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IN THE SUPREME COURT OF FLORIDA

PATRICK ALBERT EVANS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. SC12-2160
Lower Tribunal No. CRC08-26829CFANO
Death Penalty Case

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

STATEMENT OF THE CASE AND FACTS..... 1

SUMMARY OF THE ARGUMENT..... 26

ARGUMENT..... 29

ISSUE I..... 29
THE MOTION FOR JUDGMENT OF ACQUITTAL CLAIM

ISSUE II..... 40
THE SUFFICIENCY OF THE EVIDENCE CLAIM

ISSUE III..... 47
THE VOICE IDENTIFICATION CLAIM

ISSUE IV..... 55
THE CROSS-EXAMINATION CLAIM

ISSUE V..... 62
THE GUILT PHASE CLOSING ARGUMENT CLAIM

ISSUE VI..... 80
THE CUMULATIVE ERROR CLAIM

ISSUE VII..... 81
THE WEIGHING OF MITIGATION CLAIM

ISSUE VIII..... 87
THE PROPORTIONALITY CLAIM

CONCLUSION..... 93

CERTIFICATE OF SERVICE..... 94

CERTIFICATE OF FONT COMPLIANCE..... 94

TABLE OF AUTHORITIES

Federal Cases

Darden v. Wainwright,
477 U.S. 168 (1986) 66

Dixon v. United States,
548 U.S. 1 (2006) 44

Michelson v. United States,
335 U.S. 469 (1948) 58

Reese v. Secretary, Florida Dept. of Corrections,
675 F.3d 1277 (11th Cir. 2012) 66

U.S. v. Metayer,
2013 WL 5942597 (11th Cir. 2013) 52

United States v. Caldwell,
543 F. 2d 1333 (D.C. Cir. 1974), *cert. denied*,
423 U.S. 1087 (1976) 71

United States v. Jacoby,
955 F.2d 1527 (11th Cir. 1992) 65, 78

State Cases

Abdool v. State,
53 So. 3d 208 (Fla. 2010) 87

Allen v. State,
2013 WL 3466777 (Fla. July 11, 2013) 84

Allred v. State,
55 So. 3d 1267 (Fla. 2010) 91, 93

Alston v. State,
723 So. 2d 148 (Fla. 1998) 39

Anderson v. State,
863 So. 2d 169 (Fla. 2003) 63, 66, 84

Archer v. State,
613 So. 2d 446 (Fla. 1993) 30

Archer v. State,
934 So. 2d 1187 (Fla. 2006) 76

Ault v. State,
53 So. 3d 175 (Fla. 2010) 84, 86

Ayalavillamizar v. State,
2014 WL 537573 (Fla. 4th DCA Feb. 12, 2014) 36

Bell v. State,
841 So. 2d 329 (Fla. 2002) 85

Blackwood v. State,
777 So. 2d 399 (Fla. 2000) 89, 92

Blanton v. State,
978 So. 2d 149 (Fla. 2008) 55

Braddy v. State,
111 So. 3d 810 (Fla. 2012) 60, 71, 79

Bradley v. State,
33 So. 3d 664 (Fla. 2010) 45, 46

Breedlove v. State,
413 So. 2d 1 (Fla. 1982) 62

Brooks v. State,
762 So. 2d 879 (Fla. 2000) 68

Buzia v. State,
926 So. 2d 1203 (Fla. 2006) 37

Carpenter v. State,
664 So. 2d 1167 (Fla. 4th DCA 1995) 58

Carter v. State,
980 So. 2d 473 (Fla. 2008) 90

Cason v. State,
211 So. 2d 604 (Fla. 2d DCA 1968) 50

Chandler v. State,
702 So. 2d 186 (Fla. 1997) 79

Coday v. State,
946 So. 2d 988 (Fla. 2006) 30

Cole v. State,
701 So. 2d 845 (Fla. 1997) 56

Conahan v. State,
844 So. 2d 629 (Fla. 2003) 66

Crain v. State,
894 So. 2d 59 (Fla. 2004) 40

Davis v. State,
121 So. 3d 462 (Fla. 2013) 91

Davis v. State,
90 So. 2d 629 (Fla. 1956) 32

Dennis v. State,
817 So. 2d 741 (Fla. 2002) 90

Disney v. State,
73 So. 598 (Fla. 1916) 34

England v. State,
940 So. 2d 389 (Fla. 2006) 50

Febre v. State,
30 So. 2d 367 (1947) 33

Ferguson v. State,
417 So. 2d 639 (Fla. 1982) 69

Floyd v. State,
850 So. 2d 383 (2002) 36

Floyd v. State,
913 So. 2d 564 (Fla. 2005) 32

Gonzalez v. State,
786 So. 2d 559 (Fla. 2001) 68

Gosciminski v. State,
994 So. 2d 1018 (Fla. 2008) 57, 59

Green v. State,
715 So. 2d 940 (Fla. 1998) 37

Gregory v. State,
118 So. 3d 770 (Fla. 2013) 39, 48, 49, 90

Hayward v. State,
24 So. 3d 14 (Fla. 2009) 77

Heyne v. State,
88 So. 3d 113 (Fla. 2012) 84

Israel v. State,
837 So. 2d 381 (Fla. 2002) 56

Jean-Philippe v. State,
123 So. 3d 1071 (Fla. 2013) 90

Johnston v. State,
863 So. 2d 271 (Fla. 2003) 30

Jones v. State,
998 So. 2d 573 (Fla. 2008) 74

Kearse v. State,
662 So. 2d 677 (Fla. 1995) 43

Kocaker v. State,
119 So. 3d 1214 (Fla. 2013) 31

Kopsho v. State,
84 So. 3d 204 (Fla. 2012) 89

Lebron v. State,
2014 WL 321817 (Fla. Jan. 30, 2014) 74

Lynch v. State,
293 So. 2d 44 (Fla. 1974) 30

McDonald v. State,
743 So. 2d 501 (Fla. 1999) 77

McMillian v.State,
94 So. 3d 572 (Fla. 2012) 31, 88, 89, 92

McWatters v. State,
36 So. 3d 613 (Fla. 2010) 48

Miller v. State,
733 So. 2d 955 (Fla. 1999) 44

Nibert v. State,
574 So. 2d 1059 (Fla. 1990) 82, 83, 84, 85

Norton v. State,
709 So. 2d 87 (Fla. 1997) 37

Overton v. State,
976 So. 2d 536 (Fla. 2007) 53

Pagan v. State,
830 So. 2d 792 (Fla. 2002) ..... passim

Patrick v. State,
104 So. 3d 1046 (Fla. 2012) 80

Paz v. State,
777 So. 2d 983 (Fla. 3d DCA 2004) 34

Peterson v. State,
94 So. 3d 514 (Fla. 2012) 81

Pham v. State,
70 So. 3d 485 (Fla. 2011) 39, 62

Poole v. State,
997 So. 2d 382 (Fla. 2008) 68, 76

Pope v. State,
679 So. 2d 710 (Fla. 1996) 89

Porter v. State,
564 So. 2d 1060 (Fla. 1990) 90

Randolph v. State,
834 So. 2d 705 (Fla. 4th DCA 2002) 43

Rigterink v. State,
66 So. 3d 866 (Fla. 2011) 87

Rivers v. State,
78 So. 343 (1918) 34

Roberson v. State,
841 So. 2d 490 (Fla. 4th DCA 2003) 43

Robertson v. State,
699 So. 2d 1343 (Fla. 1997) 44

Rodgers v. State,
948 So. 2d 655 (Fla. 2006) 81

Rodriguez v. State,
919 So. 2d 1252 (Fla. 2005) 78

Salazar v. State,
991 So. 2d 364 (Fla. 2008) 63, 68

Serrano v. State,
64 So. 3d 93 (Fla. 2011) 87

Silvia v. State,
60 So. 3d 959 (Fla. 2011) 90, 93

Sims v. State,
681 So. 2d 1112 (Fla. 1996) 75

Sliney v. State,
699 So. 2d 662 (Fla. 1997) 91

Smith v. State,
2014 WL 172534 (Fla. Jan. 16, 2014) 42

Smith v. State,
7 So. 3d 473 (Fla. 2009) 69, 71, 73

Spencer v. State,
615 So. 2d 688 (Fla. 1993) 2

Spencer v. State,
645 So. 2d 377 (Fla. 1994) 37, 46

State v. Cordia,
564 So. 2d 601 (Fla. 2d DCA 1990) 50

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1986) ..... passim

State v. Sawko,
624 So. 2d 751 (Fla. 5th DCA 1993) 45

Steinhorst v. State,
412 So. 2d 332 (Fla. 1982) 51, 53

Tinker v. State,
784 So. 2d 1198 (Fla. 2d DCA 2001) 43

Twilegar v. State,
42 So. 3d 177 (Fla. 2010) 41

Wade v. State,
41 So. 3d 857 (Fla. 2010) 69

Wheeler v. State,
4 So. 3d 599 (Fla. 2009) 39

Williamson v. State,
994 So. 2d 1000 (Fla. 2008) 69

Wright v. State,
688 So. 2d 298 (Fla. 1996) 92

Other Authorities

§ 810.015(2), Fla. Stat..... 45

§ 810.02(1)(b), Fla. Stat..... 43

§ 90.403, Fla. Stat..... 54

Charles W. Ehrhardt, FLORIDA EVIDENCE,
§ 701.1 (2013 Ed.) 51

Charles W. Ehrhardt, FLORIDA EVIDENCE,
§ 901.6 (2013 Ed.) 51

Fla. Fam. L. R. P. 12.140..... 35

Fla. R. Civ. P. 1.140..... 35

Fla. Std. Jury Instr. (Crim.), 13.1 Burglary § 810.02,
Fla. Stat. 43

STATEMENT OF THE CASE AND FACTS

On January 22, 2009 a Pinellas County grand jury indicated Defendant Patrick A. Evans with the first-degree murder of Elizabeth Evans and the first-degree murder of Gerald Taylor. (V1/93-94).[1] The murders occurred on December 20, 2008 and Defendant, the estranged husband of victim Evans, was arrested the following day. (V1/1-2; V20/662).

Defendant's jury trial began on November 1, 2011. (V16). Closing arguments were delivered November 8, 2011. (V25). The following morning, November 9, 2011, the trial court instructed the jury and the jury found Defendant guilty of two counts of first degree murder. (V9/1584-87; V25/1456-57; V26/1461-92, 1503, 1505, 1508-09).[2]

Defendant's penalty phase took place on November 10, 2011. (V15/2461). The State did not present any additional evidence. The Defendant presented the testimony of his two brothers, and mother. (V15/2470-94). The jury recommended by a vote of nine

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[1] The record on appeal consists of forty-one volumes, and one addendum; citations to the record will be referred to by the appropriate volume number followed by the page number (V__/__). The record on appeal begins with the arrest affidavit in Volume 1. The trial transcripts, exhibits, sentencing, and trial court filings are contained in Volumes 1-26. Copies of the trial transcripts are repeated in Volumes 27-41.

[2] It appears from the record that court commenced at 8:30 a.m. and the jury's verdict was returned at approximately 11:30 a.m. (V25/1456-57; V26/1508-09).

to three that the trial court impose the death sentence for the murder of Elizabeth Evans. (V9/1600; V15/2536-37). The jury recommended by a vote of eight to four that the trial court impose the death sentence for the murder of Gerald Taylor. (V9/1601; V15/2537). A Spencer[3] hearing was held on April 16, 2012. (V9/1640-45). Defendant did not testify and did not have any additional mitigating evidence to present. (V9/1642-43). Defendant was evaluated for the purposes of mental mitigation, however, defense counsel indicated "there is nothing for which I would intend to have presented that would indicate that there was any evidence of any mental mitigation for which the Court could consider in this matter." (V9/1637, 1642-43; V13/2174-78).[4] Thereafter, the State and Defendant submitted sentencing memoranda. (V9/1646-69).

Defendant's sentencing took place on July 27, 2012. (V13/2179-2210). Defendant declined to make a statement. (V13/2185). The Honorable Richard A. Luce sentenced Defendant to death for the murder of Elizabeth Evans, and sentenced Defendant to death for the murder of Gerald Taylor. (V10/1811). In his sentencing order, Judge Luce found the following

[3] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

[4] At a June 28, 2012 status check defense counsel reaffirmed there was not any additional mitigation to be presented, and Defendant concurred. (V10/1770-71).

aggravating factors: (1) the Defendant was previously convicted of another capital felony, assigned great weight, and (2) the capital felony was committed while the Defendant was engaged in the commission of or an attempt to commit a burglary, assigned great weight. (V10/1798-1803). After considering mitigation presented during the penalty phase and in Defendant's sentencing memorandum, the following single statutory mitigating factor was found: Defendant has no significant history of prior criminal activity, assigned some weight. (V10/1804-05). The statutory mitigating factor of the age of the Defendant at the time of the offense was rejected by the trial court. (V10/1805-06).[5] The following non-statutory mitigating factors were found by the trial court: (1) the Defendant's work ethic and work history, assigned moderate weight, (2) the Defendant has two children with whom he had a significant relationship at the time of the homicides, assigned little weight, (3) the Defendant shares love and support with his family, assigned little weight, (4) the Defendant has behaved appropriately during his confinement and exhibited appropriate courtroom behavior, assigned minimal weight, (5) incarceration in lieu of the death penalty, assigned

[5] As noted in the sentencing order Defendant was forty-one years of age, a college graduate, and a successful business executive; there was no evidence he suffered from a low emotional age compared to his chronological age. (V10/1805-06).

little weight, and (6) charitable or humanitarian deeds, assigned little weight. (V10/1806-10).[6] The trial court concluded the facts of the murders "support the aggravators in this case and also outweigh the mitigators, which, while several in number, fail to reach to magnitude of the aggravating factors." (V10/1811).[7]

On December 20, 2008 just after 7:00 p.m. the murders of Elizabeth Evans and Gerald Taylor in victim Evans' home were recorded by the Pinellas County 911 Communications Center. The 911 Center called the number of a 911 call that had been disconnected (referred to as an abandoned line), and after someone answered the phone recorded the following:

Defendant: Sit on the bed.

Victim Evans: I'm gonna put a robe on.

Defendant: No, you're not.

911 Center: Hello?

Defendant: Sit on the bed.

Victim Evans: No.

911 Center: Hello?

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[6] Factors (5) and (6) were not included in Defendant's sentencing memorandum, but were presented during the penalty phase. (V10/1809-10).

[7] The trial court gave the jury's death recommendations "great weight." (V10/1811).

Victim Evans: Rick --

Defendant: Sit on the bed.

Victim Evans: No. Rick --

Victim Taylor: Put the gun down and I'll sit on the bed. All right?

Defendant: Sit on the bed. Sit on the bed, Jerry.

Victim Taylor: I'll sit down. Let's put the gun -- hey, hey -- gun down --

Defendant: Jerry, sit on the bed.

Victim Evans: Help.

Victim Evans: Help.

Victim Taylor: Put the gun -- [GUNSHOT FIRED]

Victim Evans: Are you out of your fucking -- [GUNSHOT FIRED]

(V15/2547-48, 2554-55, 2559-60, 2565-66, 2571; V17/289-90, 307-11, 416; V18/435-39; V19/530-34; V20/706-09, 717-20 Addendum V1/2574, 2575).[8]

Pinellas County Sheriff Deputies Christopher Parkins and Bryant Duncan received a service call to respond to the 911

[8] On June 28, 2012 Judge Luce ordered the court reporters to review their notes and audio related to the 911 recording to determine if any revisions needed to be made to the 911 transcriptions. (V10/1760-61). To ensure accurate transcriptions were made, supplemental transcripts were filed in the trial court on July 2, 2012. (V13/2183-84; V15/2545-73).

call. (V16/27-29, 99).[9] The deputies were aware a gun was mentioned, and a woman could be heard screaming; they were just over a mile away and arrived at Evans' Gulfport Boulevard condominium within 3-5 minutes. (V16/28-30, 94). The condominium was located in a gated community, and a gate code was needed to enter. (V16/29-30). Gerald Taylor's green sports utility vehicle was outside and its hood was warm to the touch, indicating it was recently running. (V16/30-31, 45-46).

The deputies knocked on the door; however, there was no response. (V16/31, 100). A small dog could be heard barking, the deputies began beating on the door, still no response. (V16/32). They announced "Sheriff's Office," still no response. (V16/32). The front door was closed shut but not locked, and there were no signs of a forced entry. (V16/32-33, 52, 101; V630-31). Nothing was stolen. In fact, a wallet with money and jewelry were left in plain view. (V20/631-32). The condominium was not ransacked. (V20/632).

The deputies announced they were entering and began clearing the residence, looking for people. (V16/34). After not finding anyone downstairs, they began to ascend the stairs

[9] The service call was received at 7:13 p.m. (V16/63-64, 93, 95, 109).

to the second floor. (V16/34-36). Parkins led the way with his service weapon drawn, Duncan behind him. (V16/36, 102-03).

As soon as Parkins reached the second floor, he saw Gerald Taylor laying naked on the master bedroom floor. (V16/36-37, 39, 102-03). Parkins announced "Sherriff's Office. Can you hear me? Raise your hand. Do anything if you can hear me." (V16/37). There was no movement from Taylor. (V16/37). Parkins went to Taylor, there was a gunshot wound to the right side of his neck, blood was coming down and pooling underneath his body. (V16/37-39, 57-58). Taylor opened his mouth three times, Parkins began yelling at him attempting to get any response, but there was none. (V16/37). Parkins, who had paramedic training, attempted to check for a pulse, but there was none. (V16/37-38). The shell casing from the fatal gunshot was found by Taylor's body. (V16/38-39).

The deputies then began searching for the female who was heard on the 911 recording. (V16/28, 34, 40). There was a screened-in patio off the master bedroom. (V16/40-41). Elizabeth Evans' nude body was found in the corner of the patio. (V16/40-41). She was seated, her head down slouched over her legs out in front of her; blood pooled all around her. (V16/41). Blood splatter was evident on the floor. (V16/41).

Parkins attempted to communicate with her. He testified:

> I started yelling "ma'am" at her. 'Ma'am, can you hear me?" You know, anything. I'm shouting at her, "Can you hear me? Move. Say something. Anything you can."

(V16/41).

There was no response. (V16/41). Parkins reached down and shook Evans' shoulder. (V16/42). His attempts to rouse her, and his call to paramedics were done in vein, Evans had no pulse. (V16/40, 42).[10] A gunshot wound was visible on Evans' neck as well. (V16/42). The shell casing from the fatal gunshot wound was found near Evans' body. (V16/42). Evans' Yorkshire Terrier was right next to her laying in her blood, shaking. (V16/43).[11] The two shell casings were collected, and processed for fingerprints. (V16/151, 176-77). None were found; crime scene specialists testified the heat from the firearm can affect whether a print can be found. (V16/154, 177-78).

[10] After finding Taylor's body, paramedics had been called and were on their way. (V16/40).

[11] Parkins indicated there were two tiny terriers, the one downstairs that was barking, and the one he found with Evans. (V16/43).

An empty "Uncle Mike's" black canvas firearm holster was found on the nightstand next to the bed. (V16/43, 103-04).[12] The search for a firearm at the scene was unsuccessful, and later searches were also unsuccessful; the firearm used in the murders would never be recovered. (V16/39-40, 42, 104; V20/630, 671, 695; V21/845-50). The cordless phone that made the 911 call was found downstairs on the breakfast bar, still on, and the deputies picked it up and ended the call. (V16/61, 107).[13] Wine and two glasses were also found on the breakfast bar. (V16/60-61).[14]

Elliot Burke, a friend of victim Evans' daughter, saw victim Evans with victim Taylor the night of their murders. (V17/188-89, 200-02). Evans and Taylor were seen at a nearby golf course, and Burke testified they left between 5:15 p.m. and 5:30 p.m. (V17/197-98, 202). Burke drove by victim Evans' condo that evening no later than 6:15 p.m., and testified he saw

[12] The holster was entered into evidence as State's Exhibit 38. (V10/1859; V17/266-67).

[13] There was one cordless phone in the home that victim Evans had kept on her bedside table. (V19/523-24).

[14] Latent Prints were collected from the condominium. Prints from the garage door, entrance door, and rear door belonged to Victim Evans. (V19/603-04). Victims Evans' and Taylor's prints were found on the wine glasses and bottle. (V19/604-06). None of the prints collected belonged to Defendant. (V19/608).

a sports utility vehicle there he did not recognize. (V17/203-04).

Scott Graham, a neighbor of victim Evans', was taking his dog out at approximately 6:45 p.m. the night of the murders. (V17/212, 226). Graham explained the condominiums are located on a golf course, and while the front appears secure, the back and sides are not. (V17/214, 218). As he was taking his dog out a man who he described as white male, 5'9", 5'10", 180/190 pounds with short brown hair walked up to him and asked him if he had seen "a couple of yorkies." (V17/224-27, 234).[15] The man came from between the condominiums towards the golf course. (V17/227-28, 245, 249-50).[16] After they spoke, the man left walking towards victim Evans' condominium. (V17/232). Graham described the male as "lurking" to law enforcement. (V20/755). Graham testified when he later saw a picture of Defendant, he testified "couldn't say 100 percent it looked like him, but it was definitely a resemblance." (V17/236). Graham testified the man he saw was not victim Taylor. (V17/235-36).

On December 20, 2008 at 7:09 p.m. an abandoned 911 call was received by the Pinellas County 911 communications center.

[15] Defendant is a white male, 5'10", 185 pounds, and has brown hair. (V1/1; V20/666).

[16] One could see into victim Evans' condominium from this area. (V20/704-05).

(V17/288-90).[17] The call originated from victim Evans' home. (V17/290). Leslie Perrico was assigned to answer 911 calls on the day of the murders. (V17/302, 306-07). The 911 communications center notified Perrico of the abandoned 911 call. (V17/307-08). She hung up the phone with the communications center at 7:10 p.m. (V17/309-10). Perrico called the number back. (V17/310).

Someone answered the phone, and then Perrico indicated she heard two male voices, and one female voice engaged in an escalating domestic dispute, and then two gunshots. (V17/310-313). After the call went silent, Perrico stayed on the line, heard the sheriff deputies arrive and terminated the call when dispatch confirmed the deputies' presence and their request for rescue services. (V17/313-14). Two CD recordings of the murders were entered into evidence as State's Exhibit 44 and 46. (V17/328-32; V18/409; Addendum 2574, 2575). The difference between the two calls is that State's Exhibit 44 is an edited version where the "dead air" time was excised; in all other respects, the recordings were exactly the same. (V18/381, 392-93, 406-409, 416-17; V20/653-56).

[17] A subsequent call was received at 7:22 p.m. for emergency medical services. (V17/291).

Pamela Ashby was a neighbor and good friend of victim Evans. (V18/421-24). Ashby knew Defendant, and had spoken to him to arrange play dates between Teddy (whom she was a guardian of) and Cameron (Defendant's son). (V18/420, 426).[18] She had both victim Evans' phone number and Defendant's number in her phone contacts. (V18/427). On the night of the murders, Ashby attempted to call victim Evans' at approximately 6:15 p.m., but accidently called Defendant. (V18/431-32).

During the phone call Defendant informed Ashby that victim Evans was out "on a date." (V18/432-33). Ashby testified she was aware Defendant and victim Evans were estranged and victim Evans did not encourage "hanging out" with him. (V18/426). Ashby further indicated that she spoke to Defendant about the relationship and "he said that they were estranged and that he felt it would be able to be worked out." (V18/428). As for victim Evans, Ashby testified she did not share the same feelings. (V18/428, 452). Specifically she testified, "She was not planning on getting back together. She just wanted to get on with her life." (V18/428). After she hung up her call with Defendant, she called victim Evans' home but there was no answer. (V18/434).

[18] Ashby, like others, met Defendant as "Rick" Evans--the first-name he used. (V17/196-96; V18/426; V19/499).

Ashby testified she was familiar with both Defendant's and victim Evans' voice, and she could recognize them if she heard them on tape. (V18/435-36). Thereafter, Ashby listened to the beginning of the 911 recording. She indicated she heard three voices, one female, two male. (V18/439). She recognized the female voice as her friend victim Evans. (V18/439). She recognized one of the male voices as Defendant. (V18/439). To distinguish which male voice was Defendant, Ashby was asked to identify some of the things he was saying. She testified: "Sit on the bed." (V18/439). There was no question in her mind that the voices she identified belonged to victim Evans and Defendant. (V18/439).

Victim Evans' only child, twenty-year old college junior Molly Rhoades, testified her mother met Defendant when she was in middle school. (V19/491-93, 497). Defendant and victim Evans were married December 23, 2005. (V19/498). Defendant, victim Evans, and Molly lived at Defendant's home on St. Petersburg beach. (V19/498). Defendant had one child, four-year-old Cameron, when he married victim Evans. (V19/499). Cameron spent every other week with Defendant, and victim Evans eventually chose not to work in order to care for Cameron and Molly. (V19/500). Victim Evans loved Cameron and the two were described as being very close. (V19/509).

Victim Evans began working again in February 2008. (V19/501). While out of town for work in April 2008, Defendant filed a petition for dissolution of marriage and Molly was served with the divorce papers at the beachfront home they shared. (V19/501-03).[19] When victim Evans returned, Defendant had changed the locks at their home. (V19/503). Molly testified that without her knowledge or victim Evans' knowledge, Defendant moved their clothing in trash bags to a condominium that Defendant and victim Evans co-owned. (V19/502-05).

After approximately one week, without their knowledge Defendant moved victim Evans' and Molly's belongings back to the home they had shared. (V19/504-05). Molly indicated they did not stay there long. (V19/506). By the end of May 2008, victim Evans had leased the Gulfport Boulevard condominium. (V19/506). Victim Evans continued to want to be a part of Cameron's life despite the looming divorce, and set up a bedroom for him in her new home. (V19/508-10).

During the summer of 2008, Defendant was attempting to reconcile with victim Evans. (V19/510). He bought her a diamond necklace, and even attended church services where she worshipped. (V19/510-11). Defendant even began wearing his

[19] The petition was filed on April 25, 2008. (V10/1876-70; V19/502-03).

wedding ring again (that he stopped wearing when he filed for divorce). (V19/511). Molly testified that her mother was not "exactly happy" about Defendant's efforts. (V19/511). Despite this, Defendant dismissed the divorce proceedings July 22, 2008. (V10/1890-91; V19/513). Victim Evans then filed a petition for divorce on November 21, 2008. (V10/1892-95; V19/514-15).[20] Service was accepted on December 3, 2008. (V10/1896-87; V19/514).

Molly testified Defendant came to the Gulfport Boulevard condominium to drop off or pick up Cameron; he used the front door to enter, and would knock if the door was locked but would enter if it was unlocked. (V19/510, 516). Molly testified she and her mother were both upset that Defendant would enter without knocking. (V19/516). Furthermore, Molly indicated that Defendant was not given a key and should not have had a key to their home. (V19/516). Sometime in the fall of 2008, victim Evans' lost her keys, and they were later returned by Defendant's mother. (V19/516-17).

On the morning of the murders, victim Evans took Molly to the airport as she was traveling to Pennsylvania to see her

[20] When asked why her mother waited to file for divorce, Molly testified they didn't have any money, Defendant was not providing any support, and her mother had even removed a diamond from a ring to sell. (V19/515-16).

father. (V18/428; V19/519-20). Molly testified her mother was spending the weekend with victim Taylor. (V19/520). Her mother also informed her that she was meeting with Defendant and a real estate agent during the day in order to attempt a short-sale on a condominium they still jointly owned. (V19/520). This was the only piece of property they jointly owned. (V23/1210).

Molly indicated she was able to identify Defendant's voice (who she lived with for over three years) and her mother's voice. (V19/530). After listening to the voices on the 911 recording, Molly testified the female voice was her mother's and the male voice saying to "sit on the bed" was Defendant's. (V19/532-34). There was no question in her mind whatsoever that the voices belonged to her mother and Defendant. (V19/534). Molly testified Defendant was very controlling. (V19/549).

Medical Examiner Christopher Wilson conducted the autopsies on both victims. (V18/461). Victim Taylor had a gunshot wound to the right neck surrounded by an area of stippling. (V18/463, 467-68). Wilson explained stippling occurs when you have gunpowder fragments impacting the skin causing small abrasions or scrapes. (V18/463-64). A finding of stippling indicates that the firearm was fired from a distance of two to twenty-four inches away. (V18/464). Victim Evans had a gunshot wound to the left lower neck. (V18/469-72). In Evans' case there was no

evidence of stippling, indicating the firearm was fired at a distance of more than twenty-four inches away. (V18/472). Dr. Wilson indicated the wound injury in Evans' case was the "mirror image" of Taylor's case. (V18/472).

The gunshots wounds inflicted upon both victims injured major blood vessels, and caused their deaths. (V18/463-64, 469, 471-75). The bullets that caused the deaths were still in the victims' bodies and were recovered by Wilson during his autopsy. (V18/465-66, 468, 470, 473). The deaths were ruled to be homicides. (V18/475).

Pinellas County Sherriff Officers arrived at Defendant's home at approximately 8:30 p.m. the night of the murders. (V19/564-67, 570-71). Defendant's white pickup truck was in the driveway and there was a light on upstairs in the home. (V19/568, 570, 589). The officers were informed that Defendant's home may be related to the murders and when they initially arrived they were there to conduct surveillance. (V19/567-69). In the driveway, there was a Ford F-150 that belonged to Defendant. (V20/641). The hood was slightly warm. (V20/745).

At approximately 11:15 p.m. Detective Edward Judy arrived. (V19/571, 589; V20/634). Judy indicated that Defendant's home was a ten minute drive from victim Evans' home. (V20/634-35).

Judy along with the other officers attempted to make contact with Defendant. They knocked on the front door hard, and knocked at every access point around the home. (V19/571-74). They went around Defendant's home and knocked on every door and window they could reach. (V20/636, 640-41). Judy testified they "pounded" on the front door and windows around the home, doing everything to get someone's attention inside. (V20/636-37). They announced "Sheriff's Office", however, there was no answer from Defendant. (V19/572-74; V20/637). They rang the doorbell numerous times. (V20/636). Judy testified the doorbell was working as he could hear it. (V20/636). Judy even attempted to call Defendant on his phone; however, Defendant failed to answer. (V20/637-38). Eventually, he left his business card on Defendant's front door. (V19/574; V20/640).

After Judy left Defendant's house he received a call from Pinellas County Communications Center informing him of the 911 recording. (V20/646-48). Judy went and listened to the recording until it went silent. (V20/648-49). When listening to the recording, Judy testified the perpetrator is identified two times as "Rick". (V20/650). Judy indicated he could clearly hear two men, and one woman. (V20/650). One of the men is being called "Rick" and the other man is being referred to as

"Jerry". (V20/651). At this point, Judy knew Defendant was known as Rick. (V20/633).

Judy testified he listened to phone calls Defendant made while incarcerated and believed he could identify his voice. (V20/706-09). The 911 recording was played for Judy and he identified Defendant's voice as one of the male voices. (V20/717-20). For instance, Judy indicated when victim Evans said she was putting on a robe on, Defendant said "no you're not." (V20/720). Judy also identified Defendant as saying "get on the bed, sit on the bed, Jerry, sit on the bed." (V20/720).

The morning after the murders, Defendant was taken into custody. (V20/662). He was pulled over in his truck by the officers who had been watching his home. (V20/656-57, 662). Judy responded, and found Defendant in his truck just down the street from him home. (V20/662-63). Defendant had "wet" the shorts. (V20/663). Defendant was still wearing his wedding ring. (V20/665-66).

Judy executed a search warrant for a firearm and ammunition at Defendant's home. (V20/666). While the firearm would not be found, Judy found a gun safe which contained a Glock .40 caliber firearm case, and three boxes of hollow point ammunition.

(V20/666-70, 679-81, 690-93).[21] The firearm case indicated two magazines would be included in the contents. (V20/681). However, a magazine was missing. (V20/682). Inside the case, latex gloves, one of the two magazines, and a sealed envelope containing two test-fired casings were found. (V20/671-72, 682). The sealed envelope and firearm case were entered into evidence as State's Exhibit #39 and #40. (V10/1859; V20/679-80, 693-94). The firearm and the missing magazine were never recovered. (V20/671).

A receipt for the firearm was found in the case. Defendant had purchased the Glock, a holster and ammunition from Bill Jackson's sporting goods store. (V10/1858, 1862; V20/682-87). The serial number "FPZ 312" on the receipt matched the serial number on the pistol case found in Defendant's home. (V20/688). This serial number was the same serial number recorded from Defendant's firearm in 2007 by the St. Petersburg Beach Police Department.[22] (V10/1835-36, 1847-48, 1858-59; V20/679-87).[23]

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[21] Defendant was a hunter, and was known to own long guns, hunting guns, and a handgun. (V19/529; V21/843).

[22] During a traffic stop in October 2007, the St. Petersburg Beach Police Department took a .40 caliber Glock firearm and an "Uncle Mike's" firearm holster into property from Defendant. (V19/558-59, 562). Defendant recovered his firearm and holster shortly after his traffic stop. (V19/562). The serial number of the .40 caliber Glock firearm was FPZ 312. (V19/558-59).

The firearm was purchased at Bill Jackson's Sporting Goods and Judy went there with Defendant's receipt. (V20/697). At Bill Jackson's Judy discovered the "SKU number" on the receipt belonged to an "Uncle Mike's" brand holster. (V20/697). The holster entered as State's Exhibit #38, found on the night stand in victim Evans' bedroom, appeared identical to the holsters at Bill Jackson's with the same SKU number. (V10/1859; V17/261-62, 266-67; V20/698). This also corresponded to the information from the St. Petersburg Beach Police Department report regarding Defendant's "Uncle Mike's" holster. (V20/699).

The ammunition was Speer Gold Dot ammunition, and Speer casings were found at the scene. (V20/673). One box was full, one was missing a single bullet, and the other was missing fifteen. (V20/673-74). Judy testified the casings at the crime scene were "identical" to the ammunition found in Defendant's gun safe. (V20/676). Judy testified they were identical in that they both had the same "Speer", "S&W", and "40" markings. (V20/676). Additionally, they were the same color. (V20/676).

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[23] Copies of the sales receipt and firearm case are contained in the record as they were entered into evidence during a bond reduction hearing. They are cited here for reference purposes. The receipts and firearm case entered into evidence during the trial are in the Pinellas County Clerk of Court's Office. The receipts were part of a composite poster board exhibit that was not transported to this Court; likewise, the actual firearm case was not transported to this Court.

The sealed envelope with the test fired casings found in Defendant's home was sent to the Florida Department of Law Enforcement to compare them to the casings recovered from the crime scene. (V20/693-95). The envelope indicated the casings were from a .40 caliber Glock, it also indicated the serial number of the firearm which was consistent with the pistol case, and receipt found in Defendant's home. (V20/696).[24]

Florida Department of Law Enforcement firearms analyst Stephanie Stewart analyzed the two casings recovered from the crime scene and the two test-fired casings found in Defendant's pistol case. (V21/883-84, 891-99). Stewart was able to determine the casings were all fired from the same firearm, a .40 caliber Glock. (V21/910). Stewart testified each contained the same unusual elliptical tool mark identification left from the firing pin. (V21/892-99, 902). She explained, when the cartridge casing leaves a firearm it imprints a "fingerprint type mark" that is unique to that firearm. (V21/897).

[24] Sharon Zaffiro, an employee of Glock, Inc., was shown State's Exhibit #39 and #40. (V17/275, 281). Zaffiro testified State's Exhibit #40 was a Glock firearms case that accompanies a firearm sale. (V17/281). The case has the company name on it, and the serial number of the firearm on the label. (V17/281). Zaffiro further testified that when Glock sells a firearm, it is accompanied by two test-fired casings that are placed in an envelope. (V17/277-80). She identified State's Exhibit #39 as the casings envelope. (V17/281-83).

Stewart's conclusions were verified by an additional FDLE examiner. (V21/912).

Defendant presented an alibi defense. The defense argued victim Evans may have brought Defendant's firearm into her home, a stranger committed the murders, and victim Evans' was impaired when she indicated "Rick" on the 911 recording. (V22/963-69; V25/1340-42, 1365-77, 1388-91, 1395-98, 1404-05).

The Defendant's case began with toxicologist Ron Bell who testified victim Evans consumed alcohol very close to her murder and her blood alcohol level was associated with impairment. (V22/983, 987, 990). The amount was consistent with two or three glasses of wine. (V22/994). He also testified she had Xanax and Librium (drugs lawfully prescribed to her) in her urine, but could not quantify the amount or indicate when she took them. (V22/991, 994, 996). He could not state how much these drugs would enhance any impairment. (V22/995).

Defendant called real estate Kerry Fuller who met with Defendant and victim Evans the morning of the murders to testify they did not argue during the forty minutes to one hour he was with them. (V22/998-1002, 1005).

Defendant's brother Rodney Evans testified he was with Defendant during the time of the murders. (V23/1021, 1030-39). Rodney knew he was an alibi witness for his brother but

indicated he did not speak to law enforcement after his brother was arrested because he was advised by Defendant's attorneys not to. (V23/1044, 1060-62). He first spoke the State just prior to trial which was almost three years after the murders. (V23/1056-57).[25] Rodney has been convicted twice for crimes involving dishonesty. (V23/1078, 1080).

Defendant testified in his own defense. He testified he goes by the name "Rick." (V23/1086). Defendant claimed at the time of the murders he was home. (V23/1125-26, 1130). He admitted to being home when law enforcement was there knocking on his doors and windows, but claimed he didn't hear them as the movie he had on was "pretty loud" and he was asleep. (V23/1131).

Defendant testified he owned a .40 caliber Glock firearm which he kept in his gun safe. (V23/1139-41). He claimed he last remembered seeing this firearm in November 2008 when he placed it into his safe. (V23/1145, 1219). Defendant testified that only he, his ex-wife Andrea, and victim Evans knew the code to his safe. (V23/1144).

[25] Approximately two weeks prior to trial Rodney Evans was listed as a defense witness. (V30/607). His deposition took place on October 27, 2011. (V7/1248-1304). Defendant filed his "Notice of Alibi" on November 2, 2011. (V8/1548). As previously noted, the jury trial began on November 1, 2011. (V16).

Defendant denied murdering victim Evans and victim Taylor. (V23/1146-47, 1150-51). Defendant denied going to victim Evans' the evening of the murders. (V23/1146). The 911 recording was played during Defendant's direct examination and he indicated the voice captured was not his. For the jury's consideration Defendant repeated words from the recording, such as "sit on the bed." (V23/1147-50). Thereafter, trial counsel noted "laughter" in the courtroom. (V23/1151).

The State called Detective Judy in rebuttal. Judy testified he heard no noise whatsoever coming from Defendant's home the night of the murders; no noise, no television. (V23/1249).

SUMMARY OF THE ARGUMENT

Issue I – The Motion for Judgment of Acquittal Claim

The trial court properly denied Defendant's motions for judgment of acquittal. The evidence established Defendant traveled to victim Evans' home with a firearm to commit the murders. Defendant was not acting in the heat-of-passion. No justification existed for the premeditated murders of Elizabeth Evans and Gerald Taylor.

Issue II – The Sufficiency of the Evidence Claim

Sufficient evidence exists to support Defendant's convictions for felony-murder, with burglary as the underlying felony. Defendant did not have consent to enter victim Evans' home. Defendant entered victim Evans' home with the intent to commit murder, and any purported consent would have been negated by Defendant's criminal acts.

Issue III – The Voice Identification Claim

The trial court did not abuse its discretion in admitting Detective Judy's testimony concerning his identification of Defendant on the 911 recording. Judy testified he was familiar with Defendant's voice, and indicated he was able to indentify Defendant's voice. In any event, any error would be harmless, as Detective Judy's testimony was cumulative to witnesses Molly

Rhodes and Pamela Ashby's testimonies which also indentified Defendant's voice on the 911 recording.

Issue IV – The Cross-Examination Claim

The trial court did not abuse its discretion in denying Defendant's motion for mistrial due to a question posed to Defendant during cross-examination regarding whether he hired a private investigator to find out information about victim Taylor. Defendant denied hiring an investigator. The prosecutor had a good faith reasonable basis to ask the question based upon the information he possessed. The implication that Defendant hired an investigator, assuming that implication was accepted, was not evidence of premeditation, and was not argued as such below. The challenged reference to a possible private investigator was an isolated question which was not repeated in closing argument or otherwise highlighted for the jury. The trial court did not err.

Issue V – The Guilt Phase Closing Argument Claim

The trial court acted within its discretion in denying Defendant's motions for mistrial after allegedly improper comments by the prosecutor. The comments by the prosecutor were not improper, and even if this Court were to find that any of the comments were improper, any error was harmless.

Issue VI – The Cumulative Error Claim

Defendant's claims for relief do no present any basis for relief, either individually or collectively. As such, any cumulative error claim must be rejected.

Issue VII - The Weighing of Mitigation Claim

The trial court did not abuse its discretion in weighing the mitigation presented. The trial court's order reflects that the court evaluated each mitigating factor proposed and entered findings consistent with evidence to support the particular weight allocated.

Issue VIII - The Proportionality Claim

Defendant's death sentence is clearly proportional. In this double homicide, the trial court found in aggravation that the Defendant was previously convicted of another capital felony, and the capital felony was committed while the Defendant was engaged in the commission of or an attempt to commit a burglary. There was no mental health mitigation and the mitigation presented was not compelling.

ARGUMENT

ISSUE I

THE MOTION FOR JUDGMENT OF ACQUITTAL CLAIM

Defendant first asserts that the trial court erred in denying his motions for judgment of acquittal.[26] Defendant moved for a judgment of acquittal as to premeditated first-degree murder arguing there was insufficient evidence to establish premeditation. Defendant asserted that at most these murders were committed in the "heat of passion" and that the evidence was equally suggestive that Defendant was in victim Evans' bedroom to "scare" or "confront" the victims. (V22/925-43; V24/1269-73). The trial court denied Defendant's motions. (V22/946; V24/1274).

Defendant argues that the denial of these motions was error. Furthermore, Defendant asserts that regardless of whether the murders were committed in a heat-of-passion, the "circumstantial" evidence fails to establish premeditated murder. Initial Brief of Appellant at pp. 32-39. Further, Defendant argues for the first time on appeal that the evidence is consistent with the theory that Defendant panicked and shot victim Taylor when he "went for the gun" and then shot victim

[26] Defendant made his motions at the close of the State's case, and at the close of the Defendant's case.

Evans "reflectively and without forethought". Initial Brief of Appellant at p. 46. As this last argument was not presented to the trial court, is not preserved for appellate review. Archer v. State, 613 So. 2d 446, 447-48 (Fla. 1993). Notwithstanding, all Defendant's claims are without merit.[27]

The standard of review for the denial of a judgment of acquittal is *de novo*. Johnston v. State, 863 So. 2d 271, 283 (Fla. 2003); Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002). "A motion for judgment of acquittal should not be granted by the trial court unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law." Coday v. State, 946 So. 2d 988, 996 (Fla. 2006). When moving for a judgment of acquittal, a defendant "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974). Regarding premeditation, this Court has observed:

> "Premeditation is a factual issue for the jury, *Asay v. State,* 580 So. 2d 610, 612 (Fla. 1991), and several

[27] Relying on the prosecutor's closing argument Defendant asserts that the State's theory was that Defendant acted in a "rage". Appellant's Initial Brief at 32, 38-39. However, this enumeration of error is directed to the trial court's denial of Defendant's motions for judgment of acquittal. Thus, the denial of the motions is the relevant inquiry not the closing argument.

> standards of review are applicable." *Twilegar v. State,* 42 So. 3d 177, 190 (Fla. 2010), *cert. denied,* ---- U.S. ----, 131 S.Ct. 1476, 179 L.Ed.2d 315 (2011). Where direct evidence of premeditation is presented, the "jury's finding of premeditation will be sustained if supported by competent, substantial evidence in the record." *Id.* However, in a case where the evidence of premeditation is entirely circumstantial, "not only must the evidence be sufficient to support the finding of premeditation, but the evidence, when viewed in the light most favorable to the State, must also be inconsistent with any other reasonable inference." *Id.*

McMillian v.State, 94 So. 3d 572, 580 (Fla. 2012).

Although Defendant invokes the circumstantial evidence rule, the facts incriminating him in this murder were established by direct and circumstantial evidence. Regarding direct and circumstantial evidence, this Court has found:

> "Direct evidence is evidence which requires only the inference that what the witness said is true to prove a material fact.... Circumstantial evidence is evidence which involves an additional inference to prove the material fact." Charles W. Ehrhardt, *Florida Evidence* § 401.1 (2012 ed.); *see also* McCormick, Handbook of the Law of Evidence § 185 (6th ed. 2010) ("Direct evidence is evidence which, if believed, resolves a matter in issue. Circumstantial evidence also may be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the desired conclusion.").

Kocaker v. State, 119 So. 3d 1214, 1224-25 (Fla. 2013).

Accordingly, the 911 recording which essentially placed the jurors and trial court at the murder scene is direct evidence. The testimony identifying Defendant committing the murders on the 911 recording does not require any additional reasoning.

Indeed, that testimony alone allowed the court and jury to be witness to the murders without any additional reasoning, that testimony alone resolved the matter at issue, that testimony alone established Defendant committed the murders. In addition to the 911 recording, the forensic evidence and testimony linking Defendant to the murders is circumstantial evidence of Defendant's guilt. Since facts were proven by direct as well as circumstantial evidence, there is no reason to analyze whether the State's case was inconsistent with any other reasonable inference. See Floyd v. State, 913 So. 2d 564, 571 (Fla. 2005) ("This case does not rest wholly on circumstantial evidence; thus the latter standard does not apply"); Pagan, 830 So. 2d at 803 (special rule applies if State's evidence is "wholly" circumstantial); Davis v. State, 90 So. 2d 629, 631 (Fla. 1956) (special rule applies where case proven "purely" on circumstantial evidence).

At any rate, the State's burden was clearly met in this case. The evidence refutes Defendant's assertion that these murders were committed in the heat-of-passion, and fully support convictions for premeditated murder.

This Court has held an intentional killing may not be murder in the first-degree where the murder was committed in the heat-of-passion. However, not every murder committed by a

former partner, lover, or paramour is excusable because one claims heat-of-passion. In Febre v. State, 30 So. 2d 367 (1947), this Court explained the reasoning underlying the defense of heat-of-passion:

> The law reduces the killing of a person in the heat of passion from murder to manslaughter out of a recognition of the frailty of human nature, of the temporary suspension or overthrow of the reason or judgment of the defendant by the sudden access of passion and because in such case there is an absence of malice. Such killing is not supposed to proceed from a bad or corrupt heart, but rather from the infirmity of passion to which even good men are subject. Passion is the state of mind when it is powerfully acted on and influenced by something external to itself. It is one of the emotions of the mind known as anger, rage, sudden resentment, or terror. **But for passion to constitute a mitigation of the crime from murder to manslaughter, it must arise from legal provocation.**

Febre, 30 So. 2d at 369; Collins v. State, 102 So. 880, 882 (Fla. 1925) (for heat-of-passion to mitigate the crime from premeditated murder to manslaughter, it must arise from a valid legal provocation).[28] Indeed, as this Court observed:

> **There must be an adequate or sufficient provocation to excite the anger or arouse the sudden impulse to kill in order to exclude premeditation and a previously formed design. A man is not permitted to act upon any provocation which he may think sufficient to excuse him from murder in the first degree in taking human life, merely because it is sufficient to excite his anger and impulse to kill and thereby reduce his crime to manslaughter.** It is a well-known fact that a person

[28] In Febre, the Defendant did not have knowledge of any relationship his wife had with the victim.

> who has never been accustomed to restrain his passions, and who has a depraved mind regardless of the rights of others and of human life, of a cruel, vindictive, and aggressive disposition, will seize upon the slightest provocation to satisfy his uncontrolled passions by forming a design to kill and executing the design immediately after its formation; **therefore the law lays it down as a rule that an adequate provocation is one that would be calculated to excite such anger as might obscure the reason or dominate the volition of an ordinary reasonable man.**

Rivers v. State, 78 So. 343, 345 (1918) (emphasis supplied); see also Disney v. State, 73 So. 598, 502 (Fla. 1916) (in heat-of-passion murder, "slayer is oblivious to his real or apparent situation"); Paz v. State, 777 So. 2d 983, 984 (Fla. 3d DCA 2004) ("classic example" of a heat-of-passion murder where husband immediately killed man upon realizing he sexually assaulted his wife).

The claim that these murders were committed in the heat-of-passion is belied by the evidence. Defendant came to victim Evans' home with the knowledge she was with a date. He traveled to victim Evans' home and entered with a loaded firearm. The recording of the murders show that Defendant was not acting in a frenzy, or overcome with rage, or any like emotion. Defendant certainly had frightened the victims, arriving uninvited with a firearm in hand as they were unclothed in the bedroom. The victims did not put up any resistance; they sought to reason with the unreasonable. Defendant was not going to put his

firearm down and leave quietly, he was there to extinguish the lives of his estranged wife who no longer wanted him, and the man she was with. Their divorce was imminent, the murders occurring just a few days before Defendant was to respond to victim Evans' divorce petition, and the same day they met to sell the last and only property they jointly owned.[29] Defendant had many chances to leave victim Evans and Taylor unharmed, but instead fired the two fatal shots, executing each of them. In fact, the recording and the crime scene evidence establish that victim Evans, after seeing Defendant murder victim Taylor, ran for her life. She screamed for "Help", and Defendant shot her-cornered in the balcony, her last word a simple plea that went unanswered.

If one follows Defendant's argument any unhappy, disenchanted, or scorned partner's actions would be excused. This of course cannot be the case. Here this is especially true as Defendant's argument fails where (1) Defendant arrived armed with his loaded firearm, (2) Defendant was not acting in the heat-of-passion, and (3) there was no legal provocation. Moreover, Defendant could have left the victims unharmed, but

[29] Defendant was served with victim Evans' divorce petition on December 3, 2008, the murders occurred on December 20, 2008 and Defendant's answer to the petition would have been due December 23, 2008. See Florida Family Law Rules of Procedure Rule 12.140; Florida Rules of Civil Procedure Rule 1.140.

instead fired his firearm in such a manner as to cause the certain deaths of the victims.

This case is similar to Floyd v. State, 850 So. 2d 383 (2002) where this Court rejected Floyd's claim that the murder was committed in the heat-of-passion where his "selection and transportation of a gun to the victim's home" was "clearly inconsistent" with his theory he committed the murder in a rage. Floyd, 850 So. 2d at 397; see also Ayalavillamizar v. State, ___ So. 3d ____, 2014 WL 537573, *2 (Fla. 4th DCA Feb. 12, 2014) (where State introduced evidence inconsistent with defendant's theory intruder committed murder, theory was not a reasonable hypotheses of innocence). Furthermore, in discussing premeditation, this Court observed:

> We do not endeavor to state with precision the exact moment Floyd premeditated the murder. We simply note that he had many opportunities, at several junctures, to do so before he made and implemented the fateful decision to employ a deadly weapon and actually place it in use. We further note that one day prior to the fateful events of July 13 that led to Ms. Goss's death, Floyd threatened to kill his wife or someone she loved. No definite length of time for premeditation to exist has been set and indeed could not be. Moreover, premeditation may be evinced by the defendant's actions in choosing and transporting a certain weapon and employing that weapon in performance of the killing.

Floyd v. State, 850 So. 2d 383, 397 (Fla. 2002) (quotations and citations omitted); see also Buzia v. State, 926 So. 2d 1203,

1214-15 (Fla. 2006) (heightened premeditation found where advanced procurement of weapon). As Defendant committed these murders with a premeditated design, any heat-of-passion argument was properly rejected. See Spencer v. State, 645 So. 2d 377, 380-81 (Fla. 1994).

Premeditation is "more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act." Norton v. State, 709 So. 2d 87, 92 (Fla. 1997) (*quotin*g Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997)). Premeditation may be shown by evidence such as "the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." Green v. State, 715 So. 2d 940, 943 (Fla. 1998) (*quoting* Holton v. State, 573 So. 2d 284, 289. (Fla. 1990)).

In the present case, viewing the facts in a light most favorable to the State supports a finding of premeditation and refutes Defendant's assertions-that these murders were committed in the heat-of-passion, that Defendant was simply there to confront or scare the victims, or that these murders were

committed in a panic without forethought. Viewing the evidence in support of the verdicts reveals that (1) the Defendant traveled to victim Evans home with a deadly weapon; (2) the victims did not provoke a reactive killing; (3) there were no prior difficulties between the parties;[30] (4) Defendant had sufficient time to be conscious of his actions as he attempted to gain control over the victims while holding them at gunpoint; (5) Defendant had sufficient time to be conscious of his actions as he followed victim Evans as she attempted to flee; (6) Defendant shot both victims in the neck; and (7) the probable result of such an injury would be death or, at a minimum, significant trauma. Because the State's evidence of unprovoked, focused deadly force is inconsistent with Defendant's assertions, the trial court properly denied Defendant's motions.

Furthermore, Defendant had the opportunity to leave the victims unharmed, but needlessly chose to commit these murders. As the trial court observed during sentencing, the Defendant "executed two people". (V10/2207). The heightened premeditation required to support the cold, calculated, and premeditated aggravator can be established where a Defendant procures a weapon in advance, receives no resistance or provocation from a

[30] In fact, Defendant's "version" of the facts paints an amicable relationship with victim Evans, and no anger relating to her date. Appellant's Initial Brief at pp. 20-21, 43.

victim, and carries out the murder as a matter of course. Gregory v. State, 118 So. 3d 770, 782-83 (Fla. 2013); Pham v. State, 70 So. 3d 485, 498-99 (Fla. 2011). This Court has found the heightened premeditation to support CCP where a Defendant has the opportunity to leave the victim unharmed, but instead commits the murder. Gregory, 118 So. 3d at 784. In the instant case, there was ample time for Defendant to contemplate his actions, and leave the victims unharmed. He could have left after arriving, and frightening the unsuspecting victims. He could have left after the victims were not sitting on the bed. He could have left after he shot victim Taylor. He could have left after victim Evans ran to the balcony. At each of these junctures though, Defendant was not deterred. The evidence establishes a finding of premeditation. See Wheeler v. State, 4 So. 3d 599, 605 (Fla. 2009); Alston v. State, 723 So. 2d 148, 162 (Fla. 1998) (heightened premeditation element supported where defendant had the opportunity to leave the victim unharmed but instead commits murder).

In conclusion, the record provides ample support for the jury verdict convicting Defendant of the first-degree premeditated murder of Elizabeth Evans and Gerald Taylor. Direct and circumstantial evidence established that Defendant took his firearm to victim Evans' condominium, and without any

justification or provocation murdered the victims. The 911 recording, and the physical evidence illustrate the circumstances surrounding these murders. The events are not "lacking or incomplete" as Defendant asserts. Appellant's Initial Brief at pp. 39-40. The court below properly denied Defendant's motions for judgment of acquittal, and this Court must affirm Defendant's convictions.

ISSUE II

THE SUFFICIENCY OF THE EVIDENCE CLAIM

In Defendant's second enumeration of error, he asserts the State did not establish the offense of felony murder as the State did not meet their burden in proving the offense of burglary. Defendant's argument is based upon his notion that he had "consent" to enter victim Evans' home. Here, Defendant did not meet his burden in establishing he had consent to enter victim Evans' home when he committed the murders. Moreover, when Defendant entered victim Evans' home with the intent to commit these murders the offense of burglary was certainly established.

As this Court noted in Crain v. State, 894 So. 2d 59, 71 (Fla. 2004) (citations omitted):

> A judgment of conviction comes to this Court with a presumption of correctness and a defendant's claim of

> insufficiency of the evidence cannot prevail where there is substantial competent evidence to support the verdict and judgment. The fact that the evidence is contradictory does not warrant a judgment of acquittal since the weight of the evidence and the witnesses' credibility are questions solely for the jury. It is not this Court's function to retry a case or reweigh conflicting evidence submitted to the trier of fact.

In analyzing sufficiency of the evidence, this Court has observed:

> When sufficiency of the evidence is in issue, several standards of review are applicable. The following standard applies where the evidence of guilt is direct, whether in whole or in part: if a rational trier of fact, upon reviewing the evidence in the light most favorable to the State, could find that the elements of the crime have been established beyond a reasonable doubt, then the evidence is sufficient to sustain the conviction. *Pagan v. State,* 830 So. 2d 792, 803 (Fla. 2002). Where the evidence of guilt is wholly circumstantial, on the other hand, the following standard applies: not only must the evidence be sufficient to establish each element of the offense, but the evidence also must be inconsistent with any reasonable hypothesis of innocence proposed by the defendant. *Id.* The issue of inconsistency is a jury question and the verdict will be sustained if supported by competent, substantial evidence. *State v. Law,* 559 So. 2d 187, 188 (Fla. 1989).

Twilegar v. State, 42 So. 3d 177, 188 (Fla. 2010).

The State submits that there was sufficient evidence to support the jury's verdicts. Even viewing this case as a wholly circumstantial evidence case, the State has satisfied its burden. In this case, Defendant's hypothesis of innocence was he was at home with his brother. As will be demonstrated, the

State's evidence was clearly sufficient to support convictions for felony-murder, with burglary as the underlying felony. Furthermore, competent, substantial evidence supports the conclusion that the State's evidence is inconsistent with Defendant's alibi defense presented at trial and consent argument he posits before this Court. It should be noted Defendant's consent defense was not presented before the jury below. As such, it is not preserved as the "relevant inquiry regarding whether the circumstantial evidence of guilt is inconsistent with the defense's theory of innocence is based upon the evidence presented and the theory argued to the jury at trial." Smith v. State, ___ So. 3d ____, 2014 WL 172534, *4 (Fla. Jan. 16, 2014). Notwithstanding, Defendant's new consent defense was not established and is refuted by the evidence.

The jury was instructed that to prove the crime of burglary the State would have to prove the following three elements: (1) the Defendant entered a structure owned by or in possession of Elizabeth Evans; (2) at the time of the entering of the structure, Defendant had the intent to commit an offense in that structure; and (3) Defendant was not invited or licensed to enter the structure. The jury was further instructed that if the invitation or license was obtained by trick, fraud, or deceit, it was not valid. (V26/1470-71). It should be noted

that, as the facts support Defendant's convictions for felony-murder with burglary as the underlying felony there is no merit to the argument that the jury burglary instruction was error. See Kearse v. State, 662 So. 2d 677, 683 (Fla. 1995).

While there is additional language regarding where one "remains" in the premises with the intent to commit an offense, this language is not applicable to the instant case as Defendant's entry was without consent. See The Florida Bar, Florida Standard Jury Instructions in Criminal Cases, 13.1 Burglary § 810.02, Fla. Stat.; Roberson v. State, 841 So. 2d 490 (Fla. 4th DCA 2003); Randolph v. State, 834 So. 2d 705, 707 (Fla. 4th DCA 2002); Tinker v. State, 784 So. 2d 1198, 1199 (Fla. 2d DCA 2001).

Florida Statutes Section 810.02(1)(b) defines burglary as:

> Entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are open to the public or the defendant is licensed to enter.

In the instant case, the burglary was committed when Defendant entered victim Evans' condominium without permission with the intent to commit an offense. The facts demonstrate that entry was without permission, and to the extent Defendant claims "consent" as an affirmative defense, Defendant did not meet his burden. Miller v. State, 733 So. 2d 955, 957 (Fla.

1999) (burden is on Defendant to establish consent); Robertson v. State, 699 So. 2d 1343, 1346 (Fla. 1997) (Defendant has initial burden of establishing evidence of affirmative defense of consent); see also Dixon v. United States, 548 U.S. 1, 9 (2006) (party has burden of proof as to an affirmative defense raised).

While Defendant argues that his entry into victim Evans' condominium was based upon consent, the evidence, and simple common sense defies this assertion.[31] First, Defendant and victim Evans were in the process of divorcing, victim Evans was not seeking reconciliation; and the condominium where Defendant entered and committed these murders was not their marital residence. Second, Defendant's entry into the condominium was permitted (a) to pick up his son; or assuming his version of the facts (b) to assist victim Evans with chores the day of the murders. There is absolutely no evidence that entry with a loaded firearm on the evening in question was consensual. Lastly, it borders upon the absurd to suggest that Defendant was invited to enter or had consent to enter victim Evans'

[31] Defendant incorrectly asserts the State's evidence established consent. However, much of the evidence cited was from Defendant's testimony; the evidence from the State only established Defendant came to Evans' home to pick up his son. Appellant's Initial Brief at pp. 52-53. There was no evidence of consent the night of the murders.

condominium when she was in a state of undress with a date. Certainly, Defendant cannot posit that argument in good faith before this Court.

Even if Defendant came forward with proof of consent, one could reasonably conclude that the consent did not extend to entering victim Evans' home with a firearm while she was nude in her bedroom with her date; or was withdrawn by Defendant's criminal acts. See State v. Sawko, 624 So. 2d 751 (Fla. 5th DCA 1993) (vacating order dismissing burglary charge as defendant exceeded scope of consent to enter residence and collecting cases where burglary convictions upheld where defendant exceeded scope of consent). Indeed, Defendant's murderous acts negate any consent defense. See Fla. Stat. § 810.015(2) (intent of legislature that burglary statute be construed in conformity with cases holding consent withdrawn by criminal acts); Bradley v. State, 33 So. 3d 664, 681 & n. 17 (Fla. 2010). There was substantial, competent evidence to support Defendant's convictions.

Furthermore, a review of the evidence establishes that Defendant's theory of defense was directly refuted by the evidence. While Defendant wished to rely on the defense of alibi at trial, presenting the testimony of his brother, and himself, this testimony was refuted by the evidence. First, and

foremost, the 911 recording was a window into the bedroom where the murders took place. Defendant was undoubtedly present; victims Evans and Taylor clearly recognized Defendant and sought to reason with him. Second, Defendant's voice was identified by three different trial witnesses on the 911 recording. And lastly, the physical evidence established Defendant used his Glock firearm to commit these murders. The alibi defense was clearly inconsistent with the 911 recording, the testimony of Molly Rhoades, the testimony of Pamela Ashby, the testimony of Detective Judy, and the physical evidence which placed Defendant at the murder scene firing the fatal shots. As the evidence established Defendant committed these murders during the course of a burglary and the State presented evidence which was inconsistent with Defendant's theory of innocence, the evidence below satisfied the State's burden.[32]

Finally, any failure to establish felony murder is harmless as Defendant's conviction for first-degree premeditated murder would remain. Bradley, 33 So. 3d at 683. Defendant's convictions must be affirmed.

[32] The jury was not required to believe Defendant's version of the facts where the State produced conflicting evidence. Spencer, 645 So. 2d at 381.

ISSUE III

THE VOICE IDENTIFICATION CLAIM

On December 20, 2008 the murders of Elizabeth Evans and Gerald Taylor in victim Elizabeth Evans' home were recorded by the Pinellas County 911 Communications Center. Three distinct voices - two male voices and one female voice - were recorded on the 911 audiotape. (V35/1407). At trial, three witnesses - Molly Rhodes, Pamela Ashby and Detective Judy - each separately identified the voice of the male assailant, recorded on the 911 call, as the voice of the defendant, Patrick "Rick" Evans.[33]

[33] Pamela Ashby, the victim's neighbor, testified that she was familiar with the Defendant's voice and victim Evans' voice, and she could recognize them if she heard them on tape. (V18/435-36). Thereafter, Ashby listened to the beginning of the 911 recording. She heard three voices, one female and two male. (V18/439). She recognized the female voice as her friend, victim Evans. (V18/439). She recognized one of the male voices as the Defendant. (V18/439). To distinguish which male voice was Defendant, Ashby was asked to identify some of the things he was saying. She testified: "Sit on the bed." (V18/439). There was no question in her mind that the voices she identified belonged to victim Evans and Defendant. (V18/439).

Molly Rhodes, the victim's 20-year old daughter, was able to identify both her mother's voice and the voice of the Defendant (whom she lived with for over three years). (V19/530). After listening to the 911 recording, Molly testified the female voice was her mother's voice and the male voice saying to "sit on the bed" was the Defendant's voice. (V19/532-34). There was no question in her mind whatsoever that the voices belonged to her mother and the Defendant. (V19/534).

On appeal, the Defendant argues that the trial court erred in admitting the voice identification testimony of one of these three witnesses: Detective Judy. In overruling the defense objection to Detective Judy's identification of the Defendant's voice on the recorded 911 call, the trial court noted, ". . . whatever limited probative value - it doesn't rise to the level that it's prejudicial to your client in light of prior identifications." (V35/1396-1397).

This Court reviews "'a trial court's decision to admit evidence under an abuse of discretion standard.'" McWatters v. State, 36 So. 3d 613, 639 (Fla. 2010) (*quoting* Hudson v. State, 992 So. 2d 96, 107 (Fla. 2008)). For the following reasons, the trial court did not abuse its discretion in admitting Detective Judy's testimony concerning his recognition of Defendant "Rick" Evans' voice and identification of the Defendant's voice as that of the assailant on the 911 recording. (V35/1397, 1408).

In Gregory v. State, 118 So. 3d 770 (Fla. 2013), this Court recently reiterated the principles governing the admission of relevant evidence. In Gregory, this Court stated:

> "Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. (2011). "All relevant evidence is admissible, except as provided by law." § 90.402, Fla. Stat. (2011).
>
> Relevant evidence "is inadmissible if its probative value is substantially outweighed by the danger of

> unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (2011). "The trial court is obligated to exclude evidence in which unfair prejudice outweighs the probative value in order to avoid the danger that a jury will convict a defendant based upon reasons other than evidence establishing his guilt." *McDuffie v. State*, 970 So. 2d 312, 327 (Fla. 2007).

Gregory, 118 So. 3d at 780.

In the instant case, the 911 recording captured the interaction between the Defendant and the victims, and the murders. (V15/2547-48, 2554-55, 2559-60, 2565-66, 2571; V18/435-39; V19/530-34; V20/706-09, 717-20; Addendum V1/2574, 2575).

As previously noted, three distinct voices - two male voices and one female voice - were recorded on the 911 audiotape. At trial, three witnesses - Molly Rhodes, Pamela Ashby and Detective Judy - separately identified the voice of the male assailant, recorded on the 911 call, as the voice of the Defendant, "Rick" Evans. Detective Judy was familiar with Defendant's voice because he had listened to the Defendant's recorded telephone conversations from the jail. Detective Judy had listened to enough of the jail conversations to enable him to recognize the Defendant's voice, "absolutely." (V35/1397). Detective Judy believed he could identify the Defendant's voice. (V20/706-09). Detective Judy also listened to the 911 recording more than 50 times. (V35/1405; V36/1501).

Detective Judy listened to the 911 recording until it went silent. (V20/648-49). When listening to the recording, Judy testified the perpetrator is identified two times as "Rick." (V20/650). Judy could clearly hear two men, and one woman. (V20/650). One of the men was being called "Rick" and the other man was referred to as "Jerry". (V20/651). At this point, Detective Judy knew that the Defendant was known as "Rick." (V20/633). The 911 recording was played for Detective Judy and he identified the Defendant's voice as one of the male voices. (V20/717-20). Detective Judy recognized the Defendant's voice as the same one that told victim Evans, "**No, you're not**" [when she announced her intention to put on a robe], directed the two victims to "**Get on the bed. Sit on the bed,**" and insisted, "**Jerry, sit on the bed.**" (V35/1408; V20/720).

The Defendant recognizes that voice identification testimony is admissible at trial when the witness is sufficiently familiar with the speaker's voice. Appellant's Initial Brief at p. 59, *citing* England v. State, 940 So. 2d 389 (Fla. 2006), Cason v. State, 211 So. 2d 604 (Fla. 2d DCA 1968), and State v. Cordia, 564 So. 2d 601 (Fla. 2d DCA 1990). The Defendant does not dispute that Detective Judy became sufficiently familiar with Defendant's voice. Instead, the Defendant argues that Detective Judy's testimony was improper

because Detective Judy had never met the Defendant before this investigation and Detective Judy was not qualified as a voice identification expert. These arguments were not presented below and, therefore, are not preserved for appeal. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Moreover, these arguments are unavailing as well. In Florida, and in federal court as well, a communication may be authenticated by testimony that the witness recognizes a person's voice. See Charles W. Ehrhardt, FLORIDA EVIDENCE, § 701.1 (2013 Ed.) (recognizing that "a voice identification by non-expert witness is admissible if the witness is familiar with the voice. A predicate must be laid to show the circumstances whereby the lay witness became familiar with the person who was identified and the opportunity that the witness had to hear the voice during the situation in question."). Thus, familiarity with the speaker's voice may be acquired either before, or during, or after hearing the voice to be identified. The requisite foundation is established once the witness states how the witness is acquainted with the defendant's voice. Once this threshold foundation is established, the reliability of a witness' voice identification goes merely to the weight of evidence rather than admissibility. See Charles W. Ehrhardt, FLORIDA EVIDENCE, § 901.6 (2013 Ed.) (collecting cases and stating "[a] witness may testify that he

or she recognizes a voice that has been electronically reproduced if a foundation has been laid to indicated the circumstances whereby the witness acquired familiarity with the reproduced voice"); see also U.S. v. Metayer, 2013 WL 5942597, *3 (11th Cir. 2013) (unpublished) (noting that the federal rules of evidence provide that a witness may identify a voice 'based on hearing the voice at any time under circumstances that connect it with the alleged speaker,' and '[o]nce a witness establishes familiarity with an identified voice, it is up to the jury to determine the weight to place on the witness's voice identification' and *citing* Brown v. City of Hialeah, 30 F.3d 1433, 1437 (11th Cir. 1994) and concluding, "[n]or does either [the Agent's] failure to qualify as a voice-recognition expert or his unfamiliarity with [the criminal defendant's] identity during the investigation change our analysis."). As a result, arguments concerning the reliability of the voice identification testimony generally go to the weight and not the admissibility of the testimony.

In this case, the jury heard the 911 recording and also heard the voice used by the Defendant when he testified at trial.[34] At trial, the defense objected to Detective Judy's

[34] The 911 recording was replayed during the Defendant's direct examination and he insisted the taped voice was *not* his. For

voice identification based on alleged "bias and prejudice" (because Detective Judy was the case agent) and because it allegedly would invade the province of the jury. (V35/1395-1396). Again, matters of alleged "bias and prejudice" relate to the weight of the testimony, not its admissibility, and the defense remained free to cross-examine Detective Judy and present any defense arguments challenging the reliability of his voice identification testimony. Accordingly, Detective Judy's voice identification testimony did not "invade the province of the jury." Furthermore, the Defendant's current claim of alleged "improper bolstering" was not fairly presented below and, therefore, is not preserved for appeal. See Steinhorst, 412 So. 2d at 338; Overton v. State, 976 So. 2d 536, 547 (Fla. 2007) (*citing* F.B. v. State, 852 So. 2d 226, 229 (Fla. 2003) and Steinhorst, 412 So. 2d at 338, and reiterating, "[t]o preserve error for appellate review, the general rule requires that a contemporaneous, specific objection occur at the time of the alleged error."). In addition, the additional defense arguments still go to the weight and not the admissibility of the testimony. Notably, the defense also has criticized the voice identification testimony of Pamela Ashby because she had not

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the jury's consideration, the Defendant repeated words from the recording, such as "sit on the bed." (V23/1147-50). Thereafter, trial counsel noted "laughter" in the courtroom. (V23/1151).

heard the Defendant's voice in three years. In contrast, Detective Judy heard the Defendant's voice more recently as a result of listening to Defendant's recorded telephone calls at the jail. As a result, it was appropriate for the State to present a witness who was familiar with the Defendant's more-recent conversations and [unaltered] voice. The defense also suggests that the State "should have played" (and re-played) both the recorded jail telephone calls and the 911 recording for the jury. Appellant's Initial Brief at 64. Detective Judy had listened to enough of the jail conversations to enable him to recognize Defendant's voice, "absolutely." (V35/1397). Detective Judy also listened to the 911 recording more than 50 times. (V35/1405; V36/1501). Although a time-consuming and tedious playing (and replaying) of the recorded jail calls arguably might have been available, the content of the calls was not shown to be relevant and any probative value was subject to being substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Fla. Stat. § 90.403.

Lastly, any error, if any arguably exists, a proposition which the State emphatically disputes, is harmless. The identification of Defendant's voice - by trial witnesses Molly Rhodes and Pamela Ashby - is not challenged on appeal. As the

trial court noted in admitting the voice identification testimony of Detective Judy, for "whatever limited probative value - it doesn't rise to the level that it's prejudicial to your client in light of prior identifications." (V35/1396-1397). In short, Detective Judy's voice identification testimony was cumulative to the voice identification testimony presented by two other witnesses, Molly Rhodes and Pamela Ashby. As this Court ruled in Blanton v. State, 978 So. 2d 149, 157 (Fla. 2008), testimony which is merely cumulative to other properly admitted evidence may be deemed harmless. Here, as in Blanton, 978 So. 2d at 157, there is no "reasonable possibility that the error affected the verdict" and error, if any, was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986).

ISSUE IV

THE CROSS-EXAMINATION CLAIM

Defendant next asserts that a new trial is required due to a question asked by the prosecutor in cross-examining him at trial. Specifically, Defendant was asked if he hired a private investigator to find out information about victim Taylor prior to the day of the murders; Defendant denied that he had done so. (V39/1951). There was no objection to the question when asked

and answered. After the State presented its rebuttal case, the defense requested a mistrial, claiming that the prosecutor did not have a good faith basis for implying that a private investigator had been hired. The trial court denied the mistrial, noting that Defendant had answered the question in the negative. (V39/2018). A curative instruction was requested and denied, and then the prosecutor explained that he had a good faith basis for the question, based on inadmissible [hearsay] statements that the victim Evans believed an investigator had been hired because Defendant had information about victim Taylor. (V39/2019-20).

This evidentiary ruling is subject to review under an abuse of discretion standard. Cole v. State, 701 So. 2d 845, 852 (Fla. 1997); Israel v. State, 837 So. 2d 381, 389 (Fla. 2002). Defendant has failed to demonstrate any such abuse and, accordingly, this Court must deny this claim.

Defendant asserts that the prosecutor's question improperly inferred that he had hired a private investigator to find out about victim Taylor, which Defendant submits would leave the jury to conclude that Defendant was "stalking" his estranged wife, victim Evans. The prosecutor had a reasonable basis to believe that an investigator had been hired, but the jury heard Defendant deny that he had hired anyone. After this response,

there was never any further indication that a private investigator had been hired.

Defendant relies on Gosciminski v. State, 994 So. 2d 1018, 1023-24 (Fla. 2008), but that case does not support his plea for relief. In Gosciminski, the prosecutor's cross-examination of the Defendant at trial included an accusation that Gosciminski had not bothered to wipe blood off of the victim's ring before showing it to his work colleagues. The only support for this suggestion was the description of the ring provided by the co-workers, noting that the ring had black around it when shown to them the morning after the murder, and the fact that the murder scene was very bloody. The co-workers did not testify the ring looked bloody, only dirty. Moreover, after suggesting that the ring Gosciminski had shown was bloody, the prosecutor made two different statements in closing argument alluding to the bloody nature of that ring.

In this case, the prosecutor's explanation of the question is criticized by Defendant because it was based on inadmissible statements the deceased victim had made rather than any "facts" in evidence. However, there is no authority which requires the good faith basis for asking an impeaching question to be based only on record evidence. The problem identified in Gosciminski was that the prosecutor's explanation was not reasonable; the

prosecutor relied on the inference that the victim's ring would have been bloody because the murder scene was very bloody, but this did not support any inference about what caused the dark appearance on the ring which Gosciminski initially gave his girlfriend. The issue of support for the prosecutor's good faith belief turned on the reasonableness of the explanation, and not whether it was supported by record evidence.

In Carpenter v. State, 664 So. 2d 1167 (Fla. 4th DCA 1995), the Fourth District held that no error occurred when the prosecutor in that case asked the defendant on cross examination if he had admitted to a third party that his shooting of the victim was not in self-defense, contrary to the defense theory at trial. The appellate court noted the basis for asking the question was contained in police reports that detailed the third party's statements, and cited Professor Ehrhardt and Michelson v. United States, 335 U.S. 469 (1948), in concluding that an attorney's good faith belief in asking an impeaching question does not require facts supported only by admissible evidence. Thus, the prosecutor's reliance on the victim's inadmissible statements for a good faith basis in asking Defendant about hiring a private investigator was not improper or insufficient. Since the good faith basis in fact existed, Defendant has not shown any error in the trial court's allowing the question and

answer about the private investigator to stand.

Even if any possible error occurred, it would necessarily be harmless on the facts of this case. The implication that Defendant may have hired a private investigator is not so prejudicial that it would interfere with his right to a fair trial. It is not an incriminating fact in and of itself or under the circumstances of the case; contrary to Defendant's assertion, it is not evidence of premeditation and was not argued as such below. Hiring an investigator is an innocent act, unlike the implication in Gosciminski which suggested that Gosciminski had given away his victim's diamond ring without bothering to clean off the blood. Defendant's jury was properly aware of the nature of his relationship with his wife, and knew that they were estranged, and that Defendant thought their problems would be worked out while victim Evans felt the relationship was over. (V18/426, 428, 452; V19/510-11). Defendant also knew that victim Evans was going "on a date" that night. (V18/432-33).

Defendant asserts that the prejudice occurred because on the tape, "Rick" directs "Jerry" to sit on the bed, repeatedly, and the suggestion of a private investigator might explain how Defendant knew Jerry's name. Appellant's Initial Brief at pp. 73-74. Importantly, no one ever offered this scenario for the

jury's consideration. The State's initial closing argument did not even mention the fact that Jerry's name was known by the killer. The defense closing argument theorized that the perpetrator may have heard victim Evans refer to Jerry by name, before the recording started. (V40/2158). In the State's final closing, the prosecutor noted the possibility that victim Evans had identified Jerry Taylor by name that morning, when she told Defendant of her plans to be on a date that night. (V40/2177-78). This is another distinction from Gosciminski, where the prosecutor exacerbated his error by repeating the prejudicial inference in his closing argument, and other improper evidence was also admitted and argued at that trial. In this case, the challenged reference to a possible private investigator was an isolated question which was not repeated in the prosecutor's closing argument or otherwise highlighted for the jury.

In Braddy v. State, 111 So. 3d 810, 853 (Fla. 2012), where this issue was not preserved with a specific objection, this Court found that it was not fundamental error for the State to cross examine the defendant's wife about the defendant having extramarital affairs. Although the State did not support the inference that the defendant had been unfaithful with independent evidence of such, this Court found that the impropriety only concerned a minor aspect of the case against

Braddy, seeking to discredit a nonstatutory mitigating circumstance. Similarly, the guilt phase presentation against Defendant is not seriously affected by the possibility that he hired a private investigator. A man resembling Defendant was seen in the area around the time of the murders, asking about "a couple of Yorkies."[35] (17/224-27, 234). Significantly, Defendant was recorded as he murdered victims Evans and Taylor; victim Evans refers to the shooter as "Rick" and Defendant's voice was positively identified as the perpetrator on the recording (V18/439; V19/532-34; V20/650-51, 717-20). An empty holster at the scene corresponded with a firearm purchase Defendant had made at a local sporting goods store, and the casings found at the scene were identical to ammunition found in Evans' gun safe at home and had been fired from Defendant's firearm, which was never recovered. (V20/693-99; V21/910, 912). Defendant's guilt was established with solid evidence and the lone reference to the potential of his having hired a private investigator did not affect the jury's verdict in this case.

Defendant's guilt as to these murders was well established by both direct and circumstantial evidence below. Accordingly, any potential error in the ruling to permit this question and

[35] Victim Evans owned two Yorkshire terriers, which were in her condo at the time of the murders. (V16/43).

answer to be considered by the jury is harmless beyond any reasonable doubt. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). Because the prosecutor had a good faith basis for asking the question about hiring a private investigator, no error has been demonstrated in this case. This Court must reject this issue and affirm the convictions returned against Defendant.

ISSUE V

THE GUILT PHASE CLOSING ARGUMENT CLAIM

In this issue, Defendant argues that the prosecutor's comments during closing argument deprived him of a fair trial. The principle is well-settled that "[w]ide latitude is permitted in arguing to a jury." Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982). And, as this Court reiterated in Pham v. State, 70 So. 3d 485, 492 (Fla. 2011):

> Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. *Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999). "It is within the judge's discretion to control the comments made to a jury, and [this Court] will not interfere unless an abuse of discretion is shown." *Moore v. State*, 701 So. 2d 545, 551 (Fla. 1997)."

Pham, 70 So. 3d at 492.

This Court reviews trial court rulings regarding the propriety of comments in closing for an abuse of discretion.

Salazar v. State, 991 So. 2d 364, 377 (Fla. 2008). Moreover, in order to require a new trial based on allegedly improper prosecutorial comments, the prosecutor's comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise. Anderson v. State, 863 So. 2d 169, 187 (Fla. 2003).

The Defendant's guilt phase proceedings spanned eight days. An excerpt from the guilt phase transcript, beginning at the prosecutor's opening statement and ending at the rebuttal closing, encompasses more than 1,400 pages of the record. (V16/1 - V25/1454). Before closing arguments began, the trial court instructed the jury:

> THE COURT: All right. Members of the jury, both the State and the Defense have rested their cases. We're now at that juncture where you will hear closing arguments. I'd ask that you receive these closing arguments with these ground rules:
>
> **First, what the attorneys say is not evidence.** However, they well [sic] be commenting on their recollection of the evidence. If an attorney's reference to the evidence or testimony is different from your recollection, you'll need to rely upon your individual and collective recollection of the evidence.

> Secondly, I do not permit the attorneys to just read the law to you. That is exclusively the province of the court. However, the attorneys will be making reference to the law. **If an attorney's reference to the law is different from the reading of the law, obviously, you'll need to rely upon the Court's version of the law.**
>
> * * *

(V40/2054-2055) (emphasis supplied).

The prosecutors' combined closing arguments, in their entirety, amount to 77 pages of the 1,400+ page transcript. (State's initial closing at V40/2055-2085; Defense closing at V40/2087-2171; and State's rebuttal at V40/2171-2218). No objections were raised to any of the prosecutor's initial closing arguments. (V40/2055-85). However, during the prosecutor's *rebuttal* closing, the defense did object, and move for a mistrial, based on three of the prosecutor's comments.[36] (V40/2191, 2194, 2211).

For the following reasons, the prosecutor's rebuttal comments were either within the wide latitude afforded counsel, fair comment on the evidence adduced at trial, legitimate

[36] On November 21, 2011, the Defendant filed a "Motion for New Trial," which was based, in part, on the prosecutor's comments during closing argument. (V9/1604-1605). On February 14, 2012, the trial court denied the Motion for New Trial. (V9/1638). On June 27, 2012, the Defendant filed "Amendments to Motion for New Trial," which cited, *inter alia*, to the three objected-to comments and also attached a transcript of the State's closing arguments at the guilt phase. (V9/1670-1671; 1672-1759). On July 23, 2012, the trial court denied the "Amendments to Motion for New Trial." (V10/1795-1796).

inferences reasonably drawn from the evidence, or invited reply to defense arguments and fair rebuttal to defense counsel's closing. And, even if any of the prosecutor's comments arguably were deemed improper, because the statements of counsel are not evidence, the trial court "may rectify improper prosecutorial statements by instructing the jury that only the evidence in the case is to be considered." United States v. Jacoby, 955 F.2d 1527, 1541 (11th Cir. 1992). Here, the trial court instructed the jury before the closing arguments that "what the attorneys say is not evidence." (V40/2054). After closing arguments, the trial court further instructed the jury that "[i]t is to the evidence introduced in this trial and to it alone that you are to look for that proof" (V41/2259), and "this case must be decided only upon the evidence that you have heard from the testimony of the witnesses and have seen or heard in the form of exhibits in evidence and these instructions." (V41/2262). In conclusion, the trial court emphasized to the jury that "it is important that you follow the law as spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case." (V41/2269).

As previously noted, in closing argument, counsel is permitted to review the evidence and fairly discuss and comment upon properly admitted testimony and logical inferences from

that evidence. Conahan v. State, 844 So. 2d 629, 640 (Fla. 2003), *citing* Mann v. State, 603 So. 2d 1141, 1143 (Fla. 1992). Moreover, even if, *arguendo*, any of the prosecutor's rebuttal comments were deemed improper,[37] they "did not deprive the defendant of a fair and impartial trial, [nor] materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." See Anderson, 863 So. 2d at 187.

Comment #1:

The Defendant sums up the defense argument at closing as "if the killer had planned the murders, he would not have left incriminating objects behind." Appellant's Initial Brief at p. 75. This theory overlooks the fact that the two victims refused to "cooperate" with his "plan." For example, the two victims

[37] The U.S. Supreme Court has explained that reversal of a conviction or a sentence is warranted only when improper comments by a prosecutor have "so infected the trial with unfairness as to make the resulting conviction [or sentence] a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464 (1986), *quoting* Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974). In Reese v. Secretary, Florida Dept. of Corrections, 675 F.3d 1277, 1287-1288 (11th Cir. 2012), the Eleventh Circuit noted that the U.S. Supreme Court "has never held that a prosecutor's closing arguments were so unfair as to violate the right of a defendant to due process."

were not compliant and did not just "sit on the bed" as the Defendant demanded. And, when victim Evans attempted to flee to the balcony and screamed for help, she was shot and killed. After the murders, the Defendant did not linger long in the bedroom.[38]

The first challenged rebuttal comment was the prosecutor's reply to the defense argument that the Defendant was "not" guilty because of the incriminating evidence against him - specifically, the spent casings recovered at the scene that matched the two casings that were fired from the Defendant's gun and were still in the Glock envelope in Defendant's safe. Under the defense theory, the Defendant was "not guilty" because he would have done more to "cover his tracks" and gotten "rid of" the casings in the safe.[39] See Defense closing at (V40/2115-2116). In other words, from the defense viewpoint, the incriminating evidence -- which included the holster left behind

[38] As the prosecutor noted, "Now, if Beth hadn't yelled for help, if he had a silencer on his gun, if it was a house that didn't have a condo next to it, was out in the country, yeah, he might have had time to reflect and say, What do I need to do to pick up to cover my tracks?" (V40/2193).

[39] During defense counsel's closing argument, he agreed that the Glock representative confirmed at trial that, with every single one of their guns, Glock provides two spent shell casings that are specifically fired from that gun for the purpose of identification, and they are given [to the buyer] when the gun is purchased. (V40/2114).

at the scene and the spent casings at the scene which matched the spent casings found in the Defendant's gun safe -- was, instead, evidence that the Defendant was "not" guilty. In response to the somewhat perplexing suggestion that the incriminating evidence against the Defendant meant, instead, that he was "not" guilty, the prosecutor replied, "I mean, only in a world populated by defense attorneys would that be true." (V40/2191). The defense objected and moved for a mistrial; the trial court did not rule on the defense objection, but did deny the motion for mistrial. (V40/2191).

In order 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). 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 properly granted only if the comment was such as to have deprived the defendant of a fair trial. Salazar, 991 So. 2d at 371-72. As this Court has held, "[a] motion for mistrial is addressed to the sound discretion of

the trial judge and '. . . should be done only in cases of absolute necessity.'" Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982) (*citing* Salvatore v. State, 366 So. 2d 745, 750 (Fla. 1978)). Here, the statements made by the prosecutor were within the realm of acceptable comments made in closing argument and the trial court did not abuse its discretion in denying the motion for mistrial as there was no absolute necessity.

The prosecutor's rebuttal was fair reply to the defense argument that incriminating evidence was, instead, evidence that the Defendant was "not" guilty. Again, the "proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." Wade v. State, 41 So. 3d 857, 868 (Fla. 2010), *quoting* Bertolotti, 476 So. 2d at 134. 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). Here, the prosecutor's comment was a reasonable inference made in fair reply to Defendant's preceding closing argument. See Williamson v. State, 994 So. 2d 1000, 1013 (Fla. 2008) (holding that the prosecutor's suggestion that a witness's testimony was credible

was "fair reply" to defense argument that it was not). Because the State's comment was merely a fair response to Defendant's argument, it was not improper. Pagan, 830 So. 2d at 809. Moreover, even if arguably improper, Defendant was not deprived of a fair trial as a result of the prosecutor's brief comment. Error, if any, was harmless. DiGuilio, 491 So. 2d at 1139.

Comment #2:

The defense next objected and moved for a mistrial based on the prosecutor's response to the hypothetical scenario suggested during defense counsel's closing argument. The prosecutor permissibly responded to the defense arguments which suggested that the Defendant might have been framed, and, therefore, maybe (1) somebody else [maybe Andrea, the defendant's ex-wife] did it, (2) that somebody else intentionally left evidence pointing to the Defendant, (3) that somebody else got victims Evans and Taylor to go along with the killer's perfect script and call him/her by the Defendant's name, "Rick," on the 911 call recording, (4) that somebody else stole the Defendant's gun and left the holster and casings at the scene so [law enforcement] would think the Defendant did it. After examining the multiple layers required within the improbable defense-suggested theory, the prosecutor then remarked "I mean talk about bad TV. That wouldn't even make it on TV." (V40/2194-95).

The Defendant argues that the prosecutor's comment improperly denigrated the defense and he now cites a series of cases for the proposition that comments which denigrate the defense are improper. Appellant's Initial Brief at pp. 77-78. However, the prosecutor's comments, when viewed in context, were a permissible response to the implausible scenario urged by the defense. As such, they were not improper. See Braddy, 111 So. 3d at 839 (ruling that prosecutor's statement, which Braddy claimed denigrated the manner in which his counsel conducted his defense, was not improper and the challenged comment was made in response to the defense's theory that persons other that Braddy had a motive for attacking the mother of the victim). The "bad TV" comment did little more than reflect the implausibility of the defense theory, and was fair reply to the hypothetical scenario urged by the defense.[40] As in Braddy, the prosecutor's comments, in context, were "within the wide latitude afforded to the State at closing to advance all legitimate arguments based on the evidence." See also Smith, 7 So. 3d at 509 (holding that the State has "wide latitude to argue to the jury during closing

[40] See also United States v. Caldwell, 543 F. 2d 1333, 1361-62 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087, 96 S.Ct. 877 (1976) (concluding that the prosecutor's mere use in summation of such criticisms as 'absurd' and 'a big fake' were a characterization that counsel could properly urge in light of the evidence presented at trial and the jury could accept or disregard as it saw fit).

argument" and is entitled to draw "[l]ogical inferences" and advance "all legitimate arguments"). Moreover, even if arguably improper, the defendant was not deprived of a fair trial as a result of the prosecutor's brief comment. Error, if any, was harmless. DiGuilio, 491 So. 2d at 1139.

Comment #3:

The third challenged comment was also made during the State's rebuttal argument. The defense objected and moved for a mistrial after the prosecutor stated, ". . . when you got a guy on tape doing a murder and using his gun, I'm going to suggest there is not a lot you can argue. This is what America is about. Everybody has a right to a jury trial." (V40/2210-2211). The trial court overruled the defense objection and denied the motion for mistrial.[41] (V40/2211).

[41] In addressing the prosecutor's comment that "everybody has a right to a jury trial," the Appellant's Initial Brief, at pages 78-79, relies on an incorrect, and therefore misleading, sequence of the defense objection and motion for mistrial below. The defense objected and moved for a mistrial when the prosecutor stated ". . . when you got a guy on tape doing a murder and using his gun, I'm going to suggest there is not a lot you can argue. This is what America is about. Everybody has a right to a jury trial." (V40/2210-2211). The defense objected on the ground of "denigrating the defense." (V40/2211). The trial court overruled the defense objection and denied the motion for mistrial. (V40/2211). Thereafter, the prosecutor continued his argument [which included "It could be on videotape. It could be in front of a hundred priests."] without objection.

The instant double homicide case did involve "a guy on [audio] tape" committing "a murder and using his gun." Therefore, the prosecutor's introductory comment was entirely proper. The prosecutor's next suggestion - that having "a guy on tape doing a murder and using his gun," probably would limit the availability of potential defenses - also was a logical inference derived from the evidence and, as a result, was not improper. See Smith, 7 So. 3d at 509 (reiterating that "[l]ogical inferences may be drawn, and counsel is allowed to advance all legitimate arguments."

The Defendant focuses, primarily, on the prosecutor's statement that "This is what America is about. Everybody has the right to a jury trial." (V40/2210-2211). The defense objected below on the ground that the prosecutor's remark allegedly was "denigrating the defense." (V40/2211). The defendant cites to a series of cases for the proposition that prosecutors may not disparage a defendant for having exercised his right to a jury trial. Appellant's Initial Brief at p. 79. However, when the prosecutor's entire argument is read in context, the State submits that it is not one suggesting disparagement, but, instead, one recognizing an uncontested legal principle as a truism. Once again, as this Court most recently reiterated in Lebron v. State, ___ So. 3d. ___, 2014 WL

321817, *12 (Fla. Jan. 30, 2014), "[i]n Florida, a prosecutor's comments will merit a mistrial only when they deprive the defendant of a fair and impartial trial, materially contribute to the conviction, are so harmful or fundamentally tainted as to require a new trial, or are so inflammatory they might have influenced the jury to reach a more severe verdict than it would have otherwise rendered." Even if, *arguendo*, any of the prosecutor's comments were deemed improper, none of the prosecutor's comments, individually or cumulatively, deprived the defendant of a fair trial. See Jones v. State, 998 So. 2d 573, 589 (Fla. 2008) (stating that to require mistrial, an improper comment must deprive the defendant of a fair trial).

Comment #4:

Next, the Defendant faults the prosecutor's single remark regarding homicides committed by family members or friends. This isolated remark immediately followed the prosecutor's argument on the circumstances known to the police on the first night of their investigation. (V40/2172-2173). Those undisputed circumstances included that the police arrived at a scene where two people were murdered, there was no sign of a robbery, nothing was stolen, nothing was ransacked, the female victim was estranged from her husband, and was with another man and they were both naked. Recognizing that law enforcement would

investigate if the woman's estranged husband might be a suspect, the prosecutor remarked, "[b]ecause we need to find out because, as you all know, most homicides are committed by family members or friends." (V40/2173). The defense objected on the ground "[t]hat's not in evidence" and the trial court overruled the objection. (V40/2173). Defense counsel did not seek a mistrial on the basis of this isolated remark nor raise a claim of "improper bolstering" below. Therefore, the Defendant's current claim of "improper bolstering" (Appellant's Initial Brief at p. 79) is not fairly preserved for appeal and is procedurally barred. Moreover, the prosecutor's brief comment, even if arguably based on "facts not in evidence," does not warrant any relief. The Defendant was not deprived of a fair trial as a result of the prosecutor's isolated remark. Error, if any, was harmless. DiGuilio, 491 So. 2d at 1139.

The unpreserved comments:

The Defendant's remaining arguments now asserted on appeal (Appellant's Initial Brief at pp. 80-90) were not raised at trial and, therefore, are unpreserved for appeal and now procedurally barred. See Sims v. State, 681 So. 2d 1112, 1116-17 (Fla. 1996) (stating that claimed errors when prosecutor referred to the defendant as a liar and accused defense counsel of misleading the jury were not properly before the Court on

appeal without an objection). Moreover, the unobjected-to comments were either within the wide latitude afforded counsel, fair comment on the evidence adduced at trial, legitimate inferences reasonably drawn from the evidence, or invited reply to defense arguments and fair rebuttal to defense counsel's closing. See Poole, 997 So. 2d at 390 (holding that a prosecutor's statement "that there was no evidence ... that someone else inflicted the injuries on the victims" was invited response to defense counsel's argument). Ultimately, even if any of the comments were deemed erroneous, the prosecutor's comments do not constitute fundamental error. Poole, 997 So. 2d at 391.

In order for the Defendant to obtain relief based upon the unobjected-to comments, he must establish that the comments rise to the level of fundamental error. Fundamental error is error that "reach[es] 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." Archer v. State, 934 So. 2d 1187, 1205 (Fla. 2006). None of the unobjected-to comments in the Defendant's brief, either alone or collectively, rise to the level of fundamental error. 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." Hayward v. State, 24 So. 3d 14, 40-41 (Fla. 2009). In the instant case, no such error occurred in the prosecution's closing that "reache[d] 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." McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999).

On appeal, the Defendant accuses the prosecutor of being sarcastic and mocking. Appellant's Initial Brief at pp. 80-81. However, inasmuch as there was no objection raised below, defense counsel, who was present in the courtroom, apparently did not share appellate counsel's interpretation of the prosecutor's argument. Appellate counsel's interpretation is nothing but rank speculation unsupported by any objection by trial counsel. Next, the prosecutor's one-line criticism of the hearsay advice supposedly furnished by a predecessor counsel to the Defendant's brother, Rodney, was fair reply to Rodney's self-serving explanation. In addition, the prosecutor's description of the Defendant as a "control freak" was not improper, but a logical inference derived from the record. Furthermore, the prosecutor's response to the testimony of Ron Bell also was fair reply to the defense theory that victim Evans

"incorrectly assumed the intruder was Mr. Evans, partly because she had been drinking while taking prescription medication." Appellant's Initial Brief at p. 82. And, when the Defendant took the stand and testified, the prosecutor was free to comment on the Defendant's apparent attempt to alter his voice.

The majority of the Defendant's remaining argument on the unobjected-to comments concerns the prosecutor arguing that these murders were not committed in "heat of passion". Appellant's Initial Brief at pp. 83-89. The Defendant now asserts that the State's initial closing argument allegedly misstated the law. However, when the prosecutor's comments are read in context, they did not do so. This Court has recognized that comments that merely urge a jury to follow the Court's instructions are not improper. Rodriguez v. State, 919 So. 2d 1252, 1282-83 (Fla. 2005). Here, the State merely informed the jury regarding instructions it would be receiving and explained why the evidence supported the greater offense and made an argument consistent with the jury instructions on why the lesser offenses should be rejected. The prosecutor's argument was not improper. Furthermore, error, if any, was cured by the trial court's instructions. Jacoby, 955 F.2d at 1541; DiGuilio, 491 So. 2d at 1139.

In Braddy, 111 So. 3d at 838, this Court found that even if the prosecutor's comments were assumed to be improper, given the abundant evidence of Braddy's guilt at trial, these comments — either individually or cumulatively — did not rise to the level of fundamental error. See also Chandler v. State, 702 So. 2d 186, 191 n. 5 (Fla. 1997) (holding that State's comments at closing referring to defense counsel's conduct as "cowardly" and "despicable" and calling defendant "malevolent ... a brutal rapist and conscienceless murderer" were "thoughtless and petty" but not fundamental error). Since the vast majority of the State's comments were proper and the evidence was overwhelming, the Defendant has not carried his heavy burden of showing that any impropriety in the comments, either individually or cumulative, deprived him of a fair trial. Given the trial court's instructions and the strength of the State's evidence, the prosecutor's comments, even if found to be improper, could not have contributed to the jury's verdict. The Defendant has failed to establish fundamental error on the basis of the prosecutor's unobjected-to comments. Relief must be denied.

ISSUE VI

THE CUMULATIVE ERROR CLAIM

Defendant also claims that a new trial is required due to cumulative error committed at the guilt phase of his capital trial. Although this issue is presented as an independent basis for relief, Defendant does not identify any purported errors beyond the ones already addressed in this brief. He simply asserts that the effect of the errors must be considered cumulatively and recites the standard for harmless error, declaring these errors are not harmless.

There is no standard of review for this issue, as the Court is not "reviewing" any particular ruling or action by the trial court. Although the legal principle that prejudice from trial errors can be considered cumulatively is sound, this claim must be rejected factually because there were no such errors committed in this case to combine when considering the impact on the trial. As this Court has recognized, a cumulative error claim must necessarily be rejected where the underlying errors are either procedurally barred or without merit. Patrick v. State, 104 So. 3d 1046, 1063-64 (Fla. 2012); Pagan, 830 So. 2d at 815.

In this case, the substantive issues do not present any basis for relief, either individually or collectively, for the reasons explained. Accordingly, relief must be denied on this issue.

ISSUE VII

THE WEIGHING OF MITIGATION CLAIM

Here, Defendant challenges the trial court's sentencing order, claiming that the court erred by failing to adequately weigh the mitigation evidence presented. Such a claim is reviewed for an abuse of discretion. Peterson v. State, 94 So. 3d 514, 536 (Fla. 2012). Under this standard, the trial court's assessment is accepted "unless no reasonable person would have assigned the weight the trial court did." Peterson, 94 So. 3d at 536; Rodgers v. State, 948 So. 2d 655, 669 (Fla. 2006). Defendant has failed to demonstrate any abuse in this case, and this Court must deny relief.

The court below entered the following findings as to mitigation: no significant history of criminal activity, given some weight; age of 41 at the time of the crime, rejected and given no weight; work ethic and work history, given moderate weight; significant relationship with his two children at the time of the homicides, given little weight; sharing love and

support with his family, given little weight; appropriate behavior during confinement and in courtroom, given minimal weight; incarceration for life as alternative sentence, given little weight; charitable or humanitarian deeds, given little weight (V10/1804-10). The court weighed the total mitigation against two aggravating factors which were each given great weight and determined the aggravators outweighed the mitigators "which, while several in number, fail to reach the magnitude of the aggravating factors" (V10/1810-11).

Defendant now complains that two of these findings, giving little weight to his having two children and the love and support of his family, require a new sentencing because the judge purportedly used faulty reasoning and inappropriate considerations in assessing these factors. Specifically, Evans asserts that the judge improperly reduced the weight of these factors based on irrelevant circumstances, committing the same error this Court identified in Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990). However, Defendant's allegations are refuted by reasonable analysis of the sentencing order, which reflects that the weight was properly reduced based on legitimate factual findings supported by the evidence in this case.

According to Defendant, under the reasoning employed below, "any time the defendant kills a victim who has children, the

fact that the defendant was a good father with a good relationship with his children could not be used as mitigation." Appellant's Initial Brief at p. 94. What Defendant fails to appreciate is that, by choosing to kill his estranged wife as one of his victims, Evans act of murder had a direct and foreseeable devastating impact on his own children. Not every child whose father commits murder suffers such a personal loss. Despite having the love of his son Cameron, Defendant chose to deprive Cameron of the love and support of victim Elizabeth Evans, a woman who also cared for and had a significant relationship with Cameron. By taking deliberate action which would so negatively affect Cameron's life, Defendant demonstrated that his relationship with Cameron was not so significant that it appreciably reduced his moral culpability for Elizabeth Evans' murder. Accordingly, the weight of this factor was properly gauged as "little" and no abuse of discretion has been shown.

Nibert, the only case cited to support Defendant's claim, does not suggest any error in the findings entered below. Initially, it must be noted that Nibert did not even involve the issue of discretion with regard to weighing a mitigating factor. In that case, the trial judge rejected altogether Nibert's mitigation of having been raised in an abusive home based on

Nibert being 27 and having left the home at 18 years of age. In finding error, this Court noted that the fact the abuse had ended did not diminish the decade of abuse during Nibert's formative years. Because the court below found and weighed the mitigation at issue, reliance on Nibert is misplaced. See Anderson v. State, 863 So. 2d 169, 179 (Fla. 2003) (distinguishing Nibert's rejection of mitigation from the treatment of mitigation in that case, where the mitigation was found but only given "little" weight).

In Allen v. State, ___ So. 3d ___, 2013 WL 3466777 (Fla. July 11, 2013), this Court found no abuse of discretion in the giving of "some weight" and "little weight" to nonstatutory mitigation including having been a victim of physical and possibly sexual abuse; brain damage resulting in loss of impulse control; having grown up in a violent neighborhood; and helping other people by providing food, shelter, or money. This Court noted that the trial court considered each of the mitigating circumstances presented and provided detailed factual findings as to its evaluation, which were supported by the record. See Heyne v. State, 88 So. 3d 113, 124 (Fla. 2012) (noting that court's finding on mitigation was not an abuse of discretion where it is supported by competent, substantial evidence); Ault v. State, 53 So. 3d 175, 187 (Fla. 2010) (same). In this case,

Defendant does not assert that that the court below ignored or overlooked any particular mitigation, and does not dispute the factual findings which resulted in a reduction of the weight given to the mitigators. Rather, he simply argues that the reasons given are not legitimate reasons to discount the evidence, but there is no legal basis to overturn the reasoning offered below to support the court's findings.

This Court has found an abuse of discretion with the weighing of mitigation when the sentencing court has added requirements not legally compelled to the mitigation sought. For example, in Bell v. State, 841 So. 2d 329 (Fla. 2002), the trial court only gave "little" weight to the statutory mitigator of age, despite the defendant being only seventeen years old, because the defendant did not show that he had been abused or neglected. But this Court's case law does not require a defendant under the age of majority to show abuse or neglect in order to secure the age mitigator, and therefore reducing the weight on that basis was improper. This is similar to the situation in Nibert where the legal error was in rejecting childhood abuse as mitigation because there was no showing of a nexus between the abuse and the commission of the murder, when legally no such nexus is required. Defendant does not allege that a similar error occurred in his case, and a review of the

sentencing order reflects that the court below did not reduce the weight of any mitigation based on a finding that Defendant had not proven an additional requirement in order to satisfy the existence of the mitigator.

Rather, the order entered below reflects that the court evaluated each mitigating factor proposed by the defense and entered findings consistent with the evidence to support the particular weight allocated. Any possible error with regard to the court's findings on Defendant's family mitigation would clearly be harmless beyond any reasonable doubt, as death is the only reasonable sentence based on the weighty aggravating factors and the minimal mitigation presented. Ault, 53 So. 3d at 195 (noting that reversal is only available "if the excluded mitigating factors reasonably could have resulted in a lesser sentence," and when "there is no likelihood of a different sentence, then the error must be deemed harmless"). Because the reasons given provided an ample basis for the weight allocated to Defendant's mitigation, relief must be denied on this claim.

ISSUE VIII

THE PROPORTIONALITY CLAIM

Defendant's final issue presumes the aggravating factor of the murders having been committed during the course of a burglary should be stricken, rendering this a "single aggravator" case which he asserts is disproportionate in light of his substantial mitigation. However, the finding that Defendant was committing a burglary at the time of the murders is well supported by the evidence, as addressed in Issue II. With or without this factor, Defendant's sentence is proportionate to other cases in which the death sentence has been imposed and upheld.

This Court has emphasized that its proportionality review is qualitative, not quantitative; it is "not a mere numbers game; rather, it is a holistic comparison of the circumstances of the current case with those of prior decisions where the Court has found that the death penalty was a proportionate punishment." Rigterink v. State, 66 So. 3d 866, 899 (Fla. 2011). Rather than counting the aggravating and mitigating circumstances, the Court considers the nature of, and the weight given to, the relevant factors. Serrano v. State, 64 So. 3d 93, 115 (Fla. 2011); Abdool v. State, 53 So. 3d 208, 224 (Fla. 2010)

(noting large quantity of mitigation presented, but confirming that the focus is on the quality, not the quantity, of the evidence).

A review of factually comparable cases confirms the propriety of Evans' sentence in this case. In McMillian v. State, 94 So. 3d 572 (Fla. 2012), this Court affirmed a death sentence imposed in a similar case. McMillian shot his girlfriend in her townhouse, after she had been out drinking with coworkers. McMillian had a prior violent felony conviction based on having shot at a K-9 law enforcement officer after he was stopped to be arrested for the girlfriend's murder; his other aggravating factor was due to his being on felony probation for a prior charge of fleeing and eluding the police. The statutory mitigator of no significant criminal history was found, along with nonstatutory mitigation, including an IQ of 76. McMillian is factually similar but appears to be less aggravated and more mitigated than Evan's case.

In McMillian this Court noted the sentence has been proportionate in cases involving a shooting death following domestic disputes over sexual infidelity, *citing* Rodgers v. State, 948 So. 2d 655 (Fla. 2006) (defendant shot wife after catching her cheating; sentence supported by the single aggravator of prior violent felony conviction based on a prior

robbery and a prior manslaughter conviction despite nonstatutory mitigation including borderline intelligence), and Evans v. State, 838 So. 2d 1090 (Fla. 2002) (defendant shot brother's girlfriend during argument over her alleged infidelity; sentence supported by prior violent felony conviction and being on felony probation, despite nonstatutory mitigation). McMillian, 94 So. 3d at 582; see also Blackwood v. State, 777 So. 2d 399 (Fla. 2000) (sentence affirmed for murder committed as a result of lover's quarrel where the sole aggravating factor, heinous, atrocious or cruel, was weighed against no significant criminal history and nonstatutory mental health evidence along with defendant being a good parent with a steady employment history); Pope v. State, 679 So. 2d 710 (Fla. 1996) (defendant's beating murder of his girlfriend supported by prior violent felony conviction and pecuniary gain despite application of both statutory mental health mitigators); Kopsho v. State, 84 So. 3d 204 (Fla. 2012) (defendant shot and killed his wife after she fled his moving vehicle; he indicated he decided to kill her after hearing she had slept with another man).

Critically, the instant case presents a double homicide. Defendant murdered not only his estranged wife, but a man she was involved with as well. This Court has upheld the imposition of the death penalty in a number of cases offering this

scenario. Gregory v. State, 118 So. 3d 770 (Fla. 2013) (defendant, under the influence of an extreme mental or emotional disturbance, shot his former girlfriend and her new boyfriend while they slept in the girlfriend's grandparents' house); Carter v. State, 980 So. 2d 473 (Fla. 2008) (defendant shot former girlfriend and her new boyfriend); Dennis v. State, 817 So. 2d 741 (Fla. 2002) (same); Porter v. State, 564 So. 2d 1060 (Fla. 1990) (same); see also Silvia v. State, 60 So. 3d 959, 974 (Fla. 2011) (second victim, the wife's mother, was shot but not killed); Jean-Philippe v. State, 123 So. 3d 1071 (Fla. 2013) (second victim, the wife's sister, was also struck with tire iron but not killed). Although these cases also apply the aggravating factor that the murders were cold, calculated and premeditated, they are factually similar to the commission of the murders herein and typically involved more mitigation. In Carter, this Court upheld the application of CCP, but noted that even if CCP and/or the during-the-course-of-a-burglary aggravators were stricken, reliance on these factors at sentence was harmless in light of the other violent offenses committed because Carter also killed his girlfriend's new boyfriend and wounded the boyfriend's daughter. Carter, 980 So. 2d at 483.

In this case, Defendant was armed when he went to his estranged wife's home, knowing she had been out, and his

confrontation with victims Evans and Taylor was captured for the jury; we know there was no heated argument or provocation and that after Defendant shot Taylor, he chased victim Evans onto the porch and shot her while she cowered in fear of her life. These cold facts are properly considered in assessing proportionality, despite the lack of CCP or HAC in aggravation. See Sliney v. State, 699 So. 2d 662, 672 (Fla. 1997) (considering the brutality of the murder in proportionality analysis, despite lack of HAC factor).

Cases where more than one victim are shot and killed are typically proportional since a prior violent felony conviction which was another capital murder, even a contemporaneous capital murder, is a very weighty aggravating factor. Under such circumstances, the factor is routinely given great weight, as it was here. See Allred v. State, 55 So. 3d 1267, 1284 (Fla. 2010). An example of the mitigation necessary to overturn a death sentence where multiple victims were killed is found in Davis v. State, 121 So. 3d 462 (Fla. 2013), where the offenses occurred while the 21-year-old defendant was suffering from a psychotic episode. The mitigation in Defendant's case is minimal rather than significant or persuasive and does not offset the strong aggravation at issue when an innocent party is also killed when a defendant murders a current or former wife or

girlfriend. Other than the statutory mitigator of no significant criminal history (afforded "some" weight), which also applied in McMillian and Blackwood, the court below cited only Defendant's work ethic and history; the love of his family and his relationship with his children; appropriate behavior in jail and in court; the alternative sentence of life imprisonment, and minor charitable deeds as mitigation.

According to Defendant, death is not warranted here because the murders occurred when he "snapped" when he found his wife in a sexual encounter with another man; he characterizes this as "an isolated incident with emotional implications". Appellant's Initial Brief at p. 98. However, as noted above, the evidence in this case demonstrated that Defendant was armed and seeking victim Evans *before* finding her with victim Taylor, and the recording of the murders establishes that there was no heated argument or provocation prior to the shootings.

The only factually comparable case which Defendant offers is Wright v. State, 688 So. 2d 298 (Fla. 1996). Reliance on Wright is misplaced as Wright did not kill anyone else at the scene, suffered from an extreme mental or emotional disturbance and presented what this Court characterized as "copious" mitigation. In addition, Wright was decided before this Court expressly recognized there is not a "domestic dispute" exception

to imposition of the death penalty. See Silvia, 60 So. 3d at 974 (distinguishing finding of disproportionality in Farinas v. State, 569 So. 2d 425 (Fla. 1990), by noting later cases had specifically declined to recognize a domestic dispute exception, and *citing* Lynch v. State, 841 So. 2d 362 (Fla. 2003), as making clear that proposition); Allred, 55 So. 3d at 1284.

As the death sentences in this case are consistent with other cases where that penalty has been imposed and upheld, this Court must reject Defendant's claim of disproportionality.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the State respectfully requests that this Honorable Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of February, 2014, a true and correct copy of the foregoing has been furnished electronically to Cynthia J. Dodge, Assistant Public Defender, Post Office Box 9000 - Drawer PD, Bartow, Florida 33831-9000 at the following designated email addresses: theadodge@gmail.com; appealfilings@pd10.state.fl.us and tmiller@pd10.state.fl.us.

CERTIFICATE OF FONT COMPLIANCE

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

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