IN THE SUPREME COURT OF FLORIDA

JOHN SEXTON,

Appellant,

v.

STATE OF FLORIDA

Appellee.
_____/

CASE NO. SC14-0062
L.T. No. CRC10-06284 CFAWS

DEATH PENALTY CASE

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

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "DAR V_/_" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On October 15, 2012, a Pasco County grand jury indicted Appellant, John Sexton, with the first-degree murder of Ann Parlato. (DAR V1/6-7). The murder occurred between the late hours of September 22 and the early hours of September 23, 2010. (DAR V1/6). Sexton was arrested on September 28, 2010. (DAR V1/-21).

The jury trial began on April 16, 2013. (DAR V24). The jury found Sexton guilty of first-degree murder. (DAR V30/5062-63). The penalty phase took place on May 6-7, 2013. (DAR V16-V18; V33-35). The jury recommended that the court impose the death sentence by a ten-to-two vote. (DAR V15/2522). A *Spencer*[1] hearing was held on September 13, 2013. (DAR V20/3474-3490). No additional argument was offered by the parties, and Sexton did not testify. (DAR V20/3474-3490). Sexton's sentencing occurred on December 13, 2013. (DAR V20/3397-3432). The Honorable Mary Handsel sentenced Sexton to death for the murder of Ann Parlato. (DAR V19/3185-3197).

[1] *Spencer v. State*, 615 So. 2d 688, 689 (Fla. 1993).

Facts from the Guilt Phase

At noon on September 23, 2010, Ann Parlato was found deceased in the living room of her home. (DAR V24/3968, 3973-74). It was immediately apparent that the ninety-four-year-old victim had died from unnatural causes. (DAR V28/4645). Her naked body was partially covered with a white sheet. (DAR V24/3971-73). Her face was bludgeoned to the point of being unrecognizable. (DAR V24/3989). Her right breast had been removed, and a prosthetic breast pad was placed over the incision. (DAR V28/4646-47). Her excised right breast was near her head. (DAR V28/4646-47). A foreign object later determined to be a ceramic vase protruded from her rectum. (DAR V28/4646-47).

Blood surrounded her body and blood spatter was all around her head. (DAR V24/4645). Her mid-thigh and genital area had been burned. (DAR V28/4646). A cane and knife were lying near her body, and the home was left in disarray. (DAR V24/3971-73, 3990).

There were leaves and dirt in the doorway, various objects strewn on the floor, and a dolly left in the foyer. (DAR V24/3971). Blood was in the foyer and the living room, and blood stains were on the shower curtain, bedroom door, bedroom sheet, and kitchen blinds. (DAR V23/4010-11, 4013). The bedroom "was

all torn apart" and the kitchen was a mess. (DAR V24/3975). Several kitchen knives were in the basin of the kitchen sink. (DAR V24/4042). A large wooden clock in the living room had a knife protruding from the top of it. (DAR V23/4012; V28/4704).

Bottles of cleaner appearing to have been opened were on the floor near the washer and dryer (DAR V23/4014), and a bottle of bleach had blood on it. (DAR V27/4543). There was what appeared to be a bloody handprint on the dryer. (DAR V23/4014). Several items of clothing and grass were inside the washer, and it was wet as if it had just gone through the rinse cycle. (DAR V27/4544). Testimony from Parlato's friend and frequent visitor of her home, Dorinda Cifelli, established that items near the washer and dryer had been moved around.[2] (DAR V24/3978-79).

Numerous witnesses testified that Parlato was a non-smoker who did not permit people to smoke in her home. (DAR V24/3963-64, 4058; V25/4224, 4230). However, there was cigarette ash in the dining room and by the coffee table in the living room. (DAR V24/4043, V28/4704). A cigarette butt was collected from the base of the kitchen trashcan (DAR V24/4039-40), another cigarette butt was inside the toilet (DAR V27/4540), and two more were inside the washing machine. (DAR V27/4544). Cifelli

[2] Cifelli also testified that Parlato rarely used the washing machine and never used the dryer. (DAR V24/3965).

had just visited Parlato's home two days prior, and the home had been clean and orderly. (DAR V24/3697).

Devlynn Saunders, David Carlin and Patrick Grattan lived together in a house next to Parlato. (DAR V24/4060-62). They observed a man in Parlato's home after midnight and a truck parked in her driveway. (DAR V24/4069-70, 4094-96, 4109-10). Saunders and Carlin identified Sexton in court as the man that was in Parlato's home. (DAR V24/4076, 4101).[3] Saunders and Carlin both recognized Sexton because they had seen him cutting Parlato's grass in the past. (DAR V24/4062-32, 4091). They had also noticed his truck parked in the street when he was working. (DAR V24/4062-32, 4091). In addition, Sexton approached them on several occasions inquiring whether they were interested in using his lawn care services. (DAR V24/4063, 4069, 4091).

Carlin testified that he had just been outside around 11:30 p.m. on September 22, and he did not notice anything unusual about Parlato's home. (DAR V24/4093). Subsequently, while all three witnesses were inside their home, they heard a large noise that caused them to go outside to investigate. (DAR V24/4068, 4094-95, 4108). Parlato's curtains were open, her lights were

[3] Grattan testified that he saw a man moving around inside the victim's house and using the sink; however, he did not see the man's face and he was unable to make an identification. (DAR V24/4109-10).

on, and Sexton was seen in the window. (DAR V24/4069, 4094-96). He appeared to be "doing dishes" in her sink because they could hear the water running and "stuff clanking around in the sink." (DAR V24/4070, 4095). Sexton's vehicle was backed into her driveway without the trailer attached. (DAR V24/4070, 4-96).

Carlin felt that it was unusual for Sexton to be in Parlato's home, so he walked over to his truck and recorded the license number. (DAR V24/4070, 4069-97). He wrote "Handicap Y2JMI" on a piece of paper. (DAR V24/4099). The information was provided to the Pasco County Sheriff's Office later that day after Parlato's body was discovered and the investigation was initiated. (DAR V24/4098; V24/4075). Detectives Robert Grady and Jason Hatcher conducted a registration search and learned that the vehicle was registered to Catherine and John Sexton. (DAR V25/4240-41, 4367).

Detectives Grady and Hatcher went to the address listed on the vehicle registration. (DAR V25/4241; V26/4367). A blue Dodge pickup truck with the same tag number was parked directly in front of the home, and Sexton was standing outside. (DAR V25/4249, 4253). Detective Hatcher introduced himself to Sexton; he told him he was from the Pasco County Sheriff's Office and he was there regarding Parlato. (DAR V25/4253). Sexton was wearing a gray USF Bulls T-shirt, khaki shorts, and flip-flops. (DAR

V25/4255; V26/4368). Detective Grady noticed that Sexton had what appeared to be bloodstains on his shirt and shorts. (DAR V26/4368). At some point Sergeant Seltzer from the Pasco County Sheriff's Office arrived at Sexton's home and also observed what appeared to be dried blood spots on Sexton's shirt and shorts. (DAR V26/4382-84).

A recording of Detective Hatcher's conversation with Sexton was admitted into evidence during trial and published to the jury. (DAR V25/4267-69). Sexton told the detective that he went over Parlato's home around 8:00 the previous evening. (DAR V25/4269). He stated that he was only there for about ten minutes, and he had talked to Parlato in the foyer. (DAR V25/4270). He denied being in her kitchen. (DAR V25/4279). After he left her house, he went to a bar and had one beer. (DAR V25/4272). According to Sexton, he dropped his trailer off at a job site. (DAR V25/4272). He then drove around and drank another beer. (DAR V25/4273).

During the conversation, Sexton's wife, Catherine Sexton, approached the detectives. (DAR V25/4274). Sexton told his wife that Parlato had been murdered. (DAR V25/4274). Sexton then asked her what time he got home the previous evening. (DAR V25/4275). He questioned, "10:30, maybe? Something like that?"

(DAR V25/4275). Sexton concluded, "she doesn't remember."[4] (DAR V25/4275). The recording does not capture any response from his wife.[5]

According to Detective Hatcher, Sexton appeared nervous during their conversation, and his hands began to shake. (DAR V25/4254). He also kept turning his knuckles inward; possibly to conceal a cut he had on his hand. (DAR V25/4254). Upon being questioned about the injury, Sexton responded that he had previously cut his right knuckle from a razor blade. (DAR V25/4254, 4276).

Sexton admitted that he had not showered yet that day, and he had slept in the same clothing from the day before. (DAR V25/4280-81). He provided all of his clothing to the detective as well as the boots he wore the previous day. (DAR V25/4261). Sexton also agreed to have his saliva swabbed. (DAR V25/4274).

Lisa Thomas, a forensic analyst from the Florida Department of Law Enforcement ("FDLE"), received a buccal swab from Sexton and a blood standard from the victim. (DAR V27/4568). Thomas

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[4] Catherine Sexton testified during trial that she heard Sexton return home at about 1:55 a.m. (DAR V26/4349).

[5] During trial, the court permitted the State to question Detective Grady about Sexton's wife's response that was not captured on the recording. (DAR V26/4369-74). Detective Grady testified that she immediately stated, "He's not telling the truth. He got home at 2:00 A.M." (DAR V26/4374).

analyzed Sexton's shirt, shorts, and shoes, and all items yielded a positive chemical indication for the presence of blood. (DAR V27/4569-70). According to Thomas, the shirts and shorts appeared to have been washed; however, it was still possible to develop a DNA profile. (DAR V27/4591).

She tested the areas and obtained a complete DNA profile from the blood on the shirt, shorts, and shoes. (DAR V27/4570-71). The DNA profiles from Sexton's clothing matched the DNA profile obtained from the victim's blood sample. (DAR V27/4571). This DNA profile would exist in approximately 1 in 69 trillion Caucasians. (DAR V27/4573-74).

Thomas also took cuticle swabs and fingernail clippings from Sexton. (DAR V27/4577). Sexton's right hand cuticle tested positive for blood, and a DNA profile was developed from the area. (DAR V27/4578). The profile contained a mixture of DNA from at least three people. (DAR V27/4578-79). Thomas was unable to segregate Sexton's DNA from the rest of the mixture; however, she did determine that the DNA profile from the victim was consistent with the foreign sample. (DAR V27/4579). The statistical frequency of finding a random individual with the same DNA types present would occur in approximately 1 in 420,000 Caucasians. (DAR V27/4580).

Additionally, Sexton's left hand cuticle had a DNA profile

from two individuals, and Thomas was able to develop a profile for the foreign contributor. (DAR V27/4584). The DNA profile matched the victim's DNA, and that same match would occur in 1 and 76 million Caucasians. (DAR V27/4584).

The victim's DNA types were included as a possible contributor from the results found on Sexton's right hand fingernail clippings. (DAR V27/4581). With regard to the left hand fingernail clippings, Thomas was able to develop a mixed DNA profile but was unable to include the victim as a possible contributor because the results were "significantly lower than the other samples." (DAR V27/4584).

Thomas further determined that the blade of the knife found in the sink matched the victim's DNA. (DAR V27/4587). The handle portion also had a DNA profile matching the victim's DNA. (DAR V27/4587). There was an indication of DNA from another individual; however, she was unable to develop a DNA profile. (DAR V27/4587). The DNA could have originated from Sexton, but there was not enough information to include him as a possible contributor. (DAR V27/4588).

The knife found in the wooden clock cabinet had the victim's DNA on the blade and handle. (DAR V27/4588). The knife on the living room floor had the victim's DNA on the handle and the DNA of a minor contributor as well. (DAR V27/4604). Thomas

determined that the DNA originated from a male individual, and she excluded Sexton as a possible contributor. (DAR V27/4605).

Sean Michaels, a crime laboratory analyst at FDLE specializing in serology and DNA analysis, testified during trial. (DAR V28/4732-4755). He analyzed the cigarette butts found in Parlato's home. (DAR V28/4737). He was able to develop a complete DNA profile from one cigarette butt. (DAR V28/4742). Using the results that Thomas obtained from Sexton's DNA profile, Michaels matched the DNA profile from the cigarette butt to Sexton's DNA profile. (DAR V28/4743-44). The frequency of that DNA profile occurring in the population was 1 in 150 quadrillion. (DAR V28/4744).

The blood spatter at the crime scene was analyzed by Jerry Findley, an expert in crime scene reconstruction and blood pattern analysis. (DAR V25/4163). Findley testified that, due to the impact and cast off stains, there were a minimum of three blows in that foyer. (DAR V25/4171-72). Next, the chair in the middle of the living room contained at least one impact stain caused from a blow or forceful impact. (DAR V25/4172). Finally, the victim received a minimum of seven blows in the area where her body was found. (DAR V25/4173). Her upper body was in a raised position during one blow, and her head was on the floor for the remainder of the blows. (DAR V25/4173-74).

An impact blood stain was on Sexton's shoe, meaning the shoe was close to the victim when she was hit. (DAR V25/4196). The victim's sock had been "pulled down," and blood was on the bottom of her foot, but not her sock. (DAR V25/4190). Findley testified that the victim's sock became loose and she then stepped in blood along the way while she was still standing upright. (DAR V26/4190).

Findly further opined that the blood in the other areas of the home indicated that the perpetrator moved around after the blood incident. (DAR V25/4175-77). According to Findly, there were also signs that someone attempted to cover up the crime scene. (DAR V25/4175). Three circles in the living room were consistent with the size of the bottom of a two-gallon bucket. (DAR V25/4175). This was corroborated by one of the officer's reports noting a strong chemical odor consistent with bleach at the crime scene.[6] (DAR V25/4175).

The District 6 Medical Examiner, Jonathan Thogmartin, responded to the crime scene and also conducted the victim's autopsy. (DAR V28/4641-42, 4648). He determined the cause of death to be blunt trauma to the face and head. (DAR V28/4649-50). The manner of death was homicide. (DAR V28/4669).

[6] Forensic Investigator Susan Miller testified that she noticed a strong odor consistent with the smell of bleach when she arrived at the scene. (DAR V27/4516).

Parlato suffered multiple blunt force traumatic impacts to her face. (DAR V28/4651). Her cheek bones were crushed, and the bones around her eyes had been broken. (DAR V28/4651-52). Her spine was dislocated from the "wrenching of the head [or] neck" or a blow to the head that caused twisting. (DAR V28/4652). She had a subdural hemorrhage, bruising to the brain, and fractures to her orbits. (DAR V28/4653). There were also rib fractures from someone sitting on her, hitting her chest, or her chest hitting something during the initial struggle. (DAR V28/4645). She sustained an injury to her middle finger that was a defensive-type wound. (DAR V28/4677).

She had three vaginal tears; one was six centimeters in length. (DAR V28/4655). All of the vaginal tears were associated with bleeding, meaning she was alive when they were inflicted. (DAR V28/4655, 4667-48). Dr. Thogmartin stated that the tears were caused by an object being inside her vagina and tearing it; it could have been a penis or an unnatural object, such as a vase. (DAR V28/4655). These injuries were consistent with forcible sexual battery, and they would have caused horrible pain. (DAR V28/5655-56). He further testified that the rectum tear, breast removal, thermal injuries, and stab wound occurred after her death. (DAR V28/4668, 4678).

Penalty Phase Testimony and Sentencing Order

The State did not present any new evidence during the penalty phase. Sexton presented testimony from Corrections Deputy Michael Habib, Deputy Sheriff Adam Smith, mitigation specialist Carol Springer, Catherine Sexton, expert psychologist Dr. Valerie McClain, and expert psychiatrist Dr. Michael Maher. Habib and Smith both testified that Sexton had been compliant and followed directions while incarcerated. (DAR V33/5366, 5374).

Springer provided a detailed account of Sexton's life from childhood through adulthood, she testified about what she learned from her meetings with Sexton's family members, and she read a letter from Sexton's sister, Belinda Lister. (DAR V33/5400-5454). Her testimony revealed the following: Sexton suffered from severe asthma as a child; his father was abusive; Sexton received a college education; Sexton was in the United States Marine Corps for four or five weeks; Sexton's younger brother was killed from a gun accident; Sexton held various employment positions, including work as a newspaper journalist; Sexton was exposed to chemicals when he worked for a waterproofing company; Sexton was treated for alcoholism, but he continued to abuse alcohol after treatment; Sexton attempted suicide; and he was Baker Acted. (DAR V33/5401-02, 5405, 5409,

5411-13, 5428-29, 5430, 5432, 5435-37, 5439, 5442-43, 5449, 5440, 5454). Sexton's wife also testified about Sexton's employment history (DAR V34/5662-63) and Sexton's mental health problems and use of alcohol. (DAR V34/5664-68).

Dr. McClain diagnosed Sexton with Bipolar Disorder and Alcohol Dependence. (DAR V34/5527). She testified that alcohol and toxic chemicals could cause brain damage. (DAR V34/5536-37). She opined that Sexton's actions were reflective of a manic state. (DAR V34/5533). She further opined that the capital felony was committed while Sexton was under the influence of extreme mental or emotional disturbance (V34/5544-45), and Sexton's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantial impaired. (DAR V34/5546-5549). She also acknowledged the following additional mitigating factors: exposure to domestic violence, exposure to parents' use of alcohol during upbringing, and his brother's death. (DAR V34/5549).

Dr. Maher testified about Sexton's exposure to toxic chemicals (DAR V34/5609-5619) and alcohol (DAR V34/5620-5622) and the effects they had on his brain. He opined that Sexton suffered from cognitive impairment caused by exposure to organic solvents and alcohol. (DAR V34/5624-25). Dr. Maher further opined that Sexton's capacity to appreciate the criminality of

his conduct or to conform his conduct to the requirements of law was substantially impaired. (DAR V34/5630).

At the sentencing hearing, the trial court found the following aggravating circumstances and supported each with findings of fact: 1) the victim was particularly vulnerable due to her advanced age ("great weight"); 2) the capital felony was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, a sexual battery ("great weight"); and 3) the capital felony was especially heinous, atrocious, or cruel. ("great weight"). (DAR V19/3191-93).

The court found the following mitigating factors had been established: 1) lack of a significant prior criminal history ("moderate weight"); 2) Sexton was under the influence of extreme mental or emotional disturbance ("little weight"); 3) Sexton's capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired ("little weight"); and 4) Sexton was amendable to rehabilitation and a productive life in prison ("little weight"). (DAR V19/3193-96).

The court "established, considered, and weighed the mitigating factors against the aggravating factors." (DARV19/3196). The court ultimately concluded that "the nature

and quality of the mitigation pales in comparison to the weighty aggravating factors proved beyond a reasonable doubt." (DAR V19/3196). In finding beyond a reasonable doubt that the aggravating factors substantially outweighed the mitigating factors, the court imposed the death penalty. (DAR V19/3196).

This appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE I: The trial court correctly prevented defense counsel from cross-examining Florida Department of Law Enforcement ("FDLE") forensic analyst Lisa Thomas regarding prior incidents of contamination in other cases. The questioning was an attempt to improperly impeach the witness based on collateral acts. No contamination occurred in Sexton's case, and Sexton did not challenge Thomas's qualifications as an expert. Any attempt to discredit her testimony based on circumstances that occurred in other cases, under completely different factual scenarios, was improper when there was no correlation to this case.

ISSUE II: The trial court did not abuse its discretion by prohibiting Stephen Tarnowski from testifying that he saw two men without shirts trying to open the door of his neighbor's car, which was located several streets away from where the murder occurred in this case. The testimony was not at all relevant to this case, and it would not have shown that someone else could have committed the murder.

ISSUE III: The trial court properly admitted Catherine Sexton's statement, "He's not telling the truth. He got home at 2 a.m." as a spontaneous statement or an excited utterance. The statement was made to Detective Grady right after Appellant had

just stated that he got home at 10:30 p.m. Even if the trial court erred in admitting the statement, it was harmless because Catherine Sexton testified at trial that Appellant arrived home at 1:55 a.m.

ISSUE IV: The trial court did not abuse its discretion by admitting minimal, relevant photographs and testimony relating to the victim's postmortem injuries. The evidence was used to show the position and location that the victim was found by the witnesses, to assist crime scene technicians in explaining the condition of the crime scene, to show the location and order of injuries sustained, and to assist with testimony regarding the bloodstain patterns around the victim's body. The evidence also demonstrated Sexton's premeditation and consciousness of guilt.

ISSUE V: The court acted within its discretion when it denied defense counsel's second motion to continue the penalty phase. While Sexton claims he was prejudiced because his witnesses from Oregon did not testify, his counsel elected not to have the witnesses testify, and instead, the mitigation specialist, Carol Springer, testified as to hearsay statements made by the Oregon witnesses. Sexton further argues that if his counsel had more time to speak expert witness Dr. Maher, he would have learned that Dr. Maher was not an expert on the effects of chemicals, and he could have hired a different

expert. However, Dr. Maher was asked to focus on the effects of chemicals when he was initially retained. Dr. Maher researched the chemicals and their effects on the brain, and he provided his expert opinion that the chemicals and alcohol negatively impacted Sexton. Most notably, the court found that Sexton established the mitigating factor that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Accordingly, the court's ruling on the continuance did not result in undue prejudice to Sexton.

ISSUE VI: Similarly, Sexton was not entitled to dismiss his penalty phase counsel and have substitute counsel appointed based on his complaints that penalty phase counsel waited weeks to reassign the case and failed to keep in contact with the Oregon witnesses. The record refutes these claims; the case was reassigned within days, and the Oregon witnesses were called numerous times, but they delayed responding or did not respond at all. Defense counsel ultimately elected to have Springer's testimony encompass the mitigation testimony that would have been presented by the Oregon witnesses. Sexton failed to make an actual claim of incompetence, and the trial court had no reasonable cause to believe that his counsel was rendering ineffective assistance.

ISSUE VII: The court acted within its discretion by precluding irrelevant photographs. The photograph of Sexton's younger brother, Duey Sexton, was irrelevant and cumulative of the other evidence. The photograph of Sexton in St. Louis Cardinals clothing was neither relevant nor mitigating.

ISSUE VIII: No fundamental error occurred where the court allegedly used the word "aggravating" instead of "mitigating" while instructing the jury. The alleged misreading went unnoticed by all parties present, and the jury was provided with correct written instructions.

ISSUE IX: Competent, substantial evidence supports the court's ruling that the murder was especially heinous, atrocious, or cruel ("HAC"). The ninety-four-year-old victim was brutally beaten by Sexton. The victim was certainly awake and conscious. The evidence established that the struggle began by the front door of the victim's home, and Sexton continued to strike the victim as she moved from the foyer into to the living room. The victim was still upright for at least one of the blows that she suffered in the third area of impact where her body was ultimately found. She also sustained a defensive wound to her finger. The court's finding is properly supported by the evidence; however, even if this Court were to strike the HAC aggravator, two aggravators given great weight by the trial

court would remain, and given the circumstances of this case, there would be no reasonable likelihood of a life sentence being imposed.

ISSUE X: The sentencing order expressly evaluates all of the mitigating circumstances proposed by Sexton, and any alleged error was harmless.

ISSUE XI: The trial court properly refused Sexton's request for a special jury instruction that was poorly worded and would have confused or misled the jury.

ISSUE XII: Sexton's final challenge to Florida's capital sentence statute pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002), is without merit.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY PRECLUDED DEFENSE COUNSEL FROM CROSS-EXAMINING THE DNA LAB ANALYST REGARDING PRIOR INCIDENTS OF CONTAMINATION IN OTHER CASES WHEN THERE WAS NO CONTAMINATION IN THIS CASE.

In his first issue, Appellant argues that the trial court erred in preventing his counsel from cross-examining Florida Department of Law Enforcement ("FDLE") forensic analyst Lisa Thomas regarding prior incidents of contamination involving other cases. Appellant also challenges testimony with regard to FDLE crime laboratory analyst Sean Michaels; however, as will subsequently be explained, this issue has not been preserved for appellate review.

The scope of cross-examination and the appropriate subjects of inquiry are within the sound discretion of the trial court. *Morrison v. State*, 818 So. 2d 432, 448 (Fla. 2002); *Cruse v. State*, 588 So. 2d 983 (Fla.1991). The trial court's exercise of discretion is not subject to appellate review "except in cases of clear abuse." *Rose v. State*, 472 So. 2d 1155, 1158 (Fla. 1985). "[Q]uestions on cross-examination must either relate to credibility or be germane to the matters brought out on direct examination." *Steinhorst v. State*, 412 So. 2d 332, 337 (Fla. 1982). Evidence of particular acts of misconduct cannot be

introduced to impeach the credibility of a witness. *Hitchcock v. State*, 413 So. 2d 741, 744 (Fla. 1982).

During pretrial proceedings, the State sought to exclude the defense from questioning Thomas at trial regarding six to ten documented instances of contamination in other cases that were revealed during Thomas's deposition.[7] The State specifically argued that questioning Thomas about instances of contamination in other cases would amount to impeachment through acts of misconduct, while the defense responded that the questioning "tends to show that the witness might not be credible in observing what she's testifying about." (DAR V22/3593, 3595).

The court questioned defense counsel about the contamination, and learned that the defense had hired a DNA expert to review all of the evidence in Sexton's case, and no contamination issues or errors had been found. (DAR V22/3596-3601). The court ultimately granted the motion. In doing so, it explained that the instances of contamination documented at the FDLE lab in other cases were not relevant to the witness's actions in this case. (DAR V22/3602). The court clarified that unless the witness made some statement regarding her work being

[7] Thomas admitted that she was aware of the various instances of contamination that had occurred in her cases; however, none of the incidents of contamination related to Sexton's case. (DAR V22/3593).

perfect, flawless, or without any contamination issues, then cross-examination regarding the prior instances of contamination would be improper. (DAR V22/3602-03).

At trial, defense counsel renewed his objection to the court's granting of the motion *in limine*. (DAR V27/4593). Counsel also argued that the State opened the door when it asked Thomas how many DNA samples she had processed, and Thomas responded that she had processed 5,000 DNA samples. (DAR V27/4593). Counsel wanted to question Thomas about the 5,000 samples and any problems that she had encountered with contamination among those samples. (DAR V27/4594). The trial court correctly precluded the questioning.

First, it would have been improper to impeach Thomas with collateral matters by asking about unrelated instances of contamination that were not correlated to Sexton's case. There was absolutely no documentation of contamination in Sexton's case. In *Cruse v. State*, 588 So. 2d 983, 988 (Fla. 1991), the defendant challenged the trial court's failure to allow cross-examination of the State's expert, Dr. Kirkland, concerning his examination of a criminal defendant in a different case. The trial court had determined that Dr. Kirkland's past examination of another person "was purely a collateral matter." *Cruse*, 588 So. 2d at 988. In finding that the trial court did not abuse its

discretion, this Court explained,

> Cruse was attempting to introduce evidence of an arguably inadequate evaluation by an expert over ten years before he even conducted an evaluation in this case. If this were permitted, the State could then have introduced evidence that the Sireci evaluation was not inadequate and may even have gone on to introduce evidence of prior competent evaluations performed by Kirkland. If such inquiry were permissible, every trial involving expert testimony could quickly turn into a battle over the merits of prior opinions by those experts in previous cases, malpractice suits filed against them, and Department of Professional Regulation allegations.
>
> The adequacy of Dr. Kirkland's evaluation of a criminal defendant over ten years earlier was not a relevant issue for the jury's consideration. The trial judge properly found that Dr. Kirkland was qualified to testify as an expert, and the court did not in any way attempt to limit defense examination of the merits of the evaluation of Cruse himself or of the doctor's overall qualifications as an expert in the fields of psychiatry and forensic psychiatry. While a defendant is generally accorded wide latitude in the cross-examination of State experts, a trial court is not required to permit inquiry of the sort requested by the defense in this case.

Cruse, 588 So. 2d at 988.

Here, contamination that occurred in other cases was completely irrelevant to this case, especially given that there were absolutely no instances of contamination or misreadings of the DNA evidence. *See Salas v. State*, 972 So. 2d 941, 956 (Fla. 5th DCA 2007) (holding that it was proper for the trial court to preclude the defense from questioning the medical examiner about the victims' blood alcohol levels because that testimony was not

part of the medical examiner's direct testimony, and thus, was not a proper subject for cross-examination.); *Farinas v. State*, 569 So. 2d 425, 429 (Fla. 1990) (where the State's questioning of the key defense witness regarding alleged unethical conduct with a previous employer constituted improper use of acts of misconduct to impeach the credibility of a witness); *Rose v. State*, 472 So. 2d 1155 (Fla. 1985) (holding that attacking a detective's professionalism was not a proper method of attacking credibility under section 90.608).

Next, the State did not "open the door" to the questioning. The concept of "opening the door" is based on considerations of fairness and the truth-seeking function of a trial, and it allows the admission of otherwise inadmissible testimony to "qualify, explain, or limit" testimony or evidence previously admitted." *Hudson v. State*, 992 So. 2d 96, 110 (Fla. 2008); *Lawrence v. State*, 846 So. 2d 440 (Fla. 2003)). "Thus, a party 'opens the door' when it elicits misleading testimony or makes a factual assertion that the opposing party has a right to correct so that the jury will not be misled." *Austin v. State*, 48 So. 3d 1025, 1027 (Fla. 2d DCA 2010).

In this case, asking Thomas about how many DNA samples she had tested did not "open the door" for Sexton's counsel to question her about instances of contamination among those

samples. The State merely attempted to qualify Thomas as an expert witness by demonstrating her experience; the State did not ask specific questions about those DNA samples involving contamination.

By the same token, Thomas's testimony did not concern contamination instances or lack thereof. Thus, cross-examination was not required to remedy incomplete or misleading testimony. *Compare with Lawrence v. State*, 846 So. 2d 440, 452 (Fla. 2003) (without the explanation on recross-examination, the investigator's opinion would have been incomplete and misleading); *Overton v. State*, 801 So. 2d 877, 901 (Fla. 2001) (trial court did not abuse its discretion by permitting the State to question the detective when the defense counsel's questioning had opened the door to such questioning and preventing it would have given rise to a false implication).

Next, appellate counsel argues that the trial court's ruling regarding the motion *in limine* applied to FDLE laboratory analyst Sean Michaels as well. This is incorrect. The motion *in limine* and the hearing on the motion related to the testimony of Thomas. There was no discussion of Sean Michaels during the hearing. Further, trial counsel renewed his objection and made additional argument at the trial when Thomas testified. Trial

counsel made no such objections or argument during Michaels's testimony.[8]

"[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." *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). Thus, the specific contention asserted must be the exact same contention raised on appeal. *Farina v. State*, 937 So. 2d 612, 628 (Fla. 2006). In this case, the trial court's ruling on the motion *in limine* only related to Thomas. No ruling was made precluding questioning of Michaels regarding contamination issues.

A reviewing court will generally not consider points raised for the first time on appeal. *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978) (*citing Dorminey v. State*, 314 So.2d 134 (Fla. 1975)). "To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978). There was no objection in this case to put

[8] Defense counsel requested that Michaels's deposition testimony regarding instances of contamination be proffered to the court, but he made no argument that he be allowed to question Michaels regarding any testimony relating to the proffer, nor did he ask such questions during cross-examination. (DAR V28/4753-54).

the court on notice that Sexton wanted to elicit contamination testimony from Michaels. By not objecting at the time of Michaels's cross-examination or testimony, the challenge relating to the scope of the cross-examination has been waived for appellate review. *Brooks v. State*, 762 So. 2d 879, 890 (Fla. 2000).

In order to address the merits of this argument, Appellee would have to speculate as to what defense counsel's argument would have been and what the trial court would have ruled. Had the court precluded Sexton from questioning Michaels as to prior instances of contamination discussed in his deposition transcript, the trial court would have been within its discretion. The instances of contamination in other cases were not relevant to Michaels's forensic analyses in Sexton's case. There was no contamination or allegation that the methods used in Sexton's case were similar to the methods used in the past cases involving contamination. *Farinas v. State*, 569 So. 2d 425, 429 (Fla. 1990); *Rose v. State*, 472 So. 2d 1155 (Fla. 1985). Thus, any testimony regarding contamination in other cases would have been based on pure speculation that contamination could have occurred in this case as well.

Lastly, even if the trial court erred in some way by limiting the cross-examination of Thomas, Michaels, or both

witnesses, any error would be harmless. The result would not have been different had the witnesses been questioned about the instances of contamination in other cases because there were no known instances of contamination in this case. *See Simmons v. State*, 105 So. 3d 475, 498-99 (Fla. 2012) ("The argument proffered by Simmons that the jury could believe the DNA evidence tested by Johnson was tainted has no basis in fact and is mere speculation."). The DNA evidence implicating Sexton was conclusive. The victim's complete DNA profile was on Sexton's clothing (DAR V27/4570-71, 4573), and the victim's DNA was also on his hand. (DAR V27/4584). Sexton's complete DNA profile was linked to a cigarette butt in the victim's home. (DAR V28/ 4742-4744).

The evidence against Sexton was overwhelming. Sexton was identified in court by two witnesses who had observed him in the victim's home around the time of the murder. (DAR V24/4076, 4101). They also witnessed Sexton's vehicle parked in the victim's driveway and recorded his tag number. (DAR V24/4097-99; V25/4241). When Sexton talked to law enforcement, he was still wearing the same clothing that he had worn when the murder occurred. (DAR V25/4280-81). A detective and sergeant testified during trial that they observed blood on Sexton's clothing. (DAR V26/4368, 4382-84). Sexton also lied about his whereabouts. (DAR

V26/4374). Based on the foregoing, there is no reasonable possibility that the alleged error(s) contributed to Sexton's conviction. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986).

ISSUE II

THE TRIAL COURT PROPERLY PRECLUDED STEPHEN TARNOWSKI FROM TESTIFYING ABOUT TWO MEN IN THE AREA ATTEMPTING TO OPEN A CAR DOOR SEVERAL STREETS AWAY FROM THE VICTIM'S HOME. THE TESTIMONY WAS NOT RELEVANT, NOR DID IT SHOW THAT SOMEONE ELSE COMMITTED THE MURDER.

Next, Sexton asserts that the trial court erred by prohibiting Stephen Tarnowski from testifying about a potential car burglary on the night of the murder. A trial court's ruling regarding the exclusion of evidence is reviewed for an abuse of discretion. *England v. State*, 940 So. 2d 389, 405 (Fla. 2006). There was no abuse of discretion in this case.

Sexton sought to show that someone else could have killed Parlato through Tarnowski. Tarnowski's proffered testimony was that he saw two men without shirts trying to get into his neighbor's car between the hours of one and three in the morning. (DAR V29/4804). Tarnowski yelled at the men, and they ran away. (DAR V29/4804-05). Tarnowski later learned about the murder "a couple [of] streets over" and he thought that it was possible that the two crimes could be related. (DAR V29/4805-06). So he, therefore, went over to the crime scene and reported his observation of the men to an officer at the scene. (DAR V29/4806).

In finding the testimony to be inadmissible, the trial court noted that the circumstances surrounding the proffered

testimony were completely dissimilar to the instant case. (DAR V29/4816-19). The court specifically explained:

> In this particular case, there's two gentlemen indicated by the witness that's been proffered. There's no indication in the case so far that I've seen that there was more than one perpetrator. So, now, I guess one of the two gentlemen who were shirtless did this act, yet, we had two that were breaking into cars, were considerably father away from the crime scene. It wasn't on the street where it occurred. They ran the opposite way. They're shirtless, unidentified. They're breaking into cars. There's no indication there was forced entry into the home of the victim that would indicate a burglary.
>
> You even indicated it's quite [sic] evidence that a burglary probably didn't occur because none of the items are being taken, so, therefore, a burglary is not even being asked for or you're actually indicating that you wouldn't – you would argue against a burglary being the felony murder – underlying felony murder case because it appears there's no forced entry in the house; there's no things that are missing. There's no indication that there was more than one perpetrator, yet you want to put someone on that said, "Several blocks away some shirtless men were trying a car door and they ran away."
>
> I don't think that meets the standard under Keen. I don't think that meets the standard what would allow reverse Williams Rule.
>
> If you had someone breaking into houses, someone burglarizing little old ladies, I might be closer. At least you have the same night. But the fact that you have some – two unidentified gentlemen running down the street away from him when they were going over to cars and checking doors, in itself, would not lead to be significantly similar in order to allow the admissibility, and, therefore, the motion to strike the witness's testimony as to that testimony will be granted.

(DAR V29/4816-19).

Sexton argues that the trial court erred by treating the

testimony as reverse *Williams*[9] Rule and excluding the testimony. Because Sexton sought to admit the testimony in an effort to establish that someone else may have committed the crime, he was using it in an effort to prove identity. Similar fact evidence of other crimes, wrongs, or acts is known as *Williams* Rule evidence. *Durousseau v. State*, 55 So. 3d 543, 551 (Fla. 2010). Such evidence is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; however, the evidence is inadmissible when relevant solely to prove bad character or propensity. *Id.* While *Williams* Rule evidence is usually used by the prosecution against a defendant, the defendant has the ability to use it as well, and such use is referred to as "reverse *Williams* Rule." *Id.*

In order for reverse *Williams* Rule evidence to be admitted for exculpatory purposes, it must be relevant. "When the purported relevancy of past crimes is to identify the perpetrator of the crime being tried, we have required a close similarity of facts, a unique or 'fingerprint' type of information, for the evidence to be relevant." *State v. Savino*, 567 So. 2d 892, 894 (Fla. 1990).

[9] *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

> The mode of operating theory of proving identity is based on both the **similarity of and the unusual nature of the factual situations being compared.** A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant.

Drake v. State, 400 So. 2d 1217, 1219 (Fla. 1981)(emphasis added).

In this case, the trial court properly analyzed the facts surrounding the proffered testimony, finding the incident with the two men at a car to be completely dissimilar to the crime in the instant case. As Appellant candidly asserts in his brief, the actions of the two men "were not similar to the murder" in this case. Initial Brief at 56.

A similar situation occurred in *Rivera v. State,* 561 So. 2d 536, 537 (Fla. 1990), when the defendant sought to introduce evidence pertaining to another, dissimilar abduction that occurred while he was in custody. *Id.* at 540. This Court explained:

> We find the dissimilarity of this crime to Staci Jazvac's murder sufficient to preclude its admissibility as relevant evidence. Linda Kalitan was twenty-nine years of age, whereas Staci was eleven. Her body was fully developed, whereas Staci's body was childlike. Linda's body was totally nude except for a pair of socks, whereas Staci was clothed. Linda's body

> was found in a canal and her clothing was weighted down by rocks. Although both bodies were found in the same general location, Staci was found in the vacant field. In Linda's case, there was evidence of anal sex prior to her death, unlike Staci's case. Staci was abducted in northern Broward County, and Linda was abducted in southwest Broward County. The only alleged similarities were that both Staci and Linda were riding bicycles when they were abducted; they were both asphyxiated; their bodies were found in the same general area; and pantyhose was discovered in the vicinity of their bodies. Under these circumstances, we find that the trial court did not abuse its discretion in excluding the proffered evidence.

Rivera, 561 So. 2d at 540.

In this case, the circumstances of the proffered testimony were not similar to the crimes at issue; thus, the evidence was not relevant to prove identity, and the trial court properly precluded it. *Id.; Olsen v. State*, 751 So. 2d 108, 111-12 (Fla. 2d DCA 2000)(no abuse of discretion by excluding proffered evidence of crimes that were altogether different than from the circumstances surrounding the defendant's case); *State v. Savino*, 567 So. 2d 892, 894 (Fla. 1990) (the trial court did not abuse its discretion by excluding evidence from the defendant's wife alleging abuse of a different child under dissimilar circumstances during defendant's trial for the death of the six-year-old child.)

Even if, as Sexton's asserts, the trial court was incorrect to analyze the admissibility of the evidence under the "reverse

Williams Rule" standard, the ultimate conclusion would remain the same: the key consideration would still be relevancy. Sexton has failed to show how this evidence was relevant. The fact that two people may have attempted to gain access to a vehicle parked several streets away from the victim's home does not, by any means, suggest that there may be different "suspects" in this case other than Sexton. If that logic is to be followed, then defendants would be permitted to introduce evidence of any and all crimes occurring within a radius of a victim's home around the time that the charged offense occurred.

In this case, Sexton was observed in the victim's home; his vehicle was seen parked outside of her house; the victim's blood was found on Sexton's clothing; and his DNA was linked to the murder scene. Sexton knew the victim and there were no signs of forced entry into the home. The evidence concerning the other men was not relevant in this case, and the trial court properly excluded it.

ISSUE III

THE TRIAL COURT PROPERLY ADMITTED CATHERINE SEXTON'S STATEMENT TO THE DETECTIVE,"HE'S NOT TELLING THE TRUTH. HE GOT HOME AT 2 A.M."

In his third issue, Sexton argues that the trial court erred by permitting the prosecutor to ask Detective Grady about a comment Sexton's wife, Catherine Sexton, made while the detectives were talking to Sexton. A trial court's ruling on the admissibility of evidence will be upheld absent an abuse of discretion. *Williams v. State*, 967 So. 2d 735, 747-48 (Fla. 2007).

At trial, a recording was played of Sexton's conversation with Detective Hatcher that occurred with Detective Grady present. (DAR V25/4267-69). During the conversation, Catherine Sexton approached the detectives. (DAR V25/4274). She could be heard saying, "Hi." (DAR V25/4274). The following conversation ensued:

> SEXTON: Do you know that old lady Ann, the one that talks on the phone when she calls me to do her lawn?
>
> [CATHERINE SEXTON]: Uh-huh.
>
> SEXTON: They said they think she was murdered last night.
>
> [CATHERINE SEXTON]: Oh, my God.
>
> SEXTON: Because I had driven by there just after I seen you, because her lawn wasn't quite up, but sometimes she wants me to do other things. She's

always got a multitude of things she wants done, and I was trying to pick up an extra job, and talking to her around ten minutes.

DETECTIVE HATCHER: We're walking around talking to anyone that had any contact with her yesterday and the last few days.

[CATHERINE SEXTON]: (Inaudible) inside her home and the daughter has left a message before.

DETECTIVE HATCHER: Yeah. Yeah. I just need you to – you can print there, print there and sign there. […] All you've got to do is just take them both out, swab it all underneath your tongue, down on the gums, get it nice and juicy and wet. Do it up underneath the other side. Okay.

SEXTON: What time did I get home last night? 10:30, maybe? Something like that?
She doesn't' remember.

DETECTIVE HATCHER: All right. So you got home around home – you're saying you got home around 10:30?

SEXTON: around 10:30.

(DAR V25/4274-76).

Detective Grady testified after this recording had been admitted into evidence and played for the jury. The prosecutor asked Detective Grady about the response Catherine Sexton gave that was not captured on the recording. Sexton's counsel then made a hearsay objection, which was overruled by the trial court. (DAR V26/4369). The trial court found the response to be a spontaneous statement. (DAR V26/4372).

As a result, Detective Grady testified that upon Sexton asking for confirmation from his wife that he arrived home at 10:30 the previous evening, she immediately advised to the detective, "He's not telling the truth. He got home at 2:00 A.M." (DAR V26/4374). Sexton argues that this statement was hearsay, and the trial court erred in admitting it as a spontaneous statement because the statement was not made in response to an event recently observed. Sexton specifically argues that the statement was made around two to four in the afternoon, and it referenced an event that had occurred at two in the morning. Initial brief at 58. He concludes that the twelve hour time difference between his alleged return home and the time that the statement was made means that the statement was not made at the time of or immediately after observing the event. Initial brief at 58.

"A spontaneous statement must be made 'at the time of, or immediately following, the declarant's observation of the event or condition described.'" *Deparvine v. State*, 995 So. 2d 351, 369 (Fla. 2008)(*quoting J.M. v. State*, 665 So.2d 1135, 1137 (Fla. 5th DCA 1996)). Here, Catherine Sexton's statement immediately followed her observation of her husband lying to detectives. Sexton just told the detectives that he had arrived home at 10:30 the night before, and he had attempted to get

Catherine Sexton to cover for him. Catherine Sexton promptly reacted by telling Detective Grady that Sexton was "not telling the truth." (DAR V26/4374). She advised the detective that he got home at 2:00, not 10:30 like he had just said.

Catherine Sexton was not merely narrating the past event of Sexton's arrival home. Rather, she was responding to the situation and making sure the detective knew that Sexton was dishonest about when he returned home. She was describing the event as it was occurring and setting the record straight. *See Deparvine*, 995 So. 2d at 371.

Alternatively, Catherine Sexton's statement could also be admitted as an excited utterance.[10] The following conditions are necessary in order for an excited utterance to be admissible: 1) there must have been an event startling enough to cause nervous excitement; 2) the statement must have been made before there was time to contrive or misrepresent; and 3) the statement must have been made while the person was under the stress of excitement caused by the startling event. *Stoll v. State*, 762 So. 2d 870, 873 (Fla. 2000). Under the excited utterance exception to hearsay, it is not necessary for the statement to

[10] The trial court recognized that the statement could be considered either a spontaneous statement or an excited utterance. (DAR V26/4372).

"describe or explain" the event, rather, it must only "relate" to the event causing the excitement. Charles W. Ehrhardt, *Florida Evidence* § 803.2, at 735 (2002 ed.).

Catherine Sexton walked into a conversation in which her husband was being questioned by two detectives. She learned that the woman her husband worked for had just been murdered, and her husband had been to Parlato's house before she was murdered. Certainly, these facts would be startling enough to cause Catherine Sexton to feel nervous excitement. Additionally, Catherine Sexton made her statement before she had an opportunity to make a misrepresentation. The statement was an instantaneous response to Sexton's misrepresentation, and the statement was made without reflection.

The timing of the statement occurred while Catherine Sexton was under the stress of excitement caused by the startling event. The detectives were at her home, her husband was being questioned about a murder, and he had just been dishonest regarding his whereabouts the night before. All of these circumstances in which the statement was made fit the required elements for the statement to be classified as an excited utterance. *E.g.*, *Rogers v. State*, 660 So. 2d 237 (Fla. 1995)(permitting a witness to testify, under the excited utterance exception, about statements the victim made to her

after she had called the police for assistance but while she was still under the stress of startling event).

Nevertheless, any alleged error was harmless because Catherine Sexton testified at trial and the jury heard her statement that Sexton arrived home at 1:55 a.m. (DAR V26/4349, 4354). Thus, the challenged testimony regarding when Sexton actually arrived home was cumulative of the trial testimony.

Further, the defense had an opportunity cross-examine Catherine Sexton, and she explained that "a lot of times" Sexton would return home and sit outside for a while before knocking on the door to be let inside. (DAR V26/4354). According to Catherine Sexton, he would listen to music and drink beers outside. (DAR V26/4354). She ultimately concluded that she did not know what time Sexton arrived home; she only knew that he knocked on the door around 1:55 a.m. (DAR V26/4355). Therefore, the jury was presented with the possibility that Sexton did indeed arrive home around 10:30, but that he had stayed outside before actually entering the home. Based on the foregoing, Sexton's conviction requires affirmance.

ISSUE IV

THE TRIAL COURT DID NOT ABUSE ITS DICRETION BY ALLOWING THE STATE TO PRESENT EVIDENCE AND LIMITED PHOTOGRAPHS OF POSTMORTEM INJURIES.

Next, Sexton claims that the trial court erred in admitting testimony and photographs of the victim's postmortem injuries. He specifically argues that because the injuries did not cause the victim's death, they should not have been discussed by the medical examiner, and the State should not have been permitted to admit photographs depicting the injuries. "A trial court's ruling on the admission of photographic evidence will not be disturbed absent a clear showing of abuse of discretion." *Armstrong v. State*, 73 So. 3d 155, 166 (Fla. 2011) (internal citations omitted).

This Court has long held that photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance. *Jennings v. State*, 123 So. 3d 1101, 1126 (Fla. 2013); *Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990). "The test for admissibility of photographic evidence is relevancy rather than necessity." *Douglas v. State*, 878 So. 2d 1246, 1255 (Fla. 2004) (*quoting Pope v. State*, 679 So.2d 710, 713 (Fla. 1996)). Crime scene photographs are relevant to establish the manner in which the murder was committed, to show the position and location that the victim was found by police,

or to assist crime scene technicians in explaining the condition of the crime scene when the police arrived. *Douglas*, 878 So. 2d 1246. In this case, the photographs and testimony relating to the victim's postmortem injuries were used for all of these permissible purposes.

Susan Miller, Forensic Investigator from the Pasco County Sherriff's Office, used photographs to aid her testimony about the crime scene and the victim's condition when she was found. (DAR V27/4467, 4511, 4513-17, 4520). The medical examiner, Dr. Thogmartin, also used a crime scene photograph[11] to explain the victim's condition and injuries. (DAR V28/4643-46). Another photograph was used by Jerry Findley, expert on crime scene reconstruction and bloodstain pattern analysis. (DAR V25/4183). He showed the jury the pattern of blood stains in the picture, and he concluded that the victim sustained a minimum of seven blows in that area. (DAR V25/4183, 4184). Accordingly, the challenged photographs were properly admitted to aid the witnesses' testimony, to show the victim's injuries, and explain the crime scene. *See Jennings v. State*, 123 So. 3d 1101, 1127 (Fla. 2013) (finding no error in the trial court's admission of photographs depicting the murder scene that were used by law

[11] This was one of the photographs already used during Miller's testimony.

enforcement officers to describe how they found the victims and other evidence, such as a bloody shoe track).

The photographs and testimony referencing postmortem injuries were relevant for additional purposes. They demonstrated premeditation. *See Philmore v. State*, 820 So. 2d 919, 931-32 (Fla. 2002). Parlato ultimately died from the injuries to her face; however, Sexton may have not known whether or when she would die from the injuries to her face. All of the injuries provided context and further demonstrated Sexton's intent.

The burning of Parlato's vaginal area showed Sexton's consciousness of guilt. Sexton may have been attempting to remove his DNA after he committed the sexual battery because he used bleach and started a fire. The stab wound and excised breast explained the knives at crime scene, provided context to the neighbors' observation of Sexton washing objects in Parlato's kitchen sink, and offered a possible explanation for the presence of Parlato's blood on Sexton's clothing. Based on all these reasons, the photographs and testimony relating to the postmortem injuries were properly admitted. *Jennings v. State*, 123 So. 3d 1101, 1127 (Fla. 2013) (finding no error in the trial court's admission of photographs depicting the murder scene that were used by law enforcement officers to describe how they found

the victims and other evidence, such as a bloody footprint); *Douglas*, 878 So. 2d 1256 (the autopsy photographs depicting the postmortem injuries were relevant to show that the injuries were consistent with having been run over by a car and to identify the defendant as to assailant by explaining how the victim's blood was on the vehicle that the defendant was driving on the night of the murder); *Seibert v. State*, 64 So. 3d 67, 88 (Fla. 2010) (no abuse of discretion where trial court admitted a photograph depicting the victim's dismemberment because it was relevant to show premeditation, consciousness of guilt, the sequence of events based on blood spatter patterns, and to show the details of the crime scene).

Even if the trial court erred in admitting the photographs, any alleged error must be deemed harmless given all of the evidence implicating Sexton and the minor role that the photographs and testimony of the postmortem injuries played in the State's case. *Hertz v. State*, 803 So. 2d 629, 643 (Fla. 2001; *Looney v. State*, 803 So. 2d 656, 670 (Fla. 2001); *Thompson v. State*, 619 So. 2d 261, 266 (Fla. 1993). Accordingly, Sexton's conviction requires affirmance by this Court.

ISSUE V

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE SECOND MOTION TO CONTINUE THE PENALTY PHASE WHEN SUBSTITUTE COUNSEL HAD ADEQUATE TIME TO PREPARE, AND THE TRIAL COURT ADDRESSED, REMEDIED, OR ACCOMMODATED ALL OF SUBSTITUTE COUNSEL'S CONCERNS LISTED IN SUPPORT OF THE NEED FOR A CONTINUANCE.

Sexton next challenges the trial court's denial of substitute counsel's motion for continuance of the penalty phase. The granting or denying of a motion for continuance is within the discretion of the trial court. *Hernandez-Alberto v. State*, 889 So. 2d 721, 730 (Fla. 2004). This Court has consistently held that

> An abuse of discretion is generally not found unless the court's ruling on the continuance results in undue prejudice to the defendant. This general rule is true even in death penalty cases. While death penalty cases command our closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance.

Snelgrove v. State, 107 So. 3d 242, 250-51 (Fla. 2012) (*quoting Doorbal v. State*, 983 So. 2d 464, 486 (Fla. 2008). The trial court did not abuse its discretion by denying the motion for continuance in this case.

The penalty phase was scheduled to begin April 23, 2013. (DAR V30/5071-72). Steven Fisher, of The Office of Criminal Conflict and Civil Regional Counsel, was assigned as Sexton's

lead penalty phase counsel, and Bryon Hileman was Fisher's supervisor. Fisher's wife was involved in an automobile accident, and Fisher was unable to serve as Sexton's penalty phase counsel.

On April 22, right before the penalty phase was scheduled to begin, Hileman advised the court of the accident. (V13/2266-67). He also explained that defense expert witness Dr. Michael Maher was unavailable until May 6. (DAR V13/2267; DARV31/ 5102). Based on those reasons, he requested a continuance until May 6. (V13/2266-67). The court granted the motion for continuance, and the penalty phase was rescheduled for May 6. (V13/2274).

At an April 29 hearing regarding an alternate juror, Hileman requested that the penalty phase be continued until June. Hileman stated that he did not feel comfortable that he would be "sufficiently, fully prepared on May 6." (DAR V31/5272). The court denied counsel's *ore tenus* motion for continuance. (DAR V31/5100).

On May 3, Hileman again requested a motion for continuance. Hileman advised the court that he worked 22 hours over the weekend. (DAR V31/5107). He had meetings with Sexton's trial counsel on April 29 and April 30. (DAR V31/5107). He had five lawyers in his office assisting him with various tasks. (DAR V31/5107). On May 2, he met with expert witness, Dr. Valerie

McClain, and he planned to have another meeting with her over the weekend. (DAR V31/5107). He estimated he had spent 60 to 70 hours preparing for the penalty phase. (DAR V31/5111).

Counsel indicated that the family witnesses from Oregon had been phoned numerous times and had finally just responded. (DAR V31/5108). Hileman felt that he required more time to talk to each family member to determine whether they should be called as a witness, and he did not want to rely on another person's report in making that determination. (DAR V31/5113).

Additionally, because the family witnesses did not initially return the phone calls, he was not sure whether they would be available or willing to testify, and he had not scheduled video conferencing for their testimony. (DAR V31/5108). However, Carol Springer, the mitigation specialist had worked on Sexton's case for two years, and she was available as a witness. (DAR V31/5108). Hileman had met with her for four hours the previous day. (DAR V31/5128). Hileman also explained that Dr. Maher was in California, and he required more time to speak to him. (DAR V31/5113). Based on all of these explanations, Hileman requested a four-week continuance, explaining that he could "probably get up to speed" if the hearing was continued until June. (DAR V31/5112-13).

The trial court pointed out that Sexton had demanded a speedy trial. (DAR V31/5132). The court explained,

> As far as I was concerned, the defense knew as early as the 21st of April, clearly by the 22nd of April, that this case, if continued, was going to be –have to be handled by another individual.
>
> Mr. Anderson has been here throughout. He handled the penalty—the guilt phase of this trial. He's more than able to assist you in what occurred during that time and the testimony of all of the witnesses.
>
> And as I recall, at many bench conferences, he had typed-written notes of the statements made by witnesses in his presence and in his person and he showed them to me. He said the witness said, blah, blah, blah and it turned out he was right. I went back. I had the clerk read those words back and he was correct.
>
> So he has in his possession, my guess is, many, many, many, personal notes that could be reviewed that are, by my indication, quite accurate as to what the testimony of the witnesses were.
>
> He prepared the entire guilt phase himself. He did almost all the witnesses, but for a few. So the testimony and the cross-examination, what people said, can be gotten very well from your cocounsel who sits next to you and has been here the entire time.
>
> The rest of the witnesses, as Mr. Halkitis points out in his motion, are not extensive. We have some children whose deposition was done with Mr. Anderson present, again, in – typed up, ready for you to review. And you could talk to them by phone. But their depositions have been taken, can be reviewed. Whether you called them or not call them, that can be something you can consider with your client prior to calling them as a witness.
>
> We haven't even gotten to whether they would be available by teleconference or to flying back. But

I'm sure Mr. Halkitis, if it meant continuing this case, would agree to let them testify live via Skype teleconference, if they're testimony is consistent with that they're going to recall in deposition. But I'll leave that for a motion and a hearing.

So then we're left with the doctors.
You've spoken to Dr. Maher. By your own admission. You talked to him at length, at least 45 minutes or more. And I had indicated I would break on Monday to allow you to have the two to four hours.

Now, call me silly, but I've done a lot of these cases and the doctor's testimony is almost always pretty consistent. They have their own opinion of the defendant; they look at his records, his reports. Certainly. We're not talking about you learning a language you don't already know.

I'm sure you're quite aware of the MMPI-II or II or whatever reports that he did. A review of those reports, two to four hours, will get you up to speed on what it is that this doctor is going to present – the doctor is going to present to the jury.

As to whether the mitigator – mitigation specialist can testify, case law seems to indicate that notwithstanding some hearsay objections, most of what she has to say could come in. […]

The State has already indicated they are not going to put on any witnesses. They are going to rely on the guilt phase, which, again, your cocounsel was there for, reviewed, all of that was presented and can be brought – you brought up-to-date pretty quickly.

I sat through the trial. […] Dr. Thogmartin's testimony, by my recollection, was less than 30 minutes. Quite clear, quite concise. […] The blood spatter expert's testimony, I don't recall that taking more than, maybe, 45 minutes tops. And that's with direct and cross-examination.

So, Counsel, I appreciate that you want to do what you believe is your obligation as a defense attorney, but

> **I believe that you can. I would never put you in a situation where I felt that you could not or would not be prepared, notwithstanding what you would put on the record.**
>
> So you have tired many of these cases. The situation, the complexity of this case, the types of witnesses that are going to be called by the defense and the State are not of any great knowledge that you wouldn't already have or couldn't digest. **Whether you want to go through every scrap of paper in your file, I can understand that, but I'm not sure that that is the basis by which I have to grant a continuance or not grant a continuance. It's whether you can, given the time and complexity of this case, be prepared to handle the death penalty part of the murder case.**
>
> And, in this case, given the fact that you've known since April 22nd of the serious nature of the injuries to Mr. Fisher's wife, and the likelihood that, at best, he would be at 50 percent, that you've had since April 22nd to prepare, Your office has had since April 22 to prepare. And Mr. Anderson, who was here and did the entire guilt phase of this, has been here and is available to you and available to assist you in the penalty phase. The motion for continuance will be denied.

(DAR V31/5132-5140).

On May 6, Hileman renewed his objection to the trial court's denial of this motion for continuance. (DAR V33/5317). The court denied the motion based upon its previous rulings. (DAR V33/5317). It further noted that all of the jurors were polled regarding their availability from May until mid-June, and

there were no other dates in which all of the jurors were available. [12] (DAR V33/5318).

The court did not abuse its discretion in denying the motion to continue for four weeks. Sexton suffered no prejudice from having the penalty phase at that time. Sexton was represented by an extremely skilled and experienced attorney. The record reflects that Hileman had already spent 60-70 hours preparing by May 3, and he likely spent significantly more hours on the case before the penalty phase began. He was also receiving help from numerous other attorneys,[13] including Sexton's lead trial counsel, Anderson. Anderson was present for the depositions of penalty phase witnesses as well.

Moreover, the trial court made every effort to accommodate Hileman as substitution counsel. The court continued the penalty phase for two weeks, which provided additional time for Hileman to prepare. The court agreed to end early on May 6 to give

[12] They were already using the second, alternate juror. (DAR V33/5346). Another juror planned to return home to Wisconsin later in May and would not be available to return to Florida for five months. (DAR V31/5131). The remaining could not be available on the same day in June. (DAR V33/5318).

[13] Hileman received further assistance from Mr. Watts, Mr. Christopher Boldt and Ms. Ita Neymotin, who was head of Regional Counsel. (DAR V33/5322, 5326-27, 5343, 5352). The court acknowledged that Mr. Watts had excellent expertise in death penalty cases. (DAR V33/5327).

Hileman more time to meet with Dr. Maher. Springer was permitted to testify about hearsay from Sexton's family members,[14] and the court allowed Springer to read a letter from Sexton's sister, who was not listed as a defense witness. (DAR V31/5391). The court even granted Hileman's special request to instruct the jury that Fisher had a medical emergency. (DAR V33/5324-25).

This case is distinguishable from Sexton's relied upon authority of *Wike v. State*, 596 So. 2d 1020, 1025 (Fla. 1992). In *Wike*, this Court emphasized that Wike's request for a continuance was for a short period of time and for a specific purpose of procuring additional mitigation witnesses who could have provided admissible evidence for the jury to consider during the penalty phase. *Id.* Under these circumstances, this Court found that the failure to grant a continuance that was only for a few days constituted error. *Id.*

Here, one continuance had already been granted. An additional four-week continuance would have required empanelling

[14] Hileman stated that Jonathan Sexton and Lorina Smith were not able to fly to Florida on May 6, and Madison Sexton would not return his calls. (DAR V33/5340). According to the prosecutor, none of the witnesses had expressed problems returning to Florida during their depositions. (DAR V33/5341). Sexton had also made statements during his jail phone calls that he hoped that they would not be testifying. (DAR V33/5342). The record reflects that Jonathan Sexton and Lorina Smith delayed returning calls about their testimony. (DAR V31/5108).

a new jury. Thus, the continuance in this case would have been longer and much more complicated than the few-day continuance in *Wike*. This case is also different because although Hileman alleged he needed more time to prepare, he did not offer a valid, specific purpose for the continuance as counsel had done in *Wike*.

Hileman claimed that he wanted a continuance in order to have more time with Dr. Maher. The trial court planned to end court early on May 6 to provide Hileman with the opportunity to have additional time to meet with Dr. Maher. However, on the morning of May 6, the record reflects that Hileman had determined that he no longer needed the time to speak to Dr. Maher. (DAR V33/5340). If Hileman did not need to use the time that he had to meet with Dr. Maher, he certainly did not require an additional four weeks (or more) in order to have more time with Dr. Maher.

Furthermore, Hileman had claimed that a continuance was necessary to speak to Sexton's family and friends to determine whether he should use them as witnesses. However, Hileman ultimately chose to present the evidence through Springer's testimony instead of having Sexton's family and friends testify. The court entered a ruling allowing the mitigation expert to "testify to all the statements of the witnesses who are not

present and all the hearsay[.]" (DAR V33/5343). Given that Springer was permitted to testify to the non-present witnesses' hearsay statements and Hileman was provided ample time to have discussions with Dr. Maher, Sexton suffered no prejudice, much less undue prejudice.

While it is Sexton's burden to establish that the court abused its discretion, Sexton's offers no reasoning to support his claim. On appeal, Sexton merely claims that if Hileman had time to talk to Dr. Maher, he would have learned that Dr. Maher was not an expert on the effects of chemicals and he could have hired a neurophamacologist who could have fully explained Sexton's symptoms from chemical and alcohol exposure. Initial Brief at 72. This argument was never presented to the trial court, and therefore, it is not preserved for appellate review. *See Farina v. State*, 937 So. 2d 612, 628 (Fla. 2006); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982).

Even if it had been preserved, it would have been without merit because Dr. Maher had been asked to focus on Sexton's exposure to toxic chemicals when he was initially retained in his case. (DAR V34/5609). Thus, the defense had always planned to have Dr. Maher testify in that regard. Dr. Maher investigated various toxic substances and their effects on the brain as well as alcohol interactions. (DAR V34/5608-5610). He researched

Toluene, Methyl Ethyl Ketone, and other organic solvents relating to Sexton's exposure. (DAR V34/5610). Dr. Maher testified about the solvents and the effects that they could have had on Sexton. (DAR V34/5610-5625).

Dr. Maher concluded that Sexton suffered from cognitive impairment from exposure to organic solvents and alcohol. (DAR V34/5624-25). He opined that Sexton's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired based on the physiological effects that the underlying conditions had on Sexton's brain, and he opined that they were present continuously and "would certainly have been present in the time period leading up to and the time period encompassing the offense." (DAR V34/5630).

Furthermore, Sexton's other expert, Dr. McClain, testified that chronic use of alcohol and exposure to toxic chemicals could compound or have interactive effects on the severity of Bipolar Disorder symptoms. (DAR V34/5536-37). Dr. McClain also opined that intoxication could greatly increase the likelihood of an intense overreaction from someone suffering from Bipolar disorder. (DAR V34/5541).

Significantly, the trial court found mitigation based on this testimony. The court found that Sexton had established

that his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was substantially impaired. Accordingly, the denial of the motion for continuance did not result in undue prejudice to Sexton, and the trial court did abuse of discretion in this case. Therefore, Sexton is not entitled to a new penalty phase proceeding.

ISSUE VI

THE TRIAL COURT PROPERLY DENIED SEXTON'S REQUEST TO HAVE COUNSEL DISMISSED.

In his next challenge, Sexton argues that the trial court erred by denying his request to have penalty phase counsel dismissed.

> [W]here a defendant, before the commencement of trial, makes it appear to the trial judge that he desires to discharge his court appointed counsel, the trial judge, in order to protect the indigent's right to effective counsel, should make an inquiry of the defendant as to the reason for the request to discharge. **If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense.**

Nelson v. State, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973) (emphasis added). Thus, in order to be entitled to substitute counsel, a defendant must allege incompetency, and there must be reasonable cause to believe that counsel is rendering ineffective assistance.

Sexton did not allege that Hileman was incompetent. In fact, Sexton actually admitted, "Well, I cannot attest to the competence of Mr. Hileman[.]" (DAR V33/5332). Rather, Sexton

felt that Hileman failed to be "proactive" by not immediately reassigning the case to himself or another attorney upon learning of Fisher's wife's accident. (DAR V33/5332). Sexton stated that Hileman was neither diligent nor conscientious by delaying the reassignment. (DAR V33/5332-34). Sexton alleged that Hileman waited several weeks to reassign the case, which resulted in three of his defense witnesses being unavailable. (DAR V33/5337-38, 5334).

Sexton's allegations were premised on dissatisfaction rather than incompetence. Under similar scenarios, this Court has found that no further inquiry by the trial court was warranted. *McKenzie v. State*, 29 So. 3d 272, 282 (Fla. 2010); *Morrison v. State*, 818 So. 2d 432, 440 (Fla. 2002); *Watts v. State*, 593 So. 2d 198, 203 (Fla. 1992). Nevertheless, the court in this case initiated comprehensive inquiry regarding Sexton's concerns. In response to the allegations, Hileman explained that he reassigned the case after several days of learning of the accident; Sexton's assertion that he waited several weeks was incorrect. (DAR V33/5337).

With regard to the Oregon witnesses, they were flown to Florida on April 22 to testify, but because of Fischer's wife's accident, the penalty phase was continued. (DAR V33/5338). The witnesses returned to Oregon, as they were unable to stay

through the new penalty phase date. (DAR V33/5338). Hileman was receiving help from Anderson, and Anderson had provided them with phone numbers to his office and cellular phone, and instructed them to call him regarding their availability. (DAR V33/5339). They never called him regarding their availability. Anderson phoned them several times over a week-long period, but his calls were not returned. (DAR V33/5339). Springer also called the witnesses to no avail. (DAR V33/5339). On May 3, Jonathan Sexton and Lorina Smith returned the calls to inform that they could not return to Florida to testify on May 6. (DAR V33/5339). Madison Sexton never retuned the phone calls. (DAR V33/5339)

After questioning Sexton about his concerns as well as listening to the accounts from Anderson, Hileman, and the prosecutor, the court, finding no basis for ineffective assistance, denied the motion to discharge counsel. On appeal, Sexton concedes that the trial court followed the proper procedure in responding to his request to dismiss counsel.[15] Initial Brief at 74. Taking no issue with the procedure, Sexton merely disagrees with the trial court's outcome.

[15] Therefore, he has waived any claim regarding the adequacy of the court's inquiry.

Sexton argues that the three witnesses were brought from Oregon "with the full intention to have them testify at the original penalty phase." Initial Brief at 74. He claims that when the proceeding was delayed, the witnesses returned to Oregon, and defense counsel failed to maintain contact them. Initial Brief at 74-75. Sexton appears to be faulting Hileman for delaying the penalty phase when the witnesses were present, even though Hileman had just learned of Fisher's wife's accident and had not yet begun preparation. Given that Hileman received a continuance in order to prepare for Sexton's case, and the witnesses were unable to stay in Florida for the new penalty phase date, they returned to Oregon. The record completely refutes the allegation that defense counsel did not maintain contact with the three witnesses.

The witnesses were called numerous times by Anderson as well as Springer. The witnesses delayed returning the numerous messages, and when they eventually responded, they stated they were unable to travel to Florida. Sexton's daughter did not even bother returning the calls at all. Any allegation that Sexton's defense was not diligent in attempting to communicate with the

witnesses after the penalty phase was continued is completely without merit.[16]

Despite the witnesses being uncooperative, Hileman arranged to have their statements admitted through Springer. The trial court made it very clear that it was not going to continue the penalty phase again, and Hileman appeared to have done everything he could given Fischer's unavailability and the lack of cooperation from the witnesses. Sexton's claim that he should have been entitled to new counsel under these circumstances is absurd because new counsel would not remedy any of these issues.

Sexton has altogether failed to assert an actual claim of incompetence. *See Sexton v. State*, 775 So. 2d 923, 930 (Fla. 2000)(finding an appeal to be without merit where the appellant had requested new counsel a week before trial but was merely noting his disagreement with his attorney's trial strategy and preparation and he did not assert a sufficient basis to support a contention that his attorney was incompetent). Thus, this issue is without merit.

[16] Appellee notes that, during Sexton's recorded jail calls, Sexton expressed his desire that his family not testify. (DAR V33/5342).

ISSUE VII

THE TRIAL COURT PROPERLY EXCLUDED IRRELEVANT PHOTOGRAPHS OF APPELLANT AND HIS BROTHER.

In his seventh claim, Sexton challenges the trial court's denial of his request to introduce certain photographs during the penalty phase. "A trial court's ruling on the admission of photographic evidence will not be disturbed absent a clear showing of abuse of discretion." *Armstrong*, 73 So. 3d at 166. While a defendant is entitled to present any conceivable mitigation to a jury or judge or consideration, "the mitigating evidence must be 'relevant to the defendant's character, his prior record, and the circumstances of the offense in issue."' *Eaglin v. State*, 19 So. 3d 935, 943-44 (Fla. 2009).

The photographs at issue include a photograph of Sexton's deceased brother, Duey Sexton ("Duey") as well a photograph of Sexton wearing St. Louis Cardinals garb. However, the Initial Brief also appears to be referencing another photograph of Sexton that is different from the one of him in the St. Louis Cardinals outfit. When the trial court entered a ruling regarding the photograph of Duey, Sexton's counsel elected not to introduce the other photograph of Sexton, which apparently pictured him around the time of Duey's death. (DAR V33/5418). To the extent that Sexton's argument appears to be including this

photograph within his challenge to the trial court's ruling regarding the photograph of Duey, this issue has been waived. *Doorbal v. State*, 983 So. 2d 464, 499 (Fla. 2008). Thus, there are only two photographs at issue: one of Duey and another of Sexton in the St. Louis Cardinals clothing.

Sexton attempted to introduce the photograph of Duey during Singer's mitigation testimony. Singer testified that Duey was born when Sexton was about five years old. (DAR V33/5403). In August of 1983, Duey was shot while he and his friend were playing with a gun. (DAR V33/5411). Sexton was nineteen at the time of Duey's death, and Duey was approximately fourteen. (DAR V33/5411). An article from the local newspaper featuring Duey's death was admitted into evidence and read to the jury. (DAR V33/5411-12). Sexton then sought to introduce a photograph of Duey pictured alone shortly before his death. (DAR V33/5414).

The trial court found that the article and the testimony already explained the accident, and the picture of Duey was not relevant nor did it corroborate his death or humanize Sexton. (DAR V33/5416-18). Hileman argued that it corroborated the fact that there was a family relationship. (DAR V33/5417). But the court disagreed, finding it irrelevant. (DAR V33/5417-18).

The trial court properly excluded the photograph of Duey because it was not relevant; it did not speak to Duey's

accident, Sexton's relationship with Duey, or the effect of Duey's death on Sexton. While Sexton claims that the photograph was relevant to show the age of Duey at the time of his death, Springer's testimony established Duey's age and Sexton's age at the time of Duey's death. It was not necessary for the jury to see what Duey looked like around the age of his death in order to understand that Duey died or that Sexton was impacted by his brother's death.

Even if the picture could have been relevant to prove any of those issues, it would have been cumulative of the other evidence presented. Here, Sexton had Singer's testimony, the article regarding the shooting, and even a family photograph picturing Duey at a younger age. (DAR V33/5427). The photograph at issue was clearly cumulative of the other evidence.

This Court has affirmed trial courts' rulings under similar circumstances. *See Johnson v. State*, 660 So. 2d 637, 645 (Fla. 1995) (trial court did not err by precluding photograph of Johnson's daughter who had died by miscarriage when the photograph was of little relevance and was cumulative of the other evidence presented); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000) (finding no error in the trial court's denial of Zack's request to introduce a photograph of his niece when he was allowed to offer testimony about his niece and the photograph

was unnecessarily cumulative); *see also Eaglin v. State,* 19 So. 3d 935, 943-44 (Fla. 2009) (affirming the trial court's ruling in excluding the videotape of a former prison guard's interview because the evidence would not properly be considered mitigating). Accordingly, the trial court did not abuse its discretion by denying Sexton's request to admit the photograph of Duey.

Next, Sexton challenges the preclusion of his photograph wearing a St. Louis Cardinals jacket and hat. Sexton sought to admit numerous photographs of himself at various ages, and the court had explained that it would not allow a "chronological picture order" of Sexton's life. (DAR V33/5416). The court then reviewed the additional photographs Sexton sought to introduce, and the court permitted several photographs to be admitted. The court limited the number of photographs of Sexton's family members, and it excluded a picture of Sexton sporting St. Louis Cardinals gear, noting that he was not pictured with any children in that photograph, and it did not show anything but Sexton wearing a St. Louis jacket. (DAR V33/5422).

Counsel then offered the little league explanation in an effort to make the photograph relevant; however, the court did not agree that the St. Louis Cardinals outfit related to little league, and it reiterated its decision not admit the photograph.

Even without the trial court's experience as a little league coach, it was reasonable to conclude that a photograph of Sexton pictured alone wearing St. Louis Cardinals gear was not relevant to show his involvement in little league.

This case is altogether different from Sexton's cited authority of *Alamo Rent-A-Car v. Phillips*, 613 So. 2d 56 (Fla. 1st DCA 1992), where the judge made several comments reflecting his personal bias and prejudice against the defense expert witness. *Id.* at 58. Here, the court made no such comments, and its evidentiary ruling was properly based on relevancy.

In his brief, Sexton alternatively claims that he should have been allowed to present the photograph to show that he was an avid St. Louis Cardinals fan; however, this argument was never presented to the trial court, and thus, has not been preserved. Initial Brief at 77. Even if it had been preserved, it was without merit. A picture allegedly showing that Sexton was an avid St. Louis Cardinals fan because he wore a St. Louis Cardinals jacket and a baseball cap does not constitute mitigation evidence. The trial court properly excluded the photograph as irrelevant.

The court did, however, admit numerous photographs that Sexton had requested, including a photograph of Sexton at a young age, a family picture, a photograph of Sexton sledding

with his daughter, a picture of Sexton playing a game with his son, a picture of Sexton sailing, and a picture of Sexton's daughter and grandchildren. (DAR V37/6145-6161; V33/5440, 5454, 5455). Given the testimony and evidence already presented by Sexton during the penalty phase, any alleged error in not admitting these photographs was harmless.

ISSUE VIII

THE TRIAL COURT'S ALLEGED MINOR MISREADING OF THE PENALTY PHASE JURY INSTRUCTION DID NOT CONSTITUTE FUNDAMENTAL ERROR WHEN IT WENT UNNOTICED BY THE PARTIES AND THE JURY RECEIVED THE CORRECT WRITTEN INSTRUCTIONS.

Sexton's next issue involves the court's reading of the jury instructions. No challenge was made to the reading of the jury instructions below, and Sexton agreed that the reading of the instructions was accurate. (DAR V35/5841). Therefore, this issue has not been preserved, and the fundamental error standard is applicable. *Farina v. State*, 937 So. 2d 612, 629 (Fla. 2006).

Sexton contends that the trial court misread the instructions by stating "in the absence of *aggravating* factors" when it should have read "in the absence of *mitigating* factors." However, none of the attorneys noticed this alleged mistake.

Nevertheless, the written instructions stated the correct language. (DAR V15/2519). Each member of the jury received a copy of the instructions. (DAR V35/5824). Further, the instructions advised the jury, "You must follow the law that will be given to you," and "You must follow the law as it set out in these instructions." (DAR V15/2513, 2515).

Given the written instructions that were provided to the jury, any alleged error in the misreading of the instructions

did not amount to fundamental error. *Polls v. State*, 134 So. 3d 1068, 1069-70 (Fla. 4th DCA 2013) (no fundamental error from the trial court incorrectly substituting the word "possessing" for the word "processing" while orally defining the term "manufacture" to the jury when the written jury instructions included the correct definition); *Partin v. State*, 82 So. 3d 31, 45 (Fla. 2011) (any potential error in the trial court's reading of the jury instruction was harmless because the jury was provided with correct written instructions); *Wike v. State*, 698 So. 2d 817, 822 (Fla. 1997) (court's erroneous use of the word "or" when "and" was required did constitute fundamental error where the jury was provided with a written copy of the instructions).

Sexton's brief attempts to manufacture a fundamental error that was overlooked by all penalty phase participants. Experienced trial counsels and the judge, who all knew the way the instruction should read, did not notice any error. To suggest that the jury actually noticed the alleged misreading and was somehow confused by the written instructions involves a stretch of the imagination that goes far beyond the analysis required for fundamental error. Sexton's claim is without merit, and no new penalty phase is warranted.

ISSUE IX

COMPETENT SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT THE MURDER WAS HEINOUS, ATROCIOUS, OR CRUEL.

Sexton's ninth issue challenges the trial court's finding of the heinous, atrocious, or cruel (HAC) aggravator. In analyzing a trial court's finding of an aggravating factor, this Court reviews the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent, substantial evidence supports its finding. *Boyd v. State*, 910 So. 2d 167, 191 (Fla. 2005). The analysis for HAC focuses on "the means and manner" in which the defendant killed the victim and the victim's perceptions of the circumstances. *Buzia v. State*, 926 So. 2d 1203, 1212 (Fla. 2006).

The evidence in this case established that the ninety-four-year-old victim died of repeated blows to the head and neck. (DAR V28/4650). Her right eyebrow suffered multiple blunt force traumatic impacts that caused her bones to break. (DAR V28/4651-52). Her cheek bones were crushed. (DAR V28/4651). Her vertebrae became dislocated and "slipped" due to the impact. (DAR V28/4652).

The pummeling caused bleeding around her brain and bruising to a portion of her brain. (DAR V28/4652-53). Her orbits were fractured, and part of the broken bone went into her skull. (DAR V28/4653). Parlato's rib fractures were blunt force injuries from either someone sitting on her, hitting her chest, or her chest hitting something during the struggle. (DAR V28/4653).

In addition to the blunt impact injuries, the victim had three vaginal tears that occurred while she was alive. (DAR V28/4655). This was a traumatic injury caused by something being inserted into her vagina, and the "the pain would have been horrible." (DAR V25/4656). She also had a defensive injury on her middle finger. (DAR V28/4677).

Dr. Thogmartin testified that at some time the victim became unconscious, but he could not state the exact point that unconsciousness occurred. (DAR V28/4677). He opined that the victim's defensive injury to her middle finger showed that she was awake at some point during the attack. (DAR V25/4677). However, he admitted there was no way of knowing whether the defensive injury occurred at the end of the attack or near the beginning. (DAR V25/4677). He explained that the best estimate was by the context of the crime scene; if there was blood everywhere it would show that she was moving around after she was hit. (DAR V25/4677-78).

Sexton's main argument is that the evidence did not support HAC when "the victim may have been killed or rendered unconscious by the first or second blow to the head. Initial Brief at 80. Sexton is incorrect; the record does not support that the victim was unconscious by the first or second blow. Rather, the record establishes that the victim was alive and aware of her impending death.

According to Jerry Findley, the expert in blood spatter analysis, the victim was hit at least three times in the foyer, near the front door. (DAR V25/4171). She was hit at least once in a living room chair. (DAR V25/4172). She sustained seven blows in the location of the living room where her body was found. (DAR V25/4173). During one blow, the upper part of her body was in a raised position, while the remainder of the blows indicated that her head was on the floor. (DAR V25/4173). Given this testimony, the trial court's conclusion that the victim was awake for at least a portion of the attack was supported by competent substantial evidence.

The different areas of impact establish that Parlato was conscious and moving from the front door back into the living room as Sexton was attacking her. This is further supported by the condition in which the victim was found with her sock pulled down and blood on the bottom of her foot. Findley testified that

this was caused by Parlato stepping along the way as she was standing upright. (DAR V26/4190). The blood spatter in the living room also shows that Parlato was at least initially conscious in the third area of impact, as her head went from an upright position onto the floor.

Parlato's defensive injury to her middle finger further supports the fact that she was conscious during Sexton's attack. (DAR V28/4677). This Court has held that defensive wounds are indicative of the victim's consciousness. *Guardado v. State*, 965 So. 2d 108, 116 (Fla. 2007). "The existence of defensive wounds is relevant to the HAC analysis." *King v. State*, 130 So. 3d 676, 684 (Fla. 2013), *reh'g denied* (Oct. 3, 2013). While the victim in this case only appeared to have one defensive wound, "this Court has never required a minimum number of defensive wounds in order to sustain a finding of HAC." *King*, 130 So. 3d at 685 (Fla. 2013), *reh'g denied* (Oct. 3, 2013).

The victim's defensive finger wound established that she was conscious and warding off Sexton during the attack. This belies Sexton's allegation that the victim was immediately knocked unconscious. This Court has affirmed HAC under similar circumstances where the victim sustained defensive wounds. *Guardado v. State*, 965 So. 2d 108, 116 (Fla. 2007); *See, e.g., Reynolds v. State*, 934 So. 2d 1128, 1155 (Fla. 2006) (finding

competent, substantial evidence to support the trial court's finding that the murders satisfied the HAC aggravating factor where the testimony of the medical examiner established that both victims exhibited defensive wounds, indicating that they were conscious during some part of the attack and attempting to ward off their attacker); *Boyd v. State*, 910 So. 2d 167, 191 (Fla. 2005) (affirming finding of HAC where bruising around the victim's wounds indicated she was alive when inflicted, and the defensive wounds showed she was conscious).

Even if the victim became unconscious earlier on in the attack, HAC still would be supported under the circumstances of this case. This Court has upheld the HAC aggravator where the victim was conscious for merely seconds. *Buzia v. State*, 926 So. 2d 1203, 1214 (Fla. 2006); *See, e.g., Francis v. State*, 808 So. 2d 110, 135 (Fla. 2001) (HAC upheld where medical examiner determined the victim was conscious for merely seconds); *Rolling v. State*, 695 So. 2d 278, 296 (Fla. 1997) (affirming HAC were victim sustained defensive wounds on her arms during the attack and was awake between thirty and sixty seconds before losing consciousness and dying).

The ninety-four-year-old victim was certainly conscious for at least some of the beatings she endured from Sexton. The fear that she felt is unimaginable; as she must have realized that

her trusted lawn care man was there, not to help, but to brutally injure and kill her. As the trial court pointed out, her advanced age would have made it difficult for her to fight against a significantly younger, taller, and stronger male, such as Sexton. (DAR V19/3192). Despite her handicap, she attempted to defend herself, only resulting in further injury. Sexton heinously attacked the victim in this case, and competent, substantial evidence supports the trial court's finding of the HAC aggravator.

While Sexton has not asserted that the imposition of the death sentence for the murder of Parlato is disproportionate, this Court considers the proportionality of a death sentence on direct appeal in every capital case. *See Gosciminski v. State*, 132 So. 3d 678, 716 (Fla. 2013); *Miller v. State*, 42 So. 3d 204, 229 (Fla. 2010). Notably, HAC is considered one of the most serious aggravators in the statutory sentencing scheme. *Hoskins v. State,* 965 So. 2d 1, 22 (Fla. 2007).

In addition to finding HAC, the trial court in this case found two additional aggravating factors: the victim was particularly vulnerable due to her advanced age or disability; and the capital felony was committed while Sexton was engaged in the commission of or an attempt to commit a sexual battery. The court weighed this aggravation against the following three

statutory mitigating factors and one nonstatutory mitigating factor: Sexton had no significant history of prior criminal activity; the capital felony was committed while Sexton was under the influence of extreme mental or emotional disturbance; Sexton's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and Sexton was amendable to rehabilitation and a productive life in prison.

The trial court found that the "nature and quality of the mitigation pales in comparison to the weighty aggravating factors[.]" (DAR V19/3196). The court assigned "great weight" to the aggravating factors and "little weight" to all of the mitigating factors except for Sexton's lack of criminal history, which was assigned "moderate weight." The court noted that even given the existence of the mitigating factors and the weight assigned to them, the aggravating factors far outweighed any mitigation.

This Court has affirmed the death penalty under similar scenarios where courts' have found mitigating circumstances to be far outweighed by the serious aggravating circumstances involved. *See, e.g., Douglas v. State,* 878 So. 2d 1246, 1262-63 (Fla. 2004) (upholding a death sentence where the victim was sexually battered and beaten, and the trial court found two

aggravators: HAC and commission during the course of a sexual battery, one statutory mitigator, and sixteen nonstatutory mitigators); *Everett v. State*, 893 So. 2d 1278, 1288 (Fla. 2004) (upholding a death sentence where the victim was beaten, raped, and suffocated and the trial court found three statutory aggravators: 1) convicted felon under sentence of imprisonment; 2) commission during the course of a sexual battery or burglary; and 3) HAC balanced against five statutory mitigators and four nonstatutory mitigators); *Mansfield v. State,* 758 So. 2d 636, 642, 647 (Fla. 2000)(defendant, who strangled victim and excised her genitalia while she was unconscious, had proportional death sentence when the trial court found two aggravating circumstances 1) HAC and 2) the crime was committed during the commission of or an attempt to commit a sexual battery, and five nonstatutory mitigators). This Court has also upheld death sentences in numerous cases involving beating deaths. *Allen v. State*, 137 So. 3d 946, 963 (Fla. 2013); *Buzia v. State*, 926 So. 2d 1203, 1206 (Fla. 2006); *Bogle v. State*, 655 So. 2d 1103, 1109 (Fla. 1995); *Chandler v. State*, 534 So. 2d 701 (Fla. 1988).

Even if this Court were to disagree with the first portion of this issue addressing why the court's finding of HAC was proper, Sexton's sentence would still be proportionate. *See Darling v. State*, 808 So. 2d 145, 164 (Fla. 2002) (holding death

sentence proportional where murder was committed while defendant was engaged in the commission of the crime of armed sexual battery and defendant had been previously convicted of felony involving the use or threat of violence to the person); *Sliney v. State*, 699 So. 2d 662, 667 (Fla. 1997) (death sentence proportional where the trial court gave great weight to two aggravators—committed during the course of a felony and for the purpose of avoiding lawful arrest—and statutory mitigators of 1) youthful age (little weight), and 2) no significant prior criminal history; nonstatutory mitigators: 1) his politeness; 2) good neighbor; 3) caring person; 4) good school record; and 5) gainful employment; *Smith v. State*, 641 So. 2d 1319, 1323 (Fla. 1994)(finding death sentence for first-degree murder of cab driver proportionate when 1) murder was committed while defendant was attempting to commit robbery and 2) defendant had previous conviction for violent felony, and mitigation included lack of significant history of criminal activity).

If this Court were to strike the HAC aggravator, two valid aggravating factors given great weight by the trial court would remain. The jury recommended death by a ten-to-two vote in this case. The trial court gave "little weight" to most of Sexton's mitigation and "moderate weight" to Sexton's lack of a significant criminal history, and the court concluded that the

aggravation far outweighed the mitigation. Even without the HAC aggravator, there was no reasonable likelihood of a life sentence being imposed under the circumstances of this case. Thus, any alleged error, beyond a reasonable doubt, did not contribute to the trial court's imposition of the death penalty.

ISSUE X

THE TRIAL COURT'S SENTENCING ORDER ADDRESSED ALL OF THE MITIGATING CIRCUMSTANCES REQUESTED BY SEXTON IN HIS SENTENCING MEMORANDUM AND ANY ALLEGED ERROR WAS HARMLESS.

Sexton's tenth claim alleges that the trial court failed to address numerous mitigating factors as required by *Campbell v. State*, 571 So. 2d 415, 419-20 (Fla. 1990). The sentencing court's duty to analyze mitigation offered by the defendant has been outlined by this Court in *Campbell* as follows:

> the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature.... The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance.

Reese v. State, 694 So. 2d 678, 684 (Fla. 1997) (*quoting Campbell v. State*, 571 So.2d 415, 419-20 (Fla.1990))[17].

At trial, Sexton offered a list of 22 mitigating factors that were presented to the jury. (DAR V15/2518-19). The list combined both statutory and nonstatutory mitigators. The first two mitigators were 1) the capital felony was committed while

[17] The portion of the *Campbell* opinion disallowing courts from according no weight to a mitigating factor was receded from in *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000).

the defendant was under the influence of extreme mental or emotional disturbance, and 2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (DAR V14/2518). The last mitigator listed "any other factors in the defendant's character, background, or life, or the circumstances of the offense that would mitigate against the imposition of the death penalty." (DAR V15/2519).

In between the first two mitigators and the last mitigator was a plethora of circumstances for the jury to consider, many of which were overlapping in nature by relating to the same subject matter. For instance, the following factors involved Sexton's mental health: 3) the defendant has bipolar disorder, 14) the defendant attempted suicide on multiple occasions, 15) the defendant was Baker Acted, and 16) the defendant sought treatment for his mental health issues. (DAR V15/2518). Additional factors also related to Sexton's mental health insofar as they were considered by Sexton's mental health experts and attributed to the experts' opinions, including: 4) alcoholic parents, 6) exposure to domestic violence, 10) death of younger brother, 11) alcoholism, 12) exposure to chemical toxins, and 17) intoxication.

At the *Spencer* hearing, no additional evidence was presented. The State announced its intention to rely on its sentencing memorandum, which had been filed, and the defense advised the court of its intention to file a memorandum at a later date. Sexton did not address the court, and no argument was made regarding his mitigating circumstances.

In his sentencing memorandum, the mitigation section referenced portions of the jury instructions and explained that counsel "undertook extensive investigation into the Defendant's background, character, medical and psychiatric history, and relationships." (DAR V19/3168). It advised that "the following evidence presented at trial and the penalty phase supports the reasonableness of a life sentence[…]" (DAR V19/3169).

Following that sentence, Sexton listed four categories of mitigating circumstances along with his supporting evidence and explanation. The categories included: 1) the capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law was substantially impaired; 2) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; 3) no significant history of criminal activity; and 4) the defendant is amendable to rehabilitation and a productive life in prison. (DAR V19/3169-3175).

It is clear that the format of Sexton's applicable mitigating circumstances changed after the penalty phase hearing. Sexton combined and condensed his requested mitigating circumstances in his sentencing memorandum.[18] He also included an additional factor not previously sought and did not reference a few factors that had been previously requested. In its sentencing order, the trial court considered the same four categories of mitigation that Sexton had requested in his sentencing memorandum.

Sexton now argues that the trial court's sentencing order was defective for failing to address numbers 3-17 of his mitigating factors that were listed in the penalty phase jury instructions. However, the sentencing order analyzes all of the mitigators that Sexton requested from the court in his sentencing memorandum.

A similar challenge was made in *Allred v. State*, 55 So. 3d 1267, 1282-83 (Fla. 2010), where Allred contended that the trial court failed to consider the prior domestic violence in his home

[18] In support of the argument that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, the sentencing memorandum references numerous factors that were listed separately in the jury instructions, including factors 11, 14, 16, 15, 17, 3, 4, 6, 10, 14, 1, 12, and 2. (DAR V19/3169-73).

and his father's drinking problem, but he did not specifically propose those factors of his home environment as separate, nonstatutory mitigating factors in his sentencing memorandum. *Id.* This Court found that Allred failed to demonstrate error because he did not specially propose that those mitigating circumstances. *Id.*

Likewise, in *Gonzalez v. State*, 136 So. 3d 1125 (Fla. 2014), the defendant claimed that the trial judge erred in failing to consider numerous nonstatutory mitigators, but he did not include those factors in the mitigating factors he argued to the court at trial or in his sentencing memorandum. This Court held that the court committed no error in failing to consider the factors when Gonzalez did not specifically raise those nonstatutory mitigating factors. *Id.* at 1165-66.

This Court should also find no error in the instant case. While Sexton argues that the trial court should have separately analyzed each mitigating circumstance originally provided to the jury, he seems to disregard the fact that he reconstructed his list of mitigating factors by condensing, combining, eliminating, and adding new factors for consideration in his sentencing memorandum. The court analyzed each factor Sexton asked it to consider. The court cannot be faulted for following the same format proposed by Sexton.

Moreover, the *Campbell* opinion instructs that mitigating circumstances should be dealt with as categories of related conduct rather than individual acts. *Campbell*, 571 So.2d at 419 n. 3. In *Gonzalez*, the trial court combined a broken family upbringing, depression and attention disorder, and drug addiction all under one mitigator. *Gonzalez v. State*, 136 So. 3d 1125, 1166 (Fla. 2014). This Court found no error in the court's grouping of the nonstatutory mitigators. *Id.; see also Rogers v. State*, 783 So. 2d 980, 997 (Fla. 2001)(finding that the trial court properly abided by *Campbell* where the court considered the nonstatutory mitigators "as categories of related conduct"); *Reaves v. State*, 639 So. 2d 1, 6 (Fla. 1994)(finding no abuse of discretion in the trial court's grouping of several mitigator factors into three categories when Reaves had proffered a greater number of nonstatutory factors).

Here, the sentencing order complied with the requirements of *Campbell* by considering categories of related conduct together. The trial court analyzed each circumstance that related to every one of Sexton's requested mitigating categories. The sentencing order clearly reflects that the trial court considered all of the evidence, made specific findings regarding mitigation, and weighed it accordingly. *Rogers v. State*, 783 So. 2d 980, 997 (Fla. 2001).

In the event that this Court does not agree and finds error, any error is harmless. *See Orme v. State*, 25 So. 3d 536, 548 (Fla. 2009)(finding the trial court's treatment of a mitigator to be improper but the error was harmless given the severity of the three aggravators in the case and other relatively weak mitigation); *Griffin v. State*, 820 So. 2d 906, 914 (Fla. 2002) (the trial court's omission of the word "rehabilitation" in the sentencing order was at worst harmless error where the court weighed and considered all of the factors upon which Griffin's potential for rehabilitation was specifically grounded); *Kilgore v. State*, 688 So. 2d 895, 901 (Fla. 1996) (court's failure to comment on the relationship between Kilgore and the victim in the sentencing order was harmless where the existence of the relationship was presented during the trial and this Court was confident that the trial judge was cognizant of this factor when weighing the mental health evidence); *Bogle*, 655 So. 2d at 1109("The fact that the trial judge did not specifically list Bogle's artistic talent and capacity for employment in mitigation is insufficient to overrule the trial judge's imposition of the death penalty given the minor weight that would be afforded to those factors.").

In light of the strong aggravators established in this case and the little weight assigned to Sexton's mitigating factors,

any alleged failure to strictly comply with *Campbell* was harmless. *Allred,* 55 So. 3d at 1283 (the court's failure to consider prior exposure to domestic violence and an alcoholic parent was harmless where the trial court's other findings evidenced that the court would have assigned minimal weight to those factors, the court found three significant aggravator factors, and including consideration of the difficult childhood among the other mitigation does not change the balance of the aggravating and mitigating circumstances); *Taylor v. State,* 855 So. 2d 1, 30 (Fla. 2003) (finding harmless error in trial court's failure to address the mitigating circumstance that "Taylor makes friends easily, enjoys people who also enjoy him, and has done good deeds for friends and even perfect strangers" because whether the trial court erred in rejecting it or in failing to assign any weight, any error would be harmless given the minimal amount of mitigation the factor would have provided).

The mitigation in this case cannot offset the three strong aggravating factors found, and there is no reason to remand this cause for resentencing since it is clear that any further consideration would not result in the imposition of a life sentence. *See Thomas v. State*, 693 So. 2d 951, 953 (Fla. 1997); *Lawrence v. State*, 691 So. 2d 1068, 1076 (Fla. 1997) *Barwick v.*

State, 660 So. 2d 685, 696 (Fla. 1995); *Armstrong v. State*, 642 So. 2d 730, 739 (Fla. 1994); *Wickham v. State*, 593 So. 2d 191, 194 (Fla. 1991); *Cook v. State*, 581 So. 2d 141, 144 (Fla. 1991) ("we are convinced beyond a reasonable doubt that the judge still would have imposed the sentence of death even if the sentencing order had contained findings that each of these nonstatutory mitigating circumstances had been proven"). Accordingly, this Court must affirm the death sentence imposed in this case.

ISSUE XI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO READ A PROPOSED SPECIAL JURY INSTRUCTION THAT WAS CONFUSING AND AN INACCURATE STATEMENT OF LAW.

Sexton challenges the trial court's refusal to grant his request for a special jury instruction on HAC. The decision on whether to give a particular jury instruction is within the trial court's discretion, and, absent "prejudicial error," such decisions should not be disturbed on appeal. *Card v. State*, 803 So. 2d 613, 624 (Fla. 2001) (*quoting Goldschmidt v. Holman*, 571 So.2d 422, 425 (Fla.1990)). The trial court did not abuse its discretion by denying Sexton's request for special instruction in this case when the standard instruction was adequate and the special instruction misstated the law and would have confused the jury.

Sexton's proposed special HAC instruction read as follows: "You are instructed that actions of the Defendant which were taken after the victim was rendered unconscious or dead are not relevant and should not be considered in determining whether the murder was especially heinous, atrocious, or cruel." (DAR V14/2503; V34/5698; V38/5762). The State objected to the proposed instruction based on it being an inaccurate statement of the law regarding the use of the word "relevant." (DAR V34/5698).

The court expressed concern with the instruction as written because it required the jury to determine when the victim because unconscious in order to determine which of Sexton's actions were relevant. (DAR V34/5698-99). After lengthy discussion, the court ultimately denied the request. (DAR V34/5698-5705). The court reasoned:

> At this point, I'm not going to read a special instruction. You most certainly can argue that to the jury, that if it was not done while she was awake, then they're not to consider it and the State cannot argue otherwise.
>
> However, the issues that I have with that instruction is, one, on these types of cases, the court, in most instances, tells the judge to read it as is it's [sic] written by the Supreme Court because when we don't, we get into all kinds of issues.
>
> Number two is, I'm telling the jury what is relevant and not relevant and, therefore, I'm instructing them not to consider everything. So, if I'm doing it as to one, then I need to do it as to all.
> You're telling me to tell the jury that it's not relevant. It is relevant. It's relevant for their consideration.
>
> […]I agree that it's the State's burden. But **what you're doing is you're putting an extra instruction that could mislead the jury and even confuse them about when they can use certain evidence and when they can't use certain evidence** […]

(DAR V34/5702-04) (emphasis added). The court again reiterated that Sexton would be permitted to make the argument to the jury

regarding the victim being unconscious,[19] and the court confirmed that the State would not be referencing the victim's postmortem injuries in support of the HAC aggravator. (DAR V34/5707).

Under these circumstances, the trial court properly exercised its discretion in denying Sexton's request. The standard jury instructions are presumed correct and are preferred over special instructions. *Stephens v. State*, 787 So. 2d 747, 755 (Fla. 2001). The standard jury instruction in this case defined HAC in the following manner:

> "Heinous" means extremely wicked or shockingly evil.
> "Atrocious" means outrageously wicked or 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 and was unnecessarily torturous to the victim.

(DAR V35/5831-32). This Court has approved these instructions and upheld cases attacking such instructions. *Hall v. State*, 614 So. 2d 473, 478 (Fla. 1993); *James v. State*, 695 So. 2d 1229,

[19] During closing argument, the jury was advised that the HAC aggravator applies in cases where the perpetrator kills the victim in a manner that heightens the pain and suffering. (DAR V35/5792-93). The jury was told that there was insufficient proof of HAC because the victim was unconscious or dead during the horrible acts that were committed. (DAR V35/5792-5796).

1235 (Fla. 1997). Accordingly, the standard HAC instruction was proper here, and no special instruction was necessary.

Moreover, the special instruction did not accurately state the law and would have been confusing to the jury. The instruction stated that the defendant's actions occurring after the victim was unconscious or dead were not relevant. However, those actions could be relevant in other circumstances, such as for the consideration of whether Sexton committed the capital felony while he was engaged in the commission of a sexual battery. The use of the word "relevant" in that context could have caused confusion among the jury. The wording of the proposed instruction was flawed and problematic.

In *Stephens v. State*, 787 So. 2d 747, 757 (Fla. 2001), this Court found that Stephens had failed to demonstrate that the trial court had clearly abused its discretion in denying the proposed special instructions when the instructions would have been confusing and misleading and possibly a misstatement of the law altogether. Similarly, in this case, Sexton has failed to overcome his burden of showing that his instruction, as proposed, was a correct statement of the law and neither misleading or confusing.

The court had warranted concern with the way in which the proposed instruction was written. It is worth noting that the

record does not reflect any proposed revisions of the instruction, which could have remedied the problematic wording. Nevertheless, Sexton argued to the jury that the injuries occurring after the victim was dead or unconscious could not be considered as part of their analysis for the HAC aggravator; thus, Sexton was not harmed by the ruling. Accordingly, no abuse of discretion occurred, and the court's ruling should be affirmed.

ISSUE XII

SEXTON'S ARGUMENT THAT FLORIDA'S CAPITAL SENTENCING PROCEEDINGS ARE UNCONSTITUTIONAL PURSUANT TO *RING V. ARIZONA* IS WITHOUT MERIT.

Sexton's last claim asserts that Florida's capital sentencing statute is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). The constitutionality of a statute is reviewed *de novo*. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013); *State v. Catalano*, 104 So. 3d 1069 (Fla. 2012).

This Court has repeatedly rejected Sexton's claim that *Ring* invalidated Florida's capital sentencing statute. *Gonzalez v. State*, 136 So. 3d 1125, 1168 (Fla. 2014); *Frances v. State*, 970 So. 2d 806, 822 (Fla. 2007) (noting this Court had rejected *Ring* claims in over fifty cases); *Gudinas v. State*, 879 So. 3d 616, 617 (Fla. 2004). Although Sexton requests that this Court reconsider *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) and *King v. Moore*, 831 So. 2d 143 (Fla. 2002) he has provided no valid basis for doing so. Relief must be denied.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, State of Florida, respectfully urges this Court to affirm the conviction and sentence of death imposed herein.

Respectfully submitted,

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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).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of February, 2015, I electronically filed the foregoing with the Clerk of the Court by using the e-portal system which will send a notice of electronic filing to the following: Julius J. Aulisio, Assistant Public Defender, Public Defender's Office, Post Office Box 9000-Drawer PD, Bartow, Florida 33831, [**appealfilings@pd10.state.fl.us**], [**jaulisio@pd10.state.fl.us**] and [**mjudino@pd10.state.fl.us**].

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