IN THE SUPREME COURT OF FLORIDA

KEVIN JEROME SCOTT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC09-1578

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

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

THOMAS D. WINOKUR
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 906336

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

CASES PAGE(S)

FEDERAL CASES

STATE CASES

PRELIMINARY STATEMENT

Appellant, KEVIN JEROME SCOTT, was the defendant in the trial court; this brief will refer to Appellant as such or by proper name. Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as the prosecution, or the State.

The record on appeal consists of eleven volumes, which will be referenced according to the respective Roman numeral designated in the Index to the Record on Appeal. "IB" will designate Appellant's Initial Brief. All citations are followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Desi Bolling met Kevin Scott when they were in high school (VII 437). On Friday June 29, 2007, Bolling, who was in the Army at time, came to Jacksonville from his duty station in Fort Stewart, Georgia, as he did most weekends, to visit family and friends, including Appellant (VII 436-39). Bolling and Appellant had previously discussed places to rob, and Appellant had mentioned some places near the corner of Powers and Toledo near Wolfson High School, including a coin laundry (VII 440-41).

Around 2:00 on Saturday June 30, Bolling got up and spent time with friends at Ravenwood and Williamsburg apartments (VII 445-46). Bolling contacted Appellant by phone and met up with him at a BP station that evening (VII 446-47). Appellant and another man whom Bolling did not know got into Bolling's car, a black Charger, (VII 440, 448). Bolling only learned that the other man was nicknamed "Miami" (VII 450-51). The men discussed the laundromat and firearms (VII 449-450). Appellant asked Bolling if he had his firearm, a Glock .40 caliber handgun, and retrieved it from the trunk (VII 451-52). The other man also had a firearm, but it had no bullets. *Id.* Bolling knew that Appellant and the other man were going to commit a robbery, but Bolling did not participate in it (VII 452). Bolling expected Appellant to buy the gun from him with the proceeds of the robbery (VII 452). Appellant and the other man got out of the car, and Appellant told Bolling that he would call Bolling in ten minutes, to pick them up after the robbery was completed (VII 453). Bolling left and went back to Williamsburg apartments (VII 454).

Gentian Koci was a friend of Kristo Binjaku, who often visited him at his laundromat (VI 310-11). Mr. Koci was at the laundromat on June 30, 2007, arriving there about 8:30 in the evening (VI 311). Koci was sitting in a chair by the side door when two people entered the laundromat (VI 312-14). One of them hit Koci on the shoulder, and when he turned to see who it was, he was struck on the head with a metal object (VI 314-15). Mr. Binjaku got up and told them to go away and put his hands up (VI 315-16). Binjaku was then shot (VI 317).

The two men ran away (VI 319). Koci could not see their faces because they were covered with masks (VI 319-320).

Ismet Rapi was also socializing at the laundromat on the evening of June 30, 2007 (VI 331-34). Rapi saw the two men come to the side door, and one of them had a gun (VI 336-37). The man with the gun pointed it at Mr. Koci and then hit him with it (VI 337). Rapi then saw Mr. Binjaku get up and tell the intruders that he did not have any money and to go away (VI 338). The man pointed the gun at Binjaku and shot him. *Id.* Rapi also saw that the men had covered their faces with t-shirts (VI 339). The other man did not enter the store (VI340).

Xhulio Binjaku was Kristo Binjaku's son, and was 14-years old at the time of his father's murder (VI 273-75). Xhulio was at the laundromat that evening (VI 276-77). Xhulio was playing soccer behind the laundromat with another boy around 9:30 - 9:45 (VI 278-79). Xhulio saw two black males walking toward the laundromat, and saw that they had t-shirts pulled up over their faces (VI 279-282). Xhulio saw them go to the side door of the laundromat, and Xhulio was suspicious so he went to the back door (VI 283). Xhulio saw one of the men leaning into the store and then saw them leave shortly thereafter (VI 284). Xhulio had no memory of hearing the shot, but he approached the front of the store and saw his father on the floor. *Id.* Xhulio called 911 (VI 282), the recording of which was played for the jury (VI 292-300).

James Wiggins was a customer in the laundromat that evening (VI 345-47). Wiggins heard a gumball machine getting knocked over (VI

348-49). Wiggins looked up and heard a pop, and saw someone standing in the door with his arm extended and a weapon in his hard (VI 351). Wiggins said that the shooter was wearing a white bandanna around his face (VI 352). Wiggins went to the BP station and called the police (VI 353).

Associate Medical Examiner Valerie Rao testified that the single gunshot would to Kristo Binjaku's face and neck was the cause of death (VIII 698-99). Dr. Rao testified that the bullet went through Mr. Binjaku's his mouth, and four of the teeth in the upper jaw were dislodged and fractured (VIII 703). Then the bullet went through his tongue, through his windpipe and your food pipe, and through his spine. *Id.* The bullet severed his spinal cord just beneath the medulla, and did not exit his body. *Id.*

An expended shell casing was collected from the scene (VI 385-88). No fingerprints of value were located (VI 394-97, VII 419-422).

Appellant called Desi Bolling, who was at the Williamsburg apartments, and told Bolling to meet him behind Wolfson High School (VII 455). Bolling went to the location and Appellant and "Miami" showed up about two or three minutes later. *Id.* Bolling testified that Appellant and Miami were "acting hysterical," and Appellant told Bolling that he "had shot the guy" because he "jacked the buck," meaning that he would not give them money (VII 456). When they arrived back at Williamsburg apartment, Bolling got the pistol back from Appellant and put it back in his trunk (VII 458). Bolling took Miami home, and took Appellant to Hilltop apartments (VII 460-61).

Bolling checked the pistol and saw that one bullet was missing from the clip (VII 461-62).

FDLE firearms expert Peter Lardizabal determined that the expended cartridge found at the scene of the murder was fired from Bolling's Glock .40 caliber (VIII 672-675).

On the evening of the murder John Holsenbeck was with friends at the pool of an apartment complex across the street from the laundromat (VII 528-530). Around 9:30 to 10:00 pm, Holsenbeck heard a gunshot coming from across the street (VI 531-32). A couple of minutes later, Holsenbeck saw a black male running at full speed by the pool toward Wolfson High School (VII 532-34). Holsenbeck thought it was the same man who had spoken to him about the bud schedule earlier that day (VII 536). Holsenbeck found out that Mr. Binjaku had been fatally shot, and spoke to police that evening about the man he saw running by (VI 537-38).

Lawrence Wright lived at Williamsburg apartments at this time (VII 545). Wright knew Appellant and Desi Bolling (VII 548-49). Bolling was at the apartments that evening, and Wright saw him leave and come back twice (VI 556-557). The second time he returned, having been gone only about three minutes, he had Appellant with him and another man he did not know (VI 556-58). Bolling popped the trunk of his car, and Appellant and the unknown man got out with their shirts in their hands (VI 559). Appellant appeared "nervous, shaky, sweaty, real paranoid" (VI 560). Appellant also asked for a cigarette, even though he did not smoke. *Id.* Wright saw Bolling drive Appellant and the other man away (VI 561).

Wright became aware of the shooting at the laundromat and heard that a reward was being offered for information (VI 562-63). Wright called police and told them what he had seen with Bolling and Appellant (VII 563). Wright mentioned that Bolling had tried to sell him a handgun before. *Id.* Wright agreed to wear a recording device and attempt to purchase the pistol from Bolling (VII 565-66). Wright did purchase the pistol from Bolling, and Bolling told him to be careful because the gun "has a body on it" (VI 466, VII 566).

No detectible DNA was found on the gun (VIII 637-48).

On July 12, 2007, Detective Oliver visited John Holsenbeck and showed him several photos to see if he could identify the individual he saw running by the pool the night of the murder (VII 539, 590-91). Holsenbeck picked out two photographs of individuals that could have been the man he saw (VII 539-540). Detective Oliver testified that one of the photographs Holsenbeck had chosen depicted Appellant (VII 591).

On August 10, 2007, Bolling was arrested and charged with murder and attempted armed robbery (VI 466). At first, Bolling denied that he knew anything about the murder, but later told the assistant state attorney everything that happened (VI 467-69). Bolling agreed to wear a wire and record a conversation with Appellant at the jail (VI 469). On October 2, 2007, Bolling was outfitted with a recording device and met with Appellant at the jail. *Id.* After the conversation, Appellant gave the recording device back to Detective Oliver (VI 471).

The recording was played for the jury (VI 472-495). Bolling identified himself and Appellant as the speakers (VI 475). The jury was provided a transcript of the recording to help follow the conversation (VI 474). The sentencing order reflects portions of that transcript (III 550-552). On the recording, Appellant related that he hit one man in the head, and when another man said "get out of my store" and grabbed a chair like he was going to hit Appellant with it, Appellant shot the man. *Id.*

Detective Oliver testified that he recognized Appellant's voice on the recording (VII 599-600, VIII 605).

Quartx Barney, Tony Paige, Ray Washington, and Regina Corley testified that Appellant was at a birthday party at a neighbor's house when the murder occurred (VIII 744-747, 766-68, 788-791, IX 810-11). Ms. Barney and Ms. Washington both testified that detectives had come by to talk to them about Appellant's whereabouts (VIII 751, 794-95).

Detective Oliver testified that no detective ever spoke to any of the alibi witnesses at any time (IX 851).

Appellant's girlfriend, Regina Corley testified that she had heard Appellant mention a friend named "Miami," "but there's a lot of Miamis in Jacksonville" (IX 833-34, 838).

The State filed an information charging Appellant with second-degree murder, attempted armed robbery (I 15-16). On December 6, 2007, a Duval County grand jury later indicted Appellant for first-degree murder, attempted armed robbery, and possession of a firearm by a convicted felon (I 26-27). On April 21, 2009, the State filed a information charging Appellant with aggravated battery

against Gential Koci (II 227). The court granted the State's motion to consolidate the indictment and the aggravated battery information for trial (IV 674).

Appellant proceeded to jury trial on April 27, 2009. The jury found Appellant guilty as charged on all counts (II 376-379, X 1006-1009).

The court held the penalty phase on May 5, 2009. The State presented Malvina Binjaku, Kristo Binjaku's daughter, and family friend Sally Trammel, as victim impact witnesses (X 1057-1066). The State also presented evidence regarding Appellant's prior crimes (XI 1198-1224).

In mitigation, Appellant presented the testimony of his sister, Nichol Green (X 1066-1076), Regina Corley (X 1076-1081), his grandmother Eddie Bell Phelps (X 1081-88), Holly Ayers (X 1089-1091), his stepfather Freddie Holland (X 1092-1097), his fiancé Nichol Corley (X 1097-1105), his grandmother Dorothy Gragg (X 1106-1126), and his mother, Latonya Roberts (X 1131-XI 1163). Appellant also testified on his own behalf (XI 1164-1197).

By a vote of nine to three, the jury recommended that the court impose the death penalty (III 455).

On June 18, 2009, the Court held the *Spencer* hearing (IV 790-718). On July 23, 2009, the court sentenced Appellant to death on the first-degree murder count, 25 years imprisonment on the attempted armed robbery count, and 15 years imprisonment on the aggravated battery count (III 567-575, IV 719-724).

In sentencing Appellant to death, the trial court found two aggravating circumstances: previous conviction of violent felony (i.e., the contemporaneous conviction of aggravated battery upon Gentian Koci), and murder committed while engaged in an attempt to commit armed robbery (III 552-553). Each aggravating factor was given great weight.

The court rejected both proposed statutory mitigating circumstances, no significant history of prior criminal activity, and age of defendant, finding each of them not proven (III 553-557). The court found nine non-statutory circumstances, but onhy assigned each of them "slight weight:"[1] religious faith, love for family and friends, father was absent from Defendant's life, Defendant's family loves him, Defendant was a good and respectful son, Defendant is a good surrogate father, Defendant can be a good father figure from prison, Defendant overheard domestic abuse as a small child, and the Defendant once stopped a man from stealing from Winn Dixie.

[1]With regard to the mitigating circumstance "Defendant was a good and respectful son," the court actually used the phrase "little weight" instead of "slight weight."

SUMMARY OF ARGUMENT

ISSUE I.

By failing to object to the offending comment, and waiting until after the end of the closing argument to move for mistrial, Appellant has not preserved this issue for appellate review. Even if it were preserved, Appellant has not shown that the court abused it discretion in denying a motion for mistrial. The prosecutorial remark was fair comment and a fair response to Appellant's argument. Appellant had suggested in his closing that Desi Bolling could have scripted a conversation with another inmate and that it may not have been Appellant's voice on the recording at all. The State responded by arguing that no evidence supported Appellant's theory about the voice on the recording in spite of the fact he called many witnesses familiar with Appellant's voice. The State is permitted to emphasize uncontradicted evidence for the narrow purpose of rebutting a defense argument, which is what occurred here. Finally, even if the comment were improper, its effect on the trial was minimal, so Appellant cannot demonstrate that it vitiated the entire trial.

ISSUE II.

By failing to object at the time the offending statement was made and waiting until after the conclusion of the witness's testimony to move for mistrial, Appellant has not preserved this issue for appellate review. Even if it were preserved, Appellant is not entitled to reversal. Appellant's *own witness* gave an unsolicited response during her testimony that revealed a prior charge and jail

term for Appellant. Under the circumstances presented here, the disclosure was not so prejudicial that it vitiated the entire trial. The State further asserts that it is not required to demonstrate that the "error" is harmless. "Error" in the harmless-error context means an improper judicial ruling, not an improper comment by a witness. The only judicial ruling at issue here is the denial of the mistrial motion. If the court erred in denying this motion, that error logically cannot be harmless. This principle applies with greater force in this case, because Appellant's own witness made the offending comment, unsolicited by the prosecutor. The State should not bear the burden of demonstrating that an unsolicited comment by a defense witness could not have contributed to the verdict, on pain of reversal.

ISSUE III.

Pursuant to *Illinois v. Perkins*, 496 U.S. 292, 110 S.Ct. 2394 (1990), Bolling's recording of his conversation with Appellant did not violate Appellant's Fifth Amendment right to counsel during questioning. Nor did the recording violate Appellant's offense-specific Sixth Amendment right to counsel. This right attaches at the earliest of formal charge, preliminary hearing, indictment, information, or arraignment. As none of these points had occurred, Appellant's right to counsel had not attached. Moreover, even if Appellant's right to counsel could attach at an earlier stage, it did not attach here because police were still investigating

Appellant's involvement in the murder at the time the recording was made. The court did not err.

ISSUE IV.

Evidence supporting the aggravating circumstances, when combined with the relatively weak mitigation, renders the death penalty proportionate in this case.

ISSUE V.

This Court should decline Scott's claim to recede from its prior precedent in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002) and *King v. Moore*, 831 So.2d 143 (Fla. 2002). *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002) does not invalidate Florida's death penalty. This Court has consistently rejected *Ring* claims. Moreover, Scott's jury recommended the death penalty. Even if *Ring* applied in Florida, a jury's recommendation of death necessarily means that the jury found at least one aggravator, as both this Court and the United States Supreme Court have explained. Furthermore, the jury unanimously found two of the aggravators in the guilt phase. Thus, the trial court properly denied the motion.

ARGUMENT
ISSUE I

DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING A MOTION FOR MISTRIAL FOR A PROSECUTORIAL COMMENT PURPORTEDLY SHIFTING THE BURDEN OF PROOF BY SUGGESTING THAT APPELLANT HAD AN OBLIGATION TO PRESENT EVIDENCE DISPROVING HIS GUILT? (Restated)

Standard of review

A decision on a motion for a mistrial is within the discretion of the trial judge and such a motion should be granted only in the case of absolute necessity. *Snipes v. State*, 733 So.2d 1000, 1005 (Fla. 1999). "The standard of review for the denial of a motion for new trial is abuse of discretion." *Smith v. State*, 7 So.3d 473, 507 (Fla. 2009). Furthermore, "the control of comments made to the jury is within the trial court's discretion, and an appellate court will not interfere unless an abuse of discretion is shown." *Franqui v. State*, 804 So.2d 1185, 1195 (Fla. 2001) citing *Occhicone v. State*, 570 So.2d 902, 904 (Fla. 1990)). Both the prosecutor and defense counsel are granted wide latitude in closing argument. *Ford v. State*, 802 So.2d 1121, 1129 (Fla. 2001).[2]

Trial court's ruling

Desi Bolling testified that he had a conversation with Appellant at the Duval County Jail while wearing a recording device provided to him by homicide detectives (VII 469-472, 475). The recording was

[2]Appellant offers no support for his contention that this question involves a "mixed question of law and fact" and is "reviewed in this Court under the de novo standard" (IB 30), and it is in fact a misstatement of the law.

played for the jury (VII 475-484). Bolling identified himself and Appellant as the speakers (VII 475). Appellant made several incriminating statements in the recording.

Appellant presented several witnesses who provided an alibi defense for him, namely, that he was at a birthday party at the time of the murder (VIII 740-47, 764-68, 785-91, IX 806-11).

During his closing argument, Appellant suggested that Bolling may not have actually been speaking to Appellant in the recorded conversation, but instead may have "scripted" the conversation with another inmate:

> Do you really not want to put it past Mr. Bolling to wear a wire and go into the jail and maybe script something, get a buddy of his a pack of cigarettes, whatever they sneak in in the jail? Do you really want to trust that in a first degree murder, a death case? Is it out of the realm of possibilities?

(IX 924). Appellant later repeated that no person other than Bolling testified that the person on the recording was Appellant, and again suggested that Bolling could have been lying about it:

> The tape we talked a little bit about it. Y'all listen to it if you can understand it. I suggest to you that it should be given little weight. There is no other evidence other than Bolling saying that that's Mr. Scott there. You know, Detective Oliver said, well, I recognize -- I think he said I recognize Mr. Scott's voice there, but I suggest to you weigh that very carefully and listen to that tape and as I suggest to you is it really so farfetched to think that Mr. Bolling is trying to go home and would saying anything less than the truth?

(IX 934-35).

The State addressed this argument in its own closing, noting that no witness testified that it was not Appellant's voice on the recording, in spite of the fact that many of Appellant's witnesses knew him:

> I want to talk a little bit about the different witnesses, the alibi witnesses that you heard and things of that nature. You know, as -- I'm not as veteran as Mr. de la Rionda, but in my short stint I've already learned that sometimes it's not what you hear that's actually more important than what you hear.
> I thought it was pretty ironic as I sat here listening to all the different witnesses the defense called today, girlfriend, friends. I just kept waiting. I kept thinking at any moment now one of them is going to say, oh, I've listened to that jail tape. That's not his voice. That's not him. I mean that would be the most obvious thing, wouldn't you think? Oh, yes, Desi Bolling has scripted this with somebody. That's not his voice. You didn't hear that once.

(IX 953-54).

Appellant did not object to this argument. After the prosecutor concluded the rebuttal argument, the court informed the jury that it would begin jury instructions after recess (IX 958). After the recess, Appellant moved for mistrial as follows:

> I want to move for a mistrial, Judge, without waiving any further delay in that. During Mr. Moody's rebuttal we think there was fundamental error committed by him shifting the burden of proof in the case when he made the comment that he was kind of surprised. He thought the defense would put on the girlfriend to say it wasn't his voice, and we move for a mistrial based on that.
> We think that improperly suggests to the jury that the defense has a burden of proof, in essence shifting the burden of proof and that's fundamental error and therefore ask for a mistrial.

(IX 958-59). The court responded as follows:

> Thank you. Your motion will be denied. I think it was a fair comment on people who claim to be very knowledgeable of the defendant and was staying with him or seeing him on a daily basis for a number of years, and it just seemed to be a simple, logical question if somebody were to ask him if they recognize the voice. I think it's fair comment on the evidence. Therefore I'll deny the motion.

(IX 959).

Preservation

"In order to preserve a claim of improper prosecutorial argument, '[c]ounsel must contemporaneously object to improper comments.'" *Hayward v. State*, 24 So.3d 17, 40 (Fla. 2009), citing *Bailey v. State*, 998 So.2d 545, 554 (Fla. 2008). Appellant did not contemporaneously object to the offending comment. Instead, Appellant waited until after the conclusion of the State's rebuttal closing, and after a subsequent recess, to move for mistrial. This mistrial motion did not preserve this issue for review. In *Nixon v. State*, 572 So.2d 1336 (Fla. 1990), this Court explained why such a belated mistrial motion does not preserve a complaint regarding the prosecution's closing argument for appellate review.

The prosecutor in *Nixon* made a comment during closing that the defense characterized as a "Golden Rule" argument. *Nixon* at 1340. At the close of the State's argument, defense counsel moved for a mistrial, noting that a curative instruction would be ineffective at that point. *Id.* The trial court denied the motion, finding that the comment at issue was not a Golden Rule argument. *Id.* This Court found that the motion was not timely and, therefore, did not preserve the

issue for review. Noting that "[t]he requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system," in that it "places the trial judge on notice that an error may have been committed and thus, provides the opportunity to correct the error at an early stage of the proceedings," this Court held, "[w]hile the motion for mistrial may be made as late as the end of the closing argument, a timely objection must be made in order to allow curative instructions or admonishment to counsel." *Id.* at 1341.

Nixon applies here. Rather than objecting at the time the prosecutor made the offending comment, or even at the end of closing argument, Appellant waited until after the prosecutor finished his closing and a recess. At that point, any curative instruction or admonishment would have been ineffective.[3,4]

Accordingly, Appellant failed to preserve this issue for appellate review. However, even if the court had denied a

[3]The fact that the trial court here later suggested that the comments were not improper does not obviate the need for an opportunity to issue a curative instruction or admonishment. A finding that the comments were improper does not necessarily mean that the court would not have taken the opportunity to remind the jury that the defense had no obligation to present evidence. Moreover, the trial court in *Nixon* also found that the comments were not improper, but this Court found that the defendant still should have objected contemporaneously in order to permit a curative instruction or admonishment.

[4]One could suspect that Appellant chose not to object because this type of comment is remedied so easily with a curative instruction, choosing instead to move for a belated mistrial, which could be raised on appeal without any curative instruction or admonishment on the record.

contemporaneous motion for mistrial and request for curative instruction, Appellant could still not demonstrate that the comment vitiated the entire trial.

Merits

A mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial. *See Duest v. State*, 462 So. 2d 446, 448 (Fla. 1985). A motion for a mistrial should be granted only in the case of "absolute necessity." *Snipes v. State*, 733 So.2d 1000, 1005 (Fla. 1999). "In order for the prosecutor's comments to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." *Spencer v. State*, 645 So.2d 377, 383 (Fla. 1994). Applying these standards, the court did not abuse its discretion in denying Appellant's motion for mistrial.

During closing arguments, prosecutors and defense counsel enjoy "wide latitude to advance all legitimate arguments and draw logical inferences from the evidence." *Lukehart v. State*, 776 So. 2d 906 (Fla. 2000). "Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment." *Griffin v. State*, 866 So.2d 1, 16 (Fla. 2003).

Normally, "the state cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried

the burden of introducing evidence." *Jackson v. State*, 575 So.2d 181, 188 (Fla. 1991). However, a prosecuting attorney may comment on the jury's duty to analyze and evaluate the evidence and state his or her contention relative to what conclusions may be drawn from the evidence. *See Ruiz v. State*, 743 So.2d 1, 4 (Fla. 1999).

Applying these principles, Appellant cannot show that the prosecutor's remark improperly informed the jury that he was required to produce evidence in his defense that required a mistrial. The argument was a fair comment on the evidence and fair response to Appellant's suggestion in his own closing that the voice could have been someone else's.

First, it should be noted that the prosecutor's comment did not suggest that Appellant should have testified, or that Appellant should have presented certain witnesses, or that Appellant should have introduced certain evidence. Instead, the prosecutor's comment suggested that no evidence supported Appellant's theory about the voice on the recording in spite of the fact he called many witnesses familiar with Appellant's voice. Each of the cases cited by Appellant involve a suggestion that the defendant should have called certain witnesses or presented specific evidence either to rebut the State's theory of the case or to support his own.[5]

These cases, and this legal principle in general, simply supports the right of the defendant to remain silent and require the government

[5]*Jackson v. State*, 575 So.2d 181 (Fla. 1991); *Hayes v. State*, 660 So.2d 257 (Fla. 1995); *Ealy v. State*, 915 So.2d 1288 (Fla. 2d DCA 2005); *White v. State* 757 So.2d 542 (Fla. 4th DCA 2000); *Jackson v. State*, 690 So.2d 714 (Fla. 4th DCA 1997).

to prove its case against him. When the defendant has chosen to present witnesses, and the prosecution merely suggests that these witnesses could have supported a theory presented in closing, this principle is barely implicated, if at all. As such, even if the disputed remark could be characterized as a comment on his right not to present evidence, it is simply not the type of comment that this rule of law seeks to prevent.

In any event, the remark was a fair comment, invited by Appellant's closing argument theory that the voice on the recording could have been someone other than him. "A prosecutor's comments are not improper where they fall into the category of an 'invited response' by the preceding argument of defense counsel concerning the same subject." *Walls v. State*, 926 So.2d 1156, 1166 (Fla. 2006). In his closing, Appellant proposed that Desi Bolling may have "scripted" something with a buddy, and that the voice on the recording was not Appellant (IX 924, 934-35). The prosecutor responded by noting that Appellant presented several witnesses familiar with him, and that none of them testified that the voice on the recording was not Appellant's (IX 953-54).

This comment is essentially the same as arguing that no evidence contradicted the State's evidence on a particular matter, which this Court has held to be proper argument. *See e.g. Poole v. State*, 997 So.2d 382, 390 (Fla. 2008)(holding that the prosecutor's argument that there was no evidence in the case to support the defense's argument was not improper); *Caballero v. State*, 851 So.2d 655, 660 (Fla. 2003)(holding that "it is permissible for the State to emphasize

uncontradicted evidence for the narrow purpose of rebutting a defense argument since the defense has invited the response"); *White v. State*, 377 So.2d 1149, 1150 (Fla. 1979) (holding that "a prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence during argument to the jury"). In other words, the State's evidence established that Appellant's voice was on the recording, and no evidence at trial supported Appellant's theory that it could have been someone else. Such comment is not improper. As the trial court noted, the remark was "a fair comment on people who claim to be very knowledgeable of the defendant and was staying with him or seeing him on a daily basis for a number of years, and it just seemed to be a simple, logical question if somebody were to ask him if they recognize the voice" (IX 959).

Finally, even if the offending remark did constitute an improper comment on Appellant's failure to produce certain evidence, Appellant has failed to meet his burden of demonstrating that the trial court abused its discretion in determining that the comment did not vitiate the entire trial and required a mistrial. First, Appellant's theory about the voice on the recording is based on an erroneous premise. Appellant's argument that led to the disputed remark was that only Desi Bolling testified that the voice was Appellant's, and that Bolling could not be believed and could have fabricated the recording. In fact, Detective Oliver testified that he recognized Appellant's voice on the recording (VII 599-600, VIII 605). As such, the theory was weak at best, and the State's argument refuting it, even if improper, could not have seriously harmed Appellant's defense.

Second, even without Detective Oliver's testimony, Appellant's theory was at best implausible. The recording itself (State's Exhibit #32), which the jury heard, belies any suggestion that it was a scripted endeavor. Again, any response rebutting this argument did not substantially affect Appellant's defense, because the theory itself was so improbable.

Third, the theory about the recording was hardly the centerpiece of Appellant's defense. Appellant aggressively challenged every substantial aspect of the State's case, arguing that little evidence supported Desi Bolling's testimony and asserting that Bolling himself killed Kristo Binjaku. Appellant exploited the lack of clarity in the recording, arguing that any interpretation of the statements in it was speculative.

In short, even if the State were able to refute one of Appellant's arguments with an improper comment, it regarded a relatively insignificant part of Appellant's defense. Again, Appellant is not entitled to reversal unless he demonstrates that the remark vitiated the entire trial, and that the trial court abused its discretion by finding otherwise. The comment at issue here was not improper, and even if it were, it did not deprive Appellant of a fair trial. See e.g. *Smith v. State*, 7 So.3d 473, 509 (Fla. 2009)(holding that prosecutor's improper comment on Smith's right to remain silent did not require a mistrial because it was an isolated comment that "was not so prejudicial as to require reversal").

None of the cases Appellant cites require a different conclusion. In *Hayes v. State*, 660 So.2d 257 (Fla. 1995), the trial

judge overruled a defense objection and allowed the State to ask a witness whether the defense had requested any testing of the blood stains. *Hayes* at 265. Such questioning clearly implies an obligation on the part of the defendant to produce evidence in his defense. The question in no way merely pointed out a lack of evidence to support a defense theory. Moreover, because the defense objected and the court overruled the objection, the State was required to prove that the court's error was harmless beyond a reasonable doubt. *Hayes* does not apply.

In *Ealy v. State*, 915 So.2d 1288 (Fla. 2d DCA 2005), the prosecutor commented repeatedly that no witness had contradicted that the fingerprints were the defendants and no witness testified that the defendant was at the bank another day to explain the fingerprints. The Second DCA ruled that these comments were impermissible, relying on general notions about the impermissibility of burden-shifting comments, but ignoring this Court's well-settled rule, expressed in *Poole*, *Caballero*, and *White*, that a prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence. Even without this error, the comments in *Ealy* were far more egregious than the comments at issue here, to the extent the Second DCA found that the comments suggested that the defendant had an obligation to call a fingerprint expert. Moreover, the Second DCA was troubled by the fact that the prosecutor made three references that it found improper.

In *White v. State*, 757 So.2d 542 (Fla. 4th DCA 2000), the prosecutor explicitly questioned the defendant in cross-examination about his failure to call witnesses in his defense. The Fourth DCA

ruled that the "alibi defense" exception did not apply and that the questioning was therefore improper. Nothing of the sort occurred here. The prosecutor here did not confront Appellant with his failure to call witnesses in his own defense under the mistaken belief that the questioning was a legitimate exception to the rule against commenting on the failure to present witnesses. *White* clearly does not apply here.

The same is true of *Jackson v. State*, 690 So.2d 714 (Fla. 4th DCA 1997). The defendant there was charged with possession of drugs found in an apartment of which the defendant denied ownership and control and knowledge of the drugs' presence in the apartment. He testified that a co-worker had driven him to the apartment the night before to attend a party, and that he was still there the next morning when the police executed the warrant, only because he had been drinking heavily and passed out. *Jackson* at 716. On cross-examination, the prosecutor asked the defendant whether his co-worker would have made a good witness and where he was at the time of trial. In reversing the conviction, the Fourth DCA held that the prosecutor improperly suggested to the jury that the defendant had the burden to call witnesses to prove his innocence. *Id.* Again, nothing of the sort occurred here. The prosecutor did not simply confront the defendant with his failure to call a witness who could support his story. Instead, it merely responded in closing that the evidence did not support the defendant's theory.

In summary, even if this issue were preserved for appellate review, Appellant would not be entitled to relief. The offending

remark was simply not the type of comment that has been ruled burden-shifting. The remark was fair comment, invited by Appellant's theory at closing, and served merely to highlight the fact that no evidence supported the theory. Moreover, even if the comment were improper it cannot reasonably be argued that it vitiated the entire trial. As such, Appellant has failed to demonstrate that the court abused its discretion in denying the motion for mistrial.

ISSUE II

DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING A MOTION FOR MISTRIAL FOR THE INADVERTENT INTRODUCTION OF EVIDENCE THAT APPELLANT HAD BEEN INCARCERATED ON A DRUG CHARGE? (Restated)

Standard of review

"The standard of review for the denial of a motion for new trial is abuse of discretion." *Smith v. State*, 7 So.3d 473, 507 (Fla. 2009).

The trial court's ruling

Appellant introduced the testimony of Ray Washington, a neighbor of Appellant's who testified that Appellant was at a birthday party on June 30, 2007 (IX 785-791). On cross-examination, Ms. Washington testified that detectives had come to question her and others (VIII 794-95). During the State's cross-examination, the following exchange occurred:

> Q Okay. When was the first time you told anybody that he was there on June 30th, 2007?
> A When they came and asked me.
> Q And when was that that they came and asked you?
> A I don't remember.
> Q Was it in 2007? Was it in 2008?
> A Yes. It was after he got incar cerat ed. He had went to jail on a drug charg e. Then Ms. Nicki

calle
d
down
there
and
they
say
he
had a
case
pendi
ng
and
then
that’
s
when
y’all
start
comin
g
out.

Q So when was that?
A I don’t remember.

(IX 798-99). Appellant did not object to the testimony. The prosecutor continued with the cross-examination without any comment on this testimony.

After the conclusion of Ms. Washington’s testimony, Appellant moved for mistrial, which the court denied:

> MR. GAZALEH [defense counsel]: Your Honor, at this time we would move for a mistrial. The state elicited an answer from the witness after repeatedly asking her over and over again the same questions and she volunteered that Mr. Scott was arrested or incarcerated for an offense which was not anything that was to be presented to the jury.
> She testified that he was incarcerated for a drug charge. The jury has not heard that, wasn’t going to hear that and for that reason we would move for a mistrial.
>
> THE COURT: Mr. de la Rionda.
>
> MR. DE LA RIONDA [prosecutor]: Well, I wasn’t expecting obviously for that witness to blurt

> that out. I would assume that since this witness was a defense witness that they would have told the witness not to say anything about any other charges other than the murder charge, but I'm not trying to say that the defense didn't do their job.
> I am just saying I was not anticipating that response and my objective here was to point out in terms of how she remembered specific times and dates and what brought that forward because there is inconsistencies among the witnesses to whether they talked to the police officer or attorney or who and why it took a year and a half for them to disclose these witnesses as alibi witnesses.
>
> THE COURT: Okay. The question itself was clearly not asked to elicit from the witness any information about another arrest of the defendant. This witness merely blurted it out. For all I know she thought of it herself so she could get a mistrial for her friend in this case. I don't know why she said it, but there is absolutely no misconduct of any kind on the part of the State of Florida and I am not going to declare a mistrial when it's not their fault, so your motion is denied. Do you want to do anything else?
>
> MR. GAZALEH: No, sir. I don't want an instruction of any kind.
> THE COURT: Okay. I would give a curative instruction if requested by the defense but they have asked me not to so I won't. Thank you.

(IX 804-05).

Preservation

In spite of Appellant's motion for mistrial, he has not preserved this issue for appellate review. A mistrial cannot be predicated on alleged errors to which the defendant did not contemporaneously object. See *Norton v. State*, 709 So.2d 87 (Fla. 1997). In *Norton*, the defendant complained that a witness made an improper comment during testimony. *Norton* at 94. Rather than object when the witness

made the improper comment, the defendant waited until the close of the witness' testimony at which time he moved for a mistrial. This Court held that the defendant did not preserve the objection for review:

> [D]efense counsel's failure to raise a contemporaneous objection to the comment at the time it was made waived his right to argue this issue on appeal. The purpose of the contemporaneous objection rule is to place the trial judge on notice that an error may have occurred and provide him or her with the opportunity to correct the error at an early stage of the proceedings. A timely objection must be made in order to allow curative instructions or admonishment to counsel. **Thus, despite appellant's motion for mistrial at the close of the witness's testimony, his failure to raise an appropriate objection at the time of the impermissible comment failed to adequately preserve the issue for appellate review**. (Citations and quotations omitted).

Id. The same is true here. Rather than objecting to the improper testimony when it was made, which at the time could have resulted in effective curative instructions, Appellant waited until after after the prosecutor concluded cross-examination and then moved for mistrial. The issue is not preserved.

However, even if this issue were adequately preserved, Appellant has failed to demonstrate that he is entitled to reversal.

Merits

Appellant's own witness gave an unsolicited response during her testimony that revealed a prior charge and jail term for Appellant. In spite of the fact that it was Appellant's own witness who made this disclosure, and in spite of the fact the State in no way invited the disclosure, Appellant contends that it is the State that must suffer

the penalty of mistrial as a consequence of her improper testimony. In fact, Appellant goes so far as to say that the only way the State can avoid a new trial is to prove to this Court beyond a reasonable doubt that his own witness' unsolicited comment did not contribute to the verdict. Such a rule would be grossly unfair to the State, is not necessary to protect Appellant's right to a fair trial, and should be rejected by this Court.

The mere fact that a witness, even a state witness, testifies that the defendant was in jail on other offenses does not require a mistrial. For instance, in *Johnston v. State*, 497 So.2d 863 (Fla. 1986), an investigator testified that the defendant "stated that he was scared because he had already gone to jail for two years for something." *Johnston* at 869. This Court affirmed the trial court's denial of the defendant's motion for mistrial, concluding that "any alleged prejudice which may have resulted from a reference to prior incarceration was fully alleviated by the curative instruction." *Id.*

Although it is true that no curative instruction was given in this case, that was at Appellant's specific request and the trial court was willing to give a curative instruction. As such, this Court can rely on *Johnston* for the proposition that such an improper remark does not require a mistrial in this case.

In *Cox v. State*, 819 So.2d 705 (Fla. 2002), the defendant was on trial for the murder of a fellow prison inmate. A hostile witness for the defendant testified, "Sir, he has two life sentences already." *Cox* at 713. The court informed the jury that the defendant "has never been convicted nor is he serving any sentence for homicide or any type

of murder." *Id.* This Court noted that "the fact that Cox was serving two life sentences was certainly not critical to the State's case, and was not related to its theories ...." *Id.* at 714. As such, the fact that the jury was informed that the appellant was serving two life sentences did not vitiate the entire trial. *Id.*

The same is true here. The fact that Appellant had been jailed on drug charges was in no way related to the State's case against him. Any prejudice from this fleeting, isolated remark could not have vitiated the entire trial. See also *Gorby v. State*, 630 So.2d 544, 547 (Fla. 1993)(holding that a state's witness testifying that the victim told him that he had to help the defendant because the defendant had just gotten out of jail did not require a mistrial).

The District Courts of Appeal have ruled similarly. For instance, in *Ruger v. State*, 941 So.2d 1182 (Fla. 4th DCA 2006), the court ruled that the trial court acted within its discretion in denying a motion for mistrial after the codefendant testified that she had met defendant after he had "just recently got out of prison." Similarly, in *Braggs v. State*, 815 So.2d 657, 662-63 (Fla. 3d DCA 2002)(en banc), *rev'd in part on other grounds sub nom. State v. Ruiz*, 863 So.2d 1205 (Fla. 2003), the court affirmed the denial of a mistrial requested because a witness volunteered that the defendant had been "in and out of jail and stuff like that." The court noted that the testimony "was an isolated comment in a lengthy trial." *Id.*

Again, the same is true here. Ms. Washington's comment was isolated and part of a lengthy trial. The prosecutor continued on with his questioning after the comment, which drew the jury's

attention away from it. Under these circumstances, Appellant has failed to demonstrate that his own witness's comment vitiated the entire trial. As such, the court did not abuse its discretion in denying the motion for mistrial.

Harmless error

Appellant devotes much of his argument to the proposition that the State is required to, and cannot, establish beyond a reasonable doubt that the "error" did not contribute to the verdict, applying the harmless-error standard of *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986). The State asserts that this standard does not apply to the error alleged in this issue. In recent years, this Court has grappled with the issue of the review standard for improper comments to which the defendant objects and/or moves for mistrial. See e.g. *Parker v. State*, 873 So.2d 270 (Fla. 2004); *Dessaure v. State*, 891 So.2d 455 (Fla. 2004); *Salazar v. State*, 991 So.2d 364 (Fla. 2008); *Poole v. State*, 997 So.2d 382 (Fla. 2008). Although these cases concern review of improper prosecutorial comments, the principles discussed apply equally to improper witness comments. In short, the State argues that harmless-error analysis should not be applied in this case, for the simple reason that the trial court committed no error that could be analyzed for harmlessness.

In *Poole*, the defendant objected to an improper comment during the State's closing argument and moved for mistrial. *Poole* at 390-91. This Court found that the comment was erroneous, but ruled that the court did not abuse its discretion in denying the motion for mistrial

because the erroneous comment was not so prejudicial that it vitiated the entire trial. *Id.* This Court added the following in a footnote:

> We recognize that generally, the proper standard of review for an overruled objection based on a comment on a defendant's right to remain silent or defendant's failure to testify is a harmless error test. *See Heath v. State*, 648 So.2d 660 (Fla. 1994); *see also State v. Marshall*, 476 So.2d 150 (Fla. 1985). However, this standard does not apply here because after defense counsel simultaneously objected and moved for a mistrial, the trial judge never ruled on the objection, but simply denied defense counsel's motion for mistrial. As a result, the trial court's ruling on the motion for mistrial is reviewed under an abuse of discretion standard. *Dessaure v. State*, 891 So.2d 455, 464-65 & n. 5 (Fla. 2004) (*citing Cole v. State*, 701 So.2d 845 (Fla. 1997)).

These standards are correct.[6] When a trial court overrules a valid defense objection, it has committed an *error*, and the judgment will be overturned unless the State demonstrates that the error is harmless beyond a reasonable doubt. If the trial court sustains a valid defense objection, then it has committed *no error*; as such, the ruling is not subject to harmless-error analysis.

Moreover, the harmless-error standard logically cannot apply to a ruling on a motion for mistrial. An order on a motion for mistrial evaluates whether an improper comment was so prejudicial that it vitiated the entire trial. An appellate ruling that a trial court

[6]Justice Pariente concurred in *Dessaure*, *Salazar* and *Poole*, based upon the contention that when a defendant objects to an improper comment and moves for mistrial, but the court only rules on the mistrial motion, the objection should be deemed overruled so that the error, if any, should be reviewed under the harmless-error standard. Because Appellant here did not object and only moved for mistrial, Justice Pariente's position is not implicated in this case.

committed an error in denying a motion for mistrial means that the improper comment was so prejudicial that it vitiated the entire trial. Such an error could never be deemed harmless.

These rules are simple and easy to apply. The State asserts confusion has arisen because courts occasionally, and incorrectly, refer the *improper comments themselves* as "error," subject to harmless-error analysis. For instance, in *Czubak v. State*, 570 So.2d 925 (Fla. 1990), the defendant challenged the denial of a motion for mistrial when a state witness (Schultz) disclosed that the defendant was an escaped convict. *Czubak* at 927. On appeal, the defendant argued that the "admission" of this evidence was error and was not harmless error. This Court agreed, and then rejected the State's argument that "Schultz's testimony was harmless error," ruling that it could not "say beyond a reasonable doubt that the verdict was not affected by the revelation that he was an escaped convict." *Id.* at 928.

The reasoning in *Czubak* is flawed in two related respects. First, the improper remark was not "admitted" into evidence. "Admission" of evidence means that the court has ruled that evidence is admissible. Courts, not witnesses, "admit" evidence. The trial court in *Czubak* did not "admit" the improper remark.

More importantly, "error" does not mean an improper remark by a witness or the prosecutor. "Error," in the context of appellate law, means an improper legal ruling by the *trial court* subject to reversal on appeal. An appellate court does not review the actions

of the witnesses; it reviews the actions of the trial court.[7] "Harmless error" means that the court made an improper legal ruling, but that the ruling was not prejudicial. It is simply a misapplication of the law to suggest that a witness' improper remark is an "error" that can be reviewed on appeal for "harmless error."[8]

Thus, when a witness or prosecutor makes an improper comment, the defendant objects, and the court overrules the objection, then the court has committed an error, subject to harmless-error analysis. But if the defendant only moves for mistrial, then it is the trial court's order denying the mistrial that is subject to appellate review. Either way, it is a judicial order that is reviewed for "error," and if it is error, then reviewed for harmlessness.

The State asserts that this reasoning merely supports the standards this Court has already pronounced in *Dessaure*, *Salazar*, and *Poole*. Old cases like *Czubak*, and the District Court of Appeal decisions cited by Appellant in his brief, simply do not apply correctly the standards this Court has set forth in these recent decisions. The State respectfully requests this Court to clarify

---

[7] *See e.g.*, *Tyson v. Aikman*, 159 Fla. 273, 275, 31 So.2d 272, 273 (Fla. 1947)(holding that "[a]n appeal is to consider errors alleged to have been committed by the Chancellor or trial judge"); *Hillsborough County Bd. of County Com'rs v. Public Employees Relations Com'n*, 424 So.2d 132, 134 (Fla. 1st DCA 1982)(holding that "the function of the appellate court is to determine whether the lower tribunal committed error based on the issues and evidence before it").

[8] In *Ward v. State*, 559 So.2d 450, 451 (Fla. 1st DCA 1990), one of the cases cited by Appellant, the First District made the same mistake: "we find that the State has failed to bear its burden of establishing that the erroneous statement made by the victim was harmless beyond a reasonable doubt."

that court rulings are reviewed for error (and harmless error), not remarks of the witnesses or the prosecutor. But whatever the reasoning, this Court has made it clear that orders on motions for mistrial are to be reviewed to determine whether the disputed remarks vitiated the entire trial, and not whether they constitute harmless error.

The State further asserts that this rule should apply with particular force when it is the defendant's own witness who makes the offending remark.[9] The State did nothing to elicit the improper comment from Appellant's witness.[10] Yet, Appellant wishes to make the State responsible for his own witness' improper comment, urging this Court to require the State to defend the remark, and to reverse his conviction if the State cannot demonstrate that her remark was harmless beyond a reasonable doubt.[11] Such a rule could motivate a defense witness, as the trial court here speculated, to secure a mistrial for the defendant simply by mentioning a prior crime of the defendant.

---

[9]In each of the cases cited by Appellant, it was a state witness who disclosed the defendant's crime. *Czubak* at 927 (state witness); *Ward v. State*, 559 So.2d 450, 451 (Fla. 1st DCA 1990) (victim); *Brooks v. State*, 868 So.2d 643 (Fla. 2d DCA 2004) (victim); *McGuire v. State*, 584 So.2d 89 (Fla. 5th DCA 1991) (witness for the state).

[10]Defense counsel's contention when he moved for mistrial that the prosecutor elicited this answer "after repeatedly asking her over and over again the same questions" (IX 804) is false. The prosecutor's question regarding the time of the detective's visit, which led to the improper remark, was the only mention of that subject.

[11]Of course, the State contends that, even if Ms. Washington's remark were considered an "error" subject to harmless-error analysis, it would be harmless for the reasons mentioned above.

Appellant has failed to meet his burden of demonstrating that the trial court abused its discretion in denying Appellant's motion for mistrial. He is not entitled to relief.

ISSUE III

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS A RECORDING OF APPELLANT'S STATEMENTS MADE IN JAIL? (Restated)

Standard of review

"Generally, in reviewing a trial court's ruling on a motion to suppress, this Court accords a presumption of correctness to the trial court's findings of historical fact, reversing only if the findings are not supported by competent, substantial evidence, but reviews de novo 'whether the application of the law to the historical facts establishes an adequate basis for the trial court's ruling.'" *Parker v. State*, 873 So.2d 270, 279 (Fla. 2004), citing *Connor v. State*, 803 So.2d 598, 608 (Fla. 2001).

The trial court's ruling

Appellant filed a motion suppress the recording of the conversation between Desi Bolling and Appellant in the Duval County Jail alleging, among other grounds, that the recording was obtained in violation of "constitutional rights," because he was in custody at the time of the recording and the recording was done at the direction of the Jacksonville Sheriff's Office (II 223-26). In support of this contention, Appellant alleged that on October 1, 2007, based on information from Bolling, Detective Oliver issued an "Intelligence Bulletin" for Appellant "listing him as a co-defendant of Bolling in the murder" (II 223). Appellant was later that day arrested on a drug-possession charge and jailed. *Id.* The following day, Detective Oliver cancelled the Intelligence Bulletin. Appellant was housed with Bolling, and on that day, October 2, 2007,

Bolling was outfitted by the Sheriff's Office with a recording device and instructed to attempt to engage Appellant in a conversation about the murder. *Id.* Bolling did so, and the recording of the conversation revealed inculpatory statements by Appellant that the State intended to use against Appellant at trial. *Id.* at 224.

On October 10, 2007, eight days after the recorded encounter with Bolling, Appellant was arrested and booked on the attempted robbery and murder charge (I 1-5).

Appellant offered nothing further in support of this particular ground for suppression at either hearing on the motion (IV 675-79, VI 228-233). The prosecutor noted that the "key fact" the court needed to consider was that Appellant was in jail on a separate offense unrelated to the murder, and that the recording was not improper under the authority of *Illinois v. Perkins*, 496 U.S. 292, 110 S.Ct. 2394 (1990) (IV 677-78). The court denied the motion (II 235).

Preservation

Appellant's motion to suppress did indeed vaguely refer to the recording violating his "constitutional rights" because he was "in custody at the time of the questioning by the co-defendant" (II 225). This argument may be considered barely specific enough to preserve the issue that the recording violated his Sixth Amendment right to counsel.

Merits

In *Illinois v. Perkins*, police placed an undercover agent in a jail cellblock with Perkins, who was incarcerated on charges unrelated to the murder that the undercover agent was investigating. *Perkins*, 496 U.S. at 294-95. In response to inquiries from the agent, Perkins implicated himself in the murder. *Id.* The Court held that the statements were admissible and did not violate Perkins' Fifth Amendment right to counsel, in spite of the fact that the undercover agent had not given *Miranda* warnings to Perkins before securing the incriminating statements.

Appellant does not dispute *Perkins* forecloses any argument that the admission of the recording violates his right to counsel during questioning under the Fifth Amendment. Instead, Appellant argues that *Perkins* does not apply because he is claiming a violation of his Sixth Amendment right to counsel, as well as the Sixth Amendment's Florida Constitution counterpart, article 1, section 16 (IB 49).

If officers had directed Bolling to engage Appellant in conversation at the jail in order to obtain incriminating statements after Appellant's right to counsel under the Sixth Amendment or section 16 had attached, the statements would be inadmissible. *See Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199 (1964); *Peoples v. State*, 612 So.2d 555 (Fla. 1992).

Unlike the right to counsel during questioning under the Fifth Amendment, the Sixth Amendment right to counsel is offense-specific. *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093 (1988); *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204 (1991); *Sapp v. State*, 690 So.2d 581 (Fla. 1997). As such, Appellant's Sixth Amendment right

to counsel for the drug charge for which he was jailed did not extend to the murder charge, which was not filed until eight days after the recorded encounter with Bolling.

"The Sixth Amendment right to counsel 'attaches at the earliest of the following points: formal charge, preliminary hearing, indictment, information, or arraignment.'" *Owen v. State*, 986 So.2d 534, 545 (Fla. 2008), citing *Smith v. State*, 699 So.2d 629, 638 (Fla. 1997). *See also Traylor v. State*, 596 So.2d 957 (Fla. 1992)(holding that "a defendant is entitled to counsel [pursuant to section 16] at the earliest of the following points: when he or she is formally charged with a crime via the filing of an indictment or information, or as soon as feasible after custodial restraint, or at first appearance"). Plainly, none of the points had occurred at the time of the recorded encounter between Appellant and Bolling. As such, the State did not interfere with Appellant's right to counsel under the Sixth Amendment in violation of *Massiah* or *Peoples*.

Appellant rejects these explicit rules regarding the point at which the right to counsel attaches, arguing instead that the right attaches at some indefinite time when "the State's investigatory function has shifted to an accusatory one" (IB 48). Appellant claims that this "shift" occurred when Detective Oliver issued the Intelligence Bulletin, which allegedly identified Appellant as a co-defendant in the robbery and ordered him to be picked up. The State disagrees.

First, because neither the "Intelligence Bulletin," nor any testimony regarding the effect of this document, is in the record,

it is impossible to judge the effect it may have had on the attachment of Appellant's Sixth Amendment rights.

Second, Appellant cites nothing suggesting that this bulletin overrides the well-settled rules regarding the attachment of the right to counsel. The fact that the bulletin called for Appellant to be "picked up" certainly does not alter these rules. Even if Appellant were specifically brought in for questioning on the murder, this would not invoke his Sixth Amendment right to counsel. The fact remains that Appellant was jailed on a drug charge, no matter what his status in the murder investigation was at the time.

Finally, even if the phrase "accusatory stage" had any meaning beyond what this Court has already given it in *Traylor*, the State disagrees that the record demonstrates that the Intelligence Bulletin demonstrated a shift from investigatory to accusatory function. At the time, Bolling was already under arrest for the murder and attempted robbery, and was implicating Appellant. Police had no particular reason to believe Bolling; certainly they suspected that it was possible that Bolling was lying and attempting to shift the blame from himself. Police allowed Bolling to attempt to secure information that would inculpate Appellant, and exculpate himself. Bolling was successful. Obviously, after police heard the recording, they began to prepare for the accusatory stage of the proceedings with Appellant. But at the time they outfitted Bolling with a recording device, they were certainly still in the investigatory stage of the proceedings, especially with regard to Appellant.

As such, even if Appellant were correct that "accusatory function" could begin sooner than the points outlined in *Traylor*, nothing here shows that the police were not still in an investigatory stage at the time they sent Bolling to speak with Scott. Appellant has failed to demonstrate that the court erred in denying his motion to suppress, and is not entitled to reversal.

ISSUE IV

IS THE DEATH SENTENCE PROPORTIONATE? (Restated)

"In deciding whether death is a proportionate penalty, the Court makes a 'comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence.'" Simpson v. State, 3 So.3d 1135 (Fla. 2009), *citing* Anderson v. State, 841 So.2d 390, 407-08 (Fla. 2003). The death penalty is reserved only "for the most aggravated and least mitigated murders." *Anderson*, 841 So.2d at 408. Proportionality review is not a comparison between the number of aggravating and mitigating circumstances; rather, this Court considers the totality of circumstances compared to other capital cases. Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). The State asserts that the death sentence is proportionate to this murder.

In its sentencing order, the court summarized the facts as follows:

> On June 30, 2007, the Defendant and an unidentified individual, known only as Miami, entered the Binjaku Crystal Coin Laundry to rob the business. Binjaku Crystal Coin Laundry was owned by Kristo Binjaku, a former Albanian police officer who immigrated to this Country with his family. The Defendant and Miami and t-shirts covering their faces and were armed with handguns. Once the Defendant was inside Binjaku Crystal Coin Laundry, the Defendant hit Kristo Binjaku's friend, Gentian Koci, in the head with the butt of a handgun. The Defendant then attempted to rob Kristo Binjaku. When Kristo Binjaku refused to give the Defendant the money, the Defendant fatally shot Kristo Binjaku in the mouth. Following the attempted robbery, the Defendant and Miami ran to a nearby school

where the co-defendant Desi Bolling, picked them up.
During the attempted robbery, Kristo Binjaku's fourteen year old son, Xhulio Binjaku, was outside of the store. When he heard the shot, he entered the store to see his father on the ground with Gentian Koci attempting to render aid. Xhulio Binjaku called 911.

(III 549-550).

Appellant indicates that he "met some resistance" from Gentian Koci when he entered the store, and that Kristo Binjaku rushed at him with a chair raised as a club (IB 51-52). While it is true that these statements are consistent with Appellant's jailhouse conversation with Desi Bolling, they are not consistent with the testimony of Gentian Koci and Ismet Rapi, the only eyewitnesses to the murder to testify. Koci testified that he was hit in the shoulder, and when he turned his head to see who there, he was struck "with metal thing in my head" (VI 314). Koci's description reflected a violent, unprovoked attack of which he was barely aware until after it happened. Moreover, Koci testified to the following after he was struck:

Q Tell us what --
A (Through interpreter.) Kristo get up from the place when he was working and he talked with these people and he told them just go away now. What you want here? And he put his hand like this.
Q How did he put his hands, up?
A (Through interpreter.)
Yes.
Like
this.
What
you
want
here?

Q And what happened then?

A (Through interpreter.) They shot him.

(VI 316-317). Rapi testified that "[t]he man with the gun pointed it at Mr. Koci and then hit him with it" (VI 337). Rapi then saw Mr. Binjaku get up and tell the intruders that he did not have any money and to go away (VI 338). The man pointed the gun at Binjaku and shot him. *Id.* In short, the only testimony at trial reflected that Appellant struck Koci in the head with a pistol the moment Appellant walked into the laundry, and that Binjaku did not threaten Appellant any more than raising his hands up and telling Appellant and his accomplice to go away.

In sentencing Appellant to death, the trial court found two aggravating circumstances: previous conviction of violent felony (i.e., the contemporaneous conviction of aggravated battery upon Gentian Koci), and murder committed while engaged in an attempt to commit armed robbery (III 552-553). Each aggravating factor was given great weight.

The court rejected both proposed statutory mitigating circumstances, no significant history of prior criminal activity, and age of defendant, finding each of them not proven (III 553-557). The court found nine non-statutory circumstances, but onhy assigned each of them "slight weight:"[12] religious faith, love for family and friends, father was absent from Defendant's life, Defendant's family loves him, Defendant was a good and respectful son, Defendant is a

[12]With regard to the mitigating circumstance "Defendant was a good and respectful son," the court actually used the phrase "little weight" instead of "slight weight."

good surrogate father, Defendant can be a good father figure from prison, Defendant overheard domestic abuse as a small child, and the Defendant once stopped a man from stealing from Winn Dixie.

The "totality of the circumstances" includes facts supporting the reasonableness of the great weight attributed to each aggravator. *See Hunter v. State*, 8 So.3d 1052, 1071 (Fla. 2008)("[W]eighing the aggravating circumstances against the mitigating circumstances is the trial judge's responsibility and it is not this Court's 'function to reweigh those factors'"; "weight that the trial court ascribes to the aggravating and mitigating circumstances is subject to review for an abuse of discretion").

With regard to the prior violent felony aggravator, the evidence showed that Appellant personally committed an aggravated battery upon Gentian Koci prior to his murder of Kristo Binjaku. "[T]he contemporaneous conviction of a violent felony may qualify as an aggravating circumstance, so long as the two crimes involved multiple victims or separate episodes." *Frances v. State*, 970 So.2d 806, 816 (Fla. 2007), citing *Pardo v. State*, 563 So.2d 77, 80 (Fla. 1990).

With regard to the engaged in an attempt to commit armed robbery aggravator, the evidence demonstrated that Appellant and his accomplice entered the Binjaku Crystal Coin Laundry with the intent to rob the store, and that in the course of the robbery, Appellant shot and killed Kristo Binjaku.

Just as importantly, Appellant presented very weak mitigation evidence. The court rejected Appellant's only statutory mitigation of no significant history of prior criminal activity and age (III

553-556). Appellant presented no mental-health evidence to mitigate the murder. Appellant presented no evidence of abuse as a child. The court did find nine non-statutory mitigators, but none of them were substantial, and the court only gave slight weight to each of them.

"[W]here the aggravating circumstances are very strong and the mitigating circumstances are relatively weak, this Court has found that the death penalty is proportionate." *Phillips v. State*, - So.3d - 2010 WL 1904537, *8, - So.3d -, (Fla. May 13, 2010). This is the case here. Any claim that the aggravators in this case do not support the death penalty must also consider the weakness of Appellant's mitigation. On balance, the death penalty here is proportionate.

A comparison of the facts of this case with similar cases likewise demonstrates that the death sentence was proportionate.

Hayward v. State, 24 So.3d 17 (Fla. 2009), concerned a convenience store robbery where the victim was shot. The defendant confronted the victim, who was heard saying shouting, "I don't have no more, I don't have no more." *Hayward* at 24. The witness then heard two gunshots followed by another, louder gunshot. *Id.* When paramedics arrived, the victim stated that a black male with a black stocking cap over his face ran up to him and shot him. He also told the officer that he fired back with his handgun, but that he "didn't know what happened to it." The victim died soon thereafter. *Id.*

The trial court found in aggravation: (1) prior violent felony (based on three prior violent felonies including second-degree murder) which was given great weight; and (2) that the murder was

committed while Hayward was engaged in a robbery, which was merged with the pecuniary gain aggravator and given great weight. These aggravators were weighed against eight nonstatutory mitigating factors which were given very little to some weight: (1) Hayward could have gotten a life sentence (very little weight); (2) he grew up without a father (some weight); (3) he was loved by his family (little weight); (4) he had academic problems (little weight); (5) he obtained a GED in prison (little weight); (6) he would make a good adjustment to prison (little weight); (7) he had financial stress at the time of the crime (little weight); and (8) he had some capacity for rehabilitation (little weight). *Id.* at 46. The Court found the death sentence proportionate. *Id.* at 46-47.

In *Bryant v. State*, 785 So.2d 422 (Fla. 2001), the defendant killed the owner of a store during the course of an armed robbery. Two men came into the store, and ordered the victim's wife to open the cash register and demanded money, whereupon she took money from the cash register and gave it to one of the intruders. *Id.* at 426. In his confession, the defendant stated that the owner began to struggle and wrestle with him over the gun, until the defendant got control of the gun and shot the victim. When the victim continued to fight, the defendant shot him again, and then a third time, and then fled the store. *Id.* at 427.

The trial court found three aggravators: (1) the defendant was previously convicted of a felony involving the use or threat of violence to the person, (2) the capital felony was committed while the defendant was engaged in the commission of or in an attempt to

commit the crime of robbery, and (3) the crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. The court did not find the existence of any statutory mitigating circumstances, but did find the existence of the nonstatutory mitigator of remorse; however, because of Bryant's subsequent actions, very little weight was accorded this circumstance. *Id.* at 436-37. This Court affirmed the imposition of the death penalty. On postconviction appeal, this Court found that the "avoid arrest" aggravator was improper, but found the error harmless, as the other aggravators were sufficient to support the death penalty. *Bryant v. State*, 901 So.2d 810, 828-830 (Fla. 2005).

Jackson v. State, 502 So.2d 409 (Fla. 1986), also involved a store robbery. The defendant and another man entered a hardware store. The defendant pretended to purchase something, but when the store owner opened the register, the accomplice produced a pistol and pointed it at the store owner's head. *Id.* at 410. The defendant began removing money, when the store owner grabbed him, apparently to retrieve his money. The accomplice then leaned over the counter and fired a single, fatal shot into the victim.

This Court struck the "avoid arrest" and HAC aggravators, leaving two valid aggravators of previous conviction of a violent felony (attempted armed robbery) and committed during the course of a robbery. *Id* at 411-13. The trial court had found no mitigation. *Id.* In spite of the fact that the defendant was not even the triggerman, this Court affirmed the death penalty, based in large part on the lack of mitigation.

Finally, this Court recently affirmed the death sentence in *Phillips v. State*, - So.3d - 2010 WL 1904537, - So.3d -, (Fla. May 13, 2010). The defendant there robbed a man at gunpoint. Another man began running at the defendant, who fatally shot him. The robbery victim then took off running, and Phillips began shooting at him. Phillips then jumped in the robbery victim's vehicle and drove off. *Id.* at *1. The trial court assigned great weight to each aggravating circumstances-(1) Phillips was convicted of another capital felony or of a felony involving the use or threat of violence to the person, (2) the crime for which Phillips was to be sentenced was committed while the defendant was engaged in the commission of the crime of armed robbery, and (3) the crime for which Phillips was to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest, or effecting escape from custody-the trial court assigned each great weight. The trial court found no statutory mitigating circumstances, but the trial court also considered twenty-five nonstatutory mitigating circumstances and assigned each a relevant weight. *Id.* at *8.

Noting that "where the aggravating circumstances are very strong and the mitigating circumstances are relatively weak, this Court has found that the death penalty is proportionate," this Court affirmed the imposition of the death penalty.

These cases are substantially similar to the instant case; all involved shootings during a robbery where it does not necessarily appear that the shooting was planned prior to the robbery. The aggravating circumstances were all similar to the ones found here.

Perhaps more importantly, each of these cases involves relatively weak mitigation that could not offset the aggravating circumstances, even without aggravating circumstances like heinous, atrocious and cruel, or cold calculated, and premeditated.

None of the cases Appellant cites demonstrate that the death sentence here was disproportionate. In *Hess v. State,* 794 So.2d 1249 (Fla. 2001), both of the aggravating circumstances were suspect. The evidence that the murder occurred during a robbery was exceptionally weak, "as there were no witnesses to the crime and the appellant's statements reflect a variety of bizarre scenarios." *Id.* at 1266. Moreover, the prior violent felony aggravator were weakened by the fact that "the state presented no facts as to the circumstances surrounding the offenses," and that the mother of the victims of appellant's alleged sex crimes "testified extensively in support of appellant during the penalty phase of the trial, including offering testimony that she and her daughters have forgiven him for his conduct." Id. at 1266.

Moreover, *Hess* involved significantly more mitigation than this case does. In *Hess*, this Court referred to the "extensive evidence presented in mitigation," including the fact that Hess had a history of learning disabilities, was considered ten years behind his chronological age, was considered borderline retarded during his school years and was placed in special education classes as a result of his mental or emotional infirmities. The record also reflects that appellant was diagnosed in 1991 as being chronically depressed and suffering from substantial mood swings, for which he was placed on

prescription medication. As of the time of the penalty phase proceeding, appellant was still taking medication for depression and had been receiving counseling in jail since October of 1995. In short, *Hess* bears little resemblance to the instant case.

The same is true of *Johnson v. State*, 720 So.2d 232 (Fla. 1998). There, prior violent felony aggravator was based in part on an aggravated assault for which the victim was not injured and occurred because of a misunderstanding. *Id.* at 238. The aggravator was also based in part on Johnson's two contemporaneous convictions as principal to crimes against one of the victims simultaneously committed by Johnson's co-defendant. Moreover, *Johnson* involved substantial mitigation, to which the trial court accorded "substantial weight to the final mitigating circumstance." *Id.*

In *Terry v. State*, 668 So.2d 954 (Fla. 1996), the prior violent felony aggravator was based on an aggravated assault committed by the co-defendant who pointed an inoperable gun at the victim. *Terry*, 668 So.2d at 965 ("The second aggravator, prior violent felony, does not represent an actual violent felony previously committed by Terry, but, rather, a contemporaneous conviction as principal to the aggravated assault simultaneously committed by the co-defendant Floyd who pointed an inoperable gun at Mr. Franco").

Here, unlike *Terry*, it was Scott's, not any co-defendant's conduct, that was the basis of the prior violent felony aggravator. Moreover, the crime here that was the basis of the aggravator was an aggravated battery where Scott pistol-whipped a second victim, not an assault were no actual harm to the victim occurred, as in *Terry*.

This Court has ruled that it is the fact that a co-defendant committed the "prior violent felony," and that the victim of that crime was not injured that is the key characteristic of *Terry*, rather than the fact that it was a contemporaneous felony. *See Cole v. State* 701 So.2d 845, 852 (Fla. 1997):

> Cole next challenges the weight which the trial court assigned to the prior-violent-felony aggravator because it was based upon Cole's contemporaneous convictions for violent felonies upon Pamela Edwards. This aggravator was established beyond a reasonable doubt. ... We find Cole's reliance upon *Terry v. State*, 668 So.2d 954 (Fla. 1996), to be misplaced. This Court in *Terry* found that it was relevant, when considering the entire circumstances of the case for purposes of proportionality review, that the prior- violent-felony aggravator was predicated upon a contemporaneous conviction as a principal to an aggravated assault committed by a co-defendant. ... ***Terry* is thus distinguishable from the instant case because the aggravating circumstance here is predicated upon Cole's own actions in forcibly subduing Pam, handcuffing her, robbing her of personal property including her jewelry, money and car keys, and raping her twice**.

Moreover, the decisions in *Hess* and *Johnson* are based in large part on the strength of the mitigation. Even if these cases are similar to the instant cases in terms of the aggravators, the lack of substantial mitigation is what distinguishes this case from those.

Accordingly, the death sentence imposed here is proportionate, and should be affirmed.

ISSUE V

DID THE TRIAL COURT PROPERLY DENY THE MOTION TO DECLARE FLORIDA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL BASED ON *RING V. ARIZONA*, 536 U.S. 584, 122 S.Ct. 2428(2002)? (Restated)

Scott asserts Florida's capital sentencing scheme is unconstitutional in light of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002). He urges this Court to recede from its prior precedent in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002) and *King v. Moore*, 831 So.2d 143 (Fla. 2002). This Court should decline to do so. *Ring* does not invalidate Florida's death penalty. This Court has consistently rejected *Ring* claims. Moreover, Scott's jury recommended the death penalty. Even if *Ring* applied in Florida, a jury's recommendation of death necessarily means that the jury found at least one aggravator, as both this Court and the United States Supreme Court have explained. Furthermore, the jury unanimously found two of the aggravators in the guilt phase. Thus, the trial court properly denied the motion.

The trial court's ruling

Prior to trial, defense counsel filed a written "motion to declare Florida's capital sentencing procedure unconstitutional under *Ring v. Arizona*" (I 112-121). The trial court denied the motion. Furthermore, defense counsel filed a written "motion to dismiss the indictment and to declare sections 782.04 and 921.141, Florida Statutes, unconstitutional for failure to meet requirements of and memorandum of law" (I 183-197). The trial court denied that motion as well.

Preservation

This issue is preserved. Defense counsel properly filed a motion raising the same claim as is currently being raised on appeal and properly obtained an adverse ruling. *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008), modified 986 So.2d 560 (Fla. 2008) (noting that "[t]o be preserved, the issue or legal argument must be raised and ruled on by the trial court" citing § 924.051(1)(b), Fla. Stat.)

Standard of review

Whether a statute complies with the Sixth Amendment right to a jury trial is a question of law reviewed *de novo*. Cf. *United States v. Seymour*, 519 F.3d 700 (7th Cir. 2008)(concluding that an "*Apprendi* issue is subject to *de novo* review."); *United States v. Salazar-Lopez,* 506 F.3d 748, 750-751 (9th Cir. 2007)(noting that preserved *Apprendi* challenges are reviewed *de novo*.).

Merits

> The Sixth Amendment to the federal constitution provides:
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In *Ring v. Arizona*, 536 U.S. 584, 589, 122 S.Ct. 2428, 2432 (2002), the United States Supreme Court held "capital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." This Court has

repeatedly held that Florida's death penalty scheme does not violate *Ring*. *See e.g. Miller v. State*, - So.3d -, -, 2010 WL 2195709, *6-*7 (Fla. June 3, 2010)(rejecting a due process challenge based on *Apprendi* and *Ring* to Florida capital sentencing scheme and explaining "the indictment is not required to express this specific statutory language because the statute affords sufficient notice to satisfy due process."); *Zommer v. State*, 31 So.3d 733, 752-753 (Fla. 2010)(noting "on numerous occasions," this Court has rejected the assertion that *Apprendi* and *Ring* require that aggravating and mitigating circumstances be found individually by a unanimous jury and also rejecting a claim that *Apprendi* requires sufficient aggravating circumstances and insufficient mitigating circumstances must be charged in the indictment and noting "we have previously rejected constitutional challenges to an indictment for failure to list the aggravating circumstances that the State intends to prove"); *Poole v. State* 997 So.2d 382, 396 (Fla. 2008)(noting that "since the *Ring* decision, we have rejected similar arguments that Florida's death penalty statute is unconstitutional based on *Ring*" citing *Marshall v. Crosby*, 911 So.2d 1129 (Fla. 2005); *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002) and *King v. Moore*, 831 So.2d 143 (Fla. 2002)).

Furthermore, the jury unanimously found two of the aggravators in the guilt phase by convicting Scott of attempted robbery and aggravated battery. The jury convicted Scott of both premeditated murder and felony murder by special verdict; of attempted robbery with a firearm; and of aggravated battery with a firearm (II 376-379). One of aggravators in this case is the prior violent felony aggravator

based on the contemporaneous conviction for aggravated battery with a firearm of the second victim, Gentian Koci. The jury also found the "during the course of a robbery" aggravator during the guilt phase by convicting Scott of attempted robbery with a firearm.

In *Turner v. State*, - So.3d -, 2010 WL 1994494, *15 (Fla. 2010), this Court rejected a *Ring* claim. This Court noted that it "has consistently rejected the position that section 921.141, Florida Statutes (2005), is unconstitutional under the Sixth Amendment." This Court also explained *Ring* did not apply to these facts because the "during-a-felony" and "prior violent felony" aggravating factors were present.[13] This Court also observed that Turner had not "established any basis on which this Court should reconsider the established points of law with regard to Florida's capital sentencing scheme."

Here, as in *Turner*, the "during-a-felony" and "prior violent felony" aggravators are present. Moreover, here, as in *Turner*, Scott provides no reason for this Court to recede from its well-established precedent regarding *Ring*'s and *Apprendi*'s application to Florida's death penalty scheme. Here, as in *Turner*, this claim should be rejected.

[13] It is probably more accurate to refer to *Ring* being satisfied rather than not applying to cases where the "during-a-felony" and "prior violent felony" aggravators are present. *Ring* is satisfied in the case of the "prior violent felony" aggravators because a prior jury made the finding rather than the current jury. And *Ring* is satisfied in the case of the "during-a-felony" aggravators because a this jury made the finding albeit during that guilt phase rather than the penalty phase.

Opposing counsel's argument completely ignores the reasoning of this Court's decision in *State v. Steele*, 921 So.2d 538, 547 (Fla. 2005). In *Steele*, this Court explained that, even if *Ring* applied in Florida, it would require only that the jury make a finding that at least one aggravator existed. Given the requirements of section 921.141 and the language of the standard jury instructions, such a finding is implicit in a jury's recommendation of a sentence of death. *Steele*, 921 So.2d at 546. The *Steele* Court relied on *Jones v. United States*, 526 U.S. 227, 250-251, 119 S.Ct. 1215 (1999), in which the United States Supreme Court explained that, in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055 (1989), "a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." So, according to the Florida Supreme Court in *Steele*, a jury's recommendation of death means that the jury found an aggravator, which is all *Ring* requires. *See also Poole v. State*, 997 at 396(rejecting a request that this Court reconsider the holding in *Steele* that the finding of at least one aggravator is implicit in the jury's recommendation of death). Both this Court and the United States Supreme Court have explained that a jury's recommendation of death means the jury necessarily found one aggravator. Here, the jury recommended death. Therefore, his jury necessarily found an aggravator which is all that *Ring* requires.

Accordingly, Florida's death penalty statute is not a violation of *Ring.* Thus, the trial court properly denied the motion.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's judgment and sentence entered in this case.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to W. C. McLain, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on June 21, 2010.

Respectfully submitted and served,

BILL McCOLLUM
ATTORNEY GENERAL

_____

By: THOMAS D. WINOKUR
Attorney for State of Florida

Assistant Attorney General
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300
(850) 922-6674

Florida Bar No. 906336
[AGO# L09-2-1305]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Thomas D. Winokur
Attorney for State of Florida

[C:\USERS\CRIMINAL\PLEADING\09201305\SCOTT-BA.WPD --- 6/23/10,8:13 AM]