IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-87

WADADA DELHALL,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

On April 24, 1998, Gilbert Bennett was shot and killed in the office area of Ray's Auto Body and Repair Shop in Opa Locka. (V123. 1290-91, 1314)[1] Hubert McCrae provided a statement to the police about having witnessed this murder. (V123. 1291-93) McCrae provided a description of the murderer and indicated that the murderer had entered the office through the shop bay. (V123. 1293) As a result, the door between the bay and the office was processed, and a fingerprint was lifted. (V121. 1184-90) That fingerprint was identified as belonging to Negus Delhall, Defendant's brother. (V123. 1265-79) As a result, Det. Ray Hoadley prepared a photographic array and showed it to McCrae, who identified Bennett's murderer. (V123. 1295-99) At the time, no other witnesses had come forward in that case. (V123. 1299) As a result, an arrest warrant was issued for Negus. (V123. 1299-1300, 1302)

Hoadley went to Negus's residence in an attempt to locate him and met with Defendant instead. (V123. 1300-01) Defendant insisted that he was unaware of Negus's whereabouts. (V123.

[1] Volumes 1-57 of the record contains documents filed in the trial court, is consecutively numbered and will be referred to by the symbol "R." Volumes 58-142 contain the transcripts of proceedings and are not consequently paginated. As such, the transcripts will be referred to by the symbol "V[volume number]." The symbol SR. will refer to the supplemental record on appeal.

1302) Hoadley subsequently went to another residence in an attempt to find Negus and again encountered Defendant, who appeared aggravated and accused Hoadley of following him. (V123. 1302-03) On another occasion, Hoadley went back to Negus's residence to post flyers and observed Defendant drive away from the apartment complex at a high rate of speed with an unknown individual in the car. (V123. 1304) Eventually, Negus was located in Virginia Beach, Virginia in July 2001. (V123. 1305)

On September 6, 2001, an *Arthur* hearing was held in Negus's case, at which Paul Gerson represented Negus. (R. 755, V123. 1307-08, 1310-11, 1339-40) At that time, an affidavit from McCrae was presented to the court, and McCrae was referred to during the hearing. (V123. 1307, 1311, 1341) At the conclusion of the hearing, Negus was denied bond, and on October 19, 2001, Negus's case was set for trial on December 10, 2001. (V123. 1312-13, 1342)

Clarence Gooden, who ran a lunch truck that frequently stopped at Ray's Auto, was thereafter approached by Defendant and Erwin Bruce, who questioned him about identity. (V123. 1360-64, 1369-71) During this conversation, Gooden showed Bruce his driver's license. (V123. 1371) Bruce responded to both Gooden and Defendant, who was smiling, that he knew Gooden would not have provided information to the police and left. (V123. 1372)

On November 27, 2001, Defendant visited Negus in jail. (V123. 1414) On November 29, 2001, Marcia Berry, Defendant's girlfriend, decided to leave work around 3 p.m. (V124. 1474-77, 1482-85) She was picked up at the American Express office in Plantation where she worked by Defendant and his brother Atiba, who was driving Berry's faded gold, late model, four-door Mazda Protege, which had faded tint on the windows. (V124. 1477-79, 1483-84) After visiting an aunt, Berry, Defendant, Atiba and Berry's cousin Jahary drove to Berry's home, arriving shortly after 5 p.m.. (V124. 1484-90) After spending 10 to 15 minutes at Berry's home, Defendant, Atiba and Jahary left again in Berry's car. (V124. 1490-91)

That same day, Fred Williams and Rolando Rodriguez were working at another auto repair business located in the same warehouse complex as Ray's Auto. (V123-V124. 1431-34, 1452-52) Around 6:50 p.m., Williams started to attach a battery booster to a car he had been working on in the driveway so that he could move it into the shop as it was getting dark. (V123-V124. 1432-34) Rodriguez was working on a motor in this same area while visiting with Christian Weber, a friend. (V124. 1453-54) As they were doing so, they heard a series of consecutive gunshots coming from the location of Ray's Auto, and Williams turned to see what was happening while Rodriguez ducked. (V124. 1434-36,

1454-56) Williams observed an African-American man who was 5’11” tall with a slim build wearing jeans and a tucked in button down shirt walk out of Ray’s Auto with a gun in his hand, which was held down next to his side. (V124. 1436-39) As the man approached the passenger’s side of a small car with tinted windows, he raised the gun and fired another shot toward Ray’s. (V124. 1437, 1443) The man then used his left hand to open the car door, and as the car drove quickly away, the man fired another shot. (V124. 1438-40, 1457-59)

Off. Michael Hufnagel was dispatched to the scene at 6:53 p.m. (V121. 1057-63) When he arrived two minutes later, he observed McCrae lying on the ground in front of the door used to bring cars into the shop. (V121. 1063-64) McCrae was bleeding from an obvious wound to his stomach, appeared to be concerned and in pain and complaining of difficulty breathing. (V121. 1065) Hufnagel suggested that McCrae roll onto his side given his size. (V121. 1065) When McCrae did so, his breathing eased briefly, only to become labored again. (V121. 1066) Hufnagel then noticed that McCrae had numerous wounds, and McCrae asked if he were going to die, which Hufnagel believed was likely. (V121. 1066-67) Hufnagel urged McCrae to hang on and asked him if he knew who had shot him. (V121. 1067) McCrae responded that the brother of the person who killed the previous owner of the

shop had shot him. (V121. 1068, 1081) He also indicated that the person was arrived in a small gray Mazda with tinted windows. (V121. 1069, 1087) Fire rescue then arrived, and McCrae died shortly thereafter. (V121. 1070)

The police began looking for Defendant. (V125. 1576-79, V127. 1813-14, 1816-17) On December 5, 2001, the police learned of an address, and, around noon, Det. Gustavo Bayas, John Butchko and Sgt. Yolanda Rayborn knocked on the door to the apartment, which was answered by Tiese Caldwell, who allowed the police to enter. (V125. 1577-80, V127. 1818-27) At the time, Caldwell stated that she and her children were the only people in the apartment but that Defendant also lived in the apartment. (V125. 1581-82, V127. 1825, 1827) Butchko sat on a couch speaking to Caldwell with Rayborn next to him while Bayas stood next to the kitchen counter in the small, one bedroom apartment. (V125. 1582, V127. 1828-29)

Within a couple minutes, Bayas heard a rustling noise coming from the bedroom and walked toward that area to determine the source of the noise. (V125. 1583, V127. 1830) When he looked through the open bedroom door, he saw nothing to account for the noise but heard the noise again coming from the closet area. (V125. 1583-84) As a result, Bayas entered the bedroom, drew his gun, opened the closet door and found a man hiding in the

closet. (V125. 1584-86) Bayas ordered the man out of the closet and restrained him while calling for Rayborn and Butchko. (V125. 1586, 1594, V127. 1830) Bayas took the man downstairs to the parking lot. (V125. 1594-95, V127. 1832) Once downstairs, Defendant identified him and asserted that he had hidden in the closet because he was on probation. (V125. 1592-93, 1595, V127. 1833-34) Defendant was then released and told he was not under arrest. (V125. 1596, V127. 1834, 1836) Butchko then asked Defendant if he would come to the police station to answer questions, and Defendant agreed. (V127. 1836)

Once at the station, Defendant was informed of his rights and waived them. (V127. 1848-54) At first, Defendant denied he or Berry drove the Mazda but later acknowledged driving the Mazda after being confronted with the fact it was found at his apartment. (V127. 1859-60) He claimed that on the day of the murder, he worked until 4:45 p.m., walked to his aunt's home, got his aunt to drive him to pick up Berry from work at 6:30 p.m., went shopping briefly, was dropped off at Berry's father's home with her and then drove Berry's father's car home. (V127. 1864-68) Defendant insisted that he had not been in contact with Atiba since September 11, 2001. (V127. 1862) He asserted that he knew Negus was in jail but that he was unaware of the charges or the fact of the case. (V127. 1869-70) However, he stated that he

had visited Negus in jail a week before on a Monday. (V127. 1870) In discussing Negus, Defendant appeared upset and stated that he was bothered that Negus was in jail because he was sure Negus was innocent. (V127. 1879) As the conversation continued, Defendant was told he was not under arrest at least 3 times. (V127. 1883-84) Defendant never asked to leave but continued to deny any knowledge of McCrae's murder. (V127. 1883-84)

Butchko then asked William Clifford, a civilian employee of the police department,[2] to interview Defendant, gave Clifford basic information about the crime and Defendant and brought Defendant to Clifford. (V125. 1699-1709, V127. 1884-85) Clifford had Defendant executed a written consent and a waiver of his rights. (V125. 1715-19, V127. 1885-86) He then spoke to Defendant about his background for about an hour. (V125. 1749) The conversation then turned to the McCrae murder, and Defendant denied knowing anything about McCrae or his murder. (V125. 1749-50) When Clifford suggested that it was be easy to determine the truth of that assertion, Defendant acknowledged that Gerson had informed him that McCrae was the only witness against Negus and his place of employment. (V125. 1751-52) However, Defendant insisted that he was with Berry at the time of the murder. (V125. 1752-53)

[2] Clifford was a polygrapher, but he was described as an interviewer before the jury. (V125. 1697-1704)

Clifford informed Butchko of Defendant's claim. (V125. 1755, V127. 1886) Butchko checked into the claim and informed Clifford that it was false. (V125. 1755-56, V127. 1886-87) When Clifford told Defendant of Berry's statement, Defendant thought for a couple of minutes and then confessed he had killed McCrae to prevent him from testifying against Negus both orally and in writing. (V125. 1757-64, V127. 1889)

Butchko then questioned Defendant further about the specifics of the crime. (V127. 1890-93) Defendant stated that he had been told that a person called Fat Man was a witness against Negus and that he had confronted McCrae about being that witness in October 2001, in an attempt to keep McCrae from testifying. (V127. 1924-26-27) At that time, McCrae had denied he was a witness, but Defendant did not believe him. (V127. 1926-27) Defendant claimed that when he visited Negus shortly before the murder, Negus told Defendant that he was facing the death penalty, and Defendant decided to kill McCrae. (V127. 1927-30)

Defendant told Butchko that he had driven Berry to work in her car and that he kept a loaded gun in a bookbag in the car. (V127. 1898-1900) He also acknowledged having a second revolver with him. (V127. 1900-01) He stated he picked Berry up after work, shopped briefly and then dropped Berry off at home. (V127. 1898, 1902) He then drove toward Ray's Auto while thinking of

killing McCrae to prevent him from testifying against Negus. (V127. 1903-13) Defendant claimed that he decided that God would decide if he did so by having McCrae present when he arrived. (V127. 1913-14) When he arrived, he saw McCrae working on a black SUV. (V127. 1914-15) Defendant claimed he drove out of the area briefly, returned to Ray's, got out of the car with a gun in each hand, shot McCrae repeatedly with both guns, walked back to the car, fire another shot to scare any witnesses before entering the car, started to drive away, fired a second shot to scare the witnesses and left. (V127. 1915-23) Defendant asserted that he stopped in Hialeah and sold the guns. (V127. 1923)

Defendant subsequently admitted that Atiba and Jahary had been with him earlier in the day but not during the crime. (V127. 1933) When confronted with the fact that witnesses had said the shooter was not the driver, Defendant eventually admitted that Atiba had been the driver. (V127. 1934-37) Defendant then agreed to give a stenographically recorded statement, but when the stenographer arrived, Defendant recanted his statement. (V127. 1938-41) As a result, Defendant was charged, by indictment filed on January 8, 2002, with the first degree murder of McCrae, use of a firearm in the commission of a felony and possession of a firearm by a convicted felon. (R. 45-49)

On June 10, 2003, Defendant filed a motion to suppress his statements. (SR. 7-18) He argued that his statements were obtained in violation of his Fourth and Fifth Amendment rights. He averred that he had been located and seized during a warrantless search of his apartment that exceed the scope of the consent for the officers to be in the apartment and was not justified as a protective sweep. *Id.* He further asserted that he was arrested in the bedroom without probable cause. *Id.* He also insisted that he had not voluntarily waived his rights and his statements were not voluntary. *Id.*

The State filed a written response to the motion to suppress, arguing that the officers had consent to enter the apartment and that hearing noises coming from an area of the apartment after repeatedly being assured that no one was in those areas created exigent circumstances. (SR. 22-46)[3] It also asserted that the encounter between Defendant and the police was consensual because while he was handcuffed briefly, he was then told he was not under arrest and was asked to come to the police station. *Id.* It argued that the police did have probable cause to arrest Defendant because McCrae had identified one of Negus' brothers as his murderer, 2 of the brothers could not have

[3] The State has moved to supplement the record with documents related to suppression and other issues. As such, the page numbers are estimates.

committed this crime, witnesses to the crime provided descriptions of the car used in the murder, the person leasing the apartment where Defendant was found had a similar car, Defendant was paying the rent on the apartment for this person and the car (which was observed to match the witnesses' descriptions) was found in front of the apartment. *Id.* It asserted that any illegality in the entry into the bedroom did not merit the exclusion of his statements because they were made hours later at the police station and the police did have probable cause to arrest him. *Id.* Finally, the State asserted that Defendant's statements were voluntarily made after a valid waiver of his rights. *Id.*

At the suppression hearing regarding the Fourth Amendment issues, Hoadley, the lead detective in the Bennett homicide, testified consistent with his trial testimony regarding McCrae's role in that case, his encounters with Defendant during the attempt to locate Negus, Negus's arrest and case. (V72. 7-28) He added that he provided information to Butchko about McCrae and Negus's family after this murder. (V72. 28-30)

Butchko, the lead detective in this case, testified that he knew of McCrae's statement to Hufnagel, his status in the Bennett case and the witnesses description of car used in the murder. (V72. 43-51) As a result, he investigated Negus's

brothers, learned that one was incarcerated, attempted to locate Defendant and Atiba and learned that Defendant was living in an apartment leased to Berry, who owned a small, gold Madza. (V72. 53-56)

Butchko provided testimony consistent with his trial testimony regarding the visit to Defendant's apartment, the encounter with Defendant, including Defendant's interview. (V72. 57-103) He added that Defendant was not restrained during the trip to the police station in a normal sedan without any separation between the front and back seats and that Defendant had been informed that he would be allowed to use the bathroom at his request and provided with refreshments during the time he was at the station. (V72. 78-79, 96) He also stated Clifford was a polygraph and that Clifford had informed him that Defendant had been found deceptive on a polygraph before he confessed. (V72. 82-93)

Rayborn testified consistent with the trial testimony about the visit to Defendant's apartment and encounter with him. (V72. 160-61, V73. 7-24) Bayas testified consistent with the trial testimony and Butchko's testimony about the information the police had before the visit to Defendant's apartment and the facts of the visit. (V73. 46-75) He added that Williams had described the shooter as a young African-American man around

5’11” and weighing around 160 pounds and that the officers had noticed Berry’s car and its consistency with descriptions of the car used in the murder before going to the apartment. (V73. 52-53, 60-61) He also stated that he was asked to contact Berry regarding Defendant’s whereabouts at the time of the murder later that day and that Berry had not supported Defendant’s alibi. (V73. 76-78)

Clifford provided testimony regarding his interaction with Defendant that was consistent with his trial testimony. (V73. 109-24) He added that Butchko did not state that Defendant had been arrested, that he had described Defendant as being in custody as all visitors were escorted while at the police station. (V73. 113-15) He also stated that Defendant failed the polygraph and was informed of the failure before the confession. (V73. 119-20)

Based on this evidence, Defendant argued that despite Caldwell’s agreement for the police to enter the apartment and speak to her, there was no consent for Bayas to stand by a wall in the living room while the conversation occurred. (SR. 63-81) He further asserted that the sounds that Bayas heard while standing there were insufficient to raise a concern for officer safety and justify entry into the bedroom. *Id.* He averred that he was then illegally seized in the bedroom because there was no

probable cause to arrest him, the police were outside their jurisdiction and the police did not know who he was until after he got to the parking lot. *Id.* He insisted that his consent to accompany the police to the station was tainted by the illegal seizure because he was not told he could refuse the request and was read his rights at the station. *Id.* After considering the evidence and arguments, the trial court denied the motion to suppress. (V77. 3)

On April 18, 2008, trial counsel adopted a *pro se* demand for speedy trial. (V110. 4-6) At that point, the trial court explained to Defendant personally that he was waiving the right to further discovery and that he could impair his ability to present information that he had not provided in discovery. (V110. 11-16) Defendant indicated that he understood and wished to proceed to a speedy trial regardless of the consequences. *Id.* The demand was subsequent stricken after a notice of alibi was filed and a new demand was made. (V111. 3-7)

On May 19, 2008, the State filed a *Williams* rule notice, indicating that it intended to present the facts of the Bennett murder. (R. 343-44) Defendant filed a motion to strike this notice on the grounds that the notice was overly broad, that all the facts of the Bennett murder were not relevant and that the undue prejudice from the presentation of this evidence would

outweigh its probative value. (R. 371-72) At the hearing, Defendant asserted that allowing the State to present all of the evidence concerning the Bennett murder would cause it to become a feature in this case. (V112. 82) However, Defendant admitted that the fact of the Bennett murder was relevant and suggested that evidence about it should be limited to Defendant's confession that he killed McCrae because he was a witness against Negus. (V112. 82-83) The State responded that since Defendant was planning to claim that his confession was false, it needed to corroborate the confession and to prove motive and the hinder a governmental function aggravator. (V112. 84)

The State then explained the circumstances of the Bennett murder and asserted that McCrae's role as a witness in that case provided the motive for his murder. (V112. 84-86) Additionally, the State asserted that Gerson's testimony would show that Defendant was aware of McCrae as it did not believe that it could prove that Defendant attended Negus's *Arthur* hearing. (V112. 86-87) After considering these arguments, the trial court ruled that the State could present the basic facts of the Bennett murder, McCrae's status as a witness and Defendant's knowledge of that status but could not get into other evidence about the Bennett murder. (V112. 95-99)

On May 29, 2008, Defendant moved in limine to exclude

McCrae's dying declaration. (R. 373-74) In support of this motion, Defendant argued that the statement did not fit within the definition of a dying declaration because McCrae was allegedly unaware of his impending death and that the statement was not trustworthy because McCrae could have meant Defendant's brother Atiba. *Id.* However, Defendant made no assertion that the admission of this statement would violate the Confrontation Clause. *Id.*

At the hearing on the motion, the State asserted that the statement qualified as both a dying declaration and an excited utterance. (V112. 110-11) Defendant asserted that the statement should not be admitted because it might have referred to Atiba and not him. (V112. 111) The trial court rejected this argument, finding that it went to the weight of the evidence. (V112. 111) The trial court also indicated that it believed that statement qualified as an excited utterance because it was made within minutes of the shoot. (V112. 111-12) It questioned whether the statement qualified as a dying declaration because a doctor did not say McCrae was not going to make it. (V112. 112) Defendant insisted that it did not qualify as an excited utterance because McCrae was answering questions and mentioned *Crawford*. (V112. 112-13) The trial court stated that the mere fact the statement was made in response to a question did not prevent it from being

an excited utterance and ruled the statement admissible as one. (V112. 113-14)

On June 5, 2008, Paul Gerson, Negus' attorney filed a motion to quash a subpoena issued to him. (R. 444-46) In the motion, Gerson admitted meeting with Defendant at his office the day after Negus's *Arthur* hearing and being asked about the hearing by Defendant. *Id.* At the hearing on the motion, the trial court found that Defendant had no attorney-client privilege with his brother's attorney and denied the motion. (V112. 3-14)

That same day, Defendant moved in limine to prevent the State from offering evidence showing that two bullets were found in Barry's car when it was searched on December 5, 2001. (R. 463-64) In support of this motion, Defendant argued that the bullets were not relevant because the car was not in his exclusive possession, the search occurred six days after the murder and while one of the bullets was the same caliber as bullets used to kill McCrae, the bullets were not unique. *Id.*

At the hearing on the motion, the State agreed that the bullet that was not of the same caliber as the bullets used in the shooting was irrelevant. (V112. 115) However, it argued that the bullet that matched the caliber of one type of bullet used in the shooting was relevant, as there was evidence that the car

was used in the murder, Defendant's personal possession were found in the car and Defendant used numerous different types of this caliber of bullet to commit the crime. (V112. 115-17) Defendant responded that while there were different types of this caliber bullet used in this crime, the live round found in the car was still another type of this caliber. He added that because the bullet was found a week later, it was not relevant. (V112. 117-18) The trial court denied the motion to exclude this bullet. (V112. 118)

The matter proceeded to trial on June 5, 2008. (R. 393) On the morning of opening statement, Defendant provided the State with a stack of documents as discovery. (V121. 1052) After opening statements, Defendant stated that he wanted to amend his witness list to add Howard Lubel, an assistant public defender who had represented Negus. (V121. 1053) He asserted that he needed to add Lubel because the State had mentioned that Negus' case was set for trial shortly after McCrae was killed and he did not believe that trial setting was not reasonable. (V121. 1053-54) The trial court responded that it did not believe the information was relevant but stated it would defer ruling on the issue until Defendant attempted to present such testimony. (V121. 1054) The State asserted that Defendant should not be able to add witnesses since he had demanded a speedy trial, and

the trial court indicated that it would consider any issue about a discovery violation later as well. (V121. 1054-55)

When Hufnagel was asked about McCrae's statements, Defendant renewed his objection, and the trial court overruled the objection. (V121. 1068)

Crime Scene Technician Jorge Garrido testified that he was the lead crime scene investigator in this matter. (V121. 1091-1103) He observed a vehicle with the hood up in the door and McCrae's body lying between the vehicle and the door. (V121. 1105) There were numerous casings outside the door next to the vehicle. (V121. 1105) In total, he located and impounded 11 shell casings. (V121. 1113, 1120-21, 1127) Ten of the casings were in front of the door and one was in the road in front of the next business. (V121. 1109, 1113, 1121-22, 1124) The casings were all .9 mm casings. (V121. 1128-33) Markings on the casings showed that one was from an RP bullet, five were from Federal bullets and five were from Wolf bullets. (V121. 1129-33) Garrido stated that it was not unusual to find multiple types of bullets being fired from the same gun. (V121. 1131) Garrido attempted to process the work bay area in which the murder occurred for fingerprints without success because the area was very dirty. (V121. 1134-35)

Crime Scene Technician Victor Chavez testified that he

assisted in processing the scene after the Bennett murder and prepared the crime scene sketch. (V121. 1775-77) He stated that Bennett's body was found in the office area, which had a door leading to the outside and a door leading to the bay. (V121. 1180-81)

Chavez also assisted Garrido in processing the same scene after this murder. (V121. 1190) He observed a Lexus parked in the bay with a bullet hole in its windshield and hood. (V122. 1208-09) He also found projectiles and fragments of projectiles around an engine dolly in the bay. (V122. 1210-11) He also located a projectile on floor next to the left front tire of the Lexus. (V122. 1214) In total, Chavez collected six projectiles and a series of fragments from the bay. (V122. 1214-16) When the medical examiner arrived, McCrae was fully clothed from the waist down and a shirt was lying next to him. (V122. 1217-18) McCrae was rolled over, his pants were lowered and an additional projectile was found sticking to his buttocks. (V122. 1219)

The day after Chavez testified, Defendant indicated that he wished to present evidence through Chavez and asked the trial court to order the State to make him available as a defense witness. (V123. 1237) The trial court responded that Defendant would have to subpoena Chavez as his witness properly and that it would not require the State to make arrangements for the

defense. (V123. 1237-39) Defendant later reported he was unable to serve Chavez because he had not attempted to do so on a timely basis. (V123. 1403) The trial court indicated that it would attempt to assist Defendant in contacting Chavez. (V123. 1406)

The State then noted that Defendant had demanded a speedy trial but had listed four additional witnesses during trial and provided the State with a series of disciplinary reports about an officer without having a witness listed to admit the documents. (V123. 1239-40) It asked the trial court to impose a discovery cut off on Defendant. (V123. 1241) It also noted that the disciplinary reports were inadmissible. (V123. 1242) The trial court indicated that it would not impose a discovery cut off but would consider sanctions for discovery violations when Defendant attempted to admit the evidence. (V123. 1241-43)

Defendant also moved the trial court to take judicial notice of the entire court file regarding Negus' conviction in the Bennett murder. (SR. 105-07, V123. 1248) The State responded that it had intended to seek the admission of the docket sheet from that case, that it believed Defendant's request was unnecessary and that everything contained in a court file would not be relevant or admissible. (V123. 1248-51) The trial court indicated that it believed it could take judicial notice of the

file and make its contents admissible as evidence without including specific information from the file. (V123. 1249-51) Defendant responded that he believed it was essential to show that Negus' case was not ready for trial at the time it was set shortly after McCrae's murder to show that Defendant was not desperate to free his brother and that he wanted to present the court file and testimony from Negus' attorneys to show that it was not and that they had told Negus that a continuance would be sought. (V123. 1251-52) After further discussion of issues related to the admissibility of the information Defendant wanted to present, the trial court indicated that it did not believe the information was admissible. (V123. 1252-62)

During cross examination of Robert Woodson, the fingerprint analyst who identified Negus's print from the Bennett, Defendant elicited that Woodson took a new set of standard prints from Negus on April 8, 2004, and testified at Negus' trial on April 15, 2004. (V123. 1281-82)

During the direct testimony of Hoadley, the State sought the admission of the affidavit McCrae executed for Negus's *Arthur* hearing, and Defendant objected that it was hearsay. (V123. 1308) The trial court overruled the objection. (V123. 1308) Hoadley also testified that he located another witness to the Bennett murder after McCrae was murder and that witness was

able to identify Negus. (V123. 1314) On cross, Defendant elicited that Hoadley did not complete his report in the Bennett murder until November 29, 2001, and he was not deposed for a year and a half. (V123. 1317, 1321)

Gerson stated that he did not recall meeting with Defendant the day after Negus's *Arthur* hearing and discussing the case with him. (V123. 1342-45) When confronted with the fact that he had stated that he did speak to Defendant about the *Arthur* hearing the day after it occurred, Gerson asserted he was just outlining the State's position. (V123. 1345-47) On cross, Gerson stated that he assumed Defendant was present during Negus's *Arthur* hearing. (V123. 1354)

Williams acknowledged that he had difficulty judging colors accurately because it was dusk and he needed glasses. (V124. 1438-39) He stated that he believed the getaway car was light colored, like white. (V124. 1443)

Rodriguez saw the passenger's side of the car as it fled and described it as an older, grey, four-door Mazda 323. (V124. 1458-60) He stated that Berry's car looked similar to the car he saw. (V124. 1461, 1477)

Berry testified that after 8 p.m. on November 29, 2001, she called Defendant on his cell phone and asked him to return her car as she was hungry and wanted to get something to eat. (V124.

1492-94) Defendant responded that he would do so soon but did not get back until after 10 p.m. (V124. 1493-94) They immediately went to a fast food restaurant, arriving just before it closed. (V124. 1493-94)

Berry stated that she met with the police on December 5, 2001, and gave them consent to search her home and car. (V124. 1494-98) She recognized a blue backpack found in her car as Defendant's backpack. (V124. 1498-99) She stated that she did not keep ammunition in her car or book bag and did not know why ammunition would have been found in her car. (V124. 1499)

On cross, Defendant elicited that Berry believed Defendant was a loving person and brother and that he took care of his youngest brother. (V124. 1505) She was aware that Defendant's brothers Atiba, Negus and Bobo spent time incarcerated, that their parent did not live in this country and that Defendant had been responsible for raising his brothers since his late teens. (V124. 1505-06)

On redirect, Berry admitted that she had some understanding that Defendant had been convicted of a crime and was on probation but did not ask about the specifics of the crime. (V124. 1531) She also never inquired about Defendant's activities while she was working. (V124. 1532) She was aware that Defendant was married while she was dating him but believed

he was separated. (V124. 1532)

On the third day of trial, the State indicated that Defendant had still not produced the witnesses he had listed during trial for deposition. (V125. 1568) The trial court responded that it would not permit the witnesses to testify unless they were produced for deposition. (V125. 1568) The trial court then inquired about attempts to contact Chavez, and the State indicated that it had not been able to do so as he would not be returning for two more days. (V125. 1569)

When Bayas stated that he had ordered Defendant out of the closet, Defendant renewed his suppression motion while agreeing that Defendant's statement that he was hiding in the closet because he was on probation was admissible. (V125. 1586-89) Bayas also testified that he later obtained consent to search the apartment from both Caldwell and Defendant. (V125. 1596-1602) However, no evidence was found in the search of the apartment. (V125. 1604-05)

While in the parking lot, Bayas noticed Berry's car, which matched the description of the getaway car, parked in front of the stairwell to Defendant's apartment. (V125. 1602-03) Bayas testified that he obtained consent to search the car and Berry's apartment from Berry. (V125. 1608-10) No evidence was found during the search of Berry's apartment. (V125. 1609)

Pursuant to a stipulation by the parties, the trial court informed the jury that Defendant was convicted of a felony on September 22, 2000. (V125. 1649)

Crime Scene Technician Tommy Charles testified that he photographed and secured Berry's car at Defendant's apartment by taping all the openings to the car. (V125. 1650-55) After car was towed, Charles determined that the car had remained sealed and searched it. (V125. 1658-60) In doing so, Charles found numerous items belonging to Defendant, including a backpack containing a live .9 mm Winchester bullet. (V125. 1661-74) He also processed the car for fingerprints and lifted 7 prints. (V125. 1677-78)

Lyoubomir Nikolov, a fingerprint analyst, testified that the papers from the car that mentioned Defendant and the shell casings were processed for prints, but none were found. (V125. 1685-88) He also examined the 7 prints lift from Berry's car, determined that 4 were of value and identified 1 as belonging to Defendant. (V125. 1688-91) He noted that he had met Defendant and had him sign something, which Defendant did with his right hand. (V125. 1690-91)

Clifford testified that Defendant informed him that he got along well with both of his parents and always had, that his parents were married and lived in Jamaica, that his mother

raised him with the assistance of his Aunt Angie Francis and that he was the oldest of a large group of children. (V125. 1722-24) Defendant stated that he had been separated from his wife for a year, had no children and supported two brothers by working in his aunt's restaurant and being a general laborer. (V125. 1724) He averred that he had never received mental health treatment had no illnesses and took no medications but had smoked marijuana since he was 7. (V125. 1744-45) He asserted that he had been knocked unconscious during a street fight a year before his statement but had not suffered any serious head injuries as a child. (V125. 1746)

Butchko testified that Defendant executed a consent to search Berry's car. (V127. 1949-50) He stated that he learned from the lab that two different guns had been used to kill McCrae on January 16, 2002. (V127. 1951-52)

George Hertel, a firearms examiner, testified that he reviewed a report from a prior firearms examiner who had since retired and the firearms evidence from this matter. (V128. 2010-32) He determined that some of the projectiles had been fired by a .9 mm weapon that was probably a Smith and Wesson semiautomatic and that some of the projectiles came from .38 caliber revolver. (V128. 2032-33, 2040-50) He also opined that all of the casings recovered from the crime scene had been fired

by the same .9 mm pistol even though there were different brands of bullets used. (V128. 2033-37) He determined that 6 of the projectiles were all fired from the same .9 mm pistol and one additional projectile could have been fired from that same gun. (V128. 2050-51) He also opined that 3 of the .38 caliber projectiles could have been fired by the same .38 caliber revolver. (V128. 2051-52)

Dr. Emma Lew, a medical examiner, testified that she supervised Dr. Lisa Steele in conducting an autopsy on McCrae. (V129. 2092-2101) On external examination, 15 bullet wounds were found on McCrae's body. (V129. 2108)

One bullet entered the back of McCrae's left forearm, went through his arm, entered his left side and lodged on the left side of his lumbar spine. (V129. 2111-15) Another bullet entered the right side of McCrae's abdomen just below the bellybutton, went through the mesentery of the bowels, liver and diaphragm and lodged below his right lung. (V129. 2116-18) This bullet would have caused McCrae to bleed to death. (V129. 2118) A third bullet entered McCrae's scrotum, went into his left thigh and lodged next to his bladder. (V129. 2123-24) Another bullet entered McCrae's left thigh and lodged in the left side of his abdomen. (V129. 2126) A fifth bullet entered McCrae's left thigh and exited his left buttock. (V129. 2127-28) A sixth bullet

entered the back of McCrae's upper left arm, broke his shoulder blade and a rib and lodged next to his spine. (V129. 2128-31) A seventh bullet went through McCrae's upper left arm. (V129. 2131-32) An eighth bullet entered McCrae's left hip and exited his right buttock. (V129. 3132-35) A ninth bullet entered the left side of McCrae's scrotum and exited the left side of his torso. (V129. 2135-36) A tenth bullet grazed McCrae's left side. (V129. 2136-37) McCrae also sustained a superficial bullet injury to his left pinkie and a scrape to his back. (V129. 2137-39)

Dr. Lew opined that McCrae died from multiple gunshot wounds. (V129. 2143) She stated that the trajectories of the bullets was consistent with McCrae being shot from the side as he worked on a car and falling toward his side as the shots continued. (V129. 2140-42)

After the State rested, Defendant testified he was born in New York and moved to Florida with his mother when he was about 8 or 9. (V129. 2146, 2165-67) In 1995, Defendant's mother gave birth to Defendant's brother Dwight and was arrested about a month later. (V129. 2168-69) Defendant's mother gave him power of attorney, and he was granted custody of his younger brothers. (V129. 2170-71) Defendant then left school and got a job unloading trucks to support his brothers. (V129. 2171-72) After

her release from prison in 1997, Defendant's mother was deported to Jamaica and took Dwight with her. (V129. 2173-74, 2176)

Defendant stated that he learned that Negus was being sought by the police in 1998, because the police came to his home on numerous occasions looking for him. (V129. 2175-76) In 1999, Defendant was working at a carwash, which was located near the warehouse complex that housed Ray's Auto, with his friend Erwin Bruce. (V129. 2177-78) He asserted that his brother Atiba and his friend Anthony Scarlett also used to hang out in the car wash. (V129. 2178-79)

Defendant claimed that in 1999, he allowed Terrance Cody, another friend who did not have a driver's license, to drive his car. (V129. 2180-81) When Cody sped away from a light, the police attempted to stop the car, and he and Cody fled from the police both in the car and on foot after crashing the car. (V129. 2180-81) Defendant asserted that the officers slammed him to the ground when they caught him and hit him when he lied about another person having been in the car. (V129. 2181) He averred that the police continued to beat him at the police station when he allegedly tried to invoke his rights and rendered him unconscious. (V129. 2182-84) Defendant acknowledged that he plead guilty and was placed on probation in connection with this incident but claimed he only did so because some of

the charges were dropped and he was incarcerated after missing a hearing and having his bond revoked. (V129. 2184-86) Defendant acknowledged that he had also been convicted for carrying a concealed firearm. (V129. 2186-87) Defendant claimed that this conviction resulted when he was taking a friend his gun and was stopped running a red light. *Id.*

Defendant asserted that he and Atiba had an argument over a car on September 11, 2001, that he had moved away from Atiba as a result and that he was not really in contact with Atiba thereafter. (V129. 2188) He claimed that around this same time, he learned that Negus had been arrested and attempted to help Negus get a lawyer. (V129. 2189-90)

Defendant claimed that he was arrested in late August 2001 for driving a car with a stolen license plate. (V129. 2190) He insisted that his friend had placed his aunt's tag on Defendant's car without telling him. (V129. 2190) He claimed that he remained incarcerated on this charge until September 7, 2001. (V129. 2191) Over objection, Defendant stated that he and his attorney had discussed his incarceration on this charge and that his attorney had shown him paperwork regarding that incarceration so that he could remember the exact dates. (V129. 2191-92)

Defendant insisted that he did not attend Negus' *Arthur*

hearing but acknowledged that he hired Gerson to represent Negus. (V129. 2192-93) He averred that he spoke to Gerson on the phone once before the *Arthur* hearing and once after the *Arthur* hearing. (V129. 2194-95) Defendant insisted that the facts of Negus's case were not discussed in either conversation. *Id.* He stated that he had spoken to one friend about the *Arthur* hearing but claimed that all the friend said was that Gerson was not doing his job. (V129. 2195-96)

Defendant admitted that he drove Berry's car on occasion and kept some of his possessions in that car. (V129. 2199) He claimed that he routinely loaned that car to other family members and friends. (V129. 2199-2200) Defendant acknowledged that he visited Negus in jail on November 27, 2001, but claimed not to remember what occurred during that visit. (V129. 2200-01)

Defendant claimed that he was in his closet picking out clothes when the police came to his house on December 5, 2001. (V129. 2202) He insisted that he froze when he heard a loud noise followed by walkie-talkies. (V129. 2202-03) He claimed that within a minute of hearing the noise, an officer was in his bedroom, pointing a gun at him and ordering him out of the closet. (V129. 2203-04) He averred that he was asked, and provided, his name while still in the apartment. (V129. 2204) He insisted that the police removed him from the apartment despite

knowing who he was and refused to tell him why they were doing so. (V129. 2206) He stated that he was kept in handcuffs in the first car for 10 to 15 minutes and then moved to a second car. (V129. 2206-07) Defendant claimed that he remained in handcuffs from the time he was found in the closet until he was at the police station except for a brief period of time when he signed a consent to search his apartment. (V129. 2207)

Defendant averred that he did not want to sign the consent form and only did so because the police told him that they would remove his cousin's children from the apartment and make them sit in the grass until a search warrant was obtained. (V129. 2207-08) Defendant insisted that the police said nothing to him and simply drove him to the police station. (V129. 2208)

Defendant averred that once he got to the police station, the police asked him to sign a consent to search Berry's car, which he initially refused to sign. (V129. 2209) He claimed that he relented after the police told him that they would seize the car and hold it for 3 days while obtaining a warrant. (V129. 2209-10) He averred that he signed the consents and *Miranda* waiver forms without reading them because the police told him to sign the papers. (V129. 2210)

Defendant stated that once he signed the forms, he was handcuffed again and left alone in an interview room for 30 to

45 minutes. (V129. 2210-11) He insisted that Butchko then entered the room and started asking him background questions. (V129. 2211-12) He stated that he lied to Butchko in response to some of these questions, particularly concerning his employment, because he was concerned about having his probation revoked. (V129. 2211-12) He averred that Butchko had 3 files with him, one with his name on it, one with Atiba's name on it and one with Fagan's name on it. (V129. 2213-14)

Defendant stated that when Butchko asked about his brothers, Defendant told him that Negus and Bobo were incarcerated, that he had visited Negus the week before and that he knew nothing about Negus's case. (V129. 2213-14) He denied that Negus had given him any information during the visit and that he had been to Opa Locka concerning a witness in Negus's case. (V129. 2214-18)

Defendant acknowledged that the police never laid a hand on him during the interview. (V129. 2215-16) However, he claimed that Clifford told him that the police were frustrated and would beat him if he did not confess. (V129. 2215, 2218) He also averred that Clifford told him that the police would arrest his younger brother. (V129. 2218-19) He also claimed that the police deprived him of food, drinks and use of the bathroom throughout the questioning. (V129. 2238)

Defendant claimed that he spent the day of the murder with Berry, his brother Jamal, Berry's cousin and Berry's aunt and at a record studio with friends. (V129. 2221-25) He stated that he merely told Clifford that he had been with Berry but did not give any details. (V129. 2225) He averred that Clifford left the room, saying he was going to call Berry. (V129. 2225-26) He stated that when Clifford returned, he stated that he had spoke to Berry, that Berry did not recall his whereabouts, that he would he going to jail for a probation violation for 5 years and that he and Jamal would both face life imprisonment. (V129. 2226-27) He claimed that Clifford stated that he would receive a concurrent 5 year sentence to manslaughter if he confessed. (V129. 2227) He stated that he then decided to confess since he was already facing a sentence for a probation violation based on his recent arrest and he did not want Jamal arrested. (V129. 2228-31) He claimed that Clifford told him what to write in his confession, that he did not original say anything in the written confession that implicated himself directly, that Clifford told him he had to implicate himself and that he then added that he shot McCrae. (V129. 2231-36) Defendant averred that after he signed the confession, he attempted to remove the line about the shoot but that Clifford would not let him. (V129. 2237)

Defendant claimed that after he confessed to Clifford, he

spoke to Berry on the phone, who told him not to say anything. (V129. 2238-39) He averred that he then told Butchko that he had not committed the crime when he was questioned further and that during this questioning, the police suggested answers to their own questions. (V129. 2240-45)

During cross, the State questioned Defendant regarding whether he was aware that Negus had accepted a contract to kill Bennett because Bennett was a friend of a person named Conroy Turner who had ripped off Defendant's friends during a drug deal and would not reveal Turner's location and Defendant denied everything. (V129. 2250-52) During this questioning, the State used the word "you" to describe the group of people who desired Bennett's death, and Defendant objected. (V129. 2251) At sidebar, Defendant moved for a mistrial, claiming that the State had suggested that Defendant was involved in another murder. (V129. 2253) The trial court found that the State had not said that and denied the motion. (V129. 2253)

The State then questioned Defendant whether his account of his 1999 arrest and conviction were accurate, and Defendant insisted they were. (V129. 2254-66) He stated that he had plead to a different set of facts merely to get out of jail and have some of the charges dropped. (V129. 2257)

The State elicited that Defendant had visited Negus in jail

and had hired an attorney for Negus. (V129. 2268-70) However, Defendant claimed that he did not visit Negus regularly and claimed never to have discussed Negus's case with him. (V129. 2268-69, 2273-75) Without objection, the State elicited that Defendant claimed to have paperwork showing that he was incarcerated at the time of Negus's *Arthur* hearing. (V129. 2270) Defendant claimed not to have spoken to Gerson after the *Arthur* hearing and not to have known of McCrae's affidavit. (V129-30. 2270-71) Defendant admitted that he knew Gooden but claimed that he was not involved in having Gooden show Bruce his license. (V130. 2272-73)

During redirect, Defendant had a document marked and sought its admission without asking a single question, at which time the State objected. (V130. 2294) At sidebar, the State pointed out that the document that Defendant had was not relevant or admissible. (V130. 2295) Defendant claimed it was admissible because the State had asked about proof that Defendant was in custody on September 7, 2001. (V130. 2295) When the State pointed out that the document concerned 1999, Defendant produced a second document, and the State asserted that there was a discovery violation as it had never seen the document before. (V130. 2295-96)

After the jury was excused, the trial court identified the

document as a purported booking report from the Broward County Jail showing that Defendant was taken into custody at 4:47 p.m. on August 27, 2001, on charges of petit theft, failure to register a vehicle and driving without proof of insurance, and released from jail at 7:38 p.m. on September 7, 2001, and asked if the State disputed the accuracy of the document. (V130. 2297) The State responded that since it had never seen the document, did not know where it came from and could not verify the accuracy of the information, it did dispute the accuracy of the document. (V130. 2297-98) It also pointed out that Defendant was not an appropriate witness through whom to admit the document. (V130. 2298) Defendant responded that he was prepared to have his investigator testify that she obtained the document from the Clerk's office. (V130. 2298) The trial court indicated that the investigator would not be able to authenticate the document and inquired what witness Defendant intended to call to do so. (V130. 2299) Defendant responded that he would simply use the document to refresh his recollection. (V130. 2299) When the trial court indicated that there was no basis to refresh Defendant's recollection, Defendant then asked for a continuance to obtain a witness to lay a predicate for the document. (V130. 2299-2300)

The trial court denied the continuance and noted that there

was a discovery violation because Defendant knew of the document before trial. (V130. 2300) Defendant first responded that the State should have investigated and found the document without him complying with his discovery obligation, and when the trial court rejected that assertion, stated that he was surprised the issue had arisen. (V130. 2300-01) When the trial court rejected that argument as well, Defendant asserted that he might have provided the document to the State pretrial because he provided documents regarding the 1999 arrest. (V130. 2301) The State then argued that it had never seen the document and was prejudiced because it had already asked Defendant about the issue on cross. (V130. 2301-02)

The trial court then returned to how Defendant believed he could lay a predicate for the admission of the document even if it had been timely disclosed, and Defendant indicated that he simply believed the State would stipulate to the document. (V130. 2302-03) Defendant then asserted that there was no prejudice to the State because it could have found the information itself. (V130. 2303)

Defendant then testified that he had discussed the dates of his 2001 incarceration with his counsel. (V130. 2306) Over objection, Defendant then testified that his counsel had shown him a document that refreshed his recollection of that date.

(V130. 2306)

Howard Lubel testified that he had previously been an Assistant Public Defender handling capital cases. (V130. 2310-11) He stated that capital cases generally take a long period of time to prepare for trial and that he explains this to his clients. (V130. 2312-14) He averred that he had previously represented Negus and that he would not have been ready for trial in December 2001. (V130. 2314-16) On cross, Lubel admitted that he had no independent recollection of Negus or of any conversations he had with Negus other than that he once discussimg one piece of evidence with him. (V130. 2316-18) As such, Lubel could not say whether he had spoken to Negus about the likelihood of going to trial in December 2001. (V130. 2318-21)

In rebuttal, Off. Christopher Schraub testified that Defendant driving a car with an expired tag and attempted to stop him. (V130. 2346-50) However, Defendant sped off, Schraub did not chase Defendant, Defendant crashed his car, Schraub found the wrecked car, Defendant fled on foot and Defendant was caught without any physical assault. (V130. 2352-55)

Defendant was then transported to a police substation, read his rights and invoked them. (V130. 2355-57) Defendant was read his rights and invoked them. (V130. 2357) When Schraub attempted

to fingerprint Defendant, Defendant attacked Schraub and attempted to get his gun. (V130. 2358-63) Other officers came pulled Defendant off of Schraub and sprayed him with pepper spray. (V130. 2363) Defendant was placed back into handcuffs and was washed down with a hose to remove the pepper spray. (V130. 2364) Paramedics were called and examined Defendant, who had never lost consciousness and who refused to go to the hospital. (V130. 2364)

After considering the evidence, the jury found Defendant guilty as charged on all counts. (R. 1014-17, V131. 2569-70) The trial court adjudicated Defendant in accordance with the verdict. (R. 5730-32, V131. 2576-77)

The penalty phase commenced on August 13, 2008. (R. 1323) Immediately before the jury entered the courtroom, the parties addressed whether the fact that Caldwell had a case pending against her could be used to impeach her. (V135. 10) Defendant argued that such evidence should not be admissible as it was prior bad acts evidence since it showed that he associated with criminal and the prejudice would outweigh the probative value. (V135. 10-11, 21) The trial court ruled that such evidence would be admissible. (V135. 22)

Defendant also moved in limine to preclude the State from presenting evidence about a shooting committed by Bobo. (R.

1476-77) In support of the motion, Defendant argued that the incident concerned Bobo and that the testimony would be hearsay. (V135. 31-33) The State argued that the testimony would not be hearsay because it would be asking the witness about what he observed and that Defendant was personally involved in the violent burglary to which this testimony related. (V135. 33-34) Defendant continued to argue that since he was not charged with the shooting, it should not be admissible even though it was part of the burglary to which Defendant plead guilty. (V135. 34-35) The trial court denied the motion. (V135. 35)

Defendant sought a special jury instruction on the prior violent felony aggravator, informing the jury that "the prior offense must have been life-threatening in nature, in which the perpetrator came in direct contact with a human victim." (R. 1446) The State responded that there was no reason to deviate from the standard jury instructions. (R. 1454-60) At the hearing on the instruction, Defendant stood on his pleading, and the trial court denied the request, finding that the standard jury instructions were adequate. (V135. 45-47)

During the penalty phase, Dep. Doug Lashbrook testified that he was dispatched to a shooting in Broward County on September 14, 1999. When he arrived he found evidence that a burglary and fight had occurred in which hurricane shutters were

stolen and Phelps, the homeowner, had been shot and taken to the hospital. (V135. 90-93, 160) Defendant was found conscious and with facial injuries. (V135. 94) A subsequent search of Defendant's home revealed firearms, ammunition, drugs and stolen hurricane shutters. (V135. 94-96) As a result, Defendant was charged with burglary and attempted strong armed robbery, plead guilty to burglary and was sentenced on September 6, 2000, to 2 years probation. (V135. 167-68, 173)

Dep. Chris Percival testified that he worked that burglary and was aware that Defendant was arrested for burglary and attempted strong armed robbery, which are bondable offenses. (V136. 190-91) He was also present in the police station on December 2, 1999, when Defendant was arrested. (V136. 191-93) He was aware after the burglary that a person with the last name Delhall who looked like Defendant and was related to him was wanted by the Miami-Dade Police. (V136. 193-94) As a result, Percival suggested that Schraub check Defendant's identity. (V136. 194-95) Percival then left the room and heard a commotion. (V136. 195) He went back to the room and saw Defendant fighting with Schraub, who was saying that Defendant was trying to get his gun. (V136. 196) Percival and other officers assisted in restraining Defendant, who continued to struggle with the officers violently until he was handcuffed.

(V136. 196-97) As a result of this incident, Defendant plead guilty to aggravated fleeing and eluding a police officer, resisting arrest with violence, driving while license suspended, resisting arrest without violence, and failure to register a motor vehicle. (V136. 199) He was sentenced to 2 years probation on September 6, 2000. (V136. 200)

Irma McCrae, McCrae's wife, Roslyn McCrae, his daughter, and Andrew Benjamin, his cousin, read prepared statements about the impact of his death on them. (V136. 213-22)

In mitigation, Joseph Delhall, Defendant's father; Marcia Delhall, Defendant's father's girlfriend; Shawna Webster, Defendant's cousin; Njina Caldwell, another cousin; Jamal Gardner, Defendant's half-brother; Grace Allen, Defendant's mother, Ethyln Lee, Defendant's grandmother; Robert Lee, Defendant's uncle; Caldwell, Defendant's cousin; Danisha Smith, another cousin; and Linda Allen, Defendant's aunt, testified. (V135. 108-36, 138-54, V136-138. 226-494) According to these witnesses, Defendant came from a close family, his parents never married but did live together for a period of time, his parents separated when he was 7, both of his parents were drug dealers who were incarcerated and deported, Defendant was left in charge of his brothers and cousins after his mother's arrest and Defendant provided a positive influence to his brothers and

cousins. *Id.* Grace Allen also claimed that Defendant did well in school and was not a discipline problem. (V137. 329, 331, 333) As a result, she was cross examined about the fact that Defendant had been repeated sent to detention and suspended, acknowledged knowing of some of these incidents and suggested that she had testified about them on direct. (V137. 370-72)

During the charge conference, the trial court noted that it had listed burglary and resisting arrest with violence as violent felonies in the prior violent felony instruction. (V139. 506) Defendant merely renewed his prior objections. (V139. 507)

In instructing the jury on the prior violent felony aggravator, the trial court states:

> [Defendant] has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person;
> The crimes of Burglary and/or Resisting Arrest With Violence are felonies involving the use or threat of violence to another person.

(R. 1582, V139. 605) After the jury instructions were read, Defendant simply renewed his prior objections. (V139. 613-14)

After considering the evidence, the jury recommended that Defendant be sentenced to death by a vote of 8 to 4. (R. 1556, V139. 619) At the *Spencer* hearing, Defendant presented the testimony of Dr. Brad Fisher. (V140. 4) Dr. Fisher, a psychologist, testified that he reviewed Defendant's jail records and the penalty phase transcript and interviewed him.

(V140. 5-8) He opined that Defendant had no major mental illness or neurological deficits and that he would adjust well to prison. (V140. 9) However, he admitted that Defendant had been in 2 fights while in pretrial detention and had been found with a shank on another occasion. (V140. 9)

On cross, Dr. Fisher admitted that he testified frequently for defendants but could not even recall the last time he had been hired by a prosecutor. (V140. 10-11) He admitted that his opinion was based on a person's past criminal behavior but that he did not consider behavior that did not result in a police report. (V140. 15) He admitted that Defendant had been disciplined for 2 fights and a large scale racial dispute, having a shank, attempting to have Atiba give him a cell phone, have excess linens and have excess medication in his cell. (V140. 17-18) He had ignored the linens because he had not realized that linens could be used to escape. (V140. 17-18) He had also ignored that Defendant had been caught speaking to another inmate on the phone about using a witness's family to prevent him from testifying. (V140. 22) He had not looked at records concerning Defendant's prior convictions. (V140. 23) He also did not consider the facts of Defendant's attack on Schraub or Defendant's actions when he was found in his apartment important. (V140. 23-24)

Charles Lawrence testified that he had worked in classifications for the Department of Corrections for 19 years. (V140. 52-54) He stated that prison inmate populations are transient. (V140. 54-55) He stated that inmates of all types frequently are found with shanks. (V140. 56) He stated that the prison system consider the possession of cell phones to be a serious problem. (V140. 56) Defendant subsequently submitted the State Attorney's closing memo regarding Bobo's case that was connected to Defendant's burglary. (V141. 16)

On October 6, 2008, Defendant moved for a new trial. (R. 5240-67) As part of this motion, Defendant argued that the admission of McCrae's dying declaration and his affidavit in the Bennett murder violated *Crawford*. *Id.* The trial court denied the motion. (V141. 18)

On December 13, 2008, the trial court followed the jury's recommendation and sentenced Defendant to death. (R. 5717-27, 5733, V142. 8-21) In doing so, the trial court found four aggravators: CCP - great weight; prior violent felony - great weight; under a sentence of probation - great weight; and hinder a governmental function -great weight. (R. 5717-27) It found three nonstatutory mitigators: Defendant's family background - little weight; the impact of Defendant's execution on his family - little weight; and ability to adjust to prison life -little

weight. *Id.* It considered and rejected the extreme mental or emotional disturbance, extreme duress and age statutory mitigators and the alternative sentence as nonstatutory mitigation. *Id.* It withheld entry of sentence for the possession of a firearm during a criminal offense and sentenced Defendant to fifteen years imprisonment with a three year minimum mandatory provision for the possession of a firearm by a convicted felon. (R. 5733-36) It ordered the sentences to be served consecutively. *Id.* This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in admitting relevant evidence concerning Defendant's motive for committing this crime and that evidence did not become a feature of this trial. Moreover, the trial court also did not abuse its discretion in allowing the State to cross examine Defendant about his knowledge of that other crime after Defendant opened the door to such examination during direct. Any issue that the admission of McCrae's affidavit and McCrae's statement as he was dying violated Defendant's confrontation rights is unpreserved and meritless. Defendant's motion to suppress was properly denied, as the officers' actions were properly motivated by exigent circumstances, the officers had probable cause to arrest Defendant and any taint from any illegality was attenuated. The

trial court did not abuse its discretion in admitting a bullet found in Defendant's backpack. The issue regarding the jury instruction on the prior violent felony aggravator is unpreserved and not fundamental. The issue regarding the comments in closing is largely unpreserved and the comments were mainly proper, as comments on the evidence and fair response to Defendant's arguments. The evidence is sufficient to sustain Defendant's convictions. Defendant's death sentence is proportional.

ARGUMENT

I. & II. ADMISSION OF EVIDENCE ABOUT THE BENNETT MURDER.

In his first two issues, Defendant asserts that the trial court abused its discretion in admitting evidence of the Bennett murder. Defendant seems to suggest that the evidence was inadmissible and that the State suggested that he had committed the murder during its cross examination of him. However, parts of these issues are unpreserved and the trial court did not abuse its discretion in admitting this evidence.[4]

to preserve an issue regarding the admission of evidence, a defendant must have objected to the evidence before it was admitted and that objection must have been based on the same

[4] Trial rulings regarding the admissibility of evidence are reviewed for an abuse of discretion. *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008).

grounds that are presented on appeal. *McWatter v. State*, 36 So. 3d 613, 639 (Fla. 2010); *Williams v. State*, 967 So. 2d 735, 748 n.11 (Fla. 2007). Here, while Defendant made a motion in limine regarding evidence of the Bennett murder, that motion was based on the assertion that presentation of all of the evidence regarding the Bennett murder would not be relevant, would make the Bennett murder a feature of the trial and would be unduly prejudicial. (R. 371-72) In fact, at the hearing on that motion, Defendant agreed that the Bennett murder was relevant to this case. (V112. 82-83) As such, Defendant's present claims that the information about the Bennett murder was not admissible because it concerned Negus's criminal activity and because the State did not prove by clear and convincing evidence that he committed the murder are unpreserved.

Moreover, the trial court did not abuse its discretion in allow the State to admit evidence regarding the basic facts of the Bennett murder, McCrae's status as a witness in that case and Defendant's knowledge of McCrae's status. (V112. 95-99) While Defendant refers to evidence as *Williams* rule evidence and argues that the evidence did not meet the standard for *Williams* rule evidence, this label is mistaken. As this Court has recognized, not all evidence that indicates the commission of another crime is *Williams* Rule evidence. *Griffin v. State*, 639

So. 2d 966, 968 (Fla. 1994). Moreover, when evidence is relevant, it is admissible even if it concerns the commission of another crime. *Bryan v. State*, 533 So. 2d 744, 746-47 (Fla. 1988). This Court has stated that one instance of other crimes evidence being relevant is when the other crime provides the motive for the charged crime. *Floyd v. State*, 913 So. 2d 564, 572 (Fla. 2005); *Jorgenson v. State*, 714 So. 2d 423, 427 (Fla. 1998).

Here, in his confessions, Defendant admitted that the reason why he killed McCrae was that he was a witness to the Bennett murder. (V125. 1757-64, V127. 1889) As such, evidence regarding the Bennett murder was relevant to show Defendant's motive for committing this murder, as Defendant himself conceded during the hearing on the motion in limine. *Floyd*, 913 So. 2d at 572; *Jorgenson*, 714 So. 2d at 427. The trial court did not abuse its discretion in so finding and should be affirmed.

Further, contrary to Defendant's suggestion, the trial court did not allow evidence of the Bennett murder to become a feature of this case. The determination of whether evidence regarding another crime became a feature is based largely on whether the evidence concerning the other crime that was admitted concerned issues that were not relevant to the purpose for which the evidence of the other crime was admitted and not

on the amount of testimony concerning the other crime that was presented. *Conde v. State*, 860 So. 2d 930, 946-47 (Fla. 2003). Here, the trial court limited the State to presenting the basic facts of the Bennett murder, McCrae's role in that case and Defendant's knowledge of that role. (V112. 95-99) As such evidence was relevant to Defendant's motive for this crime, the trial court did not abuse its discretion in imposing those limits.

While Defendant suggested that the State was permitted to exceed these bounds, this is not true. Hoadley's testimony was limited to the fact that Bennett was shot to death at Ray's Auto, that McCrae provided a statement providing a description of the crime and killer, that Negus's fingerprint was identified at the scene, that McCrae was then shown a photo array, that Defendant was aware that Negus was being sought for the Bennett murder and behaved toward the police in a manner suggesting a desire to help Negus, that McCrae was a crucial witness in the Bennett murder, that McCrae's identity and status were disclosed during Negus's *Arthur* hearing and that Negus had a rapidly approaching trial date at the time McCrae was killed. (V123. 1290-1315) Thus, Hoadley's testimony was limited to evidence relevant to Defendant's motive and corroboration of his confession.

While Defendant suggests that Gooden was called merely to discuss the Bennett murder, this is not true. The primary purpose for which the State called Gooden was to show Defendant's efforts to determine who McCrae was and the fact that Gooden had witnessed the Bennett murder was only mentioned as part of explaining why Defendant might have believed that Gooden was McCrae. (V123. 1361-73) As such, Gooden's testimony was relevant to Defendant's premeditation in this case.

Chavez's testimony about the layout of Ray's Auto had relevance to both cases, as both murders were committed there. Moreover, his testimony about processing the scene at the time of the Bennett murder and Woodson's testimony about finding only one identifiable print on a door in a public place from the evidence in the Bennett murder showed how McCrae's testimony in that case was necessary and strengthened Defendant's motive to eliminate McCrae so that Negus could go free.

While Defendant asserts that Hertel's testimony concerned the Bennett homicide, this is simply not true. Garrido had already testified that case no. 655222Z was the case number for this murder. (V121. 1103) Chavez testified that the case number for the Bennett murder was 224694V. (V121. 1178) Moreover, Hertel correlated the evidence he was testifying about to the evidence collected in this case. (V128. 2032-64) As such,

Hertel's testimony about evidence in this case does not show anything about evidence concerning the Bennett murder becoming a feature. Thus, the record shows that not only did the trial court properly limit the testimony concerning the Bennett murder to that which was relevant to establish Defendant's motive for this murder but also that those limits were obeyed during the State's case. The trial court should be affirmed.

In an attempt to show that the limits were not followed, Defendant complains that the State extensively cross examined him concerning the facts of the Bennett murder and accused him of committing that murder in the process. However, Defendant never objected that cross examining regarding the Bennett murder made it a feature. (V129. 2250-53) Instead, Defendant only objected to two questions during this cross examination and did so on the grounds that the questions suggested that he had committed that murder. (V129. 2251, 2252-53) As such, any claim that the cross examination made the Bennett murder a feature is not preserved. *McWatter*, 36 So. 3d at 639; *Williams*, 967 So. 2d at 748 n.11.

Further, this cross examination was proper. During his direct testimony, Defendant volunteered that he was friends with a number of people. (V129. 2177-78) During pretrial hearings, the State had indicated that these individuals were connected to

the Bennett murder. (V72. 19, V111. 84-85) He also acknowledged hiring Gerson to represent Negus, having conversations with Gerson, having a conversation with a friend who attended Negus's *Arthur* hearing and visiting Negus in jail. (V129. 2192-94, 2200-01) However, Defendant insisted that he knew nothing about the facts of the Bennett murder case. (V129. 2192-94, 2200-01) Given these circumstances, Defendant opened the door to questioning during cross examination regarding his actual knowledge of the Bennett case and its participants.[5] *Rodriguez v. State*, 753 So. 2d 29, 41-42 (Fla. 2000). Further, while the State did use the word "you" in describing the group of people involved in the Bennett murder, a review of the entire line of questions indicated that the State consistent asserted that Negus and Defendant's friends were the people involved in the Bennett murder. (V129. 2250-52) As such, the trial court did not abuse its discretion in finding that the use of this word did not indicate that Defendant committed the Bennett murder. Moreover, any error in the brief use of this indefinite word would be harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The

[5] Defendant also mentions that he was cross examined about the facts of his prior conviction resulting from a 1999 arrest. However, Defendant did not object to this cross examination. (V129. 2255-66) Moreover, during direct, Defendant had provided his own version of those crimes, his arrest and his convictions. (V129. 2180-87) As such, he opened the door to this cross examination, as well.

convictions should be affirmed.

III. MCCRAE'S AFFIDAVIT.

Defendant next asserts that the trial court violated his right to confrontation by admitting McCrae's affidavit regarding the Bennett murder. However, this issue is unpreserved and meritless.

To preserve an issue that the admission of evidence violated the Confrontation Clause, a defendant must have specifically raised the argument that the admission of such evidence violated the Confrontation Clause and that a mere objection that the evidence was hearsay is not sufficient. *Williams*, 967 So. 2d at 748 n.11; *Schoenwetter v. State*, 931 So. 2d 857, 871 (Fla. 2006). Here, Defendant did not object to the admission of the affidavit on the grounds that it violated his confrontation rights in the trial court. Instead, he simply objected that the affidavit constituted hearsay when the State sought to admit the affidavit. (V123. 1307-08) As such, Defendant's claim that the admission of the affidavit violated his confrontation rights is not.

Even if Defendant had preserved the issue, it should still be rejected because it is meritless. In *Crawford v. Washington*, 541 U.S. 36, 59 (2004), the Court made clear that the Confrontation Clause placed no restraints on the admission of

statements that were offered "for purposes other than establishing the truth of the matter asserted."[6]

Here, the matters asserted in McCrae's affidavit concerned his witnessing the Bennett murder, providing a sworn statement about what he saw and identifying a person in a photo array. (R. 753) In his brief, Defendant admits that the affidavit was not admitted to prove that these statements were truth but were instead admitted to show Defendant's motive for killing McCrae from testifying regarding these facts. As such, the affidavit was not admitted to show the truth of the facts in the affidavit but to show the effect on Defendant of the fact that the affidavit existed. *Breedlove*, 413 So. 2d at 6-7. Since the affidavit was not admitted for a hearsay purpose, its admission did not violate *Crawford*. The convictions should be affirmed.

Even if the issue could be considered to be preserved, any error would be harmless. The affidavit was cumulative to Hoadley's testimony that McCrae had been a witness in Negus's case and Gerson's testimony that he had argued that McCrae was crucial to Negus's case. As such, any inability to cross examine McCrae about the Bennett murder here cannot be said to have contributed to the verdict. Additionally, McCrae identified

[6] In fact, this Court has held that statements that are not admitted for their truth do not even qualify as hearsay. *Breedlove v. State*, 413 So. 2d 1, 6-7 (Fla. 1982).

Defendant as his killer in his dying declaration, Defendant provided both a verbal and written confession and Ms. Berry placed Defendant in possession of her car, which matched the description of the car used in the murder. As such, any error would be harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The conviction should be affirmed.

IV. EXCLUSION OF THE UNAUTHENTICATED HEARSAY DOCUMENT.

Defendant next asserts that the trial court erred in excluding a report that allegedly showed that Defendant was in jail at the time of his brother's bond hearing. Defendant suggests that the trial court did not hold a proper hearing on a discovery violation regarding the report and should not have found that he committed a discovery violation. However, the trial court did not abuse its discretion[7] in excluding this report given the combination of the lack of a proper predicate to admit the document and the discovery violation regarding it, which was adequately addressed by the trial court.[8]

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[7] Trial court's rulings regarding discovery are reviewed for an abuse of discretion. *Lightbourne v. State*, 453 So. 2d 380, 390 (Fla. 1983). The same is true of a trial court's ruling regarding the admissibility of evidence. *Hudson*, 992 So. 2d at 107.

[8] While Defendant suggests that the questions improperly shifted the burden of proof, any such issue is not preserved because Defendant did not object to these questions. *Castor v. State*, 365 So. 2d 701 (Fla. 1978). Moreover, Defendant ignores that he raised his presence in jail at the time of the *Arthur* hearing

Pursuant to Fla. R. Crim. P. 3.220(d), a defendant who had elected to participate in discovery is required to provide the State with "a written list of the names and addresses of all witnesses whom the defendant expects to call as witnesses at the trial or hearing" and to disclose to the State "any tangible papers or objects that the defendant intends to use in the hearing or trial." When a trial court is informed that there has been a discovery violation, it is required to conduct an inquiry into the circumstances of the discovery violation that covers, at least, whether the violation was willful or inadvertent and trivial or substantial and whether the trial preparation or strategy of the party that did not receive the discovery was adversely affected. *Ricardson v. State*, 246 So. 2d 771, 775 (Fla. 1971). Where the record shows that the trial court did receive information on these issues, the inquiry regarding the discovery violation will be considered adequate. *State v. Hall*, 509 So. 2d 1093 (Fla. 1987). Further, even where such an inquiry was not properly made, the error will be deemed harmless if the record discloses that evidence on these issues. *State v. Schopp*, 653 So. 2d 1016, 1020-21 (Fla. 1995).

Moreover, pursuant to §90.901, Fla. Stat., documents are

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and the existence of documentation concerning his incarceration on direct examination. (V129. 2190-92) As such, Defendant opened the door to this questioning and voluntarily assumed the burden of this partial alibi. *Rodriguez*, 753 So. 2d at 38-39, 42.

not admissible until they are authenticated. *See Johnson v. State*, 660 So. 2d 637, 645 (Fla. 1995). This requires that there be some evidence presented showing that the document is what it purports to be. *Justus v. State*, 438 So. 2d 358, 365 (Fla. 1983). Moreover, when the document constitutes hearsay, the proponent of the evidence must also show that the evidence satisfies a hearsay exception before the document is admitted. *See Sikes v. Seaboard Coast Line Railroad Co.*, 429 So. 2d 1216, 1220 (Fla. 1st DCA 1983); *see also Amos v. Gartner, Inc.*, 17 So. 3d 829, 833 (Fla. 1st DCA 2009). To establish that a record meets the public records exception, the proponent of the record must show that the record is either a record of the activities of the office or agency or that the record by an official with first-hand knowledge of an event who observed the event pursuant to a legal duty and who had a legal duty to report the event. *Yisreal v. State*, 993 So. 2d 952, 959 (Fla. 2008).

Here, the inquiry the trial court conducted did cover all of the areas required in a *Richardson* inquiry and any technical defects in the manner in which the trial court obtained the information would be harmless. Through his own questions on direct, Defendant established that he had been in possession of the document for some time and Defendant made no attempt to deny this was true when confronted by the trial court. (V129. 2191-

92, 2301) Moreover, Defendant's suggestion that he did not need to disclose the document because the State could have found it on its own was belied by his statement that he provided documents regarding his other case. (V130. 2300-01) Further, Defendant's suggestion that he somehow did not anticipate using the document was belied by the fact that it was Defendant who placed his presence at the *Arthur* hearing and the existence of documentation about his incarceration at issue through his direct testimony. Moreover, the State explained that it was prejudiced because it had already asked about documentation before the document was disclosed and there was no person available to ask about the record. As such, the record does reflect that the trial court did learn all of the information required by *Richardson*. Thus, the inquiry was sufficient and any error in the manner in which the trial court obtained the information was harmless. *Schopp*, 653 So. 2d at 1020-21; *Hall*, 509 So. 2d at 1097.

Defendant suggests that even if the inquiry was adequate, the trial court abused its discretion in finding that he had committed a discovery violation and in excluding the document as a sanction. Defendant's assertion that he did not commit a discovery violation is based on his assertion that report was in the constructive possession of the State and it had a duty to

disclose the evidence because it concerned a prior conviction upon which the State intended to rely. However, the record reflects that the record at issue concerned a prior arrest for misdemeanor offense related to Defendant driving a car with a tag that had been taken from another car. (V129. 2190-91, V130. 2298) As such, the record refutes the assertion that the document concerned a prior conviction that the State was relying upon at trial. As this Court has recognized, information held by state personnel unrelated to a case is not considered in the State's constructive possession. *Jones v. State*, 709 So. 2d 512, 520 (Fla. 1998); *see also Moon v. Head*, 285 F.3d 1301, 1308-10 (11th Cir. 2002).

Thus, the mere fact that the document was allegedly a government document does not show that the State had a duty to disclose this document in discovery. This is particularly true, as the document was not exculpatory or impeaching. The State was not prosecuting Defendant on the theory that he learned of McCrae's existence and status as a witness against Negus being at the *Arthur* hearing. Instead, the State was prosecuting Defendant on the theory that he learned of McCrae from Negus's attorney after the *Arthur* hearing. (V112. 86-87, V125. 1751-52) As such, the trial court did not abuse its discretion in finding a discovery violation.

The cases relied upon by Defendant do not compel a different result. In *State v. Coney*, 294 So. 2d 82 (Fla. 1974), this Court held that the State could be required to produce information about the criminal records of its witnesses that were in its actual or constructive possession. However, this Court limited that holding on rehearing because the State was not required to prepare a defendant's case for him. *Id.* at 87-88. Thus, this holding would support the rejection of Defendant's assertion that he was not required to disclose the document because the State could have found this document if it had looked. In *Gorham v. State*, 597 So. 2d 782, 784-85 (Fla. 1992), this Court held that the State had committed a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose that one of its main witnesses was a paid confidential information, which could have been used to impeach the witness. Because this information was in the hands of the police, this Court found the information was in the constructive possession of the State. *Id.* Here, as noted above, this information was not exculpatory. Thus, *Gorham* does not show that Defendant did not have a duty to disclose information he was relying upon at trial.

In *Hrehor v. State*, 916 So. 2d 825, 827 (Fla. 2d DCA 2005), the crime in question was alleged to have occurred during the

course, and a result, of the victim's employment as a Department of Children and Families (DCF) caseworker handling a case involving the defendant. The records in question concerned the DCF file about the case and contained materials impeaching the State's main witness. *Id.* As such, the Court found that the State could not claim a discovery violation because it was required to disclose the records itself during discovery as impeachment materials concerning its witness. Here, the records in question concerned Defendant's incarceration regarding unrelated misdemeanors that were neither exculpatory nor impeaching of the State's case. As such, this case does not show that the trial court abused its discretion in finding a discovery violation here.

Further, Defendant's suggestion that the trial court abused its discretion in excluding the evidence as a sanction should be rejected. While Defendant seems to suggest that the discovery violation should not have been viewed as willful, the record amply shows that the trial court did not abuse its discretion in considering the violation to be willful. Defendant's only explanations of why he had not disclosed the document were that the State could have found the document itself and that he had not planned to use the document. However, the State had no reason to look for this document as it had nothing to do with

the State's theory of the case and concerned unrelated misdemeanors. Further, Defendant's assertion that he did not intend to use the document was belied by his presenting testimony about having seen before trial during direct. Thus, the trial court did not abuse its discretion in not accepting these excuses for failing to disclose the document earlier.

Moreover, this was not the first problem that had surfaced regarding Defendant's failure to have provided timely discovery. Instead, issues related to Defendant's failure to have provided timely discovery had arisen on several occasions before this incident. (V121. 1052-55, V123. 1237-39, V123. 1239-43, 1403-06, V125. 1568-69) As such, the trial court did not abuse its discretion in viewing Defendant's actions as willful. This is particularly true, as the only reason why trial occurred when it did was that Defendant filed demands for speedy trial. (V110. 4-6, V111. 3-7) At the time he filed the demand, Defendant knew that the prosecutor was already set for a three week trial in another case. (V110. 4-10) Moreover, the trial court was aware that Defendant's counsel had made a habit of filing speedy trial demands when he knew that the prosecutor had other commitments. (V107. 4-5) Given all of these circumstances, the trial court did not abuse its discretion in considering this discovery violation to be willful and desiring of sanctions.

Moreover, the trial court also did not abuse its discretion in excluding the document as a sanction to the extent that it did so. While Defendant seems to such that some lesser sanction would have remedied the violation, this is not true. As the State explained, it was prejudiced because it had already asked about the document before it was disclosed and would not have done so if the document had been disclosed. (V130. 2301-02) Where a party has already asked based on the lack of discovery, the damage is done and lesser sanctions are unavailing. *Brown v. State*, 640 So. 2d 106, 108 (Fla. 4th DCA 1994); *see also Thompson v. State*, 565 So. 2d 1311, 1317 (Fla. 1990); *Rojas v. State*, 904 So. 2d 598, 601 (Fla. 5th DCA 2005). Moreover, as the State also noted, a brief recess would not have cured the problem, as Defendant did not even have a witness available who it could question about the authenticity of the document. As such, a brief recess to permit the State to question the witness was not available. *Johnson v. State*, 25 So. 3d 662, 666 (Fla. 1st DCA 2010). Thus, the trial court did not abuse its discretion in excluding the document as a discovery sanction.

Even if the trial court's ruling regarding the discovery violation had been an abuse of discretion, the trial court would still have not abused its discretion in excluding the document. Defendant had no witness available to authenticate the document

or laid a predicate for its admission under a hearsay exception. As such, the document would not have been admissible even if it had been disclosed. *Johnson*, 660 So. 2d at 645; *Amos*, 17 So. 3d at 833. Thus, the trial court did not abuse its discretion in excluding the document.

While Defendant seems to suggest that the trial court should have granted him a continuance so that he could find a witness through whom the document would have been admissible, the trial court did not abuse its discretion in denying this request as well. As this Court has held, this Court reviews a trial court's decision regarding a continuance for an abuse of discretion. *Doorbal v. State*, 983 So. 2d 464, 486-89 (Fla. 2008). Moreover, to obtain a continuance, a defendant needs to show "(1) prior due diligence to obtain the witness's presence; (2) that substantially favorable testimony would have been forthcoming; (3) that the witness was available and willing to testify; and (4) that the denial of the continuance caused material prejudice." *Geralds v. State*, 674 So. 2d 96, 99 (Fla. 1996).

Here, Defendant did not show any diligence in failing to have a witness through whom the document would be admissible present. Instead, he simply stated that he assumed the State would accept his testimony about being incarcerated and having

documentation to support that assertion and would agree to the document. (V130. 2301-02) Defendant did not, and could not, make any showing regarding the second and third *Geralds* prong, as he was asking for a continuance to find a witness.[9]

Additionally, it should be remembered that the trial proceeded when it did because of Defendant's speedy trial demands. As noted above, Defendant's counsel made a practice of making such demands when he knew the prosecutor had other commitments and followed that practice in making the demand in this case. (V107. 4-5, V110. 4-10, V111. 3-7) Further, Defendant was aware that the trial court was not going to be available during the week of June 23, 2008, before trial began. (V113. 102) As a result, jurors were selected who would not be available during that time. (V113. 102-03, V117. 538) The request for a continuance was made in the afternoon of Thursday, June 19, 2008. (V130. 2300) Given all of these circumstances, the trial court did not abuse its discretion in denying the continuance.

Moreover, even if the exclusion of the document was error, it was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). As noted repeatedly above, the State never claimed that

[9] In fact, when Defendant had attempted to admit other documents from another jail earlier during trial, the records custodian and testified that the records were not accurate. (V123. 1411-26)

Defendant learned of McCrae and his status from attending the *Arthur* hearing. Instead, it asserted, consistent with Defendant's confession to Clifford, that Defendant learned of McCrae from talking to Gerson after the *Arthur* hearing. As such, Defendant's testimony that he was not present at the *Arthur* hearing was irrelevant and unrebutted. Moreover, the State presented McCrae's dying declaration and Defendant's confessions. While Defendant's testimony about his whereabouts at the time of the *Arthur* hearing was uncontroverted, the jury had ample reason to question his credibility. Defendant stipulated that he was a convicted felon. He provided his account of the facts of some of his prior convictions that was inconsistent with the testimony of the officers involved in those crimes and the fact that Defendant had plead guilty to the crimes. He admitted that he had given Berry as an alibi when speaking to the police but claimed to have a different alibi at trial, which was supported only by his testimony. He admitted that he had visited Negus in jail, had hired a lawyer for Negus and was friends with individuals implicated in the Bennett murder but asserted he knew nothing about the Bennett case. Given these circumstances, there is not possibility that the presentation of an unauthenticated document showing that Defendant was incarcerated at the time of the *Arthur* hearing

would have affected the jury's verdict. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

V. MCCRAE'S STATEMENT.

Defendant next asserts that the trial court violated his confrontation rights by admitting McCrae's statements about who shot him. However, the claim of a confrontation violation is not preserve, the trial court did not abuse its discretion in admitting the statement and the admission of the statement did not violate the confrontation clause.

To be preserved an issue about the admissibility of evidence for appeal, a defendant must have objected to the evidence before it was admitted and that objection must have been based on the same grounds that are presented on appeal. *McWatter*, 36 So. 3d at 639; *Williams*, 967 So. 2d at 748 n.11. Here, while Defendant moved in limine to exclude McCrae's dying declaration as inadmissible hearsay, he did not assert that the admission of that statement would violate his confrontation rights in that motion. (R. 373-74) At the hearing on the motion, Defendant again did not mention the Confrontation Clause. (V112. 110-13) While he used the word "Crawford," he did so in asserting that a statement made in response to a question could not be an excited utterance. (V112. 112-13) When the statement was actually elicited, Defendant objected only on hearsay

grounds. (V121. 1068) As Defendant did not objected that the admission of this statement would violate the Confrontation Clause,[10] the claim that it did is not preserved for review and should be rejected.

Even if the issue had been preserved, it should still be rejected because it was meritless. In *Crawford*, 541 U.S. at 56 n.6, the Court recognized that it had always considered dying declarations to be admissible under the Confrontation Clause and stated that it was not disturbing this line of precedent. As a result, it has been recognized that dying declarations are admissible even after *Crawford*. *Cobb v. State*, 16 So. 3d 207, 211-12 (Fla. 5th DCA 2009).

Here, McCrae's statement is properly considered a dying declaration. This Court has held that statements are admissible as dying declarations where the statements was made by a declarant who believed that his death was imminent and inevitable and concerned the cause of the declarant's death. *Williams*, 967 So. 2d at 749. While the declarant must have believed that he was about the die, it is not necessary for

[10] While Defendant did raise the confrontation issue in his motion for new trial, that motion was not filed until months after the evidence had been submitted and both the guilt and penalty phases had concluded. (R. 5240-67) As such, raising the issue in this motion did not preserve the issue. *Parker v. State*, 456 So. 2d 436, 442-43 (Fla. 1984); *Jackson v. State*, 451 So. 2d 458, 461 (Fla. 1984); *see also Brooks v. State*, 762 So. 2d 879 (Fla. 2000).

there to be a verbal expression of that belief for the statement to qualify as a dying declaration. *Hayward v. State*, 24 So. 3d 17, 30 (Fla. 2009). However, this Court has consistently upheld the admission of a statement as a dying declaration where the declarant did verbalize the expectation of death. *Williams*, 967 So. 2d at 748-49; *Pope v. State*, 679 So. 2d 710, 713 (Fla. 1996).

Here, Hufnagel testified that at the time he found McCrae, McCrae had clearly sustained multiple gunshot wounds, was having difficulty breathing that only briefly subsided and spoke to Hufnagel about his death being likely repeatedly. (V121. 1065-69) Given these circumstances, McCrae's statement was properly admissible as a dying declaration. As such, Defendant's claim of a confrontation violation would be meritless even if it was preserved. The conviction should be affirmed.

While it is true that the trial court stated that it did not believe that the statement qualified as a dying declaration during a hearing on a motion in limine, it is clear that the statement was based on a misunderstanding of the law and facts. In making the statement, the trial court indicated that it believed that someone had to tell McCrae that he was going to die for the predicate for a dying declaration to be laid. (V112. 111-12) However, no verbalization of the expectation of death is

necessary for a statement to qualify as a dying declaration. *Hayward*, 24 So. 3d at 30. Moreover, in his motion in limine, Defendant suggested that Hufnagel had told McCrae he would be okay when he expressed a concern about his impending death. (R. 373) However, Hufnagel's testified that what he actually said to McCrae was that he should hold, as Hufnagel recognized that McCrae was going to die, and that McCrae repeated his concern about his death despite this statement. (V121. 1066-67) Moreover, as Hufnagel admitted, McCrae was attempting to explain everything he could about his knowledge of Defendant even though Hufnagel did not consider this information germane, which indicated that McCrae realized he needed to provide what information he could while he could do so. (V121. 1068-69) Given these circumstances, the statement did qualify as a dying declaration. *Williams*, 967 So. 2d at 749. The admission of the statement should be affirmed.

Even if the statement did not qualify as a dying declaration, the statement was still properly admitted. The trial court did not abuse its discretion in finding that the statement qualified as an excited utterance. As this Court has held, a statement qualifies as an excited utterance when it regards a startling event, was made before there was time to contrive and while the declarant was still under the stress of

the event. *Hayward*, 24 So. 3d at 29. Here, McCrae's statements were made within minutes of his being shot repeatedly while McCrae was concerned, in pain and bleed and regarded his being shot. As such, the trial court did not abuse its discretion in finding that the statement qualified as an excited utterance.

Moreover, even if Defendant had preserved a claim that admitting the statement violated his confrontation rights, the claim would have been properly rejected. In *Davis v. Washington*, 547 U.S. 813, 822 (2006), the Court held that statements were nontestimonial and not violative of the confrontation clause "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." The Court noted that the identity of the offender was part of meeting an ongoing emergency because that information in assessing the danger. *Id.* at 828.

Here, the objective facts indicate that McCrae's statement were part of an ongoing emergency. The statements were made within minutes of McCrae being shot and before he received any medical attention for his injuries while he was still at the scene. Moreover, Defendant had continued firing shots after he had already hit McCrae multiple times and even as he drove away. The area around Ray's auto was such that it would have been

difficult to have turned a car around. (V127. 1921) Additionally, Defendant admitted that he had driven through the complex before he shot McCrae, exited the complex and returned. (V127. 1915-23) Given these circumstances, there was reason to be concerned that Defendant might return and continue shooting. Thus, the objective facts indicate that the statement was made during an ongoing emergency. *Williams*, 967 So. 2d at 747 n.11.

Defendant's reliance on *Hayward* is misplaced. In *Hayward*, the exact amount of time after the crime was unknown but the robbery and shooting had been completed and both the victim and Defendant had left the crime scene in opposite directions. Moreover, the victim was already receiving medical. Given these circumstances, the victim was in a place of safety and there was no reason to be concerned that the robber might return. *Hayward*, 24 So. 3d at 29-33. Here, the shooting was not part of any other completed crime, and Defendant had continued to fire even after he had completed shooting McCrae. Moreover, the shooting had occurred only minutes earlier, and McCrae had yet to receive any medical assistance and was still at the crime scene. The area was such that it was necessary to drive out of the area and back into it, as Defendant admitted he had done. As such, it was possible that Defendant might return and continue shooting. Given the differences, *Hayward* does not show that the admission

of the statements violated the Confrontation Clause. The convictions should be affirmed.

VI. SUPPRESSION.

Defendant next asserts that the trial court erred in denying his motion to suppress his statements as having been obtained as the result of an unlawful arrest. However, the trial court properly denied[11] Defendant's motion to suppress, as Defendant was discovered during a protective sweep justified by specific facts to establish a concern for officer safety and his brief detention was a proper response to the circumstances. Moreover, the police did have probable cause to arrest him so that his subsequent statements would not be subject to suppression even if the police had acted improperly in apartment and the taint of any actions in the apartment was attenuated from the statement.

In *Maryland v. Buie*, 494 U.S. 325 (1990), the Court recognized that when the police were lawfully in a home and were able to identify specific, articulable facts indicating a danger to officer safety, the police are permitted to conduct a brief sweep of the area. While Defendant has suggested that such

[11] In reviewing a trial court's ruling on a motion to suppress, this Court accepts the trial court's factual findings if they are supported by competent, substantial evidence but reviews the application of the law to the facts *de novo*. *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001)

sweeps are limited to circumstances in which the police are lawfully in the home to make an arrest, the courts have no so limited *Buie*. *Taylor v. State*, 855 So. 2d 1, 16 (Fla. 2003); *Nolin v. State*, 946 So. 2d 52 (Fla. 2d DCA 2006).

Here, it was undisputed that Caldwell gave the police consent to enter the apartment and told the police that there was no one in the apartment except herself and her children, who were visible in the living room. Moreover, Defendant was suspected of having murder McCrae and had behaved in a volatile manner during his prior encounters. As such, the police had reason to believe that he could pose a danger to them. While Caldwell was being interviewed, Bayas heard noises indicating movement in the bedroom of the small, one bedroom apartment. As such, his actions in looking into the door of the room to ensure officer safety were reasonable. Moreover, when he observed nothing that would cause the noise but heard it again, he was justified in checking the room and closet. It was then that he found Defendant, who identity was unknown to him at the time, hiding in the closet. Given these circumstances, Bayas' action in brief detaining Defendant and removing him as a threat were reasonable. As such, the motion to suppress was proper denied and should be affirmed.

Even if the actions in Defendant's apartment did result in

an illegal arrest, the trial court was still correct in denying the motion to suppress. In *New York v. Harris*, 495 U.S. 14 (1990), the Court held that an arrest based on probable cause that was illegal only because it was made in a defendant's home without a warrant or consent did not require suppression of the defendant's subsequent confession.

Here, while Defendant has continually relied upon the officers' testimony that they did not believe they had probable cause to arrest Defendant, the United States Supreme Court has made it clear that the determination of probable cause is based on an objective analysis of the totality of the circumstances and not the subjective beliefs of the officers. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); *Whren v. Ohio*, 517 U.S. 806, 812-13 (2004). As such, the fact that the officers did not believe that they did not have probable cause to arrest Defendant does not show that probable cause did not exist.

Moreover, the facts known by the officers show that they did have probable cause. Probable cause exists when the facts known to the police give them reasonable cause to believe that the defendant has committed a crime. *Blanco v. State*, 452 So. 2d 520, 523 (Fla. 1984). Here, the police knew that McCrae had identified as his killer as a brother of Negus. They had information showing that two people had been involved; a driver

and a shooter. They had received a description of the shooter that was consistent with Defendant. They knew that only Defendant or Atiba could have been the brother McCrae described since Bobo was incarcerated and Jamal was a teenager. They knew that Defendant had engaged in actions during their search for Negus that suggested that he had a desire to assist Negus in avoiding arrest. They knew that Defendant was tied to an apartment rented in Berry's name and that Berry drove a car consistent with the description of the car used during the murder. They observed that car parked in front of Defendant's apartment before they approached it. Given all of this information, the police did have probable cause to believe that Defendant had committed McCrae's murder and the statements he made at the police station were properly admitted even if the police illegal acted on that probable cause in Defendant's home. *Krawczuk v. State*, 634 So. 2d 1070, 1072-73 (Fla. 1994). The denial of the motion to suppress should be affirmed.

Even if Defendant had been illegal arrested in his home without probable cause, the denial of the motion to suppress should still be affirmed. In *Brown v. Illinois*, 422 U.S. 590, 603 (1975), the Court held that a statement made after an illegal arrest would not be subject to suppression if it was shown that the statement was made after a break in the causal

connection between the illegal arrest and the statement. *Id.* The Court held that in determining whether such a break exists, courts should consider the facts of the case, including the giving of *Miranda* warnings, the temporal proximity between the statement and the confession, any intervening circumstances and the purpose and flagrancy of the official misconduct. *Id.* at 603-04.

Here, the circumstances show that such a break did exist. The only reason the police took any actions against Defendant in his apartment was that they were concerned for the safety. Moreover, they removed Defendant's restraints once that concern was dissipated. They left Defendant unrestrained for a period of about 10 minutes. They informed Defendant while still in front of his apartment that he was not under arrest. They asked Defendant to come to the station voluntarily. Defendant was not restrained during the subsequent ride to the police station and was transported in a normal car. Once at the station, Defendant was told repeatedly that he was not under arrest. Before he confessed Defendant had been read his *Miranda* rights twice and a period of at least 8 hours had elapsed. Thus, the record does establish a break between the alleged illegality and the confession sufficient to dissipate any taint. *Sanchez-Velasco v. State*, 570 So. 2d 908, 914 (Fla. 1990). The denial of the motion

to suppress should be affirmed.

Defendant's reliance on *Adams v. State*, 830 So. 2d 911 (Fla. 3d DCA 2002), is misplaced. In *Adams*, the police misconduct was far more flagrant, as an officer tackled the defendant from behind, handcuffed him and forcibly placed the defendant in a police car and drove him to the station without explanation based merely on a BOLO stating that the defendant was wanted for questioning. *Id.* at 913. Further, while the defendant was told he was not under arrest, this only occurred as the defendant was riding to the station in handcuffs and at the station. *Id.* at 914. Here, the police actions occurred only out of concern for officer safety, and Defendant's restraints were released quickly. Moreover, Defendant was told he was not under arrest while still in front of his apartment and then asked to come to the station voluntarily. Thus, Defendant had the opportunity to avoid further interaction with the police by simply declining the request. As such, *Adams* does not apply. The denial of the motion to suppress should be affirmed.

VII. ADMISSION OF THE BULLET.

Defendant next asserts that the trial court abused its discretion in admitting a live round found in the car he drove. However, the trial court did not abuse its discretion in

admitting the bullet.[12]

Pursuant to §90.401, Fla. Stat., evidence is relevant if it tends to prove a material fact. Pursuant to §90.402, Fla. Stat., relevant evidence is admissible. As a result, evidence regarding weapons has been upheld even where there was no testimony directly linking the weapon to a crime. *See Cole v. State*, 701 So. 2d 845, 855 (Fla. 1997); *Council v. State*, 691 So. 2d 1192, 1194 (Fla. 4th DCA 1997); *Herman v. State*, 396 So. 2d 222, 228-29 (Fla. 4th DCA 1981). Moreover, this Court has previously relied on a defendant's possession of ammunition and guns similar to a murder weapon as circumstantial evidence that the defendant committed a crime even where the murder weapon was never located. *Riechmann v. State*, 581 So. 2d 133, 141 (Fla. 1991).

Here, Defendant was charged not only with the murder but with possession of a firearm by a convicted felon and elected to have both of those charges tried together. The .9mm bullet in question was found in a backpack together with other property related to Defendant in Berry's car. (V125. 1673-76) Berry, the other person who regularly used the car, testified that she had not placed any bullets in the car. (V124. 1499) Casings recovered from the scene showed that .9mm gun had been used in

[12] Trial rulings regarding the admissibility of evidence are reviewed for an abuse of discretion. *Hudson*, 992 So. 2d at 107.

this crime and that it had been loaded with bullets from 3 different manufacturers. (V121. 1128-33) Moreover, during his confession the day before the car was searched and the bullet was found, Defendant informed Butchko that he had carried the guns he used in this crime in his backpack in Berry's car. (V127. 1898-1900) Given these circumstances, the bullet did have some tendency to show that Defendant possessed a gun and had placed it in the backpack. Thus, the bullet was relevant.

The cases relied upon by Defendant do not compel a different result. In *Cooper v. State*, 778 So. 2d 542 (Fla. 3d DCA 2001), the bullets were not found in the defendant's possession until 9 months after the crime at a place remote from anything to do with the crime and there was no possession charge. In *Sosa v. State*, 639 So. 2d 173 (Fla. 3d DCA 1994), the bullets were not even of the same caliber as the weapon used. In *Huhn v. State*, 511 So. 2d 583, 587 (Fla. 4th DCA 1987), the gun was located at least 5 months after the crime in a location unconnected with the crime and the State presented no evidence that even suggested that the gun was related to the crime. In *Fugate v. State*, 691 So. 2d 53, 54 (Fla. 4th DCA 1997), the gun was not found at a location connected to the crime and was not connected to either the crime or the defendant. In *Moore v. State*, 1 So. 3d 1177 (Fla. 2009), the Court merely stated that

guns that allegedly were not the same caliber as the gun used in a crime would not be relevant.

Here, the bullet was of the same caliber as one of the guns used in this murder. Moreover, it was found in a place where Defendant had admitted storing the gun before the crime in a car that was connected with the murder a week after the murder. Given these circumstances, the present of the bullet did make it more likely that Defendant's confession was accurate and that he had committed the crime. As such, none of these cases show that the trial court abused its discretion in admitting the bullet. The convictions should be affirmed.

Even if the trial court had abused its discretion in denying the motion for post conviction relief, any error was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). McCrae identified his killer as one of Negus's brothers with his dying breath. The witnesses' description of the killer and the fact that several of Negus's brother's were incarcerated limited the number of people who could be McCrae's killer to two. Berry's testimony placed Defendant in possession of a car matching the witnesses' description of the car used in the murder at the time of the murder and showed that the alibi Defendant admitted providing the police was false. Defendant confessed to the murder and in doing so provided details of the crimes that the

police could not have known at the time of the crimes. While Defendant insisted that he was forced to write the confession in his handwriting and did not make the oral statements, Defendant's testimony contradicted every other witness presented. In fact, the State only mentioned the bullet once in passing during its initial closing argument. (V131. 2422) Given these circumstances, there is no possibility that the jury convicted Defendant because of the bullet. As such, any error in the admission of the bullet was harmless.

VIII. JURY INSTRUCTION ON PRIOR VIOLENT FELONY.

Defendant next asserts that the trial court abused its discretion in the manner in which he instructed the jury about the prior violent felony. Specifically, he asserts that the trial court should not have stated that burglary was a crime of violence. However, the issue is unpreserved and the alleged error is not fundamental.

To preserve an issue regarding the giving of a jury instruction, a defendant must have raised a contemporaneous objection to the instruction on the basis asserted on appeal. *Victorino v. State*, 23 So. 3d 87, 100 (Fla. 2009); *Hunter v. State*, 8 So. 3d 1052, 1070 (Fla. 2008); *State v. Weaver*, 957 So. 2d 586, 588 (Fla. 2007). Here, the record does not reflect that Defendant specifically objected to the instruction that burglary

was a crime involving violence. (V139. 506-15) As such, this issue is unpreserved.

Because the issue is unpreserved, Defendant would only be entitled to relief if he showed that the error in the instruction constituted fundamental error. "Fundamental error in a jury instruction requires that the error 'reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" *Hunter*, 8 So. 3d at 1070 (quoting *Garzon v. State*, 980 So. 2d 1038, 1042 (Fla. 2008)). Here, that standard is not met.

This Court has repeatedly found that improperly instructing a jury that a prior crime was a crime of violence is harmless error where evidence was presented showing that some violence or threat of violence was used in the commission of the felony or where there was another prior crime that did involve the use of violence. *Hess v. State*, 794 So. 2d 1249, 1263-64 (Fla. 2001); *Sweet v. State*, 624 So. 2d 1138, 1142-43 (Fla. 1993); *Johnson v. State*, 465 So. 2d 499, 505-06 (Fla. 1985).

Here, the State presented evidence that during the burglary in question, there had been a fight between Defendant and the property owner that resulted in injuries to both parties and had resulted in charges of both burglary and strong armed robbery.

(V135. 90-94, 160, V136. 190-91) Thus, there was evidence that the burglary did involve the use or threat of violence. *See Hess*, 794 So. 2d at 1264; *Gore v. State*, 706 So. 2d 1328, 1333-34 (Fla. 1998). Moreover, the prior violent felony aggravator was also supported by Defendant's prior conviction for resisting arrest with violence, and there was amply testimony showing that Defendant attacked a police officer, attempted to take his gun and had to be subdued by several officers. (V130. 2346-64, V136. 194-97) Since the State did present evidence showing that violence was involved in the burglary and there was another crime of violence supporting the prior violent felony aggravator, any error in the instruction here would be harmless. As this Court has held, a harmless error is not a fundamental error. *Reed v. State*, 837 So. 2d 366, 370 (Fla. 2002).

Moreover, the State informed the jury that not all burglaries qualified as prior violent felonies in its closing. (V139. 527) Defendant's own confessions show that Defendant killed McCrae to prevent him from testifying against Negus. Once Defendant learned McCrae's name in early September, he set about finding McCrae and attempted to intimidate him to prevent him from testifying in October. He decided to kill McCrae after visiting Negus two days before the murder. He then armed himself, drove to Ray's, made sure that McCrae was there before,

left the area and returned to shoot McCrae repeatedly using two different guns without any confrontation.[13] Further, Defendant was on probation for his prior crimes at the time he committed this murder. As a result, the trial court properly found four aggravators applicable to this case: CCP, prior violent felony based only on the resisting arrest with violence, under a sentence of probation and hinder a governmental function. (R. 5717-27)

Further, the mitigation presented was extremely weak. While Defendant presented numerous family members before the jury, their testimony showed little than that they loved Defendant, that because of his parents' separation and their own criminal activities and deportations, his parents were not around him much and that he took charge of his brothers and cousins after his mother was arrested and deported. While Defendant attempted to portray his actions in caring for his brothers and cousins as being a positive influence, the jury learned that 3 of Defendant's brothers ended up in prison, that one of his cousin was a criminal and that the remaining brother was drifting aimlessly around the country.

Additionally, while Dr. Fisher testified at *Spencer* hearing

[13] This evidence shows that the evidence was more than sufficient to sustain his convictions. *Green v. State*, 715 So. 2d 940, 943 (Fla. 1998).

that he believed that Defendant would adjust well to prison life, he admitted that Defendant had no mental illnesses or neurological deficits, that Defendant had been in two fights and been caught with a shank during his pretrial detention and that Dr. Fisher had ignored other indications that Defendant's past behavior did not indicate that he would behave well in the future. As a result, the trial court found no statutory mitigation and only gave little weight to the three nonstatutory mitigators he found: Defendant's family background, the impact of Defendant's execution on his family and ability to adjust to prison life.

Given these circumstances, it cannot be said that either the jury would not have recommended that Defendant should be sentenced to death had it not been instructed that burglary was a crime of violence.[14] As such, any error in that instruction was not fundamental. *Hunter*, 8 So. 3d at 1070.

IX & X. COMMENT IN CLOSING.

Defendant finally asserts that the State made improper comments during closing argument. However, the issue regarding

[14] Moreover, the sentence is proportional. *Phillips v. State*, 705 So. 2d 1320, 1321 (Fla. 1997)(aggravators: under sentence of imprisonment, hinder governmental function, prior violent felony, CCP; nonstatutory mitigation: low IQ, poor family background, abusive childhood); *Hodges v. State*, 595 So. 2d 929, 934 (Fla. 1992)(aggravators: hinder governmental function and CCP; nonstatutory mitigation regarding childhood, educational history, work history and close family relationships).

many of the comments is unpreserved, and the comments were largely proper in context.

To preserve an issue regarding a comment in closing, it is necessary for a defendant to object to the comment contemporaneously on the grounds asserted on appeal and obtain a ruling on the objection. *Gonzalez v. State*, 786 So. 2d 559, 568 (Fla. 2001); *Brooks v. State*, 762 So. 2d 879, 898-99 (Fla. 2000); *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983). Further, if a trial court sustains the defendant's objection, it is necessary for him to move for a mistrial to preserve an issue about the comment. *Rose v. State*, 787 So. 2d 786, 797 (Fla. 2001). When a defendant simultaneously objects and moves for a mistrial and the trial court only rules on the motion for mistrial, the only issue that is preserved is the denial of the motion for mistrial. *Poole v. State*, 997 So. 2d 382, 391 n.3 (Fla. 2008). A motion for mistrial is only properly granted if the comment was such as to have deprived the defendant of a fair trial. *Salazar v. State*, 991 So. 2d 364, 371-72 (Fla. 2008). When an issue regarding a comment is not preserved for review, this Court will only consider the issue if the comment constitutes fundamental error. *Hayward*, 24 So. 3d at 40-41. In demonstrating fundamental error, a defendant has a "high burden" of showing that the error was such that it "reaches down into

the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Id.* at 41.

Moreover, attorneys are permitted wide latitude in arguing the facts and law to the jury and may draw logical inferences in doing so. *Smith v. State*, 7 So. 3d 473, 509 (Fla. 2009). Moreover, this Court has recognized that comments made in fair reply to a defense argument are proper. *Pagan v. State*, 830 So. 2d 792, 809 (Fla. 2002).

Applying these principals here, Defendant is entitled to no relief. Defendant suggests that by using the word dangerous, the State implied that he would be a danger in the future. However, Defendant ignores that the only two times he objected to the use of the word, the trial court sustained the objection. (V139. 523, 530, 559, 560) As such, the only issue that is preserved for review is the trial court's denial of a motion for mistrial after the argument concluded. (V139. 562) However, the trial court did not abuse its discretion in denying that motion. The State used the word dangerous to describe Defendant's actions in planning this crime to eliminate a witness and to assertthat fact of his prior violent conviction for resisting an officer showed that the prior violent felony, hinder a governmental function and CCP aggravators were entitled to great

weight. (V139. 523, 530, 559, 560) The State never suggested that Defendant would be dangerous in the future. *Id.* As this Court has noted, such comments about past dangerousness are not sufficient to deprive a defendant of a fair trial. *Knight v. State*, 746 So. 2d 423, 431 n.10 (Fla. 1999). As such, the trial court did not abuse its discretion in denying the motion for mistrial. *Salazar*, 991 So. 2d at 371-72.

The same is true of Defendant's complaint about the use of the word violent. Defendant only objected to the use of the word violent three times. (V139. 522, 536, 545) However, on each of these occasions the State was referring to Defendant's prior violent felonies. *Id.* Since the State was referring to the prior violent felony aggravator on these occasions, the trial court did not abuse its discretion in overruling the State's comments about that aggravator. *Smith*, 7 So. 3d at 509. The same is true of a number of the instances where the State used the word and Defendant did not object. (V139. 527, 528, 529) Further, the one remaining instance in which the State used the word violent and Defendant did not object to the word, the State was again referring to Defendant's past behavior and was suggesting that it did not result from being left in charge of his brothers after his mother's arrest and deportation. (V139. 542) As such, this was a fair reply to Defendant's assertion that he killed

McCrae merely because he was forced to care for his brothers and not an assertion of future dangerousness. *Pagan*, 830 So. 2d at 809. Since these comments were proper, they do not constitute fundamental error.

Further, Defendant's suggestion that the State's comment about his effect on others concerned his potential for future dangerous is based on an unobjected to comment that is taken out of context. (V139. 555-56) The State did not comment about Defendant's alleged effect on others as evidence of aggravation. Instead, the State was responding to Defendant's argument that he was entitled to mitigation because he had been and continued to be a positive influence on those around him. (V139. 555-56) As Defendant had presented numerous witnesses to claim that he had been a positive influence on the lives of others, the State's comment was merely a comment on the evidence. As such, the comment was proper and does not amount to fundamental error.

Similarly, while Defendant insists that the use of the word lawless was improper, Defendant only objected to the use of the word once and he obtained no ruling from the court. (V139. 522, 544) As such, the issue is unpreserved. *Richardson*, 437 So. 2d at 1094. Moreover, the comments do not constitute fundamental error. While Defendant suggests that these comments concerned future dangerousness, each of these comments referred to

Defendant's past behavior as support for aggravation or rebuttal of mitigation that Defendant was raising his brother Jamal to get an education. (V139. 522, 544, 545) As such, the comments were merely comments or proper inferences to be drawn from the evidence in weighing the aggravation and mitigation. *Smith*, 7 So. 3d at 509.

Defendant next suggests that the State acted improperly in impeaching his mother's testimony about his school performance and improperly commented on that testimony in closing. However, the trial court properly found that the impeachment was proper and properly allow comments on the evidence presented.

During her direct testimony, Allen insisted that Defendant did well in school and was not a discipline problem there. (V137. 329, 333) She stated that while her children were occasionally were sent to detention, the child about whom this occurred was mainly Atiba. (V137. 331) Given these circumstances, Defendant opened the door to questions regarding her knowledge of Defendant being placed in detention on numerous occasions for numerous reasons. (V137. 370-72) As such, the trial court did not abuse its discretion in allowing the questions. *Rodriguez*, 753 So. 2d at 41-42. Moreover, Allen responded that she did recall Defendant being suspended and suggested that she had admitted as much during direct. (V137.

370-72) Given these circumstances, the State's comments about this testimony were proper comments on the evidence presented. (V139. 522-23) As such, the trial court did not abuse its discretion in overruling the objection to these comments. *Smith*, 7 So. 3d at 509.

Defendant next suggests that the State presented improper evidence about Caldwell's criminal activity and commented on it in closing. However, Defendant again opened the door to this testimony. *Rodriguez*, 753 So. 2d at 41-42. During her direct testimony, Caldwell claimed that Defendant took her in after their mothers were arrested, taught her how to be a responsible adult and continued to assist her and communicate with her thereafter. (V138. 457-62) Given these circumstances, Defendant placed at issue what kind of adult Caldwell had become as a result of Defendant's tutelage. As such, the trial court did not abuse its discretion in finding that Defendant opened the door to this evidence. Moreover, since the evidence was properly admitted, it was proper to comment on that evidence. (V139. 552) As such, the trial court did not abuse its discretion in overruling the objection to these comments. *Smith*, 7 So. 3d at 509.

Defendant next suggests that the State made improper comments based on facts not in evidence concerning his prior

burglary conviction. However, Defendant ignores that the trial court sustained his objection to these comment. (V139. 528) While Defendant moved for mistrial on numerous grounds, he did not assert that the State's comments about the pictures of the burglary concerned facts not in evidence. (V139. 561-64) As such, Defendant would only be entitled to relief if any error was fundamental.

Moreover, while Defendant insists that there was no evidence of violence during his burglary, he ignores that he admitted during opening that he was attempting to get hurricane shutters and that a violent encountered occurred while he was doing so. (V135. 86) Moreover, Lashbrook testified that there had been a fight when Defendant committed the burglary to steal the shutters. (V135. 90-93, 160) Further, photographs were admitted showing the homeowner had partially assembled the shutters and had tool out to finish the job. (R. 1373-79) As such, the State's comments were merely drew a proper influence that Defendant became involved in a confrontation with the home owner when he was caught burglarizing his home to steal the shutters such that the burglary conviction was violent. (V139. 527-28) As such, the comments were proper. *Smith*, 7 So. 3d at 509. Thus, the comments do not constitute fundamental error.

Further, while Defendant claims that comments about his

brothers and their actions were improper, Defendant did not object to these comments when they were made. (V139. 527, 555) Instead, he merely moved for a mistrial after closing argument ended. (V139. 562) As such, the only preserved issue is the denial of a motion for mistrial.

However, the trial court did not abuse its discretion in denying that motion. A major portion of Defendant's mitigation case was that he had taken responsibility for his brothers when his parents were deported. (V135. 85) As such, comments about what Defendant's influence on his brothers had caused were a fair reply to Defendant's assertion that his influence on his brothers was mitigating. *Pagan*, 830 So. 2d at 809. As such, the trial court did not abuse its discretion in denying a motion for mistrial regarding these comments.

While Defendant asserts that the State improperly denigrated his religious beliefs and commented on the murder being a contract killing, Defendant did not object to the comment. (V139. 532) As such, Defendant would only be entitled to relief if these comments constituted fundamental error. *Hayward*, 24 So. 3d at 40-41. Moreover, the comments here do not constitute such error as they were made in fair response to Defendant's arguments. *See Wade v. State*, 41 So. 3d 857, 869-70 (Fla. 2010).

In his confession, Defendant stated that he had thought during the drive to Ray's that McCrae would be present if God wanted him to kill McCrae. (V127. 1913-14) During his opening statement at the penalty phase, Defendant asserted that the fact that he planned to kill McCrae to eliminate him as a witness against Negus was not entitled to weight because it was not a contract killing for money. (V135. 72) Defendant also suggested that his statement about God and his desperation over Negus somehow showed that the aggravators did not apply. (V135. 82) In addressing why CCP did apply and was entitled to great weight, the State responded to these arguments:

> He went to a lawyer He questioned people his own little detective work. He confronted Keith in his shop, got two guns. Remember he dropped Marcia Berry off, wasn't getting her involved, keeping Atiba around, but not bringing in Marcia Berry.
>
> He knew it would be dark. Drove down from Broward What do you think he's thinking about? he's going to Publix? What's he going to about? He's thinking. That's his substantial period of reflection.
>
> That's a contract kill, his contract. He drove down and then this is the interesting part and I want you to think about it. If he's there, then I have to do it. That's part of his plan.
>
> The God thing. He uses God that way It's revolving, the God thing, to use God that way. Maybe he wasn't really reflecting. No, you're waiting for the plan. Your plan is, if he's there, boom, I'm going with the plan. That's part of the plan. That's not I'm backing out. That's like that's my green light to go.

(V139. 532-33) Given these circumstances, the State's comments were merely responding to Defendant's arguments regarding why

CCP did not apply and was not entitled to weight. As such, they do not constitute fundamental error.

Defendant also complains that the trial court overruled his objection when the State used the word excuse in referring to mitigation. However, this statement was made in fair response to Defendant's argument. *Street v. State*, 636 So. 2d 1297, 1303 (Fla. 1994). During opening statement, Defendant argued that his conscious decision to kill McCrae to eliminate him as a witness should not be found to be aggravating because Defendant made a "tragic mistake" because he had been left with the responsibility for his brothers after his mother's arrest and deportation. (V135. 82-88) As such, Defendant argued that his life circumstances excused his criminal conduct. Moreover, during the penalty phase, Defendant presented numerous family members who had spent little time with him to testify about their reactions to the consequences of Defendant's actions. As such, the State's brief comment that the jury should not excuse Defendant's conduct and consider it tragic mistake was invited by Defendant's argument. (V139. 535-36) Thus, the trial court did not abuse its discretion in overruling this objection.

Moreover, the major theme of this portion of the State's closing argument was that while Defendant had presented numerous witnesses who had cried before the jury, the jury was not

allowed to rely on sympathy as mitigation. (V139. 535-36) This Court had recognized that it is proper to urge the jury not to rely on mere sympathy. *Valle v. State*, 581 So. 2d 40, 46-47 (Fla. 1991). The use of the word excuse was brief and tied to Defendant's suggestion that his planned actions to eliminate a witness were a mistake.

Additionally, as argued in the issue regarding the jury instruction, there was overwhelming evidence of 4 strong aggravators and very weak mitigation. Given these circumstances, Defendant is not entitled to any relief based on the comments in closing. *Hayward*, 24 So. 3d at 40-41; *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Melodee A. Smith, 101 N.E. 3rd Avenue, Suite 1500, Ft. Lauderdale, Florida 33301, this 28th day of January 2011.

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SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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SANDRA S. JAGGARD
Assistant Attorney General