IN THE SUPREME COURT OF FLORIDA

DONTAE R. MORRIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. SC15-2395
L.T. No. 10-10373
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Dontae Morris was convicted of the May 18, 2010, murder of Derek Anderson. He was sentenced to death on December 4, 2015. This is a direct appeal of his conviction and sentence.

JURY SELECTION:

July 20, 2015:

Two hundred citizens of Hillsborough County, Florida were summoned for jury selection in this case. (V14/T91). When the pool was asked if they had read or heard anything about this case prior to coming to court approximately 80 people raised their hands. (V13/T137-44). Those jurors were questioned individually to determine what, if anything, they knew about this case, Dontae Morris, or Courtnee Brantley. Prior to individual questioning, the trial court noted that there were an additional 50 people available for jury selection if needed. (V14/T147). During individual voir dire, if any of the potential jurors had the vaguest recollection of Appellant's involvement in the police shootings or associated his name in anyway with those murders they were released from service. Of the 80, 15 were sufficiently unaware of the crime charged in this case and with any previous offenses Appellant committed – specifically the murders of Tampa Police Officers Curtis and Kocab – to be returned to the jury pool for further questioning.

Two of those 15 individuals, Nancy Blunk and Kevin Naeher ultimately served on Appellant's jury. Prospective juror Blunk stated that Appellant's name sounded very familiar to her. Blunk explained that she was an "avid news watcher" and that if she had heard anything about Appellant "it would have been back years ago." (V14/T152). She did not recognize Courtnee Brantley's name at all. (V14/T153). She did not see or hear anything regarding Appellant in the days and weeks prior to jury selection that jogged her memory as to why the name was familiar to her. (V14/T153).

Naeher stated that a few months prior to jury selection his mother and grandmother were watching the news and he saw Appellant's picture. His mother and grandmother were discussing the newscast. Naeher stated that he was not "really paying attention" to the newscast or his mother and grandmother's conversation. He just remembered seeing Appellant's picture. (V14/226-30). He did not know anything about what Appellant was accused of doing or what the reporters had said about Appellant. (V14/229-30).

Before recessing for the day, the court informed the parties that there were 100 jurors on standby in addition to the 130 remaining jurors from the original 200. (V15/T407).

July 21, 2015:

The defense renewed its motion for change of venue without presenting any additional argument and the motion was denied. (V16/T417). Prior to the start of questioning, the court asked if anyone had heard, read, or otherwise became familiar with anything about Appellant. (V16/421-22). Eight people, who previously did not make any association between Appellant and the murders of Curtis and Kocab raised their hands. Of those 8, most stated that their recollection of Appellant's involvement in the police murders was spontaneous. (V16/T428, 431, 433, 439, 440). It just dawned on them. Some heard brief mentions on the news before turning the television off or had otherwise inadvertently heard discussion about Appellant and/or his previous offenses. (V16/T430). One juror associated Appellant either with the police murders or another high-profile case involving the murder of a baby. (V16/T446). And one juror admitted violating the court's order by reading an article in the newspaper the previous day. (V16/T437). All were released from service. (V16/T428, 431, 433, 439, 441) The parties began death qualification and general voir dire that afternoon.

July 22, 2015:

Defense counsel renewed the motion for change of venue. This time arguing that African Americans were not fairly represented on the venire because a disproportionate number of them had to be

struck for cause as a result of the fact that the manhunt for Appellant was conducted primarily in African American communities. (V17/T558-59). The motion was denied. (V17/T564).

When the venire was brought back into the courtroom the court asked if anyone had been exposed to anything that jogged their memories regarding Appellant of anything that had been thus far discussed in jury selection. Venireperson Perritt privately informed the court that she recalled that Appellant was involved in the shooting of a police officer. (V17/T569). Perritt was returned to the jury pool at that point but did not serve on Appellant's jury. At the beginning of the afternoon session, the court asked the potential jurors if they had been exposed to anything about Appellant or this case "in any way shape or form." (V18/T720). Potential juror Perdomo privately brought to the court's and the parties' attention that he spoke to his boss to inform him that he would be out another day. His boss asked if Perdomo was on the Dontae Morris case. When the Perdomo denied being on that case, his boss proceeded to tell him that "he was the guy that shot the two law enforcement officers." (V18/720). The court thanked Perdomo for his candor and excused Perdomo from service. (V18/721). The parties continued with voir dire.

July 23, 2015:

The court started the day, as he did every session, asking the potential jurors if they had been exposed to anything "in any way, shape or form" related to Appellant. (V19/841). Four potential jurors raised their hands. Three of them overheard others' conversations regarding Appellant that jogged their memories and one potential juror's mother, not knowing her daughter was on jury duty, mentioned to her that Appellant was previously convicted of the murders of Curtis and Kocab. (V19/842-44). All of the potential jurors were excused. (V19/844).

Voir dire continued and none of the remaining potential jurors expressed any knowledge of Appellant's previous convictions or other offenses.

Conference:

The parties agreed to strike for cause eight venirepersons. Neither Blunk nor Naeher were included in that group. (V20/T1164). The parties also agreed to defer decision on two other individuals, neither of which was Blunk or Naeher. (V20/T1164). Naeher was placed on the possible panel as a result of defense counsel exercising two peremptory challenges on other potential jurors. (V20/T1169). Instead of striking Naeher, defense counsel used a peremptory to strike another venireperson instead. (V20/T1169).

The State accepted the panel with Naeher and defense counsel asserted a for cause challenge on another panel member. The State

did not object to the for cause challenge and accepted the resulting panel. (V20/T1170). Defense counsel used another peremptory strike to someone other than Naeher. (V20/T1171). The State accepted that panel as well as did the defense. (V20/T1171). Blunk was put on the panel as a result of backstriking by both the State and the defense. (V20/T1170-79). Both the State and the defense accepted the panel with both Blunk and Naeher. The defense still had 2 peremptory challenges left. (V20/T1178-79; 1181-83).

GUILT PHASE

According to Appellant's own after-the-fact account to Ashley Price, sometime during the day of May 18, 2010, Appellant confronted the victim, Derek Anderson, on the basketball court of Johnson Kenneth Apartments about Mr. Anderson selling marijuana in the apartment complex. (V22/T1491). Appellant told Derek[1] that the apartments were his (Appellant's) turf. (V22/T1491). Derek questioned Appellant's authority to tell him where he could and could not sell marijuana stating, "who are you to tell me where I can sell weed at?" (T22/T1491). Derek informed Appellant that he (Derek) would sell marijuana anywhere he pleased. (V22/T1491). Appellant asked Derek where he lived and Derek told Appellant that he lived at the Johnson Kenneth Apartments. (TV22/T1491).

[1] The victim and Joe Anderson will be referred to by their first names in order to avoid confusion.

Shortly after 4:00 p.m. on May 18, 2010, Joe Anderson (no relation to Derek) went to the Derek's apartment where the two men played video games until around 7:00 p.m. (V21/T1277; 1300). Derek asked Joe if he could wash a load of laundry at Joe's house. (T1277). After getting permission from Joe's mom, Derek put his laundry in a backpack and the two men took the five-to-seven minute walk to Joe's house. (T1276, 1278-79).

At Joe's, the men watched a basketball game while waiting for Derek's laundry. (V21/T1283). At around 11:00 p.m., Derek folded his freshly-laundered clothes and put them back in the backpack. (T21/T1279). The men then walked back to the Johnson Kenneth Apartments. (V21/T1279). At some point on the route Joe and Derek were walking westbound on Hillsborough Avenue and Joe noticed a white Nissan Maxima headed in the same direction on Hillsborough Avenue. As Joe and Derek waited on the median to cross Hillsborough Avenue, the car made a U-turn and was now traveling eastbound on Hillsborough Avenue. (T21/T1287-89). The car slowed as it passed the men. (V21/T1286-87). Joe and Derek crossed Hillsborough Avenue and made a left onto 43rd Street where the entrance to the Johnson Kenneth Apartments was located. (V21/T1288-89).

When Joe and Derek arrived at the Johnson Kenneth Apartments they stopped at the 43rd Street entrance to talk for a few minutes. Joe saw the same white car approaching. The car slowed to about 5

miles per hour. The front driver's side window was rolled down about 4 or 5 inches and, in the dashboard light, Joe could see four men in the car – all the men were looking and him and Derek. (V21/T1291). Joe had never seen the car before and did not recognize any of the men. (V21/T1301-02). The car then drove into the apartment complex. (V21/T1292).

Joe and Derek said their goodbyes and Joe waited until Derek walked across the parking lot, as was his usual practice, to ensure that Derek arrived at his apartment safely. (V21/T1292-93). During his walk home, Joe called Derek on the phone and spoke with him briefly. (V21/T1293). Derek did not own a phone so Joe called Derek's mother's cellphone number to reach Derek. (V21/T1302). The call ended abruptly when Joe heard crackling and static and the phone went dead. (V21/T1294). Around that time, or within a few minutes, Joe heard a "pop" and assumed it was coming from a nearby mechanics garage. (V21/T1294-95). Joe called Derek back and Derek's mother answered the phone. All Joe heard was screaming. (V21/T1295, 1303). Joe arrived home, spoke to his parents, and then ran back to the Johnson Kenneth Apartments. When he arrived at the apartments law enforcement was already there and Derek's body was still at the scene. (V21/T1297).

Tamora Dorn is Derek Anderson's sister. She lived in the Johnson Kenneth Apartments, but in a different apartment from Derek

and their mother. On May 18, 2010, at around 11:00 p.m. her apartment's front door was open because she was cleaning. (V21/T1352). Around that time, Ms. Dorn heard a gunshot and walked out of her apartment to see a number of people moving in the direction of her mother's apartment. She spoke to someone briefly, and after that conversation she ran to her mother's apartment. As she came up the stairs and approached the first-floor landing, she could see her brother's body and heard her mother screaming. By this time, a number of people had gathered around her brother's body. (V21/T1357). Ms. Dorn confirmed that Derek did not have a phone and would use his mother's cell phone for making and receiving calls. (T21/T1360).

Cordelia Fisher is a tenant at the Johnson Kenneth Apartments. At around 11:00 p.m. on May 18, 2010, she heard a gunshot. She looked out of her daughter's bedroom window and saw four black males running toward a white car that was in the parking lot near 43rd Street. (V21/T1340-41). She did not recognize any of the men and did not know the make or model of the car but was fairly certain it was a four-door model. (V21/T1341).

Willieshia Jones knew Derek Anderson and was supposed to meet up with him earlier in the day. She lived near, but not in, the Johnson Kenneth Apartments. At around 11:00 p.m. she was in the apartments' playground/park area when she heard a gunshot.

(V21/T1371). She saw people running toward the back of the apartment complex. She followed the crowd and saw Derek's body. When she turned to walk away from the area she saw a white car pull out of the parking lot onto 43rd Street. (V21/T1373). She could not see inside the car. (V21/T1376).

At 11:03, 11:04, and 11:07 p.m. on May 18, 2010, Appellant's cell phone utilized a cell tower about three miles – as the crow flies - from the Johnson Kenneth Apartments (5.5 driving distance). (V25/T1719). A little more than 10 minutes later, at 11:19 p.m. Appellant's cell phone pings on a tower 1.9 miles from the crime scene (3.1 driving distance). (V25/T1723 - 28). Around the time of the murder, 11:30 p.m., Appellant's phone is using a tower .3 miles from the crime scene (.6 miles driving distance). Minutes after the murder, between 11:34 and 11:55, Appellant's phone is using towers 2.7 miles away (3.9 driving distance). (V25/T1732). Calls made from Appellant's phone after midnight used a tower 7.7 miles away (driving distance). (V25/1735).

Officer John Simpkins of the Tampa Police Department was dispatched to the Johnson Kenneth Apartments regarding a shooting and arrived 11:32 p.m.. (V21/T1248). In the breezeway of one of the buildings there was a crowd of about 20 or 30 people all of whom were agitated and yelling. Officer Simpkins climbed the stairs to the breezeway and saw a black male on the ground. There was a

large bloodstain on the man's shirt. Officer Simpkins checked for a pulse and listened for a heartbeat. Finding no pulse and hearing no heartbeat, Officer Simpkins called for fire rescue and began CPR. (V21/T1261). In order to facilitate CPR, Officer Simpkins had to remove a backpack from the victim's body. (V21/T1262). Officer Dennis Small arrived soon thereafter and assisted with CPR until fire rescue arrived. (V21/T1236, 1313).

Officer Small stayed on the scene with Officer Simpkins to secure the area. (V21/T1314). Neither officer saw any shell casings or projectiles near the body, although neither was specifically looking for those items as their priority was helping the victim and officer safety. (V21/T1314, 1329). At some point an on-scene supervisor told Officer Small to go to Tampa General Hospital's emergency room where medical personnel were working to save Derek Anderson's life. (T21/T1316). The doctors and nurses were unsuccessful and Derek Anderson was pronounced dead at 12:33 a.m.. (V21/T1317).

There was no exit wound on Derek's body and Officer Small requested that the doctors remove any projectiles from the body for evidentiary purposes. (V21/T1318). Officer Small witnessed a doctor remove a projectile from Derek's right pectoral muscle. (V21/T1320). The doctor placed the projectile in a plastic container and handed it to Officer Small. (V21/T1321). Office Small

retained custody of the projectile until crime scene technicians arrived at the hospital. (V21/T1322). Hospital personnel also placed Derek's clothing (black shoes, underwear, shorts, belt, and socks) in a brown paper bag. (T21/T1235-26). Emergency medical personnel had removed Derek's white tank top at the scene. (V21/T1236).

Dr. Mary Mainland performed the autopsy on Derek Anderson. She testified that Derek suffered a gunshot wound to the torso that perforated the heart, aorta, esophagus, and lungs. (V25/T1650, 1657). The projectile did not exit the body, but was removed at the hospital. (V25/T1657). The projectile entered the body in an upward angle, from back to front, and right to left. (V25/T1659). Derek bled to death. His death would have taken seconds or minutes. (V25/T1660). Derek had THC, the chemical compound found in marijuana, in his system. (V25/T1656).

Yolanda Soto, a firearm and tool-mark examiner with the Florida Department of Law Enforcement, testified that she compared the projectile taken from Derek Anderson's body with two projectiles that came from a firearm Appellant fired 42 days after Derek Anderson was shot. (V22/T1399, 1453-56). All three projectiles came from the same gun. (V22/T1451-53).

In May of 2010, Ashley Price was friends with Appellant whom she referred to as "Quelo." Ms. Price and Appellant had sex on one

occasion prior to May 2010. After that encounter, they remained friends but were not romantically involved. (V22/T1480). Ms. Price's sister, Tiffany, dated Appellant's friend Jovante Dennard, known as "Pedro." (V22/T1481). Tiffany lived in the Johnson Kenneth Apartments in May 2010. Ms. Price had previously lived in the apartments but was not living there in May 2010. Ms. Price knew Derek Anderson from seeing him around the neighborhood. Ms. Price knew that Derek sold marijuana in the apartments. (V22/T1483).

Days after the murder, Appellant told Ms. Price that he had shot Derek. (V22/T1485). Appellant told Ms. Price that Derek Anderson was selling marijuana on Appellant's turf. (V22/T1492). On the night of the murder, Appellant saw Derek walking in the Johnson Kenneth Apartment parking lot. (V22/T1487). Appellant told Ms. Price that he followed Derek Anderson from a safe distance and when Derek was in front of his mother's apartment's door talking on the phone Appellant stood on low wall in the breezeway and shot Derek in the stomach area. (V22/T1489). According to Appellant, Derek fell to the ground immediately. Appellant told Ms. Price that he knew where to shoot a person to kill them. (V22/T1489).

During the investigation a detective stood on planter, which was a wall about knee high, that was on the ground floor of the apartments. From there, the detective had a clear view of the location where Derek Anderson was shot. (V23/T1612). Additionally,

when Ms. Price was interviewed, law enforcement had not released any information about Derek Anderson being on the phone when he was shot. (V23/T1608).

Appellant phoned Ms. Price from the jail on March 4, 2011. The call was a three-way call among Appellant, Ms. Price, and Dwayne Callaway, who Appellant refers to as "D." (V22/T1492). Later, Jovante Dennard "Pedro" and Ms. Price's sister Tiffany, get on the call. Ms. Price told Appellant that she would come visit him in jail the next day, although she had no intention of doing so. (V22/T1497).

Phone calls made to or from the Hillsborough County Jail are recorded. Inmates must register with the call system and receive PIN numbers before being able to use the phones at the jail. (V23/T1528). The calls are stored in a computer system and backed up on tape. (V23/T1527). The State introduced a tape recorded phone call made by Appellant on March 4, 2011. In the call, Appellant is initially speaking with Dwayne Callaway. Appellant asks Callaway to call "Pedro" (Jovante Dennard). Appellant instructs Callaway to "hit is ass up." (V23/T1545). Appellant, Callaway, and Dennard are involved in a three-way conversation. Appellant stated that they "need to get his taken care of" referring to Ashely Price, who Appellant believed had spoken to detectives. (V23/T1550).

Appellant tells "Pedro" to bring Ms. Price into the jail to visit Appellant. (V23/T1550).

Another call is made during the same time period Appellant, Tiffany Price, and Dwayne Callaway are involved in the conversation. Appellant tells Tiffany Price that she needs to call her sister (Ashley Price) for him. (V23/T1555). Ashley Price then gets on the phone and Appellant tells her to come visit him the next day because he needs to speak to her. (V23/T1550). Ashley Price agrees to come see Appellant at 3:00 in the afternoon the next day. (V23/T1559). When Ashley and Tiffany Price get off the phone, Appellant tells Callaway to "hit Pedro back" – meaning to call Dennard again. (V23/T1546). Appellant tells Dennard to make sure Ashley Price comes to the jail the next day. Appellant states, "I'm gonna put her ass down tomorrow, though and see what's good, man." (V23/T1567).

In November 2011, Deputy Ruben Clemente was standing outside of a holding facility in the Hillsborough County Jail. Appellant was in the holding facility and Deputy Clemente heard him say "I repent for killing." (V23/T1623).

Appellant did not testify and the defense did not present any other witnesses. (V27/T1753). Defense counsel moved for a judgment of acquittal arguing the State did not prove premeditation. The motion was denied. (V25/T1745). Appellant was found guilty of first

degree premediated murder with a specific finding that Appellant "did not carry, use, display, threaten to use or attempt to use a firearm." (V28/T1876).

PENALTY PHASE

Prior to the beginning of the penalty phase, defense counsel requested that the court instruct the jury that their recommendation will be given great weight and only in the most unusual of circumstances would the court deviate from their recommendation. (V28/T1891). The court took this request under advisement. (V28/T1891). Additionally, defense counsel renewed the pretrial Ring motion. After hearing argument on the issue, the court inquired to defense counsel "Are you simply asking me to require a 12-0 recommendation?" (V28/T1895). Defense counsel stated, "Yes, Your Honor. And I would just for the record purposes point out that at least this issue is partially before the US Supreme Court in Hurst v. Florida." (V28/T1895). After taking the issue under advisement, the court ultimately denied the request. (V29/T1980).

Defense counsel also argued that the video of the officers' being killed was overly prejudicial. The assistant state attorney pointed out that the video is not particularly graphic in that it does not show blood or brain matter. Rather, it showed "brutally quick and efficient murder(s)." (V28/T1902). The court ruled that

the video was admissible only to the extent it showed the shootings. The State was not permitted to show the aftermath of the murders such as other officers arriving at the scene and giving CPR and bystanders who gathered after the fact. (V28/T1923). Additionally, the court did not permit the use of medical examiner photographs of the officers' autopsies. (V28/T1921). The only aggravator presented to the jury was Appellant's conviction of previous capital felonies related to the murders of Officers Curtis and Kocab. The jury recommended death by a vote of 10-2.

The court conducted a Spencer hearing on October 2, 2015. During the hearing, the defense presented the previously-transcribed testimony of Dr. Valarie McClain[2] and the State presented the testimony of Dr. Emily Lazarou. The court followed the jury's recommendation and sentenced Appellant to death. The order details the evidence presented and the court's considerations. The court concluded as follows:

> The Court has independently considered and weighed the mitigating circumstances established at the second phase of this trial, those established at the second phase of the prior trial, and those established at two Spencer hearings, against the one aggravating circumstance established at the second phase of this trial, and has considered the jury's 10-2 advisory verdict. The Court concludes and determines first, that at least one aggravating circumstance proved beyond a reasonable doubt exists to support and warrant the recommendation of and imposition of the death sentence, and concludes

[2] The transcript was of Dr. McClain's testimony at the Spencer hearing regarding the murders of Officers Curtis and Kocab.

> and determines second, that the mitigating circumstances established by a preponderance of the evidence do not outweigh the one aggravating circumstance proved beyond a reasonable doubt, which was established by proof of prior convictions for three capital homicides and for one crime of violence (attempted robbery with a firearm).

(V7/R1461-73).

SUMMARY OF THE ARGUMENT

I: Appellant asserts that the voir dire process in this case could never result in an impartial jury because counsel was unable to ask the venire members – those who recognized Appellant's name and those who did not – "what they knew or felt about the murders of police officers Curtis and Kocab, or what impact it would have on them once they found out that the defendant whose fate they were deciding was responsible for those notorious murders, or once they saw the dash cam video showing the murders taking place." This argument is premised on the assumption that the potential jurors knew about the murder – even those who expressed no knowledge of Appellant or his offenses. It is also premised on the assumption that the jurors came into the process lacking the requisite impartiality. Neither presumption is valid. The impartiality of prospective jurors is presumed and the mere existence of extensive pretrial publicity is insufficient to rebut that presumption. Likewise, prospective jurors' awareness of the facts and issues involved in a case and/or a preconceived opinion as to guilt or

innocence standing alone does not rebut the presumption of impartiality.

The media coverage in this case can hardly be deemed inflammatory. The coverage as a whole was fact-based and straightforward. Furthermore, the coverage did not present the prosecution's version of events to the exclusion of Appellant's. Furthermore, Hillsborough County, Florida is a large and growing metropolitan area with a steady influx of new residents. It is likely many of whom never heard of Appellant or his crimes. Significantly, a jury was selected and Appellant had two remaining peremptory challenges. Appellant has not met his burden to show that the community atmosphere was inherently prejudicial so that he was deprived due process.

II: An admission of killing is relevant when one is on trial for murder – an unlawful killing. There is nothing unfairly prejudicial about using a defendant's admissions against him. Additionally, the relevance of the statement was not diminished because Appellant did not name Derek Anderson as his victim. As this Court has recognized, an admission is relevant if it tends in some way, when taken together with other facts, to establish guilt. Moreover, admissions are relevant even when they merely raise an inference of guilty conduct. Here, when taken together with the other facts

presented by the State, the relevance of the "I repent for killing" statement is apparent.

Appellant failed to preserve the issue of whether Dr. McClain's testimony was properly excluded. The failure to provide this proffer compels rejection of this claim as unpreserved. Even if this issue is considered substantively, no relief is due. The trial court's ruling expressly did not preclude the defense from presenting testimony and evidence regarding the circumstances of the statement. Unlike the defendant in Crane v. Kentucky, 476 U.S. 683 (1986), who was not permitted to present any evidence about the circumstances surrounding his confession, the order in this case specifically stated that Appellant could present evidence of the circumstances surrounding his statement but could not present expert or lay testimony regarding his mental state. The order states, "This ruling does not preclude or prohibit defense counsel from offering evidence of any other statement by Morris or observations of Morris' conduct or actions during the time period deputies were observing him. Under no circumstance, however, will either party be permitted to offer lay or expert evidence of that portion of his statement wherein he mentions killing of 5 persons or lay or expert evidence of Morris' mental state at the time he made the statement." Crane does not stand for the proposition that expert or lay testimony regarding a declarant's state of mind or

mental condition must be admitted. Instead, it stands for the proposition that even where the there is a pretrial ruling regarding voluntariness, the jury is permitted to reach its own conclusions as to whether the statement was voluntary, credible, and reliable and what weight to afford it. Appellant has not carried the heavy burden of establishing a due process violation nor has he established that the court abused its discretion in excluding expert testimony regarding Appellant's mental state at the time he made the "I repent for killing" statement.

III: The prosecutor did not engage in misconduct. His argument did not consist of "improper bolstering" as he did not suggest that Appellant is guilty based on information known to him and not presented in court. Additionally, he did not argue his personal opinion about Appellant's guilt. Instead, his arguments were fair conclusions and inferences based on the evidence presented in the case. An attorney is allowed to argue credibility of witnesses or any other relevant issue so long as the argument is based on the evidence. The prosecutor's argument relating to the credibility of the State's witnesses was to rebut the defense's attack on their credibility – particularly the credibility of Ms. Price. The prosecutor did not argue that Appellant should have or could have brought in additional evidence of Ms. Price's lack of credibility. Instead, the prosecutor was commenting on what *was* brought into

evidence regarding Ms. Price's credibility. It is proper for a prosecutor to ask the jury to consider what motive a witness would have to lie. Likewise, when no such motive has been presented during the trial it is proper for the prosecutor to ask the jury to consider that fact in assessing the witness testimony. Finally, Appellant did not object at any time when the State played the taped telephone conversation for the jury or when he (the prosecutor) provided the context for Appellant's audio recorded telephone call. The State presented its argument in response to defense counsel's argument that Appellant was not trying to "silence" Ms. Price, but rather, he was trying to get her to tell the truth. The prosecutor pointed out to the jury tenor of Appellant's statements, the inflection of his voice, the words he used to express himself, and the fact that he knew he was being recorded. The prosecutor properly argued that this evidence, when taken in context, shows not a man seeking the truth, but a man attempting to intimidate a witness.

IV: During the penalty phase, the State is permitted to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person "rather than the bare admission of the conviction. Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of

the crime so that the jury can make an informed recommendation as to the appropriate sentence." Here, the fact that Appellant murdered three people within a month's time is relevant and probative of Appellant's character - a proper consideration in determining whether the death penalty is appropriately applied to him. Furthermore, the trial court carefully considered any unfair prejudicial effect the video might have on the jury. The court permitted the State to present only a portion of the video tape of Officers Curtis and Kocab murders. Specifically, the court excluded the aftermath of the shooting such as other officers responding to the scene and attempting to save their follow officers' lives. Also excluded was the portion of the tape showing a gathering crowd around the scene and any commentary that could be heard. The court determined that this evidence was overly prejudicial in relation to its probative value. The court did not abuse its discretion in this regard.

V: The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance. Prior convictions in existence at the time of sentencing is a sentencing factor and is generally recognized as appropriate. With regard to Appellant's argument that the prior conviction aggravator was not as "weighty" as it would be had the offenses occurred before this murder this

statement is overbroad and overlooks a number of significant facts. Appellant committed three other murder within weeks of the murder of Derek Anderson. It is not just the mere existence of his prior convictions, the nature of his prior convictions weighs heavily as an aggravator. Appellant's death sentence is proportionate.

VI: Appellee recognizes that this Court's decision in Hurst v. State, 202 So. 3d 40 (Fla. 2016) requires a unanimous jury recommendation for the imposition of the death penalty. Nonetheless, this Court also noted that any alleged "Hurst" error is subject to a harmless error review. See Hurst, 202 So. 3d at 67 (recognizing that a Hurst error is capable of harmless error review); and Hurst v. Florida, 136 S. Ct. 616, 624 (2016) (remanding to the state court to determine whether the error was harmless). The relevant question for purposes of a harmless error analysis is "whether there is a reasonable possibility that the error affected the verdict." In applying the harmless-error test, the court should not substitute itself for the trier-of-fact by simply weighing the evidence. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). Here, the State unquestionably proved beyond a reasonable doubt the existence of the prior felony conviction aggravators. The only question is whether, if properly instructed, the jury would return a unanimous recommendation for death. As mentioned earlier, Appellant's prior convictions consist of the

murder and attempted robbery of Rodney Jones and the murder of Officers Curtis and Kocab. These murders occurred within weeks of Derek Anderson's murder. In relation to murdering three people in about a month's time, the mitigation offered in this case pales. Based on the facts of this case and the evidence presented at the penalty phase the jury would have reached a unanimous recommendation of death had it been instructed to do so.

ARGUMENT

ISSUE I

HILLSBOROUGH COUNTY VENIREPERSONS WERE NOT SO INFECTED WITH KNOWLEDGE REGARDING APPELLANT, HIS CRIMES, AND ACCOMPANYING PREJUDICE OR BIAS SUCH THAT JURORS COULD NOT POSSIBLY PUT THESE MATTERS OUT OF THEIR MINDS AND TRY THE CASE SOLELY ON THE EVIDENCE PRESENTED IN THE COURTROOM DURING THE GUILT AND PENALTY PHASES OF THE TRIAL.

The trial court did not abuse it discretion in granting the State's motion to reconsider the change of venue. Armstrong v. State, 862 So. 2d 705, 719 (Fla. 2003). The court considered totality of the circumstances in determining whether to grant the motion, including the factors applicable to a change of venue motion. Therefore, as with the denial of a motion for change of venue, the ruling should not be reversed absent a clear abuse of discretion. Pietri v. State, 644 So. 2d 1347, 1352 (Fla. 1994) citing Davis v. State, 461 So. 2d 67, 69 (Fla. 1984).

Appellant asserts that the voir dire process in this case could never result in an impartial jury because counsel was unable to ask the venire members – those who recognized Appellant's name and those who did not – "what they knew or felt about the murders of police officers Curtis and Kocab, or what impact it would have on them once they found out that the defendant whose fate they were deciding was responsible for those notorious murders, or once they saw the dash cam video showing the murders taking place." (IB p. 32). This argument is premised on the assumption that the

potential jurors knew about the murder – even those who expressed no knowledge of Appellant or his offenses. It is also premised on the assumption that the jurors came into the process lacking the requisite impartiality. Neither presumption is valid. Additionally, even for those who recognized Appellant's name, "a defendant does not have a constitutional right to question potential jurors about exactly what they have read – even when a case generates extensive publicity." Pietri, 633 So. 2d at 1351 citing Mu'Min v. Virginia, 500 U.S. 415 (1991).

The impartiality of prospective jurors is presumed and the mere existence of extensive pretrial publicity is insufficient to rebut that presumption. Bundy v. State, 471 So. 2d 9, 20 (Fla. 1985). Likewise, prospective jurors' awareness of the facts and issues involved in a case and/or a preconceived opinion as to guilt or innocence standing alone does not rebut the presumption of impartiality. Id.

While criminal defendants have a right to have a panel of fair and impartial jurors those jurors need not be totally ignorant of the facts and issues involved in the present case or of the defendant's other unrelated offenses. Murphy v. Florida, 421 U.S. 794 (1975); See also Bundy, 471 So. 2d at 20. In the case before the Court, Murphy was convicted of robbery and assault with intent to commit robbery in Dade County, Florida. Prior to his robbery

trial Murphy was notorious for his part in the theft of the Star of India sapphire from New York museum. Additionally, prior to his robbery trial in Dade County, he was convicted of one count of murder and pleaded guilty to one count of a federal charge of conspiring to transport stolen securities in Broward County, Florida. The United States Supreme Court rejected the contention that jurors in that case were unconstitutionally prejudiced as a result of their knowledge of the crime with which Murphy was charged as well as knowledge of Murphy's prior offenses.

The Court noted that the record contained "scores of articles reporting on the petitioner's trial and tribulations during this period; many purportedly relate statements that petitioner or his attorneys made to reporters." Murphy, 421 U.S. at 796. Additionally, after the Star of India theft Murphy was routinely a subject of press interest because of his flamboyant lifestyle and was referred to in the press as "Murph the Surf." Murphy moved to dismiss his jury and renewed his motion for change of venue when the jurors selected were aware that he had been previously convicted of either the Star of India theft or the Broward County murder and were exposed to allegedly prejudicial pretrial publicity. Those motions were denied.

The United States Supreme Court held that exposure to information regarding a defendant's prior crimes or to news

accounts of the crime with which he is currently charged does not presumptively deprive a criminal defendant of due process. Instead, courts must examine the totality of the circumstances for any indication that the trial itself was fundamentally unfair. Murphy, 421 U.S. at 799. The burden is on the defendant to demonstrate that the setting of the trial was inherently prejudicial or that the jury selection process permits an inference of actual prejudice. Id. at 803.

Murphy attempted to support his contention that the community atmosphere was sufficiently inflammatory such that the Court could disregard other indicia of impartiality, such as the jurors' assurances that they could be fair, by directing the Court's attention to the publicity surrounding Murphy and his crimes. In rejecting this contention, the Court noted that the news articles concerning Murphy appeared between December 1967 and January 1969 – the later date being months before the Dade County jury was selected.

"The length to which the trial court must go in order to select jurors who appear to be impartial is another factor relevant in evaluating those jurors' assurances of impartiality." Murphy, 421 U.S. at 803. In Murphy's case, 20 of the 78 venirepersons were excused because they indicated an opinion as to Murphy's guilt. The Court observed, "this may indeed be 20 more than would occur

in the trial of a totally obscure person, but it by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own." Id.

Ultimately, the Court found that Murphy failed to establish a presumption of unconstitutional prejudice even where the jurors each had some knowledge of his prior offenses and at least a vague recollection of the robbery for which he was on trial. The Court stated, "this case indicates no such hostility to petitioner by the jurors who served in this trial as to suggest a partiality that could not be laid aside." Murphy, 421 U.S. at 800.

In Bundy v. State, 471 So. 2d 9 (1985) this Court similarly held that Bundy's jurors were not constitutionally unfair even though they either knew of or had some "sketchy ideas" regarding Bundy's prior convictions. The venue for Bundy's trial for the murder of 12 year-old Kimberly Leach was changed from Suwanee County to Orange County. Bundy, nonetheless, requested abatement of prosecution or change of venue alleging that the setting and timing of his trial was inherently prejudicial. Bundy had previously been convicted of the murders of Lisa Levy and Margaret Bowman and the attempted murder of Karen Chandler, Cathy Kleiner and Cheryl Thomas. All the women were Florida State University students and, but for Cheryl Thomas, were members of the Chi Omega

sorority. The sorority members were attacked as they slept at the Chi Omega house. Ms. Thomas was attacked in her apartment not far from the Florida State University campus. See Bundy v. State, 455 So. 2d 330 (Fla. 1984). The crimes received extensive media coverage. This Court held:

> The record shows that, of the twelve jurors at Bundy's trial, three had no knowledge of the Chi Omega murders. Of those three, two had never even heard of Bundy. Five of the remaining nine had some knowledge of the Chi Omega murders, but they had no more than sketchy ideas of what had occurred. The four remaining jurors did know about Bundy's conviction for the Chi Omega murders. However, all the jurors stated they would put aside any opinion they might hold and decide the case only on the evidence presented. We hold that Bundy has failed to show that he did not receive a fair and impartial trial because the setting or time of his trial was inherently prejudicial. The trial judge committed no error in denying the motion for change of venue or abatement of prosecution.

Bundy, 471 So. 2d at 20.

About 10 years later, another Florida college town, Gainesville, was scene of the serial murders of five college students over a three-day period. Rolling v. State, 695 So. 2d 278 (Fla. 1997). Danny Rolling was convicted of the murders of Sonya Larson, Christina Powell, Christa Hoyt, Manual Toboada and Tracy Paules. The case generated "massive pretrial publicity." Id. at 284. On appeal, Rolling argued, among other things, that the trial court abused its discretion in denying his motion for change of venue from Alachua County because the "entire Gainesville and Alachua County community had been victimized by Rolling's crimes

and harbored an inherent prejudice and animosity against him." Rolling, 695 So. 2d at 285. After independently evaluating the circumstances this Court disagreed.

Notably, Rolling pleaded guilty to all counts and was seeking a change of venue for the penalty phase only. This Court stated that pretrial publicity is normal and expected in certain kinds of cases. That fact alone, though, does not require a change of venue. Rolling, 695 So. 2d at 285. Instead, courts look to various factors, including:

> (1) the length of time that has passed from the crime to the trial and when, within this time, the publicity occurred, (2) whether the publicity consisted of straight, factual news stories or inflammatory stories, (3) whether the news stories consisted of the police or prosecutor's version of the offense to the exclusion of the defendant's version, (4) the size of the community in question, and (5) whether the defendant exhausted all of his peremptory challenges.

Rolling, 695 So. 2d at 285 (internal citations omitted).

The evidence Appellant presented in support of his motion to change venue consists of news reports and online reports regarding the death of Officers Curtis and Kocab, the manhunt for their killer, their funerals, and the community response to the crimes. All of the articles were written between 2010 and 2012, at least three years prior to Appellant's trial in this matter.

Some of the articles profile the officers and their families but most are written in a factual and straightforward way. In some

of the earlier articles, the chief of police and the then mayor of Tampa are quoted expressing their sadness and concern regarding the killings and their sympathies for the officers' families. Admittedly, in one article the chief of police does refer to Appellant as a "stone cold killer" (AV1/R188) and The Tampa Tribune published an editorial about a week after the murders lauding the city and police for the efforts to find and arrest Appellant. The editorial states, that "if the shooting during a traffic stop showed the depths of human depravity, there were reassuring examples of strength and kindness throughout this traumatic week." (AV2/R298). Even with that the coverage can hardly be deemed inflammatory. The coverage as a whole was fact-based and straightforward. Furthermore, the coverage did not present the prosecution's version of events to the exclusion of Appellant's.

According to the 2010 National Census Hillsborough County, Florida had a population of 1,229,226 and was (and is) the fourth most populous county in Florida. By 2015, the county population grew by 9.7% (http://www.census.gov/quickfacts/table/PST045215/12057). Between 2015 and 2016 the county's population grew 2.33%- second only to Orange County among the state's population centers. The growth was driven primarily by the in-migration of 23,205 new residents, a little more of half of which came from other states and U.S.

territories. Another 8,000 or so came from other countries. Salinero, M. (2016) Hillsborough County Population up 2.33% Hits Nearly 1.35 Million, retrieved from http://www.tbo.com/apps/pbcsdll. Of course not all of the new residents would be eligible for jury duty. Nonetheless, Hillsborough County is a large and growing metropolitan center with a steady influx of people who are new to the area and one can assume were not exposed to media coverage of Appellant's 2010 crimes.

Similarly, nothing in this record establishes that the citizens of Hillsborough County, Florida were inherently prejudiced against Appellant or that they had a deeply-felt animosity toward him so that an impartial jury was an impossibility. While the murders of Officers Curtis and Kocab certainly had an impact on the Tampa Bay area the media coverage and the nature of the crimes themselves pales in comparison to the crimes committed by and media's coverage of the crimes committed by Danny Rolling and Ted Bundy.

In Bundy's trial for the murder of Kimberly Leach the jurors either knew of or had some "sketchy ideas" about Bundy's involvement in the brutal Chi Omega murders and the attempted murder of three other young college students. Nonetheless, this Court held that Bundy failed to show that the setting or time of

his trial resulted in an inherently prejudicial jury. Instead, this Court found that Bundy received a fair trial for the murder of Kimberly Leach despite the jurors' knowledge of his other offenses.

Likewise, this Court found that Danny Rolling - who was sentenced to death by a jury comprised of citizens of Alachua County where he committed his crimes - received a fair penalty phase proceeding despite the fact that his crimes "generated overwhelming local and national media attention" and "deeply affected the community of Gainesville, Florida." Additionally, this Court was not moved by the fact that "every member of the venire had some extrinsic knowledge of the fact and circumstances surrounding" Rolling's case. Rolling, 695 So. 2d at 287.

In this case, the trial court excused any potential juror who had made even the vaguest connection between Appellant and the officers' murders. Jurors Blunk and Naeher recognized Appellant's name but never stated that they associated it with the officers' murders . . . or any other crimes. Even if they had expressed knowledge of Appellant's prior offenses, as the Bundy and Rolling case establish, that fact alone is insufficient to establish a constitutionally unfair jury.

Appellant cites Manning v. State, 378 So. 2d 274 (Fla. 1979) in support of his proposition that a change of venue was necessary.

Other than the fact that Manning involved the shooting death of two law enforcement officers the cases are quite different. Manning committed his murders in a "small rural community" of which Manning was not a member and the murders became a "main topic of conversation." Additionally, the police department and the Office of the State Attorney released to the press their version of the fact and circumstances surrounding the shooting. Additionally, the prosecutor released the names of potential witnesses and revealed the substance of the witness' statements. Likewise, the sheriff's office disclosed to the press the evidence obtained during the investigation and offered its opinion that the killings were completely unjustified. This contradicted what Appellant told law enforcement shortly after his arrest.

The change of venue motion filed in Manning's case included 15 affidavits from residents attesting to the prevalent bad feelings and animosity toward Manning. Additionally, Manning alleged the local police threatened his life and Manning was transferred to a jail outside of Columbia County due to the "widespread discussion and comment among the citizens of Columbia County" expressing bias and prejudice against Manning.

The trial judge denied the motion for change of venue. This Court reversed and distinguished this case from others that received a great deal of pretrial publicity by noting "[t]hese

were different facts under different circumstances, not the least of which was the fact that this incident occurred in a rural community where it is apparent that the incident had received substantially more attention than if the same incident had occurred in a metropolitan area." Manning, 378 So. 2d 274.

Finally, and significantly, Appellant did not exhaust his peremptory challenges in search of an impartial jury. When considered in their totality, these circumstances did not require the trial court to change the venue of Appellant's trial. There is no record evidence that Appellant had anything but an impartial and fair jury decide his fate. Appellant's arguments to the contrary are based on speculation and a false presumption that the Hillsborough County community was inherently biased against Appellant. Appellant was afforded an opportunity to substantiate his claims with evidence and was unable to do so. Under these facts, the trial court did not abuse its discretion in refusing to change the venue of Appellant's trial. This Court should affirm.

ISSUE II

(1)THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE PROSECUTION TO INTRODUCE A REDACTED STATEMENT ("I REPENT FOR KILLING"), MADE BY MORRIS WHILE HE WAS UNDER MEDICAL OBSERVATION AT THE JAIL; AND (2) THE TRIAL COURT'S RULING PRECLUDING THE DEFENSE FROM INTRODUCING THE EXPERT TESTIMONY OF DR.VALERIE MCCLAIN REGARDING MORRIS' MENTAL CONDITION AT THE TIME THE STATEMENT WAS NOT AN ABUSE OR DISCRETION AND DID VIOLATE MORRIS' SIXTH AND FOURTEENTH AMENDMENT RIGHTS OR DEPRIVED HIM OF A FAIR TRIAL.

Admission of the Statement "I Repent for Killing.":

This Court reviews "'a trial court's decision to admit evidence under an abuse of discretion standard.'" McWatters v. State, 36 So. 3d 613, 639 (Fla. 2010) quoting Hudson v. State, 992 So. 2d 96, 107 (Fla. 2008), as revised on denial of reh'g (Sept. 25, 2008); Gregory v. State, 118 So. 3d 770 (Fla. 2013). Evidence tending to prove or disprove a material fact is relevant. § 90.401, Fla. Stat. In admitting relevant evidence trial courts must determine if the evidence, though relevant, would be unfairly prejudicial, confusing, cumulative, or misleading. § 90.403, Fla. Stat. In order to be unfairly prejudicial the prejudicial affect must substantially outweigh the probative value. State v. Williams, 992 So. 2d 330, 333 (Fla. 3d DCA 2008).

An admission of killing is relevant when one is on trial for murder – an unlawful killing. There is nothing unfairly prejudicial about using a defendant's admissions against him. See Gregory, 118 So. 3d at 780 (defendant's statement, eight months prior to

shooting his ex-girlfriend and another man, that he would kill them both if he caught her cheating was relevant and admissible); Johnston v. State, 863 So. 2d 271 (Fla. 2003) (admissions of party opponent must have some logical bearing on an issue of material facts; defendant's post-arrest admissions regarding "Dwight," a bad man that lived within him, were relevant and admissible); Swafford v. State, 533 So. 2d 270 (Fla. 1988) (defendant's response to being asked whether it would bother him after he suggested kidnapping and shooting a woman, that "you just get used to it," relevant and properly admitted).

Additionally, there is no reasonable argument that a collateral crime was suggested by that admission of the redacted statement. The reason for redacting the statement was so the jury did not know that Appellant actually admitted killing five people. Since there is no reason for the jury to have believed that Appellant was admitting other crimes, there is no danger of unfair prejudice other than the legitimate and necessary prejudice that flows from a defendant admitting a criminal act.

Further, the relevance of Appellant's admission was not eliminated or even reduced by the court-ordered redaction. Appellant now claims that the statement, as redacted, did not specify that he killed Derek Anderson. Therefore, according to Appellant, the statement was one of general propensity. The fact

that the statement does not identify individual victims or specify the victim in this case does not diminish its relevance. As this Court has recognized, an admission is relevant "if it tends in some way, when taken together with other facts, to establish guilt," and admissions are relevant even when they merely raise an inference of guilty conduct. Swafford, 533 So. 2d at 274–75. Here, when taken together with the other facts presented by the State, the relevance of the "I repent for killing" statement is apparent.

To the extent there was any error in admitting the statement the error was harmless. The State presented evidence that Appellant told Ms. Price that he killed Derek Anderson. Additionally, the State presented evidence putting Appellant near the Johnson Kenneth Apartment at the time Mr. Anderson was murdered as well as evidence that the bullet recovered from Mr. Anderson's body matched the bullets that were fired from a gun in Appellant's possession a little more than a month later. It is not reasonable to conclude that Appellant's expression of repentance had any effect on the jury's verdict.

Exclusion of Dr. McClain's Testimony Regarding Defendant's State of Mind when Making the Statement "I Repent for Killing.":

Appellant never proffered below specifically what evidence he withheld as a result of the trial court's ruling. His general proffer of proposed evidence at the hearing on the motion to reconsider is insufficient, since much of what he proposed to offer

there could have been admitted but was not. Kight v. State, 512 So. 2d 922, 930 (Fla. 1987), receded from on other grounds, Owen v. State, 596 So. 2d 985, 990 (Fla. 1992) (declining to review testimony from suppression hearing for proffer to determine whether trial court erred in excluding law enforcement officer's testimony about defendant's mental state at time of confession). It was incumbent upon the defense to provide an adequate proffer for this Court to assess the scope of the court's ruling below and the resulting impact on the trial itself. Blackwood v. State, 777 So. 2d 399, 410-11 (Fla. 2000); Finney v. State, 660 So. 2d 674, 684 (Fla. 1995) (proffer is necessary to preserve issue of exclusion of evidence, as appellate court must be able to assess what effect the error may have had on the result). The failure to provide this proffer compels rejection of this claim as unpreserved.

Even if this issue is considered substantively, no relief is due. The trial court's ruling expressly did not preclude the defense from presenting testimony and evidence regarding the circumstances of the statement.

Appellant heavily relies on Crane v. Kentucky, 476 U.S. 683 (1986), for the proposition that he was entitled to present Dr. McClain's testimony to a jury and that the trial court's ruling to the contrary violated his due process right to present a defense.

Crane does not reach as broadly as Appellant suggests. In Crane, the trial court made a pretrial determination that the defendant's confession was voluntary. At trial Crane sought to "introduce testimony about the physical and psychological environment in which the confession was obtained." Id. at 684. However, Crane was not allowed to present any evidence related to the circumstances surrounding his confession. Id. at 686. "The trial court ruled that the testimony pertained solely to the issue of voluntariness and was therefore inadmissible." Id. at 684.

On appeal, Crane argued this ruling deprived him his constitutional right to present a defense. Id. The United States Supreme Court held that "the requirement that the court make a pretrial voluntariness determination does not undercut the defendant's traditional prerogative to challenge the confessions' reliability during the course of the trial." Id. at 688. The Court held that the trial court erred when it excluded all evidence of the environment in which Crane made his confession because this evidence was highly relevant to Crane's defense that he did not commit the crime and that his confession was not to be believed. Id. at 691.

Unlike the defendant in Crane, who was not permitted to present *any* evidence about the circumstances surrounding his confession, the order in this case specifically stated that

Appellant could present evidence of the circumstances surrounding his statement but could not present expert or lay testimony regarding his mental state. The order states, "This ruling does not preclude or prohibit defense counsel from offering evidence of any other statement by Morris or observations of Morris' conduct or actions during the time period deputies were observing him. Under no circumstance, however, will either party be permitted to offer lay or expert evidence of that portion of his statement wherein he mentions killing of 5 persons or lay or expert evidence of Morris' mental state at the time he made the statement." (SR2/T209). Crane does not stand for the proposition that expert or lay testimony regarding a declarant's state of mind or mental condition must be admitted. Instead, it stands for the proposition that even where the there is a pretrial ruling regarding voluntariness, the jury is permitted to reach its own conclusions as to whether the statement was voluntary, credible, and reliable and what weight to afford it.

In his Initial Brief, Appellant details the notations in the observation log kept by law enforcement during the period where Appellant was under observation in the jail. For example, it includes notations indicating Appellant was pacing, singing, picking his feet and nails, and twisting his beard. It also notes that Appellant expressed concern that the detention deputies were

going to kill him in his sleep and that they laced his food with drugs. He told detention deputies that voices were telling him that he had AIDS and that the "voodoo has been trying to kill him." Appellant paced in his cell and appeared agitated. (SR139-200). The trial court's order did not prohibit Appellant from informing the jury about Appellant's actions and other statements made during observation in order to challenge the reliability or credibility of the "I repent for killing" statement.

A criminal defendant does not have the right to introduce any and all relevant evidence that supports his defense. Montana v. Egelhoff, 518 U.S. 37, 43 (1996). In Egelhoff the Court stated: "Of course, to say that the right to introduce relevant evidence is not absolute is not to say that the Due Process Clause places no limits upon restriction of that right. But it is to say that the defendant asserting such a limit must sustain the usual heavy burden that a due process claim entails." An evidentiary ruling violates due process only where "it offends some principle of justice so rooted in the traditions and conscious of our people as to be ranked as fundamental." Id. citing Patterson v. New York, 432 U.S. 197, 201–202 (1977); See also Marshall v. Lonberger, 459 U.S. 422, 438, n. 6 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules").

Appellant has not carried the heavy burden of establishing a due process violation nor has he established that the court abused its discretion in excluding expert testimony regarding Appellant's mental state at the time he made the "I repent for killing" statement.

Likewise, Appellant's reliance on United States v. Shay, 57 F.3d 126 (1st Cir. 1995) is misplaced. In Shay, the appellant was charged with conspiracy and aiding and abetting an attempt to blow up his father's car. A police officer was killed and another seriously wounded when the bomb exploded as they were examining it. The government's theory was that Shay conspired with a friend, Alfred Trenkler, to kill Shay's father. In supporting those charges the government relied on incriminating statements Shay made to the press, fellow inmates, and the police. For example, Shay told a police officer he was sorry and that he wished he could turn back time. He told reporters that the police had questioned his ability to make a remote detonator. He also stated in an interview that he knew Trenkler built the bomb but came to the knowledge after-the-fact. According to Shay, Trenkler told him that he (Trenkler) had a surprise for Shay, which turned out to be the bomb. Shay stated that he bought the toggle switch and the battery holder that Trenkler used to detonate the bomb. Finally, Shay allegedly told

a cellmate "I'm boom boom. Don't you know me? You have to know me. I'm the one who killed the Boston cop."

At his trial, Shay sought to introduce the testimony of a psychiatrist, Dr. Robert Phillips. Dr. Phillips was prepared to testify that Shay suffered from a "recognized mental disorder knowledge as 'pseudologia fantastica.'" According to the doctor, the disorder causes Shay to create fantasies in which he is the central figure, tailor his words so that he is the center of attention, and attempt to draw others into his fantasy world. The court excluded this testimony finding that under Fed. R. Evid. 702 such expert testimony would not assist the trier of fact to understand the evidence or determine a fact in issue.

The appellate court agreed with the proposition that expert testimony concerning credibility issues is ordinarily inadmissible because it is outside the scope of the expert's specialized knowledge but disagreed with the government's assertion that such evidence is always inadmissible. Instead, the appellate court looked to the rule of evidence regarding expert testimony to determine if the trial court properly excluded the evidence at issue. The court concluded that the testimony should have been permitted because it would help the jury understand that Shay suffered from a mental disorder that caused him to make false

statements even if they were inconsistent with this own self-interest.

Dr. McClain's purported opinion was much less definite. In fact, during her deposition she hesitated to declare that she had diagnosed Appellant' with any recognized mental disorder. Instead, she stated her "hypothesis" was that he was suffering from major depression with psychotic features. (V3/R495). Her hypothesis of psychosis was based on the observation logs from when Appellant was placed in the psychiatric unit in "an abundance of caution" due to his "change in behavior." She testified that Appellant's statements while under observation would be of "questionable reliability based upon what [she] would assume to be a break with reality at points in, the descriptions." (V3/T521). This is hardly the same as testimony explaining that a defendant's mental disorder *causes* him to make statements that are untrue.

Notably, the court's order was not based on Florida's expert testimony rule of evidence. Instead, the court determined that the proposed evidence was not relevant and even if it were that its probative value was outweighed by the fact that it would confuse the issues for the jury rather than clarify them. The court was correct. Admission of this type of evidence would have opened the door to a mini-trial as to Appellant's state of mind, in a case where insanity was not an issue. Thus, the ruling below was

consistent with a number of cases from this Court, encompassing several legal considerations. See Palmes v. State, 397 So. 2d 648, 653 (Fla. 1981) (trial court erred in denying Palmes the opportunity to testify about the circumstances of his statement); Pietri v. State, 885 So. 2d 245, 254-55 (Fla. 2004) (expert testimony of defendant's mental health inadmissible where sanity is not an issue); Zeigler v. State, 402 So. 2d 365, 373 (Fla. 1981) (same).

In Kight, this Court upheld the exclusion of expert evidence as to a defendant's mental capacity at the time of his post-arrest confession. Kight argued that evidence of his mental retardation was necessary for the jury to consider as part of the totality of the circumstances in weighing the credibility of the statements. This Court concluded that Kight's ultimate purpose was to suggest to the jury that Kight was a follower, easily led, to support his claim that his codefendant had committed the murder. This Court held that, in the absence of a plea of not guilty by reason of insanity, "testimony concerning a defendant's mental state is inadmissible during the guilt phase of a trial." Kight, 512 So. 2d at 929. The Court noted that allowing evidence of a mental state in the guilt phase when there is no insanity plea would confuse and create immaterial issues, observing that nearly all criminals

have some psychological issues, but the relevant standard is sanity.

Finally, again, any possible error was harmless. Palmes, 397 So. 2d at 653 (error in denying defendant's testimony as to the circumstances of the confession was harmless); Kight, 512 So. 2d at 931 (any error in denying expert's testimony of defendant's mental state at time of confession was harmless). Appellant essentially complains that the court did not let him present an expert that would have revealed that Morris admitted to being a child molester and found Appellant to be delusional when offering what otherwise appeared to be sincere statements of religious faith. Appellant's identity was well established by the other evidence presented at trial, and any error in this ruling could not have affected the jury's verdict.

ISSUE III

APPELLANT WAS NOT DEPRIVED OF A FAIR TRIAL BY PROSECUTORAL MISCONDUCT.

In this appeal, Appellant complains about statements made by the prosecutor in opening statement and closing argument. Some of which were objected to and some of which were not. Specifically, Appellant claims the prosecutor expressed his personal opinion regarding witness's credibility; expressed his personal belief regarding Appellant's guilt; shifted the burden of proof to

Appellant; and improperly commented upon and "interpreted" Appellant's recorded telephone call.

Objected to comments:

"Control of prosecutorial comments to the jury is within the trial court's discretion, and the exercise of that discretion will not be disturbed absent a showing of an abuse of discretion." Sinclair v. State, 717 So. 2d 99 (Fla. 4th DCA 1998). "Wide latitude is permitted in arguing to a jury." Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982). "In order to require a new trial, the prosecutor's comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." Voorhees v. State, 699 So. 2d 602 (Fla. 1997).

Prosecutors' obligation to seek justice is not violated where they "argue the State's case with passion and conviction." Diaz v. State, 797 So. 2d 1286, 1287 (Fla. 4th DCA 2001). The State's closing arguments are not limited to a "flat, robotic recitations of 'just the facts.'" Closing argument "is a time for robust, vigorous, challenging . . . of an opponent's ideas." Norman v. Gloria Farms, Inc., 668 So. 2d 1016, 1032 (Fla. 4th DCA 1996) (Farmer, J., dissenting). Courts should have "great confidence in

the common sense of jurors to decide cases on the law and facts without being unduly swayed by the lawyers' oratory." Diaz, 797 So. 2d at 1287.

Counsel objected, on grounds of improper bolstering, to prosecutor's statement in opening that state-witness Ashley Price was not a convicted felon when she went to police in 2010. At the bench conference regarding this objection, the prosecutor explained that he anticipated that defense counsel would either insinuate or outright argue that Ms. Price's 2014 plea deal for violating probation was in exchange for her testimony in this case. The prosecutor explained: "At this point I am talking about her being on probation, which is clearly admissible, and I believe the Defense is going to ask her that she's on probation." (V21/T1230). The court inquired as to whether "there [is] any suggestion or intimation that she got a deal for her testimony here?" (V21/T1230). When defense counsel denied any such suggestion or intimation, the prosecutor explained further that "[t]hey are going to ask her that she violated in January 2014 and was reinstated on probation. So I wanted to bring that out and I think I'm entitled to do that anticipatorily." Defense counsel countered stating, "I was not going to bring that out. We were not going to bring that out, your honor." (V21/T1231).

At this point the trial judge sustained the objection but refused Appellant's request for a curative instruction. (V21/T1231). It is within the trial judge's discretion to refuse to issue a curative instruction. Defense counsel did not propose a specific instruction and did not request a mistrial. Regardless, there was no need for a curative instruction. The prosecutor's comment was brief and unelaborated upon. The court instructed the jury that "what lawyers say is not evidence and you are not to consider it as such." (V21/T1214). With this instruction shortly before the comment was made it is difficult to see how the court's refusal to give a "curative instruction" was an abuse of discretion. See Jennings v. State, 124 So. 3d 257, 267 (Fla. 3d DCA 2013) (stating with regard to objections during closing argument that "the trial judge was in the best position to gauge the impact of the improper arguments on the entire trial. The trial judge's unique vantage point in this regard is precisely why the question of whether to issue a curative instruction or to grant a mistrial rests within her sound discretion.")

Additionally, the comment was not "improper bolstering." Improper bolstering occurs when the prosecutor "suggests that she has reasons to believe a witness that were not presented to the jury." Jackson v. State, 89 So. 3d 1011, 1018 (Fla. 4th DCA 2012) quoting United States v. Rivas, 493 F.3d 131, 137 (3d Cir. 2007).

No such bolstering occurred with this statement. Instead, the prosecutor, in good faith, was explaining to the jury the evidence that he believed would be presented. That is that the prosecutor believed that defense counsel would attack Ms. Price's credibility by arguing that she had a motive to cooperate with the police and the State attorney in order to obtain a "deal" on her violation of probation. Had that argument come to pass it would have been proper and relevant to present that at the time she spoke to the police she had not yet been convicted of the crime for which she was placed on probation. The fact that the prosecutor turned out to be incorrect with regard to defense counsel's tactics is not the same thing as improperly vouching for the credibility of a witness.

Additionally, even if the court's failure to give a curative instruction was error, the error was harmless. The prosecutor did not bring up Ms. Price's lack of prior convictions again during this days-long trial. (V22/T1500). While Ms. Price was an important witness for the State, and her credibility was at issue, Appellant was able to attack Ms. Price's credibility by using her status as a convicted felon – with no mention of the timing of those convictions - and by pointing out the inconsistencies between portions of her testimony and the other evidence presented. (V22/1500-03; V26/T1769-73). The prosecutor's statement and the

court's lack of a "curative instruction" could not have reasonably affected the jury's verdict.

The second objected-to argument was regarding prosecutor's comment in closing argument that Ashley Price had no motive to lie and none was suggested during the trial or in cross examination. Defense counsel objected on the grounds of burden shifting but the record does not include the court's ruling. There was no effort by defense counsel to obtain as ruling on the objection, assuming the court did not give one. (V26/T1884).

"A plethora of Florida cases support the notion that a party must obtain a ruling from the trial court in order to preserve an issue for appellate review." Carratelli v. State, 832 So. 2d 850, 856 (Fla. 4th DCA 2002) citing Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983) (stating "We note also that appellant did not pursue his motion to strike even though the judge did not rule on the motion. Under these circumstances, appellant has not preserved the issue for appeal.")[3]

[3]Also citing Rose v. State, 787 So. 2d 786, 797 (Fla. 2001), cert. denied, 535 U.S. 951, 122 S. Ct. 1349 (2002) (noting that as a general rule, the failure of a party to get a timely ruling by a trial court constitutes a waiver of the matter for appellate purposes; citing with approval to *Richardson*); Bush v. State, 809 So. 2d 107, 117 (Fla. 4th DCA 2002) (holding that the defendant failed to preserve for appellate review one prosecutorial closing argument comment because she did not object at all and failed to preserve a second prosecutorial closing argument comment because she "failed to secure a ruling on her objection ... and failed to move for a mistrial"); LeRetilley v. Harris, 354 So. 2d 1213, 1214

Even if the issue were preserved Appellant has not shown reversible error. When looked at in context, the State's argument was in rebuttal to defense counsel's attack on Ms. Price's credibility during its closing. (V26/T1769-73). Therefore, it was an invited response. Vazquez v. State, 635 So. 2d 1088 (Fla. 3d DCA 1994) ("When read in its full context, the rebuttal argument was tailored to respond to the defense closing argument, and did not, as we view the record, materially mislead the jury as to the burden of proof in a criminal case.")

The prosecutor did not argue that Appellant should have or could have brought in additional evidence of Ms. Price's lack of credibility. Instead, the prosecutor was commenting on what *was* brought into evidence regarding Ms. Price's credibility. See Steinhorst v. State, 412 So. 2d 332, 337 (Fla. 1982) ("The proper purposes of cross-examination are: (1) to weaken, test, or demonstrate the impossibility of the testimony of the witness on direct examination and, (2) to impeach the credibility of the

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(Fla. 4th DCA 1978) (observing that "failure to secure a ruling on an objection waives it, unless the court deliberately and patently refuses to so rule"); Willingham v. State, 781 So. 2d 512, 513 (Fla. 5th DCA 2001); Newton v. S. Fla. Baptist Hosp., 614 So. 2d 1195, 1196 (Fla. 2d DCA 1993) (failure to obtain clear ruling from trial court waives for appellate review issue of whether comment in closing argument was improper); Schreidell v. Shoter, 500 So. 2d 228, 233 (Fla. 3d DCA 1986) (finding waiver where party objected to the opponent's comment in closing argument and moved for a mistrial, but "the trial judge made no response to either request").

witness . . .”). This Court has held that it is “proper for a prosecutor to ask the jury to consider what motive a witness would have to lie.” Valentine v. State, 98 So. 3d 44, 56 (Fla. 2012). Likewise, when no such motive has been presented during the trial it is proper for the prosecutor to ask the jury to consider that fact in assessing the witness testimony.

Non-objected to comments:

Appellant further argues that a number of unobjected-to comments constitute fundamental error and require reversal. Specifically, Appellant challenges the prosecutor’s additional arguments regarding Ms. Price’s credibility and her lack of motive to lie. The prosecutor’s description of Appellant as a “stone cold killer” and the like. The prosecutor’s description of Joseph Anderson as a “very credible young man.” (V26/17892). And the prosecutor’s alleged expression of his personal belief in Appellant’s guilt. (V26/T1817).

Argument Regarding the Credibility of Ashley Price and Joseph Anderson:

The arguments based on these statements are unpreserved. “In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.” Tillman

v. State, 471 So. 2d 32, 35 (Fla. 1985) citing Steinhorst v. State, 412 So. 2d 332, 338 (Fla.1982).

Because the issue is not preserved, to be afforded any relief Appellant has the burden of proving fundamental error. He has not and cannot. To establish fundamental error in closing argument the Appellant must show the error "is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury." Servis v. State, 855 So. 2d 1190, 1193 (Fla. 5th DCA 2003) citing Silva v. Nightingale, 619 So. 2d 4, 5 (Fla. 5th DCA 1993).

No such error occurred in this case. ". . .[A]n attorney is allowed . . . to argue credibility of witnesses or any other relevant issue so long as the argument is based on the evidence." Jackson v. State, 89 So. 3d 1011, 1018 (Fla. 4th DCA 2012) quoting Miller v. State, 926 So. 2d 1243, 1254–55 (Fla. 2006). A prosecutor cannot personally vouch for the credibility of a witness, or suggest that there is additional evidence which supports the State's case. Lowe v. State, 2 So. 3d 21, 43 (Fla. 2008); Gorby v. State, 630 So. 2d 544, 547 (Fla. 1993). That is not what happened here. Improper prosecutorial vouching for the credibility of a witness occurs where the prosecutor "implicitly refers to information outside the record" or suggests that he or she has reasons to believe the witness that were not presented to the jury.

Jackson, 89. So. 3d. at 1018. None of the prosecutor's comments in this case crossed that line. Instead, he urged the jury to believe Ms. Price and Mr. Anderson based on their testimony in conjunction with the evidence presented at the trial.

Additionally, the State's argument regarding Ms. Price's testimony and what weight the jury should afford it did not shift the burden of proof to Appellant. Again, context is important in reviewing the State's arguments. Much of the defense's closing arguments concentrated on discrediting Ms. Price's testimony and the State was in the position to respond to the allegations made by defense counsel. As noted above, so long as the argument is based on the evidence presented to the jury it is proper for the prosecution to ask the jury to consider whether or not a witness had a motive to lie. To the extent the comments regarding the defendant's failure to show Ms. Price was not credible was error any error was not fundamental. The argument did not urge the jury to find Appellant guilty based on some impermissible consideration. It did not gravely impair "a calm and dispassionate consideration of the evidence."

Likewise, the prosecutor's description of Appellant as a "stone cold killer" was not fundamental error. The prosecutor did not offer his unsupported opinion of Appellant's guilt or his general character. Instead, the prosecutor argued that the

evidence established that Appellant killed Derek Anderson with deliberation and intent and because the victim was selling marijuana on Appellant's "turf." The Appellant followed the victim back to the Johnson Kenneth Apartments with the sole intent of killing him. As described by the prosecutor, Appellant "spotted him, stalked him, came up behind him and when he had the shot that he wanted, this defendant didn't hesitate." (V26/T1760). The prosecutor further argued:

> That young man, Derek Anderson, stood up to this defendant. He told this defendant no, no. And because of that this defendant made the decision that Derek Anderson had to die because he stood up to him . . .
>
> You now at this point heard overwhelming evidence that irresistibly points to that defendant's guilt. And overwhelming amount of evidence layered upon itself in this case. And there is no doubt whatsoever, none that this defendant is that stone-cold killer that took this 21-year-old man just like that."

(V26/T1760).

The evidence fully supports this argument. Therefore, there was no error and certainly no fundamental error. As this Court has previously held: "*Except to the extent [the prosecutor] bases any opinion on the evidence in the case*, he may not express his personal opinion on the merits of the case or the credibility of witnesses." Ruiz v. State, 743 So. 2d 1, 4 (Fla.1999) (emphasis added) quoting United States v. Garza, 608 F. 2d 659, 662 (5th

Cir. 1979). Here, the prosecutor's "opinion" was based on the evidence presented in the case.

Similarly, the prosecutor argued reasonable inferences from the evidence when he expressed to the jury that Appellant was "guilty all day long" and "as sure as day follows night." These were not the prosecutor's personal beliefs with no evidentiary support. Instead, the prosecutor's statements regarding the obviousness of Appellant's guilt in this case was based on the totality of the evidence against him as summarized by the prosecutor in closing arguments. Consequently, no error occurred. Being unable to show the existence of error, Appellant cannot meet his burden of showing fundamental error.

Finally, Appellant did not object at any time when the State played the taped telephone conversation for the jury or when he (the prosecutor) provided the context for Appellant's audio recorded telephone call. The State presented its argument in response to defense counsel's argument that Appellant was not trying to "silence" Ms. Price, but rather, he was trying to get her to tell the truth. According to the argument, Appellant is upset because Ms. Price is lying to the police about him. Specifically, defense counsel argued:

> But listen to that recording. A desperate effort to silence a witness? No, that's not what this is at all. Mr. Morris says repeatedly, repeatedly to both Ashely Price and to the others on the line that what he wants

> her to do is call his lawyers and to tell the truth. He doesn't concoct some story for her to make up. Say, hey, tell them I was here or say I was doing this or whatever. None of that. There's no – that was not part of the conversation. Told her I want you to tell the truth. He told her that – and I told other people on the phone that he wasn't mad at her. Said he things that the police are threatening to take his – her children away. That's the evidence you heard.

(V26/T1778-79).

Defense counsel urged the jury to conclude that the taped phone call shows a man who was merely seeking the truth. A man who was trying to get the witness to change her statement to police and "tell the truth." In response, and after playing portions of the taped conversation, the State argued: Now obviously you can use your common sense. It's not about interpreting. It's called context. You can use your common sense in determining what he means by the context of what he is saying." (V26/T1810-11). The prosecutor pointed out to the jury tenor of Appellant's statements, the inflection of his voice, the words he used to express himself, and the fact that he knew he was being recorded. The prosecutor properly argued that this evidence, when taken in context, shows not a man seeking the truth, but a man attempting to intimidate a witness.

The State's argument was a fair comment on the evidence and in response to defense counsels' closing depicting the phone call

as Appellant's attempt to get at the truth. Therefore, there was no error and certainly no fundamental error.

ISSUE IV

THE DASH CAM VIDEO OF THE MURDERS OF OFFICERS CURTIS AND KOCAB WAS NOT UNDULY PREJUDICIAL DURING THE PENALTY PHASE AND DID NOT DENY APPELLANT OF A FAIR JURY DETERMINATION OF WHETHER HE SHOULD BE SENTENCED TO DEATH OR LIFE IMPRISONMENT FOR THE DEREK ANDERSON MURDER.

During the penalty phase, the State is permitted to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person "rather than the bare admission of the conviction. Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence." Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989). In order to prevail on appeal, Appellant must show that the admission of such evidence was an abuse of the trial court's broad discretion. Such evidence is also relevant in determine the weight to give to the prior felony aggravator. Franklin v. State, 965 So. 2d 79, 96 (Fla. 2007).

Likewise, "any relevant evidence as to a defendant's character or the circumstances of the crime is admissible [during capital] sentencing [proceedings]." Id. quoting Stano v. State, 473 So. 2d 1282, 1286 (Fla.1985). Pursuant to § 921.141(a), "Any

such evidence that the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." Here, the fact that Appellant murdered three people within a month's time is relevant and probative of Appellant's character - a proper consideration in determining whether the death penalty is appropriately applied to him.

Furthermore, the trial court carefully considered any unfair prejudicial effect the video might have on the jury. The court permitted the State to present only a portion of the video tape of Officers Curtis and Kocab murders. Specifically, the court excluded the aftermath of the shooting such as other officers responding to the scene and attempting to save their follow officers' lives. Also excluded was the portion of the tape showing a gathering crowd around the scene and any commentary that could be heard. The court determined that this evidence was overly prejudicial in relation to its probative value.

The video of the minutes before and the actual shooting were allowed to be presented. While disturbing and possibly shocking for the jury to see, it was the undistorted evidence of the circumstances surrounding two of Appellant's prior felony convictions. Unlike witness testimony, which is also admissible,

the video evidence is not subject to forgetting or elaborating. See Franklin, 965 So. 2d at 96 (" . . . the witnesses recounted the factual circumstances of the crimes committed against them and did not engage in any editorializing or inflammatory rhetoric.") The video tape is the best evidence (not in the legal sense of the term) of the circumstances surrounding Appellant's prior conviction and it was properly admitted.

In order to substantiate his argument that the video became an improper feature of the penalty phase Appellant resorts to his speculation that the jurors would spontaneously remember Appellant's connection with the murders or that their "recollection" would be refreshed once they saw the video. There is no evidence in this record that any of the jurors who considered Appellant's sentence had heard of the officers' murders or that they associated Appellant with them. These concerns were address and allayed during jury selection. The jurors on Appellant's trial had expressed no knowledge of the officers' murders or the Appellant's involvement with them. Appellant's assertion that they just "forgot" is pure speculation not supported by the record.

The trial court did not abuse it discretion in admitting a portion of the dash-cam video depicting the circumstances of Appellant's prior conviction.

ISSUE V

MORRIS' DEATH SENTENCE, BASED SOLELY ON HIS CONVICTIONS FOR LATER-OCCURRING CRIMES, IS NOT DISPROPORTIONATE AND DOES NOT VIOLATE THE EIGHTH AMENDMENT.

This Court has routinely held legislative intent is the "polestar that guides the Court's inquiry" into the meaning of a statute. Florida Convalescent Centers v. Somberg, 840 So. 2d 998, 1000 (Fla. 2003). Such intent is derived primarily from the language of the statute. State v. Bodden, 29 Fla. L. Weekly S 153 (Fla. 2004). Where the statutory language is clear and unambiguous and conveys a clear and definite meaning, there is no need to resort to rules of statutory construction. Id. "It is 'axiomatic that in construing a statute courts must first look at the actual language used in the statute'." Id. quoting Woodham v. Blue Cross & Blue Shield of Florida, Inc., (Fla. 2002).

The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance. Prior convictions in existence at the time of sentencing is a sentencing factor and is generally recognized as appropriate. King v. State, 390 So. 2d 315, 320 (Fla. 1980).

In Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977) the appellant argued "that because the Nelson murder occurred after the killing in the instant case, the crime does not qualify as an aggravating circumstance under Section 921.141(5)(b), Florida

Statutes (1975).” This Court disagreed stating, ‘[s]uch an assertion simply does not comport with a plain reading of the statute. It is clear that the Legislature referred to “previous convictions” and not “previous crimes.” Id.

With regard to Appellant’s argument that the prior conviction aggravator was not as “weighty” as it would be had the offenses occurred before this murder this statement is overbroad and overlooks a number of significant facts. The offenses used as aggravators in this case occurred on May 31, 2010 (first degree murder and attempted robbery of Rodney Jones) and June 29, 2010 (murders of Officers Curtis and Kocab.) Appellant murdered Derek Anderson on May 18, 2010, 13 days before the murder and attempted robbery of Rodney Jones and less than one month before the murders of Curtis and Kocab.

Additionally, in Urbin v. State, 714 So. 2d 411 (Fla. 1998) this Court did not hold that a prior felony conviction aggravator that occurred two weeks after the offense at issue was “less weighty” by virtue of its timing. Rather, in that case this Court conducted a proportionality review examining all the circumstances. This court determined the prior conviction did not outweigh the mitigating circumstances including the defendant’s age (17); parental neglect; extensive evidence of abuse; and a finding that Urbin’s capacity to appreciate the criminality of his

conduct was substantially impaired. Urbin, 714 So. 2d at 417. This Court merely "noted" that the prior violent felony used as an aggravator occurred two weeks after the murder in question. Id.

Likewise, in Hess v State, 794 So. 2d 1249 (Fla. 2d 2001) this Court "noted" that the prior felony conviction occurred years before the offense for which Hess was being sentenced. But that was not the only consideration. This Court also noted that the State did not present the circumstances surrounding the prior convictions. Id. at 1266. Also notable is that Hess's prior offenses, prior sexual offenses against two of his nieces, while reprehensible, were not other murders.

Here, Appellant committed three other murder within weeks of the murder of Derek Anderson. It is not just the mere existence of his prior convictions, the nature of his prior convictions weighs heavily as an aggravator. Appellant's death sentence is proportionate.

ISSUE VI

ANY ERROR IN THE JURY'S NONUNANIMOUS (10-2) DEATH RECOMMENDATION IS HARMLESS.

Appellee recognizes that this Court's decision in Hurst v. State, 202 So. 3d 40 (Fla. 2016) requires a unanimous jury recommendation for the imposition of the death penalty. Nonetheless, this Court also noted that any alleged "Hurst" error is subject to a harmless error review. See Hurst, 202 So. 3d at 67

(recognizing that a Hurst error is capable of harmless error review); and Hurst v. Florida, 136 S. Ct. 616, 624 (2016) (remanding to the state court to determine whether the error was harmless). The relevant question for purposes of a harmless error analysis is "whether there is a reasonable possibility that the error affected the verdict." In applying the harmless-error test, the court should not substitute itself for the trier-of-fact by simply weighing the evidence. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

The State recognizes the harmless error test is not an overwhelming evidence test. That does not mean the court can ignore the evidence supporting the verdict. For example, it is only when balancing the properly admitted evidence with the improperly admitted or excluded evidence that court can determine the impact of an alleged evidentiary error.

As noted in Justice Canaday's dissent in Ventura v. State, 20 So. 3d 1086, 1092 (Fla. 2010) (Canaday, J. dissenting), the Supreme Court of the United States recognized that the harmless error analysis must be "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Id. quoting Arizona v. Fulminante, 499 U.S. 279, 308 (1991).

Here, the State unquestionably proved beyond a reasonable

doubt the existence of the prior felony conviction aggravators. The only question is whether, if properly instructed, the jury would return a unanimous recommendation for death. As mentioned earlier, Appellant's prior convictions consist of the murder and attempted robbery of Rodney Jones and the murder of Officers Curtis and Kocab. These murders occurred within weeks of Derek Anderson's murder. In relation to murdering three people in about a month's time, the mitigation offered in this case pales. Based on the facts of this case and the evidence presented at the penalty phase the jury would have reached a unanimous recommendation of death had it been instructed to do so.

STATEMENT REGARDING SUFFICIENCY OF THE EVIDENCE

Appellant does not challenge the sufficiency of the evidence to support the jury's verdict, finding him guilty of first degree murder in the death of Derek Anderson. Because this Court reviews this issue on direct appeal in every capital case, this statement is offered to assist the Court in that function.

The State presented evidence that Appellant admitted to his involvement in the murder to Ashely Price. Additionally, the jury could consider Appellant's statement or repentance as evidence of his involvement in the murder of Derek Anderson. Further, the State presented cellphone evidence putting Appellant near the Johnson Kenneth Apartments at the time of the murder. Finally, the State

presented evidence that 45 days after Derek Anderson's murder Appellant was in possession of two projectiles that matched the projectiles used to kill Mr. Anderson. The State's direct and circumstantial evidence is more than sufficient to support the verdict in this case.

STATEMENT REGARDING PROPORTIONALITY

Other than as expressed in Issue V, Appellant does not challenge the proportionality of his sentences. Because this Court reviews this issue on direct appeal in every capital case, this statement is offered to assist the Court in that function.

As this Court has noted numerous times this Court's proportionality review involves "'a qualitative review . . . of the underlying basis for each aggravator and mitigator rather than a quantitative analysis.'" Martin v. State, 151 So. 3d 1184, 1197-98 (Fla. 2014) quoting Offord v. State, 959 SO. 2d 187, 191 (Fla. 2007). Therefore, this Court should not simply compare the number of aggravating circumstances versus the number of mitigating circumstances. Instead, this Court must do a qualitative assessment of the aggravating and mitigating circumstances.

This Court has affirmed death sentences in cases where, "the sole aggravating circumstance was a prior violent felony conviction for second-degree murder." See Ferrell v. State, 680 So. 2d 390 (Fla. 1996); Duncan v. State, 619 So. 2d 279 (Fla.

1993). Additionally, a qualitative assessment takes into consideration not just the existence of a prior conviction, but also the nature of the prior conviction. This Court has previously stated that an "appellant's prior convictions are particularly weighty" when they include murders of the other victims as well as other violent offenses. See Winkles v. State, 894 So. 2d 842, 847 (Fla. 2005).

Appellant committed three murders, and an attempted robbery. These are particularly weighty aggravators, which have been found sufficient to establish a that a death sentence is proportional.

CONCLUSION

This Court should affirm Appellant's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 23rd day of January, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Steven L. Bolotin, Assistant Public Defender, Office of the Public Defender, Tenth Judicial Circuit, P.O. Box 9000 - Drawer PD, Bartow, Florida 33831, **sbolotin@pdl0.org** and **appealfilings@pd10.org**.

CERTIFICATE OF FONT COMPLIANCE

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

/s/ Marilyn Muir Beccue
COUNSEL FOR APPELLEE