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**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC12-890**

**BILLY JIM SHEPPARD JR.,**

**Appellant,**

**vs.**

**THE STATE OF FLORIDA,**

**Appellee.**

**ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, CRIMINAL DIVISION**

# BRIEF OF APPELLEE

**PAMELA JO BONDI**
**Attorney General**
**Tallahassee, Florida**

**TAMARA MILOSEVIC**
**Assistant Attorney General**
**Florida Bar No. 0093614**
**Office of the Attorney General**
**Rivergate Plaza -- Suite 650**
**444 Brickell Avenue**
**Miami, Florida 33131**
**PH. (305) 377-5441**
**FAX (305) 377-5655**
**Primary: capapp@myfloridalegal.com**
**Secondary: Tamara.Milosevic@myfloridalegal.com**

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## STATEMENT OF CASE AND FACTS

In the early morning hours of July 20, 2008, Patrick Stafford picked up his cousin Leporyon Worthey from work. (Vol. 10 at 686-87) They went together to Worthey's home located at 1658 Academy Street, Jacksonville, where they socialized until approximately 3:00 a.m. (Vol. 10 at 687) Worthey went to sleep inside his house, and Stafford slept in Worthey's car, which was located in front of the house. (Vol. 10 at 677, 688)

At approximately 6:00 a.m., Defendant and Evans approached Stafford in an attempt to rob him. (Vol. 10 at 728-31) As Stafford resisted the robbery and did not want to give up the car, Defendant and Evans shot him multiple times. (Vol. 10 at 728-31, 678, 777-85) Shamicka Worthey heard the gunshots, jumped up from her bed and went to wake up her brother and uncle, Lance Worthey and Leporyon Worthey. (Vol. 10 at 680) They ran to the window to see what happened and saw Stafford, lying on the ground with blood coming out of his shirt. (Vol. 10 at 680-81) Shamicka called the police, and Leporyon went outside to check on Stafford. (Vol. 10 at 681, 690-91) The police arrived around 7:00 a.m. (Vol. 9 at 559) The police recovered six shell casings from the crime scene. (Vol. 10 at 701-04)

Thereafter, around 8:30 a.m., Dorsette James parked his 2001

gray Crown Victoria in the parking lot of the Prime Stop Food Store, located at 1501 West Beaver Street. (Vol. 9 at 469-71) Willie Lee Carter, Jr. came to the store on his bicycle shortly after James. (Vol. 9 at 469-70) Carter noticed Defendant and Evans hanging around outside of the store. (Vol. 9 at 472-73) Carter went to the restroom, a location from which he could see James's car. (Vol. 9 at 474-76)

The next moment, Carter heard James say to Defendant and Evans, "Man don't do it like that," as he was trying to get into his car. (Vol. 9 at 474-76) Carter observed Defendant and Evans enter James's car. (Vol. 9 at 475-76) James attempted to stop Defendant and Evans from stealing his car but he surrendered his car after he saw that Defendant had a gun. (Vol. 9 at 477-78) Defendant and Evans drove off in James's car. (Vol. 9 at 476-77)

Finally, around 10:00 a.m., Monquel Wimberly, a 16 year old boy, was riding his bicycle down King Street towards the entrance of the Hollybrook Apartments, located at 104 King Street. (Vol. 9 at 419, 450; Vol. 10 at 652) Evans, who was driving James's stolen Crown Victoria, and Defendant, who was seated in the passenger seat, pulled alongside of Wimberly. (Vol. 9 at 451, 652-53; Vol. 10 at 733-34) Wimberly stopped and put his hands in the air. (Vol. 9 at 451; Vol. 10 at 654-55) Defendant put a gun

through the window and shot the defenseless Wimberly six times. (Vol. 9 at 417-18, 451, 454; Vol. 10 at 654-55, 729-34, 787-95) Wimberly fell to the ground. (Vol. 9 at 451-56) Defendant and Evans kept driving towards the entrance of the apartment complex. (Vol. 9 at 451-56; Vol. 10 at 656)

Dtayla Barrett, a security guard at Hollybrook Apartment, heard the gunshots while she was standing outside of the guard post. (Vol. 9 at 417-18) She ran to the street in time to see the gun extended outside of the passenger side of the car. (Vol. 9 at 417-18) After the shots were fired, Barrett ran back to the guard post and called the police. (Vol. 9 at 420) Then, Barrett ran towards Wimberly to render aid. (Vol. 9 at 420-21) The car returned and, as it passed by her, Barrett clearly observed Defendant stick his head through the window looking back at Wimberly who was lying on the ground. (Vol. 9 at 422-23) At the same time, neighbors who witnessed the shooting, Mejors and Sherrod, called the police and ran down to check on Wimberly. (Vol. 9 at 457; Vol. 10 at 658) Wimberly was still alive when Mejors and Sherrod approached him but could not speak. (Vol. 9 at 457; Vol. 10 at 659)

The police came to the King Street crime scene around 10:47 a.m. (Vol. 9 at 494, 560-61) They processed the crime scene and

collected 9mm shell casings and projectiles. (Vol. 9 at 495-96, 561)

James's stolen vehicle was recovered around 8:00 p.m., at 1628 Windle Street. (Vol. 9 at 503-07, 576) On August 8, 2008, Defendant was arrested in Polk County, Florida, and brought back to Jacksonville. (Vol. 9 at 577-78)

Carter identified Defendant and Evans as the persons who stole James's 2001 gray Crown Victoria. (Vol. 9 at 483-84, 570-73) Fingerprints from James's stolen car matched Evans. (Vol. 9 at 522-26, 576-77)

Defendant confessed that he and Evans stole James's car. (Vol. 10 at 618-19) Defendant admitted that at first, he drove James's car but that later, on Acorn Street, he allowed Evans to take the driver's seat. (Vol. 10 at 643) Defendant confessed to Roberts that he shot Wimberly and Stafford. (Vol. 10 at 729-34)

Barrett identified Defendant as the person who shot Wimberly. (Vol. 9 at 427-30, 444-45; Vol. 10 at 627-28) Barrett's description of the vehicle was consistent with that given by Sherrod and Mejors. (Vol. 10 at 645-46, 653) Ballistic examination revealed that six shell casings recovered from the Wimberly murder scene and four shell casings recovered from the Stafford murder scene were fired from the same gun. (Vol. 11 at

812-13, 818-19) Projectiles recovered from Wimberly's body matched projectiles recovered from Stafford's body. (Vol. 11 at 810-21)

As a result, Defendant was charged by indictment with the first degree murder of Monquell Wimberly (Count I), first degree murder of Patrick Stafford (Count II), attempted armed robbery of Stafford (Count III), possession of a firearm by a convicted felon (Count V), and grand theft auto (Count VI). (Vol. 1 at 32-34)

At the conclusion of the voir dire, the trial court inquired if there were any issues that parties needed to address. (Vol. 8 at 350, 356) The parties informed the trial court that there were no such issues. (Vol. 8 at 350, 356) The State explained that the parties had met, reviewed the evidence and would be stipulating that all the exhibits be admitted into evidence. (Vol. 8 at 350-52) The State specifically noted that the evidence included a redacted video of Defendant's interrogation. (Vol. 8 at 353) The State noted that it intended to announce the stipulation and admit the evidence immediately prior to the opening statement. (Vol. 8 at 359-60) The following day, the State did so. (Vol. 8 at 364-65)

Dtalya Barrett testified that she could not see the driver

of the subject vehicle. (Vol. 9 at 422, 434) The distance between her and the vehicle was between 10 and 12 feet. (Vol. 9 at 424-25) Barrett stated that she initially described the shooter as a black man, with dreads and no facial hair. (Vol. 9 at 425-26)

When the police arrived to the crime scene, Barrett spoke to the detectives. (Vol. 9 at 434-45) However, after speaking to the police, she ran off because she was concerned for her safety and that of her children. (Vol. 9 at 435) She explained that she believed that anyone who would kill a minor in broad daylight was also capable of killing a witness or her family. (Vol. 9 at 435) Defendant did not object to this testimony. (Vol. 9 at 435)

The day after the shooting, Barrett contacted the police and cooperated in the investigation. (Vol. 9 at 435-36) She went to the police station where she was shown photographs of individuals who generally matched her description of the assailant. (Vol. 9 at 426, 436) She made no identification but informed the detective that one photo showed a person who shared the same facial features and a hairstyle as the shooter. (Vol. 9 at 426-27, 436)

On August 14, 2008, Barrett returned to the police station, where detectives showed her a photo spread. (Vol. 9 at 427-28)

Barrett identified Defendant as the shooter and signed the photo she identified. (Vol. 9 at 427-28) She also identified Defendant in the courtroom as the person who shot Wimberly. (Vol. 9 at 429) She had no doubt in her mind that she made an accurate identification of Defendant. (Vol. 9 at 430) She explained that she had approximately four to five seconds to look at Defendant's face as the vehicle drove past her. (Vol. 9 at 430) Barrett further identified a photograph of the vehicle she saw during the course of the shooting. (Vol. 9 at 431) She did not look at the tag of the vehicle and was not able to identify it. (Vol. 9 at 432)

On cross, Barrett testified that she could not see the color of the gun nor if anybody was in the backseat. (Vol. 9 at 439-41) Barrett could not remember how many doors the vehicle had and could not see the license plate. (Vol. 9 at 440-41)

On redirect, Barrett testified that when the vehicle passed by her, she could clearly see Defendant's face because he was looking back through the window towards the victim. (Vol. 9 at 444-45) She explained that she was focused on Defendant's face because she wanted to make sure he would not come and kill her. (Vol. 9 at 445-46) Defendant did not object to this testimony. (Vol. 9 at 445-46)

Khalilah Mejors testified that, on July 20, 2008, she lived at Hollybrook Apartments. (Vol. 9 at 448) Her apartment was on the third floor facing the main street. (Vol. 9 at 448-49) Mejors described the vehicle she saw during the course of the shooting, as a dark gray Ford Crown Victoria or Mercury. (Vol. 9 at 450-51) Mejors could not see the occupants inside the vehicle. (Vol. 9 at 451) She observed the arm of the shooter as he extended it through the window and stated that it was the arm of an African-American male. (Vol. 9 at 452) The gun appeared to be black and similar to a Glock. (Vol. 9 at 452-53)

Willie Lee Carter, Jr., testified that on August 7, 2008, he met with Detective Bowers, who showed him a photo array for identification. (Vol. 9 at 479) Carter identified Defendant as the person who jumped into the driver's seat of James's car and drove off. (Vol. 9 at 480–83) He confirmed that he knew Defendant and Evans from the neighborhood so that he was able to make a positive identification. (Vol. 9 at 483–84)

On cross, Carter testified that he had felony convictions. (Vol. 9 at 485-86) He did not see the gun. (Vol. 9 at 490)

On redirect, Carter admitted that he was currently serving a 12 year sentence for sale of cocaine. (Vol. 9 at 490) The sentence was the result of a negotiated plea that had nothing to

do with his identification of Defendant and Evans. (Vol. 9 at 491) When he made the identification, he did not have any charges pending against him. (Vol. 9 at 491)

Detective J.A. Gay testified that he was involved in the investigation of the incident at Hollybrook Apartments. (Vol. 9 at 493) Gay photographed the crime scene and collected shell casings and projectiles. (Vol. 9 at 495-503) On July 22, 2008, Gay processed the vehicle connected with the shooting for latent prints. (Vol. 9 at 503-06)

The parties stipulated that DNA swabs collected by Detective Gay from the gray Crown Victoria were submitted to FDLE for DNA testing and that said testing concluded that no DNA was found on the swabs for comparison purposes. (Vol. 9 at 514-15)

Richard Kocik, a latent print examiner with JSO, testified that he examined four latent fingerprint cards lifted from the left rear door and the trunk area of the Crown Victoria and determined that they matched codefendant Evans. (Vol. 9 at 522-26) Kocik examined two additional latent fingerprint cards, but they were of no value for identification. (Vol. 9 at 521-22)

Chaeva Powell testified that, in July of 2008, she was in a five year relationship with Rashard Evans. (Vol. 9 at 532) She also knew Defendant because he was in a relationship with her

sister. (Vol. 9 at 533)

When the prosecutor asked Powell if Evans called her from the jail after he was arrested and asked her to relay a message, Defendant objected on hearsay grounds. (Vol. 9 at 533) The State argued that the statement was a verbal act and suggested a proffer. (Vol. 534)

During the proffer, Powell testified that after Evans was arrested, she talked to him by phone from her sister's apartment. (Vol. 9 at 534) Defendant was also present. (Vol. 9 at 534) During the conversation, Evans asked Powell to tell Defendant "to get rid of the package." (Vol. 9 at 535) Powell relayed this message to Defendant and asked him "what the package was." (Vol. 9 at 535) Defendant responded that the package was a gun. (Vol. 9 at 535) Powell stated that Defendant did not tell her anything further about "the package." (Vol. 9 at 536)

The State argued that Evans's statement was a verbal act, not offered for the truth of the matter asserted, and its content was irrelevant. (Vol. 9 at 537, 542-43, 545) The State also argued that Evans's statement was introduced only because of Defendant's subsequent response, which constituted an admission by a party opponent. (Vol. 9 at 537, 542-45) Defendant argued that the admission of Evans's statement presented a Bruton

violation, that the statement was offered for the truth of the matter asserted and that it implied Defendant's involvement in the murder and possession of the gun. (Vol. 9 at 539, 546) Defendant conceded that Powell's statement to Defendant and Defendant's response were not hearsay statements. (Vol. 9 at 547) The trial court overruled Defendant's objection. (Vol. 9 at 548) The trial court reasoned that it was irrelevant whether Evans's statement was true or not and that "what is relevant was the defense's response, and that's the only reason the statement's coming in. Therefore, it's an admission-on the second level, it's admission against interest by the defendant and therefore it's coming in." (Vol. 9 at 548)

Powell then testified before the jury that after Evans was arrested, he called her from the Duval County Jail and asked her to tell Defendant "to get rid of the package." (Vol. 9 at 551) Powell immediately relayed the message to Defendant. (Vol. 9 at 550-51) Powell asked Defendant what "the package" was, and Defendant responded that it was a gun. (Vol. 9 at 552) Powell stated that Defendant and Evans were members of PYC gang. (Vol. 9 at 552)

On cross, Powell testified that she did not remember the exact date of the subject conversation. (Vol. 9 at 553-54)

On redirect, Powell stated that the conversation occurred sometime in July or August of 2008. (Vol. 9 at 554)

Detective Bobby Bowers Sr. testified that in July of 2008 he was assigned to the homicide unit with JSO. (Vol. 9 at 558) He was the lead detective in Wimberly's murder and assisted in the investigation of Patrick Stafford's murder. (Vol. 9 at 559-60) On July 20, 2008, around 10:00 a.m., Bowers came to the Wimberly murder crime scene and immediately noticed Wimberly's body lying alongside the street. (Vol. 9 at 560-61) Nine millimeter shell casings and projectiles were collected from the crime scene. (Vol. 9 at 561) A 9mm caliber weapon was also used in the murder of Stafford. (Vol. 9 at 562)

At the crime scene, he saw a witness Barrett but did not speak to her that day because she disappeared. (Vol. 9 at 563-64) Barrett called Bowers the next morning and came to the police station, where she was interviewed. (Vol. 9 at 563-64) Bowers showed Barrett a series of general photographs from a computer database for identification. (Vol. 9 at 565-66) Barrett pointed at one individual and said that he had the same facial features and hairstyle, but she never identified that person as the shooter. (Vol. 9 at 566)

During the course of the investigation, he learned that a

gray Crown Victoria was stolen in the parking lot of Prime Stop Food Store. (Vol. 9 at 566-67) The description of the stolen vehicle matched witnesses' descriptions of the vehicle used in the shooting of Wimberly. (Vol. 9 at 567) The murders of Wimberly and Stafford and the car theft at the parking lot of the Prime Stop Food Store occurred within a mile of each other. (Vol. 9 at 568-69)

During the course of the investigation of the car theft, Bowers spoke to the victim, Dorsette James (who has since died of unrelated causes), and Willie Carter. (Vol. 9 at 569) Bowers showed Carter a photo array that included pictures of Evans and Defendant. (Vol. 9 at 570-71) Carter identified Evans as the individual who jumped into the passenger seat of the stolen vehicle. (Vol. 9 at 572-73)

Bowers obtained a surveillance video of the interior of the Prime Stop Food Store from July 20, 2008. (Vol. 9 at 574-75) Defendant and Evans were visible on the video just before the carjacking. (Vol. 9 at 575-76)

James's car was recovered on July 20, 2008, around 8:00 p.m., on Windle Street. (Vol. 9 at 576) Bowers requested that the vehicle be processed for possible fingerprints and DNA. (Vol. 9 at 576) The fingerprints obtained from the vehicle matched

Evans's fingerprints. (Vol. 9 at 576-77) As a result, arrest warrants were issued for Defendant and Evans on auto theft charge. (Vol. 9 at 577)

Bowers testified that he requested the assistance of a career criminal team in capturing Defendant. (Vol. 9 at 577-78) Defendant did not object to this testimony. (Vol. 9 at 578) However, outside of the presence of the jury, the trial court sua sponte expressed its concern that the jury could have inferred from that testimony that Defendant was a career criminal. (Vol. 9 at 582-83) Defense informed the court that they would not ask for a mistrial. (Vol. 9 at 583-84) Rather, the defense suggested that this issue be resolved by clarifying to the jury that a career criminal team was a unit within the Sheriff's office and that Defendant was not considered a career criminal because this unit helped in his capture. (Vol. 9 at 583-84) As such, the trial court requested a proffer. (Vol. 9 at 585-88) During the proffer, Bowers testified that Defendant was not a career criminal and that career criminal team was a name of the unit within the Sheriff's Office. (Vol. 9 at 588-90) The defense agreed that this testimony be published to the jury and informed the trial court that no further instruction or clarification would be necessary. (Vol. 9 at 589, 593)

After resolving this issue, and while the jury was still out, the trial court requested a proffer of Defendant's post-Miranda statements to avoid any issue about its admissibility. (Vol. 9 at 589-90) The State responded that it did not intend to elicit testimony from Bowers regarding the content of the statement. (Vol. 9 at 590-91) Instead, it planned to play a video of the interrogation that the parties had stipulated into evidence during voir dire. (Vol. 9 at 590-91) It noted that the defense had viewed the video before entering the stipulation and that redactions had been made. (Vol. 9 at 592) Defendant acknowledged his stipulation and agreement to proceed in this manner. (Vol. 9 at 591) As such, the trial court withdrew its request for a proffer. (Vol. 9 at 592-93)

When the jury returned, Bowers testified that the career criminal unit within the SWAT team helped in capturing Defendant. (Vol. 9 at 594) He explained that Defendant was not a career criminal and that he was referring to the name of the unit. (Vol. 9 at 594)

On August 12, 2008, he and Detective Warkentien conducted an interview with Defendant. (Vol. 9 at 596-98) A redacted video of this interview was published before the jury. (Vol. 9-10 at 596-625) The tape showed that Defendant initially denied any

knowledge of, or participation in, the crimes. (Vol. 10 at 618-19) However, when shown a photo of himself taken from the store video, Defendant admitted that he and Evans stole the car. (Vol. 10 at 613-16) He continued to deny his involvement in the murder of Wimberly. (Vol. 9-10 at 596-625)

Bowers testified that he showed a photo array to Dtalya Barrett and that she identified Defendant as the shooter. (Vol. 10 at 627-28) Barrett told Bowers that Defendant's hair was different in the picture than on the day of the shooting. (Vol. 10 at 628-29) During the course of the investigation, Bowers submitted shell casings and projectiles collected from both murder scenes to FDLE crime lab for the analysis. (Vol. 10 at 630-31)

On cross, Bowers confirmed that the video of Defendant's interview that was played to the jury showed the complete interaction between him and Defendant that occurred after Defendant was arrested, except for the portions that were redacted for the trial purposes. (Vol. 10 at 637) Bowers stated that interaction between him and Barrett was not taped. (Vol. 10 at 637) During the interview, Defendant admitted that at first he drove James's car, but that later, Evans took the driver's seat. (Vol. 10 at 642)

Bowers met with Michael Roberts, who was previously incarcerated with Defendant in Duval County Jail. (Vol. 10 at 639-40) They spoke about conversations Defendant and Roberts had while they were in jail together. (Vol. 10 at 639-40)

On redirect, Bowers testified that Barrett's description of the vehicle was consistent with that given by Mejors. (Vol. 10 at 646)

Kieva Sherrod testified that on July 20, 2008, she lived in Hollybrook Apartments, on the third floor, with a balcony facing King Street. (Vol. 10 at 651-52) Sherrod was not able to see a tag number of the vehicle involved in the shooting. (Vol. 10 at 656) She identified a photograph of the car she saw during the course of the shooting. (Vol. 10 at 660)

Detective Howard Smith testified that he collected six 9 mm shell casings found at the Stafford murder scene and marked and preserved each of them separately. (Vol. 10 at 701-04)

Michael Roberts testified that in July of 2009, he was incarcerated at the Duval County Jail. (Vol. 10 at 715) Roberts shared a cell with Defendant and Danny James. (Vol. 10 at 716-18) After some time, Roberts and Defendant started to get closer and shared information about each other's cases. (Vol. 10 at 719) Defendant asked Roberts about the significance of eyewitness

testimony, and Roberts advised him that eyewitness testimony would be crucial at trial. (Vol. 10 at 720) Roberts helped Defendant do his taxes. (Vol. 10 at 724)

Defendant admitted to Roberts that he and Evans shot Stafford after he resisted a robbery attempt. (Vol. 10 at 728-31) Roberts testified that he heard Defendant said to other inmates, "I shot that fuck nigger on the bike from West Jax." (Vol. 10 at 732) Sometime later, Defendant and Roberts talked again about Defendant's case. (Vol. 10 at 732-33) Defendant confessed to Roberts that he and Evans shot Wimberly. (Vol. 10 at 732-33) Defendant explained that he was in the passenger seat while Evans was driving. (Vol. 10 at 733) Defendant asked Roberts to kill a woman who saw him murdering Wimberly and offered $10,000 from his and Evans's tax return as a payment for that service. (Vol. 10 at 735-36) Roberts said that he would think about it because he did not want to look weak. (Vol. 10 at 736)

Roberts was released in December of 2009, as the charges against him were dropped. (Vol. 10 at 737-38) He did not divulge the content of the conversations with Defendant before his charges were dropped. (Vol. 10 at 738-39) Neither he nor his attorney ever spoke about the subject conversations with Defendant with anyone from the State before the release. (Vol. 10

at 738-39)

In May of 2010, Roberts was arrested in Nassau County and charged with the burglary. (Vol. 10 at 739) In June of 2010, he contacted the State Attorney's office, through his girlfriend, about the statements because he was facing 30 years in prison and wanted to get his charges reduced. (Vol. 10 at 7441) The State did not promise him anything in relation to the charges against him and the sentence he might have received in return for his testimony. (Vol. 10 at 742) At the time he testified against Defendant, Roberts had pled guilty to the burglary charges and was awaiting the sentencing. (Vol. 10 at 741-42)

Roberts testified that everything he knew about the subject murders, he learned from Defendant himself. (Vol. 10 at 742-43) Defendant had never given Roberts any of his paperwork to read. (Vol. 10 at 742-43)

On cross, Roberts testified that he was hoping that his testimony against Defendant would be taken into consideration at his upcoming sentencing hearing. (Vol. 10 at 746-47) Roberts admitted that he had nine previous felony convictions. (Vol. 10 at 745) Roberts said that, hypothetically, it would have been possible to read your cellmate's paperwork when he was not in his cell. (Vol. 10 at 752-54)

On redirect, Roberts testified that he had never read Defendant's paperwork. (Vol. 10 at 763) Roberts did not have any access to Defendant's paperwork after he left the Duval County Jail in December of 2009. (Vol. 10 at 763) He also did not have any access to Defendant's paperwork when he decided to come forward and share the information with the law enforcement. (Vol. 10 at 764) Roberts confirmed that everything he testified about came from Defendant directly. (Vol. 10 at 766)

Dr. Valerie Rao, a forensic pathologist, testified that, she performed an autopsy of Patrick Stafford. (Vol. 10 at 775) She found a gunshot wound where the bullet entered Stafford's right thigh and came out of his right buttock. (Vol. 10 at 777-78) Dr. Rao observed an entrance wound at the back of Stafford's shoulder. (Vol. 10 at 779) That bullet was recovered from the right arm. (Vol. 10 at 779) There was also an entrance wound above the left buttock and exit wound beneath the right nipple. (Vol. 10 at 780) She observed a bullet entrance on the inside of the right arm. (Vol. 10 at 782) That bullet was recovered from the right forearm. (Vol. 10 at 782) Dr. Rao found an entrance wound on the right forearm and an exit wound on the wrist. (Vol. 10 at 782-83) Dr. Rao opined that the cause of death of Stafford was multiple gunshot wounds and the manner of death was a

homicide. (Vol. 10 at 784-85)

Dr. Rao also performed an autopsy of Monquell Wimberly. (Vol. 10 at 786-87) Dr. Rao found a gunshot wound where a bullet entered Wimberly's back. (Vol. 10 at 787-88) That bullet was recovered from the right humerus. (Vol. 10 at 787-88) She found a gunshot wound where a bullet entered the back and exited through the top of the left shoulder. (Vol. 10 at 788-89) There was an entrance wound on the back, more toward the left side, and an exit wound on the right chest area. (Vol. 10 at 789-90) Dr. Rao observed an entrance wound on the back and an exit wound on the right side of the chest. (Vol. 10 at 789-90) Another bullet entered the left buttock and exited the right thigh. (Vol. 10 at 791-92) Dr. Rao found an entrance wound on the right buttock and an exit wound on the right thigh. (Vol. 10 at 792-93) There was a graze wound to Wimberly's right calf where a bullet never entered the calf. (Vol. 10 at 793) She also found a wound on the inner part of the right arm where a bullet never entered the body. (Vol. 10 at 793) Dr. Rao opined that the cause of death of Monquell Wimberly was multiple gunshot wounds and the manner of death was a homicide. (Vol. 10 at 794-95)

David Warniment, a firearms examiner with FDLE, testified that he examined six shell casings and two projectiles that were

recovered from the Wimberly murder scene and three projectiles recovered from Wimberly's body. (Vol. 11 at 808-09) Warniment also examined four shell casings recovered from the Stafford murder scene and two projectiles recovered from Stafford's body. (Vol. 11 at 808-22) He determined that all but two of the shell casings from the Stafford murder scene and one of the projectiles from Stafford's body came from a 9mm Luger. (Vol. 11 at 821-23) The shell casings and projectile that did not match came from a second gun. (Vol. 11 at 821-22) As a result, Warniment opined that two guns were used in Stafford's murder (Vol. 11 at 821-22, 825)

On cross, Warniment testified that although he opined that two firearms were used in the Stafford murder, he could not tell who held those firearms, whether there were two individuals holding those firearms or whether there was one individual holding two firearms. (Vol. 11 at 831-32)

After both sides had rested their case but before closing argument, Juror Nugent indicated she needed to address the court. (Vol. 11 at 913-14) Outside the presence of the other jurors, Nugent informed the trial judge that, alternate juror Bostic told her that she believed Defendant was guilty during a bus ride to the parking lot the previous afternoon. (Vol. 11 at 915-16)

Nugent said that she was not influenced by Bostic's statement and that she had not mentioned anything to other jurors. (Vol. 11 at 915-16, 918) She did not know whether other jurors could have heard Bostic's statement. (Vol. 11 at 917-18) However, it was noisy on the bus, and Bostic was talking only to her. (Vol. 11 at 917-18) Moreover, she did not observe Bostic speaking to any other jurors. (Vol. 11 at 917-18) When the trial court offered to question Nugent further, the parties declined. (Vol. 11 at 917-18) The trial judge instructed Nugent not to mention anything to the other jurors. (Vol. 11 at 918)

The trial judge decided sua sponte to question Bostic about her alleged conduct. (Vol. 11 at 928-29) Bostic denied that she ever made the subject statement. (Vol. 11 at 929-30) On questioning by the State, Bostic denied even having formed a fixed opinion. (Vol. 11 at 930) Defendant declined to question Bostic. (Vol. 11 at 931)

When the trial court started to discharge Bostic without hearing argument, the State objected. (Vol. 11 at 931) Outside the jurors' presence, the State argued that because of the conflict in testimony between Nugent and Bostic, it believed they both should be excused. (Vol. 11 at 932-33) Defendant responded that neither should be excused and that Bostic should be made the

last alternate instead. (Vol. 11 at 933) After further argument, the trial court indicated that he believed that Nugent was more likely to have been truthful and that Bostic repeating the conduct was a concern. (Vol. 11 943-44) As such, it excused Bostic and retained Nugent. (Vol. 11 at 943-45) At no point during the discussion of this issue did Defendant ever request that other jurors be questioned or excused. (Vol. 11 at 914-15)

After deliberating, the jury returned a verdict of guilty of first degree murder of Monquell Wimberly as to Count I, guilty of first degree murder of Patrick Stafford as to Count II, guilty of attempted armed robbery as to Count III, and guilty of grand theft auto as to Count VI. (Vol. 12 at 1121-23, Vol. 3 at 572-79) The jury specifically found the Stafford murder was a felony murder. (Vol. 12 at 1121-23)

Before sending the jury for additional deliberations as to Count V, possession of a firearm by a convicted felon, the State moved into evidence a stipulation that was previously prepared by the parties. (Vol. 12 at 1129-30) The trial judge read the stipulation to the jury, which stated that Defendant had been previously convicted of a felony offense. (Vol. 12 at 1130) The jury returned a verdict of guilty as to Count V. (Vol. 12 at 1155)

At the penalty phase, Officer Dwayne Crouch of JSO testified that he was assigned to perform a follow-up investigation related to a January 15, 2001 shooting at the Jacksonville Landing area. (Vol. 13 at 42-43) During the investigation, Crouch talked with Christopher Wakefield, the 15 years old victim. (Vol. 13 at 43) Crouch learned that there were two altercations inside the Landing, one in the game room on the second floor and another one in a small food court downstairs. (Vol. 13 at 43-44) The groups that were involved in the incident were removed by the security. (Vol. 13 at 44) When one group was leaving in a vehicle, a shooting occurred. (Vol. 13 at 44) Wakefield got shot while he was sitting in the back right side of the vehicle. (Vol. 13 at 44) After he completed the investigation, Crouch arrested Defendant in relation to the shooting. (Vol. 13 at 45-46)

On cross, Crouch testified that according to the police report, Wakefield reported that he was walking when he suddenly got shot. (Vol. 13 at 49) Crouch testified that he ultimately determined that Defendant was responsible for the shooting. (Vol. 13 at 49) Defendant was 14 years old at the time of the arrest. (Vol. 13 at 49) The State and the defense stipulated that on June 22, 2001, Defendant was convicted of aggravated battery and shooting or throwing deadly missiles as a result of this arrest.

(Vol. 13 at 50)

Monique Hodge, Wimberly's mother, and Frankie Johnson Sr., Stafford's father, read victim impact statements to the jury. (Vol. 13 at 53-59)

Juwaun Newkirk testified that Defendant was his uncle and that they always had a very good relationship. (Vol. 13 at 62-63) After Defendant got out of the prison, he came to live with Newkirk and his family. (Vol. 13 at 63) Newkirk and Defendant used to spend time together. (Vol. 13 at 63) Defendant gave Newkirk $5 for doing well in school. (Vol. 13 at 64)

Alonzo Adams, Defendant's cousin, testified that Defendant was a happy guy and fun to be around. (Vol. 13 at 65) Adams kept in contact with Defendant when Defendant was at prison. (Vol. 13 at 66)

Chiquita Adams, Defendant's cousin, testified that she and Defendant were very close. (Vol. 13 at 68) When Adams' mother was sick, Defendant helped her take care of her mother. (Vol. 13 at 68) Adams and Defendant stayed in contact after he went to prison. (Vol. 13 at 69)

Curtiayanna Tompkins testified that she met Defendant in 2008, at the local county jail when she was visiting her brother. (Vol. 13 at 70-71) Tompkins and Defendant continued to stay in

touch through letters and phone calls. (Vol. 13 at 71) She would like to continue her relationship with Defendant. (Vol. 13 at 71)

On cross, Tompkins explained that she met Defendant after he got arrested for the first degree murder charges and that outside of visiting Defendant in jail setting, she did not know him and had no relationship with him. (Vol. 13 at 72)

Bessie Walker, Defendant's grandmother, testified that Defendant spent a lot of time at her house over a period of years because Defendant's mother was a drug and alcohol addict. (Vol. 13 at 74) Defendant respected Walker and helped her around the house. (Vol. 13 at 74) When Defendant was 13 years old, he started to "run the streets" and associated with people Walker disliked. (Vol. 13 at 75) Defendant went to the prison when he was 14 years old. (Vol. 13 at 75-76)

On cross, Walker testified that she had warned Defendant about associating with a "wrong crowd." (Vol. 13 at 77) Other people also had offered counseling and guidance to Defendant. (Vol. 13 at 77) On redirect, Walker testified that Defendant's father passed away when Defendant was five or six years old. (Vol. 13 at 78)

Kathryn Lunford, Defendant's mother, testified that she always had a close and loving relationship with Defendant. (Vol.

13 at 79) Lunford had struggled with alcohol and drug dependence over a period of time. (Vol. 13 at 79-80) During that time period, Lunford could not take care of her children so she sent them to live with their grandmother. (Vol. 13 at 80) Lunford and Defendant's father broke up when Defendant was six months old. (Vol. 13 at 81) Defendant's father died when Defendant was eight years old. (Vol. 13 at 81) Defendant's stepfather passed away in 2008. (Vol. 13 at 82) In March of 2008, Defendant got shot in a drive-by shooting. (Vol. 13 at 82) Defendant's best friend, Joshua Swan, was murdered in June of 2008. (Vol. 13 at 83)

Quintina Sheppard, Defendant's sister, testified that she and Defendant were extremely close. (Vol. 13 at 84) When Defendant and Sheppard went to live with their grandmother, they did not spend much time with their mother, which was hard for them. (Vol. 13 at 85-86) By the time Defendant turned 14, Sheppard and Defendant were changing their residence every couple of months. (Vol. 13 at 86-87) In 2007, when Defendant came back from prison, he started to behave differently. (Vol. 13 at 89) He would not sleep in the dark and would barricade himself in his bedroom. (Vol. 13 at 89) When Defendant's best friend was gunned down in 2008, Defendant took that very hard. (Vol. 13 at 90)

On cross, Sheppard testified that when Defendant came back

from prison, he violated his probation and went back to prison. (Vol. 13 at 93)

After deliberating, the jury recommended that the trial court impose a death sentence upon Defendant by a vote of 8-4, for the murder of Monquell Wimberly (Count I). (Vol. 13 at 174-75) As to the murder of Patrick Stafford (Count II), the jury recommended that the trial court impose life imprisonment without the possibility of parole upon Defendant. (Vol. 13 at 174-75)

At the Spencer hearing, the State and Defendant submitted their sentencing memoranda. (Vol. 6 at 1097-1162; Vol. 4 at 609-24) The State submitted three additional victim impact statements prepared by Patrick Stafford, Jr., Stafford's son, Vonette Nixon, Wimberly's aunt, and Tangela, Wimberly's sister. (Vol. 4 at 625-27)

Defendant submitted nine statements prepared by Quintina Sheppard, Bessie Walker, Chiquita Adams, Kathryn Lunford Walker, Margaret Cummings, Defendant's aunt, Cheryl Cummings, Defendant's cousin, Muffin, Defendant's cousin, and Marva Hendrix, a family friend. (Vol. 4 at 627-627-41) In her statement, Bessie claimed that when Defendant was born he was not like other kids, something was wrong with him. (Vol. 4 at 628) She tried to get Defendant into a special program but could not help him much.

(Vol. 4 at 628) Defendant helped his family when needed. (Vol. 4 at 629)

Kathryn averred that Defendant was a slow kid who did not learn to talk until he was four years old. (Vol. 4 at 633) He lost his father when he was 8 years old and became depressed. (Vol. 4 at 633) In February of 2008, Defendant lost his step-father to cancer and that same year he was shot in a drive-by shooting. (Vol. 4 at 633) In 2008, Defendant's best friend was shot in a drive-by shooting. (Vol. 4 at 634) Kathryn claimed Defendant had a low IQ and was easily manipulated by others. (Vol. 4 at 634) Margaret Cummings stated that Defendant went to prison when he was very young and never finished school. (Vol. 4 at 635-36)

The trial court agreed with the jury's recommendation and imposed a death sentence for the Wimberly murder, a life sentence for the Stafford murder, a life sentence for the Attempted Armed Robbery, 15 years imprisonment, with a three year mandatory minimum sentence, for Possession of a Firearm by a Convicted Felon and 5 years imprisonment for Grand Theft Auto. (Vol. 4 at 656-78) The Court found one aggravator: Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person based on Defendant's

contemporaneous murder conviction and two prior violent felonies-great weight. (Vol. 4 at 663-65) The Court found one statutory mitigator: the age of Defendant at the time of the crime-little weight. (Vol. 4 at 666-67) The Court found the following non-statutory mitigators: Defendant is a loving brother, son, grandson, and friend-little weight; Defendant is capable of establishing and maintaining bonds with others-little weight; Defendant is friendly/good with family members, animals, and children-little weight; Defendant always has a desire to help his family members especially when they are sick-little weight; Defendant has shown concern regarding family members and how they have had to endure his arrest and trial and can still continue to have a positive impact on the people close to him-little weight; Defendant's mother abused alcohol and drugs during his childhood forcing him to live with his grandmother who had responsibilities of her own-some weight; Defendant was forced to witness frequent and on-going violence as a very young child-some weight; Defendant has a limited education-little weight; Defendant suffered from poverty-slight weight; Defendant lost his father at a very young age-some weight; Defendant entered the penal system treated as an adult at 14 years of age and Defendant spent what should have been his high school years behind adult prison

bars-some weight; Defendant was intoxicated at the time of the offense-very slight weight; Defendant is amenable to a productive life in prison-slight weight; Defendant suffered from mental disabilities that caused him to develop at a slower pace than other children his age and resulted in people taking advantage of Defendant-slight weight; and Defendant suffered three devastating hardships in the months leading up to his arrest for the instant offense, including the death of his stepfather-little weight, Defendant being shot and his best friend being murdered-no weight. (Vol. 4 at 667-76) The trial court found that the following two mitigating circumstances were not established: Defendant lacked any productive role models and Defendant's mother did not permit his father to have a meaningful relationship with him. (Vol. 4 at 670-72) The trial court found that the mitigating circumstances were insufficient in weight to outweigh the one aggravating circumstance, which has been proven beyond a reasonable doubt. (Vol. 4 at 676)

This appeal follows.

## SUMMARY OF THE ARGUMENT

The trial court properly admitted the nonhearsay testimony regarding Evans's statement. The statement was not admitted to prove the truth of the matter asserted but to show its effect on Defendant and give legal significance to Defendant's subsequent statement, which was admissible as an admission of a party opponent. Because Evans's statement was not admitted for its truth and Defendant's statement was an admission by a party opponent, no Confrontation Clause violation occurred.

The issue regarding the jury viewing a video recording of Defendant's police interview was not preserved. Bower's statements were admitted not for their truth but for the effect they had on Defendant. Bower's questions and statements provoked relevant responses from Defendant because he confessed to stealing James's car. That confession implicated Defendant in the Wimberly and Stafford murders. The video was also admissible to provide the jury with relevant evidence to evaluate the voluntariness of Defendant's confession. Defendant did not meet his burden to show fundamental error occurred.

The issue regarding the alleged premature jury deliberations was not preserved. No premature deliberations occurred. Further, the trial judge did not abuse its discretion in dealing with

allegations of Bostic's misconduct.

The issue regarding the admission of Barrett's testimony was not preserved. Barrett's statements were admissible because they were directly relevant to her credibility. There was no golden rule violation. No fundamental error occurred.

The trial court did not abuse its discretion in assigning little weight to the age mitigator. Defendant's sentence is not disproportionate to Evans's sentence as a matter of law. Defendant's death sentence is proportionate. When the facts as found by the trial court are considered, this Court has affirmed death sentences in similar cases.

Defendant's convictions are supported by competent, substantial evidence.

## ARGUMENT

### I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE NONHEARSAY TESTIMONY REGARDING THE STATEMENT OF CO-DEFENDANT EVANS.

Defendant asserts that the trial court erred in admitting Powell's testimony about Evans's statement because it was hearsay not subject to a valid exception and violated his confrontation rights. Defendant also contends that Defendant's subsequent statement to Powell was not admissible as a statement against penal interests. However, the trial court did not abuse its discretion[1] in admitting this evidence.

As this Court has long recognized, testimony about information said to a defendant for its effect on the defendant and to explain his own subsequent statements or actions are not hearsay at all. In Breedlove v. State, 413 So. 2d 1, 6-8 (Fla. 1982), this Court held that merely because an out-of-court statement is inadmissible to prove the truth of the matter asserted does not mean it is inadmissible for another purpose. See also Blackwood v. State, 777 So. 2d 399, 407 (Fla. 2000).

Here, the testimony of Powell regarding Evans's statement in which he asked Powell to tell Defendant to "get rid of the package" was admitted to show the effect on Defendant and not for

1 The admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 611 (Fla. 2000).

the truth of the matter contained in the statement. Evans's statement was solely important because of Defendant's response to the statement, that the "package" was a gun, which statement was admissible as an admission by a party opponent. Moreover, Evans never said that Defendant should get rid of a gun. As Evans's statement only referred to the "package," the subsequent statement made by Defendant implies that he knew that the "package" Evans was referring to was actually a gun. As such, Evans's statement was admissible to show solely that the statement was made, irrespective of its truth and to give context to Defendant's response.

Considering decisions of Florida courts under similar circumstances, the trial court properly admitted Evans's statement. For example, in Breedlove, 413 So. 2d at 6-7, the detective testified regarding statements the defendant made to him. In relating what the defendant said, the detective recited the substance of the conversation he had with the defendant's mother and brother. The defendant objected on hearsay grounds, and the trial court overruled the objection. This Court held that the testimony of the police officer concerning what the defendant's mother and brother said to him was admissible because it was admitted to show effect of those statements on the

defendant, rather than for the truth of those statements.

Similarly, in Blackwood, 777 So. 2d at 407, this Court held that the witness's statements relaying the victim's comments to the defendant about being pregnant, having abortions and not wanting to see the defendant, were not hearsay as comments were not used to prove the truth of the matter asserted but rather the effect such comments had on the defendant. This Court further held that the defendant's state of mind and knowledge were relevant to show both his motive and intent in committing the murder.

In McWatters v. State, 36 So. 3d 613, 638 (Fla. 2010), this Court held that the admission of the recording of Defendant's police interview, in which the police officer stated that declarants said that they saw the defendant leave with the victim on the night of the murder and that they thought he killed her, did not violate the Confrontation Clause where the declarants' hearsay statements were not offered for the truth of the matters asserted, and instead were offered solely to give context to the defendant's responses to the officer's questions and to set forth the circumstances in which the defendant admitted his culpability after initially denying his involvement in the murder.

In State v. McPhadder, 452 So. 2d 1017 (Fla. 1st DCA 1984),

the First District Court of Appeal reversed an order of the trial court striking certain taped statements of a confidential informant made to the defendant who was present during three purported drug transactions. The court held that "the record shows that [the informant's] statements were not being offered by the State to prove the truth of the matters asserted thereon, but instead her statements were being presented into evidence for the purpose of showing that [the defendant] engaged in the conversation with [the informant] and took part in plans to supply illegal drugs to her. Therefore, [the informants] recorded statements are not hearsay and are admissible."

In Decile v. State, 755 So. 2d 142 (Fla. 4th DCA 2000), a police officer electronically monitored a conversation between a confidential informant and the defendant wherein the informant told the defendant, "I am here, I need eight," and the defendant replied, "No problem, come inside, I get you rocks." At trial the informant did not testify, but the police officer did. The Decile court held that the police officer's testimony as to statements he heard the informant make to the defendant were admissible as verbal acts which "served to prove the nature of the act as opposed to proving the truth of the alleged statements." Id. at 1140.

Here, like in all above cited cases, Evans's statement was not offered for the truth of the matter asserted. Rather, it was offered to show the effect on Defendant and to provide context for his response. As such, the trial court did not abuse its discretion in admitting Powell's testimony.

The cases cited by Defendant for the proposition that Evans's statement was inadmissible hearsay are distinguishable on its facts from our case. In Banks v. State, 790 So. 2d 1094 (Fla. 2001), this Court held that the defendant's statement, "I need a dime," was not offered for the truth of the matter asserted, but to show that the defendant was a participant in a drug transaction. Id. at 1098. On the other hand, statements by the seller of cocaine to undercover police officer during a drug transaction, to the effect that the defendant was not a snitch and that the co-defendant and defendant had a discussion about the undercover police officer being a possible snitch were inadmissible hearsay because they did not serve to explain the nature of the act but rather directly implicated the defendant in the transaction. Id.

In McElroy v. State, 100 So. 3d 63 (Fla. 2d DCA 2001), the Second DCA held that the co-defendant's statements to the CI that the defendant would be with her at the drug transaction because

he wanted some money off the deal and that the defendant had a gun he would use if anything went wrong, were not verbal acts because it did not serve to explain the nature of the transaction or the defendant's actions but served only to prove that the defendant was a participant.

In Harris v. State, 544 So. 2d 322 (Fla. 4th DCA 1989), the statement of a CI was admitted through the testimony of a police officer that the CI told him that the defendant was supplying him with cocaine to sell. The officer then went to the location indicated by the CI, approached the defendant who was sitting in the car and saw a white blur leaving the defendant's hand and going into the car. The defendant was convicted of possession of cocaine with intent to sell. The Fourth DCA reversed the conviction and held that the statements by the CI were not verbal acts because the occurrence was complete without the statements of the confidential informant.

In Antunes-Salgado, 987 So. 2d 222 (Fla. 2d DCA 2008), a police officer testified as to the postarrest and post Miranda statements of the defendant and co-defendants when he took their statements. The police officer testified that one co-defendant told him that the defendant offered to pay the co-defendant $500 to deliver the cocaine and that the defendant gave her the

telephone number for the CI and gave her the cocaine on the morning of the transaction. The police officer testified that other co-defendants also told him that the defendant was implicated in the conspiracy. The Second DCA held that the statements were not nonhearsay verbal acts because they were only relevant to prove that the defendant had an agreement with the co-defendants to deliver cocaine to the CI. The court reasoned that had the co-defendant told the CI that the defendant would be accompanying her to the transaction, that statement would be a verbal act because it would have served to explain the defendant's presence in the back seat of the truck and might have established his involvement in the transaction. "However, none of the statements actually offered by the State at trial were relevant to explain any act by Antunes-Salgado." Id. at 227.

Unlike in Banks, McElroy, Harris and Antunes-Salgado, where the statements were introduced for the truth of the matters asserted therein, that the defendants were participants in the deals, here, Evans's statement came in to show the effect on Defendant rather than for the truth of the statement. Moreover, unlike in Banks and McElroy where the defendants did not react to the co-defendants' statements, here, the statement was admissible in order to place Defendant's subsequent statement (which

constituted an admission by a party opponent) into the context.

Defendant also asserts that the trial court abused its discretion in admitting Evans's statement to explain Defendant's subsequent admission on the basis that his subsequent statement did not qualify as a statement against penal interest. However, this argument is meritless because Defendant's own statement was admissible as an admission by a party opponent.

Admissions by a party-opponent have historically been admissible as substantive evidence. These out-of-court statements and actions are admissible, not because they were against the interests of the party when they were made, but because they are statements made by an adversary and because the adverse party cannot complain about not cross-examining himself or herself. There is no requirement under section 90.803(18), or in the reported decisions that the admissions be against a party's interest. The common name of the exception, e.g., admission, may be misleading since there is no requirement that the adversary admit anything in the statement. A more precise term for the exception is "statement by a party-opponent." An exculpatory statement of a party is admissible against the party making the statement under section 90.803(18). Charles W. Ehrhardt, Florida Evidence § 803.18, at 733–34 (1999 Edition)

Here, Defendant's statement to Powell that the "package" was a gun was Defendant's own statement and as such admissible under section 90.803(18) and not a statement against interests under section 90.804(2)(c). See Hunt v. Seaboard Coast Line R. Co., 327 So. 2d 193 (Fla. 1976) (recognizing the difference between the admission of a party and a declaration against interest: an admission is made by a party to the litigation while a declaration against interest is made by a non party; an admission comes into evidence despite the presence at trial of its author while the general hearsay rule concerning unavailability of the declarant applies in the case of declarations against interest. The statement sought to be introduced as an admission need not have been consciously against the interest of its maker at the time it occurred, while the declarant in the case of the other hearsay exception must have been aware of a risk of harm to his own interests at the time he spoke). Moreover, Defendant heard Evans's statement and knew what the "package" was. As such, Evans's statement was admitted only to show the effect on Defendant, irrespective of its truth, and to provide the context for his subsequent admission.

Defendant's assertion that admitting Powell's testimony about Evans's statement violated his confrontation rights is also

without merit.

In Crawford v. Washington, 541 U.S. 36, 59 n. 9, (2004), the United States Supreme Court recognized that the Confrontation Clause did not bar the use of other people's statements for purposes other than their truth.

Here, Powell's testimony did not violate Defendant's confrontation rights. Powell's testimony recounting Evans's statement was admitted to show the effect on Defendant and to place Defendant's statement into context, that is, that Defendant knew that the "package" Evans was referring to was a gun. The testimony was not offered or admitted to prove the truth of the matter asserted. As such, this nonhearsay use of Powell's testimony poses no confrontation clause concerns. Moreover, since Defendant's statement, that the "package" was a gun, was in fact his statement and not Evans's, Defendant's admission raises no confrontation clause concerns because Defendant cannot complain about not cross-examining himself.

In that regard, Defendant's reliance on Bruton v. United States, 391 U.S. 123 (1968), and Lilly v. Virginia, 527 U.S. 116 (1999), is meritless. In Bruton, the United States Supreme Court held that a defendant's rights under the Confrontation Clause were violated by the introduction of a non-testifying

co-defendant's confession for its truth. In Lilly, the United States Supreme Court held that the confessions made by a non-testifying co-defendant inculpating not only himself but the accused as well are inherently unreliable and not within firmly rooted hearsay exception for statements against penal interest. The Court ruled that co-defendant's custodial confession cannot be entered into evidence absent additional guarantees of trustworthiness. In the case at bar, no Confrontation Clause violation occurred because Defendant's statement that the "package" was a gun was admitted as an admission by a party opponent. In other words, here, we are not talking about the admission of statements against penal interest. Moreover, Defendant's statement was his incriminating statement and not Evans's. Furthermore, Evans's statement was not offered for the truth of the matter asserted but to show the effect on Defendant. As such, Lilly and Bruton are all inapplicable.

Even if this Court finds that the trial court erred in admitting Evans's statement, such error was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The State presented evidence that Defendant admitted that he and Evans stole James's vehicle, eyewitness testimony regarding Defendant's participation in the car theft and the murder of

Wimberly, ballistic evidence that linked Defendant to the Wimberly and Stafford murders and Defendant's admission to Roberts that he and Evans murdered Stafford after Stafford tried to resist a robbery attempt and that he shot Wimberly over a gang dispute.

During closing, the prosecutor made the following comment with reference to the statements about which Defendant complains:

> You're allowed to consider the fact that Rashard Evans told his girlfriend, Chaeva Powell, who testified before you, to tell this defendant to get rid of the package, that when she asked this defendant, well, what's the package, he told her it was a gun.

(Vol. 11 at 963) Given the substantial evidence of Defendant's guilt and the brief and ambiguous nature of the closing statement any error in the admission of Powell's testimony cannot be said to have affected the verdict and was, therefore, harmless. Defendant's conviction should be affirmed.

## II. THE ISSUE REGARDING THE JURY VIEWING A VIDEO RECORDING OF DEFENDANT'S POLICE INTERVIEW IS UNPRESERVED AND DOES NOT REQUIRE REVERSAL.

Defendant contends that the trial court erred in allowing the State to present to the jury a video recording of Defendant's police interview. Defendant asserts that during this interview the police made prejudicial accusations and improper comments on Defendant's guilt, credibility, criminal history and gang membership. Defendant further asserts that these opinions and accusations made by the police during the interrogation were designed to bolster the State's case against Defendant thereby violating his right to a fair trial. However, this issue is unpreserved and without merit.

It is well settled that to preserve an issue about the admission of evidence for appellate review, an appropriate objection must be made before the trial court. Golden v. State, 114 So.3d 404, 406 (Fla. 4th DCA 2013). Here, Defendant did not satisfy this requirement.

Defendant never objected to the admissibility of the video at all. Instead, he stipulated to the admissibility of the video during voir dire. (Vol. 8 at 350-53) He did so after reviewing the redacted version of the tape that the State planned to admit. Additionally, shortly before the video was played, the trial

court requested a proffer of the testimony regarding the interview to avoid any issues. (Vol. 9 at 589-91) Instead of raising any issue about the content of the video, Defendant again affirmatively agreed to have Defendant's confession admitted through the redacted video. (Vol. 9 at 591-93) As such the issue is not preserved.

Moreover, Defendant actually used the fact that his interaction was taped to his advantage. After eliciting the testimony from Bowers that unlike with him, nothing was taped with Barrett, Defendant used this fact to argue in closing that the jury did not see any interaction between Barrett and the police. (Vol. 11 at 978) Given that Defendant not only did not object but affirmatively stipulated to the admission of the video even in the face of the trial court's attempt to pre-screen evidence regarding the confession, Defendant invited any error. Under the invited error doctrine, a party cannot invite error at trial and then take advantage of the error on appeal. Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990); Universal Ins. Co. of North America v. Warfel, 82 So. 3d 47, 65 (Fla. 2012).

Even if the error was not invited, Defendant would only be entitled to relief if he could show that the error was fundamental. Smith v. State, 28 So. 3d 838, 857 (Fla. 2009).

Fundamental error has been defined as the type of error which 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 17, 42 (Fla. 2009). Here, Defendant cannot demonstrate fundamental error for several reasons.

As this Court has long recognized, statements made to a defendant during an interrogation that provoke an incriminating response are admissible. See McWatters v. State, 36 So. 3d 613, 638 (Fla. 2010); Jackson v. State, 18 So. 3d 1016, 1031–32 (Fla. 2009); Jones v. State, 949 So. 2d 1021, 1039 (Fla. 2006); Breedlove v. State, 413 So. 2d 1, 6-7 (Fla. 1982). This Court has applied this standard even when the statements at issue suggested that the defendant was not credible. Jones, 949 So. 2d at 1039. The rationale behind these holdings is that the officers' statements are not offered for their truth but only for the effect they had on the defendant. Breedlove, 413 So. 2d at 6-7.

Moreover, the United States Supreme Court has held that a jury cannot be prevented from considering the voluntariness of a confession even after a trial court has considered the evidence regarding the issue and found the statement voluntary at a pretrial hearing. Crane v. Kentucky, 476 U.S. 683 (1986).

Consonant with this requirement, Florida law requires that a jury to whom a defendant's confession had been presented be instructed that it can only accept the confession if they find it was voluntarily made. Fla. Std. Jury Instr. (Crim) 3.9(e). In fact, the jury in this case was given this instruction. (Vol. 3 at 564) As such, evidence bearing on the voluntariness of the confession is relevant.

Applying these standards, the tape was admissible. While Defendant attempts to act as if the officers' questions provoked no incriminating response because he did not confess to the murder, the record shows that an incriminating response was elicited. As the tape demonstrates, Defendant confessed that he and Evans stole James's car after he was confronted with pictures of himself from the store surveillance camera and the fact that he had been identified by an eyewitness. Moreover, Defendant acknowledged that he and Evans changed seats in the car shortly after it was stolen such that Defendant was seated in the passenger's seat.

While this statement may not have directly implicated Defendant in the Wimberly murder, it did so indirectly. Three witnesses identified James's car as having been used in the Wimberly murder, and two of those witnesses identified the

shooter. The Wimberly murder was committed shortly after the car was stolen a short distance from the store. Thus, by placing himself in the passenger seat of James' car, Defendant indirectly implicated himself in the Wimberly murder.

Further, the Wimberly murder was tied to the Stafford crimes through ballistic evidence. The Stafford crimes were committed shortly before the theft of James's car and in the same general area. As Roberts explained, Defendant stated that the Stafford crimes occurred when Defendant and Evans unsuccessfully attempted to steal the car in which Stafford was seated for use in the Wimberly murder. As such, by placing himself in James's car, Defendant also indirectly incriminated himself in the Stafford crimes as well.

Moreover, it should be remembered that viewing the whole tape permitted the jury to determine whether Defendant's confession was voluntary. As noted above, Defendant only admitted he stole James's car and placed himself in the passenger's seat after being confronted with the fact that the police had evidence showing that Defendant was guilty of the car theft. However, he continued to deny any involvement in the Wimberly murder. Moreover, the State's evidence showed that the Wimberly murder was committed as a form of gang retaliation. On the tape,

Defendant denied being involved in the rival gang even when confronted with the fact that he had the gang's tattoo on his arm. As such, by viewing the entire tape, the jury was able to determine that the police had not overborne Defendant's will and that his statement was voluntary.

Since Defendant did provide an incriminating response and the viewing of the whole tape allowed the jury to assess the voluntariness of this response, the admission of the tape cannot be said to have been error; much less fundamental error. Defendant's claim to the contrary should be rejected, and Defendant's convictions affirmed.

While Defendant acts as if this matter is indistinguishable from Jackson v. State, 107 So. 3d 328 (Fla. 2012), this is not true. First, in Jackson, the defendant had made a pretrial motion to exclude the tape on the grounds that its prejudicial effect outweighed its probative value. Id. at 334. While the trial court ordered certain redactions, it denied this motion and permitted the jury to hear long exchanges in which the officers' statements elicited no incriminating responses at all. Id. at 334-37. As such, this Court was concerned whether the trial court had abused its discretion in finding that exchanges that did not yield an incriminating response were more probative than prejudicial. Id.

at 339.

Here, in contrast, Defendant not only did not object to any portion of the tape on any grounds, he stipulated to the admission of the tape as redacted. Moreover, he even rebuffed the trial court's offer to determine the admissibility of what occurred during the confession when it was offered. As such, Defendant can only obtain relief if he can show he did not invite any error and the error was fundamental. Given the difference in the standard of review alone, Jackson is not applicable.

Moreover, in Jackson, the officers' questions and comments largely provoked an incriminating response. Id. at 341. Instead, the incriminating nature of Defendant's statements only arose regarding a few comments whether he lived and his daily routine at the beginning of the tape and his denial that he had ever seen the victim after being shown a photo. Id. at 340. As such, the officers' statements on the tape could not be considered to have been admitted merely for their effect on the defendant nor could they provide context to the voluntariness of a subsequent confession. See also Mohr v. State, 927 So. 2d 1031, 1032-33 (Fla. 2d DCA 2006) (state permitted to present tape of interrogation in which defendant never gave an incriminating response over objection); Sparkman v. State, 902 So. 2d 253,

256-59 (Fla. 4th DCA 2005); Pausch v. State, 596 So. 2d 1216, 1218 (Fla. 2d DCA 1992)(same).

Here, in contrast, Defendant did confess to having stolen James's car and placed himself in the passenger's seat at the time of the Wimberly murder. He did so at the end of the tape. As such, the officers' statements were relevant to both their effect on Defendant and the voluntariness of the confession. Given these difference, Jackson, Mohr, Sparkman and Pausch do not control here. The lower court should be affirmed.

Defendant's reliance on State v. Hoggins, 718 So. 2d 761 (Fla. 1998), is also misplaced. In Hoggins, this Court held that use of a defendant's post-arrest, pre-Miranda silence to impeach his trial testimony violated the right to remain silent found in the Florida Constitution. Id. at 767-70. However, as this Court has recognized, a defendant's right to remain silent cannot be violated unless the defendant actually remained silent. Hudson v. State, 992 So. 2d 96, 111 (Fla. 2008). Here, Defendant did not remain silent; he spoke. In fact, he confessed his guilt to the theft of James's car, which was a charge before the jury. Moreover, that confession incriminated Defendant in the Wimberly murder and Stafford crimes. As such, Hoggins is inapplicable.

The remaining cases relied upon by Defendant are even less

applicable. Each of these cases concerned improper comments in closing. Ruiz v. State, 743 So. 2d 1, 4-7 (Fla. 1999); Toler v. State, 95 So. 3d 913, 914-18 (Fla. 1st DCA 2012); Gomez v. State, 751 So. 2d 630, 631-32 (Fla. 3d DCA 1999). Here, the issue does not concern comments in closing. In fact, the State never even mentioned the statements from the tape that Defendant claims were improper in closing. (Vol. 11 at 953-68) Instead, the issue concerns the admission of statements made to a defendant that caused him to confess to the auto theft and implicate himself in two murders. As such, these statements were not admitted for their truth. Instead, they were admitted for effect on Defendant and to provide the jury with relevant evidence to evaluate the voluntariness of Defendant's confession. Defendant reminded the jury of the limited purpose of these statements in closing without contradiction by the State. (Vol. 11 at 991-92) Moreover, Defendant used the fact that the jury was able to see his complete interaction with the detectives but could not see the whole interaction with Barrett to his advantage. Given these circumstances, these cases do not support Defendant's position that the admission of the tape was fundamental error. The lower court should be affirmed.

This is all the more true given the other evidence presented

at trial. Defendant confessed that he stole James's car and placed himself in the passenger's seat of that car shortly before Wimberly was murdered a short distance from the murder scene. James's car was identified as being used in the Wimberly murder by three witnesses, and two of those witnesses stated that the shooter was in the passenger's seat. Barrett positively identified Defendant as Wimberly's murder. Ballistics evidence tied the Wimberly murder and the Stafford crimes. Defendant confessed his guilt of both the Wimberly murder and Stafford crimes to Roberts and admitted that the impetus behind all of Defendant's crimes that day was gang activity. Powell testified that Defendant and Evans were gang members, and the jury saw from the video that Defendant had a gang tattoo on his arm. Given these circumstances, it cannot be said that the fact the jury heard statements by the officers that were not admitted for their truth, that were not used for their truth and that the jury was told not to consider as true did not deprive Defendant of a fair trial. Defendant's claim to the contrary should be rejected, and the lower court affirmed.

## III. THE ISSUE REGARDING THE ALLEGED PREMATURE JURY DELIBERATIONS IS UNPRESERVED AND DOES NOT REQUIRE REVERSAL.

Defendant asserts that premature jury deliberations occurred when alternate juror Bostic made a comment to juror Nugent that she believed Defendant was guilty. Defendant further asserts that the trial court erred by not determining whether he had been prejudiced by the alleged premature deliberations by failing to inquire into whether other jurors overheard this comment and if they overheard it, whether they were influenced by it. Defendant further contends that Bostic's misconduct constitutes fundamental error mandating a new trial. However, this issue is unpreserved and does not merit reversal.

To preserve a claim about juror misconduct for appellate review, such claim has to be raised in a meaningful way before the trial court. James v. State, 843 So. 2d 933, 936 (Fla. 4th DCA 2003)(holding that the defendant failed to preserve for appellate review his claim that the trial court erred in denying his motion for new trial based on juror misconduct where he failed to raise such claim at trial); see also Hampton v. State, 103 So. 3d 98, 112-13 (Fla. 2012). A claim that a trial court failed to conduct an adequate inquiry regarding alleged premature jury deliberations is not preserved if the defendant did not object nor moved for a mistrial after the trial court assessed

the nature and extent of alleged deliberations and provided a remedy. United States v. Gianakos, 415 F.3d 912, 921-22 (8th Cir. 2004).

Here, Defendant did not comply with this requirement. Defendant never raised a claim of premature jury deliberations before the trial court nor did he request that other jurors be questioned at all. Moreover, after the trial judge conducted questioning of both Nugent and Bostic, Defendant did not request the removal of either of them. When the trial court decided to discharge Bostic, Defendant did not object to the trial court's remedial ruling nor moved for a mistrial. Because the argument that the premature jury deliberations occurred was raised for the first time on appeal and Defendant never made an objection nor moved for a mistrial after the trial court provided remedial measures, this issue was not preserved.

Even if this issue had been preserved, Defendant would still not be entitled to relief because no fundamental error occurred in the case at bar.[2]

No premature deliberations could have occurred in this case. Under Florida law, premature deliberations require an agreement

2 Fundamental error is defined as the type of error which "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 17, 42 (Fla. 2009).

among multiple jurors to deliberate prematurely. In Reaves v. State, 826 So. 2d 932, 943 (Fla. 2002), the defendant claimed that a trial court had erred in rejecting a claim of juror misconduct based on the assertion that one juror had expressed an opinion about the defendant's guilt prematurely with interviewing the juror. This Court rejected this claim, finding that the allegation did not show premature deliberation or any other overt action of juror misconduct. Instead, it merely showed that one juror misunderstood, or violated the court's instructions, a matter that inhered in the verdict.

In contrast, in Gray v. State, 72 So. 3d 336, 337-38 (Fla. 4th DCA 2011), an allegation of juror misconduct was found to be sufficient to merit juror interviews where it involved several jurors discussing both their opinions of the defendant's guilt and the evidence supporting the beliefs. The Court reasoned that such a discussion constituted improper, premature deliberations. Id. at 338.

Here, like in Reaves and unlike in Gray, the asserted misconduct consisted merely of Bostic expressing her opinion about Defendant's guilt to Nugent. There was no allegation of any discussion of that opinion. In fact, Nugent could not even state that any other juror heard Bostic's comment because the bus was

noisy. As such, no premature jury deliberations occurred. Rather, there was only a showing that Bostic misunderstood or violated an instruction.

Moreover, dealing with allegations of juror misconduct is left to the sound discretion of the trial court. England v. State , 940 So. 2d 389 (Fla. 2006). The review of the trial court's handling of allegations of juror misconduct is subject to an abuse of discretion standard. Marshall v. State, 976 So. 2d 1071 (Fla. 2007); Gianakos, 415 F.3d at 921-22. Any inquiry into juror misconduct must be limited to objective evidence regarding overt acts committed by or in the presence of the jury or jurors which reasonably could have affected the verdict. Powell v. Allstate Ins. Co., 652 So. 2d 354, 356 (Fla. 1995). Once a prima facie case of potential prejudice has been established with regards to juror misconduct, the burden is on the State to rebut a presumption of prejudice. Amazon v. State, 487 So. 2d 8, 11 (Fla. 1986).

Here, the trial judge acted within its discretion in dealing with allegations of Bostic's misconduct. When the trial court was put on notice of the potentially prejudicial misconduct by Bostic, it questioned Nugent and Bostic. Nugent stressed that she was not influenced by Bostic's statement and that she did not

mention anything to other jurors. She also indicated that it was noisy on the bus, that Bostic was talking only to her and that she did not observe Bostic talk to any other jurors. Bostic denied that she ever made the subject statement and insisted that she had not even formed an opinion as to Defendant's guilt. Based on this inquiry, the trial judge removed Bostic and retained Nugent. As the alleged misconduct was limited to Bostic, this was proper.

Under similar circumstances, the courts refused to reverse the conviction. In Gianakos, 415 F.3d at 921-22, the defendant argued that the district court failed to adequately investigate potential juror misconduct when one juror allegedly mouthed to another during the trial, before the jurors had been told to deliberate, that the defendant was "guilty." When the district court was put on notice of the potential misconduct, it summoned the parties. After assessing the nature and extent of the jurors' misconduct, the court admonished the jury. The defendant did not object to the court's remedial measure nor moved for a mistrial. The Eight Circuit held that the district court did not commit plain error in choosing not to inquire further into an alleged juror misconduct, where the district court, in instructing the jurors not to prematurely deliberate and to report anyone among

them who did, provided remedy consistent with the defendant's request.

The cases cited by Defendant are distinguishable from this case. Williams v. State, 793 So. 2d 1104 (Fla. 1st DCA 2001), Ramirez v. State, 922 So. 2d 386 (Fla. 1st DCA 2006), and Gray v. State, 72 So. 3d 336 (Fla. 4th DCA 2011), all concerned a scenario where multiple jurors engaged in improper discussions of the case during the trial and expressed their opinion of the defendants' guilt before hearing all the evidence. Moreover, in Ramirez and Gray, upon finding out about the alleged premature deliberations among multiple jurors, the defense filed motions to interview jurors and for a new trial asking for an inquiry of the persons involved. These motions were summarily denied by the trial court without conducting any inquiry. The record does not reflect that multiple jurors engaged in discussions. Rather, here, the issue concerns a comment made by an alternate juror to another juror after the jury heard all the evidence. Unlike in Ramirez and Gray, here, the trial court conducted an adequate inquiry into Bostic's conduct by interviewing both Nugent and Bostic. Furthermore, unlike in Ramirez and Gray, here Defendant never requested questioning of other jurors in relation to Bostic's comment.

Further, in Fischer v. State, 429 So. 2d 1309 (Fla. 1st DCA 1983), an alternate juror was allowed to deliberate with the jury. Here, this is not true. Instead, the trial court removed Bostic. The conviction should be affirmed.

## IV. ANY ISSUE REGARDING THE ADMISSION OF BARRETT'S TESTIMONY WAS NOT PRESERVED, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TESTIMONY AND ANY ERROR WAS HARMLESS.

Defendant asserts that the State admitted improper evidence regarding the reason Barrett fled the Wimberly murder scene after initially speaking to the police. Defendant argues that the subject testimony permitted the jury to draw an impermissible inference, inflamed the passions of the jury and violated the golden rule. However, this issue is unpreserved and meritless.

To preserve an issue regarding the admissibility of evidence, a defendant must make a contemporaneous objection to the evidence. Castor v. State, 365 So. 2d 701 (Fla. 1978). Here, Defendant did not object when the State inquired why Barrett left the scene and Barrett responded that she did so out of concern for the safety of herself and her family. (Vol. 9 at 435) He also did not object when Barrett stated she had concentrated on Defendant's face because of her safety concerns (Vol. 9 at 445) As such, this issue is unpreserved.

Even if the issue had been preserved, the trial court would[3] still have not abused its discretion in admitting this testimony. This Court has recognized that testimony

3 A trial court's rulings on the admission of evidence is reviewed for an abuse of discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000).

that explains a witness's actions, including a delay in providing information to

the police, is relevant to the witness's credibility and admissible. Doorbal v. State, 837 So. 2d 837, 955 (Fla. 2003). This Court reached this conclusion even though the evidence at issue implicated the defendant in other criminal activity. Id. Moreover, this holding is consistent with the Court's recognition that evidence does not become inadmissible simply because it reflects on a defendant's character if it is admissible for another purpose. Bryant v. State, 533 So. 2d 744,745-48 (Fla. 1988). Moreover, this Court has long held that a party does not have to wait for his opponent to attack a witness's credibility before presenting evidence to counter that attack and may engage in anticipatory rehabilitation. Dennis v. State, 109 So. 3d 680, 692 (Fla. 2012); Bell v. State, 491 So. 2d 537, 537 (Fla. 1986). Applying these principles here, the admission of Barrett's testimony was not an abuse of discretion.

During opening statement, Defendant indicated that a centerpiece of his defense would be the assertion that Barrett was not a credible witness. While Barrett called the police after witnessing the Wimberly murder and remained on the scene when the first officers arrived, she subsequently fled the scene before speaking to the detectives. (Vol. 9 at 407-08) As a result, she did not provide a full statement about her observations until she

contacted the police the following day. Given these circumstances, Barrett's explanation of why she delayed her contact with the police was relevant to her credibility and admissible. Doorbal, 837 So. 2d at 955.

Barrett's statements on redirect that she concentrated on Defendant's face because of her fear were even more admissible. During cross, Defendant had directly challenged Barrett's credibility because she had not paid attention to the details of the car and gun used in the murder. (Vol. 9 at 437-42) On redirect, Barrett merely explained that the reason that she had not paid attention to these details was that she had concentrated on Defendant's face. She explained that she did so because of her safety concerns. As such, Barrett's explanation was directly relevant to her credibility and admissible. Id.

This is all the more true as Barrett's explanation that she delayed her contact with the police was not even based on her knowledge of any other bad act Defendant had committed nor her assessment of his character in general. Instead, Barrett explained that her fear for the safety of herself and her children arose from the brazenness of Defendant's actions in gunning Wimberly down in broad daylight in a well occupied area and then driving back past the crime scene. As such, Defendant's

suggestion that this evidence was inadmissible character evidence is meritless. Since the evidence was properly admitted, Defendant's claim of fundamental error is unavailing. The convictions and sentences should be affirmed.

Defendant's reliance on Dawson v. State, 585 So. 2d 443, 445 (Fla. 1991), is misplaced. In Dawson, a police officer testified as to his experience with other criminals as substantive proof of the defendant's guilt. This Court rejected as prejudicial the police officer's statement that people on crack cocaine generally rob and steal to get money. Here, unlike in Dawson, there was no such generalized testimony as to certain classes of criminals. In fact, as noted above, Barrett's testimony was based on her feeling based on Defendant's actions in this case. Moreover, the evidence was not presented as substantive evidence that Defendant was guilty because he behaved in conformity with other criminals. It was presented to explain Barrett's actions. As such, Dawson does not apply.

Further, Defendant's suggestion that the admission of the evidence violated the golden rule is specious. As this Court has explained, a violation of the golden rule occurs when a party asks the jury to place themselves in the position of the victim. Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985). However,

when the State does nothing more than present evidence or comment on reasonable inferences from the evidence presented without asking the jury to place itself in the victim's position nor creating an imaginary script about what the victim felt or thought, there is no golden rule violation. Hutchinson v. State, 882 So. 2d 942, 954 (Fla. 2004), overruled on other grounds, Deparvine v. State, 995 So. 2d 351, 369 (Fla. 2008); see also Williamson v. State, 994 So. 2d 1000, 1006 (Fla. 2008).

Here, the State never asked the jury to place themselves in anyone's position. Moreover, it did not create any imaginary script regarding what anyone thought or felt. Instead, it simply presented Barrett's testimony that the reason why she left the scene and the reason why she concentrated on Defendant's face was that his actions in murdering Wimberly made her concerned for her safety and that of her family. As such, Defendant's assertion that the presentation of this testimony violated the golden rule is meritless.

Even if the admission of this evidence was error, it was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The testimony about which Defendant complains was brief, comprising but a few lines of a more than 1300 pages transcript. During closing, the State did not mention the statements about which

Defendant complains. (Vol. 11 at 953-69) In fact, the only mention of the statements was made by Defendant during closing, "Remember what she said. After the event, she gets in the police car. She gets freaked out, scared. She leaves." (Vol. 11 at 977)

Moreover, the State presented eyewitness testimony of Barrett that she had no doubt that Defendant shot Wimberly from the passenger's side of a gray Crown Victoria, Roberts' testimony regarding Defendant's participation in the Wimberly and Stafford murders, eyewitness testimony regarding Defendant's participation in the car theft, physical evidence of Evans's fingerprints in James's stolen vehicle, Defendant's confession that he and Evans stole James's car and ballistic evidence that connected Defendant to the Wimberly and Stafford murders. Given the brevity of the testimony about which Defendant complains and the wealth of evidence against him, any error in the admission of this testimony cannot be said to have affected the verdict and was, therefore, harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

## V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN WEIGHTING THE AGE STATUTORY MITIGATOR. DEFENDANT'S SENTENCE IS NOT DISPROPORTIONATE TO EVANS'S AS A MATTER OF LAW. DEFENDANT'S DEATH SENTENCE IS PROPORTIONATE.

Defendant asserts that his death sentence is not proportionate. In the course of presenting this issue, Defendant contends the trial court improperly weighed the age mitigator and made an error in assessing his relative culpability. However, in conducting the proportionality review, this Court accepts the trial court's findings of aggravating and mitigating circumstances and their weight. State v. Henry, 456 So. 2d 466, 469 (Fla. 1984). As such, Defendant's arguments that his sentence is disproportionate because the trial court erred in finding and weighing mitigators should be rejected. Additionally, to the extent that Defendant intended to raise these assertions as separate issues, they are meritless. His sentence is also proportionate.

### A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN WEIGHTING THE AGE STATUTORY MITIGATOR.

Defendant first challenges the weight given to the age statutory mitigator it found. However, this issue is meritless.

The weight assigned to a mitigator is within the trial courts discretion and subject to the abuse of discretion standard. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990);

Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000); Trease v. State, 768 So. 2d 1050 (Fla. 2000) (receding in part from Campbell; holding that though judge must consider all mitigators, little or no weight may be assigned). Judicial discretion is abused when the judicial action is arbitrary, fanciful, or unreasonable, or where no reasonable man would take the view adopted by the trial court; however, if a reasonable man could differ as to propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. Canakaris v. Canakaris, 382 So. 2d 1197, 1202-03 (Fla. 1980).

Where the defendant is not a minor, no per se rule exists which pinpoints a particular age as an automatic factor in mitigation. The existence and weight to be given to this mitigator depends on the evidence presented at trial and the sentencing hearing. Nelson v. State, 850 So. 2d 514, 528-29 (Fla. 2003). The fact that the defendant is youthful, without more, is not significant. Therefore, if a defendant's age is to be accorded any significant weight as a mitigating factor, it must be linked to some other material characteristic of the defendant or the crime, such as significant emotional immaturity or mental

problems. Hurst v. State, 819 So. 2d 689, 698 (Fla. 2002).

With respect to the age statutory mitigator, the trial court stated:

> It was established that at the time the Defendant committed the murder of Monquell Wimberly, the Defendant was 21 years of age, only 29 days shy of turning 22. (Date of offense: 7/20/2008; Defendant's date of birth: 8/18/1986).
>
> For age to be accorded any significant weight, it must be linked with some other characteristics of the defendant or the crime, such as significant emotional immaturity or mental problems. Hurst v. State, 819 So. 2d 689, 698 (Fla. 2002); Lebron v. State, 982 So. 2d 649, 660 (Fla. 2008). Evidence was presented, which will be discussed more thoroughly *infra*, that the Defendant had a difficult upbringing and missed numerous normal and important life experiences while incarcerated during his formative years. In addition, there was evidence presented that will be discussed more thoroughly *infra*, suggesting that the Defendant's mental development progressed at a slower pace than other children, and that the Defendant suffered from some sort of mental disorder and/or disability.
>
> However, evidence was also presented that described the Defendant as a loving relative and friend who would care for the sick. In addition, the Defendant's criminal history as set forth in his PSI paints a picture of someone with life experiences not commensurate with an immature 21-year-old that is prone to an isolated, impulsive, youthful mistake. As a result, the Court declines to assign significant weight to this mitigating circumstance. The Court finds this mitigating circumstance has been established and gives it little weight in determining the appropriate sentence to be imposed in the case.

(Vol. 4 at 1174-75) Given the contradictory evidence in the

record, it cannot be said that no reasonable person would not have assigned this mitigator little weight. As such, the trial court did not abuse its discretion in doing so.

In attempting to convince this Court that the trial court did abuse its discretion in assigning little weight to the age, Defendant combines the testimony he presented during the penalty phase with a statement for letters he submitted to the trial court at the Spencer hearing (Initial Brief at 81-85) to assert that he presented compelling evidence that he suffered from mental deficiencies from a young age. However, the record belies this assertion.

During the penalty phase, not a single witness testified that Defendant had mental deficiencies whatsoever. Instead, the only evidence that Defendant ever had any mental deficiencies was presented through unsworn letters from his mother, grandmother and aunt at the Spencer hearing. Not only was there nothing to suggest that these witnesses were qualified to opinion about such matters as Defendant's IQ score but also no evidence such as school records or opinions from experts was presented to corroborate these lay opinions. Moreover, it should be remembered that both Defendant's mother and grandmother testified at the penalty phase, subject to cross examination, and never mentioned

any alleged mental defects when they did so. In fact, Defendant's grandmother herself testified that Defendant was a responsible person who helped her maintain her household when she was subject to cross examination. Other family members averred that Defendant provided his family members with support and assisted in care for ill relatives when they were subject to cross examination. Moreover, it should be noted that Defendant never even argued he had any mental deficiencies at all in his sentencing memorandum. The trial court found it on its own.

Given the fact that the only evidence of mental deficiencies was presented through uncorroborated and unsworn statements of unqualified witnesses, Defendant's assertion that he presented compelling evidence of mental deficiencies is meritless. Moreover, given the contradictory evidence presented during the penalty phase itself (including contradictory evidence from the same witnesses), it cannot be said that the trial court abused its discretion in finding the witnesses's testimony more compelling than their statements and according little weight to the age mitigator as a result. The lower court should be affirmed.

Defendant's reliance on Mahn v. State, 714 So. 2d 391 (Fla. 1998), is meritless. In Mahn, the defendant was 19. Mahn

presented evidence through the testimony of his family and friends about his drug addiction, physical and mental abuse and emotional and mental instability. The defendant himself also testified about these circumstances. Moreover, two mental health experts testified related to these circumstances. Despite all the evidence that was presented, the trial court had rejected the age mitigator entirely. This Court held that the trial court erred in rejecting the age mitigator where the evidence of the drug abuse, mental and emotional instability and physical abuse was linked between the defendant's age and immaturity.

Unlike in Mahn, here, Defendant was almost 22. The evidence related to Defendant's maturity was presented through the testimony of his family members who stated that he was a caring, supportive and responsible individual. The only evidence about Defendant's mental deficiencies was presented through the unsworn statements of Bessie and Kathryn, who testified at the penalty phase without mentioning any mental defects. No mental health expert testimony was presented. Although Defendant reported he used drugs and alcohol at the time of his arrest, there was no evidence of history of substance abuse. There was no evidence of severe physical abuse either. In fact, the only evidence about any abuse was a single statement made by Defendant's sister that

Kathryn would become violent towards Defendant when she was on drugs. Neither Kathryn nor Bessie testified as to these circumstances. Finally, unlike in Mahn, here, the trial court did find the age mitigator. Mahn does not control here. The sentence of death should not be disturbed.

### B. DEFENDANT'S SENTENCE IS NOT DISPROPORTIONATE TO EVANS'S SENTENCE AS A MATTER OF LAW.

Defendant next asserts that he and Evans are equally culpable and that the trial court erred by failing to assess Defendant's relative culpability. However, this issue is meritless.

In his sentencing memorandum, Defendant conceded that he and Evans were not equally culpable. Under the invited error doctrine, a party may not invite error during the trial and then attempt to raise that error on appeal. Norton v. State, 709 So. 2d 87, 94 (Fla. 1997); Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990). Given the fact that Defendant conceded that the level of culpability was different as to him and Evans, Defendant invited the error and cannot now complain on appeal of the error that he himself induced at trial.

Even if the error was not invited, the trial court would still not have erred in rejecting this argument. It is well

settled that when codefendants are not convicted of the same degree of the offense, they are not equally culpable as a matter of law. Shere v. Moore, 830 So. 2d 56, 60-61 (Fla. 2002). Disparate treatment of codefendants is permissible in situations where a particular defendant is found guilty of a greater offense. Jennings v. State, 718 So. 2d 144, 153 (Fla. 1998); see also Steinhorst v. Singletary, 638 So. 2d 33, 35 (Fla. 1994)(where a codefendant was convicted of second-degree murder, his life sentence was not relevant to the petitioner's claim that the death penalty was disproportionate); Caballero v. State, 851 So. 2d 655, 662-63 (Fla. 2003).

Here, Defendant and Evans are not equally culpable as a matter of law. Defendant was found guilty of first-degree murder for both the Wimberly and Stafford murders, and guilty of attempting to rob Stafford. On the other hand, not only was Evans found guilty of manslaughter for the Wimberly murder, but also he was acquitted of all the crimes against Stafford. In that regard, the trial court could not have conducted an assessment of Defendant's relative culpability because it has already been determined that he was more culpable than Evans for the murder of Wimberly and that Evans was not even found guilty for the Stafford murder. As such, the trial court did not err in

rejecting this argument. The sentence of death should be affirmed.

**C. DEFENDANT'S SENTENCE IS PROPORTIONATE.**

Defendant next argues that his sentence is disproportionate. This claim is wholly without merit.

Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991).

This Court has upheld death sentences on proportionality grounds where the single aggravating circumstance was that the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person. For example, in Bolin v. State, 2013 WL 627146 (Fla. Feb. 21, 2013), this Court upheld a death sentence based on a single aggravating factor of prior violent felonies-the defendant had been previously convicted for the first-degree murder for which he had been sentenced to death, for kidnapping and rape, and for

felonious assault and escape while incarcerated. In mitigation, the trial court found the age of the defendant at the time of crime (24) and numerous nonstatutory mitigators related to the effects of his mother's alcoholism, his substance abuse, child abuse, minimal education and mental medical history, to which it assigned little or some weight.

In Rodgers v. State, 948 So. 2d 655 (Fla. 2006), this Court upheld a death sentence based on the prior violent felony aggravator, which was supported by the defendant's manslaughter conviction for the murder of his girlfriend and a robbery. This aggravator was balanced against nonstatutory mitigation including borderline intellectual functioning, loving relationship with his family, abandonment by his father and low bonding to school, to which the trial court assigned little or some weight.

In Lindsey v. State, 636 So. 2d 1327 (Fla. 1994), this Court upheld the death sentence for two counts of first degree murder of Lizziette Row and her brother, John Steward. The trial court found for both murders that the defendant had a prior conviction of second-degree murder and for Row's murder found the conviction for Steward's murder to be another violent felony. The mitigation consisted of poor health as a nonstatutory mitigator.

In Ferrell v. State, 680 So. 2d 390 (Fla. 1996), the

sentence of death was upheld where the sole aggravator was a prior second-degree murder and several nonstatutory mitigators, including that the defendant was impaired, was disturbed, was under the influence of alcohol, was a good worker and prisoner, and was remorseful, were assigned little weight.

In Duncan v. State, 619 So. 2d 279 (Fla. 1993), the sentence of death was upheld where the sole aggravator was a prior second-degree murder. The mitigation consisted of numerous nonstatutory mitigators, including an emotional handicap from a poor childhood and upbringing, the murder was related to a domestic dispute, the murder was not committed for a financial gain, the murder did not occur while the defendant was committing another crime, and the defendant was a good employee and supportive friend.

In LaMarca v. State, 785 So. 2d 1209 (Fla. 2001), a death sentence was upheld for a defendant who murdered his son-in-law. The trial court found a single aggravator of two prior violent felonies-attempted sexual battery and kidnapping. The nonstatutory mitigation was insubstantial including good behavior at trial, a history of drug and alcohol abuse and mental disorders.

Here, the aggravation and mitigation was similar to Bolin,

Rodgers, Lindsay, Ferrell, Duncan and LaMarca. The prior violent felony aggravator was supported by the Stafford murder and convictions arising from Defendant shooting into a car full of people. As explained above, the only mitigation related to Defendant's mental state was weakly supported. The other mitigation was related to his age, his close relationship to his family, living at his grandmother's house during the childhood because of his mother's substance abuse problems, witnessing violence as a young child, limited education, loss of his father, intoxication at the time of the offense and hardship for losing his stepfather and best friend, to which all the trial court assigned little, slight or very slight weight.

The cases relied upon by Defendant do not show that his sentence is disproportionate. Livingston v. State, 565 So. 2d 1288 (Fla. 1988), involved a defendant who was 17 at the time of murder and extensively used drugs and his childhood was marked by severe beatings by his mother's boyfriend after which the defendant's intellectual functioning was at best marginal.

Unlike Livingston who was a minor at the time he committed the murder, Defendant was 29 days away of turning 22. There was no history of substance abuse. Although Defendant reported that at the time of his arrest (which was around three weeks after the

offense) he heavily used alcohol and drugs, there was no evidence presented that Defendant had a history of substance abuse and none of his family members so testified. Moreover, there was no evidence of severe physical abuse. The only evidence presented related to the abuse was a single statement made by Defendant's sister who testified that their mother was violent when used drugs and alcohol. In fact, Defendant never even argued that he had suffered any abuse in his sentencing memorandum.

In Robertson v. State, 699 So. 2d 1343 (Fla. 1997), the only aggravator was during the course of a burglary. The defendant who was 19 at the time of murder, had long history of mental illness, borderline intelligence and impaired capacity due to drug and alcohol abuse. Unlike in Robertson, here, none of these mitigating circumstances was found. Moreover, the prior violent felony aggravator was supported by the murder of Stafford and prior convictions resulting from shooting into a car full of people.

Morgan v. State, 639 So. 2d 6 (Fla. 1994), involved a rage killing. The defendant entered the victim's home to mow her lawn. The victim let the defendant use the restroom. The defendant became upset because he thought that the victim went to call his parents. The defendant went into a rage, crushed the victim's

scull and stabbed her around sixty times. Morgan involved substantial mitigation: under the influence of extreme mental or emotional disturbance, the defendant's capacity to appreciate the criminality of his conduct was substantially impaired, the defendant was 16 at the time of the offense, he was of marginal intelligence and extremely immature, he had a learning disorder, he had been sniffing gasoline at the time of the murder and for years before, he was brain damaged and he had no history of violence. Unlike in Morgan, here, none of these mitigating circumstances was found. Here, the murders were not committed in a rage but were planned by Defendant who murdered Stafford to further the plan of killing Wimberly and who had previously been convicted for shooting into a car full of people.

In Urbin v. State, 714 So. 2d 411 (Fla. 1998), the murder occurred during the robbery gone bad. Urbin involved a defendant who was 17 at the time of the murder. His capacity to appreciate the criminality of his conduct was substantially impaired and he had suffered extensive parental abuse and neglect (was left by his mother to roam the streets with no guidance). The prior violent felony that was used as an aggravator occurred two weeks after the murder. Unlike in Urbin, here, none of these mitigating circumstances was found. Our case involved planned crimes where

Defendant committed two murders in few hours and within a few miles of each other and had previously shot into a car full of people.

In McKinney v. State, 579 So. 2d 80 (Fla. 1991), the sole aggravating circumstance was during the course of a felony. At penalty phase, two doctors testified that the defendant had borderline intelligence, possible organic brain damage, a history of attention deficit disorder, a learning disability and chronic disruptive behavior. McKinney's mother testified about his mental deficiencies. Unlike in McKinney, here, the prior violent felony aggravator was found. Unlike in McKinney, here, no significant prior criminal history mitigator was not found. There was no evidence of the history of alcohol and drug abuse. The only evidence related to his mental deficiencies, Defendant presented through the unsworn statements of Bessie and Kathryn who both testified at the penalty phase but were never questioned as to these circumstances. No mental health expert testified related to Defendant's mental health. As such, none of these cases show Defendant's sentence is disproportionate. It should be affirmed.

## VI. THE EVIDENCE WAS SUFFICIENT TO CONVICT DEFENDANT.

While Defendant has not addressed the sufficiency of the evidence to sustain the conviction, this Court has a duty to address the sufficiency of evidence in each capital case. Ferguson v. State, 417 So. 2d 639, 642 (Fla. 1982). Whether the evidence is sufficient is judged by whether it is competent and substantial. See Blake v. State, 972 So. 2d 839, 850 (Fla. 2007). "In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." Bradley v. State, 787 So. 2d 732, 738 (Fla. 2001); see also Simpson v. State, 3 So. 3d 1135, 1147 (Fla. 2009) (applying competent, substantial evidence standard to determine sufficiency of the evidence).

In the case at bar, the State presented direct evidence against Defendant in the form of Defendant's confession, eyewitness testimony and the physical evidence linking Defendant to the murders. "Because confessions are direct evidence, the circumstantial evidence standard does not apply in the instant case." Meyers v. State, 704 So. 2d 1368, 1370 (Fla. 1997) Direct

evidence is evidence which requires only the inference that what the witness said is true to prove a material fact. Ehrhardt, Florida Evidence §401.1 (2010 Edition). As such, the State presented competent, substantial evidence to support Defendant's conviction.

Here, Defendant confessed that he and Evans stole James's car. He also admitted that, at first, he drove the car but sometime later, he allowed Evans to take the driver's seat. Fingerprints from James's stolen vehicle matched Evans. Carter identified Defendant and Evans as persons who stole James's car.

Roberts testified that Defendant told him that he and Evans murdered Stafford when he tried to resist a robbery attempt. Roberts also testified that Defendant told him that he shot Wimberly because of a gang dispute. Defendant also told Roberts that Barrett saw him killing Wimberly.

Barrett identified Defendant as the person who shot Wimberly from the passenger's side of a gray Crown Victoria. Barrett's description of the vehicle she saw during the course of the shooting was consistent to that given by Sherrod and Mejors. That description matched James's car.

Ballistic examination revealed that six shell casings recovered from the Wimberly murder scene and four shell casings

from the Stafford murder scene were fired from the same gun. The shell casings recovered from the King Street murder scene and projectiles recovered from Wimberly's body matched four shell casings recovered from the Academy Street murder scene and two projectiles recovered from Stafford's body.

Under these circumstances, the State presented sufficient evidence to sustain Defendant's convictions. His convictions should be affirmed.

## CONCLUSION

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

Respectfully submitted,
PAMELA JO BONDI
Attorney General
Tallahassee, Florida

/s/Tamara Milosevic___
TAMARA MILOSEVIC
Assistant Attorney General
Florida Bar No. 0093614
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by electronic transmission to Rick A. Sichta, at rick@sichtalaw.com and sichtalaw@gmail.com, this 29th day of August 2013.

/s/Tamara Milosevic____
TAMARA MILOSEVIC
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE

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

/s/Tamara Milosevic____
TAMARA MILOSEVIC

Assistant Attorney General