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**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC13-442**

**JOEL LEBRON,**

**Appellant,**

**vs.**

**THE STATE OF FLORIDA,**

**Appellee.**

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

# BRIEF OF APPELLEE

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On April 27, 2002, Margarita Osorio assisted her daughter Ana Maria Angel in getting ready for a date with Nelson Portoblanco, whom Ana had been dating for 4 months. (T/4140-45, 4239-41) Around 8 p.m., Nelson arrived, Ana and her mother said goodbye to each other and Ana and Nelson left. (T/4150, 4242) After eating dinner at Bayside, Ana suggested that they go for a walk on the beach so Nelson drove over to South Beach and parked at Penrod's and they went for a walk on the beach. (T/4242-45) When Ana got cold, they started walking back to the car. (T/4245-47) As they came off the beach, they saw a white Ford F150 pickup and 2 men standing near the passenger's side. (T/4247-48) When Ana stopped by the edge of the beach to put her shoes back on, a third man, who called himself Diablo, came out of the bushes, pointed a gun at them and demanded that they get in the truck. (T/4248-50, 4262) Ana and Nelson got into the back seat of the truck. (T/4251) Diablo also got in the back seat and sat behind the driver. (T/4251-53) Three other men positioned themselves in the driver's seat and front and back passenger's seats with a four man entered the back seat and sat on the passenger's side floorboard. (T/4253-54) The men then took Ana and Nelson's wallets, phones and jewelry. (T/4255)

Once the driver found the keys, the truck drove north away from Penrod's. (T/4261) After a brief time, the truck stopped, and Diablo demanded Ana and

Nelson's PIN numbers. (T/4262-63) However, the defendants were unable to get any money and, as they drove away, the correct PIN's were demanded. (T/4263) The truck then stopped again briefly so that another attempt could be made to get money from an ATM. (T/4263) As the truck was moving after this stop, one of the defendants used Nelson's phone to call Hector Caraballo's number in the Orlando area at 12:48 a.m. (T/4264-68)

The men then demanded that Nelson kiss Ana, and when Nelson refused, the men punched Nelson in the head until he kissed Ana. (T/4269-70) The men then ordered Nelson to fondle Ana. (T/4270) The men then demanded and received Ana's panties, forced Nelson onto the floorboard and pulled Nelson's shirt over his face and Diablo and both the front and back seat passengers proceeded to force her to engage in anal, vaginal and oral sex as she begged them to stop. (T/4270-74)

After about 20 minutes, the truck stopped by the side of the road, and 2 of the men pulled Nelson out of the truck. (T/4275-76) They forced Nelson down an embankment and forced him to kneel beside a wall. (T4276-77) Once Nelson was on his knees, he was ordered to turn and look at the men. (T/4277-78) When Nelson complied, he was immediately stabbed in the face, neck and back and repeatedly kicked. (T/4278-79) To stop the attack, Nelson played dead. (T/4279) Eventually, the attack stopped, and the men left. (T/4279) Once the men were gone from the immediate area, Nelson got up and went back to the road, where he saw

the truck pulling away. (T/4279-80)

Eventually, Nelson was able to flag down a passing motorist and tell him that he and Ana had been kidnapped. (T/4280-81) The motorist called 911, and the police and an ambulance responded. (T/4281) Nelson was transported to the hospital, where he was interviewed by Det. Larry Marrero. (T/4283, 4454-58) He was left with scars from stab wounds to his back, arms, ribs, head and both sides of his neck. (T/4284-94)

When Det. Marrero and Agt. Ed Royal of FDLE learned that the number called on Nelson's phone had been linked to Hector's apartment, they provided that information to officers in Orlando and decided to fly to Orlando. (T/4317, 4326-29, 4461-62) In Orlando, FDLE Agt. Tom King, FDLE Agt. Suzie Koteen, FDLE Agt. John Burke and other officers from the Orange County Sheriff's office and FBI gathered at a car dealership near the Hawthorne Village apartments in which Hector's apartment was located. (T/4410-12, 4662-68) There, they were informed that they would be looking for Hector and Ana and given pictures of them. (T/4665-66) Officers proceeded to Hector's apartment but were unable to locate either Hector or Ana. (T/4412, 4667-69, 4700-01) However, they did determine that multiple individuals were living in the apartment and that there was a lock on a door inside the apartment. (T/4670) As a result, Agt. Koteen was sent to the apartment office to determine who was on the lease for Hector's apartment.

(T/4670) There, Agt. Koteen asked Michelle Cora, a leasing agent for Hawthorne Village, about Hector, and she responded that she did not know Hector but was aware that a person named Victor Caraballo had previously leased a different apartment there but had recently moved out while being evicted. (T/4615-21, 4670-71) Cora gave the officers permission to search Victor's former apartment and provided they with the keys. (T/4621-22, 4670)

At Victor's apartment, the police eventually gained entry and found Victor (T/4413-17, 4622, 4673-76, 4672) Realizing Victor did not speak English well, Agt. Koteen arranged for Agt. Francisco Hildago to join them and to obtain Victor's consent to searching the apartment. (T/4677-82) In searching the apartment and its attic, Agt. King found Ana's ATM card and driver's license in a cabinet. (T/4418, 4683-84, 4873-77, 4884) Ana's purse was subsequently found in a bathroom cabinet, her cellphone was found in bedroom closet and Ana and Nelson's wallets were found in the tank of the toilet (T/4684-88, 4877-85, 4897-4900) In searching dumpsters near Hector's apartment, the police located Ana's shoes. (T/4701-04, 4867-70, 4882)

Thereafter, Agt. King and FBI Agt. Kevin Farrington proceeded to the Wellington Woods apartments in Kissimmee to look for the truck and a red Honda. (T/4420-21) There, the police came into contact with Cesar Mena, who was taken to FDLE headquarters. (T/4420, 4422-26 4333-34)

In the meantime, Det. Marrero went to that apartment of Evelyn Roman and Ramon Quinones. (T/4463-64) From there, Det. Marrero, Agt. Hildago and Quinones went to the Alhambra Apartments, which was about a mile from Quinones' apartment. (T/4464-65, 4968) There, he located Roman and Defendant, who was standing in a breezeway with a duffle bag and shopping bags next to him, which were impounded. (T/4466-69, 4901-13, 4969-70) Defendant and Roman were arrested, and their clothes were impounded at the scene of the arrest to preserve trace evidence. (T/4469-72, 4913-14, 4970-71) When the clothing was taken, sheets were used to shield them from public view, even though the area was almost deserted, and they were given Tyvek suits to wear. (T/4473-74, 4914-15, 4971-72) In one of the bag, a pair of tan Lugz boots that appeared to have blood on them were found. (T/4903-04)

Defendant and Roman were also brought to FDLE headquarters. (T/4335-37, 4472, 4972) Once there, Defendant was placed in a detectives' office with Dep. Armando Sarabia as a guard and FDLE Agt. Eric Hernandez was asked to bring Defendant water. (T/4473, 4694, 4705-07, 4973-74) Because Det. Marrero had not brought a tape recorder with him and the only one readily available was a microcassette recorder, he asked Agt. Hildago if FDLE had a full sized recorder. (T/4475-77) At Agt. Hildago's request, Agt. King got a Marantz tape recorder and tapes and put them on the table where Defendant was seated. (T/4426-27) The

Marantz recorder was a sophisticated type of recorder with numerous buttons, dials and switches that was capable of recording from different inputs and had a switch to control which input was being recorded. (T/4427-33) The dials on the recorder were so sensitive that they would move in response to ambient noise even if the input was not set to the internal microphone. (T/4433-35)

Det. Marrero, who had never seen a Marantz recorder before, pressed the record button and believed that the recorder was working. (T/4477-78, 4977) Agt. Hildago then presented Defendant with a Spanish *Miranda* waiver form and read each one of the rights to Defendant. (T/4478-82, 4975-77) He then asked Defendant if he would speak to the officers without an attorney, and Defendant agreed to do so and signed the waiver form. (T/4479-83)

During his ensuing confession, Defendant admitted that he, Roman had ridden in the truck, which was being driven by Mena, to Miami to party and returned to Orlando on April 26, 2002. (T/4484, 4982) On April 27, 2002, Mena stated that he was going to Miami again with Hector and Victor and Defendant and Roman again decided to join them. (T/4485, 4715, 4982) When the group arrived in Miami, they parked behind a club on Miami Beach and attempted to sneak inside but had difficulty doing so. (T/4485) Realizing they would have to pay to enter the club, the group decided to find someone to rob. (T/4485-86, 4715-16) Defendant and Roman looked out to the beach for victims and finally decided to

hide in bushes near a trail onto the beach. (T/4486, 4716) When Ana and Nelson walked past them, Defendant stepped out of the bushes, pointed the gun at Nelson and ordered Ana and Nelson into the truck. (T/4486-87, 4717, 4982-83) Defendant got into the back driver's side seat with Nelson next to him, Ana next to Nelson and Hector in the back passenger's seat. (T/4487) Roman sat on the back floorboard while Mena drove and Victor sat in the front passenger's seat. (T/4487-88) As Mena started driving off the beach, Defendant demanded and received all of Ana and Nelson's property. (T/4489-90) They then demanded the ATM PIN number and stopped twice attempting to get money. (T/4490, 4717, 4983) While Mena and Victor got out of the truck, Defendant remained in the truck because he was concerned about being captured on video. (T/4491)

After Mena and Victor had return to their seats in the truck, Mena started driven north on I-95 while Defendant attempted to scare Ana and Nelson by asking if they could swim. (T/4492, 4717) Hector then asked Ana and Nelson if they had ever had sex, and when they responded negatively, Hector ordered them to do so and threatened to kill them when they did not immediately comply. (T/4493, 4983) Nelson and Ana then started to kiss. (T/4493) Defendant responded by telling them they were doing it wrong, hit Nelson, forced him onto the floorboard and told him not to look. (T/4493) Defendant then demanded and received Ana's panties, which he smelled and passed around to the other men. (T/4494, 4983)

Hector then ordered Ana to spread her legs, and Defendant, Victor and Hector all digitally penetrated her. (T/4495) After a discussion among the defendants during which Defendant indicated that he wanted to anally rape Ana, Ana was then forced to remove her other clothing and lay with her head in Defendant's lap. (T/4495, 4717, 4719, 4983) Hector then vaginally raped Ana while Defendant forced her to perform oral sex on him. (T/4495-96) When Hector finished, Defendant then vaginally raped Ana while stating that he also planned to rape Ana anally and did so as Ana cried and begged them to stop. (T/4496) When Defendant finished, he climbed into the front seat so Victor could move to the back seat and rape Ana. (T/4497, 4719) When Victor finished, Ana was allowed to redress. (T/4498)

Hector then indicated that the group needed to kill Nelson and Ana through hand signals. (T/4498, 4983-84) Mena stopped the car, and Defendant and Victor took Nelson from the car to the edge of the road near the sound barrier. (T/4498-99, 4719-20, 4984) Defendant then started to stab Nelson and ordered Nelson to look at him as he did so. (T/4499, 4720, 4984) Nelson fell to the ground, and Defendant kicked him repeatedly. (T/4499) Defendant and Victor then returned to where they had been sitting in the truck, believing that Nelson was dead. (T/4499-4500, 4718) Mena then drove the truck further north on I-95 until Hector made a slashing motion across his throat. (T/4501) Mena again stop the truck, and

Defendant and Roman took Ana from the truck and forced her to walk into an area of bushes near the sound barrier as she begged for her life. (T/4501-02, 4720-21, 4984) Defendant ordered Ana to get on her knees. (T/4501-02, 4722) Defendant pointed the gun at the back of Ana's head and pulled the trigger but there was only a click because the gun was a revolver that only had one bullet that was not in the firing chamber. (T/4502-03, 4722, 4984) Defendant pulled the trigger again as Ana begged for her life with the same result. (T/4503, 4722, 4984) When he pulled the trigger a third time, the gun fired, Ana fell over and Defendant and Roman returned to the truck. (T/4504-05, 4722, 4984-85) Defendant admitted that he killed Ana because he believed she would be able to identify him. (T/4507)

Mena then drove back to Orlando, where the group stopped so the Caraballos could buy crack before dropping the Caraballos off at Hawthorne Village. (T/4505) Before leaving Hawthorne Village, Defendant, Mena and Roman threw the victims' property into a dumpster. (T/4505) Defendant, Mena and Roman then took the truck to a car detailer and had it cleaned in an attempt to destroy any evidence. (T/4505) The gun and knives used in the crime were then hidden in Mena's bedroom closet. (T/4505)

When asked to provide an exact location for Ana's body, Defendant stated that it did not know the exact location but that it was not far from where Nelson had been left. (T/4506) He also stated that Mena would have a better idea of the

exact location as he had been driving. (T/4538-39) Based on this information, Agt. Royal asked Agt. Travis Lawson, who was in South Florida, to start looking for the body. (T/4344-45, 5269-70) Agt. Lawson found Ana's body on eastern shoulder of I-95 just south of exit 38 behind a thicket of palm trees next to the retaining wall. (T/4773, 4775, 5271-75) Her hands were clasped together with their fingers interlaced. (T/4777, 4807-08) She was barefoot and had a number of abrasions on her face and an abrasion on her right leg. (T/4779-85)

Meanwhile, Agt. King and Agt. Farrington then returned to Mena's apartment, obtained consent and searched the apartment. (T/4436-37, 4624-25) In the master bedroom closet, Agt. King found a basket with 2 knives in it and impounded the knives. (T/4438-43) Agt. Farrington found a gun in the pocket of a jacket in a closet by the front door, and it was impounded as well. (T/4443-46, 4625-26) As a result, Defendant was charged by indictment, filed on May 8, 2002, with (1) the first degree murder of Ana, (2) the attempted first degree murder of Nelson, (3) the armed kidnapping of Ana, (4) the armed kidnapping of Nelson, (5) the armed robbery of Ana, (6) the armed robbery of Nelson and (7) the armed sexual battery of Ana. (R/110-16)

On August 18, 2005, Defendant filed a motion to suppress his statements. (R/2918-36) At the suppression hearing, Det. Marrero testified that during a formal statement, Victor identified photos of his codefendants. (T/96, 124-25) Agt. Burke

and Agt. Koteen testified that Victor had told the police that Ana had been brought to Orlando alive and that he had last seen her being driving away from his apartment complex by other codefendants. (T/153, 169-70, 212) Agt. Ed Royal testified that Mena provided a statement in which he named his codefendants. (T/406-07, 410)

Det. Marrero testified that he first came into contact with Defendant in an apartment complex at 5207 Hacienda Circle. (T/465) Defendant was subsequently transported to FDLE headquarters. (T/465-66) At 2:42 a.m., Det. Marrero entered the room Defendant was in and then left to request a tape recorder. (T/469) When Det. Marrero reentered the room, Defendant was crying and said that he had done something wrong and admitted to shooting and killing Ana. (T/469) Det. Marrero then left the room again to advise the other investigators of Defendant's statement. (T/470) When Det. Marrero returned, Agt. Hildago then presented Defendant was a waiver of rights form and read it to Defendant. (T/466-67) Defendant executed the waiver at 3:15 a.m. (T/467-68) The interview with Defendant continued under 4:45 a.m. (T/472-74)

On cross, Det. Marrero stated that he had gone to apartment of Evelyn Roman, Defendant's sister, at 1:15 a.m. on April 29, 2002, and spoke to Ms. Roman's boyfriend Ramon Quinones. (T/490-91) Quinones informed the police that he had just had an argument with Defendant, who resided in the apartment,

over Defendant's drinking and coming home late, and Defendant had just left. (T/491-92) Quinones informed the police that Defendant and Roman had been acting as if something was wrong that day and that he believed Defendant smoked marijuana and pointed out an apartment where he thought Defendant had gone. (T/492-93, 504-05) When the Det. Marrero and Agt. Hildago approached that apartment, they observed 2 individuals walking outside and approached them. (T/493-94) When Det. Marrero realized it was Defendant, he told Defendant to stay where he was. (T/494) Defendant then dropped a bag he was carrying, and it was impounded. (T/502-03)

Defendant was then taken without handcuffs to the front of the building where a crime scene unit was located. (T/495) While surrounded by police vehicles that blocked public view, Defendant's clothing and glasses was taken to be processed for evidence, and Defendant was given a gown to wear. (T/496-97) Defendant was then handcuffed and transported to FDLE headquarters. (T/497-98) Once at headquarters, Defendant was placed unhandcuffed in a room with Agt. Hernandez, Agt. Hildago and Off. Sarabia. (T/498)

Det. Marrero averred that he simply listened when Defendant made his initial statement. (T/500) While Det. Marrero acknowledged that the statement included all of the elements of first degree murder, he stated it was not a full confession and averred that the statement Defendant made when he was being

interviewed was much more detailed. (T/501-02) Det. Marrero stated that he did not refer to the statement Defendant had already made to him when he conducted the interview after Defendant was read his rights. (T/513) Instead, Det. Marrero stated that he just began questioning Defendant about what had occurred beginning with when Defendant first met with the codefendants. (T/513) On redirect, Det. Marrero stated that he saw no signs that Defendant was intoxicated when he was arrested and interviewed. (T/534-35)

Dep. Armando Sarabia testified that he was present in a room at the FDLE headquarters in Orlando when Defendant was questioned. (T/569-70) He averred that he was assigned to watch Defendant and witnessed his waiver of rights but did not participate in the interview. (T/571-72) Dep. Sarabia continued to watch Defendant for several hours after the interview ended. (R78/572-73) During that time, Dep. Sarabia asked Defendant what it felt like to have killed someone, and Defendant responded that he "felt like a king." (T/573)

Agt. Hildago testified that Victor had identified Defendant as a participant in these crimes during a statement at his apartment on the afternoon of April 28, 2002. (T/733-51) Victor claimed that he was dropped off at his brother Hector's apartment around 1 a.m. and that Defendant, Mena and Roman had driven away with Ana after he was dropped off. (T/754) Around midnight, Agt. Hildago was informed that the police had discovered address for Defendant at the Timberskan

Apartment complex. (T/760-61) As a result, Agt. Hildago accompanied other officers to that address between midnight and 1 a.m. (T/761) In the apartment, police found Quinones, Ms. Roman and a couple of children, but neither Defendant nor Jesus Ramon were present. (T/762) Quinones told the officers that Defendant and Jesus was either walking around the Timberkan complex or at a friend's apartment in another complex. (T/763) When the police were unable to find Defendant and Jesus in the Timberkan complex, Quinones directed Agt. Hildago, Det. Marrero and Dep. Sarabia to the friend's apartment.

Once there, the police had Quinones stay in the car while they walked to the rear of the friend's apartment. (T/764) When they got near the apartment, they saw 3 people talking, walked up to them and identified themselves as police. (T/764) Jesus ran while Defendant and the other person remained. (T/764) While other officers chased Jesus, Agt. Hildago recognized Defendant and proceeded to take him in custody and handcuff him. (T/765) Once Jesus was captured, the police seized the clothing of both suspects and gave then haz-mat type suits to wear. (T/766) Defendant and Jesus were then transported separately to FDLE headquarters. (T/767)

Around 2 a.m., Agt. Hildago found Defendant seated at a table in a cubicle area and sat with him. (T/768, 770) During this time, Det. Marrero asked Agt. Hildago's assistance in locating a tape recorder, and Agt. Hildago contacted Agt.

King to get the recorder. (T/769) While Det. Marrero was getting the recorder, Agt. Hildago sat silently with Defendant and noticed that Defendant started to cry. (T/769-70) At that point, Agt. Hildago remarked to Defendant that he hoped Defendant knew what kind of trouble he was in. (T/771) Defendant responded, "Yes, I know. I killed her." (T/771) He added that he had made Ana kneel, had pulled the trigger twice without firing the gun before it went off on the third trigger pull and that her body had been left off of I-95 just north of where Nelson had been left. (T/771-72)

Upon hearing this, Agt. Hildago left Defendant to inform the other officers and to question Mena in an attempt to get a better description of where the body had been left. (T/771-72) After speaking to Mena for about 5 minutes, Agt. Hildago returned to find Det. Marrero, Agt. Hernandez and Dep. Sarabia were with Defendant and had a tape recorder. (T/775) At that point, Det. Marrero turned on the recorder, and Agt. Hildago read Defendant his rights from a form. (T/776-77, R/3669) As Agt. Hildago read each of the rights, Defendant stated that he understood them and then agreed to speak to the police with an attorney and signed the waiver form at 3:15 a.m.. (T/777-78, R/3669) Defendant did not appear to be intoxicated and appeared to understand what was happening. (T/778) No threats or promises were made to Defendant. (T/778) By that time, Defendant had stopped crying and drank some water as he calmly spoke to the officer for the next hour.

(T/779) During that time, Defendant never requested an attorney or a cessation of questioning. (T/779) He did provide a detailed statement regarding crimes. (T/782-83)

On cross, Agt. Hildago admitted that Quinones and Ms. Ramon had told him that Defendant lived with them and had been to the apartment earlier but denied that he was informed Defendant had smoked marijuana while there. (T/825-26) He acknowledged that Quinones was angry at Defendant when he was assisting the police in locating Defendant. (T/826) He admitted that he told Defendant not to look at him when he arrested Defendant. (T/828-29) Agt. Hildago acknowledged that Defendant's clothing was taken from him while he was in a parking lot at the scene of his arrest. (T/829-30) As Defendant was disrobing, Quinones approached within 5 to 10 feet of Defendant and cursed at him for a few minutes even though the police had instructed Mr. Quinones to stay in their car and then told him to leave. (T/831-32)

Agt. Hildago insisted that he had made no attempt to speak to Defendant while they were seated together in the FDLE headquarters before Defendant started to cry. (T/834-35) He averred that his statement to Defendant about being in trouble was a statement and was not intended to provoke a response, although Agt. Hildago recognized that it might provoke a response. (T/836-37) He admitted that Defendant responded by providing a confession. (T/838)

Based on this evidence, Defendant argued that he waiver of rights was not voluntary because he was arrested and allegedly stripped naked in public and Quinones was allegedly allowed to berate him. (T/979-81) He insisted that the testimony that he began to cry while sitting silently in police custody was not credible and that he must have begun to cry when Agt. Hildago made the statement about being in trouble. (T/981-82) He insisted that the statement should be viewed as an intentional attempt to interrogate Defendant without informing him of his rights. (T/982-83) He averred that because he responded to the statement by confessing, his subsequent waiver of his rights could not be considered voluntary because it was not attenuated. (T/983-84) He further insisted that the waiver should be considered involuntary because the police did not explain how a lawyer would be appointed for him during the reading of the rights and because he was crying when his rights were read. (T/984-86)

The trial court granted Defendant's motion to suppress his statements. (R/5445-56) It determined that Det. Hidalgo's statement to Defendant regarding the trouble he was in constituted the functional equivalent of interrogation and required suppression of Defendant's response because Defendant had not been read his rights before the statement. *Id.* It further determined that the confession Defendant provided after being read his rights also had to be suppressed because the response allegedly tainted Defendant's ability to waive his rights. *Id.* The State

appealed the order suppressing Defendant's statements to the Third District, which reversed the suppression of the post-*Miranda* statements. *State v. Lebron*, 979 So. 2d 1093 (Fla. 3d DCA 2008). It agreed with the trial court that the agent's statement to Defendant regarding the trouble he was in was the functional equivalent of interrogation and the statement Defendant made in response had to be suppressed because Defendant had not been read his rights. *Id.* at 1094-95. However, it determined that the suppression of this statement did not require the suppression of the statement Defendant made after he was read his rights because neither statement was coerced and the second statement was made after a valid waiver of rights. *Id.* at 1095-97.

On August 22, 2008, Defendant filed a motion to adopt codefendant Mena's motion to bar the death penalty based on *Ring v. Arizona*, 536 U.S. 584 (2002). (R/2968-69) He also sought special verdicts at the penalty phase. (R/3049-52, 3056-58) The trial court denied the motions. (R/3117-18, 3146, 3148)

On September 13, 2011, Defendant moved the trial court to determine that quantitative electroencephalogram (QEEG) evidence was admissible without holding a *Frye* hearing. (SR2/3-24) On July 2, 2012, the State filed a response to a defense motion to preclude the State from requesting a *Frye* hearing and a motion for such a hearing regarding the admissibility of QEEG evidence and evidence regarding low resolution brain electromagnetic tomography (LORETA). (R/8071-

8157) In this pleading, the State argued that the determination of whether a *Frye* hearing was needed was only properly made once the party against whom novel scientific evidence was being offered objected to the evidence such that Defendant's motion was improper. *Id.* It then argued that QEEG evidence was new and novel scientific evidence that was not generally accepted in the scientific community and had been previously rejected as inadmissible by numerous courts. *Id.* It also asserted that the use of LORETA, which creates a three dimensional picture of a brain, as a diagnostic tool for brain damage was also not generally accepted in the scientific community. *Id.*

At the *Frye* hearing, Dr. David Ross, a neurologist, testified that in doing a QEEG analysis, both a person and the computer attempt to determine and eliminate the electrical activity attributable to sources other than the brain contained in EEG data, and then the computer runs the data through a mathematical formula called a Fast Fourier Transformer to show the number of frequencies appearing in the data over a time period. (T/1403, 1405) Dr. Ross admitted that the process of identifying and eliminating activity that was not associated with the brain involved some level of judgment and training regarding the source of the activity and produced a rate of error that he did not quantify but believed was lower than the error rate produced through visual interpretation of the EEG traces. (T/1405-10) He also admitted that it was never possible to isolate the activity detected by the

electrodes that was the result of brain activity completely. (T/1457-58)

Dr. Ross stated that the information produced by the mathematical formula was then used to produce color coded pictures depicting areas of the brain where certain frequencies were found. (T/1412-15) Dr. Ross believed that using a QEEG to produce such pictures was generally accepted in the fields of neurology, anesthesiology, psychiatry, psychology and neuropsychology as a means of finding abnormalities in electrical functioning of the brain. (T/1416-17) When asked about using QEEG results as a means of diagnosing a condition, Dr. Ross responded that he had a problem with the word diagnosis and would not say whether its use as a means of diagnosis was generally accepted. (T/1417-19) He also admitted that using the result of a QEEG only to diagnose a condition would not be proper. (T/1419) Instead, he averred that he merely used QEEG results as part of an assessment regarding how he would treat a patient for conditions like ADD, PTSD and brain damage because it allowed one to distinguish between biological and emotional causes of conditions. (T/1420, 1422-23, 1424) However, he admitted that the results could not be used to show a definitive connection between the QEEG results and a mental health condition or observed behavior. (T/1425-28)

Dr. Ross stated that the final step in the QEEG analysis was a comparison of the frequencies in the analysis to information contained in a normative database to determine if there was a statistical significant abnormality. (T/1428-30) He insisted

that the use of such a statistical analysis was generally accepted in science. (T/1430-32) Dr. Ross believed that any sample greater than 30 people produced a 97% chance of having a representative sample. (t/1437-38) He stated that this analysis permitted the representation of how many standard deviations from the mean a given value in the QEEG results were. (T/1453-57) He averred that the numbers of these statistical variances allowed him to opine that there was some abnormality in a brain at a particular location but would not permit him to diagnose any condition. (T/1464-69)

Dr. Ross acknowledged that Dr. Lambros had used a different type of QEEG that conducted a similar but not identical mathematical processing of the EEG data and compared its results to its own database. (T/1483, 1493-94) He believed that the other QEEG database had been complied using a similar methodology to the one used to compile the database he used. (T/1494) He admitted that he was aware that the same raw EEG data and been submitted to both QEEG's and averred that the results were similar but not identical. (T/1495-96) In fact, he acknowledged that when it ran Dr. Lambros' data for Defendant's QEEG through his software, he found that an alleged abnormality that was not shown in Dr. Lambros' results. (T/1520) Dr. Ross stated that was he was aware of the existence of LORETA, he did not use it because he considered the data it produced irrelevant to his practice. (T/1497, 1499-1500) He described it as a means of tracing the origin of an

electrical signal found in EEG data through a mathematical analysis. (T/1498) He stated that he was asked to research the reliability of using LORETA and believed that the research showed it was scientifically valid and used in neurology and psychiatry. (T/1500)

Dr. Ross admitted that there was a difference between using medical equipment for research purposes and using it clinically. (T/1504) He averred that there were "dozens" of peer-reviewed articles from areas other than neurology regarding the use of QEEG to assess, but not diagnose, mental health conditions. (T/1504) When the trial court pressed Dr. Ross to name hospitals and doctors who used QEEG clinically, Dr. Ross first tried to evade the question and then averred that all academic medical centers used QEEG clinically but did not use normative database and that NYU was the leading source of published information on its use. (T/1505-06) He stated that AAN had opined that QEEG had a use in monitoring conditions but could not be used to diagnose a condition. (T/1507-08) He insisted that other professional organizations were not opposed to the acceptance of the QEEG but immediately admitted that he was aware the American Psychiatric Association (APA) had expressed reservations about its use in 1991 and had not changed its position. (T/1514-15) He admitted that he and everyone he knew agreed that the QEEG was not properly used as a stand alone basis for a diagnosis and that it would not be proper for use by a non-physician. (T/1515-16)

On cross, Dr. Ross acknowledged that he had not actually read all of the articles that he relied for his testimony regarding peer-review articles and that he had assumed they were peer-reviewed without checking. (T/1536-37) He admitted that most of the articles concerned issues other than traumatic brain injury and its diagnosis. (T/1537-40) Dr. Ross admitted that each individual using a QEEG made their own determination of what amount of deviation from the norm was necessary for a reading to be considered abnormal. (T/1557-61) He acknowledged that the finding of a statistically abnormal result using a QEEG did not necessarily mean that a person was unwell. (T/1562-64)

Dr. Ross admitted that the comparison he did involved age ranged subsets of the total database and that he was unaware of the ranges he used. (T/1572-73) He was unaware that individual he considered an authority had criticized the database he was using because it produced a high number of false positives. (T/1574-77) Dr. Ross admitted that some of the differences between his QEEG results and the results obtain by Dr. Lambros concerned issues of importance in formulating an opinion regarding brain functioning. (T/1599-1601) Dr. Ross also reluctantly admitted that he had referred to LORETA as low grade tomography. (T/1610-11) He acknowledged that LORETA analysis produced dramatic pictures suggesting large areas of brain damage even though its results only truly indicated that there was some dysfunction somewhere in the area, which could be misleading. (T/1613-

15)

Dr. William Lambos, a neuropsychologist, testified that type of a QEEG software had been registered with the FDA for clinical use.. (T/1896-1912) The data obtained through a QEEG was also capable of being shared with a LORETA program. (T/1912-13) Dr. Lambos claimed that using LORETA allowed him to specify the locations from which brain activity originated. (T/1929) He insisted that the areas that were colored using LORETA did reflect that the entire area was damaged. (T/1932-35) Dr. Lambos admitted that it was improper to diagnose brain damage based on QEEG results. (T/1935) However, he claimed not to have used his QEEG results to diagnose brain damage. (T/1935) Instead, he claimed that he used it to correlate a subject's symptoms to a type of finding in QEEG data. (T/1936) However, in forensic work, Dr. Lambos routinely analyzed the QEEG data without considering anything about the subject, including his age or medication state. (T/1937)

On cross, Dr. Lambos acknowledged that his doctorate was in experimental psychology and did not qualify him to become a licensed psychologist in Florida. (T/1941-42, 1943) He then obtain a certificate in clinical work through a school he attended on weekends. (T/1942) As a result, he did not obtain a psychology license in Florida until 2010, despite the fact that he had completed his doctorate in 1986. (T/1898, 1944) Dr. Lambos reluctantly admitted that he had generated $1 million

in gross income by conducting QEEG tests. (T/1947-48) He also reluctantly acknowledged that he had begun using QEEG in forensic work to increase its acceptance and generate more income from it. (T/1953-55) He eventually admitted that the fact that the FDA registered QEEG did not mean that they had approved its use. (T/1955-60)

Dr. Lambos insisted that it was unnecessary from him to know specifics regarding the database against which he compared his QEEG data to obtain his results to testify about it. (T/1973) Instead, he insisted that so long as he understood the database had been validated and accepted, he could testify about it. (T/1973) He then averred that while he knew that the database he used was subdivided into age groups, he did not know what ages fell in which group and simply relied on the software to select the group for comparison. (T/1977)

Dr. Lambos admitted that he and Dr. Ross had gotten different results feeding the same data into two different QEEG systems but insisted it was not the result of a difference in normative databases. (T/1993-94) Dr. Lambos admitted that extraneous signals should be removed from the raw EEG data before it is processed. (T/2003) However, he acknowledged that he had used raw EEG data that contained extraneous signals in this case. (T/2003-06)

Dr. Peter Kaplan, a neurologist and professor of neurology, testified that he had taught EEG use for 25 years and written several textbooks of reading EEG's,

as well as numerous other articles and book chapters. (T/1648-55) He stated that QEEG involved a mathematic manipulation of EEG data as a means of interpreting that data such that it was entirely dependent on an EEG. (T/1656-57) The field of medicine in which people of trained on interpreting EEG data is neurology. (T/1657) He was familiar with several brands of QEEG software and stated that they were not used by neurologists to determine brain injury. (T/1657) Instead, the general use of QEEG data was to do long term monitoring of EEG data in intensive care unit and surgeries. (T/1657) Such uses did not involve comparisons to databases and are generally accepted. (T/1657-58) However, neither the acceptance of such uses nor the fact that QEEG uses had been researched indicated that all clinical uses of QEEG were accepted. (T/1663-64) In particular, using QEEG information through comparisons to databases as a means of diagnosing brain injury was not generally accepted. (T/1664-66) One reason is that while the analysis permits the finding of minute differences in brain activity measured in an EEG, such differences do not necessarily equate with dysfunction or illness. (T/1665-68)

Dr. Kaplan stated one of the inherent flaws in the manner in which QEEG analysis was being conducted as a means of diagnosis was that it relies on EEG data gathered during brief time periods by untrained individuals. (T/1670-71) As a result, it easily includes analysis of electrical signals unassociated with brain

activity that a trained individual would have recognized in a longer termed review of the EEG traces. (T/1670) While the QEEG has some ability to exclude some data associated with such extraneous signals, it is not capable of recognizing all such extraneous signals. (T/1681) When information regarding such extraneous signals are run through the mathematic processing done it QEEG, it produces flawed results. (T/1682) In fact, in this case, the defense experts had analyzed portions of the EEG traces that result from electrical activity associated with muscle movement, knowing that the extraneous information was present, and then relied on resulted affected by the extraneous information in reaching their conclusions. (T/1681-82) Moreover, a study of EEG data in 12 court cases in which QEEG evidence had been presented showed that 2/3 included extraneous signals. (T/1683-84)

Moreover, even when a statistical variance regarding a signal that is actually associated with brain activity is found using a QEEG, there is no correlation with an actual brain dysfunction. (T/1678-80) Further, EEG traces after affected by the ingestion of medications and other substances, such as cigarette smoke, and by the subject's emotional state, such as anxiety or stress. (T/1680) However, these normal variations were not taken into account in selecting the entrants for the normative database such that the results of comparison is skewed. (T/1680-81) Additionally, Dr. Kaplan stated that brains change over time. (T/1673) As a result,

any comparative analysis should be conducted using people in the same age bracket. (T/1673) Moreover, there was no standardized training provided for individuals who would utilized QEEG. (T/1686) Instead, each marketer of QEEG provided its own training. (T/1686) Further, there were no standards for determine what degree of deviation from a norm would be needed to declare an abnormality. (T/1687) QEEG data is limited to the 19 electrodes used to administer the EEG. (T/1695) Yet, in drawing its color coded pictures of results, a QEEG will color areas for which it has no data, which tends to mislead people into believing that its results showed large areas of brain damage. (T/1695-96)

Dr. Kaplan stated that his review of the literature regarding QEEG showed that it had only been discussed in 600 articles and only 11 of those articles even discussed mild brain damage. (T/1697-98) Moreover, Dr. Kaplan's review of those articles that claimed that QEEG could be used to find brain damage that was not apparent in the EEG data showed that nearly 1/4 of the subjects were medicated and the effects of the medication was not considered. (T/1699-1700) Further, analysis of the results from the control group revealed a false positive rate exceeding 50%. (T/1701-02)

Dr. Kaplan was acquainted with the AAN's position on QEEG, which had remained unchanged since 1997. (T/1702-03) It position was that while QEEG data could be useful in certain applications, it did not believe that it could be used

in diagnosing brain damage because of issues regarding the formation of the normative databases, the lack of uniformity in declaring abnormalities and the lack of correlation between the statistical variations that it deems abnormal and any disease processes. (T/1704-05) Moreover, the AAN had issued an updated paper in 2005 in response to claims being made by QEEG proponents about research showed that the identified problems had been resolved. (T/1706) It determined that the studies showed that the problems had not been resolved and continued to advance the position that QEEG was not a generally accepted means of diagnosing brain damage or mental disorders. (T/1707-10)

Dr. Kaplan stated that LORETA was a mathematical formula that purported to project the raw EEG data into a three dimensional model so that the location of the activity was easier for lay people to understand. (T/1713-14) However, even its creator admitted that the images produced were of low resolution and fuzzy. (T/1714) Moreover, a LORETA image did not purport to show where exactly a statistically variant signal came from exactly but only that it existed somewhere in a colored area. (T/1716-18)

On cross, Dr. Kaplan admitted that QEEG software generally included a function that was meant to remove extraneous signals from the EEG data. (T/1714) However, that function created additional problems skewing the data because they were only useful in removing certain types of extraneous data and had settings that

when misapplied biased all the data. (T/1758) He also noted that the fact that different results were obtained running the same data through different QEEG programs suggested that the results were flawed. (T/1760)

Dr. Robert Ruff, the national director of neurological services for the VA, testified that he was responsible for interacting with the Department of Defense and the NIH, particularly regarding the brain injuries. (T/1781-87, 1809-10) Dr. Ruff had also personally been involved in researching the uses of the QEEG since 1998. (T/1797-98, 1806) Neither the VA nor the Department of Defense used QEEG to diagnose traumatic brain damage. (T/1787-88, 1810) Instead, they used it only to conduct research in using biofeedback as part of rehabilitation. (T/1788-90, 1810) The reason neither organization used it to diagnose brain damage is that their studies on whether it actually produces evidence showing brain damage have yet to show that it is reliable. (T/1790-91) While Dr. Ruff believed that QEEG technology was promising, he did not believe that it had yet gain general acceptance as a tool for clinical diagnosis. (T/1795) He stated that one problem with QEEG was that it could not reliable recognize the extraneous signals included in EEG data from the signals actually associated with brain activity. (T/1795-96)

After considering this evidence, the trial court entered an order excluding the QEEG evidence, finding that Defendant had failed to prove that it was a generally accepted method of diagnosing brain damage. (R/9317, T/2112)

On July 30, 2012, Defendant filed a motion in limine seeking, *inter alia*, to prevent the State from introducing inferential hearsay. (R/8501-06) At the hearing on the motion, the trial court ruled that such testimony would violate Defendant's confrontation rights unless the person whose statement was being used was being called as a witness. (R/11481-82)

Immediately before the first opening statement, Defendant invoked the rule of witness sequestration and asked that Ms. Osorio be required to leave the courtroom. (T/2900) The trial court found that Ms. Osorio could be present because opening statement was not evidence and Ms. Osorio was Ana's mother. (T/2900-01) After the trial court granted one of Defendant's motions for mistrial, Defendant renewed his objection to Ms. Osorio being permitted to remain in the courtroom. (T/3641) The trial court overruled the objection. (T/3641)

During voir dire, the trial court informed the jury that it could not base its verdict on sympathy for anyone. (T/3679) It gave an example of a mother stealing food to feed her children and admitting it and inquired if the any of the veniremembers would acquit the mother simply because they felt sorry for her. (T/3679-80) One veniremember raised his hand and stated that he would not do so. (T/3680-81) When the trial court attempted to clarify the answer, Defendant objected without providing any grounds. (T/3681) The trial court responded, "Okay. I'm asking." (T/3681) When the trial court continued its discussion of this

issue, Defendant did not make any objections. (T/3681-86, 3732)

After the trial court finished its questioning and took a recess and discussed other issues with the State, Defendant noted that he had previously objected and argued that the trial court's comments had been improper because they had suggested that the jury could not exercise its pardon power. (T/3757-61) The trial court questioned the validity of Defendant's assertion, requested case law to support the assertion and indicated that it believed that individuals who would not follow the law were the proper subject of a cause challenge. (T/3761-63) Instead of providing any legal support for his position, Defendant argued that the trial court's use of the example of a sympathetic defendant to make its point about ignoring sympathy had the effect of urging the jury to convict Defendant because there was nothing sympathetic about his actions in this matter. (T/3763) The trial court rejected this assertion. (T/3763-65)

Before opening statement, the trial court noted that Ms. Osorio had been very composed during her testimony previously. (T/4087) During its opening statement, the State outlined the facts of the crime and discussed how the investigation of the use of the cell phones stolen from the victims lead them to Hector and how that led to the discovery of Victor. (T/4098-4112) It then mentioned how the victims' property was located in Victor's apartment. (T/4113) It noted that further investigation led to the discovery and arrest of Mena. (T/4113-

14) It mentioned that another lead caused the police to seek out Defendant and Roman. (T/4114) Defendant objected and asked to make a motion. (T/4114) The trial court told the State to proceed. (T/4114)

During his opening statement, Defendant asserted that the officers' testimony regarding what was said during the confession was unreliable because they had met to discuss the confession when it was discovered the recording had failed, which Defendant claimed violated a "basic investigative technique." (T/4132-33)

During trial, Agt. Royal testified that he asked Det. Marrero to provide him with copies of the tape of Defendant's confession and any other taped statement he had so that he could have the statements transcribed. (T/4339) When he received the tapes, he listened to them and realized the tape that was supposed to contain Defendant's confession was blank. (T/4339) Agt. Royal contacted Det. Marrero and learned that the confession had not been recorded on May 13, 2002. (T/4341) Det. Marrero then informed the original prosecutor of the problem, and the prosecutor directed Agt. Royal and Det. Marrero to get the officers involved in the confession together and reconstruct the confession. (T/4341-43) As a result, Agt. Royal arranged a meeting for May 15, 2002, but did not attend it. (T/4343)

During his cross examination of Agt. Royal, Defendant elicited that the police normally interviewed civilian witnesses separately so that they do not

influence one another. (T/4358-61) However, Agt. Royal saw no similar problem with having the officers present during Defendant's confession met and reconstruct the confession. (T/4358-59) Instead, he believed the meeting simply provide a means of preserving evidence regarding what was said. (T/4361-63)

Daniel Sumner, a fingerprint examiner, testified that he compared the standard fingerprints of the 5 defendants and Ana and Nelson to latent prints lifted from the truck. (T/4365-76) He identified the print lifted from rearview mirror as Defendant's print, and another print as Mena's print. (T/4376-77, R60/9743)

During cross of Det. Marrero, Defendant elicited that Det. Marrero recalled what Defendant has said during the confession and that the meeting about the confession was called at the insistence of the prosecutor. (T/4576) He had Det. Marrero testified that his notes were written in English based on his understanding of what was being said in Spanish. (T/4576-77) He questioned Det. Marrero regarding exactly how Defendant indicated that all of the defendants were involved in making the plan to rob someone and suggested that Det. Marrero was misinterpreting what Defendant said because he used the word they in answering. (T/4583-85) He also suggested that Det. Marrero was distorting Defendant's confession because Det. Marrero had described the type of bushes in which Defendant had hidden before he attacked Ana and Nelson while Defendant merely said bushes and because Det. Marrero had described the walkway from the beach

to the parking lot as a trail and Defendant would have used the word path. (T/4585-86) He elicited that Det. Marrero had not used Defendant's exact words in describing the robbery of the victims, the actions during the sexual assault, the wall along I-95, what happened when he was pulling the trigger of the gun as he killed Ana or who had thrown the victims' property in the dumpster. (T/4591-94, 4597)

He repeatedly questioned Det. Marrero regarding whether the prosecutor had actually directed the officers who were present to meet about the confession, and Det. Marrero repeatedly responded that he had. (T/4600-03) He also elicited that police officers routinely separate witnesses to avoid them influencing one another and suggested that the meeting had "destroyed" evidence of what was said during the confession to which Det. Marrero responded that his memory of what was said could not be destroyed. (T/4603-04)

Thomas Fadul, a firearms examiner, testified that he examined the gun recovered from Mena's apartment and the bullet and fragments recovered from Ana's head. (T/4627-42, 4645-69) He opined that the bullet had been fired from Mena's gun and that the weight of the bullet and the fragments was consistent with them having been one at some point in time. (T/4650-54)

Agt. Hernandez testified that he decided to remain in the area where Defendant was confessing after he brought Defendant water out of curiosity and was just listening to what was being said without taking notes but was able to

recall what he heard. (T/4709-11) He stated that he found Defendant's comment about discussing his desire to rape Ana anally particularly memorable. (T/4717-18) When the State attempted to ask why, Defendant twice objected, and the trial court twice sustained the objections. (T/4718) When the State then asked if Agt. Hernandez had ever heard the type of comment from others, Defendant again objected, and the trial court overruled the objection. (T/4718) Agt. Hernandez then stated that he had never heard a confession in which a suspect made the type of comments about a rape during his career. (T/4718) Defendant again objected, moved to strike the answer and asked to reserve another motion. (T/4718) The trial court responded that the State should proceed. (T/4718)

During cross, Defendant repeatedly questioned Agt. Hernandez about his ability to remember specific times regarding his interactions with Defendant and Hector despite the fact that he did not write reports about these events but his inability to recall the date of the meeting about the confession. (T/4726-28) He also repeatedly questioned Agt. Hernandez about his ability to recall specifics of the meeting and his not having written down what he recalled of the confession before the meeting. (T/4729-33) In doing so, Defendant elicited that Agt. Hernandez was able to recalled the confession because he had never heard a similar confession in his career. (T/4731)

After Agt. Hernandez's testimony concluded, the trial court indicated that he

recalled Defendant reserving a motion regarding Agt. Hernandez having testified that he recalled the case because it was "one of the most severe cases [he] had investigated." (T/4745) Defendant agreed that he had but did not present any argument. (T/4746) The trial court responded that it usually would have required that the testimony be elicited on redirect after Defendant opened the door on cross but that it allowed the testimony in this case because Defendant had already pursued cross examination regarding the ability of the witnesses to the confession to recall what was said with Det. Marrero and it correctly anticipated he would do so again with Agt. Hernandez. (T/4746-47)

Defendant then moved for a mistrial, claiming that the State's remarks during opening about investigative leads resulting in the arrest of Defendant and his codefendants caused the admission of inferential hearsay. (T/4747) The trial court reminded Defendant that it had repeatedly informed the jury that what the attorneys said was not evidence. (T/4748)

Dr. Christopher Wilson, a medical examiner, testified that abrasions on Ana's face and legs all appeared to have been caused near the time of her death (T/4769-73, 4782-86) During the autopsy, he found a hole in the left side of the back of Ana's head. (T/4786-87) When he xray her head, Dr. Wilson found a projectile lodged in it. (T/4789-90) He observed stippling around the hole, which was consistent with the gun being less than 12" from the head when fired. (T/4793)

On internal examination, he determined that the bullet travelled downward, destroying the midbrain and that it had left 5 fragments in her scalp. (T/4790-92) He retrieved the projectile and fragments, which were then impounded. (T/4791-92) Dr. Wilson stated that he performed a rape kit on Ana's body. (T/4793, 4796-99) Crime Scene Tech Kristie Shaw collected DNA samples from Defendant, Victor and Mena. (T/4862-64, 4918-27) She also processed the truck for evidence by vacuuming the interior, looking for stains visually and with alternate light sources, conducting presumptive testing on the stains and dusted the truck for prints. (T/4929-38, 4943, 4944) In the rear seat of the car, she identified areas that appeared to be stained with bodily fluids, swabbed those areas and impounded the entire seat bottom. (T/4938-43)

Jeffrey Johnson, a forensic biologist and DNA analyst, testified that he conducted serological testing on truck's back seat cover, the Lugz boots and the vaginal and anal swabs from Ana's rape kit and found semen on the seat cover and swabs and blood on the boots. (T/5017-21, 5069-88) Subsequent DNA testing revealed a mixture of DNA on the seat cover that was consistent with the DNA of Ana, Defendant and the Caraballos, DNA consistent with Defendant on the vaginal swab and DNA consistent with Nelson on the boots. (T/5102-12, 5115-16, 5121-23, 5146-48) The likelihood of a random match to Ana was 1 in 185 billion, the likelihood of a random match to Defendant on the swab was 1 in 11.9 billion and

the likelihood of a random match to Nelson was 1 in 725 billion. (T/5113, 5116-17, 5148)

During the guilt phase charge conference, Defendant object to the portion of the Fla. Std. Jury Instr. (Crim.) 3.13 that informed the jury that no juror had a right to violate the rules we all share, claiming it was an incorrect statement of the law. (T/5142-43) The trial court overruled the objection. (T/5143) After the defense rested, the trial court informed Defendant of his right to testify even if his attorneys had advised against doing so, and Defendant responded that he understood but did not wish to testify. (T/5320-21)

During its initial closing argument, the State recounted the evidence that had been presented through Nelson's testimony regarding what occurred and how the physical evidence supported that version. (T/5335-49) It then discussed how the investigation resulted in the discovery of the defendants. (T/5349-55) It next discussed Defendant's confession. (T/5355-62) While it was discussing the portion of the confession in which Defendant had explained how he had killed Ana, Defendant objected that the State had pulled the trigger of the gun, and the trial court overruled the objection. (T/5359) The State noted that Defendant had confessed to what it was demonstrating, Defendant again objected and the trial court overruled the objections. (T/5359-60) Finally, it discussed the law and asserted that the jury should find Defendant guilty of the highest offense proven by

the evidence. (T/5362-68)

During its rebuttal closing, the State responded to Defendant's assertion that the testimony regarding the confession was unreliable because there had been a meeting about it after it was learned that the recording was blank by noting that the meeting concerned the details of the statement because no one knew how long it would be before trial. (T/5424) It then stated that "[i]n this instance, it's ten and one half years after the crime that we're all sitting here finally waiting." (T/5424) Defendant objected and asked that the record reflect what the prosecutor did, and the trial court sustained the objection. (T/5424-25)

After the jury retired to deliberate, Defendant moved for a mistrial, claiming that the State had commented that everyone was waiting for justice and gestured toward Ms. Osorio during closing argument and that doing so violated the trial court's ruling regarding Ms. Osorio's presence in the courtroom. (T/5481-82) In doing so, he acknowledged that Ms. Osorio had not engaged in an overt emotional displays during trial but stated that she cried on occasion. (T/5482) He further complained that the prosecutor had clicked the trigger of the gun 3 times during closing, which he averred was not improper demonstration that asked the jury to place itself in Ana's position. (T/5482-83) The trial court pointed out that the evidence showed that the trigger of the gun had been pulled 3 times before Ana was shot and stated that it did not consider doing so improper. (T/5484-85)

Regarding the claim about Ms. Osorio, the State pointed out that it had not gestured toward her and had merely opened both his arms while saying that everyone was awaiting a decision from the jury. (T/5486) The trial court acknowledged that the prosecutor had not pointed toward Ms. Osorio but stated that it had sustained the objection because he had turned his body toward the family. (T/5486) The prosecutor noted that logistics of the courtroom were such that he merely appeared to be turning toward Ms. Osorio when he turned toward the gallery, which the trial court acknowledged. (T/5487-88) The trial court denied the motion for mistrial. (T/5487-88) After considering the evidence and argument of counsel, the jury found Defendant guilty as charged on all counts. (R/10289-95, T/5504) The trial court adjudicated Defendant in accordance with the verdicts. (R/11680-82)

During the penalty phase, the State present victim impact evidence. (T/5565-98) It also recalled Dep. Sarabia, who testified that he remained with Defendant after his confession was over and the other officers had left. (T/5599-5600) At that point, Dep. Sarabia asked Defendant what it felt like to kill Ana, and Defendant responded that it made him feel like a king. (T/5601)

Emilia Roman, Defendant's older half-sister, testified that their mother had 8 children with different men. (T/5608-09) Two of Defendant's mother's other children had been imprisoned and a third was murdered while Defendant was

awaiting trial. (T/5624-25) Defendant's father was good to the children but abusive to Defendant's mother. (T/5609-13) His father also drank and cheated on their mother, which resulted in several separations. (T/5612-13) Defendant's father left the family permanently when Defendant was 9 or 10 and was murdered when Defendant was 15. (T/5623) The family was poor and lived in a neighborhood in which there were drug problems and shootings. (T/5613-15) Moreover, Defendant claimed his mother's other sons were abuse toward him. (T/5629)

On one occasion when Defendant was almost 5, Emilia, Defendant and their mother had gone shopping and were walking home when a car struck Defendant and his mother as they were crossing the street. (T/5615) Defendant had a cut on his forehead and was rendered unconscious. (T/5616-17, 5619) He was originally taken to a small hospital by a civilian and was subsequently transferred to a larger hospital by ambulance. (T/5617-18) Defendant remained unconscious for 5 days and was unable move his arms and feet or use the bathroom by himself for about 12 days. (T/5619, 5639-40) Thereafter, Defendant seemed to spend all his time daydreaming and would scratch himself and then smell his fingers. (T/5621-22) He also frequently complained of headaches. (T/5623)

Emilia's mother told her Defendant did poorly in school, and Emilia believed he left school in the 7th grade. (T/5625-26) She also stated that Defendant had difficulty making friends and that the other children called in a monkey.

(T/5626) Emilia's husband had Defendant working with him in construction as an adult, but she claimed that Defendant was incapable of doing more than cleaning. (T/5626-27) Defendant lived with Emilia for 4 months in 2001, and was very loving to Emilia's children and grandchildren. (T/5627) Thereafter, Defendant's mother sent him to live with his half-sister Evelyn in Orlando because she believed he was abusing drugs. (T/5627-28) On December 27, 2001, Defendant's mother was found dead in her apartment. (T/5633) When Defendant was told, he screamed and cried. (T/5633-34)

Dr. Robert Ouauo, a neuropsychologist, testified that evaluated Defendant by interviewing him, interviewing or reading interviews with Defendant's half-sisters, reviewing medical records from Puerto Rico and the jail and depositions of Defendant's other experts and administering the Rey-15 Item Test, the Wisconsin Card Sort Test and the Stroop Color Word test. (T/5649-70, R/10412-17) He averred that Defendant obtained a score of 12 on the Rey, which indicated that Defendant was not malingering, but demonstrated perseveration. (T/5670-72) On the Wisconsin Card Sort, Defendant completed 2 of the sets but then began to answer randomly so Dr. Ouauo stopped the test. (T/5672-73) Defendant did very badly on the Stroop test. (T/5673-74) Based on this evaluation, he opined that Defendant suffered damage to his frontal lobes and suggested that Defendant be evaluated by a neurologist. (T/5667, 5675-76)

Dr. Jeffrey Colino, a neurologist who had failed the board certification examination, testified that he interviewed Defendant and conducted a physical examination (T/5713-29, 5766) On the mental status examine, he found Defendant to be concrete, lacking in verbal fluency and unable to complete a test of auditory verbal learning. (T/5729-30) He also noted that Defendant had abnormal snout and palmomental reflexes and slow fine rapid finger movements. (T/5730-32) He also reviewed medical records both from Puerto Rico and from the jail and believed that they showed that Defendant had suffered a skull fracture during his accident and that he had subsequently suffered from petit mal seizures. (T/5739-57) Dr. Colino ordered a SPECT scan and believed its results supported his concerns. (T/5734-54) Based on this evaluation, Dr. Colino testified that Defendant suffered a traumatic brain injury to his frontal lobes and seizures. (T/5754-65) However, Dr. Colino admitted that he had no opinion regarding whether those alleged conditions had any effect on Defendant's behavior at the time of the crimes. (T/5799-5800)

Dr. Michael Foley, a radiologist, testified that he reviewed the SPECT scan that had been performed on Defendant and believed it showed that a prominent defect in blood perfusion in the high convexity parietal region of Defendant's brain and several other defects in the frontal lobes. (T/5809-25)

Jose Lopez, a social worker, testified that he looked into a public housing project in Puerto Rico in which Defendant was raised and found it to be a high

crime area. (T/5856-66) He spoke to a community leader in the project who stated that Defendant's mother was very active in the community, that Defendant had living in a large family in a 3 bedroom apartment there as a child and that after he left school, he hung around the project, smoking marijuana. (T/5869-70) He stated that person averred that Defendant frequently got in fights with other children because they teased him about a problem with his face and his scratching. (T/5871) Mr. Lopez also spoke to someone who claimed that have been one of Defendant's former teachers, who claimed Defendant was a good kid whom the teachers had to protect from the other children and who avoided getting involved in fights. (T/5877-78) The person also alleged stated that Defendant's mind would wonder during class. (T/5878)

Dr. Warren Janowitz, the head of radiological and nuclear medicine services for the Baptist Hospitals in South Florida, testified SPECT scans frequently vary based on what the individual is doing during the test and the nature of the equipment used to generate them. (T/5908-17) He reviewed Defendant's SPECT scan and found it to be normal. (T/5917-18, 5926) He stated that the areas that had been described as perfusion defects were really just normal variations in brain anatomy. (T/5918-19)

Dr. Ray Lopez, a board certified neurologist, testified that he evaluated Defendant by interviewing Defendant, performing a physical exam and reviewing

Defendant's medical records, police reports, the reports of the other experts and the SPECT scan. (T/5977-85, 6000) He averred that head injuries did not necessarily cause lasting brain damage, particularly when the person was young at the time of the injury. (T/5984-85) During the interview, Defendant stated that he did not know how his father died. (T/5991) Defendant had no problems with abstraction and no abnormal snout or palmomental reflexes. (T/6007-09) The hospital records from Defendant's accident showed that he had not been unconscious or paralyzed and that he was able to walk and car for himself within days. (T/5992-93) Moreover, they showed that Defendant had no skull fracture or brain hemorrhage. (T/5993-97) While the record reflected that Defendant had been evaluated for seizures because he would be inattentive at times, the evaluation showed that he had normal EEGs and did not support a finding of seizures. (T/5998-99) As a result, Dr. Lopez opined that Defendant was normal neurologically and that there was no proof Defendant ever had seizures. (T/6012-13)

At the conclusion of the penalty phase, the trial court again discussed Defendant's right to testify with him. (T/6158-60) Defendant indicated that he understood his right to testify but declined to do so. *Id.* During his closing argument, Defendant did not challenge any of the aggravators, acknowledged that all the aggravators were based on evidence the jury had accepted during the guilt phase and admitted that the jury was required to accept the statements in his

confession at the penalty phase. (T/6113-38) In his sentencing memo, Defendant did not attempt to assert that the prior violent felony and during the course of a felony aggravators did not apply as a matter of fact. (R/11612-42) After consider the evidence and argument of counsel, the jury recommended that Defendant be sentenced to death by a vote of 9 to 3. (R/10673, T/6164)

At the *Spencer* hearing, Dr. Brad Fisher, a psychologist, testified that interviewed Defendant and reviewed his jail records, depositions of some jail guards and Dr. Suarez's report. (T/6177-86) He averred that he saw nothing suggesting that Defendant had been a problem while in pretrial detention and opined that continue to behave well while incarcerated. (T/6186-94) On cross, Dr. Fisher admitted that he was aware that Defendant had been in trouble with the law and routinely carried firearms before this case and that he had escaped from juvenile detention on a couple of occasions, (T/6206-07) He admitted that he was aware that Defendant had been transferred because jail officials had received information about escape attempts but averred that he did not consider the information. (T/6211-13) He admitted that he would not consider the fact Defendant had been tape recorded trying to hire someone to kill a witness or the fact that Defendant had threatened to murder a prosecutor. (T/6213-16) Off. Pedro Frade, a corrections officer, testified that Defendant had served as a trustee while in pretrial detention. (T/6222-24) Off. Frade had never known Defendant to be a

problem and considered him a good worker. (T/6225) When the trial court inquired if there was anything else from the defense, Defendant's attorneys indicated that they had nothing further, and Defendant raised no objection to his attorneys' statements. (T/6235-36)

At the beginning of the sentencing hearing, the trial court inquired if there was anything else that needed to be presented, and Defendant's counsel responded that Defendant had declined to make a statement to the court after consultation with counsel. (T/6255) Defendant did not object to this assertion. (T/6255-63) The trial court followed the jury's recommendation and sentenced Defendant to death. (R/11662-77, T/6263-83) In doing so, it found that 6 aggravators applied: prior violent felonies, based on the jury's guilt phase regarding the attempted murder, kidnapping and armed robbery of Nelson-great weight; during the course of a sexual battery, kidnapping and robbery-great weight; avoid arrest-great weight; for pecuniary gain-some weight; HAC-great weight; and CCP-great weight. *Id.* It considered a number of facts regarding Defendant's upbringing and mental dtate and determined that these facts established mitigation that was entitled to little weight both individually and cumulatively. *Id.* It considered and rejected the assertions that the extreme duress mitigator applied, that Defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impair and that Defendant's age was

mitigating. *Id.* It also sentenced Defendant to life imprisonment on all the other counts and ordered that all of Defendant's sentence be served consecutively. (R/11677, 11683-85, T/6283) This appeal follows.

## SUMMARY OF THE ARGUMENT

The lower court properly determined that Defendant's post *Miranda* statement was admissible. Moreover, any error in the admission of the statement would be harmless in light of the eyewitness testimony and physical evidence. The evidence was also sufficient to sufficient to sustain Defendant's convictions.

Defendant's claim that he is entitled to a life sentence in light of *Hurst* is meritless, particular as his death sentence is based on 3 aggravators expressly found by the jury at the guilt phase and the overwhelming and uncontested evidence proving the 3 other aggravators. Defendant's sentence is proportionate.

The trial court also did not abuse its discretion in denying a motion for mistrial based on an officer's testimony that the uniqueness of Defendant's confession made it memorable. It also did not abuse its discretion in finding that a comment in opening did not cause the admission of inferential hearsay. Nor did the trial court abuse its discretion in allowing Ana's mother to be present at trial or in denying a motion for mistrial based on a comment regarding the time the matter had been pending that was responsive to an argument Defendant was making.

The unpreserved and meritless issue regarding the allocution does not merit

relief. The trial court properly excluded evidence based on QEEG testing. The issues regarding jury pardons are unpreserved and meritless. The trial court did not abuse its discretion in denying a motion for mistrial based on the State's use of the murder weapon to demonstrate Defendant's confession accurately. Defendant is also entitled to no relief based on the alleged cumulative effect of error.

## ARGUMENT

### I. DEFENDANT'S CONFESSION.

Defendant first asserts that the lower courts erred in finding that his post-*Miranda* statements were admissible. However, the lower court properly determined that Defendant's pre-warning statement did not render his post warning statement inadmissible and that Defendant voluntarily waived his rights.

In reviewing a ruling on a motion to suppress, this Court presumes a lower court's finding of fact are presumed correct if they are supported by competent, substantial evidence but reviews a lower court's application of the law to those facts *de novo*. *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001). Here, in determining that the post *Miranda* confession was admissible, the lower court relied on the following facts:

> The defendant was located by law enforcement officers in Orlando between 1:00 and 2:00 a.m. on April 29, 2002. The defendant was transported to the Orlando headquarters of the Florida Department of Law Enforcement ("FDLE") prior to 2:40 a.m.
>
> Upon arrival at the FDLE headquarters, the defendant was

> seated in the FDLE cafeteria with an FDLE agent. The agent was aware that no *Miranda* warnings had yet been administered. Other agents were looking for a tape recorder so that the defendant's interview could be recorded if the defendant agreed to speak with them.
>
> The agent initially said nothing to the defendant. After several minutes, the defendant's demeanor changed and he began to cry. The agent said, "I hope you know what kind of trouble you are in." The defendant replied, "Yes, I know. I killed her." He said that he told her to get down on her knees and that the gun did not go off until the third time he pulled the trigger. After the defendant said this, the agent left the room to report this information to other agents because up until that moment, the law enforcement agencies had hoped that Ms. Angel was still alive. The defendant said nothing further at that time and was not asked any questions.
>
> At 3:06 a.m. the officers had located a tape recorder and began administration of *Miranda* rights. The defendant signed the waiver form at 3:15 a.m. The defendant gave a detailed confession which included the abduction of both victims, the theft of the victims' jewelry, credit cards, bank cards, and property, the sexual assault and murder of Ms. Angel, and the attempted murder of Mr. Portobanco.

*Lebron*, 979 So. 2d at 1094. These findings are supported by the testimony of Det. Marrero, Dep. Sarabia and Agt. Hildago. (T/465-535, 569-97, 733-71) This is particularly true regarding the finding that more than 5 minutes elapsed between the unwarned and warned statements. Both Det. Marrero and Agt. Hildago stated that Defendant made his initial statement at 2:42 a.m. (T499, 770) They both stated that they immediately left the room and that when they returned, they administered *Miranda* rights, obtained a written waiver at 3:15 and took the statement. (T/510-13, 771-78) As such, these factual finding are entitled to a presumption correctness.

Moreover, the lower court's application of the law to these facts was correct. In *Oregon v. Elstad*, 470 U.S. 298, 300-03 (1985), the Court was confronted with a claim that a statement a defendant made after waiving his *Miranda* rights had to be suppressed because the defendant had previously made an incriminating statement before being read his rights. It held:

> that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.

*Id.* at 314. In doing so, it expressly rejected the assertion that the state was required to show factors such as the passage of time, change in place of interrogation and change in interrogators that were relevant to determining whether the taint of actual coercion was present to show that the statement made after warnings was admissible. *Id.* at 309-14. It also rejected as "neither practicable nor constitutionally necessary" a requirement that the police inform the defendant that his unwarned statement could not be used against him before the warned statement would be admissible. *Id.* at 316-17.

In *Missouri v. Seibert*, 542 U.S. 600, 604-07 (2004), the Court was confronted with the admissibility of a post warning statement in a situation in which the police had intentionally not provided *Miranda* warnings before

thoroughly questioning a defendant and obtaining a confession and then provided warnings and had the defendant repeat the confession. Justice Kennedy issued the controlling opinion. *Marks v. United States*, 430 U.S. 188, 193 (1977); *see also Ross v. State*, 45 So. 3d 403, 422 (Fla. 2010). In that opinion, he held that *Elstad* would continue to govern the admissibility of confessions unless the police had engaged in the deliberate two-step process of interrogation had been used. *Id.* at 622. If the process had been used, then a statement was only admissible if "curative measures," such as a substantial break in the time and circumstances of the interrogation had occurred or an additional warning concerning the inadmissibility of the first statement was given. *Id.*

In *Ross*, 45 So. 3d at 424, this Court attempted to harmonize *Elstad* and *Seibert*, and held that in determining the admissibility of a post warning statement, a court should consider:

> (1) whether the police used improper and deliberate tactics in delaying the administration of the *Miranda* warnings in order to obtain the initial statement; (2) whether the police minimized and downplayed the significance of the *Miranda* rights once they were given; and (3) the circumstances surrounding both the warned and unwarned statements including "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second [interrogations], the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first."

It found the statement in that case inadmissible because the officer continued to

question the defendant for hours after the point that departmental policy required him to administer *Miranda* warning, he downplayed the significance of the *Miranda* warnings when he did administer them, and he obtained the confession in the same circumstances as the unwarned statements were obtained through use of the unwarned statements. *Id.* at 424-33. In doing so, it acknowledged that it had previously applied *Elstad* and held a post warning statement admissible where the pre-warning questioning had been brief and there was no evidence of a "concerted effort to undermine the *Miranda* warnings" in *Davis v. State,* 859 So. 2d 465 (Fla. 2003), and did not question the validity of that ruling. *Ross*, 45 So. 3d at 421-22.

Here, as the lower court determined, the evidence did not support a finding that the police deliberately engaged in a two-step interrogation. In fact, it did not even include the 10 minutes worth of questioning that this Court found insufficient to render a post warning statement inadmissible in *Davis*. Instead, he consisted of Agt. Hildago making a single statement to Defendant, and Defendant responding by acknowledging that he had killed Ana without being asked a single question. (T/500, 771-72) After Defendant made this statement at 2:42 a.m., the officers did not question Defendant until after he was read his rights, indicated he understood his rights and executed a written waiver of the rights at 3:15 a.m. (T/466-70, 500, 776-78, R/3669, 9702) While Defendant's initial statement did indicate that Defendant had killed Ana and attempted to kill Nelson, it did not include the

details of his role in the kidnapping, robbery and sexual battery that he included in his post warning statement. (T501-02, 771-72, 782-83) Further, the evidence showed that the initial statement was not used in eliciting the post warning statement. (T/513) Given these circumstances, the lower court properly determined that the post warning statement was admissible under *Davis* and *Elstad*.

In attempting to avoid this result, Defendant insists that this Court should find that Defendant did not voluntarily waive his rights because the police did not read him his rights when they arrested him and when he was at the police station without anyone speaking to him, the seizure of his clothing at the time of his arrest, the fact he was yelled at by his brother-in-law, his being emotional during the time he was waiving his rights, the failure of the police to conduct testing to determine if Defendant was intoxicated and the alleged failure of the officer to inform Defendant of his rights adequately. However, none of these circumstances show that the waiver of rights was involuntary.

While the State's burden to show that a defendant has voluntarily waived his rights has been described as heavy, the Court has made clear that it is satisfied by simply showing by a preponderance of the evidence that the defendant was advised of his rights, understood them and acted in a manner inconsistent with their invocation. *Berghuis v. Thompkins*, 560 U.S. 370, 383-89 (2010). Moreover, this Court has recognized that *Miranda* warnings are sufficient so long as they

"reasonably conve[y] to [a suspect] his rights as required by *Miranda*," which this Court has identified as "[1] that they have a right to remain silent, [2] that anything they say will be used against them in court, [3] that they have a right to a lawyer's help, and [4] that if they cannot pay for a lawyer one will be appointed to help them." *State v. Powell*, 66 So. 3d 905, 907, 909 (Fla. 2011). This Court has only required a police officer to offer an explanation of how these rights work when a defendant asks a clear question concerning how the rights work. *Almeida v. State*, 737 So. 2d 520, 522-26 (Fla. 1999). Moreover, the Court has held that a *Miranda* waiver is not involuntary simply because the police did not inform a defendant of the subject matter of the interrogation when the waiver was obtained. *Colorado v. Spring*, 479 U.S. 564, 576 (1987). Further, the Court has made clear that a waiver is not considered invalid based on a defendant's mental or emotional state where there is no evidence that the police produced that mental or emotional state through their own overreaching. *Colorado v. Connelly*, 479 U.S. 157, 166, 169-71 (1986).

Given this body of precedent, Defendant's claim that his waiver was involuntary is specious. While Defendant acts as if the police engaged in misconduct by not reading him his rights at the time of his arrest and during the time no one was speaking to him, this Court has made it clear that *Miranda* warnings are not required outside the context of a custodial interrogation and cannot even be invoked until such a custodial interrogation is being conducted or is

at least imminent. *Sapp v. State*, 690 So. 2d 581, 585-86 (Fla. 1997). Since it was undisputed that the police did not even attempt to interrogate Defendant at the time of his arrest or while officers were simply sitting silently with Defendant, the fact that they did not read Defendant his rights at these times was not improper.

The same is true of Defendant's claim regarding the fact that he had been arrested, his clothing was seized at the time of his arrest and he was given a Tyvek suit. The police may lawfully seize the clothing of a person incident to a lawful arrest when there is reason to believe that the clothing made contain evidence of the crimes and substitute clothing is provided. *United States v. Edwards*, 415 U.S. 800, 801 (1974). Here, by the time the police arrested Defendant, they had already received Nelson's eyewitness account that he and Ana had been kidnapped, that Ana had been raped repeatedly and that Nelson had been stabbed and beaten. Moreover, they had already obtained the confessions of Mena and Victor that had identified Defendant has having participated in these crimes. (T/96, 124-25, 406-07, 410) Victor also told the police that Ana had been brought to Orlando alive and was last seen in the custody of Mena, Roman and Defendant. (T/153, 169-70, 212) This evidence provide the police with probable cause to arrest Defendant and made the seizure of his clothing, particularly his underwear, lawful as part of a search incident to arrest. Thus, the seizure does not amount to the type of police overreaching needed to make a *Miranda* waiver involuntary. *Connelly*, 479 U.S. at

169-71.

Defendant's suggestion that his brother-in-law's actions render his waiver invalid is also meritless. As the Court has recognized, the actions of third parties is not the type of police overreaching needed to render an action involuntary. *Connelly*, 479 U.S. at 166, 169-71. Here, Defendant's brother-in-law was clearly such a third party at the time he yelled at Defendant as he approached Defendant in defiance of a police directive that he remain in the car and the police acted to prevent Quinones from getting to Defendant and sent him away when he acted. (R81/831-32) In fact, in *Elstad*, the evidence showed that the police permitted the defendant's father to approach the defendant and yell at him. *Elstad*, 470 U.S. at 301. However, the Court cited to that incident as attenuating the *Miranda* violation. *Id.* at 313-14. As such, Defendant's reliance on this incident does not support his claim that his waiver of rights was involuntary.

Further, Defendant's suggestion that he did not properly waive his rights is also specious. Agt. Hildago testified that he presented Defendant with a waiver of rights form that contained all four of the rights required under *Miranda*, that he read the portion of the form containing those rights and providing for a waiver aloud to Defendant and that Defendant indicated that he understood the rights as they were being read. (T/466-67, 777-78) He averred that the only portion of the form he did not read was the first line. (T/841) However, the only information that

would have been contained on the first line would have been the crimes about which he was being questioned. (R/3669, 9792) Such information is not relevant to the validity of the waiver. *Spring*, 479 U.S. 564, 576. Not only did not police testify that Defendant agreed to speak to them willingly after receiving these warning but also they produced a written waiver. (T/777-78, R/3669) While Agt. Hildago admitted that he did not explain to Defendant how counsel would be appointed for him, such information is not part of the warnings needed to obtain a *Miranda* waiver. *Powell*, 66 So. 3d at 907, 909 (Fla. 2011); *Almeida*, 737 So. 2d at 522-26. Thus, the record amply shows that Defendant was proper advised of his rights and waived them. *Thompkins*, 560 U.S. at 383-89.

Further, Defendant's claim that his waiver was involuntary because the officers did not conduct tests to determine whether he was intoxicated is also meritless. The officers testified that Defendant did not appear to be intoxicated during their encounters with him. (T/534-35) While Quinones made statements to the police that suggested that Defendant used marijuana and had a problem with drinking, those statements did not suggest that Defendant had done so near the time of his arrest or interview. (T/504-05, 778) Thus, there was nothing to support a claim that Defendant's waiver was involuntary due to intoxication. *Jorgenson v. State*, 714 So. 2d 423, 426 (Fla. 1998); *see also Walker v. State*, 957 So. 2d 560, 575-76 (Fla. 2007). Thus, Defendant's argument that the failure to test him shows

that he *Miranda* waiver was involuntary should be rejected.

Finally, Defendant's claim that his waiver was involuntary simply because he was emotional at the time is specious. The evidence showed the fact that Defendant became emotional was not the result of any police overreaching. As such, the fact that he was emotional did not provide a basis to find his waiver involuntary. *See Connelly*, 479 U.S. at 169-71. Thus, Defendant's claim that his confession could have been suppressed because his waiver was not voluntary should be rejected and his convictions affirmed.

Even if the lower court had erred in failing to suppress Defendant's confession, any error would be harmless. The State presented Nelson's eyewitness testimony regarding the facts of the crimes. The evidence showing that Ana was shot and killed execution style by a gun found in codefendant Mena's possession. The victims' property was found in and around codefendant Victor's apartment. The fact that Defendant was one of the 5 men involved in these crimes was confirmed by the presence of his and Mena's fingerprints recovered from the truck that had DNA from Ana, Defendant and the Caraballos on its back seat. Moreover, Defendant's DNA was found in semen in Ana's vagina and blood that was DNA matched to Nelson was found on Defendant's boots.[1] During its closing argument,

[1] This evidence, together with Defendant's confession, was more than sufficient to sustain his convictions. *Rigterink v. State*, 66 So. 3d 866, 898 (Fla. 2011).

the State relied heavily on Nelson's testimony and the corroborating physical evidence. (T/5349-68) It limited its discussion of Defendant's confession to the role he played in the crimes. However, the role that Defendant played in the crimes was not relevant to Defendant's guilt for felony murder nor any of the underlying felonies. *Ray v. State*, 755 So. 2d 604, 608-09 (Fla. 2000). As such, any error in the admission of Defendant's confession was harmless. *Gonzalez v. State*, 700 So. 2d 1217, 1219 (Fla. 1997). The trial court should be affirmed.

## II. THE *HURST* CLAIM.

Defendant next contends that he is entitled to a life sentence pursuant to §775.082(2), Fla. Stat. because his death sentence was imposed under the statutory scheme the United States Supreme Court found unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016). However, Defendant is entitled to no relief.

While Defendant avers that §775.082(2), Fla. Stat. mandates that he receive an immediate life sentence, the plain language of that provision provides that it is only applicable when the death penalty is declared unconstitutional. However, in *Hurst*, the Court did not find the death penalty unconstitutional. Instead, *Hurst* merely held that *Ring v. Arizona*, 536 U.S. 584 (2002), applied to Florida's capital sentencing scheme and rendered it unconstitutional to the extent it "allow[ed] a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Hurst*, 136 S. Ct.

at 624. As both this Court and the United States Supreme Court have already held, the type of error is a mere procedural error regarding the identity of the fact finder. *Schriro v. Summerlin*, 542 U.S. 348, 354-55 (2004); *Johnson v. State*, 904 So. 2d 400, 409-10 (Fla. 2005). In fact, both this Court and the United States Supreme Court have recognized that this type of error does not even necessarily require a reversal and is, instead, subject to a harmless error analysis. *Washington v. Recuenco*, 548 U.S. 212, 215-22 (2006); *Galindez v. State*, 955 So. 2d 517, 521-23 (Fla. 2007); *see also Neder v. United States*, 527 U.S. 1, 6-15 (1999). In fact, in *Hurst* itself, the Court did not require imposition of a life sentence but remanded the matter to this Court to determine whether the error it found was harmless. *Hurst*, 136 S. Ct. at 624. Thus, *Hurst* did not hold the death penalty itself unconstitutional, and §775.082(2) does not apply. Defendant's argument to the contrary should be rejected and the trial court affirmed.

This is all the more true as the error identified in *Hurst* simply did not occur in this case. As noted above, the Court determined it was violative of the Sixth Amendment to impose a death sentence, where the finding of the aggravator necessary to impose a death sentence was made by a judge independently of any jury factfinding. *Hurst*, 136 S. Ct. at 624. Here, during the guilt phase, the jury found that Defendant was guilty of kidnapping, robbing and attempting to murder Nelson and kidnapping, robbing and sexually battering Ana. (R/10289-95) In

sentencing Defendant to death, the trial court relied on the jury's finding of guilt of the crimes against Nelson to apply the prior violent felony aggravator, on the jury's finding of guilt of the kidnapping and sexual battery of Ana to apply the during the course of a felony aggravator and of the jury's finding of guilt of the robbery of Ana to apply the pecuniary gain aggravator. (R/11664-65, 11667-68) In fact, because the jury had found Defendant guilty of these crimes during the guilt phase, Defendant could not even legally argue that these aggravators did not apply at the penalty phase. *Way v. State*, 760 So. 2d 903, 917 (Fla. 2000). Moreover, the record reflects that Defendant did not even attempt to do so either in his argument to the jury or in his sentencing memo.[2] (R/11612-42, T/6113-38) Thus, Defendant's claim that he is entitled to relief under *Hurst* is meritless.[3]

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[2] In fact, Defendant did not challenge any of the aggravators during his argument to the jury, acknowledged that all the aggravators were based on evidence the jury had accepted during the guilt phase and admitted that the jury was required to accept the statements in his confession at the penalty phase. (T/6113-38) In his confession, Defendant admitted that after Ana had been kidnapped, robbed, gang raped and seen Nelson violently removed from the truck, she was driven further, removed from the truck and shot execution style as she begged for her life, which provided ample evidence of HAC and CCP. *Hudson v. State*, 992 So. 2d 96, 115-16 (Fla. 2008). Moreover, Defendant admitted that he killed Ana because he was he believed she could identify him. (T/4507) This statement proved the avoid arrest aggravator. *Trease v. State*, 768 So. 2d 1050, 1056 (Fla. 2000). Thus, any error in the lack of specific jury findings of these aggravators was harmless. *Neder*, 527 U.S. at 6-15; *Galindez*, 955 So. 2d at 521-23.

[3] In fact, the United States Supreme Court has repeatedly denied certiorari in cases where the death sentence was based on a jury finding of an aggravator even in the wake of *Hurst*. *Jackson v. State*, 180 So. 3d 938, 964 (Fla. 2015), *cert. denied*, 136

To the extent that Defendant may contend that he is nevertheless entitled to relief because *Hurst* allegedly requires the jury to make express and unanimous findings regarding the existence of all of the aggravators and the weighing process, Defendant would still be entitled to no relief. *Hurst* did not hold that jury sentencing was required. Instead, it held that Florida's capital sentencing scheme was unconstitutional because it "required the judge alone to find the existence of an aggravating circumstance." *Hurst*, 136 S. Ct. at 624. In fact, Justice Breyer refused to join the majority opinion because it was not requiring jury sentencing. *Id.* (Breyer, J., concurring). Moreover, the Court expressly stated that it was only overruling its prior decisions in *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Hurst*, 136 S. Ct. at 624. However, *Spaziano* and *Hildwin* had held not only that the jury was not required to find an aggravator necessary to make a defendant eligible for a death sentence but also that jury sentencing was not constitutionally required. *Spaziano*, 468 U.S. at 458-65. By only overruling the portions of *Spaziano* and *Hildwin* that allow a

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S. Ct. 2015 (2016); *Hobart v. State*, 175 So. 3d 191, 203 (Fla. 2015), *cert. denied*, 136 S. Ct. 1454 (2016); *Fletcher v. State*, 168 So. 3d 186 (Fla. 2015), *cert. denied*, 136 S. Ct. 980 (2016), *reh'g denied*, 136 S. Ct. 1403 (2016); *Smith v. State*, 170 So. 3d 745 (Fla. 2015), *cert. denied*, 136 S. Ct. 980 (2016), *reh'g denied*, 136 S. Ct. 1487 (2016).

judge independently to find an aggravator needed to make a defendant eligible for a death sentence, the Court left the portions of those decisions that held that jury sentencing was not constitutionally required intact. Thus, *Hurst* did not require jury sentencing.

In fact, a similar situation occurred in the wake of *Ring*. In *Walton v. Arizona*, 497 U.S. 639, 648-52 (1990), the Court considered and rejected challenges to several aspects of Arizona's capital sentencing scheme, including its lack of any jury involvement during sentencing and its provision that required defendants to prove that the mitigators outweighed the aggravators to avoid a death sentence. In *Ring*, the Court reconsidered the constitutionality of Arizona's capital sentencing scheme in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the Arizona Supreme Court's pronouncement that a defendant was not eligible for a death sentence until an aggravator was found. *Ring*, 536 U.S. at 595-97. As such, it held that *Apprendi* applied and required the finding of an aggravator to be treated as an element of the offense of capital murder and found by a jury. *Id.* at 602-05. Just as it did with *Spaziano* and *Hildwin* in *Hurst*, it then overruled "*Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609. When in the wake of *Ring*, the Kansas Supreme Court held that the Constitution now required that the state bear the burden of proving that the

aggravators outweighed the mitigators, the United States Supreme Court reversed, finding that portion of *Walton* determining that it was constitutional for a state to require a defendant to bear the burden of proving that a death sentence was not warranted had not been overruled and controlled the issue. *Kansas v. Marsh*, 548 U.S. 163, 169-73 (2006). Similarly here, because the Court only overruled *Spaziano* and *Hildwin* "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty," *Hurst*, 136 S. Ct. at 624, it did not overrule their holdings that jury sentencing is not constitutionally required.

Moreover, in section II of the opinion in *Hurst*, the Court held that Florida's capital sentencing statute was unconstitutional in light of *Ring*. *Hurst*, 136 S. Ct. at 621-22. In doing so, it recognized that *Ring* had arisen from its prior decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Id.* at 621. It acknowledged that its holding in *Apprendi* was based on a determination that "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Hurst*, 136 S. Ct. at 621 (quoting *Apprendi*, 530 U.S. at 494). It admitted that its determination in *Ring* that *Apprendi* rendered Arizona's capital sentencing scheme unconstitutional was based on the realization that "'the required finding of an aggravated circumstance exposed *Ring* to a greater punishment than that authorized by the jury's guilty verdict.'" *Hurst*,

136 S. Ct. at 621 (quoting Ring, 536 U.S. at 604). Further, it expressly only overruled *Spaziano* and *Hildwin* "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Hurst*, 136 S. Ct. at 624. Moreover, at the conclusion of the opinion when it summarized its holding, the Court again limited its holding to the "existence of an aggravating circumstance." *Hurst*, 136 S. Ct. at 624. Thus, throughout the portions of the opinion in which the Court reached and stated its holding, the Court focused on only the finding of an aggravating circumstance necessary to make a defendant eligible for a death sentence. In contrast, the language in *Hurst* that suggests that mitigation and weighing would be included comes not from the section II of the opinion or the conclusion where the Court stated its holding but from section III of the opinion in which the Court was merely explaining why it was rejecting the arguments the State had presented. *Id.* at 622. Given the inconsistency between this language and the language in which the Court actually articulated its holding and the fact that the language is not from the portions of the opinion in which the holding was reached and enunciated, any suggestion that this language constitutes the holding of *Hurst* would incorrect.

Additionally, the language is actually inconsistent with the precedent on which the Court relied. In *Apprendi*, the Court examined whether the Sixth Amendment required a jury finding regarding a fact that made a defendant eligible

for a sentence that exceeded the statutory maximum for the offense of which he was convicted. It held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. However, it expressly noted that it was not requiring jury sentencing and was only requiring jury determinations of facts that made a defendant eligible for a greater sentence. *Id.* at 497. At the time, it rejected the assertion that this holding would invalidate state capital sentencing schemes based on the belief that once a jury had found a defendant guilty of a capital offense, the statutory maximum for the crime was death. *Id.* at 497 & n.21. Thus, the Court's focus was on facts that made a defendant eligible for a sentence and not all findings that influenced the selection of a sentence.

Two years later, the Court addressed the implications of *Apprendi* for Arizona's capital sentencing scheme based on the Arizona Supreme Court's holding that the Court had misunderstood how Arizona's capital sentencing scheme worked and that a death sentence was not authorized until an aggravator was found at the penalty phase. *Ring*, 536 U.S. at 595-96. Because Arizona had no jury involved in the penalty phase at all, it determined that Arizona's capital sentencing scheme was unconstitutional "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for

imposition of the death penalty." *Id.* at 609. However, it did not alter the fact that the focus of this type of Sixth Amendment claim was on findings needed to increase the maximum sentence; not facts that merely influenced the sentence selected. In fact, it expressly noted that the claim being presented in that case was limited to the finding of an aggravator. *Id.* at 597 & n.4.

While the Court has altered the portion of the holding of *Apprendi* to cover findings that increased the sentencing range to which a defendant is exposed even if they did not change the statutory maximum, it has not changed the focus from findings that made a defendant eligible for a sentence. *Alleyne v. United States*, 133 S. Ct. 2151, 2155, 2158 (2013); *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012); *Cunningham v. California*, 549 U.S. 270 (2007); *Blakely v. Washington*, 542 U.S. 296, 303-05 (2004). In fact, it recently reaffirmed that the Sixth Amendment right underlying *Ring* and *Apprendi* did not apply to factual findings made in selecting a sentence for a defendant after a finding had been made that authorized the defendant to receive a sentence within a particular range. *Alleyne*, 133 S. Ct. at 2161 n.2 ("Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.' *Williams*

*v. New York*, 337 U.S. 241, 246, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing."); *see also United States v. O'Brien*, 560 U.S. 218, 224 (2010). Given this continued focus on those findings that authorize a greater sentence, any assertion that *Hurst* somehow required jury findings about mitigation and the weighing process would be incorrect.

This is all the more true because the Court had frequently referred to needed factual findings in these cases but had consistently tied the determination that the findings were needed to make a defendant eligible for a greater sentence. For instance, in *Blakely*, the Court found error in sentencing a defendant in excess of the sentence available based on the facts from conviction because "the jury has not found all the facts which the law makes essential to the punishment." *Blakely*, 542 U.S. at 304 (internal quotations omitted). Yet, it immediately acknowledged that it was not discussing facts that did not increase the defendant's sentence. *Id.* at 304-05. The Court again used similar language in *Alleyne*, 133 S. Ct. at 2159. Yet as noted above, it stated that those facts did not include all facts that influenced selection of a sentence and was limited to facts that made a defendant eligible for a sentence. *Id.* at 2161 n.2; *see also Southern Union Co.*, 132 S. Ct. at 2352; *Cunningham*, 549 U.S. at 291. Given this repeated linking of essential fact findings

to findings that increase the punishment, the use of the phrase "each fact necessary to impose a sentence of death" in *Hurst* was nothing more than a shorthand reference to a factual finding that made a defendant eligible for a death sentence; not considerations made in selection an appropriate sentence for a particular defendant. Thus, it is incorrect to assert that *Hurst* required jury findings on all factual considerations made in imposing a sentence. Instead, as the Court itself stated in *Apprendi*, "once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed." *Apprendi*, 530 U.S. at 497 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n.2 (1998)(Scalia, J, dissenting)).

Further, the United States Supreme Court has made clear that it does not even consider decisions regarding mitigation and the weighing process factual findings at all. In *Kansas v. Carr*, 136 S. Ct. 633 (2016), which was decided a week after *Hurst*, the Court discussed the distinct determinations of eligibility and selection under capital sentencing scheme. *Id.* at 642. In doing so, it stated that an eligibility determination was limited to findings related to aggravating circumstances and that determinations regarding whether mitigating circumstances existed and the weighing process were selection determinations. *Id.* It stated that the selection determinations were not factual findings at all. *Id.* Instead, it termed

the determinations regarding the existence of mitigating circumstances as "judgment call[s]" and weighing determinations "question[s] of mercy." *Id.* While it has been suggested that Carr's statements about eligibility should be ignored because findings regarding mitigation are not required by Kansas law, this is untrue. Kansas's death penalty statute expressly requires that a decision regarding whether a death sentence should be imposed be based on a determination that "one or more of the aggravating circumstances enumerated in K.S.A. 21-6624, and amendments thereto, exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist." Kan. Stat. Ann. § 21-6617. Thus, *Hurst* does not require the jury to make findings other than the findings necessary to make a defendant eligible for a death sentence.

Moreover, any suggestion that the dicta in *Hurst* had made findings regarding weighing and mitigation part of death eligibility in Florida should also be rejected. The Court has recognized that federal courts, including it, are bound by state court interpretations of state law except when the interpretation was an "obvious subterfuge to evade consideration of a federal issue." *Mullaney v. Wilbur*, 421 U.S. 684, 691 & n.11 (1975). It has recognized that how a capital sentencing statute functions to make a defendant eligible for the death penalty is an issue of state law. *Zant v. Stephens*, 462 U.S. 862, 870-73 (1983). Thus, the United States

Supreme Court was bound, as a matter of constitutional federalism, by this Court's interpretation of what facts had to be found for a defendant to be eligible for the death penalty unless it could be shown that this Court's interpretation was an obvious attempt to avoid a finding of a Sixth Amendment violation.

However, no such showing can be made. Well before any of the *Apprendi*-based decisions existed, this Court had held not only is a death sentence authorized once a single aggravating circumstance is found but also that death is the presumptive proper sentence once any aggravator is found. *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973). After *Ring*, this Court adhered to the interpretation that a death sentence was authorized if an aggravator was found.[4] *State v. Steele*, 921 So. 2d 538, 545 (Fla. 2005). Since this Court's decision regarding eligibility was not an obvious attempt to avoid the Sixth Amendment issue, it was binding on the Court. Since any claim regarding the language in *Hurst* would have the United States Supreme Court overruling this Court on an issue of state law, it should be rejected.

Moreover, the holding in *Marsh* further belies any assertion that the Court considered findings regarding mitigation and weight to be the functional equivalent of elements for which jury findings are necessary under the *Apprendi* line of cases. There, the Court determined that it was not unconstitutional for a state to require

[4] In the wake of *Hurst*, the Legislature has now codified these holdings. §921.141(2)(b)(2), Fla. Stat. (2016).

that a defendant prove that a death sentence should not be imposed through the presentation of mitigation under a statute that like, §921.141, Fla. Stat., required the weighing of aggravators and mitigators to make a sentencing decision. *Marsh*, 548 U.S. at 169-73. However, the Court has made clear that the State must bear the burden of proving each element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). It has held that it is unconstitutional for a State to shift the burden of proof regarding an element to the defendant. *Mullaney*, 421 U.S. at 703-04. Thus, by allowing States to require defendants to carry the burden of proof regarding mitigation and the weighing process even where the state statute requires consideration of mitigation and weighing, the Court has clearly shown that it does not require determinations regarding mitigation and weighing to be considered elements or necessary facts to be found by a jury. Thus, any suggestion Defendant might make that *Hurst* was violated in this case based on findings regarding mitigation and weight should be rejected and his sentence affirmed.

Any reliance Defendant might place on *Rauf v. State*, 2016 WL 4224252 (Del. Aug. 2, 2016), is misplaced as that case was wrongly decided. In *Rauf*, the Delaware Supreme Court determined that *Hurst* required that a jury to determine whether a defendant be sentenced to death based on a unanimous decision that aggravators outweighed the mitigators but reached no single majority decision regarding why this was true. *Id.* at *1-*2. Instead, 3 justices opined that this was

true because they believed that the Sixth Amendment embodied a historic right to jury sentencing and they believed that the use of the phrase "fact necessary to impose a sentence of death" indicated that the Court intended to require a jury determination of any fact considered in imposing a death sentence. *Id.* at *2-*40. A fourth justice agreed that a jury finding was needed on all aggravators even though only one aggravator was necessary to make a defendant eligible for a death sentence based on a hypothetical situation in which a judge might have exercised his discretion not to impose a death sentence based merely on the aggravator the jury found, which she believed made the finding of the other aggravators "necessary." *Id.* at *40-*51.

However, the United States Supreme Court has recently made clear that neither the text of the Sixth Amendment nor its history support any claim that it has ever applied to matters that only concern sentencing. *Betterman v. Montana*, 136 S. Ct. 1609, 1613-15 (2016). Moreover, as argued above, the suggestion that findings regarding weighing and mitigation are included in the Sixth Amendment is refuted by the manner in which the Court has used wording regarding necessary factual findings to refer to findings needed to make a defendant eligible for a greater sentence and not all findings made during sentencing throughout the *Apprendi*-line of cases, the language in *Carr* and the holding in *Marsh*. Thus, the 3 Delaware Supreme Court Justices who relied on the alleged Sixth Amendment

history of jury sentencing and the word "necessary" were simply wrong. Further, the reasoning of the fourth justice is flatly refuted by the United States Supreme Court's recognition that its *Apprendi*-line of case do not apply to "factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law' even where those fact findings "lead judges to select sentences that are more severe than the ones they would have selected without those facts." *Alleyne*, 133 S. Ct. at 2161 n.2. Thus, any attempt to rely on *Rauf* should be rejected.[5]

## III. AGT.HERNANDEZ'S TESTIMONY.

Defendant next contends that the trial court abused its discretion in denying his motion for mistrial based on testimony from Agt. Hernandez. However, this is not true.

Pursuant to §90.608(4), Fla. Stat., one permissible method of impeaching a witness's testimony is to show a defect in the witness's ability to recall an event. *See Gamble v. State*, 492 So. 2d 1132, 1133–34 (Fla. 5th DCA 1986). Further, this Court had recognized that such impeachment permits a witness to testify to matters that to qualify, explain, or limit the impeachment testimony. *Tompkins v. State*, 502 So. 2d 415, 419 (Fla. 1986). Further, this Court has long recognized that a party presenting a witness made present evidence on direct examination as "'anticipatory

[5] Moreover, given the finding of 6 strong aggravators and only weak nonstatutory mitigation, Defendant's sentence is proportional. *Doorbal v. State*, 837 So. 2d 940, 962–63 (Fla. 2003).

rehabilitation.'". *Lawhorne v. State*, 500 So. 2d 519, 520 (Fla. 1986); *Bell v. State*, 491 So. 2d 537, 538 (Fla. 1986). As Justice Barkett explained in her concurrence in *Bell*, the reason why such anticipatory rehabilitation is proper is that "[i]f a jury is going to hear [the testimony], it matters not when it is heard." *Bell*, 491 So. 2d at 538–39.

Here, during his opening statement, Defendant had clearly indicated that he intended to challenge the reliability of the testimony regarding his confession on the basis that the officers had met and discussed the confession after it was learned that the recording had failed. (T/4131-33) Moreover, Defendant had already acted on this intention before Agt. Hernandez was called. Even though Agt. Royal had not been present during Defendant's confession and did not participate in the meeting about it, Defendant extensively cross examined Agt. Royal regarding the propriety of allowing witnesses to speak to one another and the effect of such an allowance on the witnesses' statement. (T/4358-61) During cross examination of Det. Marrero, Defendant reiterated this line of questions, suggesting that allowing witnesses to speak to each other "destroyed" the witnesses' recollection. (T/4603-04) Moreover, he extensively cross examined Det. Marrero regarding the accuracy of his memory of Defendant's confession . (T/4582-86, 4591-98) Given these circumstances, the trial court did not abuse its discretion in allowing the State to elicit that Agt. Hernandez had an independent recollection of statements Defendant

made in his confession and why he had that recollection as anticipatory rehabilitation. *Bell*, 491 So. 2d at 538–39. This is all the more true as Defendant did attempt to impeach Agt. Hernandez regarding his ability to recall what Defendant had said during cross examination. (R112/4726-33) Moreover, he made no attempt to suggest that he had not intended to pursue this line of cross examination before the trial court allowed the question when the trial court indicated that it had allowed the question because it had anticipated the cross examination in denying Defendant's motion for mistrial. (T/4745-47) Thus, the trial court did not abuse its discretion in finding that Agt. Hernandez's statement did not create an absolute necessity for a mistrial. *Ferguson v. State*, 417 So. 2d 639, 641 (Fla. 1982). It should be affirmed.[6]

## IV. COMMENT IN OPENING.

Defendant next contends that the lower court abused its discretion in denying a motion for mistrial based on a comment in opening statement that

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[6] Further, while Defendant asserts that Agt. Hernandez stated that "this was the worst case he had ever seen" in response to this question, this is simply untrue. Instead, the record reflects that Agt. Hernandez stated:

> In my 25 years of a law enforcement officer, I never heard a confession like that when he talked to -- to the agent about the -- how he and the other rape and did whatever.

(T/4718) Thus, Agt. Hernandez's answer did not concern the nature of the crime at all; it concerned the uniqueness of Defendant's confession. Moreover, Agt. Hernandez repeated his explanation that the uniqueness of Defendant's confession made it memorable in responding to Defendant's questioning regarding his ability to recall the statement without any objection from Defendant. (T/4731)

Defendant asserts constituted the admission of inferential hearsay. However, the trial court did not abuse its discretion in denying Defendant's motion.

In *Postell v. State*, 398 So. 2d 851, 854 (Fla. 1981), the court held that the admission of testimony that created an "inescapable inference" "that a non-testifying witness had furnished the police with evidence of the defendant's guilt" is violative of the prohibition on admitting inadmissible hearsay even when the actual content of information that the non-testifying witness provided is not disclosed. However, this Court has held that there is no violation of the prohibition on the presentation of inadmissible hearsay merely because a police officer testified regarding steps taken during an investigation without identifying anyone the police spoke to or alluding to any conversations they had. *Evans v. State*, 808 So. 2d 92, 103-04 (Fla. 2001). Moreover, this Court has recognized that a police officer can testify about the actions he took based on "a tip" or "information received" where the officer never describes the tip or information received or its source. *See Wilding v. State*, 674 So. 2d 114, 118 (Fla. 1996); *State v. Baird*, 572 So. 2d 904, 908 (Fla. 1990).

Applying this line of precedent, the trial court did not abuse its discretion in finding that the alleged violation of *Postell* did not create an absolute necessity for a mistrial. *Ferguson*, 417 So. 2d at 641. First, as seen above, the cases on which Defendant is relying concern the admission of evidence. However, Defendant is

complaining about an alleged comment in opening statement. This Court has made it clear that comments made in opening statement do not constitute evidence. *Burns v. State*, 609 So. 2d 600, 605-06 (Fla. 1992). Thus, the comment the State made in opening could not possibly have resulted in the improper admission of evidence as the trial court noted in denying Defendant's motion for mistrial. (T/4748)

This is all the more true because while Defendant avers that the State directly linked the fact that 2 of the codefendant had been arrested with the fact that the police knew they were looking for Defendant, this is not true. Instead, during its opening statement, the State discussed the facts of the crime, how the investigation of the use of the cell phones stolen from the victims lead them to Hector and how that led to the discovery of Victor and the victims' property in and around Victor's apartment. (R108/4098-4113) It then comment:

> So at that point, the police had one down, but they had four more to go.
>
> Now, as this investigation was unfolding, the police are fielding information from a lot of different sources. And one investigative lead that they got took them to another apartment complex call Wellington Woods. And Special Agent King, the one that had busted in through Victor Caraballo's evicted apartment, goes there along with an FBI agent, because the FBI is also involved in this case.
>
> And when they go to that apartment complex, they encounter an individual by the name of Cesar Mena. He's the one that I told you was driving the truck the whole time. Cesar Mena is also taken into custody. And at that point, they've got two down, and three more to go.

> The police continue fielding investigative leads. And now they know that they are looking for two individuals by the names of Jesus Roman and Joel Lebron.

(R108/4113-14) Nothing about that statement created an "escapable inference" that anyone who would not be testifying provided evidence of Defendant's guilt. Instead, the statement that police knew to look for Defendant based on fielding investigative leads from numerous sources is more akin to testimony regarding the police acting based on information received, testimony which this Court has repeatedly indicated is proper. *See Wilding*, 674 So. 2d at 118; *Baird*, 572 So. 2d at 908. In fact, by mentioning the need to field leads from numerous sources between the arrest of the codefendants and the identification of Defendant, the State actually weakened the inference that Defendant had been identified by the codefendants. As such, the trial court did not abuse its discretion in denying a motion for mistrial based on the claim that the comment created an inescapable inference that the codefendants had identified him. *Ferguson*, 417 So. 2d at 641.

## V. ANA'S MOTHER'S PRESENCE.

Defendant next asserts that the trial court abused its discretion in denying a motion for mistrial based on Ana's mother's presence during trial. However, the trial court did not abuse its discretion in allow Ms. Osorio to be present in the courtroom or in denying his motion for mistrial regarding a comment the State

made during its rebuttal guilt phase closing.[7]

While §90.616(1), Fla. Stat. does provide the trial court with the authority to exclude witnesses from the courtroom "so that they cannot hear the testimony of other witnesses," the victim's next of kin in a criminal proceeding is expressly exempted from this rule unless there is a showing that the presence of the next of kin will be prejudicial. §90.616(2)(d), Fla. Stat. Additionally, Art. I, §16, Fla. Const. provides "the next of kin of homicide victims" with a constitutional right "to be present . . . at all crucial stages of criminal proceedings." Because the next of kin possess this statutory and constitutional right to be present, this Court has required that a defendant show that he was prejudiced by the next of kin's presence to show that a trial court abused its discretion in allowing a next of kin to remain in a courtroom. *Booker v. State*, 773 So. 2d 1079, 1093-96 (Fla. 2000); *see also Davis v. State*, 875 So. 2d 359, 373 (Fla. 2003). In determining whether such prejudice has been shown, this Court has considered whether the relative testified regarding a material issue and her presence provided an opportunity to change her testimony and whether the relative engaged in overt emotional outbursts during the proceedings. *Beasley v. State*, 774 So. 2d 649, 668-69 (Fla. 2000); *see also Gore*, 599 So. 2d at 985-86. Moreover, the mere fact that a relative may have displayed

[7] This Court reviews a trial court's ruling on whether a witness can be present in the courtroom for an abuse of discretion. *Gore v. State*, 599 So. 2d 978, 986 (Fla. 1992).

some emotion during the proceeding is not sufficient to show an emotional outburst sufficient to demonstrate prejudice. *Beasley*, 774 So. 2d at 669; *Burns v. State*, 609 So. 2d 600, 604-05 (Fla. 1992).

Here, when Defendant first requested that the trial court exclude Ms. Osorio from the courtroom pursuant to §90.616, Fla. Stat., he made no attempt to suggest that her presence in the courtroom would be prejudicial either because she would be providing material testimony that could be influenced by her presence or because of a concern that she was engage in an emotional outburst. (T/2900-91) In fact, he admitted that Ms. Osorio's testimony would be limited to issues that were not in genuine dispute. (T/2901-02) When he renewed the objection after the trial court had granted a mistrial, Defendant again did not claim that Ms. Osorio's testimony would be influenced by her presence and again conceded that her testimony concerned matters that were not in genuine dispute. (T/3641) Ms. Osorio, who was the first witness during the guilt phase, testified regarding seeing Ana before she left on her date with Nelson, identifying the clothing Ana was wearing at the time and the belonging she had with her and describing Nelson's appearance when she saw him in the hospital after the crimes. (T/4139-58) Moreover, she merely provided victim impact testimony at the penalty phase. (T/5565-75) Further, the record reflects that Defendant never made any contemporaneous objection regarding any show of emotion from Ms. Osorio.

Instead, it reflects that after the mistrial, the trial court noted that Ms. Osorio had been very composed without contradiction by Defendant. (T/4087-88) Further, when he moved for a mistrial after closing argument, Defendant acknowledged that Ms. Osorio had not engaged in any emotional outbursts that disrupted the proceedings and merely claimed to have seen her crying on occasion. (T/5482)

Given these circumstances, Defendant failed to demonstrate the prejudice necessary to overcome Ms. Osorio's constitutional and statutory right to be present. *Booker*, 773 So. 2d at 1093-96; *Burns*, 609 So. 2d at 604-05; *Gore*, 599 So. 2d at 985-86. Thus, the trial court did not abuse its discretion in denying Defendant's requests that she be excluded from the courtroom.

Further, Defendant's suggestion that the trial court abused its discretion in denying a motion for mistrial based on what occurred during closing argument is specious. As this Court has held, "[a] motion for mistrial is addressed to the sound discretion of the trial judge and '. . . should be done only in cases of absolute necessity.'" *Ferguson*, 417 So. 2d at 641. While Defendant claimed in moving for mistrial that the State had made an "allusion" to Ms. Osorio while commenting that "ten and a half years have passed, and that justice and – everyone is waiting for justice," (R118/5482) the record does not support the claim. Instead, the record reflects that during his closing, Defendant argued that the jury should disbelieve the testimony regarding his confession because the officers had met after it was

learned the confession had not been recorded. (T/5380-85) During its rebuttal closing argument, the State was responded to this assertion by stating:

> So if their meeting on May the 15th to get the details – not the main thing that was said. Nobody's going to forget the main thing that was said. But nobody knows how long it's going to be before a trial is held. In this instance, it's ten and one half years after the crime that we're all sitting here finally waiting. Everyone.

(T/5424) As he did so, the prosecutor merely turned toward the gallery and held his arms open without pointing toward Ms. Osorio at all. (T/5486) Given these circumstances, the State's comment was nothing more than fair response to Defendant's argument and its gesture does not change that fact. *Walls v. State*, 926 So.2d 1156, 1166 (Fla. 2006). As such, the trial court did not abuse its discretion in denying Defendant's motion for mistrial based on the comment and gesture. It should be affirmed.

## VI. ALLOCUTION.

Defendant next complains that the trial court did not obtain a waiver of the right to make a statement at the *Spencer* Hearing on the record. However, Defendant is entitled to no relief because the issue is unpreserved and meritless.

This Court had held that before an alleged error in a trial court proceeding can be raised on appeal, it must have been preserved by a contemporaneous objection. *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978). Moreover, this Court has required a defendant who wishes to challenge the propriety of waiver of rights

to preserve the issue by moving to withdraw the waiver. *Griffin v. State*, 820 So. 2d 906, 913 (Fla. 2002); *State v. Thompson*, 735 So. 2d 482, 484 (Fla. 1999).

Here, the record reflects that Defendant never made any objection to the trial court not personally addressing him regarding his alleged desire to allocute at sentencing. Instead, it shows that after Defendant had presented evidence at the *Spencer* hearing, the trial court expressly asked the defense if it had anything else to present, Defendant's counsel responded negatively and Defendant did not object to this statement. (T/6235-36) At the sentencing hearing, Defendant's counsel expressly informed the trial court that Defendant did not want to make a statement to the court, and Defendant again did not object. (T/6255-63) Moreover, Defendant never filed any pleading suggesting that his waiver of his desire to speak at sentencing was involuntary. As such, this issue is unpreserved.

Even if the issue was properly before this Court, Defendant would still be entitled to no relief. While Defendant stresses that record waivers are required regarding certain constitutional rights, he ignores that the Supreme Court has held that a defendant has no constitutional right to allocute at sentencing. *Hill v. United States*, 368 U.S. 424, 428 (1962). Moreover, this Court has recognized that "[n]either precedent nor common sense require" affording a defendant greater rights during a sentencing hearing than at trial. *See Capuzzo v. State*, 596 So. 2d 438, 440 & n.2 (Fla. 1992). At trial, both this Court and the Supreme Court have

recognized that a defendant has a constitutional right to testify and that the decision regarding whether to exercise that right must be made by the defendant personally. *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Morris v. State*, 931 So. 2d 821, 833 (Fla. 2006). However, this Court has repeatedly held that a trial court is not required to obtain a record waiver that right. *Lott v. State*, 931 So. 2d 807, 818 (Fla. 2006); *Torres-Arboledo v. State*, 524 So. 2d 403, 409-11 (Fla. 1988). Instead, this Court that a defendant claiming a denial of his right to testify is required to "make his objection known to the court during trial, not as an afterthought." *Torres-Arboledo*, 524 So. 2d at 410.

Here, , Defendant did not make any objection to his not being allowed to address the court known either at the *Spencer* hearing or at sentencing. He did so despite the fact that the trial court had already discussed with Defendant his personal right to testify on his own behalf at both the guilt and penalty phases. (T/5320-21, 6158-60) The trial court affirmed.

**VII. QEEG EVIDENCE.**

Defendant next contends that the trial court erred in determining that QEEG evidence was inadmissible. However, the trial court properly determined that the QEEG evidence was inadmissible.

In determining whether novel scientific evidence is admissible under *Frye*, this Court has required a showing that the manner in which an expert is using a

scientific principle to reach his opinion is generally accepted in the scientific community. *Ramirez v. State*, 810 So. 2d 836, 845-52 (Fla. 2001). Moreover, this Court has stated that the mere testimony of an expert that his opinion is based on generally accepted science not sufficient if application of the science lacks indicia of acceptability. *Id.* at 844. Additionally, when the scientific evidence is derived mathematically manipulating the data acquired, the application of the mathematical principle to the type of analysis being done must also be shown to be generally accepted. *Brim v. State*, 695 So. 2d 268, 270, 271 (Fla. 1997). Further, when the testimony is based on use of a database, the evidence is not admissible when it is based on testimony from an expert who has no knowledge of how the database was assembled and used. *Murray v. State*, 692 So. 2d 157, 163-64 (Fla. 1997). Moreover, this Court has made clear that the burden of showing that *Frye* is satisfied is always on the proponent of the evidence. *Williamson v. State*, 994 So. 2d 1000, 1009-10 (Fla. 2008). It reviews whether the burden was carried *de novo*. *Murray*, 692 So. 2d at 164.

As Defendant tacitly admits, this Court has already determined that QEEG is not a generally accepted means of diagnosing brain damage. *Hernandez v. State*, 180 So. 3d 978, 1006-10 (Fla. 2015); *Mendoza v. State*, 87 So. 3d 644, 666 (Fla. 2011). He then suggests that this record provides a basis for reconsideration of that ruling because Dr. Lambros testified regarding peer-reviewed articles concerning

QEEG and the use of data derived from QEEG through a program called LORETA to produce pictures that purported to show areas of brain damage and he stated that QEEG had been registered with the FDA. However, the trial court properly determined that this information was insufficient to show that QEEG was generally accepted as a means of diagnosing brain damage.

While Dr. Lambros identified one article regarding the use of normative databases in analyzing QEEG and identified numerous abstracts of articles concerning LORETA, he admitted that he had read 20% of the articles whose abstracts he identified and did not even claim that any of them concerned using QEEG as a means of diagnosing brain damage. (R91/1914-22) Further, other evidence at the hearing showed that while there were numerous articles that had been published regarding QEEG use, most of them concerned uses other diagnosing brain damage. (T/1537-40, 1697-98) Additionally, while Defendant insists that the fact a QEEG has been registered with the FDA shows that it is a generally accepted means of diagnosing brain damage, his expert acknowledged that such registration did not suggest approval of QEEG. (T/1955-60) Thus, the lower court was correct to find that this information was insufficient to show that QEEG was generally accepted as a means of diagnosing brain.

This is all the more true as the evidence presented at the hearing was similar to the evidence relied upon in *Hernandez*. Dr. Kaplan and Dr. Ruff both testified

that QEEG was not generally accepted as a means of diagnosing brain damage. (T/1657-68, 1795) Even Defendant's expert neurologist testified that it was not proper to diagnose brain damage based on QEEG data. (T/1417-19) Moreover, both the AAN and APA had taken the position that QEEG was generally accepted. (T/1370, 1514-15, 1702-06, 1794-95) Further, both Dr. Kaplan and Dr. Ross stated that pictures produce by LORETA from QEEG data were misleading because they colored large areas as if the entire area of a brain was damaged even though the data only supported a conclusion that there was damage somewhere in that area. (T/1613-15, 1695-96, 1716-18) Moreover, Dr. Lambros admitted that he had derived generated $1 million in gross income by conducting QEEG tests and that he had begun using QEEG in forensic work to increase its acceptance and generate more income from it. (T/1947-48, 1953-55) Thus, Dr. Lambros hardly qualified as the type of impartial expert needed to show that QEEG was generally accepted. *Ramirez*, 810 So. 2d at 851. Moreover, while Dr. Lambros admitted that his results were based on using information from a database, he did not know anything regarding the creation of the database or even what portion of the database was use in the comparison. (T/1973, 1977) Thus, his testimony based on the use of the database was properly excluded. *Murray*, 692 So. 2d at 163-64. Given these circumstances the lower court was correct to find that Defendant had not carried his burden of showing that QEEG was generally accepted. *Hernandez*, 180 So. 3d

at 1006-10.[8]

In attempting to avoid this result, Defendant cites to a number of cases that he asserts show that QEEG testing is admissible. However, in those cases, the courts merely mentioned the fact that evidence based on a QEEG analysis had been presented without analyzing the admissibility of such evidence. *Jennings v. Stephens*, 537 Fed. Appx. 326, 328-29, 332-34 (5th Cir. 2013), *rev'd on other grounds*, 135 S. Ct. 793, 190 L. Ed. 2d 662 (2015); *Sellers v. Ward*, 135 F.3d 1333, 1337 (10th Cir. 1998); *Young v. Stephens*, 2014 WL 509376, *7 & n.93, *10 (W.D. Tex. Feb. 10, 2014), *vacated in part*, 2014 WL 2628941 (W.D. Tex. June 13, 2014); *Kendall v. Colvin*, 2014 WL 119346, *1 (D. Utah Jan. 13, 2014); *Smith v. Ryan*, 2012 WL 6019055, *2-*7 (D. Ariz. Dec. 3, 2012); *Florman-Goforth v. Astrue*, 2011 WL 4020938, *2 (C.D. Cal. Sept. 9, 2011); *Pinter v. Shinseki*, 2010 WL 5136141, *1 (Vet. App. Dec. 10, 2010). As this Court has recognized, the mere fact that an opinion mentioned the presentation of a type of evidence without

[8] This is all the more true as the record here actually refutes statements in Hernandez that suggested that QEEG has some acceptance. While this Court discussed testimony suggesting the VA used QEEG in relation to brain injury, id. at 1007, Dr. Ruff, the National Director of neurological services for the VA, testified that the VA's use of QEEG was not in diagnosing brain injury but in researching biofeedback as a means of rehabilitation. (T/1781-91, 1810) Moreover, Defendant's own expert admitted that QEEG was not used to diagnose brain damage by universities and hospitals and that the use that was made by such organizations did not involve the database comparisons applied in this case. (T/1604-09, 1505-06)

analyzing the admissibility of the evidence does not support an assertion that the evidence is admissible. *Mendoza*, 87 So. 3d at 665 n.20. Thus, Defendant's citation to these cases does not support his argument. The trial court should be affirmed.

Defendant also suggests that this Court should not even consider whether *Frye* was satisfied because the legislature amended §90.702, Fla. Stat. in 2013 to adopt the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). However, the determination of whether the correct procedure was applied is based on the procedural law in effect at the time of the proceeding. *Whittaker v. Eddy*, 147 So. 868, 873 (1933). Here, the trial court considered the admissibility of the QEEG evidence in 2012, regarding a trial conducted that same year. (R/9317, T/2112) The change to the *Daubert* standard did not occur until July 1, 2013. Ch. 2013-107, Laws of Fla. Moreover, Defendant's suggestion that the *Daubert* standard should be applied based on the standard of review for *Frye* determinations ignores that the standard of review for *Daubert* rulings is an abuse of discretion. *Booker v. Sumter Cty. Sheriff's Office/N. Am. Risk Servs.*, 166 So. 3d 189, 192 (Fla. 1st DCA 2015). Thus, Defendant's suggestion that the trial court's ruling should be reviewed under *Daubert* should be rejected.

Moreover, even if the *Daubert* standard applied, the trial court should still be affirmed. Under *Daubert*, a trial court determines the admissibility of scientific evidence by determining whether it is relevant and reliable by assessing such

factors as (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known potential rate of error of the particular scientific technique under consideration; and (4) whether the scientific theory or technique has achieved general acceptance in the relevant scientific community. *Daubert*, 509 U.S. at 593–94. Here, the evidence showed that not only that QEEG was not generally accepted as a means of diagnosing brain damage but also that the reason why it was not generally accepted was that it had not been shown to be reliable and it had been shown to produce a high rate of false positive results. (T/1574-77, 1701-02, R90/1790-91) The evidence showed that the process was dependent on inputting EEG data that did not contain extraneous signal, that selecting such data required a level of training and expertise in reading EEG's and that the selection process itself introduced an unquantifiable level of error. (T/1405-10) However, QEEG analysis was routine performed by individuals lacking training in reading EEG. (T/1670-71) Moreover, Defendant's own experts admitted that there was no standard set for determining the level of deviation from the norm was required before a result was determined to be abnormal. (T/1557-61, 1930) In fact, in this very case, the defense experts had run QEEG analyses on the same data using different QEEG systems and reached different results. (T/1495-96) Thus, even under *Daubert*, Defendant failed to carry his burden of proving QEEG evidence was a reliable

means of diagnosing brain damage. *See Ramirez*, 810 So. 2d at 849-50. Given these circumstances, the trial court would not have abused its discretion in excluding the QEEG data under *Daubert* if it applied. *See In re Breast Implant Litigation*, 11 F. Supp. 2d 1217, 1238 (D. Colo. 1998).

Even if the trial court's exclusion of the QEEG evidence had been improper, any error would be harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). At the penalty phase, Defendant was permitted to present expert testimony that he had brain damage based on evaluations conducted through accepted scientific analyses. (T/5667, 5675-76, 5754-65) He was permitted to present the results of SPECT that corroborated this testimony. (T/5809-25) Moreover, the trial court found that Defendant had brain damage as mitigation. (R/11662-77) Thus, presentation of the QEEG results would have been cumulative, and any error was harmless.

## VIII. PARDON POWER.

Defendant next asserts that the trial court made improper comments during voir dire that indicated that an exercise of the jury's pardon power was a violation of the law. He further contends that the trial court abused its discretion in refusing to modify the standard jury instructions to remove language that indicated that jury pardons are improper. However, Defendant is entitled to no relief as the issues are unpreserved and meritless.

To preserve an issue regarding an allegedly improper question in voir dire, a

defendant must make a contemporaneous objection on the specific grounds raised on appeal and must obtain a ruling on the objection. *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982); *Castor*, 365 So. 2d at 703. Here, when the trial court indicated that a verdict could not be based on sympathy and articulated its hypothetical regarding a mother stealing bread to feed a hungry child, Defendant raised no objection at all. (T/3678-80) Moreover, when he did object the trial court after had already asked the question and was discussing an answer with a veniremember, Defendant only raised a general objection without specifying any grounds. (T/3681) When the trial court responded to this ruling merely by saying "Okay," Defendant did not request a ruling on the objection. (T/3681) Instead, he allowed the trial court to continue to question other veniremembers about the hypothetical and their ability to set aside feelings of sympathy in rendering a verdict without any objection whatsoever. (T/3681-86, 3732) Only after the trial court had completed all of its questioning of the venire, had taken a recess and had discussed other issues with the State did Defendant finally informed the court that the basis of its objection had been that the question allegedly deprived the jury of its "pardon power." (T/3757-61) Even at that point, the trial court still did not clearly rule on the issue. Instead, it merely expressed incredulity about Defendant's position and requested legal support of it. (T/3761-63) Thus, this issue is not preserved for review.

To preserve an issue regarding a jury instruction, a defendant must make a specific objection to the language in the jury instruction that he is claiming was improper on appeal. *Globe v. State*, 877 So. 2d 663, 676–77 (Fla. 2004). Here, while Defendant now claims that Fla. Std. Jury Instr. (Crim.) 3.10(1) is a misstatement of the law, he did not object to this instruction below. Instead, he objected to Fla. Std. Jury Instr. 3.13. (R115/5142-43) As such, Defendant's issue regarding the jury instructions is also not preserved for review.

Even if the issue regarding the voir dire question had been preserved, the trial court would still not have abused its discretion.[9] As this Court has recognized, the purpose of voir dire is to secure an impartial jury. *Moody v. State*, 418 So. 2d 989, 993 (Fla. 1982). A juror is considered impartial when he will set aside his personal feelings and "render a verdict solely on the evidence presented and the instructions on the law given by the court." *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). This Court has recognized that "hypothetical question[s] making a correct reference to the law of the case to aid in determining the qualifications or acceptability of a prospective juror" are proper. *Pait v. State*, 112 So. 2d 380, 383 (Fla. 1959). As a result, it has been held that hypothetical questions designed to determine whether a potential juror would base a verdict on sympathy are proper.

[9] Decisions regarding the scope of voir dire are reviewed for an abuse of discretion. *Franqui v. State*, 699 So. 2d 1312, 1322 (Fla. 1997).

*Williams v. State*, 931 So. 2d 999, 1000 (Fla. 3d DCA 2006). Here, the trial court did nothing more than present the venire with a hypothetical question concerning a mother stealing food to feed a hungry child to determine whether its members were willing to set aside any personal feelings of sympathy and return a verdict based solely on the facts and the law. (T/3678-86) As such, the hypothetical was entirely proper, the trial court would not have abused its discretion in overruling a proper objection to it. *Williams*, 931 So. 2d at 1000. It should be affirmed.

In arguing that the hypothetical was improper, Defendant asserts that the question deprived him of his "right" to a jury pardon. However, this Court has recognized that a jury that "pardons" a defendant is acting illegally, disregarding the law and violating its oath. *Sanders v. State*, 946 So. 2d 953, 957-58, 959-60 (Fla. 2006). In fact, this Court has held that it is improper to instruct the jury on its pardon power and for a defendant to present argument about the jury's pardon power, *Ibar v. State*, 938 So. 2d 451, 473 (Fla. 2006); *Dougan v. State*, 595 So. 2d 1, 4 (Fla. 1992); *see also Harding v. State*, 736 So. 2d 1230, 1230-31 (Fla. 2d DCA 1999). Moreover, comments that urge the jury not to follow the law are not improper. *Benayer v. State*, 40 So. 3d 860, 861 (Fla. 4th DCA 2010); *Frazier v. State*, 970 So. 2d 929, 930-31 (Fla. 4th DCA 2008). Thus, the trial court's refusal to remove these correct statements of the law from the jury instructions so that the jury could act illegally was correct. *See Gross v. State*, 765 So. 2d 39, 47 (Fla.

2000).

## IX. USE OF THE GUN.

Defendant next contends that trial court abused its discretion in denying a motion for mistrial when the prosecutor pulled the trigger on the murder weapon during closing argument. However, the trial court did not abuse its discretion in overruling Defendant's objection to the State's use of the murder weapon during closing nor in denying a motion for mistrial based on its use.[10]

This Court has held that comments describing the murder for the jury based on the evidence are not improper so long as they do not actually invite the jurors to place themselves in the victim's position even where they encourage the jury to visualize the crime. *Mosley v. State*, 46 So. 3d 510, 520-22 (Fla. 2009); *Bailey v. State*, 998 So. 2d 545, 555-56 (Fla. 2008). Moreover, this Court had held that it is not improper for a trial court to allow the State to demonstrate the circumstances of a murder physically so long as the demonstration is an accurate and reasonable reproduction of what occurred based on the evidence. *Brooks v. State*, 175 So. 3d 204, 239-40 (Fla. 2015). Here, the State presented ballistics evidence proving that the gun it admitted into evidence was the weapon used to murder Ana. (T/4443-46,

[10] This Court reviews trial court rulings regarding the propriety of comments in closing for an abuse of discretion. *Smith v. State*. 866 So. 2d 51, 64 (Fla. 2004). Abuse of discretion is also the standard of review for motions for mistrial. *Id.* at 59.

4625-26, 4650-54) It also presented Defendant's confession, in which he admitted that he led Ana from the truck to the sound barrier at the edge of the highway shoulder, forced her to kneel and then pulled the trigger on the gun 3 times before the gun fired and that Ana was begging for her life as this occurred. (T/4501-05, 4720-22, 4984-85) Based on this evidence, the State then argued in closing:

> He has this gun. And it doesn't matter who owned it. It doesn't matter who's apartment it was found in. You know it's at least four pounds of pressure on a finger to pull the trigger. And while she's on her knees begging for her life – begging who? Begging him. . . . This is what he told the detectives that he did. This is the evidence in the case – that he told the detectives that he did it. Please, don't kill me. . . . And then this is what he told the detectives that he did. . . . That's the evidence in the case, ladies and gentlemen. And further, the evidence in the case is he blew a hole in that young girl[']s head, and it killer her.

(T/5359-60) As it made these comments, the State clicked the trigger on the gun 3 times. *Id.* Since the State's comments merely described what had occurred and allowed the jury to visualize the evidence and its demonstration using the actual murder weapon was an accurate and reasonable demonstration of the what occurred, the comments and demonstration were proper. *Brooks*, 175 So. 3d at 239-40; *Mosley*, 46 So. 3d at 520-22; *Bailey*, 998 So. 2d at 555-56. Thus, the trial court did not abuse its discretion in overruling Defendant's objections and denying

his motion for mistrial. It should be affirmed.[11]

## X. CUMULATIVE ERROR.

Defendant finally asserts that he is entitled to a new trial based on cumulative error. However, this Court has repeatedly held that this claim is meritless were the individual allegations of error are unpreserved or meritless. *Victorino v. State*, 23 So. 3d 87, 108 (Fla. 2009). As argued above, this is true here. The trial court should be affirmed.

## CONCLUSION

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

Respectfully submitted,

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[11] Defendant's citation to *Smith v. State*, 866 So. 2d 51 (Fla. 2004), does not compel a different result. There, the State had slammed the murder down on the defense table during closing even though there was nothing in the evidence to suggest that the gun had been slammed on anything during the crime. *Id.* at 53-55, 63. Moreover, this Court actually determined that the slamming of the gun did not merit a mistrial despite agreeing that the act of slamming the gun merited an admonishment. *Id.* at 64. Thus, *Smith* does not support Defendant's assertion that the trial court abused its discretion.

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by email to Roy D. Wasson, roy@wassonandassociates.com, Courthouse Plaza-Suite 600, 28 West Flagler Street, Miami, FL 33130, this 29th day of August 2016.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Times New Roman 14-point font.

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