IN THE SUPREME COURT OF FLORIDA

ALAN WADE

Appellant,

v. CASE NO. SC08-573

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
PL-01, THE CAPITOL
Tallahassee, Florida 32399-1050
(850) 414-3300, Ext. 3583
(850) 487-0997 (Fax)

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

CASE SNAPSHOT

This is a double murder case. Wade, along with three others, murdered Reggie and Carol Sumner, a retired elderly couple living in Jacksonville, Florida. Wade and his accomplices murdered the Sumners by invading their home, binding them with duct tape, stuffing them into the trunk of their own Lincoln Town Car, driving them into Georgia, and burying them alive in a grave dug days before the planned murder.

Over the next several days, one of Wade's co-defendant's, Michael Jackson, withdrew a significant sum of money from the Sumners' bank account, using the victims' A.T.M. card. The murderers went on a spending spree with the Sumners' money. When three of the murderers, including Wade, were captured in South Carolina where they fled after the murders, police investigators found numerous items newly purchased with the money the murderers stole from the Sumners' bank account.

After a jury trial, Wade was convicted of two counts of first degree murder, two counts of kidnapping and two counts of robbery. At the penalty phase, the State presented victim impact evidence but put no additional evidence in aggravation. Wade presented seven witnesses who testified on his behalf. At the conclusion of the penalty phase, the jury recommended Wade be sentenced to death, for both murders, by a vote of 11-1.

The trial judge followed the jury's recommendation and sentenced Wade to death for the murders of Carol and Reggie Sumner. In sentencing Wade to death for both murders, the trial court found seven aggravators to exist beyond a reasonable doubt. In mitigation, the trial court found and gave some weight to three statutory mitigator(s) and twenty non-statutory mitigators. The trial judge found the aggravators far outweighed the mitigators and sentenced Wade to death for both murders. On appeal, Wade raises eight issues.

PRELIMINARY STATEMENT

References to the appellant will be to “Wade” or “Appellant”. References to the appellee will be to the “State” or “Appellee”.

The fifteen volume record on appeal in the instant case will be referenced as “TR” followed by the appropriate volume and page number. The one volume supplemental record will be referred to as “TR Supp” followed by the appropriate page number. There are also two volumes of exhibits. These two volumes will be referenced as “TR EX” followed by the appropriate volume and page number. References to Wade’s initial brief will be to “IB” followed by the appropriate page number.

STATEMENT OF THE CASE

On or about July 8, 2005, Wade, along with Tiffany Cole, Michael Jackson, and Bruce Nixon murdered Reggie and Carol Sumner. At the time of the murder, Wade was 18 years and 1 month old.

On August 18, 2005, a Duval County Grand Jury handed down a six count indictment charging Wade with two counts of first degree murder, two counts of armed kidnapping, and two counts of armed robbery. (TR Vol. I 3-4). On October 10, 2005, the State filed a notice of intent to seek the death penalty against Wade. (TR Vol. III 423).

Wade was represented at all critical stages of the proceedings by veteran trial lawyers, Refik Eler and Frank Tassone. (TR Vol. I 1, 32). Prior to trial, trial counsel filed various motions seeking assistance in preparing their case for trial.

Trial counsel filed a motion requesting appointment of a mitigation coordinator, an investigator, a paralegal, a private investigator, and a pathologist. (TR Vol. I 33, 39, 77); (TR, Vol. II 380). The trial court granted each of trial counsel's motions. (TR Vol. I 64, 79, 82; Vol. II 380, 386).[1]

[1] Dr. Dunton was substituted for Dr. Baden, the defense's original expert, on June 26, 2007. (TR Vol. III 411).

Apart from the boilerplate motions typically filed in every capital case, Wade filed a motion to strike the State's notice of intent to seek the death penalty. The defense claimed the failure of the twenty, independent and elected, State Attorneys to have uniform standards to determine when to seek the death penalty precluded the prosecution, in this case, from seeking the death penalty. (TR Vol. III 423-429). The trial court denied the motion on October 12, 2007. (TR Vol. III 430).

Voir dire began on October 15, 2007. Opening statements commenced on October 22, 2007.

On October 24, 2007, the jury returned a verdict of guilty on all six counts of the indictment. (TR Vol. III 546).[2] On a special verdict form, the jury found the murders of Carol and Reggie Sumner were both premeditated and committed in the course of a felony. (TR Vol. III 546- 551).[3]

On November 15, 2007, the penalty phase commenced. The State called two victim impact witnesses, Jean Clark and Carolyn Sumner. Both witnesses read prepared statements.

Carolyn Sumner read a prepared statement from Fred Hallock, Carol Sumner's son. Mr. Hallock was unavailable to read the

---

[2] Prior to trial, the State deleted the "armed" allegation from the robbery and kidnapping charge.

[3] Wade filed a motion for new trial on October 31, 2007. (TR Vol. III 552). On January 30, 2008, the trial court denied the motion. (TR Vol. III 554).

statement himself. (TR Vol. XIV 1169-1177). Wade called seven lay witnesses in mitigation. The trial court instructed the jury on how it could consider victim impact evidence during its final instructions. (TR Vol. XIV 1344-1345).

At the conclusion of the evidence, the trial court instructed the jury on seven aggravators: (1) Wade was previously convicted of a violent felony, specifically the murder of the other victim; (2) the murder was committed in the course of a kidnapping; (3) the murders were especially heinous, atrocious, or cruel; (4) the murders were cold, calculated, and premeditated; (5) the murders were committed for financial gain; (6) the murders were committed to avoid or prevent a lawful arrest; and (7) the victims were particularly vulnerable due to advanced age or disability. (TR Vol. XIV 1340-1342).

The trial judge instructed the jury on the following mitigators: (1) Wade has no significant history of prior criminal activity;(2) Wade was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor; (3) the age of the defendant at the time of the crime; (4) the defendant acted under the substantial domination of another person; (5) the "catch-all" mitigator. (TR Vol. XIV 1343-1344).

On November 15, 2007, after deliberating just over an hour, the jury returned to the courtroom. The jury recommended, by a vote of 11-1, that Wade be sentenced to death for both murders. (TR Vol. III 586-587, TR Vol. XIV 1351).

On November 20, 2007, Wade filed a motion to preclude imposition of the death penalty. As authority, Wade offered several articles published in various law journals. (TR Vol. IV 602-763). The trial judge denied the motion. (TR Vol. IV 764).

Wade, through counsel, filed a sentencing memorandum on November 20, 2007. In his memo, Wade requested the trial court to sentence him to life in prison without the possibility of parole. (TR Vol. III 597-601).

Wade requested the trial court consider twenty non-statutory mitigators. (TR Vol. III 598-601). Wade did not request the trial court to consider Bruce Nixon's sentence in non-statutory mitigation. (TR Vol. III 598-601).

On December 13, 2007, the trial court conducted a Spencer hearing. (TR Vol. VI 1097-1141). Both sides called witnesses to testify before the trial judge.

On February 1, 2008, the State filed a sentencing memorandum. In its memorandum, the state requested that the trial court follow the jury recommendation and sentence Wade to death. (TR Vol. IV 779-785).

On March 4, 2008, the trial court sentenced Alan Wade to death. In sentencing Wade to death, the trial court found seven aggravators to exist beyond a reasonable doubt: (1) Wade had previously been convicted of a violent felony (contemporaneous murder of other victim); (2) the murders were committed in the course of a kidnapping; (3) the murders were especially heinous, atrocious or cruel; (4) the murders were cold, calculated, and premeditated; (5) the murders were committed for financial gain; (6) the murders were committed to avoid arrest; and (7) the victims were especially vulnerable due to age and infirmity. (TR Vol. V 806-811).

The trial court considered three statutory mitigators. First, that Wade acted under extreme duress or under the substantial domination of another person (Michael Jackson). (TR Vol. V 811).

The court noted that "[t]o the extent that one could argue that Michael Jackson masterminded the murders, one could certainly suggest that the evidence is that Wade followed Jackson's instructions as an army squad member would follow the instructions of the squad leader. But such is not the domination suggested by this statutory mitigator." (TR Vol. V 811). The court found the mitigator had not been clearly established and as such gave it little weight. (TR Vol. V 812).

The trial court also considered whether Wade's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The trial court found there was no evidence to support that this was the case. (TR Vol. V 812).

The court found that Wade knew exactly what he was doing during the course of the robbery, kidnapping and murders. 9TR Vol. V 812). The trial court found no evidence Wade was under the influence of any drugs or intoxicants at the time or that he suffered from any mental aberration at the time of the murder. (TR Vol. V 812). The court noted that, although there was some suggestion Wade had abused drugs and suffered from some emotional disturbances in the past, there was no direct evidence linking those issues to the crimes. Accordingly, the trial court gave this mitigator some weight. (TR Vol. V 812).

Finally, the trial court considered Wade's age in statutory mitigation. The trial court afforded this mitigator great weight. (TR Vol. V 812).

The trial court considered and weighed all twenty (20) non-statutory aggravators suggested by the defendant in his sentencing memorandum. These were: (1) Wade grew up without a father from the time he was 8 years old when his parents divorced; (2) Wade was raised by an absentee mother; (3) Wade was raised in a negative family setting; (4) Wade had difficulty

in school; (5) Wade lacked emotional maturity; (6) Wade had no parental guidance; (7) Wade had a drug problem; (8) Wade had a difficult childhood and acted out in response to the instability in his life; (9) Wade had mental health issues throughout his youth; (10) Wade was thrown out of the house when he was 16 because he fought constantly with his mother; (11) Wade has been a model prisoner since his arrest; (12) Wade has a desire to help others; (13) Wade has made a change for the better during his time in jail; (14) Wade is not known to be a violent person and has had only one minor discipline review since being in jail; (15) Wade continually exhibits positive personality traits; (16) Wade now has the love, affection, and support of his family; (17) Wade has exhibited good behavior during the trial; (18) Wade had demonstrated that he has the potential for rehabilitation; (19) Wade is willing to help others around him and has shown he can contribute to society; (20) Wade would be a model inmate whose life would serve a purpose in prison. (TR Vol. III 598-601).

The trial court afforded some weight or little weight to each of these twenty mitigators. The court found the aggravating circumstances far outweighed the mitigating circumstances and that death is the appropriate penalty. (TR Vol. V 818).

On March 20, 2008, Wade filed a notice of appeal. (TR Vol. V 825). On March 17, 2009, Wade filed his initial brief raising eight issues. This is the State's answer brief.

STATEMENT OF THE FACTS

Alan Wade, born on May 22, 1987 was 18 years and one month old when he, along with Michael Jackson, Tiffany Cole, and Bruce Nixon, murdered James (Reggie) and Carol Sumner on or about July 8, 2005. Bruce Nixon was also 18 years old. Tiffany Cole and Michael Jackson were 23 years old at the time of the murder.

Reggie Sumner, born on September 18, 1943 was 61 years old at the time of his death. (TR Vol. X 470). Carol Sumner, born on February 16, 1944 was also 61 years old at the time of her death. (TR Vol. X 470).

The state proceeded on a theory that Michael Jackson led the attack on the Sumners. Alan Wade was, however, a full and willing participant. Indeed, Alan Wade, alone, enlisted the assistance of 18 year old, Bruce Nixon. Bruce Nixon was Alan Wade's long time friend. It was Wade who recruited Bruce Nixon into the conspiracy to kidnap, rob, and murder Reggie and Carol Sumner.

The Sumners were not victims chosen at random nor were they in the wrong place at the wrong time. The murderers targeted the Sumners because the murderers believed the Sumners were vulnerable due to their age and infirmity and because they were people of some means.

Both Reggie and Carol Sumner were in frail health. Both had osteoporosis. (TR Vol. XII 968). At the time of her death,

Carol Sumner had liver cancer, arthritis, fibromyalgia, diabetes, and hepatitis. (TR Vol. X 473).

Reggie Sumner had diabetes and was insulin dependent. (TR Vol. X 474). Mr. Sumner wore an identification bracelet for his diabetes. (TR Vol. X 474). He had recently broken his tibia. (TR Vol. X 474). Reggie Sumner used a walker, cane, wheelchair and surgical boots. (TR Vol. X 477).

Upon autopsy, Carol Sumner weighed 90 pounds. Reggie Sumner weighed 105 pounds. (TR Vol. XII 961, 965).[4]

The Sumners died a horrible death. In the days prior to the murder, the four co-defendants dug a grave, some six feet long and four feet deep. (TR Vol. XII 890). After the murderers kidnapped the Sumners from their home and drove into Georgia with the Sumners secreted in the trunk of their own Lincoln Towncar, the Sumners were placed in the makeshift grave.

They were still alive. (TR Vol. XII 969, 973). The Sumners attempted to ward off their impending death. They assumed a defensive posture in the hole. (TR Vol. XII 975). The Sumners' position in the grave indicated the Sumners tried to fend off the dirt as it fell into their eyes, nose, and mouth. (TR Vol. XII 975). Evidence the Sumners reacted to what was

[4] Dr. Clark, the medical examiner, testified that decomposition and the manner in which they are measured likely rendered them some 10 pounds or so lighter than they were in real life. (TR Vol. XII 961).

happening to them indicates the Sumners were conscious as the murderers shoveled dirt on them. (TR Vol. XII 975). The medical examiner testified that both Sumners breathed in dirt and debris. (TR Vol. XII 974).

Two causes contributed to the Sumners' death, smothering and mechanical asphyxiation. (TR Vol. XII 983). Smothering occurred as the Sumners inhaled dirt and debris into their noses and mouths once the dirt reached their heads. (TR Vol. XII 972, 980-983). Mechanical asphyxiation occurred as the weight of the dirt covering the Sumners' bodies compressed their lungs and abdominal area, making it impossible for the Sumners to take sufficient breaths to get air into their lungs. (TR Vol. XII 983).

The Sumners would have struggled to breathe as the dirt filled in around them. It would be very uncomfortable. (TR Vol. XII 989). The Sumners could have been unconscious within 10-30 seconds after the dirt actually covered their faces. (TR Vol. XII 989). Death would have occurred in 3-5 minutes. (TR Vol. XII 984).

The evidence linking Wade to the murders of Carol and Reggie Sumner was considerable. Bruce Nixon, one of Jackson's co-defendants, testified before the jury. Bruce Nixon was 18 years old at the time of the murder. (TR Vol. XII 881). He graduated from Baker County High School. (TR Vol. XII 881).

Nixon told the jury that he participated in the murders of Reggie and Carol Sumner. (TR Vol. XII 882).

Nixon entered into a plea agreement with the state. Pursuant to the plea agreement, Nixon pled guilty to two counts of second degree murder, two counts of robbery, and two counts of kidnapping. (TR Vol. XII 924). Nixon was to be sentenced after he testified. (TR Vol. XII 924).[5] He was facing 52 years to life. (TR Vol. XII 924).

Nixon told the jury that a couple of weeks before the Sumners were killed, Wade drove over to his house and asked him about robbing somebody. (TR Vol. XII 883). Wade was alone at the time. (TR Vol. XII 883). Wade was driving a Mazda RX-8. Tiffany Cole had rented the Mazda in South Carolina on June 14, 2005. (TR Vol. XII 876).[6]

---

[5] Subsequent to Wade's trial, Nixon was sentenced to six concurrent 45 year terms in the Department of Corrections.

[6] GPS tracking of Cole's rental car revealed that Cole's rented Mazda was in the vicinity of the Sumner home at 6:31 a.m. (Pacific Standard Time) on the day of the murder. (TR Vol. X 558). No continuous tracking is done with the GPS system. Instead, the rental car office manager can only request a car's location at any give time. The computer will then give the car's location as of the time of the request. (TR Vol. X 558). A neighbor also saw the Mazda around the Sumners' home. She saw the car sometime after July 4, 2005 two or three times. (TR Vol. XI 612,614-615). The car was found in Charleston, South Carolina on July 14, 2005 about 25 miles from the Best Western motel where Alan Wade, Tiffany Cole and Michael Jackson were arrested. (TR Vol. X 559, Vol. XI 639-640).

Wade did not give any details about the robbery and did not mention the plan to murder the victims. (TR Vol. XII 884). Nixon was non-committal. (TR Vol. XII 884).

Nixon and Wade were long time friends. They had known each other since they were 13. (TR Vol. XII 918). They played together. Nixon considered Wade one of his best friends. Wade's mother was like a mother to Nixon. (TR Vol. I 919). She treated him like a son. (TR Vol. XII 919).

Subsequently, Wade called him and asked Nixon if he wanted to go with them and dig a hole. (TR Vol. XII 885). Wade told Nixon that they were going to dig a hole and rob someone. (TR Vol. XII 885). Nixon agreed. (TR Vol. XII 885). Nixon went to get some shovels to dig the hole. (TR Vol. XII 886).

Nixon stole four shovels from around his neighborhood. Wade arrived about twenty minutes later. (TR vol. XII 886). Wade arrived in a Mazda RX-8. This time, Wade was not alone. With Wade were Michael Jackson and Tiffany Cole. Nixon had not met them before. (TR Vol. XII 885-886).

The four soon to be murderers drove off in search of a place to dig a hole. They drove into Georgia and stopped at one place. It wasn't a good spot. They saw some woods and went in there to look for a place to dig. (TR Vol. XII 887). Everyone participated in deciding where to dig the hole. (TR Vol. XII 887).

When they found a place to dig a hole, the three men dug. Tiffany Cole held the flashlight. (TR Vol. XII 888). The men only used two of the shovels that Nixon stole. (TR Vol. XII 888). The three men traded off the two shovels between themselves. Wade and Nixon did most of the digging because they were stronger. (TR Vol. XII 889).

Nixon did not yet know of the plan. He knew a robbery would take place. He did not know why they were digging the hole. (TR Vol. XII 889).

It took the trio about 30 minutes to dig the hole. (TR Vol. XII 889). The hole was some six feet long and four feet deep. (TR Vol. XII 890). The men left the shovels at the hole. (TR Vol. XII 890).

When they were finished digging, they all drove back toward Nixon's house. Bruce Nixon testified that on the way, Wade asked Michael Jackson if "[Nixon] can go with them." (TR Vol. XII 890). Jackson said "Yeah." (TR Vol. XII 891).

The soon to be murderers discussed how best to carry out their plan. They discussed whether to gain entry into the Sumner home and wait till the Sumners came home or just go in while they were at home. (TR Vol. XII 891). Ultimately, they decided to go in while the Sumners were at home. (TR Vol. XII 897).

Michael Jackson would kill the Sumners. (TR Vol. XII 891). Jackson said he would give them a shot. (TR Vol. XII 892).

All four of them; Nixon, Cole, Wade, and Jackson discussed how the Sumners were to die. (TR Vol. XII 892). At that point, Nixon knew the hole they had dug was for the Sumners. (TR Vol. XII 892).

In addition to pre-digging the Sumners' grave, the killers made other preparations for the murders. Jackson, Cole, and Wade went to Walmart on July 7, 2005, the day before the murders. (TR Vol. XII 829). One of the items purchased was disposable rubber gloves. (TR Vol. XII 829).

On the night of the murder, the killers went to Office Deport. Tiffany Cole purchased duct tape and a large roll of plastic wrap. (TR Vol. XII 841, 895). The plastic wrap was found in Cole's rented Mazda RX-8. (TR Vol. XII 842). Both Jackson and Cole's prints were found on the plastic wrap. (TR Vol. XI 754).

They also obtained a toy gun. The gun was a pellet pistol that shot little yellow plastic pellets. (TR Vol. XII 893). The gun looked real even though it wasn't. (TR Vol. XII 900).

The killers cased the Sumners' house. They drove around the house and talked about how they were going to commit the crime. (TR Vol. XII 894).[7]

All four killers drove over to the Sumners' home about 10:00 p.m. on July 8, 2005. Tiffany drove the car. The killers decided that Wade and Nixon would go into the Sumners' home. Cole dropped them off at the park right by their house. (TR Vol. XII 897).

The plan was to use duct tape on the Sumners. Wade carried the duct tape. Nixon had the toy gun. (TR Vol. XII 896).

Nixon and Wade walked up to the Sumners' front door. Cole and Jackson waited in the car. (TR Vol. XII 898). Jackson would not enter the home until the Sumners were secured with their eyes covered. (TR Vol. XII 898). To Jackson, it was a mind thing. (TR Vol. XII 899). Jackson was calling the shots but Nixon, Wade, and Cole were full participants in these murders. (TR Vol. XII 899).

Nixon and Wade put their gloves on and knocked on the door. (TR Vol. XII 897). Carol Sumner opened the door. Nixon and Wade asked to use the phone. (TR Vol. XII 898).

They walked into the Sumners' home. Wade pulled out the phone. Wade grabbed Mr. Sumner and sat him down in a chair.

[7] Cole and Wade went shopping after the murder too. They bought cleaning supplies, specifically Clorox cleaner and rubber gloves. (TR Vol. XI 831-832).

Nixon pulled out the toy gun and held the Sumners at gunpoint. Wade and Nixon told the Sumners they needed their bank cards and stuff. (TR Vol. XII 900).

Ms. Sumner was crying. She asked the killers not to hurt her. Nixon told Ms. Sumner that everything was going be all right. Nixon told her to calm down. (TR Vol. XII 900).

Nixon brought the Sumners into a spare bedroom room and duct taped their legs and hands together. Nixon also put duct tape over their eyes and mouths. (TR Vol. XII 901-902).

Michael Jackson beeped Nixon on his Nextel phone. Jackson asked Nixon whether they were ready. Nixon told Jackson he could come into the house. Jackson did. (TR Vol. XII 901).

While Nixon held the Sumners at gunpoint, Wade and Jackson looked for the Sumners' bank statements and stuff. (TR Vol. XII 902). They took a large pile of mail and statements out of the Sumner house. They also took some coins and an ATM card. (TR Vol. XII 915).

After the killers found what they were looking for, Michael Jackson went out to the car and told Wade and Nixon to bring the Sumners out to their own Lincoln Towncar. Wade and Nixon put the Sumners into the trunk of the Lincoln. (TR Vol. XII 903).

The plan was to drive the Sumners to the hole. (TR Vol. XII 904). Wade drove the Lincoln and Nixon was in the passenger

seat. Jackson and Cole were in a Mazda RX-8. (TR Vol. XII 905). Enroute, they stopped for gas. (TR Vol. XII 904).

After they got gas, the killers drove out to the hole they had dug in the Georgia woods. (TR Vol. XII 906). When they arrived, they stopped the car. Jackson went up to the Lincoln and popped the trunk. Jackson started screaming. The Sumners had worked their way out of the duct tape. Nixon re-taped them. (TR Vol. XII 907).

Wade had not put the duct tape on tightly at the house. (TR Vol. XII 908). The Sumners were hugging in the trunk. (TR Vol. XII 908).[8]

After Nixon finished taping the Sumners again, Wade tried to back the Lincoln up to the hole. He could not do it. Nixon backed it up for him. (TR Vol. XII 910).

Tiffany Cole stayed up by the Mazda. They popped the trunk. Jackson told Nixon to go stand with Tiffany on the road. (TR Vol. XII 911). Nixon knew what was going to happen to the Sumners when he walked back up the road to stay with Tiffany. The Sumners were about to die. (TR Vol. XII 912). When Nixon walked up the road, Wade and Jackson remained at the grave site.

[8] Crime scene investigators found duct tape in the grave where the killers buried the Sumners alive. (TR Vol. XI 689). A roll of duct tape was also found at the gravesite. (TR Vol. XI 692). A piece of duct tape was found on Carol Sumner's left hand. (TR Vol. XI 730).

(TR Vol. XII 912). Nixon did not see the Sumners buried alive. (TR Vol. XII 912).

Someone drove the Lincoln out of the gravesite. Nixon cannot remember who. Wade and Nixon got into the Lincoln. Jackson and Cole got into the Mazda RX-8. (TR Vol. XII 912). Wade drove the Lincoln. The shovels were in the trunk. (TR Vol. XII 913).

The four killers drove to Sanderson, Florida. They wanted to drop the car off. (TR Vol. XII 913).

When the killers arrived in Sanderson, Nixon and Wade got out of the Lincoln. Nixon, Wade, and Jackson wiped the car down. They left the Lincoln there. (TR Vol. XII 914).

The four killers returned to Jacksonville. They stayed in a hotel. They hit an A.T.M. first. Wade and Cole went back to the Sumner home. They took the Sumners' computer. (TR Vol. XII 916). Cole pawned the computer.

Nixon stayed with Cole, Wade, and Jackson only one more day. (TR Vol. XII 916). Nixon went home. He did not travel to South Carolina with the other killers. (TR Vol. XII 916). Nixon only got $200 for his role in the murder. (TR Vol. XII 916).

Nixon knew that Wade, Jackson and Cole planned to go to South Carolina. They had to return the rental car. (TR Vol. XII 917).

On July 12, 2005, law enforcement officials found the Sumners' Lincoln. (TR Vol. X 492).[9] The car was located some 30-45 miles from the grave site. (TR Vol. X 496). A wadded up piece of duct tape was found in the trunk. (TR Vol. XI 677). Four shovels were also found in the trunk of the Lincoln. (TR Vol. XI 681).

Subsequently, Nixon got a call from Alan Wade. Wade told Nixon the Sumners' car had been found in Sanderson. (TR Vol. XII 917). Wade told Nixon to "be cool." (TR Vol. XII 917).

Before he was arrested, Nixon went to a party. He got wasted. He was on some pills he took from the Sumners' home. It is possible that he ran his mouth about the murder. (TR Vol. XII 918). He does not remember. (TR Vol. XII 918).

Nixon eventually told the police what happened and took them to the grave site. He did not initially tell the police the truth. He did not want to get into trouble. (TR Vol. XII 920). Nixon took the police to the grave site because he felt bad. He also thought it would help him. (TR Vol. XII 920-922).

[9] An off duty law enforcement officer spotted the Lincoln on Sunday, July 10, 2005. He ran the South Carolina plates but the Lincoln had not yet been reported stolen. When he heard the BOLO for the Sumner's Lincoln on July 12, 2005, the Officer remembered seeing the Lincoln. He confirmed the Lincoln he saw on July 10, 2005 was the one that was the subject of the BOLO.

No one forced Nixon to participate in the robbery, kidnapping, and murder of Carol and Reggie Sumner. No one forced Alan Wade to participate either. (TR Vol. XII 939).

Bruce Nixon's testimony was not the only evidence that linked Wade to the Sumner murders. Starting on July 9, 2005 at 3:34 a.m, Michael Jackson used the Sumners' ATM card to access their bank accounts. From July 9, 2005 until the time of his arrest on July 14, 2005, Michael Jackson used the Sumners' ATM card multiple times to steal some $5000 from the Sumners' accounts. (TR Vol. X 529). Jackson and Tiffany Cole even impersonated Reggie Sumner in order to persuade law enforcement authorities that Reggie and Carol Sumner were alive and well. (TR Vol. X 531-554).

On July 14, 2005, the police located Alan Wade in Charleston, South Carolina. Cole, Jackson and Wade were all staying at a Best Western motel. (TR Vol. XI 625). Tiffany Cole and Michael Jackson were staying in Room 312. Wade was in room 302. (TR Vol. XI 627).

James Rowan, a former police detective for the North Charleston Police Department, told the jury about Wade's arrest. Rowan, and Deputy U.S. Marshall David Alred, a member of the fugitive task force, knocked on Wade's door. He was alone in the room. Detective Rowan found Jackson and Cole in their room, a few doors down from Wade's room.

All three suspects were detained while law enforcement officials obtained a search warrant. The warrant authorized law enforcement officials to search both rooms and Cole's Chevy Lumina. (TR Vol. XI 630).

Once the officer obtained the warrant, the officers searched Wade's motel room. During the search, officers found the car keys to the Sumners' Lincoln. On the keys was an Air Force medallion key ring that belonged to Carol Sumner. (TR Vol. X 472, TR Vol. XI 631). Ms. Sumner had recently retired from the Air Force base. (TR Vol. X 473).

In Cole's and Jackson's room, in a zippered suitcase, the officers found paperwork and mail belonging to the Sumners. (TR Vol. X 633). Also in the room were several newly purchased items, such as shoes and athletic jerseys. (TR Vol. XI 632). Cell phones and jewelry were also found. (TR Vol. XI 633). Officers found the Sumners' checkbook, receipts, and Reggie and Carol Sumner's driver's licenses. Credit cards in Reggie Sumners' name were also recovered from Jackson's and Cole's room. (TR Vol. XI 637).

A check written on Reggie Sumner's account was found in Jackson's and Cole's motel room. The check was dated July 8, 2005 and made payable to Alan Wade. (TR Vol. XI 836-837). The check was for $8,000. (TR Vol. XII 836-837). In the trunk of

Cole's Chevy Lumina, which was parked in the Best Western parking lot, the police found Reggie Sumner's coin collection.

Cole's rented Mazda was also recovered and searched. (TR Vol. XI 663). A yellow bag was found underneath the front passenger floorboard. Two pieces of mail, a magazine, and some other items were found in the yellow bag. One piece of mail was addressed to Carol Sumner. The other piece was addressed to James Sumner.

The magazine belonged to Carol Sumner. Her name and address were on the mailing label. (TR Vol. XI 667). Alan Wade's fingerprints were found on the magazine. (TR Vol. XI 749).

Alan Wade told his mother he was involved in the Sumner murder. Although she denied it at trial, the State played a recording of a phone call that Wade's mother made to the police. In that call, Wade's mother told Detective Mark Gupton that her son told her that Michael Jackson promised him and Bruce Nixon $40,000 to help him. (TR Vol. X 518-519).

SUMMARY OF THE ARGUMENT

ISSUE I: In this claim, Wade avers his sentence to death is disproportionate because an equally culpable co-defendant, Bruce Nixon, was sentenced to 45 years in prison. Nixon pled guilty to second degree murder, kidnapping and robbery. Wade was convicted of first degree murder, kidnapping, and robbery. As a matter of law, Nixon was not equally culpable as Wade. Wade's sentence to death is also proportionate when compared to similarly situated defendants in Florida.

ISSUE II: Wade did not ask the trial judge in his sentencing memorandum to consider Nixon's disparate treatment because Nixon was equally culpable. Even if he had, the trial judge was not required to consider Nixon's disparate sentence because, as a matter of law, Nixon and Wade were not equally culpable. Finally, any error is harmless. The trial judge was well aware of Nixon's plea and sentence agreement at the time he sentenced Wade to death.

ISSUE III: This is a claim of prosecutorial misconduct. With the exception of one belated objection, Wade did not object to any of the comments about which he complains. Accordingly, any comment to which Wade failed to object must constitute fundamental error to afford Wade relief. None of the comments about which Wade complains constituted error, let alone fundamental error. Contrary to Wade's allegations, none of the

comments violated the golden rule, impermissibly vouched for a witness, instructed the jury it would violate its oath if it did not impose death, or comment on the defendant's right to remain silent.

ISSUE IV: In this claim, Wade claims that one comment made by the prosecutor during guilt phase closing arguments violated the golden rule. Contrary to his claim, the prosecutor did not ask the jury to imagine the Sumner's ride in the trunk of their car. While the prosecutor's closing comment had a slight emotional tenor, it did not cross the line and violate the golden rule.

ISSUE V: In this claim, Wade alleges Florida's capital sentencing scheme violates the dictates of Furman v. Georgia, 408 U.S. 238 (1972). This Court has consistently rejected claims that Florida's capital sentencing scheme violates the Eighth Amendment or runs afoul of Furman.

ISSUE VI: In this claim, Wade avers that in order for one State Attorney to seek the death penalty, all twenty State Attorneys throughout the State of Florida must adopt uniform standards for determining when to seek the death penalty. Wade cites to no authority in support of this argument. Moreover, this Court ensures "uniformity" when it performs a proportionality review in every case.

ISSUE VII: Wade cannot show the trial judge abused his discretion in granting the State's challenge for cause against

Ms. Butler. Her equivocal answers concerning her ability to be a fair and impartial juror, along with her answers indicating she would hold the state to a higher burden of proof than permitted by law, gave rise to a reasonable doubt about her ability to sit as a fair and impartial juror in this case. Close calls should be resolved in favor of granting a challenge for cause. The trial judge committed no error in excusing Ms. Butler for cause.

ISSUE VIII: In this claim, Wade argues that his death sentence is unconstitutional pursuant to the United States Supreme Court decision in Roper v. Simmons. Wade's argument must fail because at the time he murdered Carol and Reggie Sumner, Wade was 18 years and 1 month old. This Court has repeatedly held that Roper precludes the state from executing a person who was under the age of 18 at the time of the murder. Wade was over the age of 18 at the time he committed the murders. Roper does not apply to bar his execution.

ARGUMENT

ISSUE I

WHETHER WADE'S DEATH SENTENCE IS PROPORTIONATE

In this claim, Wade alleges his sentence to death is disproportionate. Wade argues his sentence is disproportionate in light of Nixon's 45 year prison sentence. Wade argues that because he and Nixon were equally culpable, his sentence to death is disproportionate. (IB 17).[10] Contrary to Wade's assertions, Nixon's 45 year sentence does not render Wade's sentence to death disproportionate.

This is so because, Nixon is not, as a matter of law, equally culpable. In order to be equally culpable, the defendant and his comparator codefendant, must at a minimum, be convicted of the same degree of the crime. It is the crime for which the defendant is convicted that determines his or her culpability, not the particular facts of the cases. *See* Shere v. Moore, 830 So. 2d 56, 61 (Fla. 2002).

Nixon was not convicted of first degree murder. Instead, Nixon entered into a plea agreement with the State in return for

[10] A codefendant's sentence is relevant to a proportionality analysis if the codefendant is equally or more culpable. Henyard v. State, 689 So. 2d 239, 254 (Fla. 1996). When more than one defendant is involved in the commission of a crime, this Court performs an analysis of relative culpability to ensure that equally culpable codefendants are treated alike in capital sentencing and receive equal punishment. See Shere v. Moore, 830 So. 2d 56, 60 (Fla. 2002).

his truthful testimony against the remaining three co-defendants. Nixon pled, and was adjudicated, guilty to second degree murder. In accord with this Court's well-established case law, Nixon's 45 year sentence does not render Wade's sentence to death disproportionate. Caballero v. State, 851 So. 2d 655 (Fla. 2003)(rejecting Caballero's claim his sentence to death is disproportionate because his co-defendant was sentenced to life when the co-defendant was convicted of second degree murder); Jennings v. State, 718 So. 2d 144, 153 (Fla. 1998) ("[D]isparate treatment of codefendants is permissible in situations where a particular defendant is more culpable."); Steinhorst v. Singletary, 638 So. 2d 33, 35 (Fla. 1994) (where a codefendant was convicted of second-degree murder, his life sentence was not relevant to the petitioner's claim that the death penalty was disproportionate).

While Wade does not present a general proportionality argument, this Court reviews every capital case for proportionality. In doing so, this Court reviews the instant case and compares them to other capital cases in Florida. Davis v. State, 2 So. 3d 952, 965 (Fla. 2008).

Wade's sentence is proportionate when compared to other cases in Florida. The jury in this case recommended Wade be sentenced to death by a vote of 11-1 for both murders. (TR Vol. V 818). In sentencing Wade to death for each murder, the trial

court found seven aggravating factors including HAC and CCP. (TR Vol. V 806-810).

The trial court considered three statutory mitigators including Wade's age of 18. (TR Vol. V 812). Except for the age mitigator, the trial judge noted there was no direct evidence, and little other evidence, to support the statutory mitigators he considered. (TR Vol. V 811-812).

The trial court also considered and weighed twenty non-statutory mitigators, many of which were simply different versions of the same mitigation. The trial court gave little or some weight to each of the twenty non-statutory mitigators. (TR Vol. V 812-817).

Two cases decided recently demonstrate that death is an appropriate sentence. In Davis v. State, 2 So. 3d 952, 965 (Fla. 2008), the defendant, twenty years old at the time of the crime, murdered two women with whom he was acquainted. In sentencing Davis to death, the trial court found four aggravators to exist, including HAC and CCP. In mitigation, the trial court found three statutory mitigators (age, no significant criminal history, and extreme emotional disturbance). The trial court also found twenty-seven non-statutory mitigators. Id. at 959. This Court found Davis' sentences to death proportionate. Davis v. State, 2 So. 3d at 965.

This case is remarkably similar to Davis. In Davis, as in the instant case, the trial court found the murders were HAC and CCP. Davis and Wade presented similar matters in mitigation.

Although Wade was two years younger than Davis, Davis presented evidence that at the time of the murder, he was functioning "at best like a fifteen or sixteen-year-old". Davis v. State, 2 So. 3d at 958. Moreover, while Davis presented evidence he suffered from organic brain damage and a low IQ, Wade presented no evidence to show he is either brain damaged or IQ-challenged. In accord with this Court's decision in Davis, Wade's sentence to death is proportionate.

In Frances v. State, 970 So. 2d 806 (Fla. 2007), David Frances and his younger brother, Elvis, broke into a condominium occupied, at the time, by two women (Ms. Charles and Ms. Mills). Frances and Elvis strangled Ms. Charles and Ms. Mills with their hands and with an electrical cord. Ms. Mills had multiple fresh abrasions on her face. The Frances brothers took a PlayStation and some jewelry and stole one of the victims' cars.

Frances was 20 years old. One of his victims, Ms. Charles, was just 16 years old.

The trial court found two aggravating circumstances applicable to Mills' murder: a prior violent felony based on the contemporaneous conviction for the murder of the other victim and the murder was committed during the course of a robbery.

The court found the same two aggravators applicable to Charles' murder, plus the heinous, atrocious, or cruel aggravating circumstance. The trial court found and gave unspecified weight to Frances' "relative youth [twenty years old] together with other factors," but did not specify these other factors; the relative personalities of the two brothers (David being quiet and gentle; Elvis being aggressive and bad); and David's pathologically dependent relationship with Elvis. The court also gave "serious weight" to David being abandoned by his mother shortly after birth and being raised by his grandmother in poverty; David's lack of a positive male role model; David's pathological relationship with Elvis, and Elvis's dominant role in the brothers' relationship. The trial court found the aggravating circumstances greatly outweighed the mitigating and sentenced Frances to death for both murders. Frances v. State, 970 So.2d at 818.

This Court found Frances' sentence to death proportionate. This Court noted that "this was not a robbery gone bad. Frances and his brother went to the victims' house to take the car and immediately jumped the victims and began strangling them. Moreover, rather than leave the victims unconscious from the strangling, Frances and his brother strangled them again to make sure they were dead." Id. at 820.

Like in Frances, the trial court in this case found the murders to be HAC. Like in Frances, the trial court in this case considered Wade's childhood and gave it some weight. Like in Frances, Wade and his codefendants could have taken simple steps to hide their identity during the robbery and left the frail and helpless Sumners bound and gagged, yet unharmed. Instead, Wade, without any pretense of moral or legal justification, murdered the Sumners in one of the most cruel and heartless manners that this Court has likely ever seen. *See also* Looney v. State, 803 So.2d 656, 664 (Fla. 2001) (twenty year old murderer's death sentences proportionate when defendant murdered two people, the trial court found six aggravators, including HAC and CCP and Looney's statutory and non-statutory mitigation included age, a difficult childhood, remorse, amenability to life in prison, and no significant criminal history; Kearse v. State, 770 So.2d 1119, 1136 (Fla. 2000)(death for defendant who was 18 years old at the time of the murder was proportionate in light of two aggravators, one statutory mitigator (age) and twenty-eight non-statutory mitigators that included low IQ, emotional handicap, child neglect, and sexual abuse).

Wade's death sentence is proportionate. This Court should reject any suggestion to the contrary.

ISSUE II

WHETHER THE TRIAL JUDGE ERRED by FAILING TO CONSIDER CODEFENDANT BRUCE NIXON'S RELATIVE CULPABILITY IN SENTENCING WADE TO DEATH

In this claim, Wade avers the trial court erred in failing to consider, in mitigation, the disparate treatment of an equally culpable co-defendant. Wade claims the trial judge erred in failing to consider and weigh Nixon's disparate treatment, specifically, Nixon's 45 year prison sentence when Nixon and Wade "were equally culpable in the crimes." (IB 41).[11] Wade sets forth several points of similarity between Wade and Nixon. (IB 41-44).

Wade overlooks one important fact in presenting his argument to this Court. While Wade may believe that he and Nixon were equally culpable, the fact is that, legally, they are not.

Wade was found guilty of first degree murder, kidnapping and robbery. Nixon was found guilty, pursuant to his pleas, of second degree murder, kidnapping and robbery.

A trial judge is not required to consider the disparate treatment of a codefendant when the codefendant's lesser

[11] In his sentencing memorandum, Wade did not ask the trial court to consider Nixon's 45 year prison sentence or plea agreement in non-statutory mitigation. (TR Vol. III 598-601). Wade did not a supplemental memo after Nixon was sentenced nor. Did he object after the sentencing order was entered. Accordingly, Wade did not preserve this issue for appeal. Blackwelder v. State, 851 So. 2d 650, 652 (Fla. 2003).

sentence is based on his plea to a lesser offense. England v. State, 940 So. 2d 389, 406 (Fla. 2006)(rejecting England's disparate treatment claim when his codefendant was convicted of second degree murder pursuant to a plea agreement); San Martin v. State, 705 So. 2d 1337, 1350-51 (Fla. 1997) (upholding court's rejection of codefendant's life sentence as a mitigating circumstance where codefendant's plea, sentence, and agreement to testify for the State were the products of prosecutorial discretion and negotiation); Brown v. State, 473 So. 2d 1260, 1268-69 (Fla. 1985) (finding that death sentence was proper even though accomplice received disparate prosecutorial and judicial treatment after pleading to second-degree murder in return for life sentence). Because, as a matter of law, Nixon is not equally culpable as is Wade, the trial judge was not required to consider Nixon's prison sentence as non-statutory mitigation. Wade's claim should be denied.[12]

[12] Any error in failing to consider Nixon's prison sentence as non-statutory mitigation would be harmless. The trial judge was well aware of Nixon's convictions, sentence agreement, and ultimate sentence as he presided over Nixon's plea and sentencing. Moreover, Nixon was cross-examined on his plea agreement with the State. In his sentencing order, the trial court noted that Wade was responsible for involving Nixon in these murders.

ISSUE III

WHETHER PROSECUTORIAL COMMENTS AND ARGUMENTS DEPRIVED WADE OF A FAIR TRIAL

In this claim, Wade complains about several comments made by the prosecution team during the guilt and penalty phase of Wade's capital trial. With the exception of one belated objection, Wade posed no objection to any of the comments about which he complains now. In order to overcome any issue of preservation, Wade avers all of the arguments constitute fundamental error.

In order for a prosecutor's comments to constitute fundamental error, the comments must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. Miller v. State, 926 So. 2d 1243, 1261 (Fla. 2006). In order for improper comments made during closing arguments of the penalty phase to constitute fundamental error, the comments must be so prejudicial as to taint the jury's recommended sentence. Walls v. State, 926 So. 2d 1156, 1176 (Fla. 2006).

A. Guilt Phase

The first comment about which Wade complains came when the prosecutor told the jury "Alan Wade chose Bruce Nixon as our witness." (IB 48). This comment came during the State's

initial closing argument. Wade posed no objection to the comment. (TR Vol. XIII 1060). Wade omits a portion of the prosecutor's comments. What he actually said was this:

> Finally, you have Bruce Nixon. Mr. Plotkin told you from the beginning what Bruce Nixon was, what he is. He is what he is. Alan Wade chose him as his partner. Alan Wade chose Bruce Nixon as our witness. The State did not choose Bruce Nixon as our witness. His accomplice did and Bruce Nixon told you what Alan Wade's role was.

(TR Vol. XIII 1060).

It is not error, let alone fundamental error, to argue facts in evidence. Bailey v. State, 998 So. 2d 545, 555 (Fla. 2008). At trial, Bruce Nixon testified that it was Alan Wade who invited him to participate in a robbery and it was Alan Wade who asked Michael Jackson if Nixon could come with them to rob, kidnap, and then murder the Sumners.

Reading the comments in context, it is clear the prosecutor's reference to Wade picking Nixon as the State's witness refers solely to Nixon's testimony that it was Wade who initially enlisted Nixon to participate in the killers' preparations for the murder and Wade who ultimately brought Nixon into the conspiracy to rob, kidnap, and murder Reggie and Carol Sumner. Wade cannot show this comment was error.

Wade points next to a portion of the prosecutor's argument when he is discussing the theory of principals to the jury.

Wade makes no claim the comment to which he cites constitutes error. (IB 48).

Instead, Wade seems to complain about a comment that came later in the prosecutor's closing argument. Wade posed no objection to the comment. The prosecutor told the jury:

> I expect Mr. Eler will say Bruce Nixon lied because he got a deal. He got a deal. That's why he lied, and that's – you know what, that's a pretty good reason to lie is to get a deal. No dispute about that. That's the way it is.
>
> However, it isn't really a great deal. Bruce Nixon told you what kind of deal it was when he was cross-examined and Mr. Eler said 52—you don't see the difference between 52 years and life and a 20 year old boy said not really. Seems to me that it's about the same. (TR Vol. XIII 1061).

Once again, no error was committed because the prosecutor was arguing only facts in evidence. Bailey v. State, 998 So. 2d 545, 555 (Fla. 2008). During cross-examination, Mr. Eler queried Bruce Nixon on his plea agreement in order to flesh out Nixon's motive to lie.

Bruce Nixon told the jury that he did not see the difference between "getting first degree murder and get 52 to life, same thing. It's carrying the same amount of time." (TR Vol. XII 935).[13] Defense counsel then asked Nixon "Do you see a difference between life, never getting out, and 50 years. You

[13] The fact that Bruce Nixon may have been wrong about the sentence he would get is not relevant. Because the defense was attempting to persuade the jury that Nixon's "good deal" motivated him to lie, only his subjective belief is relevant.

see a difference to that, sir." (TR Vol. XII 935). Nixon replied that he did not see a difference. He agreed that life was different from lethal injection. (TR Vol. XII 936). Nixon testified he did not want to be executed. (TR Vol. XII 936).

Wade claims the prosecutor's argument attempted to "gloss over" and "lessen the culpability of the co-defendant in order to legitimize the reduced sentence and deal he was given." Wade also accuses the prosecutor of misrepresenting the facts because Nixon was sentenced to 45 years in prison. (IB 49). Wade claims the prosecutor violated his code of ethics in making this improper argument. (IB 49).

Wade is mistaken on two fronts. First, Nixon was not sentenced to prison until after Wade's trial was concluded. Accordingly, at the time Nixon testified and the prosecutor made his argument, Nixon was indeed facing 52 years to life in prison. As such, the prosecutor did not, in any way, mislead the jury.

Second, the prosecutor was not glossing over or lessening Nixon's culpability in any way. Instead, the prosecutor simply argued that, to Bruce Nixon, the possibility of 52 years to life did not seem all that different to life in prison.

Nixon testified as much at trial. It was not error to point out that while a plea agreement can be an incentive to lie, Nixon did not seem to perceive that he was getting such a

good deal. Wade has shown no error. Bailey v. State, 998 So. 2d at 555.

Next, Wade alleges the prosecutor vouched for the credibility of Bruce Nixon when he urged the jury to reject any notion that Bruce Nixon lied about Wade's involvement in the crime. (IB 50). Wade lodged no objection to either of the comments about which he complains. (TR Vol. XIII 1061-1064; TR Vol. XIV 1102)

This Court has held that it is improper argument to vouch for the credibility of a witness. Impermissible vouching occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony. Spann v. State, 985 So. 2d 1059, 1067 (Fla. 2008) (quoting Hutchinson v. State, 882 So. 2d 943, 953 (Fla. 2004), *abrogated on other grounds by* Deparvine v. State, 995 So. 2d 351 (Fla. 2008)).

Neither of the comments, to which Wade points, constitutes impermissible vouching. (IB 50). The prosecutor's argument neither placed the prestige of the government behind the witness nor implied that information not presented to the jury made Bruce Nixon a credible witness. Instead, the prosecutor argued facts and evidence and reasonable inferences from that evidence.

It is not error, let alone fundamental error to argue that while a witness's motive to lie may be a proper consideration,

other evidence pointing to a defendant's guilt demonstrates the witness testified truthfully. Wade has failed to show any improper vouching.

Wade next alleges a golden rule violation. Wade acknowledges his claim is the same claim of error he raised in Issue IV of his initial brief. As such, he makes no argument in support of this claim.[14]

In his final guilt phase claim, Wade claims the prosecutor improperly commented on Wade's right to testify. (IB 55) Wade did not pose a contemporaneous objection to the comment. Instead, Wade waited until the prosecutor concluded his remarks to pose an objection and moved for a mistrial. (TR Vol. XIV 1107). Counsel made no request for a curative instruction.

The comment at issue came during the prosecutor's rebuttal closing argument. At issue was Wade's contention that Bruce Nixon lied about Wade's involvement in the murder. The prosecutor told the jury that:

> Bruce Nixon was the last one in and the first one out. There is no evidence that Alan Wade said a word to law enforcement about Bruce Nixon. Why is Bruce Nixon—not in March. Why is Bruce Nixon in July right after these crimes telling the police Alan Wade, my best friend, the son of my de factor mother, is committing these crimes with me? All he had to do was give up Tiffany Cole and Michael Jackson.

(TR Vol. XIV 1102).

[14] The State argued this claim in response to Wade's fourth issue on appeal and will not repeat it here.

Contrary to Wade's claim, the prosecutor, rather than commenting on Wade's failure to testify, was arguing that Bruce Nixon did not have a motive to falsely implicate his friend in these crimes. (TR Vol. XIV 1100-1105). Wade did not implicate Nixon in the murder so Nixon would have no motivation to implicate Wade in retaliation.

At trial, the evidence established that Wade and Nixon were best friends. Wade's mother was like a mother to Nixon.

While, in isolation, the brief comment might be viewed as a comment on Wade's failure to explain his side of the story; in context, no reasonable juror would make this leap. Instead, it is more than clear the prosecutor was simply pointing to facts showing that Bruce Nixon had no motive to falsely accuse his friend of murder. This claim should be denied.[15]

B. Penalty Phase

In Wade's first penalty phase claim of prosecutorial misconduct, Wade avers the prosecutor created an imaginary script and invited the jurors to place themselves in the victim's situation. The comment at issue came when the prosecutor argued that the murders were especially heinous,

[15] Even if this comment was improper, the trial judge did not abuse his discretion in denying the belated motion for mistrial. Given the evidence linking Wade to the murders, any error was not so prejudicial as to vitiate the entire trial. Poole v. State, 997 So. 2d 382, 391 (Fla. 2008).

atrocious, or cruel. (TR Vol. XIV 1301-1303). Wade made no objection to the comments.

First, no imaginary script was created. A prosecutor does not create an impermissible imaginary script with an argument, even one with a slight emotional flow, that is limited to the evidence and the reasonable inferences that can be drawn from the evidence. Brooks v. State, 762 So. 2d 879, 889-900 (Fla. 2000).

Bruce Nixon testified that the four killers kidnapped the Sumners, bound them with duct tape, placed them in the trunk of their own car, drove them away from the safety of their home, stopped for gas, and drove the Sumners into Georgia. The Sumners were hugging each other when the killers opened the trunk at the murder site. The killers placed the Sumners, still bound, in the pre-dug grave.

The four killers murdered the Sumners by burying them alive. The medical examiner's testimony established the Sumners were still alive as shovel full after shovel full of dirt filled the hole around them. Only when the dirt covered their mouths and noses did unconsciousness finally relieve the Sumners' fear and pain.

Bruce Nixon's testimony and the reasonable inferences from this testimony supported the prosecutor's argument that the Sumners were afraid and alone as they rode to their deaths in

the trunk of their own car. No error, let alone fundamental error, occurred. Brooks v. State, 762 So. 2d at 889-900.

The comments also do not constitute an impermissible golden rule argument. A prosecutor violates the "golden rule" if he invites the jurors to place themselves in the victim's position and imagine the victim's final pain, terror and defenselessness. Bailey v. State, 998 So. 2d 545, 555 (Fla. 2008).

Here, the prosecutor did not even come close to asking the jurors to put themselves or a family member in the Sumners' place. Instead, the prosecutor outlined the evidence as testified to by Bruce Nixon. The prosecutor is permitted to argue that evidence, introduced at trial, proves the murder was especially heinous, atrocious, or cruel. No golden rule violation occurred.

Next, Wade claims the prosecutor improperly asserted that a vote for life would be irresponsible and that jurors would violate their oath if they recommended a life sentence. The argument at issue came when the prosecutor argued that death was the appropriate sentence in this case. No objection was made to the argument. (TR Vol. XIV 1308). The prosecutor told the jury:[16]

[16] The defense gets last argument during the penalty phase of a capital trial. Accordingly, the prosecutor must anticipate the defendant's arguments during his only closing argument.

> You might hear an argument about life is enough. Life is however many years he's got left and he leaves prison only when he dies. What I suggest to you is that argument tells you that this defendant should not be held fully accountable for his action. That argument in essence says let's take the easy way out. I know life is life and I know it will be a miserable life in prison and let's give him life but that's not the law of the State of Florida. You have to weigh and weigh this aggravation and you will find out it cries for full accountability.

(TR Vol. XIV 1308-1309).

Contrary to Wade's suggestion, the prosecutor did not suggest that a life sentence would be irresponsible or would violate the jurors' oath. Instead, the prosecutor argued that a death sentence was more appropriate given the aggravators the state had proven. It is not impermissible for a prosecutor to argue that death is appropriate based on the evidence introduced at trial. The prosecutor did not tell the jury that death was required nor did the prosecutor ask the jury to show the same mercy to Wade as he showed to the Sumners, which most assuredly was none at all. Instead, the State asked the jury to weigh the aggravators and recommend that Wade be sentenced to death. Wade has not shown any error, let alone fundamental error, in the prosecutor's comments. Bailey v. State, 998 So. 2d 545, 556 (Fla. 2008).

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING WADE'S MOTION FOR MISTRIAL WHEN THE STATE ALLEGEDLY VIOLATED THE GOLDEN RULE

In this claim, Wade avers the trial judge erred when he denied Wade's motion for mistrial when the prosecutor allegedly violated the "golden rule" during closing arguments. A "golden rule" violation occurs when a prosecutor invites the jurors to place themselves or a relative in the victim's position and imagine the victim's final pain, terror and defenselessness. Merck v. State, 975 So. 2d 1054, 1062 (Fla. 2007)

The standard of review is an abuse of discretion. Perez v. State, 919 So. 2d 347 (Fla. 2005); Floyd v. State, 913 So. 2d 564, 576 (Fla. 2005). A trial judge should only grant a motion for mistrial when an error is so prejudicial as to vitiate the entire trial. Snipes v. State, 733 So. 2d 1000, 1005 (Fla. 1999). When the standard of review is abuse of discretion, the trial court's ruling should be sustained unless no reasonable person would take the view adopted by the trial court. Huff v. State, 569 So. 2d 1247 (Fla. 1990).

The comment at issue came during the prosecutor's rebuttal guilt phase closing arguments. The prosecutor argued that:

> This case as I told you in opening is about love and greed, the love of Carol and Reggie's family and neighbors that was passed onto law enforcement who worked so hard to put a chain together, a chain that began when Rhonda spoke to the Sheriff's Office, a

> chain that continued through fingerprints, through checks, through direct evidence, through timeline, a chain that has a link of a key, the key to the crime who left his mark on that mail.
>
> Ladies and gentlemen, it was greed that brought you here today. When you are done, I ask you to walk out not into the darkness of greed, into the terror of the night drive in the back of the trunk but into the light of justice. In the last link of the chain the justice will be when you find that man not just guilty, but fully accountable for every action that he committed when he abducted, robbed, and buried Reggie and Carol alive. Thank you.

(TR Vol. XIII 1106-1107).

This claim should be denied for two reasons. First, the comment did not constitute a "golden rule" violation. The prosecutor did not invite the jurors to imagine the Sumners' terror as they rode in the trunk of their own Lincoln Towncar to their deaths.

It is not a violation of the golden rule to argue the evidence and all reasonable inferences from that evidence. It is not a violation of the golden rule to argue a victim was vulnerable, felt fear or pain, or suffered at the hands of his killer if the evidence or reasonable inferences from that evidence support the argument. Bailey v. State, 998 So. 2d 545, 555 (Fla. 2008). Only when the prosecutor seeks to unfairly appeal to the emotion of the jury by asking them to step into the shoes of the victims to imagine their suffering does a

golden rule violation occur. Merck v. State, 975 So. 2d 1054,1062 (Fla. 2007).

Wade attempts to support his argument by citing to a decision from the Third District Court of Appeal, Bullard v. State, 436 So. 2d 962 (Fla. 3d DCA 1983). In Bullard, the State charged Bullard with aggravated assault and robbery. During his closing arguments, the prosecutor argued: "They talk I.D. problem, ladies and gentlemen, . . . Imagine yourselves as coming out of a club, imagine some individual coming up to you, pointing a gun in your face like this, tell me what you see, give me your money, give me watches, give me everything you got…." Bullard at 963. The State also told the jury "You see yellow, you see a nickel plated gun pointed at your face and all you can say is take it easy. You're not interested in wallets, you're not interested in the hat and guitar, you're interested in your life because that's the most important thing to you right then and there." Id.

The Third District ruled that by advancing a "golden rule" argument, that is, asking the jurors to place themselves in the victim's position, the prosecutor violated defendant Bullard's right to a fair trial by impartial jurors. Bullard v. State, 436 So. 2d at 963. The Court reversed and remanded for a new trial.

The prosecutor's argument in this case bears not the slightest resemblance to the prosecutor's argument in Bullard. Unlike the prosecutor in Bullard, the prosecutor in this case did not ask the jurors to put themselves in the trunk of the Sumners' Lincoln and he did not ask jurors to imagine how they would have felt if they had been in that trunk knowing, almost surely, that they would die that night. Instead, the prosecutor asked the jurors to do justice in this case. This claim should be denied because there was no golden rule violation at all.

This claim may also be denied because, even if this Court were to find the prosecutor's argument was ill advised, the comment was not so prejudicial as to vitiate the entire trial and warrant a mistrial. The comment at issue was an isolated and brief comment in a rebuttal closing argument that spanned fourteen pages of the trial transcript. The prosecutor's initial closing argument spanned some thirty-two pages of transcript.

Moreover, contrary to Wade's suggestion, there was ample evidence of Wade's guilt. Nixon's testimony established Wade's key role in the kidnapping, robbery, and murder of Carol and Reggie Sumner. Wade was seen, along with Cole and Jackson, purchasing supplies in preparation for the crimes. Wade was arrested in South Carolina along with Michael Jackson and Tiffany Cole. Wade had the keys to the Sumners' Lincoln.

Wade's fingerprints were found on a mailed magazine belonging to Carol Sumner. Other items of mail, bank statements, credit cards and checkbooks were found in Jackson's and Cole's motel room. The trial court acted within his discretion when he denied Wade's motion for mistrial. This Court should reject Wade's fourth claim on appeal.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN DENYING WADE'S MOTION TO PRECLUDE THE IMPOSITION OF THE DEATH PENALTY BECAUSE FLORIDA'S DEATH SENTENCING SCHEME DOES NOT COMPLY WITH THE REQUIREMENTS AS SET FOR IN FURMAN V. GEORGIA, 408 US 238 (1972)

In this claim, Wade alleges that Florida's capital sentencing scheme violates the Eighth Amendment and the dictates of Furman v. Georgia. Wade's argument turns on the notion that jurors in capital cases in general, and in his case in particular, are strong supporters of the death penalty. Wade alleges that all of the fourteen jurors who sat on his jury were moderate to strong supporters of the death penalty and the State and the court, in one instance, compounded the constitutional error when it struck jurors who showed a lack of support for the death penalty. Wade argues this "predominant and inherent" bias in favor of death renders Florida's sentencing scheme unconstitutional pursuant to Furman v. Georgia, 408 U.S. 238 (1972).

Wade has pointed to nothing in the record to demonstrate that even one of his jurors violated his oath or considered matters other than the evidence and the law upon which he was instructed. Nor has Wade made any showing that a single juror was not qualified under Florida law or was anything other than fair and impartial.

This Court has considered, on many occasions, whether Florida's capital sentencing scheme violates the Eighth Amendment. This Court has consistently ruled that Florida's capital sentencing scheme does not run afoul of the dictates of Furman. Hodges v. State, 885 So. 2d 338, 359 & n.9 (Fla. 2004) (noting that the defendant's claim that "the death penalty statute is unconstitutional because it fails to prevent the arbitrary and capricious imposition of the death penalty, violates due process, and constitutes cruel and unusual punishment," has "consistently been determined to lack merit"); Lugo v. State, 845 So. 2d 74, 119 (Fla. 2003) ("We have previously rejected the claim that the death penalty system is unconstitutional as being arbitrary and capricious because it fails to limit the class of persons eligible for the death penalty."). This Court should deny this claim.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING WADE'S MOTION TO STRIKE THE STATE'S NOTICE OF INTENTION TO SEEK DEATH PENALTY

In this claim, Wade alleges his death sentence is unconstitutional because all twenty of the State Attorneys in Florida do not have uniform procedures to determine whether to seek the death penalty in a particular case. Prior to trial, Wade filed a motion requesting the judge to strike the State's notice of intention to seek the death penalty. (TR Vol. III 423-429). The trial court denied the motion. (TR Vol. III 430).[17]

The trial court properly denied Wade's motion. Wade cites to no authority for the notion that statewide uniform standards must be adopted before the State Attorney in any particular circuit may seek the death penalty against a defendant who commits a murder in his circuit.

Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney of each circuit has complete discretion in deciding whether and how to prosecute. A circuit judge has no authority to interfere with the prosecutor's discretion to seek the death penalty in a

[17] In this claim, Wade cites to non-record evidence. (IB 81-82).

particular case. State v. Bloom, 497 So. 2d 2, 4 (Fla. 1986).[18] A pre-trial penalty determination by the trial judge would effectively create a statutorily unauthorized trifurcated death sentence procedure. Id.

Even if the case law on this issue was not well established, Florida law provides layers of scrutiny subsequent to the prosecutor's initial decision to seek the death penalty. Unlike every other criminal case, a capital defendant is entitled to a jury of twelve persons, all of whom must agree the defendant is guilty of first degree murder. At the penalty phase, the jury makes a sentencing recommendation and there are few circumstances that would permit a trial judge to override a life recommendation. The trial judge must then separately consider and weigh aggravating and mitigating factors and determine whether to sentence a convicted capital defendant to death.

Finally, this Court conducts a proportionality review in every case. This is so even if proportionality is not raised by

[18] There are certain narrow exceptions not alleged here. For instance, prosecutorial discretion may be curbed when impermissible motives may be attributed to the prosecution, such as bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights. *See e.g.* Bell v. State, 369 So. 2d 932, 934 (Fla. 1979). Wade makes no allegation the State sought the death penalty in his case because he is white, male, any particular religion, or to prevent the exercise of a particular constitutional right.

the defendant on appeal. Walker v. State, 957 So. 2d 560, 585 (Fla. 2007).

Wade seeks to ensure the death penalty is applied uniformly throughout the State. This Court's proportionality review is designed to do just that. This claim should be denied. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991) (purpose of this Court's proportionality review is to "foster uniformity in death-penalty law."). *See also* Proffitt v. Florida, 428 U.S. 242, 254 (1976) (rejecting argument that prosecutor's authority to decide whether to charge capital offense in the first place and whether to accept plea to lesser offense renders Florida's death penalty scheme unconstitutional).

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN PERMITTING A CHALLENGE FOR CAUSE AGAINST VENIREMAN BUTLER

In this claim, Wade claims the trial court erred in permitting the State's challenge for cause against prospective juror Butler.[19] During the prosecution's voir dire of prospective jurors, the colloquy with Ms. Butler went as follows:

> Mr. Plotkin: Your views on the death penalty, ma'am.

[19] Wade's jury selection was conducted at the same time that jury selection for co-defendant Tiffany Cole was conducted. Wade and Cole were not tried together, however.

Ms. Butler: It's mixed.

Mr. Plotkin: What?

Ms. Butler: It's mixed.

Mr. Plotkin: Mixed? Okay.

Ms. Butler: It's the….

Mr. Plotkin: I'm sorry? Let me ask you a question, the same question I've been asking.

Ms. Butler: Okay.

Mr. Plotkin: Okay.

Mr. Plotkin: If you're selected as a juror and you're in there in that guilt or innocence phase, could you make a decision whether the state's proven its case beyond a reasonable doubt or are your feelings on the death penalty going to interfere with or have a – cause a problem for you making that decision.

Ms. Butler: No. You're going to have to really show me facts.

Mr. Plotkin: Okay.

Ms. Butler: I have to live with it.

Mr. Plotkin: So—don't let me put words in your mouth, but are you saying that because the death penalty is involved that maybe you need sort of extra facts from the state.

Ms. Butler: I got to really know.

Mr. Plotkin: I'm sorry.

Ms. Butler: I got to really feel that or know for sure that.

Mr. Plotkin: All right. Let's go to that penalty phase. You obviously have some, you know, concerns about this which are—which I appreciate you

sharing with me. If you're in that penalty phase—and you're going to hear evidence on aggravating factors and mitigating factors.

Ms. Butler: Uh, huh.

Mr. Plotkin: And then you're going to be asked does the—do the aggravating factors outweigh the mitigating factors, and if you believe they do beyond a reasonable doubt, my question is: Can you vote for the death penalty or is your personal feelings going to be weighing on you and cause you some concern.

Ms. Butler: (Nods head affirmatively)

Mr. Plotkin: Yes?

Ms. Butler: Yeah.

Mr. Plotkin: Yes, you can or yes it's going to be weighing on you and cause you some concerns.

Ms. Butler: Well, if I got—if the facts is there then, yes, I can go for the death penalty depending on it.

Mr. Plotkin: Let me ask you a question I'm going to ask everyone else later. The burden of proof the state has to prove is proving a defendant guilty beyond a reasonable doubt. The Court will define that for you. That burden of proof is the same way in any criminal case whether it's a shoplifting case, a burglary case, or a death penalty case. Would you hold the state to a higher burden of proof because the death penalty is a possible penalty.

Ms. Butler: Possibly, yeah.

(TR Vol. VIII 158-161).

During the defense voir dire, defense counsel for Mr. Wade questioned Ms. Butler. The following exchange is reflected in the record:

Mr. Eler: Okay, and Ms. Butler, in this particular case, ma'am, do I take it then that you'd just rather not sit—you don't feel that you could be a fair juror in this case just because---

Ms. Butler: No.

Mr. Eler: I'm sorry, ma'am.

Ms. Butler: I don't feel comfortable in this case.

(TR Vol. VIII 185).

A bit later, Mr. Eler questioned Ms. Butler again. The record reflects the exchange:

Mr. Eler: I have down here something about the burden of proof. Mr. Plotkin asked you and I think you indicated you could sit in a guilt phase of a trial, right? Find someone guilty or not guilty, you could do that, right?

Ms. Butler: I could do that, yes.

Mr. Eler: I think his questions dealt with would you require the state to have a higher burden of proof in a death case. I think that's where we had talked—he talked to you a little bit about that. You remember that?

Ms. Butler: Yes.

Mr. Eler: Now let me ask you this: The law is—burden of proof is beyond and to the exclusion of a reasonable doubt in death cases and in non-death cases. In a DUI case and in a – I don't know, a robbery case same—it's the same burden of proof, okay? Now, knowing that the state has the burden of proof, okay—we don't have a burden, but they have a burden of proof not only in the guilt phase but also in the penalty phase. They have to prove these aggravators beyond and to the exclusion of every reasonable doubt. Okay. That's the standard burden in every case. You wouldn't require them to have a higher burden than that would you?

Ms. Butler: If they've got proof –if they—if they have sole proof that whatever it was that occurred then, yes, I could—I could see myself voting for the death penalty.

Mr. Eler: Okay. So if —-- if in the –-- in penalty phase—

Ms. Butler: In the penalty phase.

Mr. Eler: --if they presented aggravation, factors that beyond a reasonable doubt outweighed the mitigators, then you could apply the law and follow the law and vote death, is that right?

Ms. Butler: Yeah.

Mr. Eler: Okay. All right. Now that I said that on my scale, one to five, where would you be.

Ms. Butler: I'm still a two.

(TR Vol. IX 249).

After each side had questioned the panel, the court agreed to allow the parties to question several jurors individually on the issue of pre-trial publicity. Ms. Butler was not among those jurors. (TR Vol. IX 312-314).

Before questioning these jurors, Mr. Eler suggested the court consider any agreed upon challenges for cause. (TR Vol. IX 314). The trial court announced it would excuse prospective jurors Mitchner and Butler. Mr. Eler asked the court: "Assuming for cause on the death penalty, Judge." The court responded in the affirmative. (TR Vol. IX 315).

The court noted that as to Ms. Butler, she waffled on two or three things. (TR Vol. IX 315). Mr. Eler commented, "Ms. Butler, I thought I rehabilitated." (TR Vol. IX 315). The Court responded, "No." (TR Vol. IX 315). The prosecutor formally moved to challenge Ms. Butler. Mr. Eler posed no objection. (TR Vol. IX 315). The court granted the challenge. (TR Vol. IX 315).

When the parties questioned the last potential juror, the parties met to exercise challenges. The State used six of its ten peremptory challenges. (TR Vol. IX 364). The defense used all ten of its peremptory challenges. (TR Vol. IX 367).

Once all jurors had been selected, Mr. Eler told the trial court that he wanted to object to the State's use of peremptory challenges on otherwise death scrupled jurors. Mr. Eler advised he had a standing objection to the excusal of Ms. Butler and the others he felt the defense rehabilitated. (TR Vol. IX 384).[20]

The standard of review as to this claim is an abuse of discretion. Johnson v. State, 969 So. 2d 938, 946 (Fla. 2007). "The trial judge has the duty to decide if a challenge for cause

[20] Mr. Eler also told the court that he wanted additional peremptory strikes to strike those folks that the defense would have stricken if it had additional peremptory challenges. Mr. Eler did not identify any jurors he would strike if given additional peremptory challenges. (TR Vol. IX 384). The court denied Mr. Eler's general request for additional peremptory challenges. (TR Vol. IX 384).

is proper, and this Court must give deference to the judge's determination of a prospective juror's qualifications." Castro v. State, 644 So. 2d 987, 989 (Fla. 1994) (citing Wainwright v. Witt, 469 U.S. 412, 426, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)).

The decision to deny a challenge for cause will be upheld on appeal if there is support in the record for the decision. Johnson v. State, 660 So. 2d 637, 644 (Fla. 1995), *cert. denied*, 517 U.S. 1159 (1996). The trial court properly allowed the State's challenge.

A potential juror may be excused "for cause" if the juror has a state of mind regarding the case that will prevent the juror from acting with impartiality. In a capital case, this standard is met if a juror's views on the death penalty prevent or substantially impair the performance of his or her duties as a juror in accordance with the juror's instructions or oath. Johnson v. State, 969 So. 2d at 946. "A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind." Ault v. State, 866 So. 2d 674, 683 (Fla. 2003).

It is well established that a potential juror's initial response to questioning about the death penalty alone will not automatically provide good cause for excusal if subsequent responses alleviate doubt on the juror's ability to impartially

render an advisory verdict. However, a juror who gives "consistently equivocal voir dire answers" on his or her ability to recommend death is subject to a challenge for cause. Conde v. State, 860 So. 2d 930, 942-43 (Fla. 2003). This is so because persistent equivocation or vacillation by a potential juror on whether she can set aside biases or misgivings concerning the death penalty in a capital penalty phase gives rise to a reasonable doubt as to the juror's impartiality. This in turn justifies dismissal for cause. Johnson v. State, 969 So. 2d 938, 947-948 (Fla. 2007).

During voir dire, Ms. Butler told the prosecutor she might hold him to a higher standard than beyond a reasonable doubt. She also wanted "sole proof" before she could see herself voting for the death penalty. (TR Vol. IX 249). When asked whether she felt she could be a fair juror because of her feelings on the death penalty, Ms. Butler she said no, then added that she did not feel comfortable. (TR Vol. VIII 185).[21] The trial court

[21] The record shows that both sides at times asked compound questions or used double negatives that make it difficult at times to determine which question the juror is answering or thinks she is answering. However, this is the exact reason this Court reviews such matters for an abuse of discretion and gives deference to the trial judge's determination of juror competency. Johnson v. State, 969 So. 2d 938, 947-948 (Fla. 2007). The trial judge has the opportunity to see the juror's demeanor, facial expressions, looks of confusion or assuredness, etc. This is especially true in this case. The colloquy between Ms. Butler and both counsel indicate that on at least

found that Ms. Butler "waffled on two or three things. (TR Vol. IX 315).

Given Ms. Butler's answers and the trial judge's findings of equivocation, Wade failed to show the trial judge abused his discretion in granting the state's challenge for cause. Johnson v. State, 969 So. 2d 938, 947-948 (Fla. 2007); Conde v. State, 860 So. 2d 930, 942-43 (Fla. 2003) (rejecting a claim that the trial court erred in granting a cause challenge against a juror whose equivocal responses evinced what the trial court termed "deep doubt" about her ability to serve in a death penalty case). This Court should deny Wade's claim.

ISSUE VIII

WHETHER WADE'S SENTENCE TO DEATH IS UNCONSTITUTIONAL PURSUANT TO ROPER V. SIMMONS

In his eighth and final issue on appeal, Wade claims his sentence to death is unconstitutional pursuant to the United States Supreme Court's decision in Roper v. Simmons, 543 U.S. 551 (2005). In Roper, the United States Supreme Court held that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." Id. at 578.

---

one occasion, both counsel had difficulty understanding what she was saying. (e.g. TR Vol. VIII 185, Line 5).

Roper does not bar Wade's execution because Wade was 18 years and 1 month old at the time he murdered Carol and Reggie Sumner. This Court has consistently refused to expand the bright line rule established by the United States Supreme Court in holding that Roper only prohibits the execution of defendants "whose chronological age is below eighteen" at the time of the crime. Hill v. State, 921 So. 2d 579, 584 (Fla. 2006). Wade's final claim should be denied. Evans v. State, 995 So. 2d 933 (Fla. 2008) (rejecting Evans' claim that mental retardation renders him ineligible for the death penalty under Roper); Bevel v. State, 983 So. 2d 505, 525 (Fla. 2008) (rejecting Bevel's claim that Roper precludes his execution because his mental age is that of a 14 or 15 year old); Stephens v. State, 975 So. 2d 405, 427 (Fla. 2007)(rejecting Stephens' contention that because he suffers from brain damage, mental impairment, and has a mental and emotional age of less than eighteen years, the application of the death penalty in his case is cruel and unusual punishment); Kearse v. State, 969 So. 2d 976, 992 (Fla. 2007) (denying Roper claim where defendant was eighteen years and three months old at the time of the crime and had mental and emotional impairments).

CONCLUSION

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

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

_____

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399
Department of Legal Affairs
PL—01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3583 Phone
(850) 487-0997 Fax
Attorney for the Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email and U.S. Mail to Frank Tassone, 1833 Atlantic Boulevard, Jacksonville, Florida 32207 this 16th 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