Evans v. State, 800 So.2d 182, 190 (Fla. 2001)(no error where witness mentioned defendant had a prior criminal record); Cole v. State, 701 So.2d 845, 853 (Fla. 1997)(witness's testimony in response to a question about how she came to see a receipt with the victim's name on it, that, "I was nosey and knew some history on K.C., so I decided to go outside and look at the tag on the car" did not require granting a motion for mistrial or taint penalty phase jury.).

The lack of prejudice is further established here because, unlike the foregoing cases, Knight's jury was instructed to disregard the statement and the law presumes that juries will follow the instructions given to it by a trial court. Crain v. State, 894 So.2d 59, 70 (Fla. 2004), citing Sutton v. State, 718 So.2d 215, 216 & 216 n. 1 (Fla. 1st DCA 1998) and cases cited therein, ("applying the well-established presumption that juries follow trial court instructions."). Thus, going

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[4]As previously explained, Mullings's entire comment was, "I was just assuming that, truthfully, probably Odessia and Richard got into an argument or

into the penalty phase, the only evidence that can be presumed to be in the jury's collective conscious is that which was legitimately before it which established beyond a reasonable doubt Knight's responsibility for the heinous attacks on the victims in their bed.

The lack of prejudice is further established by the fact that Knight put his character at issue in the penalty phase which, consequently, opened the door for the state to present evidence in rebuttal. Hildwin v. State, 531 So.2d 124, 128 (Fla. 1988) (holding that during the penalty phase of a capital case, the state may rebut defense evidence of the defendant's nonviolent nature by means of direct evidence of specific acts of violence committed by the defendant); Squires v. State, 450 So.2d 208 (Fla. 1984) (in guilt phase of trial, state was permitted to rebut evidence of nonviolent character by showing that defendant had fired a deadly weapon at persons other than the victim.); See also Dillbeck v. State, 643 So.2d 1027, 1030 (Fla. 1994) (recognizing that state must be afforded the opportunity to present evidence in rebuttal of mitigation evidence in light of the requirement in Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990) that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved.").

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something because I know Richard's violent background." (T 25:2709)

In the instant case, Knight presented at the penalty phase several witnesses who testified about his good character. His teacher Joscelyn Walker ("Walker") told the jury that Knight was a respectful and loving boy raised in a very respected family. (T 51:724-71) Knight's high school art teacher Joscelyn Gopie ("Gopie") described Knight as a pleasant, eager boy who was quite talented at art. (T 51:779-92) Barbara Weatherly ("Weatherly") is the mother of a Jamaican girl who was affianced to Knight. She described him as a decent honorable guy who respected her rules regarding her daughter. He always helped her younger children with their drawing. He was a quiet and peaceful person who spent a lot of time alone. (T 51:794-809) A former boss and coworker of Knight's also testified. Stanley Davis ("Davis") told how Knight had been adopted into a well respected family and had a close loving relationship with his family members. Knight took over many of his father's duties when his father lost a leg. Knight worked with him at a construction company and was a good worker. (T 52: 888-908)

Defense investigator, Valerie Rivera testified Knight was abandoned by his mother and the Knight family found him at a hospital and took him home. He was a good brother and son. Knight's close friends and family said that he was a nice and good person. Knight's sister in law used to have Knight babysit her children but eventually stopped that because he was careless around the house. He blacked

out on one other occasion. Knight's former boss Stedman Stevenson said that he was a hard worker and a quick learner. He took Knight to Florida and Knight decided to stay. (T 54:1037-89)

Knight originally argued that he would be forced, in response to Mullings's comment, to put on good character evidence which would, in turn, open the door to the state putting on evidence of violence in Jamaica, including when the defendant had pulled a gun on someone and slashed someone else. Despite this extensive presentation of character evidence by Knight at the penalty phase, the State did not attempt to present this evidence in the penalty phase.[5] (T 48:501) Even without such testimony, the fact is the evidence of the murders themselves, properly admitted during the guilt phase, established that Knight was violent. Beyond the violent attack with the knives upon these two helpless victims, there was also evidence presented that Knight had damaged the apartment and broken the window, all of which are violent acts. Thus, Knight's claim that he was prejudiced by this single comment is simply without merit. The trial court did not abuse its discretion in denying the motion.

[5]Defense counsel also noted that there was evidence they had successfully blocked that Knight had engaged in sex with an underage girl. (T 48: 505)

ISSUE V

FLORIDA'S CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL. (Restated)

While Knight acknowledges that this Court has held that Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002) does not apply to the Florida death sentencing scheme as set forth in § 921.141, Florida Statutes, he asks this Court to revisit the issue and find the scheme unconstitutional. He argues that its unconstitutionality mandates a reversal of his death sentence and an imposition of a life sentence. Specifically, Knight challenges the following: it does not comply with the dictates of Ring; it permits the jury to be instructed that its recommendation is advisory in contravention of Caldwell v. Mississippi, 472 U.S. 320 (1985); the statute provides for a death recommendation based upon a majority vote; and it does not require the jury to make a finding that the aggravations outweighs the mitigation beyond a reasonable doubt. This Court has rejected such challenges and has upheld the constitutionality of Florida capital sentencing scheme. This Court should affirm.

While questions of law, are reviewed *de novo*, Elder v. Holloway, 510 U.S. 510, 516 (1994), Knight has offered nothing new to call into question the well settled case law on the impact of Ring on Florida's capital sentencing and the 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. 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 Coday v. State, 946 So.2d 988, 1005-06 (Fla. 2006)(reaffirming Ring does not render Florida capital sentencing scheme unconstitutional and rejects the challenge based on permitting majority death recommendations); Buzia v. State, 926 So.2d 1203, 1217 (Fla. 2006) (reaffirming Ring does not invalidate Florida's death penalty and concluding that the finding of a prior violent felony conviction satisfies Ring); State v. Steele, 921 So.2d 538 (Fla. 2005) (finding Ring does not require a finding that the Florida capital sentencing scheme is unconstitutional and does not require jury findings on aggravating circumstances); 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); Whitfield v. State, 706 So.2d 1 (Fla. 1997) (finding majority death recommendations are constitutionally permitted).

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). Moreover, Knight has a prior violent felony (murder) conviction which supports the prior violent felony aggravator and establishes further compliance with Ring. This Court has rejected challenges under Ring where the defendant has a prior violent felony conviction. See Robinson v. State, 865 So.2d 1259, 1265 (Fla. 2004) (noting "prior violent felony involve[s] facts that were already submitted to a jury during trial and, hence, [is] in compliance with Ring.") (citing Owen v. Crosby, 854 So.2d 182, 193 (Fla. 2003)); Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (denying Ring claim and noting "prior violent felony" aggravator justified denying Ring claim). Relief must be denied and Knight's convictions and sentences affirmed.

Courts are not required to have juries specify in their penalty recommendations which aggravating or mitigating factors exist. This Court stated, "[this] 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 and concluding that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984).

This Court has previously rejected the argument that a unanimous jury sentence recommendation is required. Evans, 800 So.2d 182; Sexton v. State, 775 So. 2d 923 (Fla. 2000); Alvord v. State, 322 So. 2d 533 (Fla. 1975). This Court has also held that "a capital jury may recommend a death sentence by a bare majority vote." Card v. State, 803 So.2d 613, 628 n. 13 (Fla. 2001) citing Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994).

Likewise, Knight's challenges to the instructions regarding the standard of proof for mitigation and the balancing of the aggravation and mitigation have been rejected. In Williams v. State, 967 So.2d 735 (Fla. 2007), this Court stated:

> ...this Court has repeatedly rejected the argument that the standard penalty phase jury instructions impermissibly shift the burden to the defense to prove that death is not the appropriate sentence. *See, e.g., Elledge v. State*, 911 So.2d 57, 79 (Fla. 2005); *Sweet v. Moore*, 822 So.2d 1269, 1274 (Fla. 2002). This Court in Sweet further rejected a claim of error where a trial court failed to instruct the jury that "it was required to find beyond a reasonable doubt that the aggravators outweighed the mitigators before recommending a sentence of death." *Id.* at 1275. Finally, in *Bogle v. State*, 655 So.2d 1103, 1108 (Fla.

> 1995), we rejected the claim that a jury instruction which provides that a mitigator may be considered if the jury is reasonably convinced of its existence erroneously restricts the evidence that a jury may consider in mitigation. Accordingly, we reject these claims.

Williams, 967 So.2d at 761. Knight has offered nothing requiring reconsideration of this settled matter.

This Court has also rejected challenges to the statute under Caldwell v. Mississippi. A Caldwell error is committed when a jury is misled regarding its sentencing duty so as to diminish its sense of responsibility for the decision. "To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989). This Court has recognized the jury's sentencing role is merely advisory, and the standard instructions adequately and constitutionally advise the jury of its responsibility; "the standard jury instruction fully advises the jury of the importance of its role, correctly states the law, ... and does not denigrate the role of the jury." Brown v. State, 721 So. 2d 274, 283 (Fla. 1998)(citation omitted). See Burns v. State, 699 So. 2d 646, 654 (Fla. 1997) (holding instruction correctly states law and advises jury of importance of its sentencing role), cert. denied, 522 U.S. 1121 (1998); Turner v. Dugger, 614 So. 2d 1075, 1079 (Fla. 1992) (finding Caldwell does not control Florida law on capital

sentencing); Combs v. State, 525 So. 2d 853, 855-58 (Fla. 1988) (rejecting claim standard jury instruction is unconstitutional under Caldwell or applicable to Florida death cases). The jury was instructed adequately and in compliance with constitutional dictates. The statute is not implicated by Ring or Caldwell. The Court should affirm.

ISSUE VI

KNIGHT'S DEATH SENTENCE IS PROPORTIONAL. (Added claim.)

Although Knight did not address proportionality, this Court has the independent duty to do so. See England v. State, 940 So.2d 389 (Fla. 2006); Gore v. State, 784 So.2d 418 (Fla. 2001); Jennings v. State, 718 So.2d 144 (Fla. 1998). This Court reviews and considers all the circumstances in a case relative to other capital cases when deciding whether death is a proportionate penalty and to ensure uniformity. See Davis v. State, 859 So.2d 465, 480 (Fla.2003); Johnson v. State, 720 So.2d 232, 238 (Fla.1998); Urbin v. State, 714 So.2d 411, 416-17 (Fla.1998). The instant capital sentence is proportional and should be affirmed.

Proportionality review is a consideration of the totality of the circumstances in a case compared with other capital cases. Urbin, 714 So.2d 411. It is not a

comparison between the number of aggravators and mitigators, but is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990); Crook v. State, 908 So.2d 350, 356 (Fla.2005) . The function is not to reweigh the factors, but to accept the jury's recommendation and the judge's weighing. Bates v. State, 750 So.2d 6, 14 (Fla. 1999).

> However, in cases where more than one defendant is involved in the commission of the crime, this Court performs an additional analysis of relative culpability. Underlying our relative culpability analysis is the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment. *See Ray v. State*, 755 So.2d 604, 611 (Fla.2000). *See also Jennings v. State*, 718 So.2d 144, 153 (Fla. 1998) ("While the death penalty is disproportionate where a less culpable defendant receives death and a more culpable defendant receives life, disparate treatment of codefendants is permissible in situations where a particular defendant is more culpable.") (citation omitted).

Shere v. Moore, 830 So.2d 56, 61-62 (Fla. 2002). See also Mordenti v. State, 630 So.2d 1080 (Fla. 1994) (noting codefendant received immunity for testimony and finding no disparate treatment); Downs v. State, 572 So.2d 895 (Fla. 1990) (finding no disparate treatment where codefendant testified against the defendant under a grant of immunity). Yet, in Garcia v. State, 492 So.2d 360 (Fla. 1986), this Court upheld a prosecutor's discretion in plea bargaining with a less culpable

codefendant and indicated such action does not violate proportionality principles. See also Diaz v. State, 513 So.2d 1045 (Fla. 1987); Brown v. State, 473 So.2d 1260 (Fla. 1985); Shere v. Moore, 830 So.2d 56, 63, n.9 (Fla. 2002).

Knight was convicted of two counts of first degree murder. The court found two aggravating factors for the murder of Odessia Stephens: a previous conviction of another violent capital felony and HAC. For the murder of Hanessia Mullings the court found three aggravating circumstances: a previous conviction of another violent capital felony, HAC, and the victim was under 12 years of age. The court found no statutory mitigating circumstances but found eight non-statutory ones. These included: 1. The defendant had a good upbringing (slight weight); 2. Defendant loves his family (moderate weight); 3. Defendant went to high school and excelled in art (little weight); 4. Defendant was admired by the children in his neighborhood as a youth and was well regarded by the adults (little weight); 5. Defendant was a valuable employee in Jamaica (little weight); 6. Defendant had part-time employment at the time of the crime (little weight); 7. Defendant behaved well in court (little weight); and 8. Defendant is capable of forming loving relationships (moderate weight). (ROA 631-643) The heinous, atrocious, or cruel aggravator is one of the "most serious aggravators set out in the statutory sentencing scheme." Larkins v. State, 739 So.2d 90, 95 (Fla.1999). Additionally,

the prior violent felony is one of the "most weighty in Florida's sentencing calculus." Sireci v. Moore, 825 So.2d 882 (Fla. 2002).

This Court has affirmed capital sentences under similar circumstances. In Aguirre-Jarquin v. State, 9 So.3d 593, 609-10 (Fla. 2009) the defendant stabbed and killed a mother and her daughter who were his neighbors. For the first murder, the trial court found three aggravating factors: prior capital felony conviction (moderate weight); the capital felony was committed while the defendant was engaged in the commission of a burglary (moderate, but less than great weight); HAC (great weight). For the second murder the court found five aggravators: prior capital felony conviction (great weight); murder committed during a burglary (moderate, but less than great weight); avoid arrest (great weight); HAC (great weight); and the victim was particularly vulnerable due to advanced age or disability (great weight). The court found the following mitigating circumstances: (1) under the influence of extreme mental or emotional disturbance (moderate weight); (2) substantially impaired ability to appreciate the criminality of his conduct (moderate weight); (3) age (24) (little weight); (4) long term substance abuse problem (moderate weight); (5) dysfunctional family setting (little weight); (6) childhood abuse (little weight); (7) poor performance in school (little weight);

(8) brain damage from substance abuse (moderate weight). This Court affirmed the death sentence.

In Smithers v. State, 826 So.2d 916 (Fla.2002) the defendant killed two women with either hitting them with an ax or stabbing them. This Court upheld the death penalty for both murders where there were three aggravators found for one murder and two for the other (HAC and prior violent felony for contemporaneous murder found for both and CCP for one) and where there were two statutory mitigators as well as seven nonstatutory mitigators. Similarly in Francis v. State, 808 So.2d 110 (Fla. 2001) (upholding death penalty for both stabbing murders of elderly sisters when trial court found four aggravators for each murder (HAC; victims vulnerable due to age; prior violent felony for contemporaneous murder; murders committed during the course of a robbery) and two statutory mitigators along with six nonstatutory mitigators). See also Morton v. State, 789 So.2d 324 (Fla.2001) (upholding both death sentences in double murder by gunshot and stabbing where trial court found three aggravators with respect to one murder and five with respect to the other (prior violent felony for contemporaneous murder and CCP found for both) and found two statutory mitigators and five nonstatutory mitigators). The sentence is proportional.

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 has been served on Melodee A. Smith, 101 NE Third Ave., Suite 1500, Ft. Lauderdale, Florida 33301, this 26th day of April, 2010.

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 May 27, 2009.

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LISA-MARIE LERNER
Assistant Attorney General