IN THE SUPREME COURT OF FLORIDA

ERIC LEE SIMMONS,

Appellant,

v.

CASE NO. SC14-2314
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

STEPHEN D. AKE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 14087
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
E-mail: capapp@myfloridalegal.com
[and] stephen.ake@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

This is a direct appeal following a resentencing proceeding. See Simmons v. State, 934 So. 2d 1100 (Fla. 2006) (affirming conviction and death sentence); Simmons v. State, 105 So. 3d 475 (Fla. 2012) (reversing and remanding for new sentencing hearing based on ineffective assistance of penalty phase counsel). The facts underlying Simmons' conviction for the murder of Deborah Tressler were set forth as follows by this Court:

> The charges against appellant, Eric Simmons, resulted from the kidnapping, sexual battery, and stabbing and beating of Deborah Tressler, who was found dead in a wooded area in Sorrento, Florida. Simmons was tried and found guilty of kidnapping, sexual battery using force likely to cause serious injury, and first-degree murder. The jury unanimously recommended death as the penalty for the murder. The trial court sentenced Simmons to death on the charge of first-degree murder and life in prison for each of the kidnapping and sexual battery charges respectively.
>
> Prosecution Evidence
>
> The evidence presented at trial indicated that on December 3, 2001, at approximately 11:30 a.m., John Conley, a Lake County Sheriff's Office (LCSO) deputy, discovered the body of Tressler in a large wooded area commonly used for illegal dumping. The body was located some 270 feet from the main road. Crime scene technician Theodore Cushing took pictures of the body, performed a sketch of the area, and found five tire tracks near the body. The crime scene technicians took plaster cast impressions of the three tracks with the most detail for comparison purposes. Mr. Cushing noticed that the tire tracks indicated that a car made a three-point turn close to the body. All-terrain

vehicle tracks were present closer to the body, but they appeared older and deteriorated.

The medical examiner, Dr. Sam Gulino, observed the victim and the surroundings at the scene on December 3, 2001, with the victim lying on her left side with her right arm over her face. Dr. Gulino estimated the time of death was twenty-four to forty-eight hours before the body was discovered.

Dr. Gulino performed an autopsy, which revealed numerous injuries. Tressler suffered some ten lacerations on her head, as well as numerous other lacerations and scrapes on her scalp and face. There was a very large fracture on the right side of her head, and her skull was broken into multiple small pieces that fell apart when the scalp was opened. Dr. Gulino opined that this injury and the injuries to her brain resulted in shock and ultimately Tressler's death. There was another fracture that extended along the base of the skull, resulting from a high-energy impact; bleeding around the brain; and bruises in the brain tissue where the fractured pieces of skull had cut the brain. There were numerous stab wounds on the neck, a long cut across the front and right portions of the neck, and other bruises and cuts. There was little bleeding from these injuries, indicating that the victim was already dead or in shock at the time of the injuries. The victim also suffered a stab wound in the right lower part of her abdomen that extended into her abdominal cavity and probably occurred after she received the head injury. There were also injuries to her anus with bruising on the right buttock extending into the anus, and the wall of the rectum was lacerated. These injuries were inflicted before death. Dr. Gulino opined that these injuries would be painful and not the result of consensual anal intercourse. The victim suffered numerous defensive wounds on her forearms and hands. There was also a t-shaped laceration on the scalp and an injury at the base of her right index finger that was patterned, as if a specific type of object, like threads on a pipe, had caused it. Dr. Gulino opined that the attack did not occur at the exact spot where Tressler was found because of the lack of blood and disruption to the area, but stated that the position of Tressler's body was consistent with an attack occurring in that area.

On December 4, 2001, Robert Bedgood, a crime scene technician, collected evidence from Tressler's body during the autopsy. Dr. Jerry Hogsette testified that, based on the temperature in the area of Tressler's body and the development of the insect larvae taken from Tressler's body, Tressler had been killed between midnight on December 1, 2001, and early Sunday morning, December 2, 2001.

After identifying the body as Tressler's, crime scene technicians went to the trailer where Tressler lived and the laundromat where she worked to conduct Luminol testing. They found Tressler's purse at the laundromat and located a birthday list containing the names of Simmons' relatives. There was no evidence of violence in either place.

Andrew Montz testified that late on the night of December 1, 2001, he was at the Circle K convenience store at the intersection of State Road 44 and County Road 437 in Lake County. Mr. Montz saw a white four-door car heading northbound on 437, stopping at the traffic light very slowly, when a woman opened the passenger door and screamed, "Somebody help me. Somebody please help me." The driver pulled the woman back into the car and ran the red light quickly. Mr. Montz stated that the woman was wearing a white T-shirt or pajama-type top. He was not able to see the driver and described the car as a Chevy Corsica/Ford Taurus-type car with a dent on the passenger side, black and silver trim on the door panel, and a flag hanging from the window. After viewing a videotape of a white 1991 Ford Taurus owned by Simmons a year later, Mr. Montz identified it as being the car he saw on December 1. Mr. Montz initially told lead Detective Stewart Perdue that the car had spoked rims, but after viewing spoked rims at an auto parts store, he concluded that the rims on the car he saw were not spoked.

Sherri Renfro testified that she was at the same Circle K as Montz between 11:30 and 11:40 p.m. with her sister-in-law's boyfriend, Shane Lolito. She also saw a white car slowly approach the red light, the passenger door open, and a woman yell for help while looking directly at Ms. Renfro. Ms. Renfro yelled at the driver to stop, but he did not, and Ms. Renfro got into her van and chased after the car. She traveled in

excess of the speed limit, but was unable to get close to the car and eventually lost track of it. Ms. Renfro thought that the car was a Chevy Corsica, but admitted that she "[did not] really know [her] cars too well." She recalled that the car had a patriotic bumper sticker in the rear window and a flag hanging from the back passenger window. She testified that there was a large spotlight on the side of the Circle K building that illuminated the surrounding area well. Ms. Renfro subsequently identified Simmons' white Ford Taurus as the car she saw at the intersection, and she recognized the interior, the bumper sticker, and the flag on the car. Ms. Renfro identified Tressler as the woman in the car when shown a photograph of her.

Jose Rodriguez testified that he knew Tressler from the laundromat, he often saw Simmons and Tressler together drinking, and he was familiar with Simmons' car. Mr. Rodriguez saw Simmons with Tressler at the laundromat on the night of December 1, 2001. When he arrived at the laundromat, he knocked on the glass window to get Simmons' attention and asked him to come outside. While Simmons was exiting, Mr. Rodriguez got Tressler's attention and asked if she was okay; she replied that she was. Mr. Rodriguez spoke with Simmons for a few minutes and then talked to his own girlfriend on the pay phone outside. When he finished, Simmons and Tressler were still inside the closed laundromat.

Mr. Rodriguez was arrested the next day on unrelated charges, and on December 5, 2001, police officers showed Mr. Rodriguez a photopack with about thirty-five pictures in it, but he was unable to identify any as Tressler's boyfriend. However, Mr. Rodriguez picked the picture that looked most like Simmons and he drew additional characteristics similar to those of Simmons. On December 7, Mr. Rodriguez positively identified a photograph of Simmons as Tressler's boyfriend.

Detective Perdue testified that he and other police officers went to Simmons' parents' home after confirming that Simmons owned a white 1991 Ford Taurus. Detective Perdue and Detective Kenneth Adams approached Simmons and asked him to walk to a group of trees so they could talk. There were some fifteen other police officers at the scene as well as a

helicopter flying overhead. Simmons acknowledged that he knew Tressler was dead, and the detectives asked if Simmons would come to the sheriff's office to talk. Simmons consented, and the detectives transported him to the sheriff's office in the back of a police cruiser. The detectives handcuffed Simmons for their protection pursuant to their standard practice, and Simmons did not object. Detectives Perdue and Adams removed the handcuffs upon arrival at the office, and interviewed Simmons in a room equipped with audio and video capabilities, although the videotape was allowed to run out after two hours.

Simmons waived his *Miranda* rights and stated that he was friends with Tressler and had tried to help her improve her living conditions. Simmons explained to Detective Perdue that on December 1, 2001, he and Tressler had been watching the Florida-Tennessee football game at his apartment in Mount Dora. The reception was bad, so Tressler asked him to take her to the laundromat or her trailer so she could watch the game. He took her to the laundromat and then drove home because Tressler and he were supposed to go to work together early the next morning for his father's landscaping business. He stated that he had engaged in sexual intercourse with Tressler on one occasion approximately two weeks before the interview, even though Simmons' semen was found in Tressler's vaginal washings during her autopsy. During a break in the interview, the detectives learned that blood had been found in Simmons' car. After the detectives informed Simmons of this, he stated, "Well, I guess if you found blood in my car, I must have did it."

Terrell Kingery, a crime lab analyst with the Florida Department of Law Enforcement (FDLE), examined the plaster tire casts from the scene of the crime and compared them to the tires on Simmons' car. The rear tires, which were different brands, were consistent with the three plaster casts. The dimension and general condition of the rear tires were consistent with two of the three casts.

Crime scene technician Ronald Shirley testified that when he performed a presumptive test for blood on a stain on the passenger door of Simmons' car, he obtained a positive result. Luminol testing was positive for blood on the area around the passenger

seat cushion, the carpet below the passenger seat in the front and back, and especially the area of the passenger seat where one sits. Mr. Shirley noted that there were containers of partially consumed cleaning materials in the car. Technicians also cut the fabric off the seat cover and noted a large stain on the cushion itself.

Brian Sloan, a forensic DNA analyst, performed a mitochondrial DNA (mtDNA) sequence on the cushion stain and testified that, in his professional opinion, the stain on the cushion was blood. He testified that mtDNA is inherited maternally, and the mitochondrial genome is 16,500 pairs long. Most of these pairs are very similar between individuals, but approximately 610 bases are highly variable between individuals, and these variable bases can be used to differentiate between people. mtDNA testing differs from the Short Tandem Repeat (STR) technique for DNA profiling because the STR technique is specific to the DNA in the nucleus, or chromosomal DNA. Mr. Sloan testified that mtDNA is the better technique to use on degraded samples because the plasmid circular DNA in mitochondria have thousands of copies in a single cell.

Mr. Sloan compared the mtDNA extracted from the seat cushion to that of Lee Daubanschmide, Tressler's mother; determined that each had an anomaly in the same place; and concluded that the two DNA sequences were consistent. After noting the consistency, Mr. Sloan entered the sequence into the FBI database of 4,839 contributors to check for matches, and concluded that the sequence had never been seen in that group. Mr. Sloan also stated that mtDNA is present in several types of human biological fluid or material, such as bones, hair, saliva, semen, diarrhea, sweat, and menstruation. He noted that he did not run statistical calculations to determine the ninety-five percent confidence interval as had Dr. Rick Staub, the director of the lab. Dr. Staub had obtained an upper confidence limit of one in 1600 individuals, but was unable to testify at trial.

Shawn Johnson, a crime laboratory analyst with the FDLE, testified that he performed a presumptive chemical test on the cushion stain, which was positive for blood. He then took three different cuttings from

three different areas, combined them into one sample, but did not get any DNA results. Mr. Johnson testified that the lack of DNA results indicated that there was degradation of the DNA. Mr. Johnson swabbed the front passenger door jamb of Simmons' car and obtained a DNA profile that matched Tressler's. Mr. Johnson also matched Tressler's DNA to other stains on the car trim.

Defense Evidence

The defense called a number of witnesses during its case. Stuart James, a defense witness who is an expert in blood stain pattern analysis, examined blood spatter in photographs of the doorjamb of Simmons' car and concluded that it was a limited amount of staining but that it was consistent with the size range found in beatings, stabbings, and sometimes gunshots.

Dr. Neal Haskell, a forensic entomologist, testified that he could not determine the time of Tressler's death from the insect specimens collected by the LCSO. He also could not determine whether Dr. Hogsette's opinion regarding the time of death was correct, but he opined that some of Dr. Hogsette's conclusions were faulty and that Dr. Hogsette was not qualified as a forensic entomologist.

Dr. Terry Melton, an expert in mtDNA analysis, testified that the State's lab results regarding the match with the mtDNA were correct, but its statistical analysis that the mtDNA sequence had never been seen in the FBI database was incorrect. Dr. Melton stated that the State's lab did a search of the DNA bases only on a portion of the DNA they obtained. In Dr. Melton's lab, they compare all 783 of the DNA bases to the known DNA bases. When Dr. Melton ran the data in the database according to her lab's methods, she found a common type sequence in 105 of the 4839 people in the database.

Dr. Wilber Frank, a veterinarian and local resident, testified that he encountered a white four-door car driving very slowly at the intersection of State Road 44 and Seminole Springs Road at about 11 a.m. on December 2, 2001, near the area where the victim's body was found. The driver appeared to be an older white male.

> At the conclusion of the trial's guilt phase, the jury found Simmons guilty of kidnapping, sexual battery using force likely to cause serious injury, and murder in the first degree, all as charged in the indictment.

Simmons, 934 So. 2d at 1105-09 (Fla. 2006) (footnotes omitted).

This Court granted Simmons postconviction relief based on trial counsel's failure to investigate and present mitigating evidence, and remanded for a new penalty phase. See Simmons v. State, 105 So. 3d 475 (Fla. 2012). Prior to the commencement of the resentencing hearing, the defense filed numerous motions challenging Florida's death penalty statute based on Ring v. Arizona, 536 U.S. 584 (2002), as well as a motion to preclude any mention of Simmons' previously-imposed death sentence. (V2:332-36, 370, 393-405).[1] The defense also requested interrogatory verdicts specific to each aggravating and mitigating circumstance, and by agreement with the State, the court submitted interrogatory verdict forms to the jury. (V2:312-16; V10:1969-73).

The State filed a motion to exclude evidence of Simmons' 2008 PET scan and any testimony surrounding an alleged brain

[1] The State will cite to the instant record on appeal by referring to the volume number, followed by the page number (V__:___). Citations to Appellant's original trial will be referred to from the direct appeal record as "DAR," and citations to the postconviction proceedings will be cited as "PCR," followed by the volume and page number.

abnormality from the penalty phase based on the recent adoption of the Daubert standard[2] in Florida Statutes, section 90.702. (V2:186-96). The court conducted a three-day Daubert hearing and issued an order denying the State's objection to the PET scan evidence. (V10:1796-1804).

On February 10-20, 2014, a new penalty phase proceeding was conducted before the Honorable Don F. Briggs.[3] At the outset of voir dire, the court was informing the panel about the procedural nature of the case and asked the panel if anyone's views on the death penalty would prevent or substantially impair their performance on the jury. (V15:59). Prospective juror Bott raised his hand, and at a bench conference, Bott raised questions about Simmons' prior sentence. (V15:59-64). The court informed Bott that the purpose of this hearing was for the jury to recommend a sentence and the court could not "get into all the particulars" about Simmons' prior sentencing. (V15:62). During a recess, the court inquired whether there was any agreement between the parties on striking any of the jurors for cause, and the court expressed concern over the potential for prospective juror Bott to poison the entire panel. (V15:111-12).

---

[2] See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

[3] Simmons' trial and postconviction proceedings were presided over by Judge T. Michael Johnson (retired).

The parties agreed to excuse four prospective jurors at this point. (V15:119). Subsequently, when the prosecutor began questioning the panel, prospective juror Bott again raised questions about Simmons' prior sentence. (V15:150-51). At a bench conference, the judge again expressed concern over Bott and stated that they needed to excuse him as he was dangerous given his vocal concern over Simmons' prior sentence. The parties agreed and Bott was excused. (V15:160-63).

After the jury was selected, the State introduced into evidence a stipulated factual summary regarding the evidence from the guilt phase.[4] (V52:11-17). The State presented brief testimony from law enforcement personnel regarding finding the victim's body on December 3, 2001, in a wooded area with tire tracks near her body.[5] (V52:67-82). The medical examiner, Dr. Sam Gulino, testified that the victim was likely murdered between 24-48 hours before he arrived at the scene. (V52:143-47). The autopsy established that the victim suffered a variety of different injuries from multiple types of weapons. The victim had a number of stab wounds from a sharp object, including

[4] The trial judge also took judicial notice of all the prior evidence and testimony introduced at the guilt phase. (V52:17).

[5] The parties stipulated that an expert in tire comparison had compared the impression to the tires on Appellant's car and determined that two of the tires on his car "had similar tread patterns, similar width and similar wear pattern." (V52:14).

multiple stab wounds to the head and neck, and numerous defensive wounds to the hands and arms.[6] (V52:150-76). In addition to these injuries, the victim also suffered multiple head injuries caused by a blunt object. There was a significant, fatal injury to the side of her head that resulted in her skull fracturing into numerous pieces. (V52:151-57). While conscious, the victim also suffered a significant injury from a blunt object to her anus with a resulting laceration to the rectum which was inconsistent with consensual sexual activity.[7] (V52:162-64).

The victim, Deborah Tressler, worked at a local laundromat and had been seen with Simmons on a number of occasions. (V52:12-16). On December 1, 2001, Jose Rodriguez saw the victim and Appellant at the laundromat at approximately 10:30 or 10:45 p.m., and Appellant's car was parked in front of the laundromat. (V52:16). Crime scene technicians found the victim's purse inside the laundromat and located a birthday list with names of Eric Simmons' family members on it. (V52:84).

---

[6] The trial court excluded testimony regarding the infliction of a major slice wound to the victim's neck and an abdomen wound because the medical examiner thought the victim was unconscious when these wounds were inflicted. (V52:157-61).

[7] The defense presented testimony from a pathologist, Dr. Edward Willey, who opined that he was not certain that the victim was conscious when she suffered the anal injury. (V53:224-30).

Around 11:30 p.m. that same evening, two eyewitnesses were at a convenience store when they saw the victim attempt to jump out of Appellant's moving car as it was approaching the intersection. Andrew Montz testified that he was checking the tire pressure on his car when he observed a white car approaching the red light at the intersection and saw the victim open the passenger door and yell, "Help me, somebody help me." The car was moving at about 10-15 miles per hour as it approached the red light, but once the victim opened the door, she was pulled back inside and the door slammed, and the car proceeded to run the red light at a very high rate of speed. (V52:111-16). Montz subsequently indentified Simmons' white car as the car he observed. (V52:118).

Similar to Montz, another eyewitness was at the convenience store and observed the victim try to exit the moving vehicle. Sheri Renfro Shelton testified that she was at the convenience store near the pay phones when she saw Simmons' car approach the light and the terrified victim flung open the door and screamed for help. (V52:190-95). Shelton moved towards the victim, but the victim was yanked back inside and the car took off at a high rate of speed through the red light. (V52:195-96). Shelton got into her own car and gave chase for 10-15 minutes, but was unable to catch up to the vehicle. Shelton subsequently viewed

photographs and identified the victim, Deborah Tressler, and Appellant's vehicle. (V52:200).

On December 7, 2001, crime scene investigators searched Appellant's car and found blood spatter stains on the interior of the car around where the front passenger door connects to the car. (V52:89-99). Samples of the blood stains were sent to the Florida Department of Law Enforcement for DNA analysis and the blood was determined to have matched the victim. (V52:14-15). Although not visible with the naked eye, with the use of luminol, crime scene technicians were able to discover a large blood stain underneath the passenger seat cushion. Because the DNA obtained from the seat cushion was degraded, mitochondrial DNA testing was performed on the stain and it was determined to be consistent with the DNA from the victim and her mother. (V52:13-15, 100-02).

At the resentencing proceedings, the State introduced into evidence certified copies of Appellant's judgment and sentence for the instant case showing his convictions for kidnapping, sexual battery, and first degree murder, as well as, a certified copy of his prior conviction for aggravated assault on a law enforcement officer. (V52:121). The State also presented brief victim impact testimony from the victim's sister and father. (V53:208-15).

In mitigation, Appellant presented testimony from numerous family members and mental health experts. Simmons' father, Terry Simmons, testified that Appellant was a normal infant until around eighteen months old when he had an incident where he became entangled in a blanket while sleeping. Terry Simmons and his mother rushed Appellant to a hospital as he was unresponsive and his face had turned purple. (V53:367-75). After being in the emergency room for about an hour or two, doctors informed Terry Simmons that Appellant was okay and they should follow up with their pediatrician. (V53:376). The family's pediatrician subsequently examined Appellant's motor skills and stated that there did not appear to be anything wrong and Appellant would be fine. (V53:377). According to family members, however, Appellant was not the same after the blanket incident and seemed to slow down. (V53:377-78).

The defense introduced testimony and school records showing that Appellant performed poorly and failed a grade in elementary school, was placed in classes for severely learning disabled and severely emotionally disturbed children, and had poor conduct. (V27:1061-171; V53:379-84). Appellant eventually quit school in the ninth or tenth grade and began working for his father's landscaping business. (V53:384, 398). Terry Simmons testified that Appellant was an excellent worker and very skilled in the

landscape business. In fact, when Terry Simmons had to have surgery, Appellant ran the work part of the company. (V53:398-99). Prior to the 2001 murder, Appellant was earning over $2000 a month, had a bank account, was living on his own, and had two cars. (V17:428-29).

In 1981, when Appellant was approximately seven years old, Terry Simmons was sentenced to fifteen years for a second degree murder conviction. (V53:385). At this time, Terry Simmons was the primary wage-earner of the family as his wife stayed home with Appellant and his younger sister. When he went to prison, his wife began working, but the family was not doing well financially. (V53:385-87, 448-49). After serving just the three-year minimum mandatory sentence, Terry Simmons came home and made major changes in his lifestyle. Prior to his incarceration, Terry Simmons was a major drinker and he acknowledged that his relationship with his wife was tumultuous. He testified that he slapped his wife on a few occasions and was sometimes verbally abusive with her. (V53:389-90). Terry Simmons also admitted that he excessively disciplined Appellant on occasion by whipping him with a leather belt or slapping him with an open hand. (V53:393-93).

Katherine Simmons, Appellant's mother, testified that she did not really notice that Appellant seemed slower after the

blanket incident, but she may have been blocking it out. (V17:440-43). She recalled that Appellant was in special classes at school for slow-learners. (V17:444-45). Mrs. Simmons testified that her husband was a big drinker prior to his incarceration and he would become mean and verbally abusive when he drank. She testified that Terry Simmons slapped her a few times, but never struck her with his fists. (V17:451-52, 477-78). Because of Terry Simmons' behavior, the couple separated several times. (V17:453-55). Katherine Simmons described her son as a quiet, hard worker who was great with animals. Appellant was kind and helpful to others, and is a loving father to his daughter. (V17:464-69). Appellant attended church about twice a week and had a good relationship with his church's pastor.[8] (V17:475-76).

Appellant's sister, Ashley Simmons, testified that she was five years younger than her brother and her memories of childhood were all after their father returned home from his

[8] Pastor Bill Cox testified at the resentencing hearing that he met the Simmons' family when Terry Simmons went to prison in 1981. (V53:246-50). The pastor testified that the family was poor and Appellant appeared slower than some of the other children. (V53:250-51). Mr. Cox stated that Terry Simmons was very strict and authoritative, but had completely changed since he was released from prison. (V53:252-53). Appellant was always respectful to the pastor and was protective over the pastor's children who were of similar age. (V53:254).

incarceration. (V53:289-92). Ashley Simmons testified that her father was aggressive with his discipline towards the kids, and was abusive with their mother. (V53:292-301). Her father drank quite a bit and had a quick temper when she was young and the family had to walk on eggshells around him. Thankfully, he changed and was a much different person as they got older. (V53:294). Ashley Simmons testified that her brother was always slow and had a learning disability. She attempted to help him with his schoolwork, but Appellant would become aggravated because he could not figure it out. (V53:306-08). Ashley explained that her brother was a technical learner who was very skilled with his hands. Like her mother, Ashley reiterated that Appellant was very good at working with horses, had a good heart, and was giving towards others. (V53:312-15). When he was older, Appellant drank quite a bit and displayed a temper. (V53:316). According to his sister, he began smoking marijuana when he was around seventeen, and his drinking became worse when he moved out of his parents home. (V53:334-35).

Appellant's aunt, Faye Byrd, testified that she was Terry Simmons' sister and spent time occasionally with Appellant when he was young. According to Ms. Byrd, Appellant was very kind and affectionate, but he was slow, had difficulties communicating,

and a short attention span.[9] (V53:261-65). Ms. Byrd also testified that Terry and Katherine Simmons had a difficult marriage and Katherine Simmons would come to her house when they had arguments. Ms. Byrd testified that Katherine Simmons told her that Terry Simmons was physically violent with her and had sexually assaulted her on one occasion when he was drunk or high. (V53:266-68). Both of Appellant's aunts testified that their father, Appellant's paternal grandfather, was mean-spirited and physically and sexually abusive to them. (V17:501-04; V53:268-72). They both also testified that the men in their extended family have all had problems with alcohol. (V53:272-73).

In addition to family members, Appellant also presented testimony from five expert witnesses. Forensic psychologist Dr. Eric Mings testified that he conducted a forensic evaluation of Appellant by interviewing him twice in 2013, reviewing background information, and conducting psychological and intelligence testing. (V17:523-27). Appellant informed the psychologist that he was a heavy alcohol drinker who began drinking at age nine and, when older, would drink daily.

[9] Appellant also presented similar testimony from another aunt, Ruby D'Antonio, who was Terry Simmons' oldest sister. (V17:493-505).

Appellant stated that he quit school in the ninth or tenth grade because he was frustrated and hated being in slow-learning classes. (V17:527-30).

In reviewing Appellant's school records, Dr. Mings noted that Appellant had scored in the low seventies on intelligence tests in 1982 and 1984 when Appellant would have been around eight and ten years old. (V17:531). In 1986, Dr. Mings testified that Appellant was given the Stanford-Binet intelligence test in a "nonstandard administration" likely in an attempt to boost his score. Appellant scored an 85 on this test. (V17:530-33). The school records indicated that Appellant was placed in learning disabled and severely emotionally disturbed classes and he attended special schools for children with emotional disabilities. (V17:534-35). Dr. Mings also reviewed an evaluation conducted by Dr. Elizabeth McMahon who indicated that she administered an IQ test to Appellant and he was in the upper end of borderline intelligence, and Dr. Mings interpreted that to be a score in the seventies.[10] (V17:535). Dr. Mings also noted that Appellant had been evaluated by Dr. Henry Dee during the postconviction proceedings and Dr. Dee administered the Wechsler

[10] Dr. McMahon evaluated Appellant in 2002-03 prior to his original trial. Dr. McMahon testified at Appellant's original Spencer hearing as well as at his postconviction evidentiary hearing. See Spencer v. State, 615 So. 2d 688 (Fla. 1993).

Adult Intelligence Scale – Third Edition (WAIS-III) and obtained a full scale score of 79. (V17:538). Dr. Mings conducted his own intelligence testing and utilized the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV) and obtained a full scale IQ score of 72. (V17:543). Dr. Mings testified that for a diagnosis of mental retardation,[11] a score should be 70 or below, but he explained that IQ scores are not exact and should be expressed as a range. When Dr. Mings applied a 95% confidence interval to Appellant's score, he determined that Appellant was in the range of 68 to 77 and the lower score is in the range of mental retardation. (V17:543-45). Ultimately, Dr. Mings found Appellant's intellectual level to be "right above the line of mental retardation when he was assessed during his childhood years and up until the present time." (V17:560).

Dr. Mings testified that based on his evaluation, Appellant has severe cognitive impairment associated with severe behavioral disinhibition, a learning disability, and alcohol/cannabis use disorder. (V17:558, 565). Dr. Mings further opined that the two statutory mental mitigators both applied in

[11] While the State recognizes that the term "intellectual disability" is now being utilized in place of "mental retardation," the State will continue to use the terminology as used by the defense's mental health experts in the instant record.

this case because Appellant has been under the influence of extreme mental and emotional disturbance his entire life and his ability to conform his conduct to the requirements of the law was substantially impaired as a result of his brain injury. (V17:561-62).

The defense presented detailed testimony from Drs. Frank Wood, Joseph Wu, and Michael Foley regarding the PET scan Dr. Wood administered to Appellant in 2008. Dr. Wood, a neuropsychologist, explained that his visual and quantitative analysis of the PET scan results indicated that Appellant had an abnormal thalamus and the left side was less active than the right side by about sixteen percent.[12] (V18:604-11). Dr. Wood opined that the PET scan results were consistent with someone who had suffered anoxia as a child. Dr. Wood testified that the abnormality in Appellant's thalamus could cause him to have undisciplined aggression and impulsivity. Dr. Wood opined that the PET scan results were consistent with the information he obtained from Appellant's school records showing a learning disability and from Dr. Mings' neuropsychological testing.

[12] Dr. Foley, a diagnostic radiologist, testified that he reviewed the PET scan and determined that Appellant had a misshapen thalamus and his frontal lobe had abnormal activity. He opined that Appellant's results were consistent with having suffered from anoxia. (V18:707-15).

(V18:616-22). Based on Appellant's brain abnormality, Dr. Wood testified that the two statutory mental mitigating factors were present in this case. (V18:622-23).

Dr. Joseph Wu, an expert in neuropsychiatry, testified that he reviewed Dr. Wood's PET scan results and reached similar conclusions. Dr. Wu also found asymmetry to Appellant's thalamus and a less active frontal lobe which was consistent with having suffered anoxia. (V18:767-79). Dr. Wu opined that Appellant's brain abnormality affected his ability to regulate aggression. (V18:780-82). Dr. Wu testified that one of the statutory mental mitigators was present in this case as Appellant's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. (V18:784-85).

Forensic psychologist Dr. Mark Cunningham testified at length and presented a slideshow to the jury regarding his evaluation of Appellant. Dr. Cunningham testified that the death penalty is reserved for those with high moral culpability and the more damaging or impairing factors present in a defendant's life, the less his moral culpability. Dr. Cunningham informed the jury that if a defendant is mentally retarded or under the age of eighteen at the time of the murder, he is ineligible for the death penalty. (V19:964). Dr. Cunningham identified five

broad categories of damaging or impairing factors in Appellant's life which lessened his moral culpability: (1) transgenerational factors; (2) neurodevelopmental factors; (3) family and parenting factors; (4) community factors; and (5) "disturbed trajectory," or the effect of these other factors on a person's life. (V19:966-67). The cumulative effect of these factors led to a greater risk of Appellant displaying violent behavior. (V19:1008-16).

When discussing Appellant's intellectual ability, Dr. Cunningham testified that Appellant had received IQ scores of 72 in childhood, but he opined that these scores were high because of "norm-related issues," and he claimed that Appellant's scores were more appropriately in the high 60's, or "in the mental retardation range." (V20:1051). The State objected to the witness referring to Appellant as mentally retarded and testifying that his scores should be lower based on norming issues or applying confidence intervals. (V20:1051-56). The court instructed defense counsel to avoid having the witness testify regarding confidence levels and norming of IQ scores. (V20:1056).

Subsequently, defense counsel proffered testimony from Dr. Cunningham that Appellant's IQ scores were in the range of mental retardation and his adaptive functioning prior to age

eighteen indicated that he was mentally retarded as a child.[13] (V20:1115-23). After the proffer, the court expressed confusion over defense counsel's objective as it appeared counsel wanted to introduce testimony that Appellant is mentally retarded and counsel had never raised that issue as a bar to execution. Despite defense counsel's indication that he was not claiming Appellant was mentally retarded, he wanted his expert witness to testify that Appellant's IQ scores and adaptive functioning are consistent with someone who is mentally retarded. (V20:1123-24). The State argued that the witness had already testified to his findings regarding Appellant's IQ scores and adaptive behavior and the defense's attempt to label Appellant as mentally retarded should not be allowed because the defense had not filed notice seeking to bar the imposition of the death penalty on the basis of mental retardation and Florida's law at the time applied a bright line test precluding a finding of mental retardation when the IQ scores are over 70. (V20:1124-25). The court agreed with the State and stated that counsel and the witness should avoid labeling Appellant as mentally retarded. (V20:1125-26).

[13] The witness could not offer testimony regarding Appellant's current adaptive functioning because he did not assess this aspect of the case. (V20:1118-19).

Following the proffer, Dr. Cunningham testified regarding standardized scoring of IQ tests and began discussing the standard error of measurement. (V20:1153-54). The State objected and the court informed defense counsel that they addressed this area of testimony, and counsel told Dr. Cunningham to "stick to the scores." (V20:1155). Dr. Cunningham proceeded to testify regarding Appellant's IQ scores and questioned the reliability of the scores and indicated that his scores represented a very significant disability. (V20:1155-57).

The State presented two rebuttal expert witnesses, Dr. Helen Mayberg, a professor of psychiatry, neurology and radiology, and Dr. Lawrence Holder, a radiologist, to testify regarding their evaluation of Appellant's PET scan results. Dr. Mayberg testified that Appellant's PET scan did not show any abnormalities and his thalamus was symmetrical. (V19:882-92). Dr. Mayberg saw no basis in the PET scan to conclude that Appellant had brain damage as a result of anoxia. (V19:896). Dr. Mayberg testified that Dr. Wood did not perform the same analysis of Appellant's PET scan as he had with his control group which he used for comparison purposes. With his control group, Dr. Wood used a PET scan and an MRI and then normalized all of the PET scan images with a computer program. In this case, an MRI was never done on Appellant and his PET scan was

not normalized. When Dr. Mayberg normalized Appellant's PET scan, she noticed that Dr. Wood was measuring Appellant's thalamus at the very edge rather than the "meat" of the thalamus. (V19:898-906). Furthermore, even assuming Appellant had a damaged thalamus or other brain damage, Dr. Mayberg testified that there is not a scientific basis to conclude that a specific brain injury or damage would cause any specific behavior such as impulsiveness or aggression. (V19:913-19).

Dr. Lawrence Holder, a nuclear physician and diagnostic radiologist, testified that there were no abnormalities in Appellant's PET scan. (V21:1262). Dr. Holder noted that there was normal variation in metabolism in the basal ganglia region, and maybe the thalamus, but it was within normal limits. (V21:1262-63). There was no indication in the PET scan that Appellant had suffered from anoxia over thirty years ago. Dr. Holder further noted that the PET scan taken in 2008 measured Appellant's metabolism at that time, and scientifically, it is impossible to project what Appellant's brain was like as an infant, or even at the time of the murder in 2001. (V21:1272-74). Although Dr. Holder disagreed with the defense experts' opinion that Appellant's PET scan showed an abnormal thalamus, he testified that, even assuming Appellant had an abnormal thalamus, it is not scientifically accepted to link that alleged

damage to specific behaviors such as impulse control, disinhibition, or aggression. (V21:1276-77).

After hearing all of the evidence, the jury returned an interrogatory verdict indicating a unanimous finding that the three aggravating factors were established beyond a reasonable doubt: (1) Simmons has previously been convicted of a felony involving the threat of violence; (2) the murder was committed while Simmons was engaged in the commission of a sexual battery, kidnapping, or both; and (3) the murder was especially heinous, atrocious, or cruel. (V10:1969-73). The jury unanimously rejected the two statutory mental mitigating factors, and by a vote of 6-6, found that nonstatutory mitigation had been established by the greater weight of the evidence. The jury recommended, by a vote of 8-4, that the death penalty should be imposed. (Vl0:1969-73)

On April 30, 2014, the court conducted a Spencer hearing and again heard testimony from Dr. Cunningham. Dr. Cunningham testified regarding Appellant's intelligence deficits and recounted his scores on four intelligence tests: the Wechsler Intelligence Scale for Children – Revised administered in 1982 and 1984 (both scores recorded as in the low 70s), the Stanford-Binet administered in 1986 (score of 85 but non-standard administration), and the Wechsler Adult Intelligence Scale –

Fourth Edition given by Dr. Mings in 2013 (score of 72).[14] (V11:2084-89). Dr. Cunningham began to testify regarding the application of a standard error of measurement and the Flynn effect to Appellant's scores and the prosecutor objected on relevance grounds to these areas of inquiry. (V11:2086-94). The court overruled the State's objections and Dr. Cunningham testified that Appellant's IQ scores were within the diagnostic criteria for mental retardation.

Subsequently, when Dr. Cunningham began discussing the other two prongs for a diagnosis of mental retardation, deficits in adaptive functioning and onset prior to age eighteen, the State again objected and noted that the defense was moving beyond intelligence testing and appeared to be attempting to introduce opinion testimony that Appellant is mentally retarded when the defense had never provided notice of its intent to move to bar the imposition of the death penalty on this basis. (V11:2111-12). The defense asserted that the witness was not going to opine on Appellant's current situation, but wanted to elicit testimony that Appellant met the diagnostic criteria for

[14] Dr. Cunningham was not aware of two other known intelligence tests administered to Appellant by Drs. McMahon and Dee. (V11:2168). As previously noted, Dr. Mings testified that Dr. McMahon obtained a score in the 70s and Dr. Dee administered the Wechsler Adult Intelligence Scale – Third Edition and obtained a full scale score of 79.

mental retardation when he was a child. (V11:2112). The court overruled the objection and Dr. Cunningham proceeded to testify that Appellant had deficits in adaptive functioning during childhood. (V11:2112-20). Defense counsel then asked the witness if he diagnosed Appellant as mentally retarded at the time of the murder and the witness began to testify that his diagnosis likely continued on to adulthood, but the State objected that the defense was attempting to "back-door" an argument on mental retardation and defense counsel indicated that he would move on. (V11:2120-21). Dr. Cunningham then testified at length regarding his violence risk assessment for prison and that Appellant has adjusted well to prison and would not pose a risk of violence. (V11:2122-65).

In rebuttal to Dr. Cunningham's risk of violence testimony, the State presented testimony from Marcus Moore, a jail detention deputy who testified that in November, 2013, he ushered Appellant to the recreation yard and Appellant uttered racially-charged statements at him and then threw water on him. When the deputy subdued Appellant on the ground, Appellant attempted to bite the deputy in the face. (V11:2073-76).

Following the Spencer hearing, the court issued its order sentencing Appellant to death. (V11:2197-242). The court found three aggravating factors had been established beyond a

reasonable doubt: (1) the defendant was previously convicted of a felony involving the use or threat of violence (moderate weight); (2) the murder was committed while Simmons was engaged in the commission of, or an attempt to commit, sexual battery, kidnapping, or both (great weight); and (3) the murder was especially heinous, atrocious, or cruel (great weight). Like the jury, the judge rejected the two statutory mental mitigators and found that they had not been proven by the greater weight of the evidence. (V11:2212-19). The court found that a number of nonstatutory mitigators had been established and gave them varying degrees of weight: (1) brain damage due to a suffocation incident as a young child (moderate weight), (2) learning disabilities (moderate weight), low IQ (moderate weight), ridiculed as a child (slight weight), abused substances (very slight weight), problems making friends (very slight weight), academic failures (very slight weight), hard worker (slight weight), kind to loved ones and friends (slight weight), helped raise his ex-girlfriend's children even though he is not their biological father (slight weight), loves animals and is skilled in training them (very slight weight), religious and active in church (slight weight), Appellant suffered and struggled as a result of his father's incarceration for second degree murder (slight weight), shown respect and appropriate behavior in court

(slight weight), loving son, brother, and nephew (slight weight), has family that love and care for him (slight weight), suffers with Attention Deficit Hyperactive Disorder (ADHD) (moderate weight), was sexually abused (very slight weight), excellent and skilled at his trade (slight weight), generous with others (slight weight), exposed to graphic sexuality as a child and adolescent (slight weight), has a family history of sexual abuse, substance abuse, and violent behavior (slight weight), suffered through a violent and abusive childhood (moderate weight), ridiculed and verbally abused by his father (slight weight), physically abused by his father and grandfather (slight weight), witnessed violent behavior between his parents (slight weight), protected by his mother from his father's abuse (slight weight), father was absent sporadically throughout childhood as a result of marital problems (slight weight), Appellant is a loving father and maintains a relationship with his daughter (moderate weight), intellectually disabled as a child (moderate weight), would adjust well to life imprisonment (slight weight). (V11:2219-32).

In addition to addressing the aggravating and mitigating circumstances, the court *sua sponte* addressed the United States Supreme Court's decision in Hall v. Florida, 134 S. Ct. 1986 (2014), as the decision was released following the Spencer

hearing and Appellant had presented evidence regarding his alleged intellectual disability as a child. While recognizing that Appellant had "not initiated the procedural requirements for a hearing to determine intellectual disability that would bar execution," the court nevertheless addressed the issue and found that Appellant had not shown current deficits in adaptive functioning to render him intellectually disabled. (V11:2232-39). The court also rejected Appellant's attempt to conduct a proportionality review because such a review is strictly within this Court's purview. (V11:2239-40). The court found that the aggravating circumstances far outweighed the mitigating circumstances and sentenced Appellant to death. (V11:2240-41). This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court acted within its sound discretion in excluding testimony from Appellant's mental health expert regarding the standard error of measurement (SEM) in standardized intelligence tests. Appellant was improperly attempting to introduce testimony to the jury that Appellant was ineligible for the death penalty due to mental retardation. Dr. Cunningham's testimony would have only confused the jury as he attempted to testify that some of Appellant's IQ scores in the low 70s were within the range of mental retardation. Furthermore, even if the court erred in limiting Dr. Cunningham's testimony regarding the SEM, any error was harmless as the defense introduced this exact testimony during psychologist Dr. Mings' testimony regarding Appellant's IQ scores. Additionally, the court admitted Dr. Cunningham's excluded testimony at the Spencer hearing, and ultimately gave moderate weight to Appellant's low intelligence and diagnosis as intellectually disabled as a child.

The trial court properly found and gave moderate weight to Appellant's nonstatutory mitigating evidence involving brain damage, and intellectual disability. Likewise, the court also properly found that the statutory "ability to conform" mental mitigator had not been established by the greater weight of the

evidence based on the evidence introduced at the penalty phase and Appellant's actions at the time of the murder. As competent, substantial evidence supports the trial court's findings, this Court should affirm Appellant's sentence of death.

Appellant's death sentence is proportionate as there is substantial aggravation in this case, including that the murder was especially heinous, atrocious, or cruel. The court found no statutory mitigation and the nonstatutory mitigation in this case is insufficient when compared to the level of aggravation.

Appellant failed to preserve any issue concerning the trial court's oral instructions to the jury on the HAC aggravating circumstance. Even if this Court addresses the merits of Appellant's claim, court's use of an "or," rather than an "and" in the HAC instruction did not constitute fundamental error when the written instructions correctly informed the jurors of the applicable law.

The trial court acted within its discretion in denying Appellant's motion for mistrial when the jury heard that the instant proceedings were a "resentencing." The jury never heard that Appellant had been previously sentenced to death. Accordingly, Appellant cannot establish an abuse of discretion.

Finally, Appellant is not entitled to any relief based on Ring v. Arizona, 536 U.S. 584 (2002), as he has a prior violent

felony conviction and a contemporaneous conviction for the murder committed during the course of a kidnapping and sexual battery. Additionally, pursuant to Appellant's request, the jury returned an interrogatory verdict form indicating that they unanimously found three aggravating factors.

ARGUMENT

ISSUE I

THE TRIAL JUDGE ACTED WITHIN ITS DISCRETION IN LIMITING A DEFENSE EXPERT'S TESTIMONY AT THE PENALTY PHASE.

Appellant argues that the trial court erred in excluding testimony from one of his experts, psychologist Dr. Mark Cunningham, regarding the standard error of measurement in IQ test scores. The State submits that the trial court acted within its discretion in excluding this evidence, and even if improperly excluded, any error was harmless because the jury heard this testimony from another defense expert, psychologist Dr. Eric Mings.

The law is well established that a ruling on the admissibility of evidence is within the discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion.[15] See Troy v. State, 948 So. 2d 635, 650 (Fla. 2006); White v. State, 817 So. 2d 799 (Fla. 2002). In this case, the court acted within its

[15] Appellant's argument that this Court should apply *de novo* review is without merit. Contrary to Appellant's argument, this is not an instance where the court was excluding evidence because it was not scientifically accepted or in violation of Hall v. Florida, 134 S. Ct. 1986 (2014), as Hall had not even issued at the time of the court's ruling. Rather, the court simply excluded evidence which was not relevant and would confuse the jury.

discretion in excluding testimony from Dr. Cunningham regarding Appellant's IQ scores falling within the range for a mental retardation determination based on the standard error of measurement. As the State noted, Appellant was attempting to present evidence to the jury that Appellant was mentally retarded and ineligible for the death penalty without having followed the procedural requirements of Florida Rule of Criminal Procedure 3.203. The court properly limited Dr. Cunningham's testimony to the actual IQ scores Appellant obtained on the tests.

In order to place this issue into proper context, it is important to review the procedural background of Appellant's case. Appellant was evaluated by a defense mental health expert, Dr. Elizabeth McMahon, prior to his original trial in 2002-03 and she found that his IQ score was "in the upper seventies." (DAR V29:1946). According to one of Appellant's original trial attorneys, Jeffry Pfister, Dr. McMahon informed him that Appellant was not mentally retarded. (PCR V23:761-62). When Florida Rule of Criminal Procedure 3.203 was promulgated and took effect on October 1, 2004, Appellant's case was pending on direct appeal and he did not raise a mental retardation claim at that time as required by the rule. See Fla. R. Crim. P. 3.203(d)(3) (2004) (stating that if a defendant's case is

pending on direct appeal on October 1, 2004, the defendant should file a motion to relinquish jurisdiction so the lower court can make a determination of mental retardation). Thereafter, during his postconviction proceedings, Appellant was again evaluated by Dr. Henry Dee who obtained an IQ score of 79. Appellant never attempted to litigate a claim of mental retardation at any time during his postconviction proceedings.

After this Court remanded for a new penalty phase, Appellant again did not raise a claim of mental retardation pursuant to Florida Rule of Criminal Procedure 3.203. Although not procedurally raising this claim as a bar to the imposition of the death penalty, defense counsel repeatedly attempted to present this argument to the jury. During Dr. Eric Mings' testimony, Dr. Mings testified that he administered the WAIS-IV and obtained a full scale IQ score of 72. (V17:543). Dr. Mings explained that for a diagnosis of mental retardation, a score should be 70 or below, but he explained that IQ scores are not exact and should be expressed as a range. When Dr. Mings applied a 95% confidence interval to Appellant's score, he determined that Appellant was in the range of 68 to 77 and the lower score is in the range of mental retardation. (V17:543-45). Although Dr. Mings did not utilize the term "standard error of measurement (SEM)," he clearly was discussing this concept. See

Hall, 134 S. Ct. at 1995 (noting that a SEM is a unit of measurement equating to a confidence of 68% that the measured score falls within a given score range and a 95% confidence interval represents two SEMs).

Following Dr. Mings' testimony, the defense presented testimony from psychologist Dr. Mark Cunningham, who testified that mentally retarded defendants, like juveniles, are legally ineligible for the death penalty. (V19:964). Defense counsel then proceeded to attempt to elicit testimony that some of Appellant's IQ scores obtained when he was a child, when adjusted for norm-related issues and SEM, were within the range for a diagnosis of mental retardation. The State objected that such testimony would mislead the jury and the defense had not given notice of any intent to argue that Appellant was mentally retarded under the rule. (V20:1051-56, 1115-27). The trial court ruled that the witness could not testify to the jury that Appellant was "mentally retarded," but could testify to Appellant's "functionality and what would be anticipated based upon his IQ scores that he achieved. . . . I mean, he can certainly talk about, you know, look, someone with an IQ of 72 or whatever it was, you would anticipate this is the kind of functionality they would have in the community, what the limitations would be, all of those things." (V20:1125-26).

Subsequently, defense counsel began inquiring of Dr. Cunningham regarding Appellant's IQ scores and the SEM, and the State objected. The court informed counsel that they had already discussed this and counsel told the witness to "just stick to the actual scores." (V20:1154-55). Appellant now argues on appeal that the court erred in limiting Dr. Cunningham's testimony and excluding evidence which allegedly prevented the jury from giving full effect to mitigating evidence. Specifically, Appellant argues in his brief:

> What the jury did not hear was that IQ scores are inherently inaccurate unless expressed in the form of a range, that a range of about 2.5 points to either side of the results relied on in this case would yield a confidence rate of 68% that the range was correct, and that a range of about 5 points to either side of the result would yield a 95% confidence rate that the range was correct. (XI 2166-67) That testimony would have allowed the jurors to intelligently consider, and give full effect to, the mitigating evidence they did hear about impaired intellectual functioning.
>
> . . .
>
> The record further shows that the court abused its discretion in excluding testimony about the margin of error.

Initial Brief of Appellant at 38-39, Simmons v. State, SC14-2314.

Contrary to Appellant's assertions, the court acted within its sound discretion in excluding this evidence as it had a danger of confusing the jury as to their responsibility in this case. After Dr. Cunningham informed the jury that mentally

retarded individuals were ineligible for the death penalty, defense counsel attempted to have the witness opine that Appellant's IQ scores as a child should have resulted in a diagnosis of mental retardation.[16] Given defense counsel's attempt to undermine the dictates of rule 3.203, the court properly ruled that Dr. Cunningham could not testify that Appellant was "mentally retarded," but rather, he could explain to the jury the functionality of a person with a low IQ and could inform the jury of Appellant's actual IQ scores.[17] The sole purpose of introducing the evidence from Dr. Cunningham regarding the SEM and the range of Appellant's IQ scores was so that the witness could opine that Appellant was "mentally retarded" and therefore ineligible for the death penalty.

Even if the Court erred in excluding Dr. Cunningham's testimony about the SEM and Appellant's IQ "range" before the jury, any error was harmless as the jury heard this exact testimony from another defense expert, Dr. Eric Mings. (V17:543-

---

[16] Defense counsel claimed that he was not attempting to elicit testimony that Appellant was currently mentally retarded, although this is exactly what he attempted to do at the Spencer hearing. (V11:2121).

[17] As the prosecutor noted, at the time of the penalty phase, this Court was applying a strict cut-off score of 70 or below for a finding of mental retardation, and none of Appellant's reported scores were at that level. See Cherry v. State, 959 So. 2d 702 (Fla. 2007).

45); see State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Dr. Mings testified that he administered the WAIS-IV to Appellant and obtained a full scale IQ score of 72. Dr. Mings explained to the jury that for a diagnosis of mental retardation an individual must score a 70 or below, but "there's variability because they understand that IQ scores are not exact." (V17:544). Dr. Mings continued to explain the SEM to the jury:

> Q. Can you please tell the jury what the 95 percent confidence interval was or the 72 IQ that he received, what exactly that means?
>
> A. The 95 percent confidence interval means that you have that amount of confidence that the true score falls within that range because you accept it. And even though I say it's a 72, as I said, there are things that can affect the variability. It's not an absolute exact. So you have -- with a 95 percent confidence interval you can say that the score is going to be somewhere within this range. And his range was 68 to 77. So you could say with 95 percent confidence that his IQ score, if it was consistently measured, would be somewhere within that range.

(V17:544). Thus, given Dr. Mings' testimony, the jury was aware that Appellant's IQ scores were not exact numbers, but should be reflected in a range according to the application of the SEM and the 95% confidence interval. Furthermore, the jury was well aware that Appellant had low intelligence based on the various experts' testimony and the introduction of his school records. Finally, prior to being sentenced, the trial court admitted at the Spencer hearing the previously-excluded testimony from Dr.

Cunningham, in great detail, because the United States Supreme Court had recently accepted certiorari in the Hall case. (V11:2084-107). The trial court also found, and gave moderate weight to, the mitigating factor of Appellant's low intelligence and Dr. Cunningham's diagnosis that Appellant was intellectually disabled as a child. Accordingly, any error in limiting Dr. Cunningham's testimony before the jury was harmless beyond a reasonable doubt. See generally Blackwood v. State, 777 So. 2d 399, 410-11 (Fla. 2000) (holding that exclusion of mental health expert's reports was not reversible error as the reports were cumulative to evidence admitted during expert's testimony); Jones v. State, 748 So. 2d 1012, 1025 (Fla. 1999) (finding that exclusion of expert's testimony regarding crack cocaine usage was harmless as evidence was cumulative to other evidence heard by the jury and trial court gave weight to defendant's crack addiction in mitigation).

ISSUE II

THE TRIAL COURT PROPERLY FOUND AND WEIGHED THE MITIGATING FACTORS PRESENTED AT THE PENALTY PHASE PROCEEDINGS.

In his second issue, Appellant argues that the court abused its discretion in giving moderate weight to the mitigating factors involving his brain damage and intellectual disability and in rejecting the statutory mental mitigating circumstance that Appellant's ability to conform his conduct to the requirements of the law was substantially impaired. Contrary to Appellant's assertions, the court acted within its discretion in assigning moderate weight to the nonstautory mitigation and there is competent, substantial evidence supporting the trial court's rejection of the statutory mental mitigating factor.

A. Nonstatutory mitigation

Appellant first argues that the court erred in requiring a nexus between Appellant's brain damage and substance abuse use to the murder when he assigned varying degrees of weight to this nonstatutory mitigation. The trial court gave "moderate weight" to the following mitigation proposed by Appellant: "Eric Simmons' brain damage causes behavioral malfunction in regard to disinhibition and impulse control," and "Eric Simmons was

intellectually disabled as a child."[18] Contrary to Appellant's assertions, the court did not abuse its discretion in assigning these mitigators "moderate weight" based on the evidence.

It is well-settled law that it is within the discretion of the court to assign relative weight to each mitigating factor, and the court's findings will not be disturbed absent a showing of abuse of discretion. See Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) ("The relative weight given each mitigating factor is within the discretion of the sentencing court."); Elledge v. State, 706 So. 2d 1340, 1347 (Fla. 1997) (finding trial court did not abuse its discretion in providing weight to the mitigating circumstances because the court could not "say that no reasonable person would give this circumstance [little] weight in the calculus of this crime"); Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990) ("[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court.").

In the instant case, the court found that there was credible evidence presented regarding Appellant's brain abnormality, but the court correctly noted that the scientific evidence did not support a finding that there was a direct link

[18] Defense counsel had argued that these mitigators should be given "great weight." (V11:2048-50).

between this brain damage suffered as a child and disinhibition or lack of impulse control in his behavior as an adult. As the court properly noted:

> There was no evidence presented as to how the brain damage manifested in disinhibition during Defendant's adult years, aside from the murder itself. Particularly, it has not been proven that disinhibition and lack of impulse control played a role in the commission of this homicide unless one could opine that any homicide accomplished by beating a victim to death is the result of disinhibition and lack of impulse control. There is simply a lack of evidence as to the underlying circumstances of the crime itself, other than the testimony regarding Tressler's fear and escape attempt from the vehicle and the evidence of the horrific injuries she suffered.

(V11:2219-20). The court found the mental health mitigation in this case, but simply lessened the amount of weight it deserved based on the evidence presented in the record.

With regard to the substance abuse mitigation, the court found that the evidence established that Appellant had a history of abusing alcohol as an adult, but there was simply no evidence that alcohol played any factor in this case as there was no evidence that Appellant had used alcohol at, or near the time, of the murder. Accordingly, the court gave "very slight weight" to his known history of alcohol abuse. (V11:2221-22).

In Carr v. State, 156 So. 3d 1052, 1066-67 (Fla. 2015), this Court recently addressed a similar claim and stated:

First, Carr claims that the trial court improperly required a nexus between several mitigating circumstances and Strong's murder. Specifically, Carr points to the trial court's findings concerning several mitigators relating to her difficult childhood (i.e., poor upbringing, unprotecting mother, dysfunctional family, and childhood sexual abuse), all of which were given little weight.

This Court has recognized that a trial court may not "enforce a nexus requirement" that results in the rejection of a mitigating circumstance unless it is connected to the murder. Cox, 819 So. 2d at 723. However, a trial court does not violate this prohibition by "attempt[ing] to place the [defendant's] mitigation evidence in context." Id. For example, in Cox, 819 So. 2d at 723 & n.15, we held that the trial court did not abuse its discretion by refusing to give any weight to the defendant's "heightened anxiety in dealing with other people" because the evidence did not "support any conclusions or even speculations as to how it contributed to [the defendant's] decisions and actions that led to [the victim's] death."

Here, the trial court did not use a nexus requirement to reject valid mitigation. To the contrary, the trial court accepted all of the challenged mitigators and gave them little weight after considering them in the context of Carr's decisions and actions in this case. For example, the trial court reasoned that these mitigators were entitled to little weight because Carr's difficult upbringing did not prevent her from participating in many positive and productive activities, like charitable work and massage therapy school.

Further, though Carr also disagrees with the weight given to these mitigators (especially her history of childhood sexual abuse), this Court has held that "mere disagreement with the force to be given [mitigating] evidence is an insufficient basis for challenging a sentence." Quince v. State, 414 So. 2d 185, 187 (Fla. 1982). Accordingly, the trial court

did not abuse its discretion in its treatment of the mitigators pertaining to Carr's difficult childhood.

Similar to the situation in Carr, the trial court did not reject any mitigation based on a nexus requirement, but rather, properly considered the mitigation in context and gave it the weight it deserved. Appellant's current disagreement over the amount of weight given to this mitigation is an insufficient basis for relief, especially considering that the trial court's conclusions are supported by sufficient evidence in the record.

B. Intellectual Disability: Current Deficits in Adaptive Functioning

Appellant next argues that this Court should disregard the findings made by the court regarding Appellant's current adaptive functioning. The State agrees that these findings were based on an incomplete record as Appellant never raised a claim that he is currently intellectually disabled as a bar to execution, but nevertheless Dr. Cunningham attempted to testify to such evidence at the Spencer hearing. (V11:2121). It appears that given the unique procedural posture of this case,[19] the

[19] The United States Supreme Court had accepted certiorari review in Hall prior to the Spencer hearing so the trial court allowed Dr. Cunningham to present evidence regarding Appellant's intellectual disability as a child. Prior to sentencing Appellant to death, the Supreme Court issued its opinion in Hall.

court *sua sponte* addressed the issue of intellectual disability as a bar to execution based on Dr. Cunningham's testimony.

The trial court found that Appellant had presented evidence at the Spencer hearing that Appellant was intellectually disabled as a child and the court gave this mitigation "moderate weight." (V11:2230). However, because the United States Supreme Court had recently issued its decision in Hall v. Florida, 134 S. Ct. 1986 (2014), the court addressed whether Appellant should be ruled ineligible from a death sentence based on his intellectual disability. (V11:2232-39). The court's conclusion that the record did not support a finding that Appellant had current deficits in adaptive functioning is factually correct, however, because this issue was not properly before the court, the State submits that this section of the court's sentencing order is superfluous. Because the court's analysis of Appellant's current adaptive functioning was only relevant to Appellant's eligibility for the death penalty and did not affect the court's assigning of weight to the proposed mitigation or the weighing of the aggravating circumstances and mitigation, there is no basis for relief.

C. Statutory mitigation

Appellant argued that the statutory mental mitigator that his ability to conform his conduct to the requirements of the

law was substantially impaired should apply in this case. The jury unanimously rejected this mitigator as evidenced by the special interrogatory verdict form and the trial court also rejected this mitigating circumstance. In rejecting this mitigator, the court stated:

> The Court's analysis of this mitigator is similar to that stated above, Defendant points to the same evidence of the suffocation event, brain abnormality, and the resulting cognitive and social deficits he suffered to mitigate the circumstances of the murder and avoid a sentence of death. As above, the record is largely devoid of testimony on the specific circumstances of the crime, although the evidence presented by Montz and Shelton is critical to the analysis of this mitigator.
>
> Both Montz and Shelton observed Defendant's vehicle slowly approaching a yellow light at an intersection, as if to stop. Both observed Tressler attempt to escape the vehicle and call out for help. Significantly, both observed Tressler being forcefully pulled back into the vehicle and the door being pulled shut, preventing Tressler's escape. The vehicle then sped off through the intersection, and the light, which was then red. When Shelton attempted to pursue the vehicle, Defendant eluded her.
>
> Furthermore, the evidence showed that Tressler's body was found in a secluded location, near tire tracks that matched Defendant's car. The blood evidence in the car indicated that the murder and sexual battery possibly occurred in the car, as there was no evidence recovered from the ground surrounding Tressler's body. Tressler was fully clothed when she was found, including her black pants, which were pulled up following the sexual battery and also covered a stab wound to the abdomen. Dr. Gulino testified that he did not recall any type of damage or hole in the pants. The evidence from the car indicated that Defendant had attempted to clean blood from the passenger seat.

> These actions are all highly relevant to the Court's finding that Defendant was able to appreciate the criminality of his conduct as he prevented Tressler's escape and was able to escape himself from Shelton's pursuit. He was able to conform his actions to the requirements of law as evidenced by his slowing down for the yellow light, in anticipation of the light turning red. This evidence is uncontroverted by any evidence of his conduct that night which would lead the Court to the opposite conclusion.
>
> Defendant relies on the evidence of his childhood impairment and the difficulties he suffered throughout his education to support this mitigating circumstance, Again, the Court must reject this evidence as it is conflicts with other evidence throughout the record. Defendant's family members and former pastor all testified that Defendant behaved respectfully in many circumstances and that it was mainly in the educational setting that he had difficulties. While all stated that he had behavioral problems in school, outside of school, Terry described Defendant as having "little temper tantrums" when he was younger, but also said that he was "quiet and easygoing [as an adult] when he's not drinking." Ashley described him as "a little more rowdy or something when he drank." Kathy testified that her son knew right from wrong.
>
> The jury's recommendation also rejected this statutory mitigator by unanimous vote (0-12). After considering any and all evidence wherever it may have presented itself in the record to substantiate this mitigating circumstance, this Court finds that this mitigating circumstance is not supported by the greater weight of the evidence and must reject it as well.

(V11:2217-19).

The State submits that the trial court's rejection of this statutory mental mitigator is supported by competent, substantial evidence. As this Court noted in Oyola v. State, 99 So. 3d 431, 444-45 (Fla. 2012):

> [A] trial court may reject a mitigator if the defendant fails to prove the mitigating circumstance, or if the record contains competent, substantial evidence supporting that rejection. See Ault, 53 So. 3d at 186. "Even expert opinion evidence may be rejected if that evidence cannot be reconciled with other evidence in the case." Id. (quoting Coday v. State, 946 So. 2d 988, 1003 (Fla. 2006)). A mitigator may also be rejected if the testimony supporting it is not substantiated by the actions of the defendant, or if the testimony supporting it conflicts with other evidence. See Douglas v. State, 878 So. 2d 1246, 1257 (Fla. 2004) (holding that although testimony supported a mitigator, the trial court did not err by not finding it because the actions of the defendant did not substantiate that testimony); see also Coday, 946 So. 2d at 1005 ("The expert testimony from the defense could be rejected only if it did not square with other evidence in the case.").

Although Appellant's mental health experts opined that Appellant's ability to conform his conduct to the requirements of the law was substantially impaired, the jury and trial court properly rejected this factor as the evidence and Appellant's actions did not support this mitigator.

The primary basis for the defense experts' opinion that this mitigator applied was their conclusion that Appellant suffered a brain abnormality as an infant following a suffocation incident with a blanket. The experts testified that this factor, as well as the subsequent effects of this damage and Appellant's upbringing, caused his ability to conform his conduct to the requirements of the law to be substantially

impaired. However, as the trial court correctly noted, the evidence in this case conflicted with the experts' opinions.

The evidence established that Appellant was driving his vehicle and slowing for a red light when the victim attempted to jump out of his moving car. Appellant yanked the victim back into the car and sped away through the intersection. Appellant managed to avoid Sheri Renfro Shelton who gave chase at a high rate of speed. The evidence was consistent with a finding that a short time later, Appellant sexually battered and murdered the victim and dumped her body in a secluded, wooded area, away from any houses or businesses. During the violent sexual battery and murder, Appellant utilized two different weapons while the victim attempted to defend herself. Following the murder, Appellant cleaned the passenger seat of his car with some type of cleaner so that blood could not be seen, but a luminol test revealed a large, degraded blood stain on the cushion underneath the seat.

Although Appellant presented evidence of a brain abnormality and a substance abuse problem, there was absolutely no evidence surrounding Appellant's mental state at the time of the murder. None of the defense's experts questioned Appellant about the facts surrounding the crime and there was no evidence introduced that Appellant was abusing alcohol or any other

substances at, or near, the time of the victim's murder. As the trial court noted, in order to find this mitigating factor, one would have to speculate that Appellant's condition is so chronic that it would always substantially impair his ability to conform his conduct to the requirements of the law, and obviously, the record refutes such speculation. Appellant's family members testified that he was a quiet, easygoing, caring and respectful person. Appellant committed the instant murder when he was twenty-seven years old and the record established that, prior to that time, he had only one prior violent felony conviction for attempting to strike an officer with his car. At the resentencing proceeding, the defense introduced evidence that Appellant had very limited disciplinary problems during his thirteen years of incarceration. Given the fact that Appellant has displayed an ability to conform his requirements to the law practically his entire adult life, the jury and the court properly rejected the speculative opinion testimony from the defense experts. See Foster v. State, 679 So. 2d 747, 755 (Fla. 1996) (finding that even uncontroverted expert opinion testimony may be rejected if that testimony cannot be squared with the other evidence in the case).

As this Court noted in Ault v. State, 53 So. 3d 175, 188 (Fla. 2010), a trial court's rejection of this mitigating

circumstance will be upheld when a defendant's actions during and after the crime indicate that he was aware of the criminality of his conduct and could conform his conduct if so desired. See also Hoskins v. State, 965 So. 2d 1, 18 (Fla. 2007) (finding that trial court's rejection of mental mitigator was based on competent, substantial evidence when there was no evidence that defendant's frontal lobe impairment prevented him from appreciating the criminality of his conduct); Nelson v. State, 850 So. 2d 514, 531 (Fla. 2003) (upholding the trial court's ruling rejecting the "ability to conform" mitigator where the defendant's actions of removing the victim from her home after sexually assaulting her, driving to two separate orange groves before killing her, and lying to police about the crime are purposeful actions "indicative of someone who knew those acts were wrong and who could conform his conduct to the law if he so desired"); Provenzano v. State, 497 So. 2d 1177, 1184 (Fla. 1986) (stating that Provenzano's actions on the day of the murder did not support the mitigator that the defendant's capacity to conform his conduct to the requirements of the law was substantially impaired because he concealed the weapons he carried, he put change in the parking meter, and took his knapsack out to his car instead of allowing it to be searched because it would have exposed his illegal possession of

weapons). Given Appellant's actions in this case, the trial court's rejection of the "ability to conform" mitigator is clearly supported by competent, substantial evidence.

Finally, even if the Court erred in rejecting this statutory mitigator or in weighing the nonstatutory mitigation, any error was harmless. The trial court considered and weighed Appellant's mental mitigation as nonstatutory mitigation even though it did not rise to the level of "substantial" impairment. The court gave moderate weight to Appellant's "brain damage caus[ing] behavioral malfunction in regard to dishinibition and impulse control," learning disabilities, low intelligence, ADHD, and intellectual disability as a child. Nevertheless, given the substantial aggravation in this case, including the fact that Appellant kidnapped and brutally sexually battered a terrified and conscious victim before murdering her, any error in the court's rejection of the statutory "ability to conform" mental mitigator or in assigning weight to the nonstatutory mitigation was clearly harmless beyond a reasonable doubt. Accordingly, this Court should affirm Appellant's sentence of death for the murder of Deborah Tressler.

ISSUE III

APPELLANT'S DEATH SENTENCE IS PROPORTIONATE IN THIS CASE.

This Court has previously noted that it has an independent obligation to perform proportionality review in all death cases.

> Due to the uniqueness and finality of death, this Court addresses the propriety of all death sentences in a proportionality review. This review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law. It is not a comparison between the number of aggravating and mitigating circumstances; rather, it is a thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases.

McCoy v. State, 853 So. 2d 396, 408 (Fla. 2003) (quotation marks and citations omitted). This Court compares the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

In the instant case, there are three substantial aggravating factors: (1) prior felony conviction involving the use or threat of violence; (2) crime committed during the commission of kidnapping and sexual battery; and (3) the murder was especially heinous, atrocious or cruel (HAC). This Court has previously stated that HAC is one "of the most serious aggravators set out in the statutory sentencing scheme," Larkins

v. State, 739 So. 2d 90, 95 (Fla. 1999), and a murder committed during the commission of a kidnapping and sexual battery is also often given significant weight by this Court. See Johnson v. State, 969 So. 2d 938 (Fla. 2007) (noting that the "murder in the course of a felony" aggravator was qualitatively significant because it rested on two grave violent crimes, sexual battery and kidnapping).

The aggravating factors far outweigh the nonstatutory mitigation found in this case. Both the jury and the trial judge rejected the two statutory mental mitigating factors in this case.[20] Thus, the only mitigation found by the trial court was nonstatutory mitigation primarily dealing with Appellant's brain abnormality, low intelligence, and family background. While the court gave moderate weight to most of the mental mitigation, as discussed in Issue II, supra, this evidence did not prevent Appellant from conforming his conduct to the requirements of the law. When comparing this mitigation to the substantial aggravation, it is clear that Appellant's death sentence is proportionate. In Mansfield v. State, 758 So. 2d 636 (Fla. 2000), this Court upheld the defendant's death sentence where

[20] The jury voted 6-6 that the greater weight of the evidence established the "catch-all" mitigator involving the defendant's character, background, and circumstances of the offense.

two aggravators were found, heinous, atrocious, or cruel and the murder committed during the commission of a sexual battery, compared to five nonstatutory mitigators including that the defendant was an alcoholic, had a poor upbringing and dysfunctional family, and suffers from a brain injury due to head trauma and alcoholism. See also Dessaure v. State, 891 So. 2d 455, 472-73 (Fla. 2004) (death sentence proportionate where defendant stabbed woman multiple times and court found aggravating factors of HAC, prior conviction for felony, and during the course of a burglary, outweighed statutory age mitigator and nonstatutory mitigation); Singleton v. State, 783 So. 2d 970 (Fla. 2001) (stating that defendant's death sentence was proportionate in stabbing murder where the two aggravating factors of HAC and prior violent felony conviction outweighed statutory mitigators of extreme mental disturbance, inability to appreciate the criminality of conduct, the defendant's age and nine nonstatutory mitigators). Accordingly, when this Court conducts its proportionality review, it should affirm Appellant's death sentence based on a finding that the instant case is one of the most aggravated and least mitigated of first degree murders.

ISSUE IV

APPELLANT FAILED TO PRESERVE ANY ISSUE REGARDING A DISCREPANCY BETWEEN THE TRIAL JUDGE'S ORAL INSTRUCTIONS TO THE JURY AND THE WRITTEN INSTRUCTIONS ON THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL MANNER.

Appellant argues in his fourth issue that the trial court committed reversible error when he orally instructed the jury on the HAC aggravating factor. When instructing the jury on the HAC aggravator, the trial court stated:

> 'Heinous' means extremely wicked or shockingly evil. 'Atrocious' means outrageously wicked and vile. 'Cruel' means designed to inflict a high degree of pain with utter indifference to or even – enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless ***or*** was unnecessarily torturous to the victim.

(V22:1457-58) (emphasis added). The trial court's written instructions which were sent back with the jury correctly tracked the standard jury instruction and stated that "[t]he kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless ***and*** was unnecessarily torturous to the victim." (V10:1963) (emphasis added).

Appellant did not raise an objection to the court's misstatement after the oral rendition,[21] and has thus failed to preserve this issue for appeal. See Wike v. State, 698 So. 2d 817, 821-22 (Fla. 1997) (stating that defendant failed to preserve claim for review by failing to raise an objection after the trial court made the same erroneous misstatement when orally instructing the jury on the HAC aggravator); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). As this Court has noted, proper preservation requires a specific, contemporaneous objection at the time of the alleged error. See Jackson v. State, 983 So. 2d 562, 567-68 (Fla. 2008).

Even if this Court addresses the merits of Appellant's procedurally barred claim, Appellant cannot establish fundamental error. In Wike, this Court addressed this claim and found under identical circumstances that when "the judge erroneously used an "or" where an "and" was required does not constitute fundamental error in a case such as this where the

[21] Appellant had previously objected to the HAC standard jury instruction on other grounds and proposed his own version. (V21:1247-49). Defense counsel renewed this objection following the court's oral instructions. (V22:1472).

jury was provided with a written copy of the instructions." Wike, 698 So. 2d at 822; see also Rhodes v. State, 638 So. 2d 920 (Fla. 1994) (defendant waived issue when trial court misspoke when reading instructions, but written instructions correctly informed jury of applicable law). Here, like in Wike, although the court misspoke and used an "or" rather than "and," the written jury instructions correctly informed the jury of the applicable law. Furthermore, the facts of the victim's kidnapping and subsequent brutal sexual battery and murder support a finding of this aggravator beyond any reasonable doubt. See Johnston v. Singletary, 640 So. 2d 1102, 1104-05 (Fla. 1994) (applying the less-stringent harmless error analysis and explaining that the "jury would have found Johnston's brutal stabbing and strangulation of the eighty-four-year-old victim, who undoubtedly suffered great terror and pain before she died, heinous, atrocious, or cruel, even with the limiting instruction").

ISSUE V

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER THE JURY HEARD THAT THE PROCEEDING WAS A RESENTENCING PROCEEDING.

At the outset of voir dire, the trial judge informed the venire that Appellant had previously been convicted of first degree murder for the 2001 murder of Deborah Tressler, and the purpose of these proceedings were for the jury to recommend a sentence of either life or death. (V15:47-48). Shortly thereafter, during questioning at the bench outside the presence of the entire panel, prospective juror Bott asked if Appellant had ever been sentenced before, and the court responded, "No. This is a new penalty phase." (V15:62). Prospective juror Bott then stated, "All this time he's never been sentenced?" The judge replied that he could not get into all the details but inquired whether Bott could follow the law. (V15:62).

At a recess during voir dire, the court inquired whether there was any agreement between the parties on striking any of the jurors for cause, and the court expressed concern over the potential for prospective juror Bott to poison the entire panel. (V15:111-12). The parties agreed to excuse four prospective jurors at this point. (V15:119). Subsequently, when the prosecutor began questioning the panel, prospective juror Bott again raised questions about Simmons' prior sentence, and the

prosecutor informed the panel that the previous jury convicted Appellant, and the purpose of this proceeding was to recommend a sentence. (V15:150-51). At a bench conference, the judge again expressed concern over Bott and stated that they needed to excuse him as he was dangerous given his vocal concern over Simmons' prior sentence. The parties agreed and Bott was excused. (V15:160-63).

Subsequently, during the penalty phase, the prosecuting attorney was conducting cross-examination of Appellant's sister and questioned her about her prior testimony from ten or eleven years ago, and mentioned on one occasion that Appellant was here for "resentencing." (V53:337-40). At the conclusion of the witness's testimony, defense counsel moved for a mistrial because the prosecutor mentioned a resentencing and counsel speculated that the jury would infer that Appellant had been sentenced to death. (V53:348-51). The trial judge denied the motion for mistrial and initially speculated that the jurors probably assumed that Appellant had been previously sentenced to death, but subsequently noted that the jurors do not know the law and probably have not assumed any prior sentence. (V53:351-52).

Appellant now argues on appeal that the court erred in denying the motion for mistrial. The law is well established

that a motion for mistrial is addressed to the sound discretion of the trial court and "the power to declare a mistrial and discharge the jury should be exercised with great care and should be done only in cases of absolute necessity." Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982). Furthermore, this Court has stated that "a mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial." Duest v. State, 462 So. 2d 446, 448 (Fla. 1985).

The abuse of discretion standard of review is applicable when reviewing a trial court's ruling on a motion for mistrial. Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999); Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000) (citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)).

In this case, Appellant has failed to establish that the trial court abused its discretion in denying the motion for mistrial. In support of this claim, Appellant erroneously claims

that a prospective juror had been excused after repeatedly insisting that "the defendant must previously have been death-sentenced in this case." Initial Brief of Appellant at 64, Simmons v. State SC14-2314. Contrary to Appellant's assertions, prospective juror Bott never indicated before the venire that Appellant must have previously been sentenced to death. Rather, he repeatedly inquired whether Appellant had been sentenced. Because the jury in this case never heard that Appellant had previously been sentenced to death, the trial court acted within its sound discretion in denying the motion for mistrial. See Jennings v. State, 512 So. 2d 169, 173-74 (Fla. 1987) (holding that trial court did not abuse its discretion in denying motion for mistrial where jury learned that defendant had previously stood trial for same crimes as "[i]t is not uncommon that jurors become aware that the case before them may have been previously tried as a result of references to prior testimony. . . . **There is no indication that the jurors knew what had occurred at appellant's previous trial.**") (emphasis added); see also Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991) (same); Hitchcock v. State, 673 So. 2d 859, 863 (Fla. 1996) ("When resentencing a defendant who has previously been sentenced to death, caution should be used in mentioning the defendant's prior sentence. Making the present jury aware that a prior jury

recommended death and reemphasizing this fact as the trial judge did here could have the effect of preconditioning the present jury to a death recommendation."); Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991) (holding that there no abuse of discretion in the trial court's refusal to grant a mistrial where the prosecutor's reference to the prior death sentence did not prejudice the defendant or play a significant role in the resentencing proceeding so as to warrant a mistrial); Teffeteller v. State, 495 So. 2d 744 (Fla. 1986) (declining to find error where the record reflected that the impact of merely mentioning a prior death sentence was negligible).

As this Court noted in Jennings, it is not uncommon for a jury to learn of prior proceedings when hearing the evidence involving a witness's prior testimony. That is exactly what happened in the instant case when the jury heard a brief mention that Appellant was being resentenced during the prosecutor's cross-examination of a witness. However, because the jury never heard that Appellant had been previously sentenced to death, the trial court acted within its sound discretion in denying the mistrial. Accordingly, this Court should follow Jennings and Robinson and affirm the trial court's ruling denying the motion for mistrial.

ISSUE VI

APPELLANT'S CLAIM THAT HE IS ENTITLED TO RELIEF BASED ON RING V. ARIZONA, 536 U.S. 584 (2002), IS WITHOUT MERIT.

Prior to the resentencing proceedings, defense counsel filed motions challenging Florida's capital sentencing scheme based on Ring v. Arizona, 536 U.S. 584 (2002), and moved for unanimous jury recommendations and special interrogatory verdict forms. (V2:312-16, 332-36, 393-405). The court denied Appellant's motions to bar the death penalty and to require jury unanimity, but granted his request for a special interrogatory verdict form. (V3:465-66). After hearing all of the evidence, the jury returned an interrogatory verdict indicating a unanimous finding that each of the three aggravating factors were established beyond a reasonable doubt: (1) Simmons has previously been convicted of a felony involving the threat of violence; (2) the murder was committed while Simmons was engaged in the commission of a sexual battery, kidnapping, or both; and (3) the murder was especially heinous, atrocious, or cruel. (V10:1969-73). The jury recommended a death sentence by a vote of 8-4. (V10:1973).

In his final issue on appeal, Appellant argues that the trial court erred in denying him relief based on Ring. Appellant correctly recognizes that this Court has rejected claims seeking

relief based on Ring when one of the aggravating factors is a prior violent felony, or a murder committed during the course of a kidnapping and sexual battery. See McCoy v. State, 132 So. 3d 756, 775-76 (Fla. 2013); Jackson v. State, 127 So. 3d 447, 475 (Fla. 2013); Smith v. State, 151 So. 3d 1177, 1182-83 (Fla. 2014). Similarly, Appellant acknowledges that this Court has rejected the argument that Ring requires a death recommendation to be unanimous. See Robards v. State, 112 So. 3d 1256, 1267 (Fla. 2013). Nevertheless, Appellant requests that this Court hold the instant case in abeyance until the United States Supreme Court issues its opinion in Hurst v. State, 147 So. 3d 435 (Fla. 2014), cert. granted, 135 S. Ct. 1531 (2015) (granting certiorari review limited to the following question: "Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)").

Appellant's request for relief based on Ring is without merit. As this is a purely legal issue, appellate review is *de novo*. Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002). As noted, this Court has repeatedly rejected the arguments advanced by Appellant when there is a prior violent felony conviction and the murder was committed during the course of a kidnapping and

sexual battery. Furthermore, in the instant case, the jury returned an interrogatory verdict form indicating that all three aggravating factors had been unanimously found beyond a reasonable doubt. Accordingly, this claim is without merit and does not implicate the issues raised in Hurst v. State, 147 So. 3d 435 (Fla. 2014), cert. granted, 135 S. Ct. 1531 (2015). Unlike the instant case, Hurst did not involve a contemporaneous felony aggravator or a prior violent felony conviction, both of which this Court's precedent clearly establishes does not implicate Ring.

The only conceivable implication of Hurst to the instant case involves the jury's non-unanimous death recommendation. However, it is well established that jury unanimity is not a constitutional requirement. In James v. State, 453 So. 2d 786, 792 (Fla. 1984), this Court noted that "the United States Supreme Court has never held that jury unanimity is a requisite of due process," Johnson v. Louisiana, 406 U.S. 356 (1972), when rejecting a defendant's claim that jury unanimity is required for a death recommendation. See also Robards v. State, 112 So. 3d 1256, 1267 (Fla. 2013) (rejecting defendant's claim that simple majority jury recommendations are inherently unconstitutional); Parker v. State, 904 So. 2d 370, 383 (Fla. 2005) ("This Court has repeatedly held that it is not

unconstitutional for a jury to recommend death on a simple majority vote."); Israel v. State, 837 So. 2d 381, 392 (Fla. 2002); Card v. State, 803 So. 2d 613, 629 n.13 (Fla. 2001). Accordingly, the State submits that Appellant's claim based on Ring is without merit.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm Appellant's sentence of death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of August, 2015, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: **Nancy Ryan**, Assistant Public Defender, Public Defender's Office, Seventh Judicial Circuit, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118, [**ryan.nancy@pd7.org**]

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Stephen D. Ake
STEPHEN D. AKE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 14087
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
E-mail: capapp@myfloridalegal.com
[and] stephen.ake@myfloridalegal.com

COUNSEL FOR APPELLEE