IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1095

RAFAEL ANDRES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

On January 24, 2005, at approximately 12:47 p.m., Ms. Hazel Vaughn was at her home when she saw smoke coming from an efficiency attached to her neighbor Mr. Jose Perez's house located at 1131 SW 74 Avenue, Miami, Florida. (T. 5668)[1] Vaughn noticed a man who resembled her neighbor's handyman, later identified as Appellant, coming and going earlier that morning from the neighbor's efficiency to his van, and at one point carrying a red gasoline container in his hand. (T. 5665-68) He then took off and left in his older model van just before Vaughn saw the smoke. (T. 5665-66) Within minutes, Miami-Dade Fire Rescue responded to the scene and discovered the dead body of a woman lying face down the floor. (T. 3810, 3817-18, 3820) The woman was later identified as the victim, Yvette Farinas, who lived in the efficiency. Yvette's body was covered in blood, beaten about the head and face, and an electrical, bloodstained cord was tied around her neck. (R. 3837, 3841-43, T. 6122, 6126-29) Yvette was pronounced dead on the scene and homicide detectives were called to respond. (T. 4351-52)

Upon inspection of the residence, the front door knob of the efficiency appeared to have been forcibly removed and there was evidence of tampering to

[1] **Error! Main Document Only.**Appellant will be referred to as such while Appellee will be referred to as the State or the Prosecutor. **Error! Main Document Only.**The symbols "R. [page]" and "T. [page]" will refer to the record on appeal and transcript of proceedings, respectively. "IB [page number]" refers to Appellant's initial brief.

the lock. (T. 3816, 4374) Miami-Dade Fire Department arson investigator Lieutenant Gene Tweedy found a fuel can spout and detected an odor of gasoline on an object behind the headboard. (T. 4311-14) Tweddy determined that the fire was started intentionally by the use of an ignitable liquid and an open flame on the bed of the bedroom based on the damage to the mattress. *Id.* Crime Scene Officers Jose Gonzalez and Roger Taffee of the Miami-Dade Police Department impounded several other pieces of evidence, including a bloody dish wash cloth, which was found near Yvette's body. (T. 4379-80, 5840)

Approximately a month prior to Ivette's murder, Yvette's landlord Jose Perez had hired Appellant, a handyman, to complete multiple renovations on his house and the two attached efficiencies. (T. 5033-34) Yvette lived in the south efficiency with her boyfriend, Alberto Ruiz, who at the time of the murder was on his daily route delivering milk to restaurants. (T. 4008-09) Yvette and Ruiz had just moved back into the efficiency on January 19, 2005 when the repairs were completed to her efficiency, as Yvette suffered from allergies to the dust from the construction. (T. 4006-08) While working on Perez's house, Appellant was also simultaneously hired to renovate the floors at the house of Perez's cousin, Angie Gonzalez. (T. 5087, 5097-98)

On the day of Yvette's murder, Appellant's only remaining projects were located in the main house. (T. 5015, 5033-5034, 5064-65) Appellant arrived

between 7:00 a.m. and 7:15 a.m. and as Perez had already left for work that day, Perez's wife, Ms. Suzelle Rodriguez, gave him the keys to the house. (T. 5020-22, 5060-61) Rodriguez then left for work. (T. 5008) Appellant was supposed to complete a full day of work soley at the Perez house. (T. 5039)

Unbeknownst that a fire had occurred, Perez later that afternoon listened to a voicemail from Appellant which was recorded around 12:47 p.m.; however, Appellant curiously stated it was 12:15 p.m. and that he was leaving the house to finish some work at the Gonzalez residence but would return later that afternoon. (T. 5039-40) Appellant failed to show up to Gonzalez's home, nor did he return to Perez's home on that day or on any day following the murder. (T. 5103) In fact, Appellant abandoned several valuable tools at Gonzalez's house and neither Perez nor Gonzalez saw him again. (T. 5104-06)

Upon learning this information in their investigation, police called Appellant, who agreed to meet with the officers at the police station the next morning. (R. 337-38, 600-01) However, Appellant did not meet with the police and could not be found. (R. 601) Accordingly, on January 26, 2005, Detective Gallagher obtained a pen register and "trap and trace" order for Appellant's wireless line. (R. 638-41) On January 27, 2005, Detective Gallagher additionally secured search warrants for the Appellant's home, body and van. (T. 4572-73; R. 366, 368-69)

On January 30, 2005, Detectives David Richards and Jose Iglesias located Appellant near a shopping center on a public street and executed the DNA warrant on his person. (T. 4627-28, 7789-90) As he was being apprehended, Appellant exclaimed, "I am not a monster, I just have a drug problem." (R. 370, 632) Several days after the murder, police found Appellant's van in a rural area with an empty red gasoline container in the trunk area. (T. 4641, 4644-45, 4650-51)

Yvette's autopsy revealed that her cause of death was multiple stab wounds to the chest and ligature strangulation. (T. 6140, 6188) Yvette also suffered blunt injuries to her face and post-mortem burns. (T. 6132-33, 6141-45, 6163) Upon submitting the evidence collected from the search of Appellant's house, his shoes came back positive for the presence of gasoline. (T. 4903) The bloody dishcloth found on the floor of the efficiency confirmed the presence of a mixture of Yvette's and Appellant's DNA. (T. 6016-17) Police later obtained video surveillance of Appellant using Yvette's debit card at several establishments on the day of, and the days following Yvette's murder. (T. 4704-05, 4954-55, 4957-63)

As a result, on April 4, 2006, Appellant was charged by indictment with (1) first-degree murder of Yvette Farinas; (2) burglary of a dwelling with an assault or battery therein of Yvette Farinas; (3) armed robbery with a deadly weapon of Yvette Farinas; and (4) first degree arson. (R. 26-30) On January 30, 2013, the State presented a second indictment amending count 2 to an armed burglary of a

dwelling with an assault or battery therein of Yvette Farinas. (R. 31-34)

A jury was sworn in and the matter proceeded to trial on October 28, 2014. (T. 3775) Captain Paganacci testified that on January 24, 2005, he responded to a fire located at 1131 Southwest 74th Avenue. (T. 3808) Upon arriving at the scene he noticed smoke and flames coming out of the right side of the home. (T. 3811, 3814) He entered Yvette's efficiency and saw the fire was coming from a bedroom but did not find any one there. (T. 3818) He continued to search in the kitchen where he saw Yvette's body face down on the ground and called for help. (T. 3818-19) Once he removed her body from the efficiency, Paganacci attempted to administer first aid, but realized Yvette had lacerations to her body and did not have a pulse. (T. 3819, 3829) Until this moment, Paganacci was not aware that Yvette was already deceased. (T. 3820, 3833) During cross-examination, Paganacci testified that, after removing Yvette from the efficiency, he noticed the doorknob of the efficiency had been ripped off. (T. 3835)

Lieutenant Gene Tweedy testified that during his investigation of the crime scene, he found a fuel can spout just outside Yvette's efficiency that had a faint odor of gasoline he knew came in recent contact with gasoline. (T. 4281, 4283)

Detective Jose Gonzalez indicated that he and Detective Roger Taffee were called to the scene to collect evidence. (T. 4352) They marked and photographed evidence of the blood stains found in the efficiency. (T. 4355) Detective Gonzalez

testified that he discovered another cap and spout of a gas can near the A/C unit of Yvette's efficiency. (T. 4363-65) Based on his law enforcement experience, he also took pictures of the efficiency door where the doorknob was pried off because he believed it indicated that Yvette's efficiency was burglarized. (T. 4373-76)

Hazel Vaughn testified that on January 24, 2005, she was living at 7381 Southwest 12th Street. (T. 5645) Vaughn saw Appellant working construction at Perez's house two or three times per week for the past month while she walked her son to school (T. 5654-55) Her face to face interactions with Appellant were brief, never going further than a "good morning" greeting. (T. 5657)

On the day of Yvette's murder, Vaughn dropped off her son at school and was back home by 8:40 a.m. (T.5651-52) Vaughn's niece was dropped off at her house between 8:45 a.m. and 9:00 a.m., and she began to take care of her niece and do some chores. (T. 5652) At one point, while Vaughn was outside, she heard a moan coming from Yvette's efficiency. (T. 5658-60) After returning inside, Vaughn was at her kitchen sink when she noticed Appellant's hand grabbing the top of Yvette's efficiency door instead of using the doorknob to close the door. (T. 5664) While a six foot tall wooden fence with slats in between each piece of wood separated Vaughn's home from Yvette's efficiency, the fence did not completely obscure Vaughn's view because her home was elevated a few feet above ground, and she was able to see through the slats of the fence. (T. 5662-63, 5666-67)

Vaughn then saw Appellant leave and subsequently come back to Yvette's efficiency. (T. 5664-65) Vaughn then saw Appellant leave again and head back to his van carrying a red gasoline container with him. (T. 5664-65, 5678) Although the fence obscured the majority of Appellant's body during this time, Vaughn recognized Appellant by his unique bushy, black hair. (T. 5667-68)

Immediately after Appellant left Yvette's efficiency, Vaughn noticed thick smoke emanating from the efficiency door and called 911. (T. 5666, 5668) At the time, Vaughn believed Appellant set fire to Yvette's efficiency to claim insurance fraud. (T. 5677) Vaughn spoke with Detective Chavary at the scene and later met with him to give him another statement and help with suspect identification. (T. 5648-49, 5672) Chavary presented Vaughn with a photographic lineup, where she identified Appellant as the individual leaving Yvette's efficiency based on his unique hair. (T. 5672, 5674, 5678-79)

Ms. Suzelle Rodriguez testified that she and her husband Jose Perez owned the house and the two attached efficiencies, including the efficiency that Yvette and Alberto Ruiz rented. (T. 4981-82) They hired Appellant in early December 2004 to do electrical work, but did not ask for his license or references. (T. 4983, 4986) Rodriguez and Perez would leave Appellant a spare set of house keys, including Yvette's efficiency keys, so Appellant could work in the efficiencies and house. (T. 4989-10, 5009) Perez was in charge of all financial matters with

Appellant. (T. 4995)

On the day of Yvette's murder, Appellant appeared for work as he normally did between 7:00 a.m. and 7:15 a.m. wearing a blue sleeveless T-shirt with lettering, blue jeans, and a navy cloth baseball cap. (T. 5007-08, 5020-21) While Appellant would occasionally carry a knife around his waist area, Rodriguez did not remember seeing the knife that day. (T. 5010) Appellant's only duties that day were to fix the kitchen outlet in the north efficiency; Appellant was never given any instruction that day to enter Yvette's efficiency, nor was Rodriguez aware of any electrical problems in her house or Yvette's efficiency. (T. 5010-11, 5022)

Mr. Jose Miguel Perez, Rodriguez's husband, testified that he hired Appellant in early December 2004 after Appellant's wife overheard him talking at a pharmacy about needing someone to do renovations to his house. (T. 5032, 5034) Appellant immediately began work but was taking a much longer time to complete the jobs Perez hired him to do, and on multiple occasions would not show up for work. (T. 5037-39) As a result, on January 23, 2005, Perez spoke with Appellant about his slow progress of work and repeated absences, indicating that he expected Appellant to work a full day on January 24, 2005. (T. 5037-39)

On the day of Yvette's murder, Perez left for work around 6:30 a.m. or 6:40 a.m. (T. 5036) At 2:00 p.m., Perez listened to a voicemail that Appellant left on his cell phone at 12:47 p.m., where Appellant strangely stated that the time was 12:15

p.m. and that he was heading to Perez's cousin Angie Gonzalez's house to finish laying tile but that he would return later in the day to complete his work. (T. 5039-40) Perez returned home at 4 p.m. to the scene of media, police officers, and ambulances on his block, where he learned that a murder and arson occurred in Yvette's efficiency (T. 5041-42) Appellant never came back that day, nor did Perez see Appellant again. (T. 5043)

During cross-examination, Perez indicated that Appellant had previously been in the house and Yvette's efficiency with a co-worker he sometimes brought with him known to Perez as "the Dominican," but Perez could not remember his given name. (T. 5058-60)

Angie Gonzalez testified that she hired Appellant to change the flooring at her new house located in the Calusa neigborhood after she met him through her family members, Suzelle Rodriguez and Jose Perez. (T. 5085-88) On January 20, 2005, Gonzalez wrote Appellant a check in the amount of $1,860.00, which constituted half of the agreed upon fee for the installation of new tile at her house. (T. 5089-90, 5094)

At noon on January 24, 2005, Gonzalez went to the new house to meet with Appellant; however, Appellant was not there. (T. 5099) Although she could not state whether Appellant did any work the weekend before, she believed the house was in the same condition. (T. 5102) Accordingly, at 4:41 p.m., 6:30 p.m., and

9:09 p.m. of January 24, Gonzalez called Appellant to inquire about his work. (T. 5103) Appellant returned Gonzalez's calls late that night indicating he could not come over to her house because he had a problem at the Perez house. (T. 5103-04) Gonzalez subsequently called thrice more on January 25, 2005, but Appellant never called back or completed the job, and Gonzalez never saw him again. (T. 5103-04) Two to three weeks later, a lady went to Gonzalez's house asking Gonzalez to return the tile cutter Appellant left behind at her, but Gonzalez refused to give it to her. (T. 5105-06)

Alberto Ruiz, Yvette's boyfriend, testified he met Yvette in March 2000 while his mother and Yvette were studying at the Miami Technical Institute. (T. 3991-92) He and Yvette began dating around April 22, 2000, moved in together in 2002, and began to live in the efficiency in April 2004. (T. 3992-95) At the time of Yvette's murder, Ruiz worked as a milk distributor and was also a licensed car bidder for a company named Pablo Arzola and Son Corporation. (T. 4000-01)

When construction on the main house started, he and Yvette moved out for 15 days because Yvette developed a dust allergy. (T. 4003-06) Upon their return, no further renovation or construction was needed to their efficiency. (T. 4008)

On the day of Yvette's murder, Ruiz left for his milk distribution job at around 4 a.m., which was comprised of several stops on an established route. (T. 4008-09) At 12:15 p.m., Lisbeth Farinas, Yvette's sister, called Ruiz to tell him she

was concered that she was unable to reach Yvette, to which Ruiz also stated that she wasn't picking up her phone for him either. (T. 4010) Ruiz told Lisbeth that he needed to finish the route and drop off the milk truck before returning home. (T. 4010-11)

At 3:05 p.m., Ruiz's brother called him to ask if something was amiss in his neighborhood because his wife was in the neighborhood and had to take a detour due to television cameras. (T. 4011) When Ruiz returned home, he saw the police cars at his home and met with Detective Chavary, who took him to the police station for questioning. (T 4011-13) Ruiz cooperated with the police's investigation, although he felt Chavary was treating him as a suspect. (T. 4048-50)

Lisbeth Farinas, Yvette's sister, testified that prior to Yvette's murder, Yvette and Ruiz were romantically involved and had a good relationship while living together for about three years. (T. 3854) She never saw Ruiz and Yvette have a physical argument. (T. 3854) On January 23, 2005, the day before the murder, Yvette planned to pick up Farinas from their mother's house in the morning to run errands and go to the doctor. (T. 3858) The plan was for Yvette to leave at around 9:00 a.m. and pick Farinas up at her mother's house by 9:15 a.m. (T. 3859-60) The next day, at around 9:30 a.m., Farinas began to call repeatedly as she was worried about her sister, who was late to pick her up. (T. 3863)

Detective Enrique Chavary testified that at around 1:30 p.m. on January 24,

2005, he arrived to the crime scene and later that evening interviewed Vaughn and Ruiz. (T. 5117) After Chavary told Ruiz that Yvette was murdered, Ruiz signed a consent to search form to search his vehicle and consented to provide DNA. (T. 5118-20, 5123) Chavary did not arrest Ruiz because during his 22 years in the Homicide division, he would not always arrest a spouse or boyfriend while investigating a crime scene. (T. 5122-23)

When Chavary first interviewed Vaughn, she indicated what she saw that day, and was asked to provide a physical description of the suspect. (T. 5126) On January 27, 2005, Vaughn met again with Chavary at the police station where she gave a further detailed description of the person at Yvette's efficiency before the fire. (T. 5129-30) At that point in the interview, Chavary did not ask her if she had previously seen this person on another day. (T. 5130) Chavary then presented a photographic line-up, depicting several individuals' faces with similar characteristics to the individual she saw that day. (T. 5131-32) Chavary indicated Vaughn correctly identified Appellant as the suspect. (T. 5133-35, 5138-40)

Chavary also recalled interviewing Juan Baccalau, who occasionally worked with Appellant at the Perez house. (T. 5141-43) Over defense objection, a picture of Baccalau was entered into evidence. (T. 5143) Subsequently, the State entered the self-authenticating death certificate of Baccalau into evidence (T. 5151-52)

Sergeant Douglas McCoy testified the police labeled Appellant as a person

of interest and began searching for him. (T. 4571-72) During the execution of the search warrant of Appellant's house on January 27, 2005, McCoy took Appellant's clothes, including two shirts and a pair of sneakers that matched the ones he was seen wearing on the day of Yvette's murder. (4591-92) McCoy also testified that he found a red gas can without a cap and spout underneath a basketball post located outside in a small backyard of Appellant's townhouse. (T. 4323-25) McCoy recognized that the gas can still had a faint odor of gasoline. (T. 4626-27)

During cross-examination, Defense counsel proceeded to ask McCoy about his familiarity with Vaughn's photographic lineup identification. (T. 4739) McCoy was asked about other addresses concerning Ruiz's route and whether McCoy traveled to any of those stops in the course of his investigation. (T. 4765) On redirect examination, McCoy confirmed that Chavary investigated and interviewed Ruiz, who was considered not to be a suspect. (T. 4795-96)

Detective Jose Pete Gonzalez of the Miami-Dade Police Department testified that he took photographs of Appellant's van after police located it in the Redlands. (T. 4813) In addition to noting that the van was "in poor condition, very messy, very dirty inside," Detective Gonzalez mentioned that someone used an object to superficially damage the van's steering column and ignition, but that it was inconsistent with a vehicle that was hotwired and stolen. (T. 4820-23) Also found in the van was a red gasoline can and clear spout. (T. 4825-26)

Collene Carbine, a criminalist for the Miami-Dade Police Department, testified that she received evidence of a core can containing fire debris (item 2), a gas can containing a sun screen (item 3) and a core can containing wood (item 4) for testing. (T. 4854, 4892-93) She concluded that all three items contained ignitable liquid gasoline. (T. 4894-95) On cross-examination, Carbine indicated that items such as wood and the sneakers were porous and that there was a chance that gasoline could be detectable for a longer period of time. (T. 4910)

Rene Farinas, Yvette's father, testified that he came to know Yvette's bank account was overdrawn in certain amounts on the day of, and after Yvette's murder when he saw several withdrawal amounts on her Washington Mutual statement and confirmed with the bank a couple of weeks after the murder. (T. 3976-78) The State entered into evidence a composite exhibit showing Yvette's bank records. (T. 3973-74)

Mario Montesinos, a banker who worked at Bank Atlantic at the time of the murder, testified he reviewed all of Bank Atlantic's internal and external controls, as well as its security systems. (T. 5195-97) The Bank Atlantic branch located on Bird Road contained a recording device that used a regular videotape to record eight hours worth of footage. (T. 5197-98) The video machines have a date and time stamp, and are regularly monitored to ensure the time and date were accurate, and checked periodically to make sure the equipment was working properly. (T.

5205, 5207-08)

Andrew Murillo, a fraud investigator for Bank Atlantic was responsible for investigating crimes against the bank and reviewing the video equipment and logs. (T. 5220) In March 2005, Detective Gallagher contacted Murillo to review footage recorded on January 24, 2005: the same date the bank charges appear on Yvette's bank account statements. (T. 5230, 5234, 5241-42)

Floyd Reid, a forensic video analyst, testified that his job was to study and evaluate multimedia for the court. (T. 5494) The State then offered the photos from the Bank Atlantic video into evidence, depicting Appellant using Yvette's debit card. (T. 5492, 5500-01)

Richard Brenner, an Asset Protection Manager for Home Depot, testified his job was to protect the company's assets and assist with third party investigations. (T. 4950) Brenner was familiar with the camera set up in January 2005, where cameras were placed at the entrances, exits, and self-check out registers of the Home Depot on Bird Road. (T. 4951-52) Homicide detectives contacted Brenner on February 23, 2005 regarding a transaction and accompanying transacted debit card number that occurred on January 25, 2005. (T. 4952-54) Brenner testified that Appellant purchased a drill combo kit and a framer. (T. 4962-63) During redirect, Brenner indicated that when a debit card with a PIN number is used, it is not customary to ask the customer for identification. (T. 4969)

Mr. Ramon Vieras, an employee of Advanced Auto located at 8860 Southwest 40th Street at the time of the murder, also testified as custodian of records to the sales receipt kept in the ordinary course of business, which indiciated a charge on Yvette's debit card on January 24th. (T. 5502-04)

Ms. Sidra Bissarus, the Reservations Manager in Hospitality for the Miccosukee Resort and Gaming hotel testified that Appellant stayed at the Resort on January 25, 2005, and paid $180 cash for his stay, in addition to incurring telephone charges for using the landline in his room and a service charge for renting a movie. (T. 5517-18) However, Appellant left $31.51 in cash behind from his deposit that the Resort would have refunded to him if he returned. (T. 5518-19)

Mr. Mike Bustillo, a custodian of records for MetroPCS, testified that based on cell phone tower records, Appellant made a call from his cellphone at 12:47 p.m. to Jose Perez within a sector close to Yvette's home. (T. 5551, 5561) Bustillo continued showing examples of how the cellphone towers recorded Appellant's outgoing calls and location as he began to leave Yvette's home. (T. 5566) On cross-examination, Bustillo stated each cellphone tower sector ranges in distance from a mile and a half to three miles from the central point. (T. 5574) The celltower that pinged Appellant's location at 12:47 p.m. was located at 7000 SW 4th Street. (T. 5574) Bustillo could not comment on Appellant's exact location on January 24 based on the cellphone records, but could state he was sure Appellant

was within the sector that also represented where Yvette lived. (T. 5576-77, 5597-98)

Detective James Gallagher testified that he arrived at the crime scene at around 1:30 p.m. on January 24, 2005. (T. 5788, 5790-91) Gallagher testified that during the murder investigation, Alberto Ruiz was ruled out as a suspect. (T. 5798) Accordingly, Gallagher did not recreate Ruiz's milk route and instead turned his focus on the evidence that indicated Appellant was involved. (T. 5798)

Directing his attention to the scene of the crime, Gallagher noticed that the doorknob to the front door was removed, presumably by a screwdriver, and that the screws were still attached to the inside of the door. (T. 5801) When he entered Yvette's kitchen, he saw water falling from the sink onto the floor, in addition to a washcloth on top of a mat near the refrigerator. (T. 5840)

During his subsequent investigation of Appellant's use of Yvette's debit card, Gallagher met with Andrew Morrill to go over videotape and bank records of Yvette's debit card activity before and after her murder. (T. 5804-08) Gallagher also obtained surveillance from Home Depot, but was unable to obtain footage from Sunshine Citgo, Advanced Auto Parts, or the Miccosukee Resort and Gaming Hotel. (T. 5832-33, 5835; R. 1517, 2249, 2251-55)

On cross examination, Defense counsel confirmed that Gallagher, despite having the addresses of the stops of Ruiz's milk route, did not send anyone to

further investigate Ruiz or personally talk to those stores. (T. 5860) On redirect examination, Gallagher reiterated the reason he did not feel the need to drive the milk route was because Ruiz was already ruled out as a suspect. (T. 5863)

Detective Dave Richards testified that on January 30th, 2005, he and Detective Iglesias executed a DNA search warrant after finding Appellant at a strip mall located at 9807 SW 40 Street. (T. 7788-90) As Richards exited his vehicle to detain Appellant, Appellant told Richards that he had a drug problem. (T. 7790)

Erin Fletcher, a retired criminal scene investigator for the Miami-Dade Police Department, testified that on January 30, 2005 she was called out to 9807 SW 40th Street to perform a search warrant of Appellant's body (T. 4839, 4841) Fletcher brought Appellant back to headquarters to process his body and collected evidence of hair and DNA samples to send to serology. (T. 4842-43, 4847-48)

Ms. Adriana Kristaly, a forensic biologist with the crime scene department of the Miami-Dade crime lab, testified that Yvette's and Appellant's DNA was found mixed together on a washcloth after she performed various DNA tests. (T. 5967, 6016-17, 6970) The odds that it was Appellant's DNA and not some other person's was 1 in 36,100. (T. 5971)

Dr. Emma Lew, chief medical examiner for the Miami-Dade Medical Examiner's Office, testified to her medical school education, technical specialization, professional experience, and duties as a medical examiner (T. 6104-

07) Dr. Lew reviewed Dr. Mott's notes,[2] reports, and the photographs of Yvette's autopsy case file and became knowledgeable about Yvette's cause of death. (T. 6109-13, 6115-17) Dr. Lew testified that she was able to determine a homicide victim's manner and cause of death based on the victim's injuries. (T. 6176)

Dr. Lew testified that the skin on the lower left side of Yvette's face and chin had a big bruise and possibly an abrasion or scrape on the left side of the lower lip, consistent with punches to that area of the body. (T. 6134-36, 6141) There was an area on the tip of Yvette's nose and right side of her lower lip, chin and cheek that was clear of blood, suggesting the right side of her face was on the ground. (T. 6126-27)

Yvette's chest contained three stab wounds, which penetrated the chest cavity and right and left lungs causing hemorrhaging, a fatal type of wound. (T. 6145, 6154-55, 6155-57) Additionally, Yvette had 600 milliliters and 100 milliliters of blood in the right and left side of her chest, respectively. (T. 6155) Dr. Lew stated that evidence of blood in the chest area is indicative of hemorrhaging. (T. 6155) Although excruciatingly painful, a person who suffers these stab wounds may not immediately lose consciousness. (T. 6169, 6176-77) Dr. Lew estimated that after Yvette sustained these injuries, she may have lived 30 minutes more

[2] Dr. Mott was the former medical examiner who performed Yvette's autopsy, but who no longer worked at the Miami-Dade Medical Examiner's Office.

before succumbing to her unfortunate death. (T. 6159)

The skin on Yvette's thighs were covered in a trail of blood running straight down to the legs and continuing in a change of direction, which suggested Yvette was upright when she sustained her chest stab wounds, but subsequently went to a kneeling position. (T. 6130-32) The small bruises and abrasions to Yvette's left knee were also consistent with her falling or being forced to her knees. (T. 6142) All of Yvette's injuries were sustained before her death and some may have been defensive wounds. (T. 6143, 6195) The skin on Yvette's feet, arms and back had some heat effect, including the skin of the right heel, arm, and lower back, which slipped off. (T. 6132-33, 6141, 6143, 6144) Ligature marks on the right and left sides of Yvette's neck, and hemorrhages in both eyeballs, evidenced an object was placed around her neck, indicating she struggled and incurred defensive scars while Appellant asphyxiated her. (T. 6141-42, 6160-66, 6177)

Dr. Lew determined Yvette's cause of death to be stab wounds to the chest and ligature strangulation. (T. 6187-88) The lack of carbon monoxide in Yvette's body, and the lack of soot at the back of the tongue, neck structure, windpipe and lungs indicated she died before the fire started. (T. 6174) While Dr. Lew determined Yvette was stabbed before being strangled, she could not tell whether the injuries to the face occurred before or after the stabbing and ligature strangulation. (T. 6189)

During the State's closing argument, the State argued Appellant surprised Yvette when he used the keys to the efficiency to steal money and that he had to eliminate Yvette to avoid being caught. (T. 6460) Following the stabbing, the State argued Appellant's failure to return to Perez's house to complete his work and abandonment of the van indicated consciousness of guilt. (T. 6466)

Thereafter, during closing Defense counsel informed the jury that the State's case was all based on assumptions. (T. 6503-04) Defense counsel specifically referred to the lack of blood on Appellant's body and belongings as evidence of innocence. (T. 6506-07) Defense counsel's theme was that Appellant did not commit this crime for money as he was receiving a lot of business from his renovation work, even though later admitting he used her card for personal consumption. (T. 6508-16) Defense counsel also argued the only reasonable inference the jury could make from Appellant's van discovery in the Redlands was that the van must have been stolen, since the tools Appellant bought were left behind in the van and he took a taxi home from Miccossukee. (T. 6534-36) Defense counsel inferred that the real culprit was Alberto Ruiz, who was not properly investigated by the police. (T. 6532-34)

In the State's rebuttal, the State used various pieces of evidence to demonstrate that when added together, Appellant's argument that the evidence was flawed was unreasonable because Appellant was always coincidentally at the

wrong place at the wrong time (T. 6552, 6554, 6556-57) Although Defense counsel objected to the State's mention of coincidences as denigration, the court overruled each objection. (T. 6552, 6554-57) The State also rebutted the idea Ruiz was to blame and that the van was stolen and that instead, the evidence reasonably was demonstrative of Appellant's consciousness of guilt. (T. 6487, 6559-60)

On November 18, 2014, the jury found Appellant guilty as charged on all counts. (R. 2424-28) The court adjudicated the Appellant guilty on all counts in accordance with the verdicts. (R. 2632-34)

On December 12, 2014, the court commenced penalty phase proceedings. The State presented evidence to the jury of five aggravating factors: (a) Appellant was previously convicted of another felony involving the use of threat of violence to the person under section 921.141(5)(b); (b) the capital felony was committed while Appellant was engaged in the commission of, or an attempt to commit any burglary under section 921.141(5)(d); (c) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effectuating an escape from custody under section 921.141(5)(e); (d) the capital felony was committed for pecuniary gain under section 91.141(5)(f); and (e) the capital felony was especially heinous, atrocious or cruel under section 921.141(5)(h). (R. 3012)

Pursuant to the prior violent felony aggravator, Detective Bruce Roberson, a former Homicide Detective for the City of Miami Police Department, testified he

interviewed Appellant regarding his involvement in the Second -Degree murder of Ms. Linda Azcarreta in 1987.[3] (T. 7125, 7128) During the interview Appellant gave multiple differing accounts of how Azcarreta died, but ultimately confessed that he killed her while they were both intoxicated during a rock cocaine binge. (T. 7136-38, 7142-43) Appellant even blamed Azcarreta for introducing him to rock cocaine, and stated he felt the only way to escape the drug's effects was to kill Azcarreta. (T. 7144) After killing Azcarreta, Appellant discarded her purse and the knife he used to kill her in a dumpster nearby. (T. 7165-66)

During the sentencing phase, defense counsel presented a total of twelve witnesses to speak about Appellant's mitigating circumstances. Roberson and Appellant's then attorney testified Appellant was especially emotional and remorseful when he confessed to killing Azcaretta. (T. 7145, 7285-86) Various corrections officers testified Appellant served as a prison trustee, informed corrections officials about future threats to prison officials and inmates, informed officers of weapons, and helped clean up the cafeteria. (T. 7123, 7299-301, 7310, 7376-78, 7380)

Mr. Tydis "Ted" Derose from Crossroads Bible Study Organization testified Appellant was very eager to learn about religion, and made strides in his understanding of the bible since entering prison. (T. 7475-76, 7480-81) Fellow

[3] Defense counsel conducted direct examination of Mr. Roberson.

inmates Charlie Thomas and Javor Williams, additionally testified Appellant shared his food and helped Thomas learn how to read. (T. 7330, 7332-33, 7437-44, 7446-47) Defense counsel lastly called four of Appellant's family members who testified that he was a good brother and father figure. (T. 7614-17, 7632, 7635, 7640, 7693-95, 7703, 7734-35)

On December 19, 2014, the jury rendered its recommendation in the penalty phase for a sentence of death by a vote of 9 to 3. (R. 3012) During the *Spencer* hearing on February 11, 2015, Oscar Andres, Appellant's older brother and Omar's twin brother, testified from the federal prison where he was incarcerated in Butler, North Carolina, via ISDN video conference. (R. 3501) Appellant then entered the perpetuated testimony of Angel Andres as Defense exhibit one. (R. 3642-3644) Appellant by "manner of allocution" expressed his desire to make a statement to the Court. (R. 3652) Although the *Spencer* hearing was not fully concluded, Defense counsel indicated Appellant's testimony should not be considered evidence or testimony, but merely Appellant's opportunity to make a statement. (R. 3653) Appellant stated he was not responsible for Yvette's murder. (R. 3672)

Sentencing memoranda were submitted by both sides on April 12, 2015. (R. 3012) On May 6, 2015, the court submitted its sentencing order and followed the jury's recommendation to impose the death sentence for the murder. (R. 3103-3127) In its sentencing order, the court found the State proved the following

aggravators beyond a reasonable doubt: (1) Appellant was previously convicted of another capital felony or of a felony involving the use or threat or violence to the person; (2) the capital felony was committed during the course of a burglary; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (4) the capital felony was committed for pecuniary gain; and (5) the capital felony was especially heinous, atrocious, or cruel. (R. 3109-18)

As mitigation, the court found and gave some weight to the following factors: (1) Appellant accepted responsibility by pleading no contest to his first murder in 1987; (2) he provided information to Miami-Dade corrections officers for the safety and protection of officers and inmates; (3) he had a positive and respectful behavior towards correction officers; (4) he taught other inmates how to read, provided them with support, and led bible study; (5) he had a positive impact on the lives of others; (6) he developed personal spiritual growth through bible studies; and (7) his family loved him and considered him a good father. (R. 3119-22)

SUMMARY OF THE ARGUMENT

Issue I. The trial court did not err by not holding a *Richardson* hearing during the testimony of Alberto Ruiz because his change in testimony was a clarification which did not amount to a discovery violation.

Issue II: The trial court did not abuse its discretion by allowing the admission of: A) Detective McCoy or Detective Gallagher's testimony regarding the fact that Alberto Ruiz was not considered a suspect; B) Hazel Vaughn's testimony as to her observations of the fire; or C) Detective's Chavary's testimony about Juan Bacalau because it was not hearsay and there was no Confrontation Clause violation.

Issue III: The trial court did not abuse its discretion when it limited Defense counsel from asking certain questions during cross-examinations of Jose Perez, Lisbeth Farinas, or Alberto Ruiz because the questions would elicit inferential hearsay, or would open the door to overly prejudicial evidence.

Issue IV: The trial court did not err when it denied Appellant's motion to suppress the evidence derived by the cell-site simulator search because police already had three separate search warrants that demonstrated police had probable cause to use the real time search. Even if they needed a separate warrant, the good faith exception to the exclusionary rule applies as the facts in this case are distinguishable from *Tracey v. State*.

Issue V: The trial court did not abuse its discretion when it allowed the prosecutor

to ask Dr. Lew hypothetical questions about Yvette's cause and manner of death because the questions were based on evidence presented during trial, and because Dr. Lew's testimony did not fall outside the scope of her expertise.

Issue VI: During closing, the prosecutor did not A) shift the burden; B) denigrate the defense; C) misstate the law; or D) make inflammatory statements, thus the trial court did not abuse its discretion nor did the comments rise to cumulative error requiring a new trial.

Issue VII: The trial court did not abuse its discretion when it prevented Defense counsel from making an argument regarding the lack of motive, when Defense counsel was referencing facts not in evidence.

Issue VIII: There was no cumulative error in the guilt phase.

Issue IX: Appellant's death sentences are not unconstitutional under the Sixth Amendment, Eighth Amendment, or under *Caldwell v. Mississippi*.

Issue X: The trial court did not abuse its discretion when it permitted Detective Roberson to testify in the penalty phase about his present sense impression that Appellant was guilty of murdering Linda Azcaretta during Appellant's 1987 Second-Degree murder case.

Issue XI: The trial court did not improperly double Appellant's burglary aggravator and pecuniary gain aggravator because the burglary here had a broader purpose than the pecuniary gain.

Issue XII: The trial court did not improperly consider the avoid arrest aggravator because the State proved beyond a reasonable doubt through overwhelming substantial and circumstantial evidence that Appellant clearly made attempts to avoid arrest.

Issue XIII: The evidence presented during trial is sufficient to sustain the conviction. Appellant was convicted by competent, substantial evidence. The trial included evidence that Appellant was in the vicinity of the crime scene at the time of the murder, his DNA could not be excluded from a dish towel found at the murder scene that was mixed with the victim's blood, and Appellant had a motive to murder Yvette Farinas after he broke into her home, startling her and had to get rid of her to cover up that mistake.

Issue XIV: Appellant's sentence is proportional.

ARGUMENT

ISSUE I: THE TRIAL COURT DID NOT ERR WHEN IT FOUND NO DISCOVERY VIOLATION OCCURRED AND DID NOT HOLD A RICHARDSON HEARING.

Appellant first claims the Court failed to find a discovery violation when Alberto Ruiz clarified his deposition testimony after defense counsel attempted to impeach him, and that the court further erred by not conducting a *Richardson*[4] hearing. However, Appellant's argument is without merit.

[4] *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

A reviewing court must utilize an abuse of discretion standard in considering the propreity of a trial court's determination regarding an alleged discovery violation. *See State v. Evans*, 770 So. 2d 1174, 1177–78 (Fla. 2000). Contrary to Appellant's assertion that Ruiz's clarification was a discovery violation, this Court has held that non-disclosure of changed testimony does not constitute a discovery violation. *See Bush v. State*, 461 So. 2d 936 (Fla. 1984). Accordingly, no abuse of discretion has been shown.

In *Bush*, the defendant asserted that the trial court should have either conducted a *Richardson* hearing or granted a mistrial because a state investigator's trial testimony contradicted his pretrial deposition testimony. *Id*. at 938. Specifically, during a pretrial deposition, the investigator testified that a clerk from a nearby convenience store did not identify the defendant from a photo lineup; however, at trial he testified that the store clerk did identify the defendant from the lineup. *Id.* This Court held "[t]he prosecutor's failure to inform the defense of this change of testimony is not a discovery violation and does not constitute the absolute legal necessity required for a mistrial." *Id.*

In so holding, this Court reasoned:

> When testimonial discrepancies appear, the witness' trial and deposition testimony can be laid side-by-side for the jury to consider. This would serve to discredit the witness and should be favorable to the defense. Therefore, unlike failure to name a witness, changed testimony does not rise to the level of a discovery violation and will

not support a motion for a Richardson inquiry.

Id.; *see also Johnson v. State*, 696 So. 2d 326, 333 (Fla. 1997) (reciting language in *Bush* in analyzing changed testimony issue); *Street v. State*, 636 So. 2d 1297, 1302 (Fla. 1994).

In *Evans*, this Court modified and clarified the *Bush* holding, which would not control in situations where the State failed to provide the defendant with a witness's statement which had changed to such an extent the witness is transformed from a witness who "didn't see anything" into a witness who observed the material aspects of the crime charged. *Evans*, 770 So. 2d at 1177–78. Accordingly, this Court held that the "changed testimony" referenced in *Bush* "certainly cannot be extended to situations where the changes in a witness's testimony include a reference to an oral statement allegedly made by the defendant." *Id.* at 1179. Nothwithstanding, *Evans* expressly approved the language quoted above from *Bush*, and did not recede from the general holding which defeats Appellant's claim. *See also Knight v. State*, 76 So. 3d 879, 887-88 (Fla. 2011) (holding a *Richardson* hearing was not required where the State ordered further DNA comparsions without giving any notice to the defense, which indicated that the defendant's DNA could not be excluded from jean shorts and boxers, although defense planned to rely on the defense that that the shorts and boxers excluded the defendant).

In this case, the exception noted in *Evans* does not apply, and *Bush* precludes relief. Here, even though Ruiz indicated there were a couple of mistakes in his deposition, including the fact that he confused one route that had a stop close to his efficiency with the route he drove the on day of Yvette's murder, which did not have a stop by his efficiency. (T. 4090-91) The State argued the deposition questions were disorganized and confusing, and that his answer was directly in response to a different question, which was whether his route took him anywhere near his apartment. (T. 4091)

Accordingly, the trial court first made its finding on the record that there was no discovery violation as to the change in testimony or as to the spelling errors that Ruiz found and corrected. (T. 4095-96) The trial court then made sure to announce that had a discovery violation been found, the *Richardson* hearing would require the court to go through the three steps, which was "was [the discovery violation] willful or inadvertent? Was it substantial or trivial? Whether [Appellant] was prejudiced, in his ability to prepare for trial." (T. 4097) The court concluded that the Ruiz's statement regarding his milk route was a clarification, and not a material change in testimony, which resulted from Defense counsel's confusing 2009 deposition question, and thus not a discovery violation. (T. 4091-97) As such, the court declined to do a full *Richardson* hearing analysis.

Appellant's reliance on *Scipio v. State*, 928 So. 2d 1138 (Fla. 2006) and

State v. Schopp, 653, So. 2d 1016 (Fla. 1995) is flawed, as those cases do not apply if there is no discovery violation which warrants conducting a *Richardson* hearing.

In *Scipio*, the discovery violation alleged was that of the medical examiner's testimony who was shown a picture at his deposition and gave his opinion that the object in the picture was a semi-automatic pistol under the body of the victim. 928 So. 2d at 1140. The medical examiner then met with the prosecutor and changed his opinion that the object in the picture was a pager and not a weapon; however, defense did not receive this changed testimony prior to the start of trial. *Id.* at 1140-41. Defense then moved for a mistrial, which the trial court denied. *Id.* at 1141. In concluding that a discovery violation had occurred, this Court explained the "State's calculated failure to inform the defense of the important and dramatic change in testimony of the medical examiner's investigator" violated the prosecutor's duty to "not strike 'foul' blows." *Id.* at 1146. However, here the trial court deemed that after consulting page 46 of the deposition there was no discovery violation as to Ruiz's testimony at trial, which was understood as a clarification based on the Defense counsel's confusing deposition question. (T. 4090, 4093, 4095-4097) As opposed to a "mistake" made by the medical examiner who clearly saw the same picture and determined the object to now be a pager rather than a pistol as he stated earlier, Ruiz's testimony as to which he was referring to would does not constitute a change akin to the material change in

testimony in *Scipio*.

Moreover, unlike the defendant in *Scipio,* Defense counsel did not persist after the trial court made its findings, nor did Defense counsel make any motion for mistrial based on the fact that no *Richardson* hearing was conducted. Instead, Defense counsel indicated she had nothing further to argue and continued to impeach Ruiz. (T. 4106) Just like in *Bush*, the testimony was not akin to failure to name a witness and therefore, "changed testimony does not rise to the level of a discovery violation and will not support a motion for a *Richardson* inquiry." 461 So. 2d at 938.

In *Schopp,* the defendant alleged the State committed a discovery violation when the State inadvertently omitted a responding officer from the witness list, who was going to testify to a report previously given to the defense. 653 So. 2d at 1019. The trial court did not find this constituted a discovery violation, and refused to continue the inquiry into the violation because the defendant filed a demand for speedy trial. *Id.* As such, no consideration was given to sanctions that might have averted any prejudice. *Id.* Nevertheless, this Court found the State's failure to include the officer on its original witness list did not materially hinder the defense, and was harmless beyond a reasonable doubt as "there would have been nothing in the officer's testimony that could have a supported a strategy different from that taken. . . ." *Id.* at 1021-22.

Ruiz's clarification is completely dissimilar to the discovery violation in *Schopp*, because Ruiz was listed as a witness. However, even if this Court determines that a *Richardson* hearing should have been held, any error is harmless, just as was found in *Schopp*.

"In determining whether a *Richardson* violation is harmless, [we] must consider whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense." *Pomeranz v. State*, 703 So. 2d 465, 468 (Fla. 1997) (citing *Schopp*, 653 So. at 1020). A defendant is procedurally prejudiced if there is a reasonable probability the defendant's trial preparation or strategy would have been materially different had the violation not occurred. *Id.*

The facts here, however, demonstrate Appellant was not procedurally prejudiced. Appellant fails to mention that at the sidebar, Defense counsel essentially conceded that she had already impeached his story, even with Ruiz's clarification in his testimony. (T. 4095) Thereafter, Defense counsel continued to impeach Ruiz by taking him through his stops; however, Defense counsel from then on did not identify any further impeachment on that particular subject to demonstrate any prejudice resulted from Ruiz's clarification. Accordingly, this Court should deny Appellant's claim.

ISSUE II: THE COURT DID NOT ERR BY ADMITTING TESTIMONIAL EVIDENCE WHICH WAS NOT HEARSAY.

Appellant next argues the trial court erred when it allowed the State to admit: (A) testimony from Sergerant McCoy and Detective Gallagher ruling out Alberto Ruiz as a suspect; (B) Hazel Vaughn's testimony regarding the cause of the fire; and (C) Detective Chavary's testimony regarding Juan Baccalau's death. Appellant also argues that the admission of this testimony constituted a violation of the Sixth Amendment's Confrontation Clause. The admission of evidence is reviewed under the abuse of discretion standard. *See Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008). No abuse of discretion has been demonstrated in this case.

The Florida Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. (1995). However, where testimony is not offered to prove the truth of the matter asserted, or where hearsay exceptions apply, the testimony shall be deemed admissible. *See Penalver v. State*, 926 So. 2d 1118, 1131-32 (Fla. 2006).

A. Miami-Dade Detectives' testimonies that Alberto Ruiz was not a suspect was not hearsay and was admissible at trial.

Appellant's argument that Sergeant McCoy's or Detective Gallagher's testimony was hearsay is without merit as the testimony was used to show their roles in the case and the steps in the investigation, not for the truth of the matter

asserted. Where the relevance of testimony is "to show a logical sequence of events leading up to an arrest," an officer is allowed to state he acted upon a "tip" or "information received," without going into the details of the accusatory information. *See State v. Baird*, 572 So. 2d 904, 908 (Fla. 1990).

Here, any prejudicial impact of the exhibit was minimal because several witnesses testified the investigation focused on evidence that led them to Appellant. The testimony concerning the police's exclusion of Ruiz as a suspect was a general statement of information received during the investigation from another detective, and was not accusatory information of Appellant. In addition, this evidence was relevant since Defense counsel, during opening suggested the investigation conducted was inadequate and that police failed to investigate other suspects. (T. 3782)

Moreover, during the questioning of Gallagher, Appellant objected to Gallagher's mention that because Ruiz was not a suspect, he did not drive the milk route and turned his focus on Appellant. (T. 5823) A sidebar was commenced and the Court overruled Appellant's objection, stating that the answer did not call for hearsay because it was within Gallagher's investigative duties. (T. 5824) Appellant moved for a mistrial, which the trial court denied. (T. 5824-25) After Defense counsel cross-examined him and confirmed he did not drive the milk route, the State on redirect examination again asked whether Gallagher drove Ruiz's milk

route in the course of his investigation and Gallagher replied "no." (T. 5823, 5860, 5863) Thus, the answer given was virtually the same answer that Defense counsel elicited and the probative value of this testinony outweighed any prejudice. Thus, the testimony was properly admitted.

Appellant's reliance on *Keen v. State*, 775 So. 2d 263 (Fla. 2000) is misplaced. In *Keen*, this Court found error where a detective without conducting its open investigation, testified that it based its murder investigation on an insurance company's report and conclusion, without doing his own investigation. *Keen*, 775 So. 2d at 273-74. Specifically, when the detective was questioned as to why he reopened the murder case, he stated that the police had received information from two insurance companies that they had received information the case was a murder, and not a missing persons case. *Id.* at 273-74. As such, this Court found that because hearsay testimony from the insurance company's report went directly to establishing evidence that the victim's disappearance was in actuality a murder, it was used for the truth of the matter asserted and pointed directly to the defendant's guilt, causing police to prepare an arrest warrant for the defendant. *Id.* at 274.

However, in this case, unlike in *Keen*, McCoy and Gallagher's testimonies related to the exclusion of one witness as a suspect and why they focused on other substantial evidence that led police to the investigation of Appellant. Thus, the

testimony is distinguishable from the testimony regarding the insurance company's report that solely implicated Keen, which was deemed inadmissible by this Court because this was hearsay information that the police used and solely relied upon without doing their own investigation. Moreover, in this case, it was Appellant who decided to use the substantive information obtained from Ruiz's employer in its defense strategy to discuss every address on Ruiz's route to try and scapegoat Ruiz as the real suspect to the jury. (T. 4098-4104; 4797-99; 5828; 5860-61) Thus, *Keen* is not applicable.

Additionally, the hearsay in *Norton v. State*, 709 So. 2d 87 (Fla. 1987) is also distinguishable from this case. There, the hearsay stemmed from the detective's testimony that after Norton told the detective he had bought tires the day before the crime, the detective searched the vicinity to find where Norton allegedly purchased those tires to corroborate his story. *Id.* at 95. However, he could not find anyone who had sold tires before. *Id*. This Court understood that to be improper hearsay because the detective must have spoken with unidentified witnesses to conclude that Norton's story was untrue. *Id.*

Unlike in this case, where the testimony concerned the collateral knowledge about Ruiz and the route he took that day, the improperly elicited hearsay in *Norton* involved the direct inculpation of the defendant himself, since it was Norton's story that the detective was trying to corroborate and it was used for the

truth of the matter asserted to infer that Norton was lying. *Id.* (noting that the detective's conclusion of the defendant's involvement in the crime cannot be predicated on information which he secured from someone else). Here, the testimony was not elicited for the truth of the matter asserted, but to explain how the police did not have a reasonable basis to focus an investigation into Ruiz.

Appellant also cites to *Wilding v. State*, 674 So. 2d 114, 118-9 (Fla. 1996), *receded from on other grounds*, *Devoney v. State*, 717 So. 2d 87, 95 (Fla. 1998), which had completely opposite facts than the facts at issue. In *Wilding*, an investigator testified that an anonymous tip identified Wilding in connection with the murder. *Id.* at 118-19. The informant implicated Wilding in the murder and was deemed reliable because police verified it by talking to Wilding's family and friends. *Id.* at 119. "Thus, the jury was led to believe that an unidentified person, who did not testify and was not subject to cross-examination, had given the police evidence of Wilding's guilt, evidence that upon investigation proved to be reliable." *Id.* Accordingly, this Court found that the testimony in *Wilding* went clearly beyond testimony which would have been authorized under the holding of *Baird*, which held that where the relevance of testimony is "to show a logical sequence of events leading up to an arrest," an officer is allowed to state that he acted upon a "tip" or "information received," without going into the details of the accusatory information. *Id.* at 119 (citing *Baird*, 572 So. 2d at 908).

In the instant case, McCoy and Gallagher's testimony regarding Ruiz's cooperation and the corroborating stories from Ruiz's employer did not go towards proving Appellant's guilt, but to establish why the detectives no longer focused on Ruiz as a suspect. Moreover, unlike the accusatory information received in *Wilding*, the information that Chavary relayed to McCoy and Gallagher was not accusatory information of Appellant, but rather exculpatory information of another person, Ruiz. Unlike the facts in *Wilding*, the information received was from Chavary who, unlike the anonymous person who gave a tip, testified at trial.

Finally, the steps taken and the roles of each detective in conducting the investigation were relevant because during cross-examination of both Gallagher and McCoy, Appellant insinuated that police did not thoroughly investigate the case because they should have focused on other people, specifically Ruiz. (T. 4796-99; 5823-27; 5860-61) As a result, it was imperative the State be allowed to ask the detectives in rebuttal what beliefs caused them to continue to pursue the investigation in the manner in which they chose, and why police chose not to take another course of action in their investigation.

The fact that defense counsel in its own opening indicated that "mistakes were made, things were not followed up and some things were left undone" made the course of the police investigation a focal point of the trial. (T. 3792) Accordingly, the State should have been allowed to touch on the course of the

investigation to rebut the Defense's theme throughout the entire trial that "things were not followed up on." *See also Norton*, 709 So. 2d at 95 (finding defense counsel opened the door to the line of questioning concerning during cross-examination when it inferred defendant's family corroborated his story, and thus it was not unreasonable for the State to ask the detective whether Norton's brother verified Norton's story). Thus, the trial court did not err in allowing Gallagher and McCoy to explain their steps in the overall investigation.

Appellant lastly argues that the State's reliance on present sense impression here is wrong, because there is no hearsay exception for that, and it doesn't meet the standard for spontaneous statement. (IB 28-29)[5] However, no hearsay exception is needed because, as demonstrated above, the testimony was not hearsay to begin with. Rather Appellant's desire to make central his argument that police did not investigate other people required the State to show its steps in the course of the investigation as to how it excluded witnesses. As such, the probative value was high and was not outweighed by the danger of unfair prejudice.

B. Hazel Vaughn's testimony concerning the cause of the fire constituted an admissible present sense impression.

Appellant claims Vaughn's testimony as to the cause of the fire was

[5] Although there is no explicit exception of present sense impression, under § 90.803(1), Fla. Stat. (2014) "Spontaneous Statement", the rules provide that a statement or thought made contemporaneously by an individual witnessing an event falls under the present sense impression of hearsay and is admissible at trial.

inadmissible testimony based on hearsay grounds. (IB at 30-31) However, his brief correctly acknowledges Vaughn's testimony was not hearsay since no out of court statement was offered.

At trial, the court sustained Defense counsel's objection on speculation grounds when the State asked Vaughn what she was thinking at the time she witnessed the smoke coming from Yvette's efficiency. (T. 5671) The parties then held a sidebar, where the State indicated it wished to ask the question: "At the time that you saw the person walking, what went through your mind as to the cause of the fire?" (T. 5674-75) The State posed the questions asked this way elicits Vaughn's ability to view and what she believed the red can was. (T. 5675) The State further argued it would not be for the truth of the matter asserted that the motive for the fire was insurance fraud, but that it went to her ability to perceive and make the identification of the red gas can. (T. 5675) Therefore, it was relevant, not speculation and would be considered a present sense impression. (T. 5675-76) The trial court then overruled Appellant's previous objection, stating the State had laid a foundation for which Vaughn could give a present sense impression of the unfolding events because this is why Vaughn acted upon herself to vacate her own house. (T. 5675-77)

Appellant does not cite to any authority indicating the testimony of Vaughn was inadmissible concerning her opinion as to the cause of the fire. However, even

if he did, his argument has no merit. After the court indicated it would let the testimony in because it was relevant, Defense counsel indicated it was not done, and when asked whether it was making a new objection, Defense counsel only responded by saying the testimony was "not a present sense exception and that it was not an exception to hearsay. (T. 5676-77)

Even if construed as hearsay, contrary to Appellant's assertion, the testimony directly falls into the exception to "spontaneaous statement" hearsay exception in § 90.803(1), where Vaughn expressed her contemporaneous thoughts as she witnessed the startling event of her neighbor's house on fire. During its direct examination, the State specifically asked Vaughn "**[a]t that particular time**" what reason Appellant had in setting fire to Yvette's efficiency. (T. 5677) (emphasis added)

Moreover, as Appellant himself describes, a present sense impression is a "spontaneous statement made describing an event at or near to the time it occurred." (IB at 31) Accordingly, applying both the actual rule of evidence and Appellant's characterization of a present sense impression, Vaughn could testify to her inner thought at the time of who was carrying a red gas can near Yvette's efficiency and what he intended on doing with it and its contents. While Appellant states Vaughn's statement was a "baseless suspicion," the rules of evidence do not require the witness's belief to be correct, particularly since it was not offered as

proof of the matter asserted. Thus, this Court must deny Appellant's claim that Vaughn's testimony was inadmissible.

Accordingly, whether the objection was still one of relevance and speculation or hearsay, the court found the question itself demonstrated Vaughn's ability to see and identify the red gas can, since she believed it was being used to start a fire. As such, it was admissible, and this claim should be denied.

C. The Court Did Not Err When It Allowed Detective Chavary Testimony About Juan Baccalau.

Appellant next argues that the testimony of Detective Chavary concerning the identity and death of Juan Baccalau, who allegedly worked with Appellant as a handyman, was inadmissible hearsay and a violation of his Confrontation Clause rights. (IB 31) A *de novo* review is applied where a trial court admitted evidence over objection relating to the Confrontation Clause. *See McWaters v. State*, 36 So. 3d 613, 637 (Fla. 2010).

A death certificate is prima facie proof of the "fact, place, date, and time of death as well as the identity of the decedent." § 731.103(1), Fla. Stat. (2007). In this case, Chavary interviewed Baccalau who occasionally worked with Appellant at the Perez house. (T. 5141-43) Over Appellant's objection, a picture of Baccalau was entered into evidence. (T. 5143) During a break before cross-examination, Appellant objected to the picture and Chavary's testimony about Baccalau as

hearsay, and a violation of Appellant's Sixth Amendment confrontation rights because Baccalau was deceased. The trial court found that based on the Appellant's physical features, the State should be able to exclude Baccalau because he had different physical characteristics from the individual Vaughn saw leaving Yvette's efficiency. (T. 5145-46) Appellant then moved for a mistrial, but failed to secure a ruling from the court. (T. 5147)

Subsequently, the State entered the self-authenticating death certificate of Baccalau into evidence (T. 5151-52) The court indicated it sustained the hearsay objection to the first time the State asked whether Baccalau worked for Appellant, but once the State changed its questioning to ask whether the Chavary knew Baccalau was dead, it was no longer inferential hearsay. (T. 5154) Over objection, the State published Baccalau's death certificate to the jury. (T. 5160)

As no statements from Baccalau were admitted against the Appellant, no violation of the Confrontation Clause has been demonstrated. Chavary's testimony that the picture accurately portrayed Baccalau was based on his own personal observations, and he was available and subjected to cross-examination.

Moreover, Appellant during the cross-examination of Jose Perez touched on the fact that there was another individual (the "Dominican") who also worked on the job site, and roughly insinuated that he may have been involved in the crime. (T. 5050) Thus, the State rightfully should have been able to counter that the

physical characteristics of this individual looked nothing like Appellant's, who Vaughn identified as on the scene on the day of Yvette's murder. (T. 5654-56)

The fact of that Baccalau was dead was established through the death certificate; thus no impropriety has been shown. Chavary's testimony that Baccalau worked with Appellant was properly admitted, for the same reasons discussed in Issue 2(A) with regard to Ruiz: the State was permitted to rebut Defense's suggestion that the police investigation was inadequate, and that Appellant's occasional helper was a potential suspect, but that police did not follow up in the investigation. (T. 3792)

Appellant's concern that the death certificate was improperly used to establish Baccalau's occupation is meritless. The State did not use the death certificate to prove occupation, and even if the jury considered it for that purpose, it would not have been prejudicial to Appellant since he was not using Baccalau to assist with any landscaping work. (T. 5156) Moreover, the certificate did not say he worked as a handyman but as a landscaper. As the court below held, the information about Baccalau was properly admitted to rebut Appellant's inference that Baccalau could have been the person that Vaughn observed leaving Yvette's efficiency on the day of her murder. Accordingly, this claim must be denied.

D. Even If The Court Improperly Admitted Hearsay, It Is Harmless Error.

If this Court determines there was error, it was harmless. An error is harmless where there is no reasonable possibility that the error contributed to the conviction. *See Moore v. State*, 701 So. 2d 545, 550 (Fla. 1997). First, the fact that the detectives testified Ruiz was not considered a suspect did not contribute to Appellant's conviction given the overwhelming amount of other evidence. Second, testimony regarding the reason the fire started did not aid in the conviction either. Third, and finally, it was Appellant who insinuated that others, including "the Dominican" worked at the construction site with Appellant to create doubt as to identity. Accordingly, the State was free to rebut the defense theory that Vaughn may have identified Baccalau instead of Appellant, and to explain that Baccalau was dead. Thus, none of the challenged testimony actually incriminated Appellant.

The jury received competent, sufficient evidence that Appellant committed the murder through testimony of his motive, his DNA test results, the fact that an eye witness identified him being in the vicinity of Yvette's efficiency at about the time the fire started, and that Appellant possessed and used Yvette's debit card only moments after her death. Therefore, this claim must be denied.

ISSUE III: THE COURT DID NOT ERR BY LIMITING CROSS-EXAMINATION.

Appellant argues the trial court improperly limited cross-examination of

three witnesses: (A) Jose Perez; (B) Lisbeth Farinas; and (C) Alberto Ruiz. For the reasons noted below, this argument is without merit. Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. § 90.612, Fla. Stat. (2016). Trial judges retain wide latitude to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. *See Moore*, 701 So. 2d at 549 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *see also State v. Ford*, 626 So. 2d 1338, 1347 (Fla. 1993). Limitation of cross-examination is subject to an abuse of discretion standard. *See Geralds v. State*, 674 So. 2d 96, 100 (Fla. 1996); *Jones v. State*, 580 So. 2d 143, 145 (Fla. 1991). No abuse has been demonstrated here.

Questions on cross-examination must either relate to credibility or be germane to the matters brought out on direct examination. *Penn v. State*, 574 So. 2d 1079 (Fla. 1991). If the defendant seeks to elicit testimony from an adverse witness which goes beyond the scope of the witness testimony during direct examination, other than matters going to credibility, he must make the witness his own. *Id.* Stated more succinctly, this rule posits that the defendant may not use cross-examination as a vehicle for presenting defensive evidence. *Id.* at 1082 (quoting *Steinhorst v. State*, 412 So. 2d 332, 337 (Fla. 1982)).

A. The Court Did Not Abuse Its Discretion When It Limited The Cross-Examination Of Jose Perez.

In this case, Appellant argues the trial court erred by limiting Perez's cross-examination, asserting the question the State asked on direct examination as to whether Perez ever saw Appellant again opened the door to a conversation between Appellant and Perez to explain why he did not return to Perez's home after Yvette's murder. Defense counsel was seeking to admit that it was Perez's statement that kept him from coming back to the house, not that he fled based on consciousness of guilt. (T. 5045-47) As explained below, this argument is flawed.

In this case, Perez indicated he never saw Appellant again after the fire on January 24, 2005. (T. 5043) After Perez stated his house was destroyed by the fire, the prosecutor asked whether he heard from Appellant regarding the reconstruction of the house. *Id.* Appellant objected on relevance, hearsay and leading grounds, all which were the court overruled. *Id.* However, Perez did not answer the question because the interpreter asked that the question be repeated. *Id.* Instead, the State rephrased the question, which asked whether Perez ever saw Appellant after the day of the murder. *Id.* Perez answered "negative." *Id.*

A sidebar was held between direct and cross-examination, where the State indicated it had been specific about the questions asked during direct about the conversations that took place between Perez and Appellant, the voicemail message,

and whether Perez ever saw Appellant again. (T. 5044-45) Defense counsel indicated he wanted to bring out the fact that Perez told Appellant not to come back to do any more work on his house because the State opened the door when it inquired whether Appellant ever came back to work. (T. 5045) However, the trial court indicated it recalled the State withdrew that first question and instead asked whether Perez ever saw Appellant again. (T. 5046) The trial court agreed with the State and found 1) the question did not open the door to the conversation that Appellant and Perez had; and 2) the conversation would be hearsay and was outside the scope of the direct examination. (T. 5046-48) Thus, Perez's truthful, unambiguous response did not open the door to correction or clarification.

Defense counsel then objected to the treatment of the scope of cross examination, arguing Appellant should be allowed to ask about the conversation because it was not being offered for the truth of the matter asserted, but to show the effect on Appellant as to why he did not come back to the house. (T. 5049) The Court maintained its prior ruling but later asked if Defense counsel wished to call Perez as a defense witness. (T. 5060) Defense counsel indicated Appellant did not need to list him as a witness. (T. 5050, 5064)

It is clear that the trial court understood that inadmissible self-serving hearsay would have been ellicited in the scope of the cross-examination, and would have confused the jury, given that there was no conversation mentioned on direct

but only whether Perez ever "saw" him again. Defense counsel was not attempting to clarify or explain Perez's direct examination, but was seeking to expand it to suggest a reason or motive to further it's own case theory of the defense. As the court acknowledged, if Appellant wished to present defensive evidence on this line of questioning, he needed to call Perez as his own witness, and the court gave him the opportunity to do so. (T. 5050) Therefore, the trial court did not abuse its discretion in limiting cross-examination on this issue.

In *Moore v. State*, the defendant argued that the court improperly limited cross-examination of a witness who said on direct examination that he did not see another witness that day. 701 So. 2d at 548. Defense counsel then proffered that at some point around noontime, the witness and the other witness had entered a park together and chased a young man named Little Terry. *Id.* After the witness answered he did not see him at any other time that day, the Court found the defense's questions were repetitive and only marginally relevant.

As in *Moore*, the testimony sought from Perez was not relevant to the State's case against Appellant. Even if the initial testimony from Perez somehow opened the door to offering a theory as to *why* Perez never saw Appellant again, that testimony would have opened the door for the State to have Perez explain on re-direct why he told Appellant not to come back, which would not be beneficial to the defense. *See also Edwards-Freeman v. State*, 93 So. 3d 497 (Fla. 4th DCA

2012) (an opposing party has the right to correct a specific factual assertion to avoid the jury being misled). Thus, any possible error in this ruling was harmless, and this Court must deny this claim.

B. The Court Did Not Abuse Its Discretion When It Limited The Cross-Examination Of Lisbeth Farinas.

Appellant argues the trial court erred when it limited the cross-examination of Lisbeth Farinas concerning her knowledge of Yvette and Ruiz's relationship, and that Appellant had a good faith basis to ask her the question given Yvette's co-worker Maria Locayo's statement, which could serve as impeachment evidence. (IB 38-39) During a break out of the presence of the jury, the trial court listened to the record where it was clear that on direct examination the State asked, "from what you observed, did your sister and Alberto have a good relationship" to which Farinas' answer was "Yes." (T. 3889-94) Defense counsel then stated she nevertheless wanted to ask Farinas about arguments that may have happened between Ruiz and Yvette, even though Defense counsel conceded that Farinas testified she did not witness physical arguments and was unaware Yvette confided in Locayo. (T. 3890-92) The trial court then ruled:

> based upon the testimony that defense explored at the deposition and based upon her answers to the questions I don't think any door is opened for anything else especially since the way in which you try to attempt to do this is to use hearsay from the cashier who spoke with the decedent.

(T. 3897)

Defense counsel then asked if she could ask the question "[d]id you see or hear any argument, did you see or hear any argument between Alberto and your sister about him spending too much time with his parents?" (T. 3900) The trial however court continued to voice its concern about impermissible inferential hearsay and eventually spelled out its reasons for limiting cross-examination when it stated that, because Farinas testified she never saw anything, the State did not open the door to whether Farinas had any hearsay knowledge of Ruiz committing bad acts on Yvette. (T. 3897-98)

Notwithstanding, the trial court allowed Appellant to ask if she saw any verbal arguments between Ruiz and Yvette based on the questions asked on direct examination. (T. 3911) The trial court cautioned that if Farinas replied "no," to the answer, that "that's the end", but if she said yes, then questions could be asked about his family. (T. 3911-13; 3915) The court reasoned Farinas could not be impeached on this line of questioning, since there was nothing stated in her deposition about these matters. (T. 3913) Defense counsel persisted that even if Farina's answer was no, she could still ask a string of questions, to which the court disagreed and the following exchange proceeded:

> COURT: The reason that you can't is because you're not producing to me any form of impeachment that you could use.

> MS. BOOTS: Because we have the witness.
>
> COURT: Okay. You have the witness and the only way that witness's testimony is coming in is through hearsay.
>
> MR. STANTON: And Your Honor, therefore if we don't like the answer we get we're struck [sic] with it, but impeachment is not cross examination. It's one part of what cross examination could be once, but once they open up subject area in direct, such as them having a good relationship, that's an area we can explore not based on hearsay, but on [sic] if they've seen it.
>
> THE COURT: Right.
>
> MR. STANTON: The only question we can ask is, did you ever saw [sic] a verbal altercation. That leaves us nowhere because the witness's opinion, I didn't see a verbal altercation, maybe she did see someone speaking harshly to someone else.
>
> THE COURT: Then it is what it is, that's what you get. So if you want to ask the question go right ahead.

(T. 3913-14)

Accordingly, when Appellant resumed cross-examination of Farinas, Defense counsel asked if Farinas ever witnessed a verbal argument, to which she replied "never." (T. 3916) Appellant was not permitted to continue examining Farinas about the specifics of having heard a discussion about Ruiz spending too much time with family, as it would not have been a proper form of impeachment.

Appellant had no further right to examine Farinas or attempt to introduce the testimony of Locayo through Farinas' testimony after she said she did not see any arguments, verbal or physical. Even if the State opened the door to questioning

about Yvette and Ruiz's testimony, Farinas' response that there was nothing wrong effectively closed Appellant from arguing factually incorrect points. As the court noted at sidebar, even if these events were indicative of a lull in the relationship, they "described like every marriage." (T. 3891) While Appellant argues it "was not required to simply accept the witness's summary conclusion that the couple never argued" (IB 38), he cannot also invent facts that are refuted by Farinas' testimony.

Appellant's argument that it had a good faith basis to proffer Locayo's testimony to rebut Lisbeth's testimony is completely erroneous. (IB 38) Appellant argued Locayo served as Yvette's confidant at work and Yvette allegedly told Locayo that her relationship with Ruiz was tumultuous. (T. 3892, 3909) Appellant asserted that Defense counsel learned many things from Locayo's testimony, including that Ruiz did not get along with the Farinas family, did not go to Yvette's family gatherings, and spent to much time with his family. (T. 3891) As such, the court properly denied Appellant from introducing Locayo as a witness because her testimony constituted hearsay (T. 3909) Since Yvette was the person who made those comments to Locayo, it would have been hearsay. Accordingly, this Court must reject Appellant's claim that the trial court restricted his ability to further cross-examine Lisbeth about Yvette and Ruiz's relationship.

C. The Court Did Not Abuse Its Discretion When It Limited The Cross-Examination Of Alberto Ruiz.

On cross-examination, Defense counsel asked Ruiz whether Appellant came to his efficiency to do some work on the wall behind the bed. (T. 4073) Ruiz could not recall saying that the workers did work inside the bedroom of the efficiency. (T. 4073) Defense counsel then confirmed with Ruiz that he spoke with police, specifically Detective Chavary on the day of Yvette's murder. (T. 4073-74) Defense counsel then asked if on Feburary 2, Ruiz had once again spoken with Chavary and proceeded to state what Ruiz told Chavary, when the State objected to improper impeachment. (T. 4074) Defense counsel at the time appeared to be holding a police report, and at sidebar confirmed it was in fact Detective Gallagher's police report. (T. 4074-75)

During the sidebar conference, the State argued Appellant was unable to impeach with a police report, but that Appellant had to call the police officer. (T. 4075-76) However, Defense counsel argued it was required to ask the question as to whether he remembered saying that workers did do work inside the efficiency before impeaching with extrinsic evidence. (T. 4076) The court then overruled the State's objection. (T. 4076)

The State and defense briefly request to go sidebar again to discuss the contents of the police report, where the State alleged that in the same conversation

that Defense was referring to, Ruiz had also told Chavary that a burglary had occurred in their efficiency two weeks prior to Yvette's murder, and that $250.00 in cash was in the top drawer which was the "loose" top drawer Yvette's kept her jewelry in. (T. 4079-80) Ruiz further told Chavary that the day before to the burglary occurred, he removed the money to deposit it at the bank, but that he believed Appellant saw the money and the jewelry when he was in the bedroom doing the work behind the bed. (T. 4080)

Prior to trial, the parties specifically agreed that there would be no eliciting of this prior bad act from either side. (T. 4083-85). However, the State argued that, should defense ask Ruiz if he remembered telling Chavary that Appellant did the work on the wall in the bedroom behind the drawer, it could open the door to Ruiz's opinion that Appellant committed the earlier burglary. (T. 4082) Implicitly, Ruiz may have only known about the work done on the bedroom wall because the burglary occurred, and had suspected Appellant had committed that burglary Appellant saw the money in the drawer.

Appellant now argues he should have been permitted to cross-examine Ruiz about his knowledge that Appellant had been in the efficiency and that it would not have opened the door to Ruiz's opinion that Appellant committed a second burglary weeks before Yvette's murder. (IB 39) However, this argument is flawed and the court did not abuse its discretion in limiting this cross-examination.

The concept of "opening the door" is based on considerations of fairness and the truth seeking function of a trial and allows the admission of otherwise inadmissible testimony to "qualify, explain, or limit" testimony or evidence previously admitted. *Ramirez v. State*, 739 So. 2d 568, 579 (Fla. 1999). To "open the door, the witness must offer misleading testimony or make a specific factual assertion which the opposing party has the right to correct to avoid the jury being misled." *Edwards-Freeman*, 93 So. 3d at 500. Where a defendant intends to impeach by way of a prior inconsistent statement, a trial court will act within its sound discretion in excluding the proffered question if it finds that any probative value of the question and answer will be clearly outweighed by the danger of misleading or confusing the jury. *See Lambrix v. State*, 494 So. 2d 1143, 1147 (Fla. 1986) (finding no abuse of discretion in excluding the proffered question although the question may have been relevant and would raise an inference that perhaps made a prior inconsistent statement).

In this case, the court referenced that by asking Ruiz about the same conversation where Ruiz indicated Appellant did work in the bedroom, it might bring in the rest of that conversation, which was that Ruiz believed Appellant was responsible for the burglary weeks before. (T. 4083-85) The sidebar conversation reflects Appellant's motive in asking the question was solely to impeach Ruiz, which the court noted would possibly open the door to rebuttal testimony about the

burglary, which was the exact prejudice the parties were seeking to exclude.

In explaining that the court had severe concerns about the prejudice that may have been elicited by the question, the trial court did not err in cautioning Appellant on cross-examination. Rather, the record demonstrates that the court merely warned Appellant that there could be consequences in asking this question. (T. 4080-84) Thus, it appears the "limit" was not of the Court's making, but more of a strategic decision by Defense counsel when it decided not to continue that line of questioning. Moreover, this line of questioning would have also been considered repetitive since there was no controverted evidence Appellant had permission weeks before Yvette's murder to do the work in the efficiency, and the jury previously had not been misled by the omission of the fact. *See Moore*, 701 So. 2d at 549 (holding where the court finds that the questions were either repetitive or irrelevant, and is concerned about prejudice or confusion of the issues, there is no abuse of discretion in limiting the scope of cross-examination). Notably, this fact came out in other places during Jose Perez's and Suzelle Rodriguez's testimony, which indicated Appellant had the keys to go into the efficiency, particularly when Yvette and Ruiz had vacated the premises. (T. 4988-90, 5038, 5058)

Thus, the court did not abuse its discretion by cautioning Appellant during cross-examination when it found that the intended line of inquiry would open the door and lead to far more prejudicial testimony against Appellant that would

outweigh the probative value of the question. Accordingly, the trial court did not abuse its discretion in limiting this testimony.

ISSUE IV: ADMISSION OF EVIDENCE FROM CELL SITE SIMULATOR SEARCH

Appellant claims the trial court erred in denying his motion to suppress the physical evidence obtained from his body because police used a cell-site simulator to seize Appellant to execute a body warrant. (IB 41) However, the court properly denied the renewed motion to suppress and its decision should be affirmed.

In reviewing a trial court's motion to suppress, this Court accepts the trial court's factual findings if they are supported by competent, substantial evidence. *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001). However, this Court reviews the application of the law to those facts *de novo*. *Id.* at 608; *see also Smithers v. State*, 826 So. 2d 916, 924-25 (Fla. 2002) (holding a trial court's decision to deny a motion to suppress comes to this Court cloaked with a presumption that its factual findings are correct, but applying a *de novo* standard of review to legal issues and mixed questions of law and fact which ultimately determine constitutional issues).

In this case, prior to trial, on November 13, 2012, Appellant filed a motion to suppress statements and evidence obtained on January 30, 2005. (R. 335-369) In his motion, Appellant requested that the court suppress Appellant's January 30 statements, the photographs taken of Appellant that day, and the initial taking of

Appellant's DNA. *Id.* The motion was denied but the trial court nevertheless excluded part of Appellant's statement made to police when they found him on January 30, 2005 finding the statements more prejudicial than probative pursuant to section 90.403 of the Florida Evidence Code. (T. 3701-02)

On October 28, 2014, during jury selection, Appellant moved for the trial court to reconsider and suppress all the evidence from the body warrant. (T. 3701) Appellant argued the initial motion meant to suppress not only the statement that Appellant "was not a monster" but all of the evidence collected on January 30, 2005, on Fourth Amendment grounds. (T. 3701-02, 3705) Appellant specifically argued that since the time the motion was addressed in court and the court's subsequent order, the law changed under *Tracey v. State,* 152 So. 3d 504 (Fla. 2014), which was ruled on in October 2014. (T. 3705-06) Appellant claimed that a probable cause warrant was required at the time the pen register was used to find Appellant and that the good faith exception did not apply. (T. 3706-08)

In *Tracey*, law enforcement learned from a confidential informant that Tracey had obtained multiple kilograms of cocaine to distribute, and utilized his Metro PCS telephone number to communicate with the confidential informant. 152 So. 3d at 506-07. Based on those sole factual allegations, officers obtained an order authorizing the installation of a "pen register" and "trap and trace device" as to Tracey's cell phone. *Id.* The application did not provide facts establishing probable

cause to track the location of Tracey's cell phone in either historical or real time, nor did it provide for access to real time cell-site location information. *Id*. at 507. Nevertheless, officers had access to the real time cell site location information, which the officers used to track him. *Id.* at 507-08.

Accordingly, this Court held that the evidence obtained as a result of that search was subject to suppression because probable cause did not support the search, and no warrant based on probable cause authorized the use of Tracey's real time cell site location information to track him. *Id.* at 526. This Court further recognized that under the circumstances of *Tracey*, "in which there was no warrant, court order, or binding appellate precedent authorizing real time cell site location tracking upon which the officers could have reasonably relied, the 'good faith' exception to the exclusionary rule for 'objectively reasonable law enforcement activity'. . . is not applicable." *Id.*

The facts here however are completely distinguishable from the facts in *Tracey.* Unlike information from a single confidential source that did not amount to probable cause in *Tracey*, Vaughn provided information that she saw Appellant with a red gas can shortly before she saw her neighbors' house set on fire, and Perez and Rodriguez placed Appellant on the scene at the time of Yvette's murder and indicated that he mysteriously left the scene when he was supposed to be working. Based on that information, on January 26, 2005, Detective Gallagher

obtained a pen register and "trap and trace" order for Appellant's wireless line. (R. 638-41) After collecting possible DNA evidence at the house, Gallagher then secured search warrants for Appellant's home, body and van, which were duly executed by a circuit court judge who found probable cause existed to detain Appellant. (T. 4572-73; R. 366, 368-69)

Three days later, Detectives David Richards and Jose Iglesias located Appellant near a shopping center on a public street, executed the DNA warrant on his person, and took pictures of his body. (T. 4627-28, 7789-90) Therefore, unlike in *Tracey*, probable cause was found to exist and a body warrant was signed and executed before and at the time Appellant was apprehended.

During oral argument on the Motion to Reconsider Appellant's Motion to Suppress, the State pointed the trial court to the fact that there were already three separate warrants in existence on January 30, 2005, including one for the search of Appellant's body, which authorized the seizure or arrest of Appellant. (T. 3714, 3717) The trial court agreed with the State and found that the facts in this case were distinguishable from the facts in *Tracey* based on the issued warrants; accordingly it denied the motion to reconsider. (T. 3727-28)

Even if the trap and trace was in violation of the Fourth Amendment, this case is still distinguishable from *Tracey*, as the facts here would allow the application of the good faith exception to the exclusionary rule set forth in *Davis v.*

United States, 564 U.S. 229 (2011) to apply. *See Davis*, 564 U.S. at 249-250 (holding "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."). Unlike in *Tracey* where no warrant was secured, here detectives secured warrants for Appellant's body, home, and van only a day after applying for the trap and trace. Contrary to Appellant's assertions, the existence of the body warrant was NOT outside the other warrant's scope. Had there been a specific warrant for the real time cell-site simulator, it still would have led to Appellant's detention, just as the body warrant authorized the seizure of Appellant's body.

However, even if a warrant was required, the error was harmless. Although the scratches on Appellant's fingers were a minimal part of the State's case and were not available later, the bloody washcloth found in Yvette's efficiency that had both Yvette and Appellant's DNA was perhaps one of the most incriminating pieces of evidence in the trial. As the body warrant permitted police to take DNA, this evidence would have eventually been collected once police found Appellant. Thus, this evidence would have been admitted under the inevitable discovery exception. *See Fitzpatrick v. State*, 900 So. 2d 495, 514 (Fla. 2005) (finding "even if there was police misconduct in pressuring Fitzpatrick to provide a blood sample, the DNA evidence was properly admitted because Fitzpatrick's DNA would ultimately have been discovered."). Therefore, the trial court did not err in denying

the motion to suppress.

ISSUE V: THE COURT DID NOT ERR BY PERMITTING THE STATE TO ASK HYPOTHETICAL QUESTIONS TO AN EXPERT WITNESS.

Appellant next claims the State used improper hypothetical questions to elicit expert opinions that were "outside of the witnesses expertise." (IB 47) However, this argument bears no merit.

The party requesting the testifying expert has the burden of laying a foundation with qualifying information about the expert's professional background. *See Anderson v. State*, Nos. SC12–1252, SC14–881, 2017 WL 930924, *1, 6 (Fla. Mar. 9 2017); *McMullen v. State*, 714 So. 2d 368, 375 (Fla. 1998). If qualified, four evidentiary requirements must be met to admit an expert opinion: (1) facts or data specific to a case that will help the trier of fact; (2) reliable principles and methods related to the expert's profession; (3) reliable application of these principles to the specific case; and (4) the testimony's probative value of the opinion must not be substantially outweighed by the danger of unfair prejudice. § 90.702, Fla. Stat. (2017); *see also Anderson v. State*, 863 So. 2d 169, 180 (Fla. 2003). When reviewing an expert witness' testimony, appellate courts review the trial court's decision on the admissibility of evidence based on abuse of discretion standard. *See Calloway v. State*, No. SC10-2170, 2017 WL 372058, *1, 25 (Fla. Jan. 26, 2017).

In this case, there was no abuse of discretion. As a preliminary matter, to the extent Appellant argues Dr. Lew was not qualified, this specific objection was never offered at trial. As such, this issue is not properly preserved and should be rejected. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982); *Occhicone v. State*, 570 So. 2d 902, 905–06 (Fla. 1990) (stating a claim was not preserved for review where defense failed to object on specific grounds advanced on appeal).

However, even if the issue was preserved, it is meritless. The State qualified Lew, the Deputy Chief Medical Examiner, as an expert witness who had sufficient knowledge and training within the field of pathology. (T. 6104-07) Lew conducted an extensive review of all the medical documents and photographs concerning Yvette's case file. (T. 6111-13, 6116-17)

Contrary to Appellant's belief that Lew went beyond the scope of her expertise, the State laid a proper foundation to allow her to provide an opinion on the cause and manner of Yvette's death. Through photographic evidence, the State extensively asked Lew about each documented injury Yvette suffered from her struggle with Appellant. (T. 6141-42) (facial and head injuries); (T. 6142) (abrasion on Yvette's knees); (T. 6144-55) (stab wounds found on Yvette's body); (T. 6161-68) (strangulation and effect of strangulation on a human body before death); (T. 6195) (defensive wounds to the hands) Lew also provided a description of the medical procedure the former associate medical examiner used to inspect

Yvette's body. (T. 6144-55) Lew also testified that Yvette's stab wounds did not render her unconscious nor kill her instantly, as she estimated Yvette survived for 30 minutes from the time she sustained them. (T. 6158-59) Thus, each explanation Lew provided met section 90.702's first, second, third, and fourth prongs' application of reliable principles and methods within Lew's field. Thus, there was no abuse of discretion.

Additionally, while Appellant currently argues that both of the hypothetical questions were highly inflammatory, bolstering and unduly prejudicial, he did not object to the questions on this basis and this is not fully preserved for appellate review. (T. 6178-88) Rather, the prosecutor began asking Lew a hypothetical question, at which time Appellant objected before she could finish the question, asserting "facts not in evidence." (T. 6178) Once the State finished its question, Defense counsel objected on grounds of "lack of foundation", speculation and compound question, which the trial court overruled. (T. 6180) Defense counsel then objected once more to facts not in evidence, at which time the parties held a sidebar conference. (T. 6181)

During the sidebar, there was one instance where Defense counsel objected to a "reenactment", arguing the question was asked in the form of a closing argument and that under Section 403, "[the question] simply has prejudicial impact and that is [the State's] intent." (T. 6185-86; IB 54) However, it is clear from the

record that the State was not using the dummy at that point when it was asking Dr. Lew the hypothetical questions.

Therefore, Appellant's argument that the hypothetical questions posed were unduly prejudicial were not properly preserved for review based on unduly prejudicial grounds. *See Anderson*, 863 So. 2d at 181 (noting it appeared the objections at trial were based on "whether the predicate facts had been established to allow [the expert] to form his opinion").[6] Similar to the facts in *Anderson*, Appellant's various and fleeting objections at trial appear for the most part to be on grounds of "facts not in evidence", "reenactment of the scene", "speculation", and "relevance". (T. 6178-88) Even on these grounds, Appellant's argument that the court erred by allowing the State to ask these questions has no merit.

As this Court has found, trial courts may allow a party to ask experts hypothetical questions to obtain an opinion on the likelihood that an event happened in a case. *See Autrey v. Carroll*, 240 So. 2d 474, 475 (Fla. 1970) (citing *Atl. Coast Line. R. Co. v. Shouse*, 91 So. 90 (Fla. 1922) (holding a party may frame a hypothetical question in a light most favorable to his or her case theory). The

[6] While Appellant in his brief contends that this Court in Anderson held that "before the state could use a hypothetical question, it was required to establish it was not more prejudicial than probative", this is not a correct understanding. All four prongs under § 90.702 are required, and there does not need to be a pretrial ruling on the materiality before the State asks a hypothetical question. However, it appears as though the trial court made a determination that the probative value of the evidence was not outweighed by undue prejudice based on its sidebar ruling.

party questioning the expert must base his hypothetical on material facts and not collateral facts. *See Smith v. State*, 7 So. 3d 473, 501 (Fla. 2009) ("A hypothetical question must be based on facts supported by evidence which has been introduced at trial."); *Zerega v. State*, 260 So. 2d 1, 3 (Fla. 1972) (finding hypothetical questions need not be an exact reproduction of the evidence and counsel may pose hypothetical upon "any reasonable theory as to the effect of evidence."); s*ee also Autrey*, 240 So. 2d at 476 (noting that conclusively proven evidence is not necessary so long as "[t]here [is] competent, substantial evidence in the record tending to prove each of the basic facts set forth in the hypothetical question.").

Here, Appellant claims that the first hypothetical question, ". . .if a person was standing at a counter where they were washing some dishes and they were surprised by the entry of someone into their home, surprised where they actually fell out of their shoes. . ." contains conclusive facts that were not in evidence. (T. 6178) Appellant's argument is meritless. First, the evidence showed Yvette's struggle with Appellant happened only in the kitchen where she was found dead as no other room in the house had any blood or signs of a struggle. (T. 3818) Second, during the investigation of Yvette's efficiency, Detective Gallagher noted water from the sink running and pooling in certain areas of the kitchen, and a washcloth was found on top of a mat next to the refrigerator, again implying a struggle occurred there while Yvette was working at the sink. (T. 5840) Applying *Autrey*

and *Zerega*, the State's hypothetical question was reasonable considering it was based on "competent, substantial evidence," and sufficiently related to the State's case theory. *Autrey*, 240 So. 2d at 476; *Zerega*, 260 So. 2d at 3.

Moreover, Appellant misreads the State's hypothetical question and wrongly assumes the State was attempting to use Lew's expertise to determine if Yvette was "scared our of her shoes." (IB. 56-57) The purpose of the State's hypothetical was not to ask Lew whether Yvette was scared when Appellant entered her efficiency uninvited, but rather the State used the hypothetical question to determine whether the State's theory was consistent with her findings based on the injuries and the evidence. (T. 6178-80) In this context, the State was permitted to assume Yvette was "scared out of her shoes" based on the photos in evidence that showed Yvette's shoes by the overflowing kitchen sink. (T. 6460) Additionally, the earlier elicited testimonial evidence indicated that Yvette's efficiency had no further maintenance issues requiring Appellant's attention and thus there was a reasonable inference that Yvette was frightened when he came in to her efficiency uninvited. (T. 5015); *see Zerega*, 260 So. 2d at 3 (noting "hypothetical questions need not be an exact reproduction of the evidence" so long as the hypothetical is based on "any reasonable theory as to the effect of the evidence."). Thus, the totality of the State's hypothetical question was focused on Yvette's injuries and not just as to whether

Appellant scared her. Accordingly, Appellant's argument is baseless and must be dismissed.

While determining the admissibility of the "reenactment", this Court should look to the facts and findings in *State v. Duncan*, 894 So. 2d 817 (Fla. 2004). In *Duncan*, the prosecutor similiarly used a dummy that had no resemblance to the victim, as a demonstrative aid during a witness's reenactment of a murder. *Id.* at 830. This Court found there was no abuse of discretion to use this visual aid because the dummy was used not to evoke a more emotional reaction, but instead to aid the jury's understanding of the facts and relevant issues including how the victim was murdered. *Id.* at 830-831.

Similar to the dummy in *Duncan*, the State used a dummy earlier in Lew's testimony, and the posed hypothetical questions thereafter were based on reasonable inferences from the evidence to help explain Lew's findings to the jury, which were consistent to the State's theory of the case. *Id.* at 830. Lew testified as to the location of the bruises and other injuries on Yvette's body. (T. 6163, 6167, 6195) Lew further testified as to how the trails of blood on Yvette's legs imply she was forced on her knees at some point during her struggle with Appellant based on the right angle of the blood. (T. 6130-31)

Finally, Appellant contends it was improper when the court allowed Lew to testify that Yvette survived for approximately 30 minutes, and that it was possible

for her attacker to leave and come back, the court found that there was other circumstantial facts in evidence from Vaughn who saw Appellant leave Yvette's efficiency holding a gas can right before Yvette's efficiency was fully aflame. (T. 5665, 5667-69, 6159) However, circumstantial evidence elicited earlier in the trial demonstrated that somehow Appellant possessed Yvette's debit card right before the fire to purchase gasoline, which would have meant he had to leave and come back to start the fire. (T. 3978) Accordingly, the court expressly found that the State's questions were valid to support the State's case theory because the hypotheticals asked Lew whether she could form an opinion as to the cause and manner of Yvette's death based off the evidence in the record. (T. 6181-82, 6186)

Moreover, contrary to Appellant's contention, the facts of this case are akin to the facts in *Smith.* 7 So. 3d at 501-02. In *Smith*, Dr. Lew was allowed to explain how the evidence was consistent with the victim being smothered by a bed pillow. *Id.* at 485. The State asked Lew to "assume the facts" in the hypothetical and whether those facts were consistent with asphyxia. *Id.* at 501. Defense counsel moved for a mistrial, which the court denied. *Id.* at 501-02. This Court held Smith was not entitled to relief because the hypothetical questions were based on facts on the record, and that it is entirely permissible for an expert to give an opinion based on a hypothetical question. *Id.* at 502.

As demonstrated above, although Appellant seeks to overlook facts elicited from other witnesses by the time Lew testified, these hypothetical questions were asked in the light most favorable to the State's theory and supported by evidence presented during trial. Just like in *Smith*, Lew was qualified to answer hypothetical questions where the evidence was consistent with her findings. Thus, the court did not abuse its discretion when it concluded Lew was able to testify to what is consistent with the physical evidence.

Even if the admission of Dr. Lew's testimony concerning these hypothetical questions was in error, the error was harmless. Appellant admitted from the very beginning of trial that Yvette's cause of death was not being contested, and that the only issue was who committed the murder. (T. 3792, 6504) During opening argument, Appellant did not contest Yvette died of a stab wounds to her chest and strangulation from the rice cooker cord. (T. 3792) Moreover, Appellant stipulated to the legal identification that the victim was in fact Yvette. (T. 3792) As such, there is no reasonable doubt that Lew's testimony on uncontested issues did not affect the jury's verdicts. Thus, the trial court should be affirmed.

ISSUE VI: THERE WAS NO PROSECUTORIAL MISCONDUCT DURING COMMENTS IN CLOSING

Appellant next asserts that a new trial is warranted due to prosecutorial misconduct in the closing arguments. He contests a number of statements the State

offered. As will be seen, no new trial is warranted on this claim.

This Court reviews trial court rulings regarding the propriety of comments made during closing argument for an abuse of discretion. *See Salazar v. State*, 991 So. 2d 364, 377 (Fla. 2008). However, where the comments were improper and the defense objected, but the trial court erroneously overruled defense counsel's objection, this Court applies the harmless error standard of review. *See Cardona v. State*, 185 So. 3d 514, 520 (Fla. 2016) (*citing Snelgrove v. State*, 921 So. 2d 560, 568 (Fla. 2005); *Doorbal v. State*, 837 So. 2d 940, 956–57 (Fla. 2003)). Where the trial court sustains the objection but denies a motion for mistrial, this Court reviews for an abuse of discretion. *Cardona*, 185 So. at 520. When no objection to a comment challenged on appeal was made below, or no motion for mistrial was made following a sustained objection, this Court reviews the issue for fundamental error. *Evans v. State*, 177 So. 3d 1219, 1234 (Fla. 2015).

Accordingly, the standard of review this Court applies will vary, as a number of Appellant's objections were overruled or sustained, and some arguments were not properly preserved. In any event, the trial court did not abuse its discretion, and even if the trial court overruled an improper comment, it was harmless error and does not warrant a new trial.

As a preliminary matter, Appellant's claim that this Court should look to examples of the prosecutor's prior conduct in previous trials is inappropriate.

Specifically, Appellant cites *Delhall v. State*, 95 So. 3d 134 (Fla. 2012), and *Bailey v. State*, 162 So. 3d 344 (Fla. 3d DCA 2015) in an attempt to align the prosecutor's past closing arguments with her comments in this case. However, this attempt is flawed at its core because the facts in those cases are completely distinguishable. In *Delhall*, this Court admonished the Prosecutor and remanded the case for a new penalty hearing after the State repeatedly mentioned Delhall's future dangerousness, a recognized form of misconduct. *Delhall*, 95 So. 3d at 168-69. In *Bailey*, the District Court found the Prosecutor did not engage in misconduct for bolstering a witness' testimony because even though she erroneously disregarded some of the trial court's orders, the testifying detective did not speak about the credibility of the witness. *Bailey*, 162 So. 3d at 347-48.

Unlike the closing in *Delhall*, the prosecutor here never mentioned character evidence but only stated her theory of how the jury should weigh the evidence. Additionally, unlike the comments in *Bailey*, the trial court never asked the prosecutor to refrain from continuing her closing. Thus, Appellant's claim that this Court should look to past conduct to demonstrate that she engaged in the same misconduct is meritless and should be denied. For all the reasons as explained below, Appellant's allegations of specific misconduct during closing are also without merit.

A. The State Did Not Engage In Burden Shifting During Rebuttal Closing Argument.

Appellant's claim that several comments and the State's use of a demonstrative aid in the State's rebuttal closing argument allegedly constituted improper burden shifting should be denied.

It is well settled that the prosecution has the heavy burden of proving to the jury "every essential element of the crime beyond a reasonable doubt." *Gore v. State*, 719 So. 2d 1197, 1200 (Fla. 1998) (reversible error where the prosecution used a "believable" standard instead of beyond a reasonable doubt). Prosecutors are permitted to use closing arguments to conclude and summarize their case theory to assist "the jury in analyzing, evaluating and applying the evidence. Its purpose is not to permit counsel to 'testify' as an 'expert witness.'" *Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999) (citing *United States v. Garza*, 608 F.2d 659, 662 (5th Cir. 1979)).

Within the realm of the prosecutor's closing argument is the "**right to state his [or her] contention as to the conclusions** that the jury should draw from the evidence." *Id.* at 4 (citing *United States v. Morris*, 568 F.2d 396, 401 (5th Cir. 1978)) (emphasis added). During closing, the prosecution is permitted to summarize and discuss "properly admitted testimony and logical inferences from that evidence" with the jury. *See Huggins v. State*, 161 So. 3d 335, 353 (Fla. 2014).

While the prosecution generally cannot refer the jury to the defendant's failure to present evidence, there is no impropriety in observing that the defense theory is not supported by actual evidence. *See Barwick v. State*, 660 So. 2d 685, 694 (Fla. 1995) (classifying "what in this courtroom, what evidence, what fact, what testimony, what anything have you heard . . . would create a reasonable doubt in your mind what he has done, what he is guilty of. Nothing.", as invited response where defendant's used closing to try and place doubt in jury's mind that prosecution was hiding evidence); *Dufour v. State*, 495 So. 2d 154, 160 (Fla. 1986) (holding "[Y]ou haven't . . . heard any evidence that . . . Dufour had any legal papers" did not constitute reversible error as the statement "fell into the category of an 'invited response' by defendant's preceding argument concerning the same subject."). In addition, this Court has recognized that comments made in fair reply to a defense argument are proper. *See Pagan v. State*, 830 So. 2d 792, 809 (Fla. 2002). The State in this case did nothing to the contrary.

In this case, Appellant first challenges the use of a white board that the prosecutor used in the State's rebuttal closing argument. The board was titled "The Scales of Justice" and the State wrote each piece of evidence it presented to the jury. It then stated that "nothing was on the not guilty side," which Appellant objected to as burden shifting, and the trial court sustained the objection. (T. 6561)

Appellant asked for a jury instruction and to "reserve" a motion and trial court told the jury to disregard the State's comment. (T. 6561)

To preserve an issue regarding a comment in closing, it is necessary for a defendant to object to the comment contemporaneously on the grounds asserted on appeal and obtain a ruling on the objection. *Gonzalez v. State*, 786 So. 2d 559, 568 (Fla. 2001); *Brooks v. State*, 762 So. 2d 879, 898-99 (Fla. 2000); *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983). Further, if a trial court sustains the defendant's objection, it is necessary for him to move for a mistrial to preserve the issue on appeal. *Rose v. State*, 787 So. 2d 786, 797 (Fla. 2001) (holding a claim is procedurally barred for failure to move for a mistrial after the trial court sustained the objection).

Here, the court granted the defense request for a jury instruction, and no ruling was sought on any "reserved" motion. Thus, there is no ruling to review and this claim should be rejected as procedurally barred. However, even if this Court considers Appellant made a motion for mistrial and the trial court did not rule, this Court reviews the prosecutor's closing arguments and the trial court's decision on the admission of statements under an abuse of discretion standard. *See Card v. State*, 803 So. 2d 613, 621 (Fla. 2001). A motion for mistrial is only properly granted if the comment was such as to deprive the defendant of a fair trial. *Salazar*, 991 So. 2d at 371-72.

While the prosecutor may have spoken inartfully, she only used the evidence at trial to deduce why Appellant was no longer shielded with the cloak of innocence, and notably, the comments were made on rebuttal after Defense counsel had presented its own theory of what the evidence showed. Moreover, throughout the trial, Appellant theorized that the evidence showed Appellant's van was stolen, which in conjunction with the other evidence would show the State's theory of the murder was inconsistent. (T. 3791, 3799) While the State never made the van a feature in its opening argument, (T. 3781-91), Appellant throughout its opening and the trial suggested Appellant did not abandon the van, but instead that someone stole it. (T. 3973-74)

Thereafter, the prosecutor introduced evidence and testimony throughout trial contending the van was in fact found abandoned near South Dade with damage to the ignition inconsistent with Appellant's insinuation that someone stole Appellant's van, and ergo could be responsible for murdering Yvette. (T. 4641, 4651, 4821-23) Nevertheless, Appellant continued insisting during several witnesses' testimonies that the evidence was inconsistent and circled back to the idea that the van was stolen to show someone else was involved in Yvette's murder. (T. 4749-51; 4769-70)

Accordingly, during closing, the State posited how the evidence supported its theory that Appellant abandoned the van and damaged the ignition himself to

make it appear it was stolen thus showing consciousness of guilt. (T. 6457, 6467, 6483) During Appellant's closing, Defense counsel once again asserted how the evidence was inconsistent to show Appellant committed the murder and how the evidence showed Appellant's van was stolen:

> There is one issue in this case and that is . . . has the prosecutor proven beyond . . . reasonable doubt that it was Mr. Andres. That is the only issue. . . We have brought out certain evidence about other people just so that you would have a better understanding of the . . . investigation. I suggest to you that the prosecutor's entire case is . . . inconsistent and we will go through that and you will hear that theme over and over again.

(T. 6504) Defense counsel continued:

> [MS. GEORGI]: . . . So he drives his van to the . . . Miccasukkee [sic] where he ends up spending the night . . . . [T]hen the van ends up down in the Redlands . [T]hen [Appellant] . . . actually called a taxi cab the next morning. . . **Now, the inference from that is that someone stole the van filled** with all [the $700 worth of goods he purchased from Home Depot on January 25th].
>
> [MS. GEORGI]: One could only imagine that a van filled with some expense [sic] tools, equipment ends up with a steering column all broken the way that it is in the picture. **Someone figured out how to start that van and take it and leave it.** There is no reason whatsoever for [Appellant] to dump his van. No reason. . . . **I point this out to you because there is some things that they put forward that just don't fit anything else in the case**. . . . There is absolutely no reason whatsoever for him to have his van dumped . . . in the Redlands. [N]o evidence.

(T. 6534-36) (emphasis added)

Accordingly, the prosecutor's statement during rebuttal retorted Appellant's theory to show the evidence did not show Appellant's inference was reasonable.

Contrary to the Second District Courts of Appeal cases that Appellant cites in his brief, the prosecutor's rhetorical questions during closing are more akin to the prosecutor's comments in *Dufour* and *Barwick. Dufour*, 495 So. 2d at 160; *Barwick*, 660 So. 2d at 694. Although the State used the abandonment of the van as proof of consciousness of guilt, the prosecutor was NOT required to provide documentation to prove Appellant's van was reported stolen because the Defense opened the door to this argument. Thus, the prosecutor's comments merely rebutted Appellant's contention that the State used "internally inconsistent" evidence to persuade the jury. (T. 6559-60)

Appellant further points to several burden shifting objections made during the State's rebuttal the court overruled. Appellant has not shown, and cannot show, how the State used evidence outside the scope of the record or that the prosecutor's closing argument used unreasonable references to the evidence. Here, the prosecutor based her argument and case theory solely on evidence presented at trial, and any comments she made at closing could reasonably be inferred from the evidence on the record. *See Huggins*, 161 So. 3d at 353.

Moreover, Appellant's reliance on *Warmington v. State*, 149 So. 3d 648 (Fla. 2014), and *Ramirez v. State*, 1 So. 3d 383 (Fla. 4th DCA 2009), is misguided, as the facts in those cases are strikingly different than the facts in this case. Unlike the defendants in those cases, who did not open the door to an invited response

before the State shifted the burden to provide documentation, here Appellant raised the issue of the van to assert it was inconsistent with the other evidence. (T. 3793)

Furthermore, unlike in *Warmington* where the shifting of proof dealt with an element of the crime, the abandonment of the van here was not an element of first degree murder, but went with the prosecutor's theory that its abandonment signified consciousness of guilt. *Warmington*, 149 So. 3d at 649-50. The prosecutor in rebuttal fulfilled her duty to provide evidence to the contrary; thus, Appellant has no grounds to claim that there was burden shifting as to the abandoned van.

Appellant's final claim that the State made a frivolous strawman alibi argument which would constitute burden shifting is also without merit. During Appellant's opening statement, Defense counsel stated "that morning [Appellant] was [at Perez's house] early and left early and he met up with Easter [sic], [Appellant's girlfriend]." (T. 3798) Appellant introduced this statement to imply to the jury that he was not at the crime scene, the textbook definition of an alibi. Appellant again uses this alibi during closing:

> [MS. GEORGI]: Then you see he starts moving around maybe 9:13, he is in a different sector. 9:14, and I think that the state just tried to say to you earlier that he comes back at 11:40. No. Nada. He comes back at 10:37. **Well, we don't even know if he is back.** He is in that sector for all of about seven or eight minutes, that whole sector which has eight streets running through it . . . **So between 10:37 and the time the fire is reported 12:47 he is nowhere in that sector;**

> **nowhere. No evidence of that.**

(T. 6530) (emphasis added)

> [MS. GEORGI]: By [Appellant] calling Jose Perez and saying "I left your place at 12:15["] **he is exactly not putting himself there. He doesn't know about the fire. He doesn't know about the crime. Why would he put himself at the crime by calling Jose Perez.** That is ridiculous. It stretches common sense to even think that way. It is 12:15? I mean, the fire started, if you remember, it's reported close to like ten minutes to one.

(T. 6543) (emphasis added)

To this end, Appellant's reliance on *Scippio v. State* is misguided. Unlike the prosecutor in *Scippio,* here the prosecutor never asked Appellant to provide an alibi regarding his whereabouts during the crime. *Scippio v. State*, 943 So. 2d 942, 944 (Fla. 4th DCA 2006). On the contrary, the State used evidence (all of which was noted on the Scales of Justice white board) to recreate a time line of Appellant's whereabouts through testimony, phone tower records, surveillance footage, and receipts of Yvette's debit card that Appellant possessed. (T. 3784-86, 3789-91) Although, Prosecutor did not ask any questions about Appellant's alibi, *Jackson* would have allowed her to do so. *See Jackson v. State*, 575 So. 2d 181, 188 (Fla. 1991). Thus, this Court should deny this frivolous claim because (1) there is no point at trial where the prosecutor demanded Appellant provide an alibi; and (2) Appellant opened the door himself to any question of his whereabouts on the day of the crime.

B. The State Did Not Denigrate Defense.

Appellant next contends the State attacked the Defenses' case theory and representation of Appellant. Specifically, Appellant first challenges the prosecutor's statement in the initial closing discussing the evidence found on the rice cooker, stating "There is no evidence before you that there is any, anyone's fingerprints on that rice cooker. [Yvette's] included. Don't get yourself caught up in that. It is a way to distract you. . . ." (T. 6473-74) Appellant objected and the court sustained the objection. The prosecutor then rephrased her statement and said, "it was a way to make you not look at the evidence that we presented," to which Appellant objected and the court overruled. (T. 6474) No error has been demonstrated in this subclaim.

A prosecutor may tell the jury to question a defendant's case theory if evidence to the contrary supports the prosecutor's position. In *Salazar v. State*, 188 So. 3d 799, 822 (Fla. 2016), this Court found the prosecutor's comments to the jury about defenses' theory to be lawful because they did not taint the jury's perception of the case, and most importantly, the evidence strongly pointed to defendant's guilt. In *Valentine v. State*, 98 So. 3d 44, 55-56 (Fla. 2012), this Court affirmed the lower court's decision that the prosecutor's comments did not constitute reversible error when the prosecutor told the jury that the defense wanted them to believe its case, but implied those statements were a distraction

from the evidence prosecution presented.[7]

In *Braddy v. State*, 111 So. 3d 810, 853-54 (Fla. 2012), this Court **did not** find the prosecutor's statement "defense . . . [is] going to be arguing about the [evidence] and screaming about the [defenses] they can. **Because maybe if you scream loud enough, maybe you can drown out the shouts of the [evidence]** . . . written in stone" was sufficiently prejudicial to the holding in the case. (emphasis added) Thus, a prosecutor may ask the jury to question the defenses' case theory if concurrently pointing to evidence that proves defendant is guilty.

Appellant's reliance on *Merck v. State*, 975 So. 2d 1054 (Fla. 2007) is flawed.[8] In *Merck*, this Court found that the prosecutor's comment in the penalty phase relating to how many books and *Penthouse* magazines the victim would

[7] "Now, [defense counsel] wants you to believe that [Romero] is lying and to have you believe that she is lying, he has to provide you with a motivation for why she was lying and so her motivation is this Costa Rican divorce. He somehow wants you to believe and wants to suggest to you that it is this woman, as she was laying there, bound, bloodied, naked, wondering if she was going to live or die, not knowing if she would ever see her children again, she thought, "Hey, if I say [Valentine] did it, maybe he has got some property in Costa Rica and I will get an attorney, and we will do a property search, and maybe I will get half." Valentine, 98 So. 3d at 55.

[8] Appellant cites to the dissenting opinion in his brief to suggest that the majority of the opinion held that "verbal attacks on the personal integrity of opposing counsel are inconsistent with the prosecutor's role." (IB 71) This is misleading as that is not what this Court's majority opinion held and moreover, a dissenting opinion is not binding precedent. *See, e.g., American Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 369 (Fla. 2005) (reiterating that a dissenting opinion is not binding precedent and that this Court is bound by the ruling of the majority).

have read had he not been murdered, was a comment that denigrated defendant reading books in prison; thus denigrating the defense's mitigation strategy. *Id.* at 1064 (citing *Taylor v. State*, 583 So. 2d 323, 329-30 (Fla. 1991) (holding comment that victims could not longer read books and engage in other activities was improper because it urged consideration of factors outside scope of deliberations). While this Court found that this prosecutorial comment was improper, it held that this comment and many other comments in tandem were "not the sort of pervasive errors that compromise the integrity of the penalty-phase proceeding…." *Id.*

However, in this case, the State continued to tie its comments back to evidence when it indicated that Appellant's argument as to the lack of fingerprints was a way to "distract" the jury from other evidence presented. (6473-74) Further, the court only sustained the objection once and overruled the other occasions. *Id.* Thus, as the lower court was able to hear the comments in the tone and context of which it was said, and the comment was geared to shift focus on other evidence that went against the defenses' theory of the case, this comment did not taint the jury's ability to render a verdict when the weight of the evidence was so strong against Appellant's theory.

Appellant's reliance on *Riley v. State*, 560 So. 2d 279, 280 (Fla. 3d DCA 1990), and *Evans*, 177 So. 3d at 1237-38, is misguided because the prosecutor here never inserted her opinion analyzing why Appellant's case theory was wrong, nor

did she use sarcasm to appeal to the jury. In fact, she even admitted that she could not present DNA evidence because there was none to present. (T. 6473) Accordingly, this Court should dismiss any claim that the prosecutor was out of line when she presented rebutting evidence to Appellant's theory of the case.

Appellant next erroneously infers that the State attacked Appellant's "lowest offense possible" strategy in rebuttal. Specifically, Appellant misreads the prosecutor's comment that "if we throw out he did a theft, you will buy it," to demonstrate that the holding in *Crew v. State*, 146 So. 3d 101 (Fla. 5th DCA 2014) is applicable; however, this analysis is flawed. (IB 68) In *Crew*, the prosecutor provided an opinion as to the merits of the defenses' use of the lowest offense strategy. *Id.* at 110. To the contrary, the prosecutor here applied the evidence of the case to the crime to show that the charge should be robbery and not theft because Appellant inferentially used lethal force to take Yvette's debit card. *Id.* at 110; (T. 6462, 6466, 6551) At no point did the prosecutor provide a personal speech on the merits of defenses' strategy; rather she was delineating between two types of crimes. (T. 6550-51)

This Court should deny Appellant's third claim that the State used a diversionary tactic in its argument because it was a minor comment not rising to the level of a theme, and because the comment was based on evidence. *See Carballo v. State*, 39 So. 3d 1234, 1248-49 (Fla. 2010), (the trial court did not err

where the State asked the jury not to fall for a distraction where it discussed each piece of evidence the jury needed to make an informed decision). Based on the overwhelming evidence the State presented to show that Appellant did murder Yvette's, a minor reference that had no influence on the jury's ability to render a fair verdict merits denial. (T. 6457)

While Appellant also cites to *Cardona*, *D'Ambrosio*, *Lewis*, *Fullmer*, and *Carter*, these cases are all distinguishable from the facts in this case. In each of those cases, the prosecutor made other significantly more prejudicial statements that placed a cloud on the jury's ability to render a fair and impartial verdict. These statements ranged from the prosecutor placing her personal beliefs on the defendant's guilt, attacking the defense counsel's family, using a justice for the victim argument, and stating defense counsel's duty to represent the defendant was almost criminal. *Cardona*, 185 So. 3d at 523-25; *D'Ambrosio v. State*, 736 So. 2d 44, 47-48 (Fla. 5th DCA 1999); *Lewis v. State*, 780 So. 2d 125, 130 (Fla. 3d DCA 2001); *Fullmer v. State*, 790 So. 2d 480, 481 (Fla. 5th DCA 2001); *Carter v. State*, 356 So. 2d 67, 67-68 (Fla. 1st DCA 1978).

Finally, Appellant contends that the prosecutor mocked and belittled the defense when she referred to the defenses' case theory as a fantasy or fairytale. (IB 68) Specifically, Appellant points this Court to the prosecutor's statements on rebuttal when she indicated that "[e]vidence comes from the exhibit and the

witnesses, not what someone asks you think or speculate; not a story; not a fairytale." (T. 6476) The court overruled Appellant's objection. (T. 6476)

This Court reviews trial court rulings regarding the propriety of comments made during closing argument for an abuse of discretion. *Salazar*, 991 So. 2d at 377. This Court has repeatedly held that even though this kind of comment may be improper, it typically does not warrant the granting of a new trial. *Salazar*, 188 So. 3d at 799, 822 (holding no fundamental error where the prosecutor referred to the defendant's case theory as "some kind of . . . fantasy" because it did not outweigh the evidence); *Franqui v. State*, 59 So. 3d 82, 98 (Fla. 2011) (finding prosecutor's statement "[t]hat's the world of [Defendant's mitigation expert] . . . Through the looking glass at Disney World. Make believe. Use your common sense." did not warrant relief because the evidence outweighed any prejudice); *Anderson*, 863 So. 2d at 187 (labeling defendant's case theory as "the National Enquirer Defense" did not influence the jury). This Court has even held that a prosecutor may refer to a defendant's case theory as fantasy if the defendant invites the response. *See Parker v. State*, 641 So. 2d 369, 375 (Fla. 1994).

Here, in the State's closing, the State presented argument regarding uncontroverted evidence of Appellant's use of Yvette's bank card without her permission, referencing Defense counsel's opening where she indicated there was evidence to explain the use of the card. (T. 6475) Appellant objected to facts not in

evidence which the court sustained. (T. 6475-76) It was at that point that the State reminded the jury that evidence comes from the exhibits and the witnesses, "not a fairytale." (T. 6476) The court then overruled Appellant's objection. (T. 6476)

Appellant has failed to demonstrate that the prosecutor's statement that defenses' case was speculative unfairly influenced the jury. The State used various pieces of evidence to demonstrate that, when added together, Appellant's argument was flawed because he was always coincidentally at the wrong place at the wrong time. (T. 6552, 6554, 6556-57) Each time, the court overruled Appellant's objections to these coincidences as denigration. (T. 6552, 6554-57)

Similar to *Parker*, Appellant invited the prosecutor's commentary that his case was speculative seconds into its opening statement. 641 So. 2d at 375; (T. 3791) ("[MS. GEORGI]: [Appellant] did not kill Yvette [sic] Farinas . . . There is indeed some circumstantial evidence to raise a suspicion, but that's where it stops.") Thus, the prosecutor was permitted to tell the jury that the defense's case theory was based on a fairytale. *See Franqui*, 59 So. 3d at 98; *Anderson*, 863 So. 2d at 187; *Henderson v. State*, 727 So. 2d 284, 285-86 (Fla. 2d DCA 1999) (all finding that a prosecutor is permitted to tell the jury that defenses' case theory is based on fantasy if the prosecutor has sufficient evidence to the contrary, and the statement does not taint the jury's decision making). The facts here are no different than those cases; in fact, the prosecutor's statements here are less extreme.

Appellant's citation to *Carballo v. State*, 762 So. 2d 542, 543-45, 548 (Fla. 5th DCA 2000); *D'Ambrosio*, 736 So. 2d at 47-48; and *Izquierdo v. State*, 724 So. 2d 124, 124-25 (Fla. 3d DCA 1998), are meritless because the courts there did not analyze the "fantasy" comment, but looked at various comments as a whole. The courts in each of those cases were significantly more focused with the other extremely prejudicial comments each prosecutor made rather than the "fantasy" remark. Thus, on its own, the fantasy statement was not considered an abuse of discretion. Therefore, this Court should reject Appellant's claim since the comments did not impact the jury's ability to analyze the evidence.

Finally, Appellant cites to several statements in the record to assert that sarcasm used in closing warrants a new trial. (IB 70) However, this Court has held where a prosecutor merely chides the defenses' case theory through evidence, a claim of needless sarcasm does not prevail. *See Davis v. State*, 136 So. 3d 1169, 1203-04 (Fla. 2014) (albeit improper, the statement "[Defendant] doesn't have the same wisdom as counsel does with respect to knowing that an unconscious child can't choke on a French fry," and that defendant was in "la-la-land" when explaining the jury instructions did not constitute reversible error); *see also Henderson*, 727 So. 2d at 285-86 (finding no fundamental error even after prosecutor stated "So what does [Henderson] do?...[he] [c]omes up . . . with this fairy tale . . . **Let's not forget about [the mother]. She is making this up too . . .**

She is in on the conspiracy . . . Everyone is involved. We better check to see where they were on November of '63 to see if they were involved with J.F.K.") (emphasis added). Thus, if the sarcasm is based on evidence and not a personal attack on the individual, it will not be held to taint the jury's decision.

Appellant overexaggerates and inaccurately compares the State's "coincidence" comments with improper sarcasm. Prosecutor's use of the word "coincidence[s]" does not rise to the level of *Gore* or *Crew*, where the Prosecutor used sarcasm to personally attack the religious background and drug addiction problems of each respective defendant. *Gore*, 719 So. 2d at 1201; *Crew*, 146 So. 3d at 109. Here, the State used the word "coincidence" to rebut Appellant's argument that he merely found the debit card, was not the individual that Vaughn saw through the fence, and had a red gas can in his home days after the crime, all of which was established on the record. (T. 4625, 4735, 5241-42, 5673-74, 5904-05) The comments in *Davis* and *Henderson* were more prejudicial to the ones here since they personally attacked the defendant and used blatant exaggeration to imply the defenses' theory was not credible. *Davis*, 136 So. 3d at 1203-04; *Henderson*, 727 So. 2d at 285-86. Because the State used uncontroverted evidence to show how defenses' theory was not credible, this Court should not find the use of the word "coincidence" constituted sarcasm.

C. The State's Reasonable Explanation Of The Law Was Not A Misstatement That Would Amount To Reversible Error.

Appellant next challenges the prosecutor's description of first degree murder as including an intent to kill. (IB 72) Specifically, the prosecutor indicated second degree murder was "a crime where you intend to kill – where you intend to do an act but you don't intend to kill them." (T. 6494-95) The State continued to explain the difference between first and second degree murder, to which the court overruled several objections. *Id.* However, as argued below, this was not a misstatement of law and did not amount to reversible error.

Here, the prosecutor's statement of law was an accurate factual comment on the law and not a misstatement. In full context of the statement, the prosecutor attempted to distinguish the premeditation element of first-degree murder when she stated, "when you think about the intent to kill" and second-degree murder acts when she stated that they are "done from ill-will, hatred, spite. . . you didn't think about it before you did it." (T. 6495) Thus, the court below heard this comment fully in context and overruled Appellant's objection that it was a misstatement, given the prosecutor was equating "intent to kill" with premeditation in a colloquial rather than legal context.

However, even if it was a misstatement, it was harmless error. Even if a prosecutor does misstate the law but the court informs the jury it will provide the

appropriate instructions, a prosecutor's statements do not amount to reversible error. *See Almeida v. State*, 748 So. 2d 922, 927 (Fla. 1999). In *Almeida*, the prosecutor's initial comment was an incorrect statement of the law and the trial court thus erred in overruling the objection. *Id.* at 927. However, this Court found that the error was harmless because: (1) the misstatement was presented to the jury in the context of closing argument by an advocate, not in the context of an instruction by the court; (2) the misstatement was an innocent one—the prosecutor was struggling with a subtle rule of law that is difficult to articulate; (3) although the prosecutor repeated the incorrect statement to the jury, he minutes later read the proper instruction; (4) immediately following the prosecutor's second improper statement, the court announced before the jury that (a) the court would be instructing them on the law, (b) they were to follow only its instructions, and (c) what the lawyers say is neither evidence nor law; (5) before the jury retired, the court also read the standard instruction to the jury; and (6) the jury took a copy of the standard instruction into the jury room during deliberations. *Id.*

When the State began detailing each element of premeditation for first degree murder, she used a factual analysis to assist the jury to use the evidence to draw a conclusion from the state's perspective. (T. 6494-95) The court twice overruled Appellant's objection to the State's explanation; however, the court did sustain the objection and informed the jury it would be providing the jury with

appropriate instructions just like in *Almeida*. (T. 6494) After the rebuttal, the trial court was able to give the proper standard instructions as to how they determine the highest crime that the evidence supports. Thus, even if the prosecutor misstated the law, it is harmless error requiring this Court to deny Appellant's claim.

D. The Prosecutor Statements Were Not So Inflammatory As To Constitute Reversible Error.

Contrary to Appellant's belief, Prosecutor's illustration of Yvette "beginning to choke on her own blood" while on the "torture chair" are not inflammatory statements requiring reversal. Additionally, Appellant's argument as to the inflammatory nature regarding two comments made about Alberto Ruiz is also without merit. First, as a preliminary matter, Appellant did not move for a mistrial after the court sustained the first objection to the "torture chair" comment. (T. 6462) Therefore, it is not properly preserved for appeal. When no objection to a comment challenged on appeal was made below or no motion for mistrial was made following a sustained objection, this Court reviews the issue for fundamental error. *Evans*, 177 So. 3d at 1234. Fundamental error is the type of error which "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *McDonald v. State*, 743 So. 2d 501, 504 (Fla. 1999).

In analyzing the first comment regarding the "torture chair," the prosecutor

argued in closing that the evidence showed that Appellant pulled her hair "and took her into the dining room chair, the "torture chair." (T. 4377-79, 6461-62) (noting that there were four dining room tables in total but one of them was found in the kitchen during the investigation) The trial court sustained Appellant's objections on inflammatory grounds but Appellant did not thereafter move for a mistrial. (T. 6462) Even if it had been preserved, there was no abuse of discretion in admitting this statement on the record. Furthermore, even if Appellant moved for mistrial based on this prosecutorial comment, it was not inflammatory. Taken into context, the prosecutor argued Appellant would not have been able to get access to her debit card without her pin number. (T. 6462) Thus, the prosecutor's reference to it referred to the evidence that was consistent with the State's theory that Appellant somehow was able to use her PIN-locked debit card, and that based on the injuries Yvette sustained, Appellant brutally attacked Yvette to get her PIN. (T. 6462) Thus, this comment did not reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the comment.

Next, Appellant argues the court erred when it overruled its objection on inflammatory grounds when the prosecutor stated that after Appellant plunged the knife into her chest, "Yvette began to choke on her own blood." This evidence was earlier corroborated through Dr. Lew's testimony when she stated that based on her findings, blood leaked into Yvette's lungs which made it difficult for her to

breathe. (T. 6154-55) Thus, the court did not err when it overruled the objection, since this comment referred directly to Lew's findings based on the autopsy.

Appellant next argues that the prosecutor's statement regarding the fact that Defense counsel had attempted to imply Alberto Ruiz was the real killer which was "insulting" was also inflammatory. (IB 74) Appellant objected but did not allege the grounds for his objection. (T. 6487) The Court continued to overrule Appellant's general objection, and as the court was in the better position to understand the tone and manner of the prosecutor when the comments were made, the court did not consider the word "insulting" to be of such an inflammatory nature. (T. 6487) Notably, the State may suggest that the evidence goes against the defenses' theory of the case. *See generally Blake v. State*, 180 So. 3d 89, 118 (Fla. 2014) (holding that after defendant put his emotional condition into evidence, the prosecutor did not use inflammatory language when she stated during closing "the tape comes on and [defendant's] crying, he's bending down, he's demonstrating that he's almost a pitiful figure.").

Here, Appellant had opened the door during his closing for the State to rebut that Alberto Ruiz did not commit the crime. In fact throughout the course of trial, Appellant attempted to place blame on Alberto Ruiz based on the extremely minimal possibility he could have murdered Yvette during his milk route on the day of the crime. (T. 5823-25, 5827, 5860) This theory opened the door for the

prosecutor to rebut that argument based on the evidence she presented throughout trial. Therefore, because this comment when understood in full context was a comment made against defense's illogical implication of what the evidence showed, this Court should affirm the lower court's ruling.

Finally, Appellant argues the prosecutor's closing comment about Alberto Ruiz was improper when she highlighted her understanding that Ruiz had testified, "my life was ruined that day. All my hopes and my dreams were taken from me. The love of my life at that time as taken from me." (T. 6487) However, the court overruled Appellant's objection to the comment being inflammatory. (T. 6487)

A court will not find reversible error when a prosecutor refers to the victim's family and the isolated comment itself is not egregious. *See Valle v. State*, 474 So. 2d 796, 805 (Fla. 1985) (finding that although improper, the prosecutor's reference to victim's wife, child, and parents did not rise to the level of prosecutorial misconduct)[9]; *Johnson v. State*, 442 So. 2d 185, 188 (Fla. 1983); *Grant v. State*, 171 So. 2d 361, 365-66 (Fla. 1965) (finding no reversible error when prosecutor referred to family once during closing).

In *Johnson v. Wainwright*, 778 F.2d 623, 630 (11th Cir. 1985), the 11th

[9] "[Victim's wife] will never see [Victim] again, nor his parents, nor his children. They will never spend a . . . birthday with Victim. . . When [Victim] left his home on that day, . . . he did not think [it] would be the last time . . ., I am sure when he kissed his wife and children good-bye, . . . he did not think [it] would be the last one." *Valle*, 474 So. 2d at 805.

Federal Circuit Court of Appeals reviewed this Court's holding that the prosecutor did not refer to the victim's family in an inflammatory manner.[10] Specifically, the Court held "a reference to the loss suffered by the victim's family is no more than a compelling statement of the victim's death and its significance. . . ." *Id.* at 630 (internal quotations omitted).

Here, similar to *Wainwright*, the prosecutor referred to Ruiz and interpreted his testimony to reflect that he had lost Yvette and their future together. (T. 3998-99) Taken in context, this comment was still made in rebuttal to Defense counsel's strategy in closing to shift the blame of Yvette's death to Ruiz. Thus, the State had every reason to show why Ruiz's testimony would not disrupt a finding that Appellant committed the crime beyond a reasonable doubt. (T. 6486-87)

Additionally, Appellant's reliance on *Garron v. State*, 528 So. 2d 353, 358-59 (Fla. 1988) is misplaced because the prosecutor did not make a "Golden Rule" argument, and thus *Garron*[11] is not applicable. *Garron*, 528 So. 2d 353.

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[10] "Another family, perhaps you haven't become closely associated with, that is the [Victim's] family, will be facing this holiday season one short." *Wainwright*, 778 So. 2d at 630.

[11] In *Garron*, this Court identified examples of what would constitute inflammatory statements during closing including where the prosecutor (1) uses the Golden Rule; (2) tells the jury if the victim were present she would argue for defendant's guilt; (3) tells the jurors to "listen to the [victim's] screams . . ."; and (4) suggests the jury's sole purpose was to sentence defendant to death. *See Garron* 528 So. 2d at 358-59. None of these examples are applicable to the comments the prosecutor made in this case.

Accordingly, this Court should deny Appellant's claim because reference to the "torture chair" was not the properly preserved for appellate review and the court did not err when it overruled Appellant's objection to the mention of Yvette choking on the blood. The comments referencing Ruiz were not inflammatory; however, even if they were improper, it would not be reversible error.

E. There Is No Cumulative Error That Would Warrant A New Trial.

When the prosecutor makes multiple statements defense believes are prejudicial, this Court conducts a cumulative effect test of the statements to determine if the defendant received a fair trial. *Card*, 803 So. 2d at 622. To "require a new trial based on improper prosecutorial comments, the prosecutor's comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory they might have influenced the jury to reach a more severe verdict than that it would have otherwise." *Id.* (citing *Spencer v. State*, 645 So. 2d 377, 383 (Fla. 1994)).

Each of the comments Appellant objected to requires this court to determine whether the lower court abused its discretion. *Card*, 803 So. 2d at 621. As case law and the transcript show, none of the prosecutor's comments merit a reversal on either an individual or cumulative level. Nothing in the facts show that a new trial is required because of improper prosecutorial comments depriving defendant of a

fair trial, materially contributing to the conviction, tainting the trial, or being overtly inflammatory. As a result, this Court must deny Appellant's claim that the statements cumulatively affected him.

ISSUE VII: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PREVENTED APPELLANT FROM DISCUSSING LACK OF MOTIVE AND MAKING BASELESS AND STACKED INFERENCES.

Appellant next disputes several trial court rulings to sustain objections to Defense counsel's closing argument. As the record reflects, the defense was not precluded from making any argument, as the comments were in fact made to the jury. The jury was not advised to disregard any comment, but heard only legal rulings to sustain the objections. To the extent Appellant infers Defense counsel would have expanded an argument or continued to develop a comment had the objection not been sustained, Appellant did not proffer any comment or argument he intended to make, and there is no precluded comment for this Court to review.

A trial court has discretion to find evidence or a comment relevant, and its decision will not be overturned unless an appellate court finds the lower court abused its discretion. *See Heath v. State*, 648 So. 2d 660, 664 (Fla. 1994) (citing *Hardwick v. State*, 521 So. 2d 1071, 1073 (Fla. 1988)). In this case, the first comment misstated the law by telling the jury that since the State failed to establish motive, they must have doubts, suggesting they should acquit. (T. 6359) With the other three comments, Defense counsel argued facts that were not supported by

any reasonable inference from the evidence. Accordingly, the remarks were improper were improper, the objections were properly sustained, and no abuse of discretion has been shown.

The court sustained the State's objection when Defense counsel began to tell the jury that if it had any doubt as to the perpetrator's motive, it must find reasonable doubt exists to preclude a conviction. Since motive is not an element of first-degree murder, this statement was legally inaccurate. This Court has repeatedly held that the State does not need to prove motive in a first-degree murder case to establish guilt or reasonable doubt. *See Belcher v. State*, 961 So. 2d 239, 249 (Fla. 2007) (citing *Norton v. State*, 709 So. 2d 87, 92 (Fla. 1997)).

A trial court has broad discretion to determine proper argument and restrict an attorney from making any comment not based on law or evidence, and an appellate court will not overturn the trial court's decision unless there is an abuse of discretion. *See King v. State*, 130 So. 3d 676, 687-88 (Fla. 2013); *see also Heath*, 648 So. 2d at 664-65.

Here, the trial court was within its discretion when it sustained the State's objection that motive was not an element of the crime when Appellant argued the State's theory was that the motive for Yvette's murder was for money and that if the jury had "questions about that, that means that you have doubts." (T. 6359) Not only was that a misstatement of the law, but based on the State's objection, the

court was correct to sustain because the court did not prohibit Appellant from making further argument as to the lack of motive, only that the objection was sustained on that particular assertion where Appellant misstated the legal consequence of the lack of motive.

Appellant misconstrues the decisions in *Swafford v. State*, 125 So. 3d 760, 778-79 (Fla. 2013), and *Washington v. State*, 737 So. 2d 1208, 1215 (Fla. 1st DCA 1999), to support his assertion that the objection should not have been sustained when he argued lack of motive meant that the jury must acquit. However, this specific issue is not central to this Court's decision in *Washington* and *Swafford*, as there was no claim in either case that the trial court abused its discretion when it sustained an objection after Appellant misstated the law when it discussed the legal consequences of the lack of motive.

Appellant's claim of improper interference with his right to argue inferences from the evidence is also meritless. Florida courts grant attorneys "wide latitude to argue to the jury during closing argument." *Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999). Within this grant of authority is the right to use inferences to advance a party's case. *Id.* However, to be considered a reasonable inference, "the inference [must be] drawn from admitted or proven facts [that] must logically flow from the facts so admitted. An illogical or unreasonable inference does not have the force of evidence[,]" and will not be admitted at trial. *Miller v. State*, 75 So. 2d 312, 315-16

(Fla. 1954). Notably, a court will find no conclusive evidence to support a claim of guilt where a party stacks multiple inferences on top of one another to prove the crime charged did not happen. *See Graham v. State*, 748 So. 2d 1071, 1072 (Fla. 4th DCA 1999) (citing *I.F.T. v. State*, 629 So. 2d 179 (Fla. 2d DCA 1993)).

Here, the trial court similarly did not abuse its discretion when it restricted Appellant from impermissibly stacking inferences to absolve himself of guilt. The court sustained the State's objection to facts not in evidence when Appellant argued in closing that Appellant knew Yvette was home since her car was in the driveway. (T. 6509-10) In fact, there was evidence to the contrary that may have suggested to the jury that Appellant may not have been familiar with Yvette's car, since Yvette and Ruiz moved out for a period of time while Appellant completed construction on their efficiency. (T. 4003)

Second, the court sustained the State's objection when Appellant inappropriately stacked Yvette's use of cash to indicate she infrequently used her debit card, with another inference that because she did not use the debit card often, she would not have noticed it went missing. (T. 6512) However, there was no evidence presented at trial showing (1) Yvette did not take her card with her in her purse or wallet; and (2) no evidence that she did not check her bank statements regularly to show her card went missing. (T. 3977) Thus, the court properly sustained the objection.

Finally, Appellant argues that he was improperly prohibited from making argument as to whether the van was stolen or abandoned. Appellant improperly stacked the inference that (1) because the state did not prove Appellant's van was not stolen, it meant that it was in fact stolen; and (2) the real suspect who stole the van is the one who is liable for Yvette's death. These inferences are unreasonable because (1) there was no evidence to suggest the van was stolen; (2) Appellant was not charged with falsifying a stolen vehicle report, and thus (3) it was not the State's burden to prove the van was stolen. On the contrary, the State presented evidence refuting the suggestion that Appellant's van was stolen. (T. 4821)

Thus, the trial court did not abuse its discretion when it restricted Appellant from making and stacking these baseless inferences. Morever, any possible error would be harmless in this case, given the strength of the evidence establishing Appellan't guilt. This Court must deny Appellant's claim.

ISSUE VIII: APPELLANT'S CLAIMS DO NOT RESULT CONSTITUTE CUMULATIVE ERROR.

Where a party claims he received an unfair trial because of multiple errors, even if individually harmless, a court considers whether their cumulative effect denied the party a fair trial. *See Hurst v. State*, 18 So. 3d 975, 1015 (Fla. 2009). However, if the reviewing court determines the claims are "individually either procedurally barred or without merit, the claim of cumulative error also necessarily

fails." *Id.* (citing *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008)).

Individually and cumulatively, Appellant's claims have no merit. Appellant exaggerates his claims to give the façade that he was denied a fair trial, when in reality the evidence and its presentation clearly show the jury correctly decided his fate. None of Appellant's claims have been shown to be meritorious and without any substantive claim, this Court must affirm the lower court and jury's decision.

ISSUE IX: APPELLANT IS NOT ENTITLED TO RELIEF UNDER HURST.

Appellant next contends that his death sentence based on a 9-3 recommendation pursuant to Section 921.141 is unconstitutional under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), which would invalidate his death sentence.

In *Hurst*, the Court held that Florida's capital sentencing structure violated *Ring v. Arizona*, 536 U.S. 584 (2002), because it required a judge to conduct the fact-finding necessary to enhance a defendant's sentence. *Hurst*, 136 S. Ct. at 621-22. In arriving at its decision, the Court looked directly to Florida's sentencing statute, finding that it does not "make a defendant eligible for death until 'findings by the court that such a person shall be punished by death.'" *Id.* at 622 (citing § 775.082(1), Fla. Stat.). Also, under *Spaziano v. State*, 433 So. 2d 508, 512 (Fla. 1983), the jury's role in sentencing a defendant to capital punishment was viewed as advisory. Thus, the Supreme Court held Florida's capital sentencing structure,

"which required the judge alone to find the existence of an aggravating circumstance," violated its decision in *Ring*, and overruled *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), to the extent that they allow a sentencing judge to find aggravating circumstances independent of a jury's fact-finding. *Hurst*, 136 S. Ct. at 618. The Court did not address the issue of any possible Eighth Amendment violation, and similarly, it did not overrule *Spaziano* on Eighth Amendment grounds. The United States Supreme Court has never held that a unanimous jury recommendation is required under the Eighth Amendment.

Specifically in this case, Appellant's death sentence is supported by five aggravating circumstances. The State presented evidence to the jury of five aggravating factors: (a) Appellant was previously convicted of another felony (the murder of Linda Azcarreta) involving the use of threat of violence to the person under section 921.141(5)(b); (b) the capital felony was committed while Appellant was engaged in the commission of, or an attempt to commit any burglary under section 921.141(5)(d); (c) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effectuating an escape from custody under section 921.141(5)(e); (d) the capital felony was committed for pecuniary gain under section 91.141(5)(f); and (e) the capital felony was especially heinous, atrocious or cruel under section 921.141(5)(h). (R. 3012)

This Court has combined the Sixth Amendment analysis of the Supreme Court in *Hurst*, and added an Eighth Amendment component to determine that our state constitution essentially requires a unanimous jury recommendation. In doing so, this Court concluded that weighing is a fact that must be found by the jury. However, the State maintains that this interpretation of the Eighth Amendment respectfully is unsound. *See In re Bohannon v. State*, No. 1150640, 2016 WL 5817692 (Ala. Sept. 30, 2016) (noting that "*Hurst* does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment" and that [. . .] "*Hurst* focuses on the jury's factual finding of the existence of an aggravating circumstance to make a defendant death-eligible[.]"); *State v. Belton*, No. 2012-0902, 2016 WL 1592786 (Ohio Apr. 20, 2016) (observing that "Federal and state courts have upheld laws similar to Ohio's, explaining that if a defendant has already been found to be death-penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate *Apprendi* and *Ring* []" and that "[w]eighing is not a fact-finding process subject to the Sixth Amendment[.]").

Thus, the State maintains that as Appellant's aggravating factors included a prior violent felony conviction and a contemporaneous conviction, this case should be exempt from the analysis in *Hurst*, as no Sixth Amendment violation exists. However, any possible *Hurst* error was harmless in this case. To be harmless error,

there must be no reasonable possibility that the *Hurst* error contributed to Appellant's death sentence. *Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016); *Hurst*, 202 So. 3d at 68.

A unanimous jury recommendation should not be required to establish harmless error. Instead, it is necessary to look to what a rational jury would have done, and whether the alleged *Hurst* error contributed to Appellant's sentence. The aggravators the trial court found in this case were inherent in the jury's verdict. Notably, some of Appellant's aggravators are directly based upon his guilty pleas or his contemporaneous conviction of burglary since the jury unanimously found that that Appellant committed a burglary during Yvette's murder. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (permitting judges to impose higher sentence based on prior conviction); *Ring*, 536 U.S. at 598 n.4 (noting *Ring* does not challenge *Almendarez-Torres*, "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"); *Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013) (affirming *Almendarez-Torres* provides a valid exception for prior convictions).

Since the aggravators supporting Appellant's death sentence were either supported by prior convictions, contemporaneous convictions or on uncontroverted facts, no rational juror would have failed to find any of the aggravators supporting Appellant's death sentence in this case.

Appellant also contends *Caldwell v. Mississippi*, 472 U.S. 320 (1985) applies to his case because the jury instructions stressed the "purely advisory nature of the juror's recommendation." (IB 83) However, Appellant's argument that *Caldwell* mandates relief in this case because of the holding in *Hurst* is patently without merit.

As recent as February 9, 2017, this Court found that *Hurst* by proxy is NOT an extension of *Caldwell*. *See Hall v. State*, Nos. SC15-1662, SC16-224, 2017 WL 526509, *1, 21 (Fla., Feb. 9, 2017) (*citing Dufour v. State*, 905 So. 2d 42, 67 (Fla. 2005) ("With regard to challenges to the standard jury instructions in death penalty cases, this Court has repeatedly held that challenges to 'the standard jury instructions that refer to the jury as advisory and that refer to the jury's verdict as a recommendation violate *Caldwell v. Mississippi*, 472 U.S. 320 (1985) are without merit. (citations omitted)")).

Accordingly, this claim should be summarily denied. Had it been instructed to, a rational jury would have unanimously found all the aggravating factors, and it would have unanimously found that the aggravating factors were sufficient for the imposition of death, and that they outweighed the mitigation presented. Thus, any *Hurst* error is harmless beyond a reasonable doubt.

ISSUE X: DETECTIVE ROBERSON'S PENALTY PHASE TESTIMONY ABOUT HIS BELIEF THAT APPELLANT WAS GUILTY OF HIS PREVIOUS SECOND DEGREE MURDER CHARGE WAS ADMISSIBLE.

Appellant argues that Detective Roberson's testimony that he believed Appellant was guilty in Linda Azcarreta's murder was inadmissible hearsay; however this argument is flawed. Appellant is not allowed in penalty phase to attack the prior conviction by arguing that he was not the perpetrator. *See Finney v. State*, 660 So. 2d 674, 684 (Fla. 1995) (reiterating that "it is not appropriate to go behind the jury's verdict in the prior case and attempt to retry those convictions.").

In this case, Appellant's argument that Detective Roberson's belief that Appellant was guilty of a prior violent constituted improper opinion is without merit. Roberson's comment was directed towards his understanding that Appellant had committed the crime, and he was called by Appellant himself as a witness to testify as to his observations of Appellant. Therefore, this claim should be denied.

Appellant next asserts that the admission of Roberson's statement, "I believed he was involved," was error because it constituted an improper opinion and hearsay. However, this is not hearsay because there is no out of court statement, and even if it was, hearsay is permitted in the penalty phase. *See Finney*, 660 So.2d at 683 ("[i]t is clear that relevant evidence concerning the circumstances of a prior violent felony conviction is admissible in a capital sentencing proceeding, unless admission of the evidence would violate the defendant's

confrontation rights, or the prejudicial effect of the evidence clearly outweighs its probative value." (citation omitted)). Thus, Appellant's argument is without merit.

Appellant cites to *Sosa-Valdez*, a case not binding on this court, where the Third District Court of Appeals found that the lead detective in the case gave an improper opinion, over Defendant's objections, about defendant's guilt. *Sosa-Valdez v. State*, 785 So. 2d 633, 635 (Fla. 3d DCA 2001). However, this did not pertain to a death penalty phase and thus is not on point. Notably, Appellant conducted the direct examination of Roberson and Appellant elicited Roberson's hearsay statement and effectively opened the door to the State being allowed to use that testimony. (T. 7124) Defendant opened the door to Roberson's belief that Appellant murdered Ms. Azcarreta while he interviewed him at the police interrogation room:

> [Ms. GEORGI]: Did you continue to talk?
>
> [DETECTIVE ROBERSON]: Yes, I did. I told him, Ralph, that **I believed that I knew what the fingerprints were going to show. And that I believed he was involved in the murder**. **And that I thought he should tell us and we should deal with it now and it should be the truth.**

(T. 7135) (emphasis added)

Even if Roberson's statement constitutes improper opinion or hearsay, it is harmless error. *Moore v. State*, 701 So. 2d 545 (Fla. 1997). The statement at issue

regarded a past felony conviction. Even if Roberson's comments were not introduced, the trial court only needed to look at Appellant's criminal record to conclude he was previously convicted and served a sentence for second degree murder. Accordingly, this had no effect on the jury rendering a verdict based on the evidence presented, and thusly this court must dismiss Appellant's claim.

ISSUE XI: THE TRIAL COURT CORRECTLY DETERMINED THAT THE BURGLARY AGGRAVATOR AND PECUNIARY GAIN AGGRAVATOR WERE NOT IMPROPER DOUBLING.

Appellant next argues the trial judge improperly doubled the separate aggravators of pecuniary gain, and during a robbery or burglary. "Improper doubling occurs when aggravating factors refer to the same aspect of the crime." *Foster v. State*, 679 So. 2d 747, 754 (Fla. 1996). In *Brown v. State*, 473 So. 2d 1260, 1267 (Fla. 1985), this Court addressed the appellant's claim that the trial court erred in finding the aggravators of pecuniary gain and during the course of a felony (burglary). The court noted the burglary, which included the appellant beating and tormenting the victim, "had a broader purpose in the minds of the perpetrators" as it was separate from the appellant selling the victim's television for pecuniary gain. *Id.* at 1267.

This Court has repeatedly held the aggravators of robbery/burglary with pecuniary gain may co-exist. *See Davis*, 207 So. 3d at 172 (no improper doubling where appellant was convicted of "murder in the course of a robbery and pecuniary

gain, because the jury convicted appellant of separate offenses of first-degree arson and armed robbery); *Henry v. State*, 613 So. 2d 429, 433-34 (Fla. 1992) (noting the aggravators of robbery and arson were separate from pecuniary gain because the evidence supported that appellant could have robbed the victims without killing them and appellant made an effort to eliminate the witnesses by committing arson to avoid arrest). Thus, the aggravator of burglary or robbery and pecuniary gain will be upheld where the burglary/robbery had a broader purpose than the pecuniary gain.

Likewise, here, the evidence supports a finding Appellant had a broader purpose in mind than simply stealing Yvette's debit card. Having worked at Perez's house for a period of time and knowing Yvette lived in the efficiency, Appellant could have entered her efficiency at a different time to steal money or valuables, or Appellant could have recused himself upon mistakenly entering Yvette's efficiency stating he thought he needed to fix something more. Identical to the situation in *Brown*, instead of just taking money, Appellant had a broader purpose to his burglary when he mercilessly beat, stabbed, and choked Yvette to death. *Brown*, 473 So. 2d at 1267.

Appellant's citation to *Barnhill v. State*, 834 So. 2d 836 (Fla. 2002); *Mills v. State*, 476 So. 2d 172 (Fla. 1985); and *Gosciminski v. State*, 132 So. 3d 678 (Fla. 2013) are misapplied to the facts here because Appellant argues a blanket rule

restricts the aggravators of robbery/burglary and pecuniary gain. In reality, *Brown* holds that this Court has upheld a combination of these aggravators. Because the evidence supports the two separate aggravators, this Court should affirm the trial court's sentence. *See also Monlyn v. State*, 705 So. 2d 1, 6 (Fla. 1997) (stating the court did not improperly double aggravators of commission during the course of or attempt to commit robbery or kidnapping and commission for financial gain because evidence supported finding that defendant committed murder while engaged in both robbery and kidnapping). *But see Davis v. State*, 604 So. 2d 794, 798 (Fla. 1992) (finding that court improperly doubled aggravators of murder committed during the course of a burglary and for pecuniary gain where purpose of burglary was for pecuniary gain); *Campbell v. State*, 571 So. 2d 415, 418 (Fla. 1990) ("Commission of a capital felony in the course of an armed robbery and burglary, and for pecuniary gain should have been counted as one, not two, factors, where the offense underlying the burglary was robbery.").

Even if this Court finds the trial judge improperly considered or doubled one of the above aggravators, the State submits the error was harmless and did not contribute to the trial court's imposition of the death penalty. *Geralds v. State*, 674 So. 2d 96 (Fla. 1996); *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). In *Geralds*, this Court found the trial court erred in finding that the cold, calculated, and premeditated aggravator was proven beyond a reasonable doubt, but upheld the

death sentence because there was no reasonable likelihood of a life sentence being imposed under the facts of that case. *Geralds*, 674 So. 2d at 104-05. Specifically, the court found two substantial aggravators and mitigation evidence that the trial judge gave "little weight." *Id.*

In the case at bar, the court found five aggravators and assigned "some weight" to Appellant's actions after Yvette's murder, including his pursuit of religion and assistance to corrections officers in maintaining order within prison; however, "minor" to "no weight" to his love of his children and his drug use prior Yvette's murder respectively. The court found that the aggravator of the prior violent felony itself outweighed the mitigating factors. (R. 3125-26) Furthermore, the court found that "each of these individual aggravators alone, overwhelmingly outweighs and far exceeds all the mitigation combined by an extreme amount." (R. 3126) Accordingly, even if this Court strikes any of the challenged aggravators, the trial judge would have nevertheless imposed the death penalty.

ISSUE XII: COMPETENT SUBSTANTIAL EVIDENCE SUPPORTED THE "AVOID ARREST" AGGRAVATOR IN THIS CASE.

Appellant's contention that the trial court errantly applied the avoid arrest aggravating factor is without merit. This court defines the avoid arrest aggravator as a course of the conduct before, during, or after a capital felony, where a defendant attempts to avoid a law enforcement arrest or eliminating a victim or

witness to a crime. *See Davis*, 207 So. 3d at 170 (citing *Wright v. State*, 19 So. 2d 277, 301 (Fla. 2009); *Consalvo v. State*, 697 So. 2d 805, 819 (Fla. 1996)). When applying the avoid arrest aggravator to non-law enforcement cases, the State must demonstrate beyond a reasonable doubt that the primary motive for the murder was to eliminate the witness. *Id.* at 170 (citing *Preston v. State*, 607 So. 2d 404, 409 (Fla. 1992)).

Factors considered in avoiding arrest include setting fire to the victim's house to eliminate evidence and murdering a victim after the defendant receives the victim's money. *Looney v. State*, 803 So. 2d 656, 676-77 (Fla. 2001); *Thompson v. State*, 648 So. 2d 692, 695 (Fla. 1994). An appellate court's duty to review the avoid arrest aggravator requires it 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." *Davis*, 207 So. 3d at 170 (citing *Russ v. State*, 73 So. 3d 178 (Fla. 2011)). This Court allows presentation of circumstantial evidence to uphold findings of the avoid arrest aggravator. *See id.* at 170 (citing *Hernandez v. State*, 4 So. 3d 642, 667 (Fla. 2009)).

Here, the trial court did not err when it looked over the overwhelmingly substantial and circumstantial evidence of Appellant's attempt to avoid arrest. First, Appellant's attempt to completely burn Yvette's house was substantial evidence of avoiding arrest. (T. 3836-37) Second, just like in *Thompson*, it is

circumstantial evidence that Appellant decided to kill Yvette after he obtained her debit card PIN number to avoid her coming forward with testimony that he forcefully robbed her. 648 So. 2d at 695; (T. 6461) Third, when police executed the search warrant at Appellant's house, there was evidence that he washed his clothes one by one to eliminate any DNA evidence. (T. 6017, 6047, 6468)

Lastly, the substantial evidence of Appellant's abandoned van in the Redlands shows he made another significant effort to dispose of any chance law enforcement would have to trace and find Appellant. (T. 4644-45, 4821, 6467) Based on this evidence, it is clear the court made no mistake when it examined the evidence and concluded that avoid arrest was a proper aggravating factor in its decision to sentence Appellant to death.

STATEMENT REGARDING SUFFICIENCY OF THE EVIDENCE

In every capital case, this Court reviews whether there was competent, substantial evidence to support the murder conviction. *Buzia v. State*, 926 So. 2d 1203, 1217 (Fla. 2006). This statement is offered to assist the Court in that function.

The evidence established at trial showed that Appellant, in his attempt to take Yvette's debit card, bound her with tape, forced her on her knees, stabbed her and strangled her with the cord of a rice cooker. (T. 8419-20) Hazel Vaughn observed Appellant coming back and forth from Yvette's efficiency, and after

running to the gas station, was seen holding a reddish gasoline container shortly before a fire was set to Yvette's efficiency. (T. 5664-65, 5678) Appellant called the owner of the efficiency, Jose Perez claiming he was calling him at a different time than recorded, and telling him that he would return later after finishing some work at his cousin's house. (T. 5039-40) Appellant never went to Perez's cousin's house, nor did he collect some of the expensive items left behind at his work locations. (T. 5103) Appellant was then observed on video at Home Depot purchasing items with Yvette's debit card, and at the Bank Atlantic bank using her debit card to withdraw money. (T. 5492, 6486) Appellant subsequently spent the night gambling at the Miccosukkee Resort and Gaming Hotel, and later abandoned the same van that was spotted at the scene of the crime in a remote location containing among other things, a similar gas container. (T. 4813, 4825-26, 6535) Mixed DNA of Yvette's and Appellant's person were found on a blody dish washcloth close to Yvette's body at the efficiency, when Appellant currently had finished renovations and did not currently have authority to enter into the efficiency. (T. 4808, 6016-17, 6970)

The State's expert testified Yvette perished shortly after being strangled and stabbed. (T. 4319) Hence, as the evidence established that Appellant planned, directed, and controlled every aspect of Yvette's murder, including the cover up of the murder by starting a fire, competent substantial evidence existed to support Appellant's conviction for first-degree murder.

STATEMENT CONCERNING PROPORTIONALITY OF THE SENTENCE

The death sentence is proportional in this case. Due to the uniqueness and finality of death, this Court addresses the propriety of all death sentences in a proportionality review. *Martin v. State*, 151 So. 3d 1184, 1197 (Fla. 2014). This Court makes a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence. *Anderson v. State*, 841 So. 2d 390, 407-08 (Fla. 2003).

The Court found the following aggravating factors: (1) Apellant was previously convicted of a violent felony; (2) the capital felony was committed while the Appellant was engaged in the commission of or an attempt to commit burglary; (3) the capital felony was committed for pecuniary gain; (4) the murder was especially heinous, atrocious or cruel; 5) the murder was heinous, atrocious and cruel. The trial court applied great weight to each aggravator. The trial court did not find that the mitigating factors of (1) Mr. Andres' respect for the trial court; (2) Mr. Andres' assistance to corrections officers including the TGK door opening incident; (3) Mr. Andres' assistance to other inmates; (4) contribution to society as a hard working person; (5) completion of advancand work in religious studies; (6) Mr. Andres' unwavering declaration of innocence; (7) the help and encouragement Mr. Andres provided his disabled brother Andres "Andy" Andres; (8) his strong

family ties to his wife, son and daughter; and (9) the negative impact his upbringing had on him, had been proven. The trial court found four non-statutory mitigating factors: (1) the jury recommendation of 9-3 (little weight); (2) the Appellant's relationship with his family members and friends (some weight); (3) the Appellant's contribution to community or society (some weight); (4) good conduct while in custody (some weight).

In analyzing proportionality, this Court's function is not to reweigh the mitigating factors against the aggravating factors; that is the function of the trial judge. *Phillips v. State*, 39 So. 3d 296, 305 (Fla. 2010). Instead, in deciding whether death is a proportionate penalty, this Court considers the totality of the circumstances in a case and compares the case with other capital cases. *Id.*

Appellant's capital sentence is clearly proportionate. This Court has frequently upheld the death penalty in cases involving the murders of two people and in cases involving the death of another by stabbing and strangulation. *See Gosciminski v. State*, 132 So. 3d 678 (Fla. 2013); *Woodel v. State*, 985 So. 2d 524 (Fla. 2008); *Floyd v. State*, 569 So. 2d 1225 (Fla. 1990). Thus, the death penalty is appropriate in this case and this Court must affirm the conviction and sentence.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of April, 2017, I electronically filed the foregoing BRIEF OF APPELLEE with the Clerk of the Court using the e-portal system which will send notice of electronic filing to Andrew Stanton, Assistant Public Defender, appellatedefender@pdmiami.com, astanton@pdmiami.com, 1320 NW 14th Street, Miami, Florida 33125.

/s/ MELISSA J. ROCA_____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Melissa J. Roca_____
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