IN THE SUPREME COURT OF FLORIDA

MICHAEL L. KING,

Appellant,

v. **CASE NO. SC09-2421**
L.T. Nos. 2008 CF 001087 NC
STATE OF FLORIDA, **2008 CF 000936 NC**

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR SARASOTA COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

On the afternoon of January 17, 2008, victim [redacted] was at home in North Port with her two young children. (V21, 1873, 1898). [redacted] husband, Nathan, last spoke with [redacted] at 11:09 AM on January 17, 2008.[1] (V21, 1916). During the conversation, Mrs. [redacted] said that she was going to give their oldest son a haircut. When Nathan arrived home at 3:30 PM, the doors were locked but [redacted] was not home. Their children, ages 6 months and two years, were in a crib together, which was not typical for them. [redacted]'s purse, cell phone, and keys were all left at the house. (V21, 1916).

Aside from some "disarray" associated with young children, there was no evidence of a struggle inside the house and Mrs. [redacted]'s purse, keys, cell phone, and vehicle were left at the home. (V21, 1874, 1898). The front door was locked upon closing, but the top lock, a deadbolt, was not locked. (V21, 1899). Given the unusual circumstances, of a young mother leaving an infant and toddler at home along, the investigative bureau was quickly called out by the first responding police officer. (V21, 1902).

That afternoon, [redacted]'s next door neighbour on Latour Avenue, Jennifer Eckert, observed a dark green Camaro slowly circling

[1] This information was read to the jury through a stipulation.

the block, passing by 4 to 5 times. (V21, 1928, 1931). The car had a dark cover over the headlights. (V21, 1932). She went outside of her home and observed the sole occupant of the car through an open window. (V21, 1932). The driver had a heavy-set face, blondish hair which was sticking up, and light eyes. (V21, 1937). The car pulled into the [redacted]s' driveway and parked. (V21, 1933). Ms. Eckert did not observe the individual get out of the car but heard a car door "slam." (V21, 1934). Ms. Eckert assumed that he was a friend of the [redacted]s, so she turned and went back inside of her house. (V21, 1935). Ms. Eckert was inside her house for about 10 or 15 minutes and saw the car pull out of the [redacted]s' driveway. (V21, 1935).

After police spoke with Ms. Eckert, an extensive search began for Mrs. [redacted] and a green 1990's Camaro. (V21, 1875). The search included Charlotte County Sheriff's Officers, Sarasota County Sheriff's officers, Venice Police Department officers and according to Detective Morales, it was "basically word of mouth that off-duty officers were hearing about it, they were just coming out in full force." (V21, 1853).

At 6:14 PM, a 911 call was received on January 17, 2008, from [redacted]. (V23, 2239). [redacted] is heard pleading with King: "I just want to see my family again." "Let me go." (V23, 2239). [redacted] is heard repeatedly asking to be let go, to

"please let me see my family again." (V23, 2239). The 911 operator can be heard asking for information, and [redacted] states: "My name is [redacted]. I'm married to a beautiful husband, and I just want to see my kids again." (V23, 2241). She also states, "Please, God. Please protect me." (V23, 2241). King repeatedly asks if [redacted] has his phone. [redacted] says "I don't - - I don't have it. I'm sorry." (V23, 2242). In response to the operator's question about her last name, [redacted] says "[redacted]." (V23, 2242). [redacted] asks "are you going to hurt me?" (V23, 2243). In response, King orders [redacted] to give him "the phone." Id. [redacted] asks King if he would let her out now, and King responds: "As soon as I get the phone." The last thing heard on the recording is [redacted]'s voice: "Help me." (V23, 2244). King and [redacted]'s voice are positively identified on that 911 call.

The State established that [redacted] 911 call came from King's cell phone. 911 records and AT & T phone records establish that the call was made from a cell phone registered to Mike King. (V22, 2132-33, 2163-66).

Harold Muxlow is Michael King's cousin and has known him all of his life, some 30 or 35 years. (V21, 1953). On the early evening of January 17, 2008, King visited him at his house on Karluk Street, at approximately 5:30 or 6:00 PM. (V21, 1955).

Muxlow had not expected to see King that evening. King said that his lawnmower was stuck in his front yard and he needed to borrow some tools. (V21, 1955). He wanted to borrow a "shovel, gas can, and a flash light." (V21, 1956). Muxlow began walking to his trailer with King and he observed King's car, a green Camaro with a black leather bra on the front. (V21, 1959, 1966). Muxlow entered the trailer and handed the shovel, gas can and flash light to King. (V21, 1960). King said to Muxlow, "I got to go, and he took off." (V21, 1960). Muxlow went back toward his house and heard the weight of the shovel or something else, hit the car. He turned toward King's car and heard a girl's voice cry out "to call the cops." (V21, 1961). When he heard the woman's voice, Muxlow turned back and walked toward King's car. (V21, 1962-63). He asked King, "what the fuck are you doing?" (V21, 1962). King responded by popping his head up, stating: "Nothing, don't worry about it." (V21, 1962). Muxlow thought maybe it was a "boyfriend/girlfriend" thing and turned back around to go into the house. (V21, 1963). However, curiosity got the best of him, and, he turned again toward the car and could see a woman's silhouette in the center of the car and a hand. Muxlow observed shoulder-length hair and then saw King push "her head down and then take off." (V21, 1963). King climbed over the console of the car and was facing the backseat.

Muxlow observed King push down a head. The only other part of the body he could see was a knee from a person. After pushing down the head, King moved back into the driver's seat of the car. (V21, 1966). Muxlow went back into his house as King drove off. (V21, 1966). When King showed up at his door, Muxlow testified that King was wearing a "white shirt with stuff on it, like a design." (V24, 2429).

Muxlow was troubled by what he heard and saw so he called his daughter to come over to watch his bedridden mother. (V21, 1966-67). Muxlow told her what had happened and wanted to check "out the story, just didn't seem right." (V21, 1967). Muxlow drove over to King's house in North Port. When he got there, he did not see a lawnmower stuck in the yard or King's green Camaro. He checked the door which was locked. Muxlow looked inside a window and could see a TV on. (V21, 1968). Muxlow dialed 911 from a gas station but was not totally forthright with the operator. Muxlow wanted to remain anonymous because King was his cousin. (V21, 1970). Muxlow gave a description of the car to a 911 operator and stated that someone in that car "seems like they might not want to be where they want to be." (V21, 1970). When Muxlow arrived back home, there were three

police cars on his street.[2] (V21, 1971). Although, Muxlow told his daughter Sabrina not to call the police until he could check it out, Sabrina called the police anyway. Muxlow, while initially upset at his daughter, was proud of her for ignoring his request and calling the police. (V21, 1994).

In court, Muxlow identified the "Maglight" flashlight, his gas can, and the shovel he gave to King [found in King's car after his arrest]. (V21, 1971, 1973). King's behaviour made Muxlow concerned for his safety and he moved his 9 millimeter gun out of the bedroom and set it by his front door. (V21, 1975). Muxlow had occasion to listen to a 911 call made by [redacted] and identified the male voice on the call as King's. Muxlow had no doubt that it was King's voice on that 911 call. (V21, 1978, 1998).

In the early evening of January 17, 2008, Shawn Johnson testified that he was driving home from work, driving south on 41 when he heard something unusual near the intersection of Chamberlin. (V21, 1999-2001). Mr. Johnson had his window

[2] North Port Police Officer Todd Choiniere testified that he was asked to go to Harold Muxlow's house on Carluke Avenue on January 17th. (V25, 2713). He arrived at 6:30 PM with Sergeant Jernigan and attempted to make contact with the residents, but no one was home. (V25, 2713). Mr. Muxlow returned to the residence driving a white Chevy pickup at 6:56 PM. (V25, 2714). Officer Choiniere left the Muxlow residence at approximately midnight. He did not see the white Chevy pickup leave the residence or Muxlow leave the residence. (V25, 2716-17).

partially rolled down and heard several cries for “help.” (V22, 2001). It was still light out and Mr. Johnson turned toward the car next to him at the stop light and noticed the driver of the Camaro looking around. Johnson could see the person’s face clearly through the car window. (V21, 2002). The voice he heard coming from the car was female, an adult female “screaming for help.” (V21, 2002). It was loud enough for Mr. Johnson to hear it clearly and was the voice of someone who was “very upset.” (V21, 2001). Mr. Johnson thought he heard several, “six, eight screams for sure.” (V21, 2003). Before the light turned green, the screams stopped. (V21, 2004). Mr. Johnson realized later, after hearing a news report, that it was more than simply a prank, and he called both 911 and the North Port police. (V21, 2005).

Mr. Johnson identified King from a photographic lineup and in court as the man driving the green Camaro. (V21, 2007-08). Mr. Johnson testified that there was no doubt that King, the person he identified in court, was the person he observed driving the Camaro. (V21, 2017-18).

On the early evening of January 17, 2008, Jane Kowalski was driving from Tampa to Fort Myers going south. (V22, 2091). It was around dusk when, driving along 41 she heard “[h]orrific screaming.” (V22, 2092). She heard the screams as she stopped

at a light. It appeared to be coming from the dark colored Camaro to the left of her. She had cracked her window despite a light rain earlier, to let air in.[3] Mrs. Kowalski looked at the person in the car next to her and he looked back at her, making eye contact. (V22, 2095). Ms. Kowalski described the screams in court: "Horrific, terrified. I've never heard anything like that in my life." (V22, 2097). After making eye contact with the driver, Ms. Kowalski said that "man over there" began pushing something down in the backseat. He used one hand and was pushing something down in the backseat, while the screams continued. (V22, 2099). Ms. Kowalski was able to see a hand coming up from the window closest to her, and began banging on the window, "very loudly." (V22, 2099). The hand she observed was small and was banging on the passenger side window. (V22, 2100).

When the light turned green, Ms. Kowalski pulled forward very slowly in order to get the tag number, the driver of the car [King], however, pulled out even more slowly and pulled in back of her car. (V22, 2102). Ms. Kowalski was going maybe 20 or 25 miles per hour which was very slow for that stretch of 41. (V22, 2102). Ms. Kowalski called 911 and told her about a cross street that she passed, Chamberlain. (V22, 2103). The 911 call

[3] The rain had stopped at the time she observed the Camaro and heard the screams. (V22, 2122).

was played for the jury, in the call she described a dark Camaro, and a driver with light powdered hair who was behind her. (V22, 2108). She continued to look at his car which was slowing down until it turned on Toledo Blade. (V22, 2109). Several days later Ms. Kowalski was provided with a photo lineup by officers from the North Port Police Department. (V22, 2112). She identified King's picture from the lineup almost immediately. (V22, 2116). Ms. Kowalski also identified King in court as the person she observed in the dark colored Camaro. (V22, 2116). Ms. Kowalski also identified King's car as the one she observed on January 17, 2008. (V22, 2119). [State's Exhibit 107A].

Florida Highway Patrol trooper Edward Pope testified that he received information about a missing person, [redacted], on the evening of January 17th. He positioned his unmarked car in North Port off of I-75 at Toledo Blade. (V21, 2033). He had a photograph of [redacted] and a BOLO with a photograph of Michael King. (V21, 2034). Trooper Pope parked his car in the median next to a marked Charlotte County police car. (V21, 2037). From dispatch, he was aware of the tag number, make and model, a green Chevy Camaro, registered to Michael King. (V21, 2038).

Trooper Pope observed some headlights enter the road from one of the side roads and was monitoring the vehicle from the

rear view mirror just after 9:00 PM. He decided to follow the vehicle after it appeared to be a green Camaro. The vehicle was getting ready to merge onto I-75. (V21, 1040). It took Trooper Pope a while to catch up but as soon as he observed the tag, he knew it matched the vehicle he was looking for. (V21, 1041). Because of the possibility that [redacted] was in the car, Trooper Pope made the decision to stop the vehicle without backup.[4] (V21, 2041). King pulled over to the right side paved shoulder. Trooper Pope conducted a felony stop, drawing his weapon. (V21, 2044). He commanded the occupant, King, to get out of the car, but, King did not respond.[5] Trooper Pope could, however, observe movement inside the vehicle. (V21, 2046). He gave a second command for King to get out of the car. Then the driver's side opened two or three inches. Trooper Pope issued a third command for the person to exit the vehicle. (V21, 2046). Trooper Pope felt danger and could not see inside of the vehicle so he wanted to get in a better tactical position. (V21, 2047). He was giving commands in a very loud, very vocal manner. (V21, 2048). Once again, after moving his position, Trooper Pope ordered King

[4] King's 1994 green Camaro was stopped near the 177 mile marker off of I-75, south of Toledo Blade Boulevard, in the southbound lane. (V21, 1862, 1863).

[5] Once the driver finally left the car, Pope recognized from the computer photo that it was a perfect match for Michael King. (V21, 2050).

out of the car. (V21, 2049). Finally, Trooper Pope yelled out to the driver to exit the vehicle or he would open fire. (V21, 2049). At that point, the driver opened the door more and was backing out of the car, and, Trooper Pope could not see King's hands. (V21, 2049). King obeyed Trooper Pope's command to go to the rear of the vehicle. Trooper Pope identified King in court as the person driving the green Camaro he pulled over. (V21, 2051). King's pants, from his waistline down to his shoes were wet. (V21, 2051). There was also mud on King's shoes. (V22, 2052). King was ordered to get down on the asphalt but was reluctant or hesitant to go down. (V22, 2052). King was cuffed on the ground and searched for weapons. (V22, 2053). King did not have any weapons, but a cell phone was recovered, a small black Motorola phone. Trooper Pope noted that the battery had been removed from the phone. (V22, 2055).

Trooper Pope also observed some strands of hair on the front of the vehicle, on the bra, and there "were some hair strands on the spoiler on the rear of the vehicle with what appeared to be some blood pellets." (V22, 2056-57).

Trooper Pope did not enter the car, but looked inside and noticed a five gallon gas can on the passenger seat, a piece of paper with a footprint on the passenger side, and, it appeared that the front floorboard of the vehicle was wet. It was not

soaked but looked "as if there was something could have been wet that had been sitting on that board." (V22, 2057). The back of the vehicle had a blanket and a ring. (V22, 2057). He also noticed what looked like a railing to a headboard or bed, it was wood. (V22, 2057-58). The car was roped off and treated as a crime scene. (V22, 2058-59).

Sarasota Sheriff's Animal Services Supervisor Tami Treadway testified that she was affiliated with the Sarasota Search and Rescue volunteer. On the morning of January 18, 2008, her team was called in and asked to search for [redacted]. (V22, 2172). At some point in the evening of January 18th, Ms. Treadway came across some ground that appeared to have been disturbed. (V22, 2173). [State's Exhibit 110]. The area looked different from the surrounding area and Treadway thought the location needed to be checked by someone of higher authority. (V22, 2176). As she looked back toward the area as other officers arrived, Ms. Treadway observed what she thought to be blood on the sand. (V22, 2178).[6]

[6] Crime Scene Technician Lisa Lanham of the Sarasota County Sheriff's Office testified that on January 18, 2008 she was called to assist North Port in the area of Plantation Boulevard. (V22, 2186). Lanham noted an area of apparent blood on the sand. The blood was under sand which looked as if sand had been used to cover the blood. (V22, 2197). She also photographed areas adjacent, on the grass and weeds that also looked like blood. (V22, 2201). There was an area of pooled or spilled blood. (V22, 2207).

Mrs. [redacted]'s body was found in a shallow grave off of a closed road near a new development off of Toledo Blade road. (V21, 1865). There were no homes at the grave site. It was in an area of undeveloped land. (V21, 1865-66). Mrs. [redacted]'s clothes were found a few hundred yards away from the grave site. (V21, 1867).

Louis Wood, supervisor of the Forensic Services Unit with the Sarasota Sheriff's Office, testified that he arrived at the gravesite in the afternoon of January 18, 2008. (V25, 2780). He observed ground that had been disturbed off of Plantation Boulevard off to the north side of the roadway. (V25, 2780-81). The mottled or mixture of soils indicated that there had been a recent excavation in the area. (V25, 2786-87). The site was not excavated that evening. (V25, 2788).

As they excavated the grave site the next day, Mr. Wood noticed scallop marks which represent shovel marks, probably from a "round-nose shovel where someone was digging the walls of this grave almost straight down." (V25, 2790-91). The marks were fairly large, in excess of 10 to 12 inches. (V25, 2781). At a depth of just over 3 feet, Mr. Wood encountered the "shoulder of the decedent." (V25, 2791). After the victim had been removed, they dug down to the bottom of the hole, which was

just over four feet deep. (V25, 2791). At the bottom of the hole, they encountered water from seepage. (V25, 2792).

Detective Morales testified that a single shell casing was found in the area of the grave.[7] (V21, 1880-81). While one bullet caused the fatal wound, the bullet has not been recovered. (V21, 1882). Further, despite an extensive search, the 9 mm handgun which fired the fatal shot has not been recovered. (V21, 1854, 1880).

Witness Robert Salvador was interviewed by a police officer at 1:30 AM on January 18, 2008 and again, two days later. (V21, 1883). It was learned that he was at the Knight's Trail Gun Range on January 17, 2008 shooting targets with King. (V21 1883-84). At the request of the police, Mr. Salvador turned in the four guns he used at the range. One of those guns turned over was a nine-millimeter. That weapon was never tested. (V21, 1884).

Detective Morales testified that Mr. Salvador was questioned about his whereabouts on January 17th two times. When questioned about his location on January 18th, he returned

[7] Anthony Egoville of the Sarasota County Sheriff's Office, testified that he was directed to the grave site off of Plantation Road near the cross-street, Toledo Blade. (V23, 2248). As part of a larger search team he worked his way through the brush with a metal detector, he located a 9 millimeter shell casing. (V23, 2250). They were unsuccessful in finding the actual bullet or projectile. (V23, 2254).

on the 20th with a receipt establishing his location. (V21, 1889). Mr. Salvador did not tell the police about being with Michael King the first time he was questioned, but came in later that day and revealed that he had been with King. (V21, 1890). Initially, Mr. Salvador was considered a suspect in the case. (V21, 1891).

King lived in a home on Sardinia Avenue, across from an elementary school in Sarasota County. (V21, 1862). North Port Police Sergeant Patrick Sachkar testified that he arrived at King's residence at 7:06 PM on January 17, 2008. (V23, 2267-68). He was looking for [redacted] and was the ranking officer on the scene. (V23, 2268-69). When they entered the house, he noticed that either a TV or radio was on. Sergeant Sachkar also immediately noticed an unusual lack of furniture. (V23, 2270). Sergeant Sachkar noticed a roll of silver duct tape on the counter as he entered the kitchen. (V23, 2270). When he entered the bedroom he noticed a pillow and two blankets and in the corner by the pillow he noticed some "wadded up duct tape." (V23, 2271). Sergeant Sachkar also observed "some like light colored long brown hairs in that wad of duct tape." (V23, 2271). That duct tape, like the roll he observed in the kitchen, was silver. (V23, 2271-72). The scene was secured, taped off, and no one was allowed inside. (V23, 2274).

Several witnesses who came into contact with King the night of his arrest testified that his pants were wet and had light colored sand or dirt on them. (V23, 2275, 2319-20). King's shoes were also muddy or dirty. (V23, 2321-22). The jeans stood out because from the knee down they appeared damp or moist, and, were muddy and dirty. (V23, 2391-92).

North Port Police Criminalist Specialist Cortnie Watts testified that she processed and photographed the victim's house on Latour before being called to examine and process a green 1994 Chevy 2 door Camaro. (V23, 2286-87). While photographing the outside of the vehicle, Ms. Watts noticed hair and a gelatinous substance that looked like sap on the front hood of the vehicle. (V23, 2290) [State's Exhibit 21]. The hair and a red colored stain were collected for analysis. (V23, 2290). Hair strands were recovered from the front and trunk of the vehicle. (V23, 2291). A long hair was collected from the front hood of the vehicle. (V23, 2291) [State's Exhibit #12]. A gelatinous material and blood spatter or reddish material was located "right underneath the hair strand." (V23, 2292) [State's Exhibit #23]. A gelatinous, sap like, or mucous type substance was also collected from the hood in the "bra area." (V23, 2292). The sap like substance was not sticky but had more of a mucous

like consistency. (V23, 2294). Another hair strand was collected from the trunk of the car. [State's Exhibit #18].

After being moved to a more secure location, she continued to process the interior of the car. In the front passenger seat, Ms. Watts observed a red gas can and baby wipes. (V23, 2301). There were swipe marks on the interior, it looked like swipe marks, from someone attempting to wash the car. (V23, 2302). Partial prints were lifted from the baby wipe box. (V23, 2305). In the back seat, Ms. Watts observed and photographed a shovel [State's Exhibit #4], a yellow blanket [State's Exhibit #10], and a ring, which was just behind the driver's seat. (V23, 2306-07). A blue flashlight was also located in the back of the vehicle as well as a black and red jacket. (V23, 2307). Dirt was on the shovel, stuck to the bottom, and was "caked" on. (V23, 2312). From the floorboard of King's car, Ms. Watts recovered a cell phone battery and cell phone back. (V23, 2313-14). [State's Exhibit #33]. Partial prints were lifted from the cell phone battery and phone back. (V23, 2315).

Ms. Watts also assisted in processing King's house and videotaped the scene. A television and clock radio were both on and turned up to loud volume. (V23, 2336). Ms. Watts noticed duct tape in the kitchen and also duct tape and hair in a garbage bag in the kitchen. (V23, 2334). The duct tape looked

suspicious because it contained hair strands. (V23, 2334). The hair and tape were recovered. (V23, 2334). Other hairs were observed in the trash, clumped together. (V23, 2334-35) [State's Exhibit #86 Tape]. In the master bedroom, Ms. Watts observed a mirror, another wad of duct tape, a yellow blanket covering the window, and a Winnie the Pooh blanket and pillows. (V23, 2335-36). On the Winnie the Pooh blanket was a rubber hair band or hair tie. [State's Exhibit #99]. Pursuant to stipulation, the parties agreed that "the hair tie found at Michael King's house on Sardinia Avenue is the same type as hair ties worn by [redacted]." (V23, 2338).

Carpeting was removed for analysis based upon alternate light or fluorescing source examination. (V23, 2343). State's Exhibit 85, a portion of that master bedroom carpeting was sent to the DNA lab for processing. (V23, 2346). Ms. Watts collected a shell casing from the area where [redacted]'s body had been found. (V23, 2347). A stipulation was read to the jury that Mrs. [redacted] was menstruating and therefore experiencing vaginal bleeding at the time of her death. (V23, 2310).

North Port Police Department Criminalist Specialist Pamela Schmidt attended the autopsy of [redacted], retrieving various items collected by the medical examiner for further analysis, including a sexual assault or rape kit. (V23, 2395-96). Swabs

were taken from the victim's mouth, vagina, anus, and any other suspicious stains or marks on the body. (V23, 2396). Ms. Schmidt noticed that the victim had duct tape on the back of her head running across her hair toward the side of her head in two different pieces. (V23, 2397). The tape essentially ran from "ear to ear." (V23, 2397-98). The medical examiner technician removed the tape and it was put on a board to be photographed and then placed in a bag. (V23, 2398) [State's Exhibit #65]. Ms. Schmidt rolled [redacted] fingerprints so that they could be sent to the AFIS lab [Automated Fingerprint Identification System]. (V23, 2400).

Clothing was recovered from vicinity of the burial site. (V24, 2403) [Panacea Boulevard, Plantation]. Ms. Schmidt found and photographed a bra strap at the scene. This clothing item was located near a barb wire fence close to Panacea. (V24, 2404). The bra was dirty and had red stains on it. She did not recover the full bra, just the strap. (V24, 2406). The bra itself was recovered from a hole with quite a bit of dirt on it, so, the grader may have pulled the bra up from the ground. (V24, 2419) The bra was not intact, a strap was missing, it was torn, broken off in the center. (V24, 2420-21). A stipulation was read stating that the "bra found near the intersection of Plantation and Panacea Boulevard is the same size and type worn

by [redacted].” Also, located in the same vicinity were some red panties under some brush. A stipulation was read that Nathan Lee “indicated the panties were of the same type and size worn by [redacted].” (V24, 2409-10). A little further from the bra strap and panties Ms. Schmidt recovered blue boxer shorts. (V24, 2410) [State’s Exhibit 46]. A stipulation was read that “the boxers found near the intersection of Plantation Boulevard and Panacea Boulevard belonged to Nathan Lee, and [redacted] regularly wore them.” (V24, 2412). A grader skimming the surface of the dirt pulled up a portion of a shirt which had been buried. (V24, 2415). Ms. Schmidt used her hands to dig up the ground and the remainder of the shirt. [State’s Exhibit 59A]. The shirt strap was broken when it was recovered it. (V24, 2416) (State’s Exhibit 47). A stipulation was read to the jury that the women’s shirt found near the intersection of Plantation Boulevard and Panacea Boulevard belonged to [redacted].” (V24, 2417-18).

Two organizations conducted DNA testing in this case. The FDLE and DNA Labs International, a private company. (V21, 1885). Jennifer Setlak worked as an analyst with the FDLE in the crime laboratory, biology section. Analyst Setlak compared the known DNA profiles of King and Mrs. [redacted] to various items processed for DNA testing. The vaginal swab taken from Mrs. [redacted] contained

sperm cells which she confirmed through visual observation. The sperm cells taken from [redacted] yielded a DNA profile which matched King's profile at all 13 locations or loci. (V24, 2465-66). A match at all 13 loci means that there is virtually a statistical certainty that the DNA came from the known or matched profile. In this case, the profile yielded population statistics of 1 in one quadrillion Caucasians, one in 26 quadrillion African Americans, and one in 7.2 quadrillion Southeastern Hispanics. (V24, 2466-67). A quadrillion is "a number one followed by 15 zeros." (V24, 2467).

Analyst Setlak testified that tape may yield a DNA profile as a person touches the tape and cells containing DNA are transferred to the tape. Tape found on King's master bedroom floor, State's Exhibit 87, yielded a profile consistent with King's at 1 in one quadrillion Caucasians, one in 26 quadrillion African Americans, and one in 7.2 quadrillion Southeastern Hispanics. (V24, 2467-68). Duct tape recovered from a trash can in King's house contained hairs which were removed from DNA analysis. This profile matched [redacted] known profile at all 13 locations, yielding populations frequency statistics of one in 110 trillion Caucasians, one in 1.5 trillion African Americans, and one in 130 trillion Southeastern Hispanics. (V24, 2470-71).

Analyst Setlak also analyzed hair removed from the hood of King's Camaro, State's Exhibit #12. The hair matched the profile of [redacted] yielding populations frequency statistics of one in 110 trillion Caucasians.[8] Another swab of material from the hood of King's Camaro tested positive for the presence of blood, State's Exhibit 13. (V24, 2472). This blood matched [redacted] DNA profile at 10 of 13 areas. Such a match could be the result of insufficient material, but, there was nothing inconsistent with [redacted]'s profile. Consequently, it was sufficient to conclude the sample came from [redacted]. (V24, 2472-73).

A swab from the bra of the Camaro, State's Exhibit 14, revealed a profile consistent with [redacted] at 8 of 13 locations. That was sufficient for Analyst Setlak to conclude that the material or fluid on that swab came from [redacted]. (V24, 2473-74). Semen was not found in the oral or anal swabs taken from [redacted]. (V24, 2485).

Kevin Noppinger is the laboratory director at DNA Labs International, a private DNA laboratory in Deerfield Beach, Florida. (V25 2740). The DNA lab is internationally accredited under ISO and also accredited nationally by the FBI. (V25, 2741). If DNA on a tested object matches a known sample, he can

[8] One in 1.5 trillion African Americans, and one in 130 trillion Southeastern Hispanics. (V24, 2471-72).

generate a number of the probability of finding another individual with that profile. (V25, 2743). The identifier system his lab uses is called Identifiler, which yields two more markers from the 13 markers used with Cofiler and Profiler Plus systems. (V25, 2758-59).

Mr. Noppinger testified that a hair found in the back seat of King's Camaro, State's Exhibit 11, matched the known profile of [redacted]. The probability of finding another individual with this profile, explained Mr. Noppinger: "I would have to test nine trillion individuals before I would expect to find somebody else. That far exceeds people on the planet." (V25, 2748). State's Exhibit 18, a blanket recovered from the back seat of King's Camaro, contained a blood stain. The blood "stain also matched Ms. [redacted] and also had the same frequency of one person in every nine trillion individuals." (V25, 2749). That blood stain also revealed another person's DNA for a mixture, the major portion matched Mrs. [redacted], the lesser amount of DNA did not reveal a full profile. However, the smaller stain did "not exclude Mr. King as possibly being a donor to that particular minor contributor." (V25, 2749-50).

State's Exhibit 88, a Winnie the Pooh blanket found on the floor of King's bedroom, was tested at multiple locations. (V25, 2750-51). One blood stain was a mixture, and, neither King nor

Mrs. [redacted] were not excluded as donors, the probability of finding that combined mixture was "one person at every 600,000 individuals before I would expect somebody else that could be a match." (V25, 2751). A semen stain on the blanket was matched to King, with a frequency of "one person in every 1.1 quadrillion. That has 15 zeros." (V25, 2752). Two stains on the bedroom carpet were tested, one was a semen stain which matched King's DNA "with the probability of 1.1 quadrillion." (V25, 2753). Another area of carpet contained a mixture from which [redacted] could not be excluded as a contributor, with a population frequency of one person in every 19,000 individuals. (V25, 2753). The mixture or markers consistent with King on that stain was smaller, or, one in every 310 individuals. (V25, 2754).

State's Exhibit 44, the bra strap located off of Plantation Boulevard, had a blood stain. This blood stain was matched to [redacted] with a population frequency of "one person in every 390 million." (V25, 2754). The boxers located off of Plantation Boulevard had a mixture stain, part of which contained sperm cells. (V25, 2754-55). Upon separation for analysis, the sperm fraction of that stain matched Michael King, yielding population statistics of "one person in 3.5 trillion individuals." (V25, 2756). The remaining cell fraction of that stain was consistent

with Michael King and [redacted], with the population frequency of finding another individual to match as "one person in every 600,000 individuals."[9] (V25, 2756).

One shell casing was examined for DNA using a newer type of test, a MiniFiler, it was cutting edge, but, no DNA profile was obtained from that shell casing. (V25, 2768). The lab was also provided the known DNA from three other individuals for comparison, Carlos Nieves, Harold Muxlow, Jr., Robert Salvador and Nathan Lee. (V25, 2770). Of all the items of evidence he examined, the carpet, blankets, jeans and other items, he did not find any evidence consistent with Robert Salvador. (V25, 2770). Nor, did he find any DNA consistent with Harold Muxlow. (V25, 2770).

FDLE Analyst Christina Sanders testified that she is in the trace evidence section and has experience examining or analyzing duct tape. (V24, 2492). Duct tape can be easily distorted and it becomes very difficult to fit that tape back into or match it into a particular roll of piece. (V24, 2493-94). She did not obtain a fracture match for the three pieces of tape submitted for analysis in this case, but, all three pieces were consistent

[9] King's blue jeans were examined but no blood was detected on those jeans, no blood stains were found on the sneakers represented as King's. Black boxers, represented as those worn by King, contained some DNA which was consistent with King's. (V25, 27666-67).

with having come from the same roll. (V24, 2494). She examined State's Exhibit 65, tape recovered from the autopsy of [redacted], State's Exhibit 87, tape recovered from King's master bedroom, State's Exhibit 86, duct tape recovered from kitchen of King's Sardinia residence. (V24, 2495). The tape had the same color, width, and "warp yarns" running in the same "north south" direction. Moreover, the spacing between the warp yarns were the same. The number and spacing of "fill yarns" also matched. (V24, 2498). Analyst Sanders was able to conclude that all three examined samples of tape "were consistent in class characteristics." (V24, 2496). While she could not say that she was 100 percent certain the tape came from the same source, they shared all the same class characteristics and could have come from the same roll of duct tape. (V24, 2510).

Robert Salvador lived in South Venice, was married, had six children, and was self-employed in construction. (V24, 2530). Mr. Salvador met King through his work for a plumbing company. (V24, 2530). His company did remodelling and renovations and would sometimes come in to repair damage after plumbing work had been completed. (V24, 2531). Salvador has known King for a little over two years. (V24, 2531). King would sometimes refer work to Mr. Salvador and in return, he would occasionally pay King for the referrals. (V24, 2567).

King and Mr. Salvador did have some limited contact outside of work, going on one fishing trip together. Mr. Salvador testified that he had not talked to King in a good two months or so but a week prior to this incident King called to say he was back in town and that he needed work. (V24, 2532-33). King also asked Mr. Salvador if he knew of anyone who had furniture as "he was trying to move back into his house." (V24, 2533). King did not have any furniture and Mr. Salvador told King he would give him a television. (V24, 2534).

King called Mr. Salvador on the morning on January 17th to confirm he was going to receive the television. Mr. Salvador had no other plans and told King he was going to the gun range. Mr. Salvador testified that he liked to get to the range two or three times a month for target shooting. (V24, 2535). Mr. Salvador used the rainy weather as an excuse to delay a screening job he had to do and went to the range instead. (V24, 2536). Mr. Salvador asked King if he wanted to go to the range with him, and, to his surprise, King said yes. (V24, 2536). King said he had a nine millimeter but didn't have any ammunition for it. (V24, 2537). Mr. Salvador told King not to worry about the ammunition, he had ammo. (V24, 2537). Mr. Salvador had four different pistols, the 9mm and two small .22 caliber pistols, and a Russian pistol. (V24, 2538).

Mr. Salvador and King drove in separate cars to the Knight's Trail gun range. (V24, 2539-41). King did not know the range rules, that they had to sign in, "and all that." (V24, 2540). When they arrived at the range, Mr. Salvador observed King retrieve a gun from "under his seat." (V24, 2541-42). King did not have a case with him and Mr. Salvador explained to King he could not just walk up to the range without a case. So, Mr. Salvador put King's gun in his own gun case and carried it into the range. (V24, 2542). King had told him it was a 9 millimeter and it looked like a weapon of that caliber. It was not a "common brand" that Mr. Salvador could remember, but, it was a semi-automatic with a clip. (V24, 2543-44). Mr. Salvador identified his own and King's signatures on the range sign in sheet and the respective times they signed it; 11:57 and 11:58. (V24, 2544-46). They stayed at the range for about an hour and Mr. King wore a black longer sleeved T-Shirt. (V24, 2566).

Mr. Salvador fired three of his pistols, a nine millimeter and his two .22s. (V24, 2548). King fired his own 9 millimeter and Salvador's and also fired one or both of Mr. Salvador's .22's. (V24, 2548). Salvador had a couple mixed boxes of ammunition at the range and provided bullets for King to fire from his own weapon. (V24, 2548). The shells were ejected at the range and they are usually swept aside into the "dirt."

(V24, 2550). Mr. Salvador offered King the remaining ammunition in a box, but, King turned him down. (V24, 2571). Mr. Salvador believed that King had no more ammunition in his gun. (V24, 2572). However, Mr. Salvador did not know if King had any rounds left in the magazine. (V24, 2572-73). The ammunition box was on the table between King and Mr. Salvador and it was possible he took ammo out of the box without his knowledge. (V24, 2593-94). And, in fact, there were times the line went "cold" and Mr. Salvador went forward to retrieve and inspect targets so King had "many opportunities." (V24, 2594-95). When they were done shooting, Mr. Salvador put King's gun back into his bag and walked it out to the parking lot and King's car. (V24, 2550). They left in their separate vehicles and Mr. Salvador went to work. (V24, 2551).

Mr. Salvador spoke to the North Port Police on two different days and later met them at the gun range. (V24, 2565). He showed the police where he and King were standing at the gun range. (V24, 2565).

The first time he had any knowledge that something was going on with King was when officers knocked on his door at about "2:00 o'clock in the morning" on January 18th. (V24, 2551). Mr. Salvador had no idea what was going on and officers asked him about Mr. King and a possible kidnapping. (V24, 2577).

Salvador admitted that he knew Mr. King but had no idea how serious the matter was. Mr. Salvador thought it was "some kind of domestic dispute he had with one of his girlfriends or something." (V24, 2553). Salvador did not tell the police at that time he had been shooting at the range the previous day. (V24, 2575-76). One week prior to the 17th, Mr. Salvador admitted he had gone to King's house on Sardinia and went inside the living room area. (V24, 2585-86). He did not know if he purposely withheld that information when he talked to the police on January 18th, but, he did not tell them about it until the next time he talked to them. (V24, 2586).

Once Salvador and his wife realized how serious this matter was, decided to go to the police. (V24, 2553). Since Mr. Salvador did not know what police department had come to his door in the morning, he went to the local Venice police department. (V24, 2554). They gave him the number of the North Port Police Department. (V24, 2554). He called the North Port Police and they told Mr. Salvador they would be getting in touch with him. (V24, 2555). Later that afternoon, he went down to the police station to speak with officers. (V24, 2556). Mr. Salvador thought that they were hard on him, but, looking back, he realized that they were "still trying to find her." (V24,

2557). Mr. Salvador explained his whereabouts the day before. He also went back to provide receipts. (V24, 2560-61).

On cross-examination, Mr. Salvador denied meeting Mr. King later the day on January 17th or going to Mr. King's house. (V24, 2587). Mr. Salvador also answered "[a]bsolutely not" to defense counsel's question: "And, Mr. Salvador, didn't you fire the shot that killed and took the life of [redacted]?" (V24, 2588).

Although initially denying and then not recalling his statement to the police that he wanted Michael King to "burn" in his January 20th, statement, after reviewing the transcript, Mr. Salvador admitted, he did say that. (V24, 2588-89). However, Mr. Salvador explained that statement: "Just that I felt like I had been used and taken advantage of, and so if this was really what was going on and, granted, if you can recall, this is the second day into this, it was quite overwhelming to believe that this would actually be something that someone would do. So in that case, I felt that justice should be taken place for if it was the truth that this was really happening." (V24, 2590).

On January 17th, Mr. Salvador deleted calls on his cell phone call list from King. In fact, he told the police on the 18th that he had deleted King's calls. The next day, however, Mr. Salvador told the police that he had not, in fact, deleted

all the calls and that one remained on his phone when he talked to the police again on the 20th. And, in fact, he showed police on the 20th that one call from King. (V24, 2578). Mr. Salvador's wife did not like him hanging around with King and he usually deleted King's call immediately after talking to him. (V24, 2591). Mr. Salvador deleted King's calls [all except one] prior to the police speaking to him at 2:00 in the morning on January 18th. (V24, 2591).

On the afternoon and evening hours of January 17th, Mr. Salvador went to a customer's house, Ms. Todd, went to Home Depot, then Checker's for which he had a receipt. He thought, refreshing his recollection with a deposition, that he went to Checker's around 4:00 and arrived home around 5:30. (V24, 2581). After Checker's, Mr. Salvador recalled he went to his storage unit off of 41 in Venice, then arrived home. (V24, 2582). After going to the range, he would clean his guns right away. (V24, 2592). He provided the police all of his weapons. (V24, 2592).

Mr. Salvador had trouble then and now recalling the exact times and events of January 17th. (V24, 2584). "So, I have trouble with remembering where I was and when exactly, which is the normal case for my type of business." (V24, 2584). Mr. Salvador explained: "I don't usually have to keep track, I'm self-employed. I'm the only person and I get calls all day long

to run here and there for estimates and quotes, and sometimes I stop and, you know, get something at the store. Sometimes I'll get an iced tea. I'm at liberty to do what I want. I'm not on a schedule." (V24, 2585).

FDLE Crime laboratory supervisor John Romeo testified that he was assigned to the firearm section. (V25, 2630). Analyst Romeo had a bachelor's degree from the University of South Florida, and testified that the "career of firearms identification is so specialized that we also complete a two-year training program - - or I completed a two year training program - - within the FDLE laboratory." (V25, 2631). In addition, Analyst Romeo testified that he has received "both internal and external proficiency testing as well as double blind tests throughout our training and then once we're recognized crime laboratory analyst as well." (V25, 2631-32). He has been subjected to both blind and double blind testing the latter of which is a random event but that the blind testing is conducted annually by an external company. (V25, 2622). Analyst Romeo has testified in court "approximately a hundred times." (V25, 2632).

Analyst Romeo received 48 9 millimeter Luger fire cartridge cases for analysis in this case. (V25, 2640). Forty-seven cartridges were represented as having been removed from a firing

range and one “that was represented as having come from a crime scene.” (V25, 2640). Romeo analyzed the 47 cartridges from the range and compared them to the one found at the crime scene. (V25, 2641). He first examines the cartridges using a “comparison microscope” which is a special microscope which allows him to view items side by side. (V25, 2641). Initially, he looks for class characteristics such as caliber, what the firing pin shape is, and other things to document what he has. (V25, 2642). Analyst Romeo testified how he conducts the analysis and what he looks for in the comparison, explaining:

> The cartridge cases are marked in numerous places from the firearm that they’re fired within. But primarily the areas of interest for most firearms to examine, to start at, is what we call the breech face and the firing pin impression that are transferred from the gun onto the head of the cartridge case. That is what we would call the head, contained the headstamp, typically, the manufacturing information - -

(V25, 2642-43).

On State’s Exhibit 61 he examined the casing and noted it was a 9 millimeter Luger caliber and the “manufacturer was Remington-Peters.” (V25, 2643-44). He was also able to observe and note the shape of the firing pin and tool marks that were left by the firearm on the cartridge. (V25, 2644). Tool marks refer to the mark a tool or harder object makes when it comes into contact with a softer object and the individual or unique marks left by the tool. (V25, 2644-45). When it comes to

firearm identification, “the firearm just happens to be the tool that is imparting those unique characteristics. What we call the signature of the firearm, or the mechanical fingerprint onto the softer ammunition components that are fired within it.” (V25, 2645).

Of the 47 he viewed, he separated three for closer inspection and found a match. (V25, 2646). Examination consisted of examining the crime scene cartridge and comparing unique shapes, scratches, striations, and “and impressed marks that are unique to that particular firearm that fired it.” (V25, 2646). In finding a match, he was looking for “a reproducible pattern of sufficient quality and quantity.” (V25, 2646). The marks on State’s Exhibit 61 matched or were the same as the marks on three fired cartridge cases from the range. (V25, 2647). If he had to provide a percentage for his degree of conviction or certainty, Analyst Romeo said it would be “a hundred percent.” (V25, 2649).

Sarasota Sheriff’s Department fingerprint examiner William Dunker examined the known prints from [redacted] and noted that they were not of good quality, it appeared that the flesh on her fingers had shrivelled up as if they had been left in hot water in a bathtub for a period of time. (V25, 2729). King’s thumb print was found on the inside lid of the baby wipes box, taken

from the suspect vehicle. (V25, 2729-30). King's left index finger print matched the latent print taken from the cell phone battery from the Motorola phone. Another print, State's Exhibit 15, from the "driver's side outside window" matched the right palm print of the victim, [redacted]. (V25, 2732). There were additional prints that Mr. Dunker analyzed but determined they were either unknown or of insufficient detail to allow a comparison. (V25, 2734-35).

Forensic pathologist Dan Schultz, MD, testified that he arrived at the excavation scene before a body had been found. With an investigator present, once the body was visible in the hole, Dr. Schultz and his investigator lifted the body out. (V26, 2856). [redacted] was found nude and over three feet down in the hole, laying on her side, in a tight fetal position. (V26, 2857). Her body was wet and her hands had been immersed in water and had a "washer-woman" appearance. (V26, 2859). She was covered in moist sand and had blood on her hair and face. (V26, 2858).

[redacted] was 5'2 and weighed 109 pounds. (V26, 2863). Dr. Schultz identified jewelry removed from [redacted] body, a heart shaped pendent from around her neck, earrings, and a wedding-set type style ring from her left hand. (V26, 2860).

Two pieces of gray duct tape were removed from her hair, mostly from the back side, they were bloody and dirty. (V26, 2861-62).

Dr. Schultz provided a range of death, from the last time she was seen alive on Thursday and the grave site was located on Friday, "so clearly she was dead after Friday evening, because the police were there the whole time." (V26, 2868). There was nothing about the condition of her body inconsistent with Mrs. [redacted] having been killed on the evening of January 17th and buried that same day. (V26, 2872-73).

Mrs. [redacted] had a bruise on the back of her left arm as well as bruises on her fingers of the same arm. (V26, 2864). Mrs. [redacted] also had bruises on her wrists, and little abrasions "on the on the left side of the wrist." (V26, 2865). The bruising he observed could be from a ligature or impact or crush injury, either impact or compression. (V26, 2865). It could be the result of someone squeezing. (V26, 2865). The injuries to [redacted] were "fresh." (V26, 2865). [redacted] right wrist was also bruised, as reflected in State Exhibit 124. (V26, 2866). Both of [redacted] wrists were bruised in the same general location, which was consistent with defensive type wounds. (V26, 2867).

[redacted] had a pattern type injury on her right thigh, [Exhibit 128], consisting of parallel oriented bruises, separate

bruises, separate in color. (V26, 2875). What was notable about this pattern is that it was similar to what "we might see with fingers, four in a row, and their thumb." (V26, 2876). This pattern was suggestive of having been inflicted by compression from a hand. (V26, 2919). Her knee also had a contusion and other bruises above her right ankle and shin.[10] (V26, 2877). These injuries had a maroon color and were all inflicted within hours of the time she died. (V26, 2878).

The medical examiner next described injuries to [redacted] face, head and chin. (V26, 2880-81). [redacted] suffered an abrasion or contusion to the top left of her jaw as the result of blunt impact. (V26, 2887). The injury occurred prior to death, within minutes to hours. (V26, 2882). Another recent injury to her cheek was noted, consisting of a series of abrasions in a pattern, surrounded by a vague maroon contusion. A gun with metal shaping on it, some 3mm apart could have caused that type of pattern injury to [redacted] face. (V26, 2884-85).

[redacted] face had an entrance gunshot wound, perforating her right eyebrow. The exit wound was in the back left part of [redacted] head. (V26, 2886). The entrance

[10] [redacted] had some injuries to her back, some are maroon and some post-mortem. But, the more recent of pre-mortem injuries to her back were located where a bra strap might be located. (V26, 2880).

wound was a contact wound, because there were satellite tears around the periphery of the wound. (V26, 2887). That meant the gun was touching [redacted]'s skin when the fatal shot was fired. Her eyeball was blown out, "effectively exploded." (V26, 2893). The eye ruptured and contains fluid which is vitreous, or, thin in consistency. It was a clear, translucent and "kind of sticky." (V26, 2895). There was no scientific test yet to determine whether fluid on King's vehicle was in fact vitreous fluid. (V26, 2895). But, he thought blood would probably be found in or around such fluid, particularly in the circumstances presented here, which caused "the eye to rupture." (V26, 2896). Blood spatter can move within several feet of a wound in some circumstances. (V26, 2915). Dr. Schultz could not say whether or not the person who held the gun would have had blood spatter on him, it could happen, but, not necessarily. (V26, 2923).

The wound went front to back and from a slightly downward angle, 45 degrees. (V26, 2898). If [redacted] eyes were open, the gun "should be in the field of vision." (V26, 2901). "A common-sense perspective is when she was shot she was alive. And judging by the scene I can tell you she was – she was upright. She had a gun against her head. She would likely not have been looking away from the gun. This is - - this is sort of common sense." (V26, 2912). The gunshot wound was not

immediately fatal, as there was aspirated blood in Mrs. [redacted]'s lungs, "[b]reathing still persisted for a little while, and this was – ultimately went down the airway and subsequently settled in the lungs." (V26, 2906).

Dr. Schultz noted vaginal injuries to the victim, notably bruises to the labia minora, on both sides. The injuries to [redacted] vagina were caused by "insertion trauma of some type." (V26, 2903). The trauma could have been cause by some object including a penis, and Dr. Schultz noted, there was some mucoid gray/white material nearby which testing eventually revealed was semen. (V26, 2903). These injuries were not consistent with consensual sex. (V26, 2903). "And frankly, that is more significant trauma than one would ever expect from a consensual event. There's lacerations of the anus and vagina." (V26, 2922).

[redacted] also had injuries to her anus, a 10mm by 2mm tear, "on the edges of the anus, "with contusions." (V26, 2903). "So it's bruised and torn." (V26, 2903). Also, at 10 o'clock there were two 2 by 2mm tears, "with contusion or bruising. There was also mucoid gray/white fluid." (V26, 2904). The injury was caused by "[i]nsertion trauma." (V26, 2904). The injuries to [redacted] anus were not consistent with consensual anal sex. (V26, 2905).

The injuries to [redacted] vagina and anus occurred prior to her death. (V26, 2905). These injuries did not occur immediately before she was shot, because the body sent anti-inflammatory cells that were working to penetrate and begin to heal these injuries. (V26, 2905). The range of time for infliction of these injuries to Mrs. [redacted] to the time she died ran from "many minutes to hours." (V26, 2905).

SUMMARY OF THE ARGUMENT

ISSUE I—-The trial court did not abuse its discretion in instructing the jury to disregard three cross-examination questions of witness Salvador. Defense counsel had no good-faith basis for the specific facts contained in those questions. When challenged, defense counsel failed to allude to, much less cite a statement, record, report, hearsay statement, or, even double hearsay statement from which the specific facts asserted in those three questions could have been derived. Further, assuming that any error could be discerned, the error was harmless given the overwhelming and uncontradicted evidence of King's guilt.

ISSUE II--Appellant's argument that an insufficient link was made between the shells from the gun range and the murder weapon fails as uncontradicted evidence linked King to the shooting

range the day of the murder [Salvador, gun range log] where the shells were recovered. The fact that three of those cartridge cases matched the single shell casing found at the burial site was relevant to show King's possession of the unrecovered murder weapon.

ISSUE III--The State properly developed Firearm Examiner Romeo's qualifications to render an opinion that based upon his microscopic analysis, three shell casings recovered from the Knight's Trail Gun Range matched the casing found at the murder scene. Such microscopic tool mark comparisons are not new or novel and have been admissible in Florida courts for decades.

ISSUE IV--The prosecutor cited a number of valid race neutral reasons for peremptorily striking a potential juror. Defense counsel did not challenge the factual basis for the reason provided, the pending drug charge, mentioned by the prosecutor and accepted by the trial court below nor mention any similarly situated comparators who were not struck. Accordingly, this issue has been waived and is otherwise without merit.

ISSUE V--King's death sentence, supported by four powerful aggravators, including HAC and CCP, recommended by the jury 12-0, and as imposed by the trial court, is clearly proportional.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING KING'S CROSS-EXAMINATION OF WITNESS ROBERT SALVADOR WAS NOT MADE IN GOOD FAITH AND IN PROVIDING AN INSTRUCTION TO THE JURY TO DISREGARD THE IMPROPER QUESTIONS?

King argues that the trial court erred in finding three questions asked of witness Robert Salvador on cross-examination were improper and in instructing the jury to disregard those questions. The State disagrees.

Of course, the trial court is vested with considerable discretion in controlling the proper bounds of cross-examination. See Kormondy v. State, 845 So. 2d 41, 52 (Fla. 2003)(Limitation on the examination of a particular witness is within in the sound discretion of the trial court); Sanders v. State, 707 So. 2d 664, 667 (Fla. 1998)(a "trial judge has broad discretion in determining limitations to be placed on cross-examination."); McCoy v. State, 853 So. 2d 396, 406 (Fla. 2003). The abuse of discretion standard of review on appeal is highly deferential to the trial court's ruling. "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." White v. State, 817 So. 2d 799,

806-807 (Fla. 2002)(citing Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000)). Under the facts of this case, no abuse of discretion has been shown.

An attorney must have a "good-faith factual basis" for asking questions of a witness on cross-examination. Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989)(citations omitted). In this case, defense counsel far exceeded the proper bounds of cross-examination of Mr. Salvador by asserting specific facts in leading questions for which counsel had no good faith basis, and which did not relate to, explain, or contradict any testimony presented on direct examination. See Gosciminski v. State, 994 So. 2d 1018, 1024 (Fla. 2008)(finding trial court erred in allowing state to insinuate that the victim's ring was covered in blood without a "good faith basis for asking this question or making such a suggestion to the jury.").

The following questions asked by defense counsel were improper: 1) "didn't you go over to his home on Sardinia that day, January 17th 2008?" 2) "And wasn't the purpose of going over there to bring a lawn mower and a gas can?" 3) "And didn't you meet him out on Plantation Boulevard during the evening hours of January 17th, 2008?" (V24, 2587-88).

Defense counsel argued that it was Mr. Salvador's consciousness of guilt that led him to ask those questions.

(V25, 2601). However, the trial court did not see the connection between Mr. Salvador's initially "not being totally candid with law enforcement with your taking it to the next step saying, did you agree to meet the defendant, did you go to the scene of the crime, and did you kill [redacted]? I don't see that connection. I really don't see that connection. Maybe you can enlighten me because I don't see it." (V24, 2602). Defense counsel Meisner did not provide any basis for this line of questioning, simply repeating the question and noting that Mr. Salvador "denied it repeatedly." (V24, 2602). The trial court, in response, stated "I still don't see the good-faith basis for you asking those questions." (V24, 2602). Defense counsel argued that Mr. Salvador had been shooting with King and owned a 9 millimeter, and had testified that Mr. King did not leave with 9 millimeter ammunition. (V24, 2602-03). Further, Mr. Meisner asserted that Mr. Salvador had "lied about his whereabouts to police" and that he had previously been to King's house on Sardinia. (V24, 2603). Defense counsel strenuously asserted that he had not now opened the door to admission of King's suppressed statements regarding the death of Mrs. [redacted]. (V24, 2603-04).

The prosecutor argued that defense counsel's cross-examination had now opened the door for introduction of King's

suppressed statements. The prosecutor maintained that once defense counsel asserted in cross-examination that Mr. Salvador later met King, and then shot and killed [redacted], the lack of good faith or lack of factual basis, "is that he obtains that information from his client, that his client is telling him that that's what happened." "And, in fact, the tone and behaviour in which he yelled and pointed at the witness when he did it, was an implication that Mr. Meisner knew that to be true and that he had been told that by his client." (V25, 2604-05). Consequently, the prosecutor asserted the defense had opened the door to King's suppressed statements that people he did not know, "wearing masks and gloves," kidnapped him and Mrs. [redacted] and that they are the ones who must have killed her, or, his prior statements that a "helicopter shot Ms. [redacted]." (V25, 2605). Those statements are obviously inconsistent with the "defendant knowing that Robert Salvador was the person who shot [redacted]." (V25, 2605).

The prosecutor added that in all the transcripts of interviews and statements made by Mr. Salvador and in his deposition, there was no basis for asking any of these questions. "I still have no idea where the good faith basis was for this. And I would remind the Court that the law doesn't require the defendant to take the stand to open the door. The

behaviour of defense counsel can open the door. And with that, I'll leave that in the Court's discretion." (V25, 2612). One thing that bothered the prosecutor was the "specificity" of the questions, like "bringing a lawn mower and a gas can to come over to King's house" and suggests that the only person who would know that and the agreement is that it "suggests that that's what he told his attorney." (V25, 2618).

The trial court again questioned the "good faith basis" for such questions. The court stated:

> Yeah, but the issue is really the good-faith basis matter.
>
> Quite frankly, Mr. Meisner, I do have some concerns in that regard. So I guess the question is what's the remedy? Because, obviously, I think you went beyond, number one, any legitimate inference from the evidence.

(V25, 2618). In response, defense counsel Meisner stated: "Well, Judge. If you're considering - - you're asking me what a potential remedy is. I think I've established my position that I haven't opened the door. If you think otherwise, one possible remedy is simply striking it from the record and instructing the jury on that." (V25, 2618).

The judge indicated he had to choose between two remedies, admitting the suppressed statements as requested by the State, or, the second option, suggested by defense counsel, striking those questions and instructing the jury to completely disregard

it. The trial court thought the remedy proposed by the State would potentially create other issues down the road, "foreseeable but unforeseeable as well." (V25, 2619). The prosecutor did not think that simply striking the statements was sufficient for the defense counsel's "bad faith allegations" suggesting to the jury information "that's factually incorrect and factually impossible based on the rest of the investigation." (V25, 2620). After some discussion, the trial court adopted the remedy of an instruction, a middle ground approach that was initially suggested by defense counsel, as the better alternative to admission of King's suppressed statements. Ultimately, the judge instructed the jury to completely disregard those questions. (V25, 2628-29).

King asserts that the State somehow laid a trap for the unwary defense counsel by failing to immediately or contemporaneously object to those improper questions and thereafter used such questions as a vehicle to attempt to bring in King's suppressed statements. Certainly, it cannot seriously be argued that the prosecutor should have anticipated defense counsel's improper questions which had no basis in any evidence presented at trial or in pretrial discovery. Further, simply because the prosecutor may not have immediately objected, does not mean that the State, shortly after hearing such improper

questions, was thereby precluded from objecting and obtaining relief from the trial court. The State objected immediately after Mr. Salvador had finished testifying and asked to discuss a matter outside of the jury's presence. This was sufficiently timely to preserve the issue and allow the trial court to consider a proper remedy. Indeed, the contemporaneous objection rule addresses preservation of an error for appellate review, not the ability of a trial judge to address or remedy an error raised in the trial court. See White v. Consol. Freightways Corp. of Delaware, 766 So. 2d 1228 (Fla. 1st DCA 2000)(motion for mistrial after opening statement and jury had been excused was timely where the trial court ruled on the motion and thereby the purpose of contemporaneous objection rule had been satisfied). See also Robertson v. State, 829 So. 2d 901, 913 (Fla. 2002)("The State cannot ask a series of impermissible questions concerning prior acts of misconduct on cross-examination, and then claim that the defendant opened the door by answering the impermissible questions.").

As for the merits of King's argument, it suffers from several fatal flaws. First, there was no evidence to support the facts defense counsel insinuated into his questions of Mr. Salvador. At no point did the defense present any evidence to support those facts, or, even an inference or logical

supposition to support those facts from anything learned at trial or in pretrial discovery. When challenged, counsel failed to allude to, much less cite a statement, record, report, hearsay statement, or, even double hearsay statement from which the specific facts asserted in those three questions to witness Salvador could have been derived. Even when pressed by the trial court below, defense counsel did not cite any source for those facts, not even King. Nor, despite appellate counsel's best efforts, has he offered any factual basis for those questions on appeal. Defense counsel below did not even assert he had unspecified or privileged sources for the facts contained in his questions. See People v. Dellarocco, 115 A.D.2d 904, 905, 496 N.Y.S.2d 801, 802 (N.Y.A.D. 3 Dept. 1985) (no abuse of discretion where trial court found no good-faith basis in fact for cross-examination questions where counsel "simply asserted that he had information from unspecified sources that the witness had been involved with drugs."). It is clear that defense counsel simply made up facts in his questions to support an implausible line of defense in a case in which King's guilt was proven with absolutely overwhelming evidence. Consequently, it cannot be said the trial court abused its broad discretion in instructing the jury to disregard questions which had no good-faith basis.

King asserts that his defense was crippled by the trial court's ruling in this case and that he was prevented or inhibited thereby from presenting his theory of defense. The defense in this case was not prohibited from presenting a single piece of evidence, or, for that matter making any inferences that could reasonably be derived from the evidence. The three stricken questions from defense counsel improperly inserted facts without any good-faith basis. Lambrix v. State, 494 So. 2d 1143, 1147-1148 (Fla. 1986)(a defendant may not "improperly seek[] to use cross-examination as a vehicle for presenting defensive evidence.")(citing Steinhorst v. State, 412 So. 2d 332 (Fla. 1982)). This ruling cannot have crippled the defense because there was never any evidence presented to support the factual assertions contained in those questions. What crippled the defense in this case, and, not unfairly, was the overwhelming amount of forensic and eyewitness testimony establishing King's guilt, not the court disallowing three questions of a single state witness. And, defense counsel was charitably allowed to accuse Mr. Salvador of murder on the witness stand, and, again, argue this theory to the jury without any factual support. Disallowing those three cross-examination questions did not cripple, much less unfairly impede the defense in this case.

The trial court in this case generously allowed defense counsel's accusatory question of witness Salvador to stand, alleging that Mr. Salvador, not King, killed the victim in this case. Since the defense did not present any evidence to support this allegation, the question and accusatory tone (V25, 2604-05) by the defense counsel amounted to nothing more than a cheap parlor trick. There was no evidence Mr. Salvador knew the victim, had any motive to kill her, that he was anywhere near the murder scene, or left any physical evidence in any of the relevant crime scenes [the victim's house, King's Camaro, King's house, or the burial site]. Since there were no facts, inferences, reports, or statements supporting such an accusation, the trial court would have been well within its discretion to advise the jury to disregard that question as well. See Cohen v. State, 581 So. 2d 926, 927 (Fla. 3d DCA 1991)(holding that "third party's possible culpability in the murder was properly excluded because there is insufficient evidence on the record to support its relevancy.")(string cites omitted); Johnson v. U.S., 552 A.2d 513, 518 (D.C. 1989)(where defendant sought to place blame on a witness against him the trial court did not err in restricting cross-examination of the witness and excluding evidence where defense failed to establish

plausible or reasonable link between witness and the charged murder.).

Curiously, King notes that Mr. Salvador's wife did not testify (Appellant's Brief at 28), apparently in an attempt to buttress an incredibly thin argument that somehow Mr. Salvador could have murdered Mrs. [redacted]. However, King fails to mention that the State attempted to call Salvador's wife to testify after defense counsel accused Mr. Salvador of murder on cross-examination. The prosecutor planned to call Mrs. Salvador to testify that Salvador was home with her at the time of the murder but the defense objected on the grounds of a discovery violation. In what can only be described as a generous or cautious ruling, the trial court excluded her as a witness because she had not been listed prior to trial as a witness by the State.[11] (V25, 2707-10). Consequently, the fact the State did not call Mrs. Salvador to testify should not serve to enhance King's argument on appeal.

In an effort to buttress his argument, King next contends that since the trial court's ruling addressed the theory of defense, a special standard applies. Essentially, King contends

[11] Since Mr. Salvador cooperated with the investigation and there was ***no evidence*** that he was involved in King's kidnapping, rape and murder of the victim, the State obviously had no reason to call her and present evidence of Mr. Salvador's location at the time of the murder. The State can hardly be faulted for failing to anticipate such a baseless allegation by defense counsel.

that he, unlike the State, does not need to have any good faith basis for his cross-examination questions. While true, courts have provided some leeway to defendants when the issue relates to a defendant's right to present a defense, it is not true, as he apparently contends, that no rules or restrictions apply to such evidence.[12] See e.g. Holmes v. South Carolina, 547 U.S. 319, 326, 126 S. Ct. 1727, 1732 (2006) ("While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.")(citations omitted); Steinhorst v. State, 412 So. 2d 332, 338-339 (Fla. 1982)("[T]he court below was correct in preventing the cross-examination from either going beyond the

[12] As explained in Shields v. State, 357 Ark. 283, 288, 166 S.W.3d 28, 32 (Ark. 2004):

> This rule does not require that any evidence, however remote, must be admitted to show a third party's possible culpability; evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt. **There must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime**. Burmingham, supra; Zinger, supra (citing People v. Kaurish, 52 Cal.3d 648, 276 Cal.Rptr. 788, 802 P.2d 278 (1990))(emphasis added).

scope of direct or becoming, under the guise of impeachment, a general attack on the character of the witness and defendant was required "to call his own witnesses" to develop this defense "theory"); Crump v. State, 622 So. 2d 963, 969 (Fla. 1993)(the defendant was not allowed to cross-examine detective on hearsay statements implicating another individual in the crime, rejecting the defense contention that any evidence offered by the defense is admissible where it directly, or, even indirectly, tended to cast doubt about the defendant's guilt); Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990)("[T]he admissibility of this evidence must be gauged by the same principle of relevancy as any other evidence offered by the defendant.").

Another glaring flaw in King's argument is that since the defense presented not a scintilla of evidence during the trial from which the jury could find, much less infer the facts contained in defense counsel's questions, and, since Salvador emphatically denied the factual assertions contained in those questions, the trial court's instruction to disregard those questions cannot have prejudiced the defense. The jury was properly instructed by the judge that their verdict must be based upon the **evidence** introduced during the trial. (V21, 1887; V27, 3045). There was no evidence presented to support any of

the facts contained in those questions.[13] In other words, the judge's instruction was superfluous because there was no evidence from which the facts asserted in those questions could have been found, or, even, inferred by the jury. Consequently, it cannot be said King suffered any prejudice as a result of the trial court's instructions to disregard those questions.

As noted, King's attempt to show some justification for defense counsel's behavior in this case fall far short, and, fails to suggest, much less establish some good faith factual basis for the stricken questions. In an attempt to obfuscate this rather glaring weakness in his argument, he contends that the trial court in this case impermissibly commented upon defense counsel's credibility. King's argument is factually inaccurate. The trial court did advise the jury as discussed above to disregard those three questions and answers. The court also advised the jury: "I'm asking you to disregard such because there is no basis in fact from the evidence or the inference from the evidence for the asking of said questions." (V25, 2629). The trial court's brief instruction did not

[13] Salvador last had contact with King in the early afternoon of January 17th when King left the gun range in his Camaro. (V24, 2550, 2587). During the course of his investigation Detective Morales confirmed through receipts and video [Home Depot] Salvador's whereabouts on the afternoon and evening of the charged offenses so that "he could not possibly be in that area at the same time." (V21, 1887).

comment upon defense counsel's credibility. The court did not chastise or otherwise condemn trial defense counsel in front of the jury. In any case, with *or without the court's inst*ruction the jury was obviously aware that no evidence supported the facts contained in those questions. Accordingly, the trial court's instruction was reasonable and no abuse of discretion has been shown.

It is unclear why King cites Scipio v. State, 928 So. 2d 1138, 1145-1146 (Fla. 2006). This Court in Scipio addressed a material discovery violation by the State, and the State's use of that improper evidence to its own tactical advantage. In this case, the defense neither alleged below or on appeal any discovery violation by the State. Rather, the issue in this case addresses defense counsel's improper cross-examination of a state witness. Thus, this Court's decision in Scipio provides no support for King's argument on appeal.

Next, King makes an unrelated burden shifting argument, referencing the prosecutor's closing argument. However, King fails to credibly link the comments to any claim of error relating to the trial court's disallowance of those three questions of Mr. Salvador. Perhaps King recognizes that neither issue comes close to establishing some sort of meaningful error in this case, and he therefore attempts to join these unrelated

claims together in a "Composite Point on Appeal." (Appellant's Brief at 60). Appellate counsel's attempt fails, as his cryptic argument does not show that any improper argument was made by the State in closing, much less a prejudicial burden shifting comment.

In closing argument the prosecutor properly addressed defense counsel's attempt to shift blame for the murder upon Mr. Salvador or some other, unspecified party. The law does not require the prosecutor to sit, deaf dumb and blind in closing argument. See McKenney v. State, 967 So. 2d 951, 955 (Fla. 3d DCA 2007)(rejecting claim that the prosecutor could not respond to defense counsel's "rhetorical question and comments to the jury during the State's closing" noting that "[t]he defense essentially asks that the State be prohibited from answering the question first posed by defense counsel..."). Since the defense counsel in opening statement told the jury that "the evidence" would "show" "the person who fired that single shot, the person who ended her life was not Michael King" (V21, 1843-44) and in cross-examining Mr. Salvador, actually accused him of murdering the victim, the State was certainly allowed to ask the jury to consider the fact that no evidence presented during the trial supported such a theory. See Caballero v. State, 851 So. 2d 655, 660 (Fla. 2003)(while it is not permissible to comment on

the defendant's right to remain silent, "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 State's response."); Barwick v. State, 660 So. 2d 685, 694 (Fla. 1995)(Prosecutor's argument asking the jury to consider "what fact, what testimony, what anything have you heard" to contradict the State's evidence was not a comment on the defendant's failure to testify but merely asked "the jury to consider the evidence presented."), receded from on other grounds, Topps v. State, 865 So. 2d 1253 (Fla. 2004); White v. State, 377 So. 2d 1149, 1150 (Fla. 1979)("It is proper for a prosecutor in closing argument to refer to the evidence as it exists before the jury and to point out that there is an absence of evidence on a certain issue.")(citations omitted).

The prosecutor did not personally attack defense counsel and did not ridicule either counsel or his theory of defense, despite the fact counsel was advocating an unsupported and implausible theory of defense in light of the evidence arrayed against King. See Dufour v. State, 495 So. 2d 154, 160 (Fla. 1986)("An examination of the statements in question and the context from which they arose, however, leads us to conclude that the statements directed the jury's attention to defense counsel and the evidence presented rather than to appellant's

failure to testify."). Finally, assuming for a moment any error can be discerned in the prosecutor's comments, any error was clearly harmless. Caballero, 851 So. 2d at 660 (stating that erroneous comments on defendant's failure to testify require reversal only "where there was a reasonable possibility that the error affected the verdict" and finding that given the confession, fingerprint and DNA evidence, the alleged error was harmless).

Assuming *arguendo,* some error can be discerned in this matter, given the uncontradicted and overwhelming evidence of King's guilt, the error was clearly harmless beyond any reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986); Ventura v. State, 29 So. 3d 1086, 1090-91 (Fla. 2010)(stating that assessment of harmless error is not simply an "overwhelming evidence test" but that the proper analysis considers whether there is a "reasonable possibility" that the error affected the verdict)(citing DiGuilio). It must be remembered that King's assignment of error encompasses the trial court's instruction to disregard a total of **three questions** to a single state witness, and, in instructing the jury, redundantly perhaps, that the reason it so instructed them is that there were no facts or factual inferences to support those questions. This can hardly be considered an important or significant matter

in this capital trial in which King was caught red-handed leaving the vicinity of Mrs. [redacted]'s fresh burial site, with compelling and uncontradicted eyewitness and physical evidence establishing that he kidnapped, raped, and murdered [redacted]. The victim was last seen and heard [911 call] alive in King's control, screaming and pleading for help, and in his car after having been taken from her home and her two young children. The State presented such a large amount of evidence establishing King's guilt that calling the evidence against Mr. King overwhelming would be an understatement.[14] See e.g. Fitzpatrick v. State, 900 So. 2d 495, 517 (Fla. 2005)(finding witness's comment on the defendant's silence was harmless where the evidence was "overwhelming" and included the fact the defendant was identified as the source of semen recovered from the victim and that the victim was last seen alive with the defendant.). Keeping in mind that this Court independently reviews the record to "determine whether sufficient evidence

[14] This Court necessarily assesses the strength of the State's case in determining whether or not a trial error has been harmful. For example, in Gosciminski v. State 994 So.2d 1018, 1028 (Fla. 2008), this Court found reversible error based upon the prosecutor asking questions which asserted that the victim's ring was covered in blood for which the prosecutor had no good faith basis. This Court noted that "not one piece of physical evidence or eyewitness testimony tied Gosciminski to this murder." In contrast here, the State presented overwhelming physical and eyewitness testimony tying King to the abduction, sexual battery and murder of Mrs. Lee.

exists to support" the defendant's murder conviction" the State provides a summary of the evidence to address both harmlessness and sufficiency.[15] See Hojan v. State, 3 So. 3d 1204, 1217 (Fla. 2009)(citations omitted).

DNA testing confirmed that sperm cells inside of [redacted]'s vagina and on her shorts found at the burial site, matched King at all 13 loci, to the exclusion of all other person's on the planet, or 1 in one quadrillion Caucasians.[16] (V24, 2465-67). [redacted] burial site was found within hours of her disappearance and her body had fresh bruising and injuries to her inner thigh, vagina, and anus which were consistent with forcible rape. (V26, 2903, 2922). [redacted] made a 911 call **from King's cell phone**, pleading for help, and begging to see her family again. (V23, 2239-41). King's voice was indentified on that same 911 call, demanding his phone. (V21, 1978,1998). King was apprehended in his car with that same phone, in the vicinity of the burial site, still wet and

[15] A sufficiency review is succinctly stated as follows: "If, after viewing the evidence in a light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction." Hojan, 3 So. 3d at 1217 (citation omitted).

[16] Mrs. Lee's boxer shorts, found a short distance from her burial site, contained a mixture stain, from which King's sperm cells separated and positively matched to King. The DNA match yielded population statistics of "one person in 3.5 trillion individuals." (V25, 2756).

muddy from digging the hole in which Mrs. [redacted]'s body was ultimately found. DNA and fingerprint evidence established that Mrs. [redacted] was held in King's car. The physical evidence included DNA from blood and hair, matched conclusively to Mrs. [redacted],[17] and Mrs. [redacted]'s palm print on the driver's side window, and her wedding/engagement ring was found on the back seat of King's car when King was apprehended. The evidence indicated that King's car was at least partially spattered by blood and fluid from [redacted] as a result of the fatal gunshot wound. [redacted] eyeball disintegrated as a result of the gunshot and blood on the hood of King's car consistent with Mrs. [redacted]'s was found, as well as head hair and a gelatinous material, consistent with the mucous or viscous material contained in a human eyeball. (V26, 2895-96).

DNA evidence also establishes that [redacted] was held in King's home, the likely scene of the sexual battery. Hair,

[17] Hair from the back seat of King's car matched [redacted] at all 13 locations, or the odds of it coming from anyone other than Mrs. Lee leaving that hair was one in 110 trillion Caucasians. (V24, 2472). A blanket recovered from the back seat of King's Camaro had a blood stain which matched [redacted] DNA profile to the exclusion of all other people on the planet." (V25, 2748). Blood on the hood of King's car, also matched [redacted] at 10 of 13 locations, sufficient to conclude that the blood came from [redacted]. (V24, 2472-73). Similarly, a swabbing of material or fluid on the bra of King's Camaro matched [redacted] profile at 8 of 13 locations, sufficient for the analyst to conclude it came from [redacted]. (V24, 2473-74).

found on silver duct tape in King's kitchen trash can was matched to Mrs. [redacted] at all 13 locations, and therefore to the exclusion of all other people on the planet, or, one in 110 trillion Caucasians.[18] (V24, 2470-71). Duct tape consistent with this tape was found on and around the hair on Mrs. [redacted]'s head when her body was found. Bruising along Mrs. [redacted]'s wrist suggests that her hands were bound with duct tape. (V26, 2867). A roll of silver duct tape was found on the kitchen counter of King's house. This roll of tape was consistent with the piece found in the trash, and another wadded up piece found in King's master bedroom (V23, 2270-71), as well as the duct tape found on [redacted] body.[19] Blood stains or mixtures from a blanket on King's bed and carpeting in his master bedroom were consistent with [redacted] as well as sperm matched to King.[20]

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[18] Pursuant to stipulation, the parties agreed that "the hair tie found at Michael King's house on Sardinia Avenue is the same type as hair ties worn by [redacted]." (V23, 2338).

[19] The tape had the same class characteristics, color, width, "warp yarns" running in the same direction and spacing of the "fill yarns." (V24, 2496).

[20] The blanket in King's master bedroom had a blood stain mixture, consistent with King and Mrs. Lee's profiles. (V25, 2751). That blanket also contained a semen stain which matched King, with a frequency of "one person in every 1.1 quadrillion." (V25, 2752). An area of carpet which was tested revealed a stain with DNA consistent with [redacted] profile, with a population frequency of 1 in every 19,000 individuals. (V25, 2753).

None of this forensic evidence was challenged or countered by King, much less an innocent explanation offered. The physical and forensic evidence alone was more than sufficient to establish King's guilt. Nonetheless, compelling eyewitness testimony also established that King acted alone in kidnapping, raping, and murdering [redacted].

Mrs. [redacted]'s neighbour identified a green Camaro with a dark cover over its headlights [matching the description of King's Camaro], circling the block slowly four or five times on the afternoon of her disappearance. The car parked in the [redacted] driveway and the sole occupant of the car had a physical description consistent with King's. (V21, 1928, 1931, 1937).

Mr. Muxlow, King's cousin, after unknowingly providing the implements King would use for disposing of [redacted] body [flashlight and shovel], heard [redacted] screaming out for help from King's car. Muxlow observed King push [redacted] head down from the back seat and take off in his car. (V21, 1963).

Two witnesses observed King in his Camaro in the vicinity of the burial site, shortly prior to her murder and heard Mrs. [redacted] screaming for help. Both, positively identified King as the driver of the Camaro the screams were heard coming from. (V21, 2007-08; V22, 2116). One, in addition to hearing

"horrific" screams, observed Mrs. [redacted]'s hand banging on the window of King's car, "very loudly." (V22, 2099).

Finally, King was pulled over in the vicinity of the burial site, alone, his jeans were still wet and covered in dirt and sand, fresh from burying Mrs. [redacted].[21] Mrs. [redacted] was found some four feet deep and Mrs. [redacted] was lying in water. King's car still had the shovel, flashlight, and gas can that Muxlow had lent him earlier that evening. The shovel had dirt and sand on it and was consistent with the rounded shovel that was used to dig Mrs. [redacted]'s grave. (V25, 2790-91).

In conclusion, there is no conceivable view of the evidence in this case for which defense counsel's three cross-examination questions, without any record or, for that matter, non-record factual basis, could have altered the outcome of this trial. Balanced against the overwhelming and uncontradicted evidence of King's guilt in this case is an alleged error so insignificant, that it cannot have contributed to the verdict. See Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 1838 (1999) (explaining that the Chapman standard asks whether it is "clear beyond a reasonable doubt that a **rational jury** would have found

[21] The fact that King's camouflage shirt had no blood on it when he was apprehended is explained by the fact he changed his shirt. Muxlow testified that when King borrowed his shovel, flashlight, and gas can, King was wearing a white shirt. (V24, 2429). King's white shirt, like the murder weapon, has not been found.

the defendant guilty absent the error")(emphasis added); Com. v. Mitchell, 576 Pa. 258, 280, 839 A.2d 202, 214-215 (Pa. 2003)(applying the same harmless beyond a reasonable doubt standard as Florida and noting that "the reviewing court will find an error harmless where the uncontradicted evidence of guilt is overwhelming, so that by comparison the error is insignificant.")(citation omitted). Accordingly, no relief is warranted.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE 47 FIRED CARTRIDGE CASES FROM THE GUN RANGE?

King argues that the trial court erred in admitting shell casings recovered from a firing range the afternoon of the charged crimes. King contends that shells taken from the range cannot sufficiently be linked to King or the murder to constitute relevant or admissible evidence in this case. King's argument is patently without merit.

"A trial court has broad discretion to determine the relevancy of evidence." Wright v. State, 19 So. 3d 277, 291 (Fla. 2009). The evidence need not prove the defendant's guilt of the charged offense if "it is in the nature of circumstantial evidence forming part of the web of truth" proving the defendant to be the perpetrator, Bryant v. State, 235 So. 2d 721 (Fla.

1970) or would "cast light" upon the character of the act under investigation. See U.S. v. Canelliere, 69 F.3d 1116, 1124 (11th Cir. 1995)("Furthermore, Rule 404(b) does not apply where the evidence concerns the 'context, motive, and set-up of the crime' and is 'linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.'")(quoting United States v. Williford, 764 F.2d 1493, 1499 (11th Cir. 1985)).

The spent shells are so obviously relevant to show King's possession of the murder weapon that it merits little discussion. The shell casings from the range were offered in conjunction the one casing discovered in the vicinity of the victim's body to show King's possession of the likely murder weapon immediately prior to the victim's murder. The State's evidence presented a logical sequence and nexus between the spent shell casings from the range and the spent shell casing from the murder scene. King fired an unrecovered 9 millimeter at the range on the day of the victim's murder.

King's argument that the State failed to conclusively show that King possessed or fired the rounds associated with those shells recovered from the Knight's Trail Gun Range is a matter of weight, not admissibility. Mr. Salvador's testimony, the gun

range sign in sheet, the testifying detective, and the Firearms examiner ultimately tied three of those shells to the spent shell casing found at the site of the victim's murder. The shells were gathered on July 18th, the day after the victim's murder. (V24, 2437-44). This evidence was but one small piece of a lengthy chain of evidence which establishes that King murdered the victim.

While appellant offers a seemingly impressive string cite in his brief to support his position that the court erred in admitting those shell casings, counsel offers no quotes or analysis from those opinions for this Court's consideration on appeal. (Appellant's Brief at 67). Perhaps, it is because those cases cannot withstand even a cursory comparison to the facts presented in the instant case. Appellant's cases stand for the unremarkable proposition that a firearm, shown to be unconnected to the charged crimes, is not relevant. For example, in the very first case cited by appellant, Green v. State, 27 So. 3d 731, 737 (Fla. 2d DCA 2010), the court found error in the introduction of three firearms seized from the defendant where the State's "forensic testing determined that none of the firearms seized from Green's home fired the fatal shot." Consequently, "the State was unable to connect any of the three firearms to the charged offenses." Similarly, admission of a

photograph depicting the defendant in possession of a sawed off shotgun in O'Connor v. State, 835 So. 2d 1226, 1231 (Fla. 4th DCA 2003) was considered irrelevant where the "murder was by a handgun with nine millimeter ammunition, not a shotgun, and nothing in the evidence connected the shotgun to the homicide."

Here, undisputed evidence placed King in possession of a 9 millimeter handgun immediately prior to the victim's murder. The victim's wound was consistent with having been inflicted by a contact wound from a handgun and, the only shell casing recovered from the murder scene was a 9 millimeter, matched by tool mark comparison to shell casings found at a range where King had been shooting on the day of the murder. The fact the actual murder weapon has not been recovered is irrelevant. The State's evidence establishing a link between the shells and King need not be conclusive to be admissible. See U.S. v. Gandolfo, 577 F.2d 955, 959 (5th Cir. 1978)(Although the "sawed-off, side-by-side shotgun received into evidence" could not conclusively be shown as the shotgun used in the robbery, the general rule is that such a weapon is admissible when it is sufficiently similar to justify an inference as having been used and therefore is relevant and admissible)(citations omitted).

This Court's decision in Evans v. State, 800 So. 2d 182, 190-191 (Fla. 2001) is more analogous to the facts presented

here than any of appellant's cited cases. In Evans, this Court rejected a similar relevancy challenge to admission of shell casings:

> First, Evans complains that the trial court erred in admitting the .22 caliber shell casing found in the car parked at the apartment. At trial, defense counsel renewed his objection to the shell casing on relevancy grounds. The State argued that the shell casing found in the car matched the shell casings found at the crime scene which supported witness testimony that the participants in the crime were involved with the car. The trial court admitted the shell casing found in the car.
>
> Evans' claim that the State failed to prove the relevance of the shell casing is not supported by the evidence. The State presented testimony that the shell casing found in the car matched the shell casings found at the murder scene. The shell casing discovered in the car came from the gun used to kill Lewis. See Dornau v. State, 306 So.2d 167, 170 (Fla. 2d DCA 1974) (jury relied on evidence showing that shell casing found at the crime scene matched shell casings found at defendant's business). This links Evans to the murder because his fingerprints were found on and inside the car, and there was testimony that Evans was in possession of the car during the night of the murder. Thus, the shell casing was relevant and was properly admitted.

Appellant's argument that an insufficient link was made between the shells from the range and the murder weapon fails as uncontradicted evidence linked King to the shooting range [Salvador, gun range log] where the shells were recovered. (V24, 2565). The firearms examiner found sufficient similarity to match the range casings to the casing found at the murder

scene.[22] Contrary to appellant's argument, such tool mark comparisons are not new or novel. See Argument Issue III, *infra*. The jury was entitled to weigh and consider this evidence and the obvious link it made to King and the victim's murder. See Dornau v. State, 306 So. 2d 167, 171 (Fla. 2d DCA 1974)(rejecting challenge to evidence sufficiency and citing evidence that shells recovered from the defendant's business matched the shell recovered at the murder scene even though no murder weapon had been recovered).

King makes some ill-defined reference to prejudice in this case from admission of the shell casings. However, this evidence did not implicate a separate crime committed by King and, in any case, this Court has routinely allowed evidence linking a defendant to a weapon even where such evidence implicates a collateral crime. See Remeta v. State, 522 So. 2d 825, 827 (Fla.

[22] In Cole v. State, 701 So. 2d 845, 855 (Fla. 1997), this Court found a stick was admissible as the potential murder weapon despite the lack of forensic evidence linking it to the crime. This court stated:

> We similarly find no impropriety in the trial court's ruling on the introduction of an oak walking stick which was purportedly the one Paul carried prior to the attack. The stick was found in the area of the assault and near to where John Edwards' body was found. Pam Edwards testified that it matched the characteristics of the one which Paul carried. The trial court found that the lack of blood or hair found on the stick related to its weight rather than its admissibility.

1988)(upholding admission of collateral crimes evidence because the same gun was used in both crimes and established defendant's possession of murder weapon); Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988)("The facts that Amoros was seen in possession of a gun on a prior occasion and that the bullet fired from that gun on the previous occasion identified it as the same weapon used to kill the victim in the instant offense rendered the evidence relevant whether the circumstances constituted a crime or not.").

In conclusion, evidence establishing King's possession of the same caliber handgun as the murder weapon hours before the kidnapping and murder is unquestionably relevant. Indeed, the defense has no grounds to challenge Mr. Salvador's testimony or the gun range log establishing King's presence at the gun range, and his possession of a 9 millimeter just hours before the victim was murdered. The relevance was clearly established and no abuse of the trial court's discretion has been shown. In any case, assuming *arguendo,* some error can be discerned, the error had no impact upon the verdict in this case. Admission of the shells and the resulting comparison were simply a small part of an overwhelming and un-rebutted chain of evidence which established that King kidnapped, sexually battered, and murdered [redacted].

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO INTRODUCE FDLE FIREARMS EXAMINER ROMEO'S OPINION THAT HE WAS CERTAIN THREE OF THE CARTRIDGE CASES FROM THE GUN RANGE MATCHED THE CARTRIDGE CASE FOUND NEAR THE CRIME SCENE?

King next contends that trial court erred in allowing the Firearm Examiner to testify regarding the microscopic tool mark identification he made between the shell found at the murder scene and three casings found at the Knight's Trial Gun Range where King fired an unrecovered 9 millimeter the day of the kidnapping and murder of [redacted]. King contends that either the science is insufficiently proven to qualify such evidence for admission, or, that the examiner was improperly allowed to state the degree of certainty he attached to his own opinion. The State disagrees.

Of course, "a trial court has broad discretion in determining the range of subjects on which an expert witness can testify, and, absent a clear showing of error, the court's ruling on such matters will be upheld." Finney v. State, 660 So. 2d 674, 682 (Fla. 1995), cert. denied, 516 U.S. 1096 (1996). See also Geralds v. State, 674 So. 2d 96, 100 (Fla. 1996); Ramirez v. State, 542 So. 2d 352, 355 (Fla. 1989). The State properly developed Forensic examiner Romeo's qualifications to render an opinion that based upon his microscopic analysis three

shell casings recovered from the Knight's Trail Gun Range matched the casing found at the murder scene. The trial court was not required to grant defense counsel's belated request [during voir dire] for a Frye hearing.[23] (V19, 1494-95).

FDLE Firearm Examiner [Crime Laboratory Supervisor] Romeo's training and experience were not challenged by the defense below. Analyst Romeo had a bachelor's degree from the University of South Florida, and testified that the "career of firearms identification is so specialized that we also complete a two-year training program - - or I completed a two year training program - - within the FDLE laboratory." (V25, 2631). In addition, Analyst Romeo testified that he has received "both internal and external proficiency testing as well as double blind tests throughout our training and then once we're recognized crime laboratory analyst as well." (V25, 2631-32). He has been subjected to both blind and double blind testing the latter of which is a random event but the blind testing is conducted annually by an external company. (V25, 2622). Analyst

[23] This Court reviews *de novo* a trial court's determination of the acceptance of a new or novel scientific theory under Frye. Brim v. State, 695 So. 2d 268, 274 (Fla. 1997). However, since tool mark examination as conducted in this case cannot be considered a new or novel scientific theory, the standard of review should be an abuse of discretion based upon the trial court's assessment of the expert's qualifications to render an opinion.

Romeo has testified in court "approximately a hundred times." (V25, 2632).

As this Court explained in Marsh v. Valyou, 977 So. 2d 543, 547 (Fla. 2007): "'By definition, the Frye standard *only applies* when an expert attempts to render an opinion that is based upon *new or novel scientific techniques.'* U.S. Sugar Corp. v. Henson, 823 So.2d 104, 109 (Fla.2002)(emphasis added). Therefore, we have recognized that Frye is inapplicable in the 'vast majority' of cases. Id.; see also Rickgauer v. Sarkar, 804 So.2d 502, 504 (Fla. 5th DCA 2001)('Most expert testimony is not subject to the *Frye* test.')." Spann v. State, 857 So. 2d 845, 852 (Fla. 2003)("In the vast majority of cases, no Frye inquiry will be required because no innovative scientific theories will be at issue."). In Spann, this Court rejected a Frye challenge to expert forensic handwriting identification since it was not "new or novel". Id. at 853. Similarly, firearm or toolmark identification testimony has been used for decades and King has not identified a single case that excludes such microscopic tool mark examination as conducted in this case as unreliable or otherwise unworthy of admission into court as evidence. See Kimbrough v. State, 700 So. 2d 634, 637 (Fla. 1997)(noting that "when scientific evidence is to be offered which is the same type that has already been received in a substantial number of

other Florida cases, any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed")(quoting Correll v. State, 523 So. 2d 562, 567 (Fla. 1988)). A Frye hearing was not required under the circumstances of this case.

Defense counsel in this case initially did not request a Frye hearing and only after voir dire had commenced did counsel change his mind. However, since the defense did not show that a new or novel scientific principle was involved and since defense counsel did not assert he had any testimony to present on the issue, the trial court was under no obligation to grant a hearing. In other words, there is no basis from this record to conclude the trial court either erred or that the defendant suffered any prejudice as a result of the failure to hold a Frye hearing. See e.g. Finney v. State, 660 So. 2d 674, 684 (Fla. 1995)("Without a proffer it is impossible for the appellate court to determine whether the trial court's ruling was erroneous and if erroneous what effect the error may have had on the result.").

After hearing defense counsel's renewed argument and the State's response, the trial court rejected the challenge to the

State's tool mark testimony. The court found that "that the testimony involving this matter is not new or novel, does not involve a new or novel scientific principle or theory or methodology." (V21, 1811). The court cited previous cases involving admission of similar tool mark or ballistics testimony and observed that "there is no state of Florida case saying that such a comparison is inadmissible, nor requires a Frye hearing." (V21, 1912). No abuse of the trial court's discretion has been shown in this case.

Firearm and toolmark identification is not a new or novel concept. See Riner v. State, 128 Fla. 848, 851, 176 So. 38, 39 (Fla. 1937). For example, in U.S. v. Hicks, 389 F.3d 514, 526 (5th Cir. 2004) the Fifth Circuit rejected a similar challenge to expert testimony matching spent shells to a particular weapon, stating:

> **Moreover, the matching of spent shell casings to the weapon that fired them has been a recognized method of ballistics testing in this circuit for decades**. See United States v. Washington, 550 F.2d 320, 324 (5th Cir.1977) ("firearms expert testified that the shell casing found in the trunk of the Mercury Comet had been fired from the pistol 'to the exclusion of all other weapons in existence' "); see also United States v. Lopez-Escobar, 920 F.2d 1241, 1243 (5th Cir.1991) (observing that the district court directed the prosecutor to arrange a comparison of a casing found near the scene of the arrest and casings to be test-fired from a specific gun). We have not been pointed to a single case in this or any other circuit suggesting that the methodology employed by Beene is unreliable.

> Additionally, standards controlling firearms comparison testing exist. As Beene testified at the state-court Daubert hearing, he followed well-accepted methods and scientific procedures in making his comparisons. He also testified in federal court that the Association of Firearm and Tool Mark Examiners produces literature about firearms comparison testing that he relied on and that is authoritative in the field of firearms and tool mark examination. Further buttressing the reliability of his methodology, Beene also testified at the state-court Daubert hearing that the error rate of firearms comparison testing is zero or near zero.
>
> Based on the widespread acceptance of firearms comparison testing, the existence of standards governing such testing, and Beene's testimony about the negligible rate of error for comparison tests, the district court had sufficient evidence to find that Beene's methodology was reliable. Accordingly, it did not abuse its discretion by admitting his testimony. (emphasis added).

King's argument that the comparison in this case is unreliable because the gun which fired the cartridges has not been recovered is not persuasive. The microscopic analysis is based upon toolmark identification principles and is not a novel technique. See State v. Williams, 992 So. 2d 330, 332 (Fla. 3d DCA 2008)(although the firearm had not been recovered, "[b]ased on an examination of the casings, a firearms expert determined that the bullet casings recovered from all three robberies were fired from the same weapon."); U.S. v. Foster, 300 F.Supp.2d 375, 376-377 (D.Md. 2004)("In this case, the testimony of Supervisory Special Agent Paul Tangren, a Firearms Tool Marks Examiner with the Federal Bureau of Investigation, established

to the court's satisfaction the general reliability of the science of ballistics, including comparisons of spent cartridge casings even where there is no "known" weapon recovered."); United States v. McKissick, 204 F.3d 1282, 1291 (10th Cir. 2000)(firearm examiner matched shell casings found in two different locations as having been fired from the same weapon even though gun had not been found).[24] King fails to cite a single case wherein such toolmark or ballistics testimony such as that offered by Firearm Examiner Romeo has been excluded from evidence.

Indeed, testimony such as that presented here has been admitted in Florida for decades. For example, in Dornau v. State, 306 So. 2d 167, 171 (Fla. 2d DCA 1974), the Second District rejected a sufficiency challenge in part based upon shell casing comparisons made at the murder scene and the location the defendant had been observed shooting targets even though the actual murder weapon had not been recovered. The court provided the following analysis of the evidence, stating:

[24] Toolmark comparisons in firearms analysis have long been recognized as admissible in courts of law throughout this county. See e.g. "Identification based upon a comparison of breechface imprints, firing pin impressions, and extractor and ejector marks, [has] achieved recognition by the courts...." A. Moenssens and F. Inbau, Scientific Evidence in Criminal Cases 195 (2d ed. 1978). See also 2 Wigmore, Evidence § 417(a), 495 (Chadbourn rev. 1979); 29 Am.Jur. P.O.F. Firearms Identification § 13 (1972).

". . . 6) The victim was shot with a .25 caliber pistol. (7) Appellant owned a .25 caliber pistol with which he had practiced in an open space behind his business (Raydor Industries); and shell casings found in the rear of his business matched a shell casing found on the floor of the Addy home after the murder. Too, while no gun was produced, ballistics established that the casing found at the murder scene was fired from the same gun that discharged several of the .25 caliber casings found in the rear of the aforesaid business. . ." (emphasis added).

Of the 47 cartridges Examiner Romeo viewed, he separated three for closer inspection and found a match with the round located near the burial site. (V25, 2646). Examiner Romeo's analysis consisted of microscopic examination of the crime scene cartridge and comparing unique shapes, scratches, striations, and "and impressed marks that are unique to that particular firearm that fired it." (V25, 2646). In finding a match, Examiner Romeo was looking for "a reproducible pattern of sufficient quality and quantity." (V25, 2646). The marks on State's Exhibit 61 matched or were the same as the marks on three fired cartridge cases from the range. (V25, 2647). If he had to provide a percentage for his degree of conviction or certainty, Analyst Romeo said it would be "a hundred percent." (V25, 2649).

The one case cited by King where tool mark testimony was excluded, Sexton v. State, 93 S.W.3d 96, 99 (Tex.Crim.App. 2002), related to **matching unfired cartridges** to spent shell casings found at the crime scene. Such a comparison was based only upon similar magazine marks. This is a significant difference from the situation here because Examiner Romeo had additional points of comparison to make a tool mark identification in this case, assessing a cartridge which had been fired.

The primary focus of King's argument appears to rest upon the degree of certainty Examiner Romeo placed upon his comparison of the three shell casings recovered from the gun range and the casing recovered near the victim's body. However, the degree of certainty of Firearm Examiner Romeo expressed in application of established and accepted tool mark examination is a matter of weight, not admissibility.[25] See U.S. Sugar Corp. v. Henson, 823 So. 2d 104, 110 (Fla. 2002)("We reaffirm our dedication to the principle that once the Frye test is satisfied through proof of general acceptance of the basis of an opinion, the expert's opinions are to be evaluated by the finder of fact and are properly assessed as a matter of weight, not

[25] For an extensive discussion of this issue from a court finding such evidence admissible but concluding that the discipline is part art and part science. See U.S. v. Willock, 696 F.Supp.2d 536, 571 (D.Md. 2010).

admissibility.”).

The very few cases discussing or in any manner questioning the admissibility or acceptance of such ballistics evidence, do not exclude such expert testimony, but, merely tend to limit the expert’s testimony regarding the degree of certainty of a “match.” See U.S. v. Monteiro, 407 F.Supp.2d 351, 366 (D.Mass. 2006)(finding the Government met its burden for admission of such evidence finding “no credible challenge to the underlying physical theory of how marks are transferred from the firearm to the cartridge case” but restricting the Government expert’s opinion to a “reasonable degree” of certainty.); U.S. v. Diaz, 2007 WL 485967, 5 (N.D.Cal. 2007)(noting that “[n]o reported decision has ever excluded firearms-identification expert testimony under Daubert” but the court restricted such expert testimony to a “reasonable degree” of ballistic certainty)(unpublished). The defense presented no objection to Examiner Romeo’s qualification as an expert, nor, did they offer any expert testimony of their own to contradict his conclusions. Under the evidence and circumstances presented to the trial court, no abuse of discretion has been shown.

Finally, assuming for a moment the trial court erred in either not conducting a Frye hearing or in admitting Firearm Romeo’s testimony, the error was clearly harmless. Firearm

Examiner Romeo's testimony was admissible at the very least to establish the cartridge case recovered at the burial site was consistent with, or matched, three of those recovered from the Knight's Trial Gun Range. Defense counsel below stated he would be satisfied with Firearm Examiner Romeo stating that his opinion was a "more than likely chance the --- or more than likely that these were caused by the same firearm; that these marks were caused by the same firearm." (V21, 1805). Again, there is no published case excluding such testimony regarding a match to a cartridge casing, but, a few cases do purport to limit or restrict the significance of the match to a "reasonable degree" of ballistic certainty. This potential limitation would not materially undercut Firearm Examiner Romeo's testimony, particularly in light of the other strong and uncontradicted evidence linking King to the victim's abduction, sexual battery, and murder. In any case, Mr. Salvador's testimony and the gun range record establishes that King was in possession of an unrecovered 9 millimeter handgun just hours prior to the victim's murder. Not so coincidently, a spent 9 millimeter shell casing was found at the burial site of the victim who was murdered by a contact wound consistent with having been inflicted with such a weapon. When coupled with the State's

unchallenged DNA, fingerprint and eyewitness testimony, any error in this case could not have contributed to the conviction.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN ACCEPTING AS GENUINE THE PROSECUTOR'S PROFFERED REASON FOR HIS PEREMPTORY STRIKE OF A MINORITY JUROR?

King next argues that the State's peremptory strike of a single juror was pretextual and amounts to reversible error. King's argument is unpreserved and otherwise devoid of merit.

On appeal this Court presumes that peremptory challenges are exercised in a nondiscriminatory manner. Additionally, because the trial court's decision turns primarily on an assessment of credibility, this Court will affirm unless the trial judge's decision to grant the strike is clearly erroneous. Murray v. State, 3 So. 3d 1108, 1120 (Fla. 2009).

In Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996), this Court determined that a trial court must go through a three step process to resolve an allegation of discrimination during the jury selection process: (1) A party objecting to the other side's use of a peremptory challenge on racial grounds must make a timely objection, identify the venireperson as a member of a distinct racial group and request the court to direct the challenger to offer a race neutral reason for the strike; (2) the court must ask the proponent of the strike to explain the

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

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

When challenged, the prosecutor in this case offered a number of facially racially neutral reasons for striking juror 111, starting with her age, 18, the youngest juror and her inexperience. The prosecutor stated:

> On juror 111 - -, she's an 18-year-old female. She came across as meek, young and inexperienced. She's the youngest on the panel we have existing so far.
>
> Her statement during the original death qualification was that living life in prison is more awful than a death sentence. Her brother has a pending felony drug charge. She watches the television show

> CSI. Commonly, a concern of ours is that they would hold us to a TV standard as opposed to a regular standard.
>
> And based on those foregoing reasons, we exercise our peremptory challenge on Number 111.

(V20, 1764).

In response, the defense counsel simply stated "it is our position those are not sufficient reasons." (V20, 1764-65). The prosecutor added that he had several reasons for the challenge; the juror also said that living in prison was worse or more awful than a death sentence. When the court noted other jurors had said that, the prosecutor added that he intended to strike any other jurors that had said that. (V20, 1765). The judge found the fact her brother had a pending drug charge was a genuine race neutral reason for the strike. (V20, 1766).

Defense counsel did not challenge the factual basis for the reason provided, the pending drug charge, mentioned by the prosecutor and accepted by the trial court below. On appeal, with the benefit of time and hindsight, and, apparently after scouring the juror questionnaires, appellate counsel asserts the strike must have been pretextual because one or more jurors may have had family members who had been charged or convicted of criminal offenses. However, defense counsel, at no point below, challenged the prosecutor's or the court's reasons by asserting the pending criminal charge applied to other non-challenged

jurors. This precludes such a claim now as jury selection is not a process by which a defendant can sit idly at the time of jury selection only to spring a potential error by scrutinizing questionnaires in an effort to perfect his pretext argument on appeal. Trial counsel below did not mention or cite a single similarly situated juror to the one challenged by the State. Consequently, this claim has been waived. Hoskins v. State, 965 So. 2d 1, 9-11 (Fla. 2007)(noting that while on appeal the defendant named a number of potential jurors who were "situated similarly" to the challenged juror, his failure to name these jurors and make this argument at trial operated to waive this claim on appeal)(citing Davis v. State, 691 So. 2d 1180, 1181 (Fla. 3d DCA 1997)(noting that the similarly situated juror argument "was not made to the trial judge and was consequently waived for purposes of appellate review"). See also Rimmer v. State, 825 So. 2d 304, 321 (Fla. 2002)(A judge cannot "be faulted for accepting the facial reason offered by the State, especially where the State's factual assertion went unchallenged by the defense."); Fotopoulos v. State, 608 So. 2d 784, 788 (Fla. 1992)(Any "claim that this reason is not supported by the record was not raised below and therefore has been waived."); Floyd v. State, 569 So. 2d 1225, 1229 (Fla. 1990)("[W]hen the state asserts a fact as existing in the record, the trial court

cannot be faulted for assuming it is so when defense counsel is silent and the assertion remains unchallenged.").

Another of the many problems with appellant's argument is the failure to establish the race of any of the comparators he mentions for the first time on appeal. Alonzo v. State, 46 So. 3d 1081, 1084 (Fla. 3d DCA 2010)("If the record fails to identify the respective race of the challenged and unchallenged jurors, the appellate court cannot determine if pretext exists.")(citing Davis, 691 So. 2d at 1182 (where record did not reflect race of allegedly similarly situated jurors, it was impossible for this Court to determine the issue of pretext). This is yet another reason to find the claim waived because trial counsel did not identify a single comparator at the time of trial.

Assuming for a moment this issue has not been waived, King has failed to carry his burden of showing the strike was exercised in a discriminatory manner. The pending or past felony drug charge or conviction was a valid, racially neutral reason for the strike. The fact that the State cited it as a "pending" felony drug charge was not shown to be in error below, or, for that matter on appeal. On the question of whether she or any other family member had been arrested or charged with a crime, Juror 111, stated on her questionnaire that her brother

"has a felony drug charge." (SR4, 605). If defense counsel had reason to doubt the prosecutor's assertion that it was a pending felony charge, he should have made that objection below. The trial court cannot be faulted for accepting this reason when the defense failed to challenge it below.

The prosecutor offered several valid, racially neutral reasons for his peremptory strike of juror 111. See Batson v. Kentucky, 476 U.S. 79, 95, 106 S. Ct. 1712 (1986)(noting the need for a judge to take into "account all possible explanatory factors in the particular case."). While the racial makeup of the panel is not known, the defense only challenged a single strike on the basis of race, therefore there was no pattern of strikes against any particular group in this case. King has not shown that any of the relevant circumstances that a trial court may consider, including the racial make-up of the venire; prior strikes exercised against the same racial group; a strike based on a reason equally applicable to an unchallenged juror; or singling the juror out for special treatment have been shown to apply in this case. See Murray, 3 So. 3d at 1120.

It is undeniable that juror 111 was the youngest prospective juror, just 19 years old at the time of trial. This was the first reason, of many, articulated by the prosecutor and

is a valid, race neutral reason.[26] See Rice v. Collins, 546 U.S. 333, 126 S. Ct. 969 (2005)(prosecutor's reason for strike, juror's youth, inexperience, and demeanor, sufficient to uphold trial court's credibility determination under Batson); Saffold v. State, 911 So. 2d 255, 256 (Fla. 3d DCA 2005)(peremptory challenge based on the age of juror was permissible); Daniels v. State, 837 So. 2d 1008 (Fla. 3d DCA 2002). The prosecutor not only mentioned her age, but, lack of experience and her perceived meekness. The record supports the prosecutor's basis for the strike, not only to age, but perceived meekness. During voir dire, the trial court had to ask juror 111 to speak up so that the court reporter could note her responses for the record. (V20, 1697-98). Further, juror 111's view on the death penalty, that life in prison may be more of a punishment than the death penalty, was yet another, valid, race neutral reason mentioned by the prosecutor for the strike. (SR4, 605).

As noted, defense counsel did not assert that any similarly situated juror with a felony charge or pending felony charge had

[26] "A potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge." People v. Sims (1993) 5 Cal.4th 405, 430, 20 Cal.Rptr.2d 537, 853 P.2d 992.); United States v. You, 382 F.3d 958, 968 (9th Cir.2004) ("valid and non-discriminatory" reasons for strikes included that one excused "juror lacked the sufficient age and maturity level" . . .); United States v. Williams, 934 F.2d 847, 849-50 (7th Cir.1991) (youth and marital status are neutral considerations).

not been challenged. Moreover, even on appeal, with the benefit of unlimited time and after meticulously mining the prospective juror questionnaires, appellate counsel has not found a single appropriate comparator. Melbourne, 679 So. 2d at 765 ("The right to an impartial jury guaranteed by article I, section 16, is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense."). None of the non-challenged comparators mentioned by appellate counsel had the combination of characteristics of being young and inexperienced (19), with a brother with a pending/past felony drug charge, with similar views on the death penalty [life in prison was worse than the death penalty]. King has not shown the trial court's ruling below was in error, much less clearly erroneous.

ISSUE V

WHETHER KING'S DEATH SENTENCE IS PROPORTIONAL?

King finally claims that, while sufficiently aggravated, the mitigation presented outweighs the aggravators and renders the death penalty inappropriate. What King is essentially asking this Court to do is reweigh the aggravating and mitigating circumstances and arrive at a different conclusion than that reached by the jury and trial court below. However, that is not the appropriate function of this Court on

proportionality review.[27] See Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989)("It is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances."). See also, Bates v. State, 750 So. 2d 6, 12 (Fla. 1999)("Our function in a proportionality review is not to reweigh the mitigating factors against the aggravating factors" but to "consider the totality of the circumstances in a case and compare it with other capital cases."). In any case, assuming for a moment that this Court were to engage such a *de novo* reweighing of the evidence, the outcome in this case would remain unchanged. King's crimes against [redacted] were so appalling that this case stands out even among capital cases for its egregious facts.

King's death sentence, supported by four powerful aggravators, recommended by the jury 12-0, and as imposed by the trial court, is clearly proportional. The trial court gave great weight to three aggravators, HAC, CCP, Avoiding Arrest, and moderate weight to in the course of a kidnapping and sexual battery aggravator, balanced against one statutory (capacity substantially impaired by brain damage, moderate weight) and a

[27] The purpose of the proportionality review is to compare the case to similar defendants and facts "to determine if death is warranted in comparison to other cases where the sentence of death has been upheld." England v. State, 940 So. 2d 389, 408 (Fla. 2006).

number of non-statutory mitigating factors including low or borderline IQ, history of non-violence, and good family background or family ties, given moderate to little weight by the court. The aggravators in this case include two of the most weighty under Florida's capital sentencing scheme, HAC and CCP. See Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999)(stating that "heinous, atrocious, or cruel" and cold, calculated and premeditated aggravators are "two of the most serious aggravators set out in the statutory sentencing scheme...")

The HAC aggravator alone far outweighs anything presented by King in mitigation. In finding the murder was HAC, the court stated, in part:

> ...the defendant was seen by the victim's next-door neighbor driving "very slowly" through the neighborhood, "back and forth" approximately four or five times. The neighbor found this so suspicious that she went outside, where she saw the defendant, who was driving a green Camaro automobile, drive into the victim's driveway.
>
> [redacted] was subsequently abducted from her home by the defendant, leaving in the home her two children, ages 6 months and 2 years of age, together in a crib. The defendant drove her to his home, a few miles away. At his home, with [redacted] bound with duct tape, the defendant sexually battered and restrained her over the course of several hours. The medical examiner found "insertion trauma" injuries to her vagina and anus, bruising of her wrists, arms, face, thigh and other areas of her body. [redacted] was 5 feet, 2 inches tall, and weighed 109 pounds.
>
> After completing these brutal acts, the defendant continued his abduction of [redacted]. The defendant drove her to the home of his cousin Harold Muxlow, who lived a few miles away. The defendant arrived between

5:30 and 6:00 PM. While [redacted] remained in the car, the defendant left his car and obtained from Muxlow a shovel, a flashlight, and a gas can. After Muxlow gave these items to the defendant, Muxlow heard [redacted] call out, “call the cops.” Muxlow saw the defendant enter the car from the passenger side of the car, climbing over the console, and pushing [redacted] head down in the back seat. The defendant, continuing his abduction, drove away from Muxlow’s home.

At some point [redacted] was able to obtain the defendant’s cell phone, quite possibly while the defendant was talking outside his car to Muxlow. At 6:14 PM, while the defendant was driving, [redacted] was able to use his cell phone to call the 911 operator without the knowledge of the defendant. The 911 call will be discussed in more detail below.

Furthermore, while the defendant drove, the kidnapping continued. With [redacted] in the back seat, two people, Shawn Johnson and Jane Kowalski, each while driving down Highway 41, saw [redacted] in the backseat of defendant’s car screaming for help. Ms. Kowaiski called the 911 operator to report what she saw. She told the 911 operator that she heard loud, “horrific” and “terrified” screaming coming from the defendant’s car. She saw what appeared to be a child screaming and “banging on the window” from the backseat. The defendant intentionally evaded Ms. Kowaiski by slowing down and then turning left onto another road, Toledo Blade Boulevard. After turning onto Toledo Blade Boulevard, the defendant drove to a remote, secluded area.

. . .

Did [redacted] feel terror or fear as these events unfolded, or fear and emotional strain preceding her almost instantaneous death? This court, in the calm reflection of the moment, and by the written words of this sentencing order, detached and objective, can find beyond all reasonable doubt that such terror, fear and emotional strain existed in the mind of [redacted] Amber Lee prior to her murder. Any words by this court, however, are not capable of truly expressing the reality of such terror.

It is most extraordinary and extremely rare that one can actually hear such emotions in the voice of an innocent victim, who is doomed to be murdered. State’s

exhibit number 102, the 911 recording of the victim, tragically reveals her fear, mental state, her terror and her emotional strain. One need only listen to portions of this call to comprehend her mental state: [the trial court cited the full transcript, only portions are reproduced here]

[redacted]: Please let me go, please. Please, Oh God, please.

[redacted]: Please let me go. Help me. I don't know.

. . .

[redacted]: I'm married to a beautiful husband and I just want to see my kids again.

[redacted]: Please God.... Please protect me.

FN. [The court acknowledges that although it quotes from the 911 call, it cannot, by any means, convey the fear and terror clearly heard in [redacted] voice in that recording.].

. . .

The call abruptly ended. The defendant took the cell phone away from [redacted] and broke it apart. To further indicate the fear [redacted] surely felt, she removed a ring she always wore and left it in the back seat as a clear marker of her presence in the car. The defendant drove the green Camaro to a deserted area, down a barricaded road not accessible to regular automobile traffic. He took her out of the car, into a wooded area and murdered her by shooting her above the right eye.

The defendant's words and actions reveal a crime that was conscienceless, pitiless, and unnecessarily tortuous with an utter indifference to [redacted] suffering. His telling her that he would let her go as soon as she gave him the cell phone was a lie, knowing full well that he was going to take her to a secluded area and murder her.

The court finds this aggravating circumstance has been established beyond a reasonable doubt and gives it great weight.

(V11, 2049-53). The State can add little to the thoughtful analysis provided by the trial court below, but, notes that King

placed the handgun against Mrs. [redacted]'s right eye, in her field of vision, which indicates that she was quite aware at the very sad end of her lengthy ordeal, that death was her imminent fate. (V26, 2901, 2912).

Balanced against the strong case in aggravation presented for the kidnapping, sexual assault of [redacted] was a single statutory mitigator and a number of non-statutory mitigators regarding his background and low IQ. The single statutory mitigator found by the trial court was that King's capacity to appreciate the criminality of his conduct and conform it to the requirements of the law was substantially impaired based upon evidence King had suffered from brain damage. Although only given moderate weight by the trial court, this was a charitable finding given the fact that contesting evidence was presented by the state expert, Dr. Michael Gamache, (V29, 3578-V30, 3605) and the fact that the thrust of Dr. Joseph Wu's testimony was that frontal lobe damage can render an individual prone to impulsive acts or violent outbursts, especially during periods of stress. (V27, 3190-93). The facts of this case reveal that King committed a methodical crime, not the least bit impulsive, from targeting the victim, to the extended period of control and domination he exercised, to the planning for her demise and his attempt to cover up his crimes. See V11, 2053-57 (discussing

the CCP and Avoiding Arrest aggravators). Indeed, Dr. Wu did not relate any of King's acts on the day of the murder to brain damage or likely brain damage.[28] Despite finding that King was "substantially impaired" in his ability to conform his conduct to the requirements of the law on the day of the crime, Dr. Wu admitted: "I have not reviewed the facts regarding the specific events." (V28, 3207). And, Dr. Wu admitted on-cross-examination that King apparently had the ability to conform his conduct to the requirements of the law most of his life. (V28, 3215). Dr. Wu also acknowledged that PET scans cannot predict violent behavior, but, perhaps, an individual would have "difficulty regulating aggressive impulses, but one can't provide a more specific quantification." (V28, 3232). Dr. Wu also agreed that experts in his field believe that knowledge of the brain itself is too uncertain to draw any conclusion about impulse control based upon PET scans. (V28, 3236).

Appellate counsel fails to cite a single comparable case in support of his claim that the death sentence is not proportional.[29] King's sentence is proportional when compared to

[28] The defense purposely avoided having King evaluated by Dr. Wu for anything other than discussing potential brain injury to preclude the State's expert from fully examining King and conducting psychological testing upon him. (V27, 3088-89).

[29] Notably, King's family background was unremarkable and did not include abuse or deprivation.

other capital cases affirmed by this Court. See Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003)(upholding death sentence in a strangulation murder where the trial court found HAC and prior violent felony against the statutory mitigating factor of substantially impaired capacity and twenty-six nonstatutory mitigating factors); Hauser v. State, 701 So. 2d 329 (Fla. 1997)(death sentence proportionate where victim was strangled and trial court found three aggravators of HAC, CCP, and pecuniary gain, measured against one statutory mitigator and four nonstatutory mitigators); Orme v. State, 677 So. 2d 258, 263 (Fla. 1996)(holding death sentence proportionate for the sexual battery, beating, and strangulation of victim where aggravators included HAC, pecuniary gain, and commission during sexual battery and mitigating factors included substantially impaired capacity and extreme emotional disturbance); Mansfield v. State, 758 So. 2d 636 (Fla. 2000)(death proportional where two aggravators of HAC and crime committed during the commission of a sexual battery, outweighed five nonstatutory mitigators); Chavez v. State, 832 So. 2d 730, 767 (Fla. 2002)(affirming death sentence for kidnapping, sexual assault and shooting murder of 9 year old boy with HAC, in the course of a felony (kidnapping), and avoiding arrest aggravators balanced against family background mitigation, good work history, and lack of violence).

Death is a proportional and clearly appropriate punishment for King's kidnapping, sexual battery, and first degree murder of [redacted].

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court AFFIRM the convictions and sentence imposed below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, Public Defender's Office, Post Office Box 9000 - Drawer PD, Bartow, Florida 33831-9000, this 31st day of January, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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