IN THE SUPREME COURT OF FLORIDA

DONALD BANKS,

Appellant,

v. CASE NO. SC08-1741

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
Tallahassee, Florida
(850) 414-3300, Ext. 3583
(850) 487-0997 (Fax)

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

PRELIMINARY STATEMENT

Appellant, DONALD BANKS raises six issues in this direct appeal from his conviction for murder and his sentence to death. References to the appellant will be to “Banks” or “Appellant”. References to the appellee will be to the “State” or “Appellee”.

The seventeen (17) volume record on appeal in the instant case will be referenced as “TR” followed by the appropriate volume number and page number. The two volumes of exhibits will be referred to as “TR EX” followed by the appropriate volume and page number. References to Banks’ initial brief will be to “IB” followed by the appropriate page number.

STATEMENT OF THE CASE

Donald Banks, born on November 30, 1972, was thirty-two (32) years old when he murdered Linda Volum on March 10, 2005. Banks was arrested for Volum's murder on November 7, 2005 at 4:45 p.m. (TR Vol. I 1).

On December 15, 2005, Banks was indicted and charged with one count of murder and one count of armed robbery. (TR Vol. I 18-19). Sometime before trial, the prosecutor *nolle prossed* the armed robbery charge. As a result, Banks went to trial only for the first degree murder of Linda Volum.

Contrary to his pleas, Banks was convicted of first degree murder. (TR Vol. V 831). During the penalty phase, the State presented one victim impact witness, Linda Volum's mother. She read a prepared statement. (TR Vol. XIV 865-868).

The State also called Larry Kuczkowski. He is a detective with the Jacksonville Sheriff's Office. (TR Vol. XIV 868).

On March 23, 2005, just thirteen days after Banks murdered Linda Volum, Banks robbed and stabbed William Johnson in front of a convenience store in Jacksonville, Florida. A video camera captured Banks' attack on Mr. Johnson. (TR Vol. XIV 869).

Detective Kuczkowski identified the videotape. The tape was introduced as State's Exhibit 1. (TR Vol. XIV 870). The

State showed the video tape to the jury. (TR Vol. XIV 870-871).

In addition to the videotape, the State presented a judgment and sentence showing that Banks had previously been convicted of three felonies in Florida. (TR Vol. XIV 872-873). The State also presented a stipulation between the State and Banks to establish that Banks had been convicted of two robberies in New Jersey, one in 1992 and one in 1996. (TR Vol. XIV 873).

Banks presented two witnesses at the penalty phase. In mitigation, Banks called his father and Dr. Harry Krop to testify. (TR Vol. XIV 875-880, 880-911). Banks also testified before the jury, against the advice of counsel. (TR Vol. XIV 913, 915-920).

The jury recommended Banks be sentenced to death by a vote of 10-2. (TR Vol. V 855). The jury was provided a special interrogatory to answer during deliberations. The jury found, beyond a reasonable doubt, that Banks played a significant role in the murder of Linda Volum. (TR Vol. V 848).

In preparation for the sentencing hearing, the State submitted its sentencing memorandum on July 21, 2008. (TR Vol. V 867). The defense submitted a sentencing memorandum on July 24, 2008. (TR Vol. V 859).

A Spencer hearing was held on August 6, 2008. The State presented additional victim impact evidence that was not presented to the jury. The State also introduced a letter from one of Ms. Volum's law school professors. Professor Daicoff wrote the letter to Ms. Volum's family shortly after her death. (TR Vol. XVI 986-994). Banks did not present any evidence at the hearing. He did complain, however, that his attorneys conceded his guilt in their sentencing memorandum. (TR Vol. XVI 995-996).

On August 15, 2008, the court held a sentencing hearing to sentence Banks for first degree murder. The judge followed the jury's recommendation and sentenced Banks to death. The trial court found the State had proven three aggravators beyond a reasonable doubt: (1) Banks had previously been convicted of a violent felony; (2) the murder was especially heinous, atrocious, or cruel (HAC); and (3) the murder was cold, calculated, and premeditated (CCP). (TR Vol. VI 998).[1]

In mitigation, the court found no statutory mitigation. The trial judge considered and weighed five non-statutory mitigators: (1) Banks has a low IQ (little weight); (2) Banks

[1] The Court found the pecuniary gain aggravator had not been established beyond a reasonable doubt. (TR Vol. V 994-998).

has a deficit in his brain (moderate weight); (3) Banks has anti-social personality traits (little weight); (4) Banks was not the only participant in the murder (no weight); and (5) Banks had a difficult childhood (little weight). (TR Vol. VI 999-1000).

On June 2, 2008, Banks filed a motion for new trial. (TR Vol. V 832-833). On June 27, 2008, Banks filed a supplemental motion for new trial. (TR Vol. V 857). The trial court denied the motions. (TR Vol. V 834, 858).

On September 9, 2008, Banks filed a notice of appeal. (TR Vol. VI 1013). On March 26, 2009, Banks filed his initial brief. This is the State's answer brief.

STATEMENT OF THE FACTS

Sometime in the early morning hours of March 10, 2005, Donald Banks murdered Linda Volum. Ms. Volum lived alone in a duplex apartment. A neighbor heard a commotion in Linda Volum's apartment sometime between midnight and 4:00 a.m. (TR Vol. IX 267, 269). The medical examiner opined that Ms. Volum died sometime between midnight and 4:00 a.m. on March 10, 2005. (TR Vol. X 558).

Banks stabbed Ms. Volum fourteen (14) times. Two of the stab wounds pierced her heart. (TR Vol. X 549). Two others penetrated her lung and liver. (TR Vol. X 549). Banks delivered several of the stab wounds with such force that they cut right through three of Ms. Volum's ribs. (TR Vol. X 547). Nonetheless, Linda Volum fought for her life. Ms. Volum had defensive wounds on her hands and fingers. (TR Vol. X 552-553).

Banks cut his own leg during the murder, leaving his blood and DNA behind. (TR Vol. IX 359). One item recovered from Linda Volum's apartment, a bloody towel, had both Banks' and Linda Volum's DNA on it. (TR Vol. X 477, 484).

Banks took Linda's White Nissan Sentra and her pre-paid ATM card. Banks attempted to use Linda Volum's ATM card at two different locations to get money between 2:30 a.m. and 3:00 a.m.

on the morning of March 10, 2005. (TR EX Vol. I, 6-12). He was unsuccessful because Ms. Volum had an insufficient balance on her card. (TR EX Vol. I 6-12).

Banks also took Ms. Volum's laptop computer and carried it away in a green pillow case taken from one of the pillows in Linda Volum's apartment. (TR Vol. IX 352). Banks went home and gave Ms. Volum's laptop computer to his girlfriend, Sudie Johnson. (TR Vol. IX 352). Banks was driving Linda Volum's car when he arrived home the morning of the murder. (TR Vol. IX 351-352).

Banks was limping when he arrived home. His leg was bleeding over his sock. (TR Vol. IX 355).

Banks told Sudie Johnson that he killed Linda Volum.[2] He described his crime. (TR Vol. IX 353).

Banks told Johnson that he stripped to his underwear before entering Ms. Volum's apartment. Banks brought his bloody underwear home with him in the same green pillow case that contained Ms. Volum's laptop computer. (TR Vol. IX 352-353).

[2] Banks did not tell Sudie Johnson the victim's name. Banks referred to Ms. Volum as "this person." Ms. Johnson discovered the name L. Volum on the welcome screen of the laptop computer that Banks brought to her after the murder.

Banks told Sudie Johnson that he put Ms. Volum in a choke hold and stabbed her in the torso until she fell down. He turned the knife with his last blow. (TR Vol. IX 358-359).

When Ms. Johnson asked Banks why he did it, Banks told her it was a murder payback. (TR Vol. IX 359). Banks also told Ms. Johnson that he staged the scene of the crime. (TR Vol. IX 360).

Banks told Sudie that he set up a crack pipe in Ms. Volum's house to make the police think it was a drug related killing. (TR Vol. IX 360). Police found a crack pipe under Linda Volum's body. (TR Vol. IX 288).

Banks went to the hospital the day after the murder to get treatment for his leg wound. Banks lied to triage personnel about how he was injured. (TR Vol. XI 684). He lied because it was in his interest to lie. (TR Vol. XI 684).

Banks testified at trial. Banks told the jury that he did not kill Linda Volum. Banks claimed that Linda gave him her computer and her ATM card to use. Banks testified that Ms. Volum gave him the computer as collateral for drugs. (TR Vol. XI 650).

Banks told the jury that Volum was a drug addict who bought drugs from him. He would "front" her drugs and she would give him things as collateral for the loan. (TR Vol. XI 636). Banks

also claimed that he knew Linda Volum very well. Banks testified that he and Linda had an on-going sexual relationship. (TR Vol. XI 631). According to Banks, Ms. Volum allowed him to use her home as a "trap" for his drug business. (TR Vol. XI 631).

Banks testified that when he left Linda Volum's apartment, she was alive and alone with someone named "Bo." (TR Vol. XI 648). Bo went along with Banks to the ATMs to use Linda Volum's ATM card. Banks told the jury that he had no idea what Bo's real name was because he is not "fluent" with him. (TR Vol. XI 644).

The police found Linda Volum's body on the floor of her apartment sometime on March 10, 2005. Police went to Ms. Volum's apartment because her car was involved in a hit and run auto accident. Witnesses saw four black males running from Ms. Volum's car after the crash. (TR Vol. IX 261).

SUMMARY OF THE ARGUMENT

CLAIM I: The trial judge correctly denied Banks' challenge for cause against Mr. Constantino. Mr. Constantino's daughter had been the victim of a dissimilar violent crime shortly before trial. However, Mr. Constantino assured the court the crime would have no adverse effect on his ability to be a fair and impartial juror in Banks' case. The trial judge was in the best position to determine Mr. Constantino's demeanor when he asserted, without equivocation, that the attack on his daughter would have no impact on him as a juror. Banks cannot show the trial judge abused his discretion in denying the challenge.

CLAIM II: The trial court committed no error in allowing the State to exercise peremptory strikes against two African-American members of the venire. When the defense objected to the challenges, the State articulated a race neutral reason for the strikes and the court permitted the strikes. The record supports the trial judge's conclusions that the State's race neutral reasons for the two strikes were genuine and not a pretext for discrimination.

CLAIM III: This claim is not preserved for appeal because Banks did not make the same argument below that he makes now before this Court. Even if the claim is properly preserved, the

trial court correctly permitted the State to introduce DNA evidence linking Banks to the murder scene. Mr. Pollock's testimony established that DNA found at the scene matched Banks' DNA. Moreover, his testimony provided the jury with expert guidance concerning the significance of the DNA matches found at the scene of Linda Volum's murder.

CLAIM IV: The trial court committed no error in denying Banks' motion for mistrial when a State witness, during cross-examination, mentioned that Banks committed another crime, specifically the stabbing of Mr. William Johnson. Banks invited the error when he asked the witness why she had stopped supporting Banks. In any event, any error was not so prejudicial as to vitiate the entire trial. The trial judge gave a curative instruction and obtained each juror's assurance he or she would not consider the witness's comment during deliberations. The State did not mention the remark during the remainder of the guilt phase of Banks' capital trial, and did not mention it during closing arguments. Banks cannot show the trial court abused his discretion in failing to grant a mistrial.

CLAIM V: In his first penalty phase claim, Banks alleges the trial judge erred in permitting the State to introduce a

video tape that depicted Banks committing a prior violent felony. Banks stabbed and then robbed 67 year old William Johnson outside a Jacksonville convenience store. The crime was captured on the store's surveillance cameras. The sounds of the attack were not recorded.

The State may introduce evidence in support of the prior violent felony aggravator. Indeed, the State may even call the victim to testify. This is so even if the defendant maimed or disfigured her during the attack.

The silent videotape was admissible during the penalty phase of Banks' capital trial. The trial judge ensured the prior violent felony would not become a feature of the penalty phase. Banks' claim is without merit.

CLAIM VI: In Banks' final claim on appeal, Banks avers the trial judge erred in finding the murder CCP. After he murdered Linda Volum, Banks outlined in detail his motive and the means by which he ended Linda Volum's life. Banks told his girlfriend, Sudie Johnson, that the murder was a "murder payback." Banks told Ms. Johnson that he took off his outer clothing and stripped to his underwear before he went into Ms. Volum's home. Banks also told Ms. Johnson that he staged the scene to make the murder look "drug related." Evidence that

Banks had a motive to kill Ms. Volum, coupled with evidence pointing to Banks' thoughtful planning and execution of this brutal murder, supports the trial judge's finding this murder was cold, calculated and premeditated.

ARGUMENT

ISSUE I

WHETHER TRIAL COUNSEL ERRED IN DENYING BANKS' CHALLENGE FOR CAUSE AGAINST PROSPECTIVE JUROR CONSTANTINO.

In this claim, Banks avers the trial judge erred in failing to grant Banks' challenge for cause against prospective juror Dennis Constantino. The gravamen of Banks' claim is that Mr. Constantino was not competent to serve because his daughter was the recent victim of an armed robbery. (IB 15).

During voir dire, the trial judge asked prospective jurors whether they or a close friend or relative had ever been the victim of a serious crime. (TR Vol. VIII 87, 91). Mr. Constantino told the court that his daughter was held up at gun point and robbed.

Mr. Constantino was living with his daughter at the time of the crime. (TR Vol. VIII 92). The robbery occurred about a month and a half before the trial. (TR Vol. VIII 92).

The trial judge asked Mr. Constantino how the robbery might affect him. Mr. Constantino told the trial court, "It's not

going to bother me." He repeated, "It won't affect me, no." (TR Vol. VIII 93).[3]

Banks moved to challenge Mr. Constantino for cause. The sole basis for the challenge was that Mr. Constantino's daughter had been recently robbed at gunpoint. Mr. Eler told the court that based on the fact it was a relative, the close in time frame and the fact Mr. Constantino had a daughter that may be around the victim's age in this case, the defense would move for cause on him. (TR Vol. VIII 190).[4]

The State objected to the challenge against Mr. Constantino. The court denied the challenge. (TR Vol. VIII

[3] Another prospective juror, Ms. Jackson told the court that her God-brother was brutally murdered on April 19, 2008. He was on his way to the prom. (TR Vol. VIII 93). Ms. Jackson said she could set that aside and decide Banks' case fairly. She told the court that she could be fair to Mr. Banks. (TR Vol. VIII 94). She understood that Banks was not involved in the murder of her God-brother. (TR Vol. VIII 94). The defense requested a challenge for cause against Ms. Jackson. The trial court denied the challenge. (TR Vol. VIII 189). Ms. Jackson did not sit on Banks' jury.

[4] There is nothing in the record to support Mr. Eler's assertion that Mr. Constantino's daughter and the victim in this case were close in age. Counsel for Mr. Banks asked no questions, during voir dire, that would establish this to be true. Mr. Constantino told the court only that he had four children and had a grandchild and nephew that he watched during the day. (TR Vol. VIII 114).

190). Subsequently, the defense used one of its peremptory challenges to strike Mr. Constantino from the venire. (TR Vol. VIII 198).

Once Banks had used all ten of his peremptory strikes, Banks asked for one additional peremptory challenge. The trial court denied his request. Banks told the court that if he had an additional peremptory challenge he would use it to challenge Mr. Ashline, the last juror seated. (TR Vol. VIII 199).

Counsel did not ask for an additional peremptory challenge because he wanted to replace the challenge he used against Mr. Constantino. Nor did he aver he was "forced" to use a peremptory challenge against Mr. Constantino because the court erred in denying his challenge for cause.[5] Instead, Mr. Eler told the court he wanted an additional peremptory challenge because the trial judge erred in his Neil/Slappy rulings. (TR Vol. VIII 199).[6]

---

[5] Setting aside Mr. Constantino's daughter's encounter with an armed robber, there is at least one other logical reason a defendant might want to use a peremptory challenge against Mr. Constantino. When initially asked to rate his support for the death penalty with 1 being the least support and 10 being the most supportive, Mr. Constantino said an 8. (TR Vol. VIII 41). Accordingly, it cannot be inferred that trial counsel used a peremptory challenge to remove Mr. Constantino because his challenge for cause was denied.

[6] The trial court's Neil/Slappy rulings are addressed in Issue II.

Before the jury was sworn, counsel for Mr. Banks told the court, "we do not accept the jury as its composed, based on our objections and our request for an additional peremptory." (TR Vol. IX 216). Once again, counsel for Mr. Banks did not inform the court that the reason he wanted an additional peremptory was to replace the one he was "forced" to use against Mr. Constantino after his challenge for cause was denied. (TR Vol. VIII 216).[7]

[7] This Court has set forth requirements for a defendant to preserve this error for review. This Court has previously held that in order to preserve such an issue for appeal, a defendant must exhaust all peremptory challenges, request more and if denied, identify a specific sitting juror that he or she would have excused if possible. The defendant must also object to the composition of the jury before it is sworn. Kearse v. State, 770 So. 2d 1119, 1128 (Fla. 2000). *See also* Bevel v. State, 983 So. 2d 505, 514 (Fla. 2008). Banks objected to the jury before it was sworn, exhausted all is peremptory challenges, requested an additional peremptory challenge and, once denied, identified a seated juror he would excuse if granted the additional challenge.

While Banks may have met the technical requirements of preservation as outlined by this Court in Kearse and Bevel, the purpose behind the rule of preservation was not met in this case. The purpose of requiring the defendant to properly preserve an error is not to burden defense counsel with technical requirements. Carratelli v. State, 961 So. 2d 312 (Fla. 2007). Instead, it is to give the trial judge a last opportunity to correct any trial error. Here, Banks did not give the trial judge this opportunity because he did not aver that he wanted an additional peremptory to replace the one he used on Mr. Constantino. Instead, Banks claimed the request for an additional peremptory challenge was to correct the trial judge's Neil/Slappy errors. By failing to alert the trial court

The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court. Lusk v. State, 446 So. 2d 1038, 1041 (Fla. 1984) (citing Singer v. State, 109 So. 2d 7 (Fla. 1959)). If a reasonable doubt exists as to whether a juror possesses an impartial state of mind, the juror must be excused for cause. Busby v. State, 894 So. 2d 88, 95 (Fla. 2004).

The standard of review is manifest error.[8] Hernandez v. State, 4 So. 3d 642 (Fla. 2009). Manifest error is tantamount to an abuse of discretion. *See* Kimbrough v. State, 700 So. 2d 634, 638-39 (Fla. 1997) (stating that court's determination of juror's competency "will not be overturned absent manifest error" and concluding that trial court did not abuse its discretion in excusing a juror for cause).

In reviewing a claim of error, such as the one Banks raises here, this Court has recognized that the trial court has a unique vantage point in the determination of juror bias. The

---

to the same error he raises now, Banks did not properly preserve this issue.

[8] The decision whether a challenge for cause is proper presents a mixed question of fact and law that will not be overturned in the absence of manifest error. Hernandez v. State, 4 So. 3d 642, 659 (Fla. 2009); Overton v. State, 801 So. 2d 877, 890 (Fla. 2001).

trial court is able to see the jurors' voir dire responses and make observations, while this Court cannot. Accordingly, a trial court has great discretion when deciding whether to grant or deny a challenge for cause based on juror incompetency. Pentecost v. State, 545 So. 2d 861 (Fla. 1989).

This claim may be denied because the trial judge committed no error in denying Banks' challenge against Mr. Constantino. While Mr. Constantino's daughter had been a victim of recent violent crime, Mr. Constantino unequivocally assured the trial judge, twice, that it would neither bother him nor have any effect on him.

In support of his argument, Banks cites to White v. State, 579 So. 2d 784, 785 (Fla. 3d DCA 1991). In White, the defendant was charged with selling cocaine within one thousand feet of a school zone. During voir dire, one juror, Ms. Castellanos, told the court that she might not be an impartial juror since she had two children, taught Sunday school, and loved children.

After some additional questioning by the trial judge, Ms. Castellanos stated she probably would be fair and acquit the defendant if there was no proof beyond a reasonable doubt of his guilt.

The defendant attempted to remove Ms. Castellanos for cause. The trial judge denied the challenge. The Third District Court of Appeals reversed and remanded for a new trial because Ms. Casetellanos' answers raised a reasonable doubt about her ability to be a fair and impartial juror. White v. State, 579 So. 2d at 785.

The case at bar bears not the slightest resemblance to the White case. In White, Ms. Castellanos told the court initially that she might not be impartial. Subsequently, the best she could say was that she would "probably" be fair. Id.

This is not the case in Banks. From the outset, Mr. Constantino told the court, unequivocally, that the crime committed against his daughter would not affect or bother him in fulfilling his duties as a juror. (TR Vol. VIII 93). While Banks wants this Court to assume that Mr. Constantino could not be fair and impartial because of the "understandable affections, concerns and worries parents have for their children," there is simply nothing in the record to support such an assumption. (IB 17). Instead, the trial judge was able to observe Mr. Constantino's demeanor when he assured the court, twice, that an unrelated crime committed against his daughter would not affect his ability to be a fair and impartial juror. As the record

supports the trial judge's decision to deny the challenge for cause, this Court should affirm.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO EXERCISE PEREMPTORY CHALLENGES AGAINST TWO AFRICAN-AMERICAN MALES.

After voir dire had been completed and all challenges for cause had been resolved, the parties met to exercise peremptory challenges against prospective jurors. The State exercised its first peremptory challenge against Glen Walker. Mr. Walker is a white male. (TR Vol. VIII 191-192). With its second peremptory, the State challenged James Ford. (TR Vol. VIII 191).

The defense asked for a race neutral reason. Trial counsel made no claim the prosecutor was striking Mr. Ford because he was African-American. Indeed, trial counsel did not even allege Mr. Ford was an African-American male. While defense counsel did not identify Mr. Ford as a black male, the State did. (TR Vol. VIII 192).

The prosecutor offered a race neutral reason for the strike. The prosecutor told the court that Mr. Ford had almost identical biographical information to Mr. Walker. The prosecutor told the court that he struck Mr. Ford because he was single and a very young male with very little ties to the

community. In addition, the prosecutor told the court that Mr. Ford did not seem to be paying attention when the prosecutor asked him about the law of principals and about the issue of motive. The prosecutor told the court that he had to repeat his question a couple of times to get an answer out of Mr. Ford. (TR Vol. VIII 192).[9]

Banks did not dispute any of the factual bases for the State's proffered reasons for the strike. (TR Vol. VIII 192). The trial court allowed the challenge to stand. (TR Vol. VIII 192).

The next juror at issue was James Laws. The State exercised its third peremptory challenge against Mr. Laws. Again, the defense objected and noted that Mr. Laws was another black male the State sought to excuse from the jury. (TR Vol. VIII 192). The prosecutor told the court that he struck Mr. Laws for the same reason as he struck Mr. Ford, he is single and rents. (TR Vol. VIII 192).

[9] The record indicates that the prosecutor and Mr. Ford engaged in a colloquy about motive. The record reflects the prosecutor perceived that Mr. Ford was hesitating in his answer. Additionally, it appears the prosecutor had to elicit a verbal response from Mr. Ford when he initially did not offer one. (TR Vol. VIII 136-137).

Trial counsel objected on the grounds that being single and renting does not make a person unsuitable for jury service. (TR Vol. VIII 192). Trial counsel did not, however, dispute the factual bases of proffered reasons for the strike. (TR Vol. VIII 192). The prosecutor pointed out that he left Mr. Wells on the jury. Mr. Wells is a black male. (TR Vol. VIII 193).

The Court asked the State whether there was any law on the issue. The State withdrew its peremptory challenge against Mr. Laws and told the court he would inform the court of any case law he found.[10]

As the strikes continued, the court noted that the State had not exercised a peremptory strike against Mr. Matthews. The court noted that Mr. Matthews is a black male. (TR Vol. VIII 193).

Subsequently, the State renewed its request to strike Mr. Laws. The State presented the trial court with the case of Cobb v. State, 825 So. 2d 1080 (Fla. 4th DCA 2002) in which the Fourth District Court of Appeal ruled that the prosecutor's

[10] The record reflects that Mr. Eler withdrew his peremptory challenge. However, Mr. Eler is Banks' defense counsel. It is likely the reference to Mr. Eler is a scrivener's error because it was the prosecutor, Mr. Mizrahi, who challenged Mr. Laws. Accordingly, it is logical to conclude that it was Mr. Mizrahi and not Mr. Eler who offered to withdraw, at least temporarily, the peremptory challenge against Mr. Laws. (TR Vol. VIII 193).

stated reason for challenging a black juror, that he was young and a student, was a race neutral reason. (TR Vol. VIII 197).

The prosecutor also pointed out that, in this case, the State struck all three single renters on the venire. (TR Vol. VIII 197). The prosecutor also reminded the court that it must determine whether the reason for his strike was genuine or not. (TR Vol. VIII 197-198).

Trial counsel did not dispute the factual bases upon which the prosecutor exercised the strike. Instead, trial counsel distinguished Cobb and advised the court that in Cobb, the prospective juror was young and a student while Mr. Laws had a job and a two year old son. (TR Vol. VIII 198). The defense objected "for the record." (TR Vol. VIII 198).

The court said he would allow the challenge. (TR Vol. VIII 198). Subsequently, the prosecutor exercised a peremptory challenge against Mr. McDonald for the same reason the prosecutor struck Mr. Laws and Mr. Ford. McDonald is single and rents. (TR Vol. IX 207-208). Banks posed no objection to the State's challenge against Mr. McDonald.[11] (TR Vol. IX 208).

[11] Because the defense made a Melbourne objection to each challenge the State made against a black juror but made no objection to the State's challenge against Mr. McDonald, it is logical to conclude that Mr. McDonald was a white male.

Banks also made no objection to the successful challenge against Ford and Laws on the grounds the trial court failed to explicitly find the State's proffered reasons for the two strikes were genuine. (TR Vol. VIII 191-198).

Before this Court now, Banks claims two errors entitle him to a new trial. First, that the prosecutor did not offer a valid race neutral reason for excusing Mr. Ford and Mr. Laws. Banks avers that to be race neutral, the State must establish a logical link between the strike and the facts of the case. According to Banks, the State may show this only by demonstrating some nexus between the defendant or the crime charged and the type of juror the State seeks to include or exclude. (IB 24).[12] Second, Banks claims the trial judge erred when he failed to make a specific finding that the State's offered reasons were genuine and to articulate his reasons for doing so. (IB 29).

[12] Banks seems to "smush" step two and step three together in making this argument. On one hand, Banks avers that in order to defeat any claim of pretext, the proponent must provide some logical nexus between the reason given and the facts of the case. (IB 23). Pretext is part of a step three analysis under Melbourne v. State, 679 So. 2d 759 (Fla. 1996). On the other hand, Banks alleges that by failing to provide a connection between the State's challenge against Mr. Laws and Mr. Ford, the State failed to meet Melbourne's second step and articulate a facially race neutral reason for a strike against a member of a protected class. (IB 28).

The standard of review is clearly erroneous. In reviewing a claim such as the one Banks makes here, this Court presumes that peremptory challenges are exercised in a nondiscriminatory manner. Additionally, because the trial court's decision turns primarily on an assessment of credibility, this Court will affirm unless the trial judge's decision to grant the strike is clearly erroneous. Murray v. State, 3 So. 3d 1108, 1120 (Fla. 2009).

In Florida, both jurors and litigants have a right to jury selection procedures that are free from discrimination. Welch v. State, 992 So. 2d 206, 211 (Fla. 2008) (citing Abshire v. State, 642 So. 2d 542, 544 (Fla. 1994)). This Court has established a process for resolving an allegation that a party is exercising peremptory challenges in a discriminatory manner. In Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996), this Court determined that a trial court must go through a three step process to resolve an allegation of discrimination during the jury selection process: (1) A party objecting to the other side's use of a peremptory challenge on racial grounds must make a timely objection, identify the venireperson as a member of a distinct racial group and request the court to direct the challenger to

offer a race neutral reason for the strike; (2) the court must ask the proponent of the strike to explain the reason for the strike and the proponent must come forward with a race-neutral explanation; and (3) if the reason is facially race neutral and the trial court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained. Id.

In step three, the trial judge focuses on the genuineness of the race-neutral explanation as opposed to its reasonableness. Farina v. State, 801 So. 2d 44, 49 (Fla. 2001). In making a genuineness determination, the court may consider all relevant circumstances surrounding the strike. This Court has determined that relevant circumstances include, but are not limited to, the racial make-up of the venire; prior strikes exercised against the same racial group; a strike based on a reason equally applicable to an unchallenged juror; or singling the juror out for special treatment. Murray v. State, 3 So. 3d 1108, 1120 (Fla. 2009).

This claim should be denied for two reasons. First, being single and a renter is a facially race neutral reason for a peremptory strike. Second, although the trial court did not use the magic words, “I find the prosecutor’s race neutral reason

genuine", the record supports a conclusion the trial court found the proffered reasons were genuine, and not a pretext for discrimination, when he allowed the challenge to stand.

Banks is mistaken when he alleges that in order to satisfy step two of Melbourne, the prosecutor's offered reason for a peremptory strike must have a logical connection to the case at hand. Even today, a prosecutor may exercise an available peremptory challenge against a prospective juror for any non-discriminatory reason whatsoever, whether the reason be reasonable or wholly illogical. For instance, a prosecutor may strike a venireman who wears an orange tie with a yellow shirt, has long hair, or prefers vanilla ice cream to chocolate.[13] The only requirement a prosecutor must satisfy to meet step two of the Melbourne test is that his offered reason is facially race neutral. Hoskins v. State, 965 So. 2d 1, 7 (Fla. 2007).

In this case, the prosecutor's offered reasons for his strike against Mr. Ford was that he was young, single, rented, and seemed not to be paying attention during a portion of the prosecutor's voir dire. The proffered reasons to strike Mr.

[13] Of course, illogical reasons such as the prospective juror prefers vanilla ice cream to chocolate may cause the trial judge to find, in step three, the stated reason was not genuine but was, instead, a pretext for discrimination. Nonetheless, such a reason, illogical or not, constitutes a facially race neutral reason.

Laws were that, like Mr. Ford, he was single and rented. All of these reasons were facially race neutral. Because these strikes were facially race neutral, the trial judge did not err in moving to step three of the Melbourne test and ultimately to sustain the strikes.

Banks is correct that the trial judge may properly consider whether the prosecutor's offered reason for the strike is logically connected to the case at hand. However, this analysis comes in Melbourne's third step, when the trial judge determines whether a facially race neutral reason is legitimate, that is, not a pretext for discrimination.

Banks is mistaken, however, in his claim the prosecutor must always show a nexus between the stricken venireman and the case at hand.[14] Instead, as this Court has made clear, there are many relevant circumstances that a trial court may consider, including the racial make-up of the venire; prior strikes exercised against the same racial group; a strike based on a reason equally applicable to an unchallenged juror; or singling

[14] If this Court were to accept Banks' argument in this regard, this Court would create a "*per se*" rule that absent a nexus between the purpose of the strike and the case, the strike is discriminatory. This Court has repeatedly ruled that it is appropriate, in Step 3 for the trial court to consider the totality of the circumstances surrounding the strike when determining whether the proffered reasons were genuine. Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996).

the juror out for special treatment. Murray v. State, 3 So. 3d 1108, 1120 (Fla. 2009).

In this case, the record supports a finding by this Court that the trial judge determined, albeit it with no magic words, that the prosecutor's reasons from striking Mr. Ford and Mr. Laws were genuine and not a pretext for discrimination. No specific words are required for the trial court to satisfy step three of the Melbourne analysis. Murray v. State, 3 So. 3d at 1119.

The record supports a finding the trial court was aware of, and considered, not only the racial make-up of the venire but the fact the prosecutor passed over at least two black jurors, and one Hispanic juror in exercising his allotted peremptory strikes. At one point during voir dire, the prosecutor pointed out that he had passed over a black juror, Mr. Wells, to challenge Mr. Ford. Subsequently, the trial judge noted that the prosecutor had left another black male, Mr. Matthews, on the jury. (TR Vol. VIII 193). The court also noted that Mr. Castellon was a Hispanic male. The State did not attempt to strike him from the jury. (TR Vol. VIII 193-194).

Additionally, Banks has never claimed the prosecutor failed to exercise a challenge against white veniremen similarly

situated to Mr. Ford or Laws or specifically singled out Mr. Ford or Mr. Laws for additional questioning in search of a valid reason for challenge. Indeed, the record shows that Mr. Ford and Mr. Laws were not singled out for special treatment and the prosecutor exercised five of his six peremptory challenges against members of the venire who were young, single and did not own their own home.[15]

The record reflects the trial judge was well aware of Melbourne's third step. The prosecutor reminded the court that it must determine whether the reason for his strike was genuine or not. (TR Vol. VIII 197-198). Immediately thereafter, the trial court allowed the strike against Mr. Laws. (TR Vol. VIII 198).

The record supports a finding the trial court complied with this Court's requirements as set forth in Melbourne. The record

[15] The prosecutor used only six of his ten peremptory challenges. Five were exercised against Mr. Ducote, Mr. McDonald, Mr. Walker, Mr. Ford, Mr. Laws. Mr. Ford, Mr. Laws, Mr. Ducote, Mr. McDonald, were young, single and rented. (TR Vol. VIII 106, 109, 112, 116). Mr. Walker was young, single and lived at home with his parents. (TR Vol. VIII 102).

The State also used one peremptory challenge against Mr. Rhames. The State struck Mr. Rhames because he had travel plans that conflicted with the scheduled penalty phase date. The court offered to allow the State to strike Mr. Rhames with an available peremptory challenge so they would not have to move the penalty phase "at extreme inconvenience for all of us." The prosecutor agreed to use a challenge to remove Mr. Rhames from the jury. (TR Vol. VIII 196).

also supports the trial judge's conclusions that the State's offered reasons were genuine and not a pretext for discrimination. Banks' second claim on appeal should be denied.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE DNA EVIDENCE.

In this claim, Banks avers the trial judge erred in permitting the State to introduce evidence that DNA found at the scene matched Banks' DNA. Banks claims the DNA evidence was not admissible because the State failed to present "population frequency" evidence. (IB 30-31).[16] Banks points to this Court's decisions in Brim v. State, 695 So. 2d 268 (Fla. 1997) and Butler v. State, 842 So. 2d 817 (Fla. 2003). (IB 30).

A. Standard of Review

Banks suggests that this Court should review this claim *de novo.* (IB 31). This Court should decline Banks' invitation to apply *de novo* review to this claim. The standard of review for a trial court's ruling on the admissibility of evidence is an abuse of discretion. Williams v. State, 967 So. 2d 735, 753 (Fla. 2007).

[16] Such evidence would usually be in the form of testimony to the effect of "The chance of someone else, other than the defendant, leaving the DNA found on the bloody towel found in the victim's apartment would be one in three quadrillion African-Americans."

B. Preservation

This claim is not preserved. The defendant did not make the same argument below that he makes here. Harmon v. State, 527 So. 2d 182, 185 (Fla. 1988) (issue of whether evidence was improperly admitted was not preserved for appeal because defendant failed to make the same objection below as raised on appeal).

Prior to trial, the defendant filed a motion in *limine* to exclude "novel scientific evidence." The defense moved to exclude the results of STR DNA testing. Banks claimed the DNA analysis was not properly conducted and the recommended protocols not followed. Banks averred that, as such, the results of the DNA should not be admitted. (TR Vol. IV 626).

Banks also moved to exclude any "population frequency statistics." (TR Vol. IV 626). Banks alleged such testimony was novel scientific evidence and, as such, must meet the Frye test for admissibility. (TR Vol. IV 626). Banks claimed the population frequency statistics the State intended to introduce were not admissible because they did not meet the standards for admissibility under Frye. Banks made no claim that STR DNA test results were not admissible unless the State also presented "population frequency" evidence. (TR Vol. IV 625-627).

The Court held two pre-trial hearings on Banks' motion in *limine* to exclude the DNA evidence. The first hearing was held on November 19, 2007.

At the hearing, the court asked whether the prosecutor intended to bring his DNA expert for a Frye hearing. The prosecutor responded he did not believe Frye testing was necessary. (TR Vol. VII 1261).

The prosecutor told the court he would lay a foundation for the admissibility of the evidence at trial. (TR Vol. VII 1261). The Court noted that standard DNA evidence was admissible. (TR Vol. VII 1262). Mr. Eler told the court that while DNA testing had been accepted in the forensic community, the State would still have to show the expert is qualified to testify and the databases they are using are not corrupted. (TR Vol. VII 1262).

Mr. Eler told the court that he believed the State should have to proffer testimony about the actual test to make sure the protocols were followed. (TR Vol. VII 1263). The Court ruled a proffer seemed unnecessary and the State could qualify the experts in front of the jury. The trial judge told defense counsel that if the defense had an objection, he would hear it then. (TR Vol. VII 1263). Banks posed no objection to the procedure. Once again, Banks did not argue that the DNA results

were inadmissible unless the State also introduced population frequency statistics.

The trial court held a second hearing on December 21, 2007. The parties briefly discussed the DNA issue. Mr. Eler told the court that he was not opposed to either proffering the population frequency evidence or taking the testimony at trial. Mr. Eler told the court that if the State failed to qualify Mr. Pollock or lay a predicate for him giving an opinion on the numbers "they're putting out there," then he would raise that objection during trial. (TR Vol. VII 1272).

Mr. Eler asked the court to reserve ruling on his motion until trial. The Court agreed to do so. (TR Vol. VII 1272). Once again, Banks did not ask the trial court to exclude any DNA evidence if the State did not introduce population frequency statistics to show the relevance of Mr. Pollock's test results.

At trial, the State called Dr. James Pollack to testify. Before Mr. Pollock testified as to the results of his testing, the defense posed an objection. The objection was "predicate." (TR Vol. X 474).

Outside the presence of the jury, Banks argued the State should be required to lay a foundation for Mr. Pollock's testimony. Trial counsel told the court, "I think they need to

establish a predicate, your Honor, regarding population statistics, regarding how they come up with their numbers and what bases they do before the actual numbers got admitted. So that's the objection." (TR Vol. X 474-475). Mr. Eler told the court, "there's two prongs, there's the analytical phase which they've gone to and they've extracted and they've got profiles and then there's the comparison to the population statistics and the databases and usually back in the old day we'd get Dr. Tracey here from Miami to argue that." (TR Vol. X 475).

The Court asked the prosecution whether they intended to elicit testimony that they have a match at all 13 loci. The State responded in the affirmative. (TR Vol. X 476). Mr. Eler told the court that "normally what they would do, Judge, and I'm anticipating the testimony is they would say, well, we run it through a computer, Pop Stats, and I'm not sure Mr. Pollock has the background for the population." (TR Vol. X 476).

The Court noted that Mr. Pollock could give statistical analysis because he had done it before. The prosecutor told the court that if he decided to ask population frequency questions, he would lay the proper predicate. (TR Vol. X 476). At no point in time, did Banks argue the DNA results were inadmissible unless the State also introduced population frequency evidence.

(TR Vol. X 474-476).

This claim is not preserved for appeal because Banks did not make the same argument below as he makes now before this Court. Harmon v. State, 527 So. 2d 182, 185 (Fla. 1988) (issue of whether evidence was improperly admitted was not preserved for appeal because defendant failed to make the same objection below as raised on appeal). On this basis alone, this Court should deny Banks' third claim on appeal.

C. Merits

This claim may also be denied on the merits. In Brim v. State, 695 So. 2d 268 (Fla. 1997) and again in Butler v. State, 842 So. 2d 817 (Fla. 2003), this Court noted that DNA testing requires a two-step process, one biochemical and the other statistical. The first step uses principles of molecular biology and chemistry to determine that two DNA samples look alike. The second step uses statistics to estimate the frequency of the profile in the population. This Court ruled that both steps must satisfy the Frye test. Id.

Contrary to Banks' argument, this Court's decisions in Brim and Butler did not create a new *per se* rule for the admissibility of DNA evidence. Nor does this Court's opinion in Brim and Butler mandate exclusion of DNA evidence if the State

does not elicit population frequency evidence from its DNA expert.

In suggesting that they do, Banks focuses on certain dicta in Brim which suggests that population frequency evidence is needed to give significance to testimony that the defendant's DNA is a "match" for DNA found at the scene of a crime. Brim v. State, 695 So. 2d at 269. This Court noted that, "[i]t is important to recognize, though, that DNA testing is a two-step process. The fact that a match is found in the first step of the DNA testing process may be "meaningless" without qualitative or quantitative estimates demonstrating the significance of the match." Id at 271.

This Court has never extended Brim and Butler to exclude DNA test results if the State does not offer "qualitative or quantitative estimates demonstrating the significance of the match". This Court should not do so now.[17]

Even if this Court were to expand Brim and Butler as Banks suggests, Banks is still not entitled to relief. The State in this case did not simply elicit testimony that Banks' DNA "matched" DNA found at the murder scene.

[17] Such a matter may be relevant to weight but not admissibility.

Instead, Mr. Pollock testified that STR testing examines 13 particular locations (loci) on a DNA sample. In addition to 13 loci, a gender marker is also examined. (TR Vol. X 460).

A full profile of 13 loci cannot be developed on all items of evidence.[18] Indeed, there were several items of evidence for which Mr. Pollock could not develop a full profile.

Mr. Pollock told the jury that on two items of evidence found at the murder scene (a bloody towel and a band aid box), a full profile was developed. DNA found matched Banks' DNA at the gender marker and all 13 loci. (TR Vol. X 477-478).

On other items of evidence, Mr. Pollock was able to develop a partial profile. For instance, Mr. Pollock testified a profile was developed from a tile cut from the dining room floor at 10 of 13 loci. That DNA profile matched the DNA profile from Donald Banks. (TR Vol. X 480). On another item, a used band-aid found at the crime scene, Mr. Pollock was able to develop a profile at 12 of 13 loci. The DNA profile matched Donald Banks' profile at all 12 loci. (TR Vol. X 481).

Mr. Pollock's testimony did not leave jurors without any expert guidance of the significance of the DNA evidence found at the scene of Linda Volum's murder. This claim should be denied.

---

[18] Size of the sample and degradation can affect an examiner's ability to develop a full profile.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING BANKS' MOTION FOR MISTRIAL WHEN, ON CROSS-EXAMINATION, A STATE WITNESS IMPLICATED BANKS IN AN UNCHARGED CRIME.

In this claim, Banks alleges the trial judge erred in denying Banks' motion for mistrial when Sudie Johnson told the jury that she had "supported Mr. Banks all the way up until I seen the tape of his stabbing Mr. William Johnson from the first–" (TR Vol. IX 378). Ms. Johnson made the comment in response to a question Mr. Eler asked her during cross-examination. (TR Vol. IX 377-378).

A trial judge should grant a motion for mistrial only when it is necessary to ensure the defendant receives a fair trial. Cole v. State, 701 So. 2d 845, 853 (Fla. 1997). Stated differently, a trial judge should grant a motion for a mistrial only when an error is so prejudicial as to vitiate the entire trial. 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.").

The standard of review applied to motions for mistrial is abuse of discretion. Floyd v. State, 913 So. 2d 564, 576 (Fla. 2005). Under the abuse of discretion standard, a trial court's ruling will be upheld unless the judicial action is arbitrary,

fanciful, or unreasonable. A trial judge abuses his discretion only when no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000).

In an attempt to show that Ms. Johnson had a motive to lie when she testified for the State against Mr. Banks, Mr. Eler attempted to elicit testimony from Ms. Johnson to show she was angry at Banks because he had consensual sexual relations with Linda Volum. Counsel asked Ms. Johnson:

> **Mr. Eler**: Did you ever find out that he was having sex with other women, ma'am?
> **Ms. Johnson**: No
> **Mr. Eler**: You'd be shocked, wouldn't you?
> **Ms. Johnson**: Yes
> **Mr. Eler**: That would hurt you deeply, wouldn't it?
> **Ms. Johnson**: Yes
> **Mr. Eler**: You wouldn't feel special anymore, would you?
> **Ms. Johnson**: No.

(TR Vol. IX 371-372).

A short time later, Mr. Eler returned to a similar line of questioning:

> **Mr. Eler**: When did you stop writing him letters?
> **Ms. Johnson**: I can't remember to the exact. I am thinking 2006.
> **Mr. Eler**: And so basically for over a year
> **Ms. Johnson**: I was writing him, yes.
> **Mr. Eler**: Even after his arrest
> **Ms. Johnson**: Yes
> **Mr. Eler**: Isn't it true, ma'am, to this day you

> don’t believe Donald Banks did this?
>
> **Ms. Johnson**: He was capable. I believe he was capable.
>
> **Mr. Eler**: But for a whole year into it, while you were communicating with him in jail, you felt he wasn’t?
>
> **Ms. Johnson**: No
>
> **Mr. Eler**: Did you change your mind?
>
> **Ms. Johnson**: Yes
>
> **Mr. Eler**: Change your mind because you found out that he and Ms. Volum had sex?
>
> **Ms. Johnson**: No, that wasn’t the reason. The reason was from the previous—I supported Mr. Banks all the way up until I seen the tape of him stabbing Mr. William Johnson from the first—

(TR Vol. IX 377-378).

Mr. Eler interrupted Ms. Johnson, and asked to approach the bench. Mr. Eler asked for a mistrial. The State argued that Mr. Eler “walked right into” Ms. Johnson’s answer. The trial court agreed and denied the motion for mistrial. (TR Vol. IX 379). The trial court found Ms. Johnson’s answer to Mr. Eler’s question was an invited response. (TR Vol. IX 379).

The court offered to give a curative instruction. (TR Vol. IX 379). Mr. Eler accepted the offer. The prosecutor assured the court that he would not argue it during his closing. (TR Vol. IX 380). The court instructed the jury to disregard Ms. Johnson’s last remark. (TR Vol. IX 381).

The next day, the trial court, *sua sponte*, took the matter up again. The court offered to ask each juror if he or she

could disregard Sudie Johnson's remark about Banks' stabbing of William Johnson. (TR Vol. X 529). Mr. Eler accepted the trial court's offer. (TR Vol. X 529-530).

When the jurors came into the courtroom, the court addressed the jury. The Court asked the jury "Yesterday, a witness named Sudie Johnson made a remark during her testimony which I instructed you to disregard. I need to know now if you will disregard this remark in deliberating your verdict and base your verdict only on the evidence before you?" (TR Vol. X 531). One juror, Ms. Slowey, said that she did not hear the remark at all. (TR Vol. X 531). All of the other jurors promised they would disregard the remark. (TR Vol. X 531-532).

The trial court properly denied Banks' motion for mistrial. This is true for two reasons. First, Banks invited Ms. Johnson's comment when he questioned her, repeatedly, about her continued support of Mr. Banks after his arrest and her apparent change of heart after she found out that Banks was unfaithful. Second, the trial judge took measures to ensure Ms. Johnson's remark was not so prejudicial as to vitiate the entire trial.

Banks acknowledges that a party cannot invite error and then complain to his advantage on appeal. (IB 39). *See* Terry v. State, 668 So. 2d 954, 962 (Fla. 1996); Czubak v. State, 570

So. 2d 925, 928 (Fla. 1990); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983). Banks seems to concede that if Sudie Johnson's answer was in fair response to defense counsel's question, then he is not entitled to relief because he invited the error. (IB 39-40). As such, Banks queries whether Ms. Johnson's answer was in fair response to counsel's question. (IB 40). The answer is unequivocally, YES.

This Court has confronted a similar situation before. In Thompson v. State, 648 So. 2d 692 (Fla. 1994), this Court ruled that a witness' hearsay response; that although he had not seen Thompson at the cemetery on the day of the murders, his crew members saw Thompson go into the victim's office with a gun, was an invited response to defense counsel's question. Thompson v. State 648 So. 2d at 694. In Thompson, the questions and answers went like this:

> **Defense Counsel**: Did you see Mr. Thompson at the cemetery?
> **Mr. Smith**: No. Everybody that appeared there know Mr. Thompson because he was working in my crew at the time.
> **Defense Counsel**: I'm not arguing with you about that, Mr. Smith, and I don't want you to think that I am. Can you just answer this question for me? On August 27th 1986, did you at any point in time while you were working on that day see Charlie Thompson on the grounds of the Myrtle Hill Cemetery?
> **Mr. Smith**:. My crew have told me he was at that time. I got to explain myself.
> **Defense Counsel**: No, sir. Just tell me this: Did

you, sir, see Thompson on August 27th at the cemetery? Did you see him?

Mr. Smith:. No, sir, but my crew did. My crew did.

Defense Counsel: When did your crew see him?

Mr. Smith: I was the foreman out there this particular day. They was there working at the office when they seen Mr. Thompson go in there and carry Mr. Swack and Ms. Nancy. They said he had a gun in his pocket.

THE COURT: Take the jury out.

This Court ruled it was apparent from the record that this damaging hearsay response was invited by defense counsel's question. Thompson at 695. This Court also affirmed the trial court's denial of Thompson's motion for mistrial.

Among the factors this Court considered were: (1) the witness had already stated twice that he himself had not seen Thompson when counsel asked the question, "When did your crew see him?"; (2) the defense attorney initially told the trial judge that there was no need for a mistrial and that a curative instruction would suffice; (3) the State did not utilize the hearsay testimony at any point throughout the remainder of the trial; and (4) there was no mention of it in final argument. Id.

Here, although trial counsel did immediately ask for a mistrial, this case is remarkably similar to Thompson. Ms. Johnson testified she did not know that Banks was having sex

with Ms. Volum. (TR Vol. IX 371). Nonetheless, trial counsel attempted to elicit an admission and create an inference, that not only did Ms. Johnson know of Banks' affair, but Banks' affair was her motive for implicating Banks in the murder.

Ms. Johnson gave Mr. Eler a direct answer to his question. By asking Ms. Johnson whether she changed her mind about supporting Mr. Banks because she found out he was having sex with Ms. Volum, Mr. Eler invited Ms. Johnson to tell the jury the real reason she no longer supported him.

Like in Thompson, the prosecutor agreed not to mention the stabbing during his closing arguments. True to his word, he did not. Nor did the State mention Ms. Johnson's remark at any point throughout the remainder of the guilt phase of Banks' capital trial.[19]

Additionally, the trial judge gave a curative instruction once and then, subsequently, without repeating the comment, elicited a promise from each juror that he or she would both disregard the remark and base his or her verdict solely on the lawful evidence before them. All jurors assured the court they would both disregard the comment and fulfill their oaths as

[19] The State introduced evidence of Banks' attack on Mr. William Johnson during the penalty phase in support of the prior violent felony aggravator.

jurors. (TR Vol. X 531-532).

The defense invited the response that Banks' now complains about on appeal. The trial court gave a curative instruction and the State did not mention Banks' attack on Mr. Johnson again, either during its cross-examination of Banks or during closing argument. Under the circumstances, the trial court properly denied Banks' motion for mistrial. Terry v. State, 668 So. 2d 954, 962 (Fla. 1996); Thompson v. State, 648 So. 2d 692 (Fla. 1994).

ISSUE V

WHETHER THE TRIAL JUDGE ERRED IN ALLOWING THE STATE TO PRESENT A VIDEOTAPE THAT DEPICTED BANKS COMMITTING A PRIOR VIOLENT FELONY FOR WHICH HE HAD BEEN CONVICTED.

In this claim, Banks avers it was error to introduce evidence actually showing Banks committing a prior violent felony. The evidence at issue is a video tape that captured Banks stabbing 67 year old William Johnson in the parking lot of a Jacksonville convenience store. Banks was convicted of attempted second degree murder, robbery, and aggravated battery as a result of the attack. (TR EX. Vol. II 126-127).

Prior to trial, Banks filed a motion in *limine* to exclude the videotape. In it, Banks acknowledged the victim had died.[20]

[20] The fact the victim died as a result of Banks' attack

Banks moved to exclude the tape because the prejudicial effect of introducing the tape would outweigh its probative value. Banks also argued the tape was not relevant because Ms. Volum was not stabbed in the back and Banks was not charged with robbing Ms. Volum. (TR Vol. IV 760).

On June 12, 2008, the trial court heard Banks' motion in *limine*. The defense told the court that the State intended to introduce a story board of the Johnson robbery, a video tape actually showing the attack, and Mr. Johnson's medical records to show the extent of his injuries. Banks argued that the State was not permitted to retry the prior violent felony during the penalty phase of this trial. (TR Vol. XII 804).

The prosecutor told the trial court that the videotape at issue had no sound. The State intended only to show the video tape to the jury and let jurors decide for themselves the violent nature of the crime. (TR Vol. XII 805).

The trial judge ruled that he would allow the video or the story board, but not both. (TR Vol. XII 807). During the penalty phase, the State elected to show the jury the video tape depicting Banks' attack on Mr. Johnson. (TR Vol. XIV 871).

---

precluded the State from calling Mr. Johnson to testify. The State did not reveal to the jury that Mr. Johnson had died from the wounds Banks inflicted on him during the robbery. (TR Vol. XII 805).

Banks concedes the tape was relevant. (IB 49). Banks claims only that the probative value of the tape was significantly outweighed by its graphic, emotional appeal. (IB 49).

The State may present evidence in support of a prior violent felony. The State may even call the victim of a prior violent felony in the penalty phase of a capital trial. Singleton v. State, 2001 Fla. LEXIS 846 (Fla. 2001). The value of such testimony is that it assists the jury in "evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence." Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989).

While the State could meet its burden of proof by simply admitting a copy of a defendant's judgment of conviction and sentence showing the defendant was convicted of a prior violent felony, such a document does not clearly set out the circumstances surrounding a defendant's crime. Accordingly, testimony from the victim is probative and relevant. Singleton v. State, 2001 Fla. LEXIS 846, *20 (Fla. 2001).

For instance, in Singleton v. State, the defendant chopped off the arms of his victim, a young girl. The State called the victim, Mary Vincent to testify about her ordeal.

Before she testified, the trial judge swore in Miss Vincent before the jury. Miss Vincent also pointed to the defendant to identify the man that attacked her. Both gestures allowed the jury to see what remained of her right arm after the defendant chopped it off.

Singleton did not object to the substance of her testimony. Singleton claimed only that the trial court erred in allowing the victim to raise her right hand to be sworn and to point to Singleton to identify him. This Court found no error. Id. at *20.[21]

This Court should apply Singleton to the facts of this case and reject Banks' fifth claim on appeal. Banks' attack on Mr. Williams resulted in his death. As such, the State could not call Mr. Williams to testify about his ordeal at Banks' hands.

Instead, the State introduced a video tape of the actual crime. Certainly, a video tape depicting the defendant committing the crime for which he was subsequently convicted is

[21] In denying Singleton relief, this Court pointed out that Ms. Vincent did not have any kind of emotional outburst when testifying. Singleton v. State, 2001 Fla. LEXIS 846, *20 (Fla. 2001).

exceptionally probative. As such, a defendant would have to show "through the roof" prejudice to mandate exclusion. Banks failed to show any unfair prejudice.

Even so, the court took steps to ensure Banks' prior violent felony would not become a feature of the penalty phase. The court limited the State to introducing either the tape or the story board containing still photos of the crime, but not both.

Likewise, contrary to Banks' claim on appeal, the prior violent felony did not become a focus of the State's closing argument. The prosecutor discussed the attack on Mr. Johnson only in conjunction with his argument in support of the prior violent felony aggravator. (TR Vol. XIV 931-932). The prosecutor's argument touching on the Johnson attack spanned less than two pages of a fifteen page closing argument. Moreover, the prosecutor argued the facts of the crime only in support of the prior violent felony aggravator and not in the context of any attack on Mr. Banks' overall character. (TR Vol. XIV 921-935).

A video tape without sound, such as the one introduced at trial, is not nearly as emotionally appealing as a young victim coming into court with the evidence of the defendant's brutality

visible to each juror. In accord with Singleton, this Court should affirm the trial judge's ruling on Banks' motion in *limine*.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN FINDING THE MURDER WAS COLD, CALCULATED, AND PREMEDITATED.

In this claim, Banks avers the trial judge erred in finding the murder of Linda Volum was cold, calculated, and premeditated (CCP). This Court has established a four-part test to determine whether the CCP aggravating factor is justified: (1) the killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) the defendant must have exhibited heightened premeditation (premeditated); and (4) there must have been no pretense of moral or legal justification. Evans v. State, 800 So. 2d 182, 192 (Fla. 2001) (quoting Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994)). Further, this Court has noted that "[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." Looney v. State, 803 So. 2d 656, 678 (Fla. 2001) (*quoting*

Rodriguez v. State, 753 So. 2d 29, 48 (Fla. 2000)).

The standard of review is competent, substantial evidence. Pearce v. State, 880 So. 2d 561, 576 (Fla. 2004). This Court will sustain a trial judge's ruling on an aggravating circumstance as long as the court applied the right rule of law and its ruling is supported by competent, substantial evidence in the record. Barnhill v. State, 834 So. 2d 836, 850-51 (Fla. 2002); Alston v. State, 723 So. 2d 148, 160 (Fla. 1998).

In support of CCP, as set forth in the sentencing order, the trial judge found that Banks murdered Ms. Volum as a "murder payback." (TR Vol. VI 997). The trial court noted that Banks removed his outer garments before entering Ms. Volum's residence. The court concluded that, in doing so, Banks coldly calculated that his clothes would otherwise be damaged or bloodied during his attack on Ms. Volum. (TR Vol. VI 997).

The trial court found the State had proven the murder was CCP beyond a reasonable doubt. The court gave this aggravator great weight. (TR Vol. VIII 997).

Banks does not dispute the notion that the trial judge applied the right rule of law. Instead, Banks claims only that the evidence was insufficient to support the CCP aggravator.

Banks makes no claim there was any pretense of moral or legal justification for Banks to stab Ms. Volum to death. Instead, Banks relies on three "facts" in support of his argument the State did not prove the murder was CCP beyond a reasonable doubt.[22] They are: (1) there was no evidence that Banks brought the knife with him to Ms. Volum's residence; (2) Banks was drunk on alcohol and drugs on the night of the murder; (3) Banks stabbed himself during the murder. Banks alleges that the fact Banks stabbed himself during the murder refutes any notion the murder was "cold." (IB 56).

Contrary to Banks' argument, there was sufficient evidence to support the CCP aggravator. The heightened level of premeditation and the cold, calculated, nature of the killing may be proven by facts showing that the Defendant committed a well planned murder. Salazar v. State, 991 So. 2d 364 (Fla. 2008).

In this case, there was evidence that Banks planned the murder before he arrived at Linda Volum's apartment. Banks told Sudie Johnson that he killed Linda Volum as a murder payback.

[22] Banks concedes that evidence the murder of Linda Volum was a "murder payback" and that Banks removed his clothes before entering Ms. Volum's house to murder her probably provides sufficient evidence to support the heightened premeditation component of CCP. (IB 54).

Banks took off his outer clothing and stripped to his underwear in order not to get blood on his denim jacket and brand name T-shirt. Banks even staged the scene in order to make it look like a drug related killing. (TR Vol. IX 288, 360-361).

Banks points out that there was no evidence that Banks brought the murder weapon with him. However, this lack of evidence does not always defeat CCP. Certainly, it does not do so in this case.

In accord with Banks' own testimony, Banks had been in Linda's Volum's apartment many times. He had a sexual relationship with her and used her home as a "trap" for drug dealing. As Banks own testimony established he was intimately familiar with Linda Volum's apartment and everything in it, the fact the State did not produce evidence Banks brought the murder weapon with him does not defeat CCP.

Banks' testimony that he was high on alcohol and drugs on the night of the murder likewise did not require the trial judge to reject CCP as an aggravator in this case. The only evidence that Banks was high on drugs and alcohol the night of the murder came from Banks' testimony at trial. Both the jury and the trial judge were free to reject such testimony. This is especially true given that the evidence refutes any notion that

Banks was high on drugs and alcohol to the extent he could not coldly and with heightened premeditation and calculation, murder Linda Volum.

Banks told Sudie Johnson that he staged the crime scene to make the murder look like a drug related murder. (TR Vol. IX 360-361). Crime scene investigators found a crack pipe underneath Linda Volum's body. (TR Vol. IX 288). Banks told Sudie Johnson that, before he went into Linda Volum's house, he took off his outer clothing and stripped down to his underwear. (TR Vol. IX 360-361). On the morning of the murder, Banks drove Ms. Volum's car, attempted to use Ms. Volum's ATM card at two different machines at two different stores, drove home to take a shower, and delivered Linda Volum's computer to his girlfriend. Evidence Banks attempted to "stage" the crime scene, drove a car, used an ATM, found his way home, and described the murder to Sudie Johnson, in accurate detail, belies any notion that Banks was "high on drugs and alcohol" to the extent the CCP aggravator is not supported by competent substantial evidence.

Finally, this Court should reject any notion that the fact Banks stabbed himself during the murder defeats CCP. This was no frenzied stabbing. Banks told Sudie Johnson that he restrained Ms. Volum in order to stab her. Banks put Ms. Volum

in a choke hold and stabbed her in the torso until she fell down. The last wound he got in, he turned the knife. (TR Vol. IX 359).

The stab wounds were deep and delivered with considerable force. Six of the stab wounds were delivered with such force that the knife cut completely through Ms. Volum's third, fourth, and fifth rib. (TR Vol. X 547). Two of the stab wounds went through Ms. Volum's heart. One stab wound went through the left lung. Another went through her liver. (TR Vol. X 549). Banks cut himself because he missed not because this was any sort of "frenzy killing." (TR Vol. IX 359).

There is competent substantial evidence to support the trial judge's finding the murder was CCP. This Court should reject Banks' final claim on appeal.[23]

---

[23] Any error in finding the murder was CCP was harmless. The trial court found two other aggravators, in addition to CCP. These two, prior violent felony and HAC, are two of the most weighty in Florida's sentencing calculus. Therefore, even if the trial court had committed error in finding the cold, calculated, and premeditated aggravator here, which it did not, such would be harmless. Sireci v. Moore, 825 So. 2d 882, 887 (Fla. 2002).

Although Banks did not raise the issue on appeal, Banks' sentence to death is proportionate. This Court has found

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm Banks' conviction and sentence to death.

Respectfully submitted,

BILL MCCOLLUM
ATTORNEY GENERAL

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399
Department of Legal Affairs
The Capitol
(850) 414-3583 Phone
(850) 487-0997 Fax
Attorney for the Appellee

---

defendants' death sentences proportionate in stabbing cases with similar aggravation but much more mitigation. Merck v. State, 975 So. 2d 1054 (Fla. 2007)(stabbing murder proportionate in light of two aggravating factors, conviction of a prior violent felony and HAC, one statutory mitigator (age) and several nonstatutory mitigating factors, including Merck's difficult family background, his alcoholism and alcohol use on the night of the murder, and his capacity to form and maintain positive relationships); Singleton v. State, 783 So. 2d 970 (Fla. 2001) (holding death sentence proportionate in stabbing death where trial court found prior violent felony and HAC aggravating factors and substantial mitigation, including extreme mental or emotional disturbance; impaired capacity to appreciate criminality of conduct or to conform conduct to requirements of law; age of sixty-nine at time of offense; under influence of alcohol and possibly medication at time of offense; alcoholism; mild dementia; attempted suicide; honorable military service; and model prisoner during prior sentence).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to David Davis, 301 South Monroe Street, Suite 401, Tallahassee, Florida 32301, this 24th day of June 2009.

_____
MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

_____
MEREDITH CHARBULA
Assistant Attorney General