

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1551

KHALID ALI PASHA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

BLAIR M. DICKERT
Assistant Attorney General
Florida Bar No. 85835
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655
Primary: capapp@myfloridalegal.com
Secondary: Blair.Dickert@
myfloridalegal.com

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STATEMENT OF CASE AND FACTS

Shortly before 3 p.m. on August 22, 2003, Raneesha Singleton drove a car belonging to her mother, Robin Canady, to the Woodland Corporate Center, parked it near the building where Canady worked and walked across the center to attend a training class. (S73/1743-45, 1747) When she finished work, Canady used the car to return to the home she shared with Defendant, whom she had married during the summer of 2002, and her 6 children, including Singleton. (S73/1742, 1745) When Defendant later arrived home from his mosque, Canady and Defendant discussed Canady's plan to pick up Singleton after her class ended between 10 and 11 p.m. (S71/1596; S73/1771)

Around 10 p.m., Canady left to get Singleton, and Defendant also left in the van his work provided and went to visit his ex-wife, Donna Murray. (S73/1743, 1746, 1764) Canady proceeded to the center where she was observed waiting for Singleton by Roland Ware. (S72/1614-15) Defendant left Murray's home at 10:55 p.m. and drove to the center. (S73/1764, S76/2229) On his way, he called Murray to complain that her kitchen clock was slow and had caused him to miss an 11 p.m. appointment. (S73/1769)

Shortly before Singleton's class got out, Ware observed Defendant emerge from some bushes wearing a clean, white jumpsuit, approach Canady's car and speak to her. (S72/1616-18)

When the class got out, Singleton came outside with Carlos Smith, Kenia Perez and Gyzel Ware, Ware's wife. (S72/1651, S73/1776) Singleton got into the front passenger's seat of Canady's car, and, before leaving, Perez, Smith and Ware all observed an African-American male, who Ware identified as Defendant, in the backseat. (S72/1617, 1651-52; S73/1775-76, 1779)

Around 11:15 p.m., Jose Sanchez was sitting at a picnic table in the center waiting for his wife Gigi when he observed Defendant walking through the center wearing a white jumpsuit covered in blood and white boots while carrying a shiny object. (S70/1415-16, 1429; S80/738) Frightened and concerned for the safety of his wife and others, Mr. Sanchez called his wife and told her to remain where she was until he came to get her. (S68/1041; S70/1416; S80/737-38) He then got into his truck, followed Defendant briefly and then went and picked up his wife. (S70/1417-18, 1429; S80/737-38) When Ms. Sanchez got in the truck, she called 911. (S70/1418-19; S80/740-41) While Ms. Sanchez remained on the phone with 911, the Sanchezes drove back toward the area where Mr. Sanchez had last seen Defendant. (S70/1418-19; S80/740-41) They observed Defendant go into bushes near the building in which Singleton had training still wearing the bloody suit and carrying the shiny object and emerge wearing

tan pants and a white t-shirt. (S68/1044-53, 1061; S70/1423-24) Defendant then ran to his van and started to drive out of the center with the Sanchezes following him. (S68/1050, S70/1424-25, S80/753-55)

As this was happening, Dep. Stahlschmidt and Dep. Mason were dispatched in response to the 911 call. (S23/230, 267-68) When the police arrived, Defendant's van was stopped at a red light by the exit to the center, and the Sanchezes were in the truck behind him, flashing their lights, motioning toward the van and yelling. (S23/234, 271; S67/1052, S68/1066; S70/1426; S72/1656) The officers activated their lights and approached the van. (S23/234-35, 271-74) They observed that Defendant was sweating profusely, gripping the wheel tightly and staring straight ahead. (S23/249, 273, S72/1663) Stahlschmidt also observed blood spatter on the left side of Defendant's t-shirt. (S23/251, 275, S72/1662) Mason, with the assistance of a flashlight, looked into the back of the van and saw the bloody jumpsuit and boots. (S23/237, 239, 240, 246-47, 278) The officers then asked Defendant to exit the van and noticed that Defendant had no shoes when he complied after a brief hesitation. (S23/240, 275-77; S72/1661) Asked about the blood on his shirt, Defendant claimed to have killed a rabbit. (S23/252, 437)

The officers then spoke to the Sanchezes, who were still present, and had them show them where they had seen Defendant while backup officers remained with Defendant. (S23/55, 79; S68/1052-54, 1057, 1061; S70/1425, 1427-29; S72/1663, S80/756) During this trip, Stahlschmidt entered a cul-de-sac, where he found Canady's car covered in blood and crashed into a wall, pools of blood in the street and a pair of shoes. (S72/1663-67) He was initially unable to find any victims but did observe bloody drag marks going into a wooded area. (S72/1668) While he followed the drag marks, Stahlschmidt contacted the officers with Defendant, who handcuffed Defendant for their safety while informing Defendant he was not under arrest. (S23/260; S25/433)

After walking about 15 feet into the wooded area, Stahlschmidt found the bodies of Canady and Singleton, both of which showed significant signs of trauma. (S72/1669) While neither had a pulse, both bodies were warm. (S72/1669-70) Jewelry was present on both bodies, which suggested that they were not killed during a robbery. (S70/1393-94) As a result, Defendant was arrested and charged with the first degree murders of Canady and Singleton. (S1/1-4)

In November 2003, the trial court appointed Daniel Hernandez to represent Defendant. In August 2005, Defendant moved to discharge Hernandez, claiming that an officer had lied

at a prior hearing regarding having not taken a particular photo and that Hernandez had played a role in hiding some evidence from him. (S42/844-51) At the hearing on the motion, Hernandez did not respond to the allegations, and the trial court discharged him without making any finding of a conflict of interest. (S60/678-80) In 2007, the matter proceeded to a trial that resulted in Defendant being convicted and sentenced to death for both murders. On appeal, this Court reversed the convictions and sentences, finding the trial court had erred in denying a request for self representation. Pasha v. State, 39 So. 3d 1259 (Fla. 2010).

On remand, Defendant moved to proceed pro se, and the motion was granted. (V1/82-88, 128; S13/3; S15/21-47) On September 20, 2010, the trial court appointed Hernandez as standby counsel without objection because it found the Public Defender and Regional Counsel had conflicts. (V1/128-29) On October 18, 2010, Defendant waived his right to be retried with 90 days of this Court's mandate. (S20/163; V7/1392-99; V3/421-23)

In January 2011, Defendant filed motions seeking to suppress the recording of the Sanchezes' 911 call on the grounds that it was not authentic and the evidence seized from his van because it was seized in violation of the Fourth Amendment.

(V3/463-65, 469-83) He also filed a motion asking that the order suppressing his statements entered before the first trial remain in effect. (V3/460-62) He subsequently filed a motion to suppress his statements, claiming they were obtained in violation of the Fourth Amendment. (V4/617-21)

At the hearing on these motions, the State presented testimony from the Sanchezes, Dep. Mason and Dep. Stahlschmidt regarding the authenticity of the tape and the circumstances of the stop of Defendant. (S80; S23/227-362) Defendant presented Heidi Shrock, HCSO communication supervisor and custodian of 911 records; former crime scene technician Barbara Chancey; Sgt. John King; Dep. Rembert; and Sgt. Rojek. (SV25/372) During the course of the hearing, the State informed the trial court that it had inadvertently admitted a copy of the 911 tape that did not have an introduction in which the date and time of the call was mentioned and asked to substitute a copy of the tape with the heading. (S23/263) Defendant affirmatively stated he had no objection to the substitution. (S23/263)

Based on the evidence presented, Defendant argued that the trial court should find that the tape of the 911 call inadmissible because there had been inconsistent testimony regarding exactly when the call was placed and how long it lasted. (V3/582-85) He averred that it should suppress the

evidence from the van because the police were acting on information relayed to them, the Sanchezes were anonymous informants, the information they provided did not provide cause to believe he had committed a crime and he was detained while the officers went with the Sanchezes and found the bodies. (V4/222-27)

After considering the evidence and arguments, the trial court denied the motions. (V6/1017-22) It found that the 911 tape was admissible and that the police had reasonable suspicion to stop the van and subsequently developed probable cause to arrest Defendant. Id.

On September 5, 2011, Defendant moved to discharge Hernandez as standby counsel based on general dissatisfaction with Hernandez. (V5/921-923) After conducting a Nelson inquiry at which Defendant failed to present anything to indicate that Hernandez was incompetent, the trial court denied the motion. (V5/981-82; S27/477-78) Thereafter, the trial court granted a motion to recuse it, after having previously denied 2 similar motions. (V1/164-72; V7/1393-99; V3/424-25, 568-69; S21/17, V6/1170-79)

After a new judge was assigned to the case, Defendant sought reconsideration of the motion to discharge Hernandez. (V6/1180-84) After another Nelson inquiry at which Defendant

again presented no grounds to question Hernandez's competence, that motion was denied as well. (V26/452) Defendant subsequently filed a bar complaint against Hernandez and claimed that he had created a conflict of interest. (V27/533) The trial court rejected this claim. (V31/636)

Thereafter, Defendant sought reconsideration of other prior rulings in the case and filed numerous motions seeking discovery. (V6/1187-96, 1276-79, 1291-94, 1327-45) Despite the fact that a large number of these motions remained pending, Defendant filed a demand for speedy trial on October 24, 2012. (V7/1355-58) He subsequently filed a pleading he entitled "Motion for Expiration of Speedy Trial." (V7/1370-76) In this pleading, Defendant admitted he had waived the right to be trial within 90 days of mandate years earlier but claimed that he had been forced to do so because of issues with access to legal materials. Id. As such, he asked the trial court to void the waiver and set his trial within the recapture window. Id.

At an October 30, 2012 hearing, the trial court first conducted a Faretta inquiry (as it did at the beginning of every hearing). (V29/583-93) It then repeatedly explained to Defendant that by filing the demand, he was indicating that he was prepared to proceed to trial immediately and that he would waive the ability to seek further discovery or to engage in further

pretrial litigation. (V29/594-607) Defendant repeatedly responded that he believed that he could continue to engage in discovery and pretrial litigation despite his demand. Id. However, he finally indicated that he preferred to keep his demand even if it meant striking his other pleadings. (V29/608) As a result, trial was set for November 26, 2012. (V30/640)

At a hearing on November 7, 2012, the trial court granted a motion Defendant had filed to retain a mitigation specialist but informed Defendant that it did not believe that a mitigation specialist would be able to assist him because of the trial date. (V30/637-39) Defendant responded by insisting that someone must have been informing the trial court of confidential information for it make such a statement. (V30/639-40) The trial court responded that it had not been provided with confidential information, that it was relying on its experience with capital cases and that it would not grant a continuance. (V30/640-45)

On November 16, 2012, Defendant filed a pleading he entitled "Motion to Discharge for Lack of Speedy Trial." (V7/1386-90) In this pleading, he reiterated the arguments he had made about his prior waiver of speedy trial, insisted that he should have been entitled to continue pretrial litigation and discovery despite his filing of a speedy trial demand and asked that he be discharged because the trial court did not allow him

to rescind his prior waiver of speedy trial and set his case within the recapture window. Id.

At the beginning of a November 19, 2012 hearing, the trial court again offered to appoint counsel for Defendant, indicated that it would allow counsel to redo the pretrial litigation and stressed the importance of Defendant considering the issue carefully as trial was about the start. (V31/653-54) Defendant then presented the trial court with a series of complaints regarding his standby counsel and his treatment by the jail. (V31/654-75) Before addressing the motions that were set, the trial court again offered to appoint counsel for Defendant. (V31/678) After speaking privately with Hernandez, Defendant accepted the offer of counsel, withdrew his speedy trial demand and was granted a continuance. (V31/678-96) The trial court then appointed penalty phase counsel to assist Hernandez. (V32/708-09)

On November 28, 2012, Petitioner then filed a motion asking to be again permitted to proceed pro se and a pleading he entitled "Motion to Be Heard." (V8/1405-08, 1411-15) In both of these pleading, Defendant claimed that Hernandez had a conflict of interest because he had filed a bar complaint against Hernandez and that he had decided that the trial court's actions at the November 19, 2012 hearing had been an attempt to protect

Hernandez and keep him from having a speedy trial. *Id.* He requested that he be allowed to represent himself, that his waiver of his speedy trial demand be rescinded and that his case be set for trial within the recapture window. *Id.* At the hearing on this motion, Defendant insisted that he had been coerced into accepting Hernandez, and the trial court denied coercing Defendant. (V32/702) After conducting a Faretta inquiry, the trial court again permitted Defendant to proceed pro se with Hernandez as standby counsel. (V32/703-17)

Defendant then indicated that he did not want to discharge penalty phase counsel, and Hernandez indicated that he was unsure that the attorney he selected as second chair would be willing or able to proceed if Defendant was representing himself at the guilt phase and demanding a speedy trial. (V32/717) The trial court indicated that it would not rescind the prior withdraw of the demand for speedy trial but would treat Defendant's motion to be heard as a new demand and again warned Defendant that it would not permit him to engage in additional discovery or further pretrial litigation in light of his demand. (V32/701, 721-22, 726-34) Defendant continued to insist that he could do so. (V32/726-34) Eventually, the trial court set trial to commence on January 14, 2013, and indicated that it would consider issues regarding the availability of penalty phase

counsel when penalty phase counsel was present. (V32/722-34) Because the second chair Hernandez had selected was not available to proceed on January 14, 2013, a different attorney was appointed as penalty phase counsel. (V8/1428-31)

On December 17, 2012, Defendant filed a notice of expiration of speedy trial time in which he insisted that since the only pleading he had filed that was called a demand for speedy trial was the one from October 24, 2012, the trial court must have permitted that demand to be reinstated. (V8/1434-38) He also filed a motion to disqualify the judge because she had allegedly ruled improperly on his attempts to discharge standby counsel, allegedly tricked him into accepting counsel and withdrawing his speedy trial demand and allegedly been disrespectful to him. (V8/1441-51) The trial court denied the motion for disqualification. (V8/1455-59) On January 2, 2013, Defendant moved for discharge claiming a speedy trial violation. (V8/1549-51) The trial court struck the notice of expiration and denied the motion for discharge because the initial demand had been withdraw and it had treated the motion to be heard as a new demand. (V8/1552-69)

On January 11, 2013, penalty phase counsel moved the trial court to grant a continuance between the guilt and penalty phases because he had recently been appointed and had not had

sufficient time to investigate mitigation. (V8/1570-78) After considering the issue, the trial court granted Defendant a 2 week continuance between the guilt and penalty phases. (S61/36-37)

Before it began questioning the venire, the trial court indicated that it intended to conduct voir dire in stages. First, it would swear the venire and discuss general qualifications, next it would discuss availability for the length of trial and finally it would discuss the death penalty and the case. (V61/5-10) During the discussion of availability, the trial court stated that jurors would need to be available for 3 weeks and that those weeks would be the next 2 weeks and the week of February 11, 2013. (V61/76-77, 143-46; S62/194-96, 261-64) Utilizing the method the trial court has described, the jury was selected on January 17, 2013. (S67/936)

During voir dire, Defendant filed a motion claiming that Florida's capital sentencing scheme violated Ring v. Arizona, 536 U.S. 584 (2002), because the judge made findings in support of a death sentence, the jury's recommendation was a recommendation that did not involve specific findings or have to be unanimous, the aggravators were not charged in the indictment and the jury was not required to find death to be an appropriate sentence beyond a reasonable doubt. (V9/1641-56) The trial court

denied the motion. (V9/1747-49)

At trial, Dep. Barbara Chancey, a crime scene technician, testified that she had taken aerial photos of the center, had been to the crime scene and was familiar with the crime scene diagram. (S67/958, 968-70) Defendant then objected to the use of the diagram because it did not depict the "total station." (S67/970) The trial court indicated that the State would have to show that diagram was a full and accurate depiction before it could use the diagram and that Defendant could cross examine Chancey. (S67/970) Chancey was then shown the diagram and testified that it accurately depicted the cul-de-sac as she saw it after the murder. (S67/971-72) When the State sought to admit the diagram, Defendant objected that Chancey lacked personal knowledge, and the trial court overruled the objection. (S67/972)

Chancey also collected blood swabs from the pavement in the cul-de-sac. (S67/974-77) During cross, Defendant asked no questions regarding the accuracy of the diagram. (S67/979-87; S68/1011)

During the middle of Chancey's testimony, Defendant filed a series of motions in limine, including one seeking to exclude gruesome photos. (S68/989, 996-97) The trial court refused to consider a blanket motion and informed Defendant he would have

to raise specific objections to the photos when they were introduced. (S68/997)

Before Ms. Sanchez began testifying, the State indicated that it had a transcript of her 911 call that it wanted to distribute during the playing of the tape. (S68/1031) The trial court indicated it would allow the use of the transcript if a predicate was laid. (S68/1031) Ms. Sanchez testified that she had listened to the tape of the 911 call and that the tape was accurate but that she had not reviewed the transcript. (S68/1035-36) When the State sought to admit the tape, Defendant objected on the basis that there were 2 copies of the tape, and the trial court overruled that objection. (S68/1036-38) Defendant then objected that the tape was hearsay, and the trial court instructed the State to lay a predicate for the admission of the tape. (S68/1039) Ms. Sanchez then testified that she had received an unexpected call from her husband in which he seemed scared that caused her to become frightened. (S68/1040-41) She was further scared when she saw the bloody man, which was when she called 911 in a state of nervousness and concern. (S68/1043) Based on this predicate, the trial court found the tape admissible without further objection by Defendant. (S68/1044) It permitted the State to provide the transcript of the tape to the jury without objection. (S68/1044)

On the tape, Ms. Sanchez told someone that the person she had seen had something in his hand and was dangerous. (S68/1047) Defendant objected that Ms. Sanchez had no personal knowledge of the character of the person, and the trial court overruled the objection. (S68/1048)

When the State asked Ms. Sanchez if she had agreed to show the police where she had seen Defendant during the call, Defendant objected that the question was leading, and the trial court overruled the objection. (S68/1057) Ms. Sanchez testified that she never clearly saw the object in Defendant's hand but that it was shiny. (S68/1068) When the State asked if Ms. Sanchez had previously described it as a knife or something, Ms. Sanchez responded that it looked like a knife to her but she could not be certain. (S68/1068) Defendant then objected that the question was leading, and the trial court overruled the objection. (S68/1068) On cross, Defendant elicited that Ms. Sanchez described the man as dangerous because he was covered in blood and had a knife-like object in his hand. (S68/1110)

The parties stipulated that to the identities of Canady and Singleton and that they had been killed at the center. (S69/1165-66)

Det. Carolyn Service, another crime scene technician, testified that she assisted in processing the scene at the cul-

de-sac. (S69/1168, 1171-72) In doing so, she took swabs of the blood found in the cul-de-sac. (S69/1182-87)

Service also assisted in photographing the victims' injuries at the morgue. (S69/1177-79) When the State sought to admit photos Service had taken, Defendant objected to all of them on the grounds that they were inflammatory. (S69/1179-80) The trial court personally reviewed Exhibits 126-36 and 141-51 and overruled Defendant's objection. (S69/1180) Service used the exhibits to describe the injuries she observed on the victims and the items recovered from their bodies. (S69/1191-1201)

Service acknowledged that she was familiar with the crime scene diagram and that it showed the cul-de-sac. (S69/1187) When the State attempted to have Service use the diagram, Defendant objected that it was not precise. (S69/1187) When the trial court pointed out that the diagram had already been admitted, Defendant averred that he was renewing his objection, and the trial court overruled it. (S69/1187-88)

On cross, Defendant had Service show where the car and a jug recovered from the scene were located on the diagram. (S69/1220) Service stated that she was unsure of the distance between the objects but estimated they were close together. (S69/1221) She averred that the distances appeared to be greater on the diagram because the entire cul-de-sac area was small.

(S69/1221) Defendant then attempted to object to the admission of the diagram as inaccurate, but the trial court refused to allow him to do so because the diagram had already been admitted. (S69/1221-22)

Defendant then continued to question Service about the distances in the diagram and whether diagram had the "total station," and Service continued to respond that she did not know the measurements. (S69/1222-23) When Defendant asked Service if the diagram could make people believe "that anything could be anywhere because there is nothing to show where things really were" in the diagram, the State objected, and the trial court sustained the objection. (S69/1223) Defendant asked to proffer the answer that might be given, but the trial court refused to permit the proffer and instructed Defendant to rephrase the question. (S69/1223-24) Instead of doing so, Defendant proceeded to question Service about the lighting conditions when she was processing the cul-de-sac. (S69/1224-25)

Crime Scene Tech. Lori Egan testified that she and Tech. Sharon Sullivan arrived and began processing the crime scene around 1 a.m. (S70/1316-20) In doing so, she first photographed Defendant's van. (S70/1322-23) From there, they proceeded to the cul-de-sac where she saw Canady's car crashed into a concrete wall. (S70/1324-25) There were large bloodstains near the car,

large blood pools in the middle of the cul-de-sac and bloody drag marks leading away from to the car to where the bodies were found. (S70/1328-36)

Egan found blood smears consistent with having been made by hands on the trunk and passenger's side roof of Canady's car. (S70/1344-47) Blood drops on the passenger's doors and ground beneath the door showed that someone had been bleeding while standing by the door. (S70/1345-46) Inside the car, Egan found blood on both front seat backs, console and inside passenger's front door. (S70/1346-47) There was blood spatter on the dashboard and windshield. (S70/1348-49)

During Egan's testimony, photos she identified as being of the crime scene, including photos of the victims, were admitted without objection. (S70/1325-26, 1342-43) Egan used these photos to explain her testimony regarding the condition of the scene and the bodies. (S70/1326-42, 1344-55)

Sgt. McCullough, the lead homicide detective, testified that during a search of Defendant's van after a warrant had been obtained, the jumpsuit and boots were seized. (S70/1378, 1380-81) In one of the boots was a bloody, broken 18" to 20" bat made of wood with a metal rod running through it that was known as a tire thumper. (S70/1381) In the other boot, a bloody butcher knife and bloody latex gloves were found. (S70/1381) McCullough

also had the clothes Defendant was wearing at the time of his arrest impounded and had Defendant's hairline swabbed as there appeared to be blood in it. (S70/1392-93; S67/960-64, 964, 966-67)

Mr. Sanchez testified that the sight of Defendant wearing the white jumpsuit covered in blood and carrying a shiny object caused him to become concerned for the safety of his wife and others. (S70/1416-17, 1429) During cross, Defendant elicited that Mr. Sanchez was sitting with several other people when he first saw Defendant. (S70/1432) Mr. Sanchez stated that he was unable to provide an exact distance between himself and Defendant when he first saw Defendant. (S70/1432) When Defendant inquired if he had ever said the distance was 50 meters, Mr. Sanchez responded that he believed the distance was closer to 25 meters. (S70/1432) Mr. Sanchez stated that he did not recall in which hand Defendant was holding the object. (S70/1432-33) When Defendant then attempted to inquire about a deposition, Mr. Sanchez responded that he had given a number of sworn statements but did not recalled to whom he had given the statements and did not know what a deposition was. (S70/1433) When shown the deposition, he did not recall it. (S70/1433-34)

Defendant then had Mr. Sanchez reiterate that the sight of Defendant caused him concern for his wife's safety and that he

followed Defendant briefly before picking her up. (S70/1434) Defendant then repeatedly accused Mr. Sanchez of not being concerned for his wife because he followed Defendant. (S70/1434-35)

Mr. Sanchez provided Defendant with a detailed account of the movements he observed Defendant making. (S70/1438-40) Defendant elicited that Mr. Sanchez believed that Defendant was lost and could not find his van when he first saw him. (S70/1441-42) Defendant then asked the question again, and received a similar response. (S70/1442) Defendant then asked if Mr. Sanchez had mental health training, and when he responded negatively, insisted that Mr. Sanchez could not assess his demeanor. (S70/1442) Mr. Sanchez responded that he did not need mental health training to assess Defendant's demeanor and suggested that the demeanor he observed was consistent with escaping the commission of the crime. (S70/1442) Defendant then elicited that Mr. Sanchez did not know he had committed a crime when he first saw him and that Mr. Sanchez was not acquainted with Defendant before the murders. (S70/1443-44) When Defendant continued to ask Mr. Sanchez about his ability to assess the demeanor of someone he did not know, the State objected, and the trial court sustained the objection. (S70/1444) He then requested to proffer the answer, and the trial court refused to

permit him to do so. (S70/1444)

Despite the fact that Mr. Sanchez had already testified that he did not recall giving a deposition and that he did not read English, Defendant then sought to have Mr. Sanchez read his deposition. (Id.) When the trial court informed Defendant that his method of questioning was improper, Defendant accused the trial court of trying to hide the truth so the trial court permitted the interpreter to read a small section of the deposition to Mr. Sanchez. (S70/1445-47) When Mr. Sanchez still testified he did not recall, Defendant informed the trial court that Mr. Sanchez should be impeached, and the trial court instructed Defendant to ask questions. (S70/1447-48)

Defendant next questioned Mr. Sanchez regarding how he could tell something was shiny in the dark. (S70/1448-49) After first not understanding the manner in which Defendant was asking the questions, Mr. Sanchez pointed out that he was following Defendant in a car with its headlights on. (Id.) When Defendant continued to ask questions about this area, the State objected that the question was asked and answered, and the trial court sustained the objection. (S70/1449-50) Defendant responded by accusing the trial court of hiding the truth, the State objected to Defendant's commentary and the trial court sustained that objection. (S70/1450-51) Defendant then continued to make

comments and was repeatedly admonished about doing so.
(S70/1450-54)

Eventually, the trial court excused the jury and warned Defendant that he would not be allowed to continue to represent himself if he continued to make statements before the jury. (S70/1454-55) Defendant responded by insisted that he should be able to impeach Mr. Sanchez with his prior statements even if Mr. Sanchez did not recall making the prior statements, and the trial court informed Defendant that it could not advise him on proper legal procedures. (S70/1455-59)

When court resumed, Defendant again asked Mr. Sanchez if he remembered the deposition, and Mr. Sanchez again stated he did not. (S71/1503) Defendant then inquired if Mr. Sanchez recalled his prior testimony, and Mr. Sanchez stated he only recalled being questioned by Defendant in 2011. (S71/1504-05) He then questioned whether Mr. Sanchez had had his recollection refreshed by the State during that hearing and received a negative response. (S71/1505)

Defendant then again had Mr. Sanchez testify regarding where he was and where Defendant was when Mr. Sanchez observed Defendant at the time of the crimes. (S71/1506-11) Defendant then sought to admit Mr. Sanchez's testimony from the first trial, and the State objected. (S71/1511) At sidebar, Defendant

claimed that the prior testimony was admissible as a prior inconsistent statement because Mr. Sanchez had allegedly described where he was sitting when he first saw Defendant differently. (S71/1511-12) The trial court and State agreed that Defendant could attempt to impeach Mr. Sanchez with his prior testimony but that he had yet to lay the proper predicate to admit the transcript. (S71/1512) However, the State indicated that it would have no object to the admission of a complete transcript of the prior testimony, and Defendant accepted the State's suggestion. (S71/1512-14)

Defendant then again questioned Mr. Sanchez about the distance between them when Mr. Sanchez first saw Defendant, and Mr. Sanchez acknowledged that he had estimated the distance as being 25 meters earlier. (S71/1514) Mr. Sanchez admitted that there was a large difference between 25 and 50 meters. (S71/1515) When Defendant asked Mr. Sanchez if he recalled having previously testified that the distance was 50 meters, Mr. Sanchez responded that he did not know the exact distance. (S71/1515) When Defendant once again asked if Mr. Sanchez had been guessing when he said 25 meters, Mr. Sanchez responded that he had been providing an approximation of the distance but was sure of having seen Defendant. (S71/1515) Defendant then asked the trial court to admonish Mr. Sanchez to answer his question,

and the trial court refused. (S71/1515) Defendant then read a question from Mr. Sanchez's prior testimony indicating that the distance was 50 meters, and Mr. Sanchez responded that he did not recall. (S71/1516) Defendant then attempted to inquire if Mr. Sanchez knew that 50 meters was 150", and Mr. Sanchez first stated that he did not know the distance between them when he first saw Defendant and then responded that he did not know the measurements equivalence. (S71/1516-17)

Defendant then asked Mr. Sanchez about his knowledge of the makeup of blood, and Mr. Sanchez admitted he had no such knowledge. (S71/1518) Defendant then inquired how Mr. Sanchez knew he was covered in blood when he saw him and if Mr. Sanchez was a chemist. (S71/1518) Mr. Sanchez responded that he had inferred the substance was blood given its color and the circumstances. (S71/1518) Defendant objected that he had only asked Mr. Sanchez if he was a chemist, and the trial court instructed Mr. Sanchez to answer that question. (S71/1518) When Defendant continued to ask Mr. Sanchez whether he could be sure the substance was blood and not paint, Mr. Sanchez reiterated that he had inferred the substance was blood and that he knew from his job that no one was painting in the area. (S71/1519-20)

Defendant then read a statement from Mr. Sanchez's deposition that indicated that Defendant was not running and

suggested that the lack of running showed Defendant was behaving normally. (S71/1520-22) Mr. Sanchez responded that he did not recall making the statement but that he did not believe Defendant was acting normally merely because he did not run. (S71/1522) Defendant then repeated his questions about Mr. Sanchez's prior knowledge of Defendant, Defendant's demeanor, the distance between them, Mr. Sanchez being afraid for his wife and Mr. Sanchez following him, all of which elicited responses consistent with Mr. Sanchez's prior testimony. (S71/1523-24) Eventually, Mr. Sanchez asked Defendant why he had not stopped and confronted Mr. Sanchez if he had not done anything, and the trial court admonished Mr. Sanchez that he could not question Defendant. (S71/1524) Defendant then complained that Mr. Sanchez had not answered his questions, and the trial court rejected the complaint. (S71/1525) When Defendant again attempted to question Mr. Sanchez about his fear and about where he saw Defendant, the State objected that the questions had been asked and answered, and the trial court overruled the objection. (S71/1525-26) Defendant then elicited that Ms. Sanchez did not see Defendant until after Mr. Sanchez picked her up. (S71/1527-28)

Defendant then returned to reading prior statements that Mr. Sanchez stated that he did not recall making. (S71/1529-30) The trial court then admonished Defendant that he could not read

statements without asking questions. (S71/1530-33) Defendant then asked Mr. Sanchez what his wife saw, and Mr. Sanchez provided a responsive answer to that question. (S71/1533) Defendant complained that the answer was unresponsive, and the trial court ruled that it was not. (S71/1534)

The State then provided Defendant with a complete transcript of Mr. Sanchez's testimony from the first trial but indicated that a portion concerning a bench conference would need to be redacted before it was published. (S71/1558) Defendant indicated that he only wanted to introduce a couple of pages. (S71/1558) The trial court indicated that Defendant could either have the entire transcript introduced by agreement with the State or it would exclude the transcript entirely. (S71/1558-59) When Defendant refused to make an election, the trial court excluded the transcript. (S71/1559-63)

Defendant then attempted to ask Mr. Sanchez a question about people being with him when he first saw Defendant that he had previously asked, the State objected and the trial court sustained the objection. (S71/1564) Defendant then reiterated the question, the State again objected and the trial court again sustained the objection. (S71/1564-65) After arguing with the trial court about its ruling, Defendant asked to make a proffer, and the trial court denied the request. (S71/1565-66)

During cross examination of Stahlschmidt, Defendant elicited that Stahlschmidt was unsure whether Defendant was on private property when he was stopped. (S72/1673) Defendant then asked if Stahlschmidt knew if public land started after a grid marking on the road, and Stahlschmidt responded that he did not know what the grid marking was. (S72/1673) The State objected that the questions regarding public and private property were irrelevant, and the trial court sustained the objection. (S72/1673-74) Defendant stated he would take "proof of the reason" for the ruling, and the trial court did not respond. (S72/1674)

Later, Defendant asked Stahlschmidt twice if he was aware of the danger an African-American might feel being stopped to a white police officer at night. (S72/1687-88) The State objected each time, and the trial court sustained both objections. (S72/1688) Defendant then inquired if Stahlschmidt was aware of a history regarding stops of African-American in areas where no one else was around, the State objected on relevance grounds and the trial court sustained the objection. (S72/1688) Defendant then stated that the trial court was sustaining objections to race related questions and that he would "take proof of that." (S72/1688) The trial court did not respond to the statement. (S72/1688)

Stahlschmidt then testified he had no way of knowing if Defendant was afraid of him when he stopped him. (S72/1690) When Defendant then asked Stahlschmidt if he knew based on history that stopping an African-American would cause fear, the State objected to speculation, and the trial court sustained the objection. (S72/1691) Defendant stated that he would offer proof of the relevancy of the race questions, and the trial court again did not respond to the statement. (S72/1691)

Crime Scene Analyst Lynn Ernst testified she examined Canady's car at the FDLE lab. (S72/1698-1700) In doing so, she observed that the front seat area was all bloody, the rear seat was clean and there were cuts in the headliner made by a sharp object. (S72/1702-03) This evidence suggested that assailant had been in the rear seat. (S72/1704) Ernst took swabs from the blood stains in the car and a fabric cutting from a blood stain on the driver's headrest. (S72/1709-14)

In addition, Ernst compared photos of shoe prints from the cul-de-sac to Canady's and Singleton's shoes recovered from the crime scene and shoes and boots recovered from Defendant's van. (S72/1715-25) She opined that the prints were consistent with having been made by the boots. (S72/1725-27) When the State showed Ernst the crime scene diagram, Defendant objected that the diagram was not the "total station," and the trial court

reminded Defendant that the diagram had already been admitted.
(S72/1727)

Robert Kelly testified that he was responsible for the security camera at the AT&T facility in the cul-de-sac at the center. (S73/1781-83) He provided a copy of a tape from the camera to the police but nothing was particularly visible on the tape. (S73/1785-90) During cross, Defendant inquired if AT&T had a corporate head of security, the State objected on relevancy grounds and the trial court sustained the objection. (S73/1800) Defendant stated that he requested an offer of proof, and the trial court did not respond to the statement. (S73/1800)

Patricia Bencivenga, a DNA analyst, testified she conducted testing on the swabs and cutting taken by Ernst, the swabs taken by the crime scene personnel, the tire thumper, the knife found in Defendant's boot, and his boots, jumpsuit and clothing. (S74/1875-1903) She found DNA matches between the blood on the tire thumper and on Defendant's right boot and shirt and Canady and averred that the likelihood of a random match was 1 in 2.2 quadrillion African-Americans for the tire thumper and 1 in 1.7 trillion for the shirt and 1 in 400 billion for the boot. (S74/1914-15) Singleton's DNA was matched to blood on the knife, on Defendant's pants and the swab of Defendant's face, and the likelihoods of random matches were 1 in 45 quadrillion for the

knife, 1 in 144 quadrillion for the pants and 1 in 64 trillion for the face. (S74/1918, 1922, 1932) The blood on the jumpsuit contained a mixture of DNA from Canady and Singleton, and the likelihood of a random match was 1 in 6.7 billion. (S74/1926) The blood samples from the car and crime scene were all DNA matches to either Canady, Singleton or both. (S74/1903, 1908-12, 1916-18, 1923-25, 1943-45)

Dr. Vera Volnikh, a medical examiner, testified that she went to the crime scene and performed the autopsies of Canady and Singleton. (S74/1975-81) At the scene, she observed blood spatter consistent with arterial spray on the windshield and passenger's side door that was consistent with the fact that both victims had severed carotid arteries. (S74/1982-83) She also saw blood smears consistent with the bodies having been dragged and found associated abrasions from being dragged by their feet on the backs of both victims. (S74/1984-87)

During Canady's autopsy, Volnikh found evidence of stabbing and slicing wounds and blunt force trauma. (S74/1988-89) Canady had 5 knife wounds to her head and neck and 3 to 4 lacerations from blunt force trauma on her scalp. (S74/1989-90) On the front and back of Canady's torso, Volnikh found 7 knife wounds and abrasions from being dragged. (S74/1992) Canady had numerous knife cuts on her hands and forearms consistent with defensive

wounds. (S74/1992-93) Vlonikh opined that Canady died from a knife wound to her neck that severed her carotid artery and jugular vein. (S74/1994)

During Singleton's autopsy, Volnikh also observed multiple stabbing and slicing wounds that were more superficial than the wounds on Canady and evidence of blunt force trauma that was more significant than the blunt force trauma to Canady. (S74/1994, 1995) Singleton had 8 knife wounds to her head and neck, including one that severed her carotid artery and jugular vein. (S74/1995) She also had 4 knife wounds to her torso and defensive wounds on her hands, leg and hip. (S74/1996, 1998) The blunt trauma injuries to Singleton's head were consistent with 6 separate blows and resulted in a skull fracture. (S74/1997) Volnikh opined that Singleton also died from the stab wound that severed her carotid artery and jugular vein. (S74/1998)

Volnikh stated that the knife found in Defendant's van was consistent with having caused the injuries to the victims. (S74/1999) The tire thumper was consistent with having caused the blunt force trauma injuries. (S74/1999) Volnikh opined that the victims sustained their injuries between 9 p.m. and 12 a.m. and that they were alive when all the injuries were inflicted. (S74/2001-02)

During her testimony, Volnikh used photos of the bodies

from the crime scene and morgue to explain her testimony. (S74/1985-87, 1989-91, 1993, 1998-99, 2000) Defendant did not object.

After the State rested, Defendant called 10 witnesses, none of whom provided any testimony regarding Defendant's whereabouts after Singleton left her training. (S75-S76/2061-2208) During direct examination of one of those witnesses, Kenia Perez, Defendant elicited that Singleton had identified her mother to her training class members the day before the murder and that Singleton had been excited about having a job so she could help her mother. (S75/2084) Perez testified that she did not know anything about why Singleton wanted to help her mother and was merely reporting what Singleton had said to her. (S75/2084) When Defendant later attempted to ask Perez again why she believed Canady needed help, the State objected that the question had been asked and answered, and the trial court sustained the objection. (S75/2091) Defendant stated that he would offer proof that Perez initiated the question, and the trial court did not respond to the statement. (S75/2091)

During direct of Donna Murray, Defendant questioned her about prior statements and actions regarding medication he had taken for a bladder condition, but Murray recalled nothing about the medication. (S75/2111-12) After Murray still did not recall

after being shown a prior statement, Defendant asked to admit the statement as a prior inconsistent statement. (S75/2112-13) The State objected that the statement was not relevant. (S75/2113) After reading the statement, the trial court stated that it indicated that Murray had previously said that Defendant took medication for bladder irritation years earlier when they were married. (S75/2114) Defendant then argued that the statement was relevant because the State had presented evidence that he had been to Murray's home and given her a check before the murders but Murray had testified that she did not recall Defendant being sick at that time. (S75/2114) The trial court found that the statement was not inconsistent with Murray's prior testimony and sustained the State's objection. (S75/2115) Defendant objected to the ruling and stated an offer of proof had been established. (S75/2116)

During direct of Sgt. McCullough, Defendant repeatedly attempted to question him about the timing and circumstances in which Felicia Solomon, another of Canady's daughters, was notified of the murders and his arrest and was interviewed, and Solomon's reaction. (S75/2124-28) McCullough repeatedly responded that he could not answer the questions as he had not been involved in notifying or interviewing Solomon. (S75/2124-28) When Defendant continued to pursue this line of questioning,

the State objected that the question had been asked and answered, and the trial court sustained the objection. (S75/2128) Defendant then stated "offer of proof," and the trial court did not respond. (S75/2128)

Wanda Garriga testified that she created the transcript of the 911 call by listening to the recording of the call. (S75/2332-34) She had reviewed the transcript against the recording and averred that it was accurate. (S75/2140-42)

Dep. Pamela Vance testified that she found a pocket knife on the ground near the crime scene tape when she was cutting the tape down. (S76/2197-99) She was unable to point to the exact location on a picture Defendant showed her because of the scale of the picture. (S76/2199-2202) During cross, Vance identified the knife from other photos. (S76/2204-05) During redirect, Defendant stated that the photos the State used were taken ½ mile from where the knife was found, and the State objected to Defendant referring to facts not in evidence. (S76/2207) When the trial court sustained the objection, Defendant noted that the photo was in evidence and was proof, which drew no response from the trial court. (S76/2207)

Before his last witness was called, Defendant informed the trial court that he did not intend to testify on his own behalf. (S76/2192-94) At the time, the trial court indicated that it had

planned to proceed to closing arguments that day and then instruct the jury and begin deliberations the following day because the jury was going to be sequestered. (S76/2195)

After the last witness had testified, Defendant again confirmed that he would not be testifying, and the trial court agreed to take a break so a stipulation could be typed. (S76/2208-09) In announcing the break, the trial court informed the jury of its scheduling plans. (S76/2209-10) When a juror inquired about making travel plans in the future, the trial court reminded the jurors about their need to be available after a 2 week break if the law required additional court time. (S76/2210-11) When another juror asked about when alternates would be released, the trial court responded that the alternates would not be released until the case was fully completed, which could include coming back after the break if necessary, and the no jurors should make plans for the dates that trial was intended to continue. (S76/2211-13) However, after the break, Defendant changed his mind and decided to testify. (S76/2217)

During his testimony, Defendant claimed that he had visited an ex-wife after leaving prayer service between 9 and 9:30 p.m. to drop off an alimony check and then proceeded to drive toward him home. (S76/2228-29) He averred that Canady called him as he was driving and convinced him to come to the center to help her

find a ring. (S76/2229-30) He claimed when he arrived, he and Canady parked next to each other, and Canady told him that she had not lost a ring but needed him to act as a lookout while she did something to get money she allegedly needed to support her family. (S76/2230-31) He insisted that Canady told him to put on the jumpsuit and boots because his clothes and shoes were expensive so he did so. (S76/2231-32) Canady then allegedly directed him to go to an area west of the cul-de-sac and stay there until she signaled him to return. (S76/2232)

Defendant claimed that after waiting in this area for more than 15 minutes, he returned to the cul-de-sac and found the victims lying dead in the middle of the street. (S76/2233-34) He averred that after holding both bodies, he ran around the center looking for someone, picked up the tire thumper and then returned to his truck. (S76/2234-35) He insisted that while returning to his van, he saw a group of people sitting at a table but did not speak to them. (S76/2235) He claimed that as he continued walking, he realized a truck was following him and subsequently left. (S76/2236) He averred that he then went between some buildings, took off his jumpsuit, walked to his van and put the jumpsuit, bat and boots in the back. (S76/2236) Without putting on his shoes, he then started to drive away from the center when he realized the police were stopping him.

(S76/2236) He averred that he started to get out his license.

(S76 2236) However, he stopped, put his hands on the steering wheel, stared straight ahead and said nothing when he saw the officers approaching because he had been trained to do so by the NAACP. (S76/2236-37)

On cross, Defendant admitted that he had lied to the police about killing a rabbit when they came to the van. (S76/2239-40) He denied that he was sweaty, and that he had told the police he had been working out, that he had been with a girlfriend and that Canady was at home. (S76/2240-41) He admitted to calling Murray after he left her home at 10:55 p.m. and complaining about her clock being slow. (S76/2242) He averred that Murray's slow clock caused him to miss a meeting at his mosque to arrange a trip to visit other mosques in the area. (S76/2243-44)

Defendant stated that he did not approach the group of people he allegedly saw at the picnic table or the people in the truck following him and asked for assistance for the victims because he was too angry. (S76/2246-47) He then stated that he did not take off his jumpsuit until he was at his van. (S76/2248-49) He claimed that he realized there was a vehicle behind him when he stopped at the light and stated that he made no attempt to seek assistance for the victims from the occupants because he considered the victims' deaths a private matter.

(S76/2250-51) When asked why he did not seek assistance for the victims when he first saw the police car, Defendant responded that he was not from Florida and people in Florida did things that others did not. (S76/2252) He claimed that this was because people in Florida were friendlier and offered more assistance than did people from his home town of Gary, Indiana. (S76/2252-53) He acknowledged that the murders would have to be reported to the police but averred that people in Gary did not speak to people they did not know because Gary was largely African-American. (S76/2253-54)

Defendant claimed not to have realized the crime scene was bloody. (S76/2254-55) He averred that he told the lie about the rabbit simply because the officers asked him a question. (S76/2255) He stated that he would not have told the officers about the victims because he was alone with them. (S76/2255) He admitted that additional officers arrived, including an African-American officer, and that he still said nothing about the victims. (S76/2255-56) He claimed that he would have told the African-American officer if he had been alone with him. (S76/2256-57) He denied that he failed to report the murders because he had committed the murders. (S76/2257-58) At no point during the State's questions regarding his failure to report the murders did Defendant object. (S76/2246-58)

Defendant insisted that he found the tire thumper in the road by the curb somewhere south of Canady's car but could not identify its exact location. (S76/2258-59) He stated that the 2 pieces of the tire thumper were separated when he found them and averred that he took it because he believed it might be the murder weapon. (S76/2259, 2262) However, he denied planning to dispose of the tire thumper, claiming that such a thought was merely in the prosecutor's mind. (S76/2262-63) He claimed never to have seen a knife at the crime scene but stated that he had taken the murder weapon out of a flower bed at his home, used it to remove a fuse from Canady's car and left it in the floorboard of Canady's car a couple of days before the murder. (S76/2259-60) However, he denied owning the murder weapon and stated that Canady kept it under the seat of her car. (S76/2260-61)

When asked whether the victims' blood was on his jumpsuit, Defendant responded the DNA evidence showed that it was. (S76/2263) He averred that he had not noticed any blood until he went to take off the jumpsuit. (S76/2263) He claimed that the officers could not have seen the bloody objects when they stopped him because they were inside the boots. (S76/2264-65) He averred that the photos showing the blood objects visible in the van were a result of police corruption. (S76/2265)

When confronted about the testimony of Ware and Perez,

Defendant acknowledged that he had been the person Ware had seen walk up to Canady's car in a white jumpsuit. (S76/2266-67) However, he insisted that Perez could not have seen him because it was dark and he was sitting in the rear seat of Canady's car behind her. (S76/2267-68)

When the State asked if Defendant was changing his testimony, Defendant then claimed that he and Canady had originally parked together in a different area of the center, that he had changed into the jumpsuit at this location, that Canady moved her car over to the area of the center near where Singleton was in training to pick Singleton up while he was changing and that he walked over and got into Canady's car after she did so. (S76/2268-69) He stated that he sat in the back because they were expecting Singleton and he was planning to go back to his van. (S76/2271-72) He stated that Singleton entered the car after she left her training and had no reaction to his presence. (S76/2270-71)

The State then asked why Defendant had killed the victims, and Defendant denied doing so. (S76/2272) He averred that the victims had done nothing to him. (S76/2272) When the State asked if Defendant had other changes he wanted to make to his testimony, Defendant responded that he had worked hard that day. (S76/2272) The State replied that the question concerned the

murders, and Defendant stated that he would never commit such crimes. (S76/2272-73)

Defendant acknowledged that he had 2 cell phones with him at the time of the murders. (S76/2274) When asked if he could have used them to summon assistance, Defendant averred that he was about to make a call when the police stopped him but claimed not to know who he was planning to call. (S76/2274) He also stated that the victims did not need assistance because they were dead. (S76/2274-75) When asked if their family might not have need justice for their murders, Defendant responded that he was sure that the family would get justice and that his decision to remove a potential murder weapon from the scene was an afterthought. (S76/2275)

Defendant then spontaneously stated that he had stopped to urinate in some bushes during his walk from where he and Canady had first met at the center to her car in front of the training center. (S76/2276-77) When the State asked Defendant why he made this statement, Defendant averred he wanted to provide a complete account. (S76/2277) The State responded that the story was still not complete and inquired why Defendant had killed Canady. (S76/2277) Defendant responded by discussing his day and his alleged exhaustion and averring that he would not have driven to the center to kill Canady. (S76/2277-78) He then added

that he had seen a rabbit at his work site that day but had not killed it and that this incident is what caused him to make up the rabbit story for the police. (S76/2278-79)

When shown a picture of the murder knife, Defendant claimed that it was covered in dirt from being used in Canady's garden. (S76/2283) When the State confronted Defendant with the fact that the evidence had shown it was covered in the victims' blood, Defendant acknowledged that such testimony had been presented but insisted that it had not been covered in blood when he last saw it and that the State must have done something to the knife to remove the dirt and make the knife shiny. (S76/2284-85)

During its closing arguments, the State discussed the elements of the crimes and the evidence it had presented to prove those elements. (S76/2291-97) In the course of doing do, the State discussed the Sanchezes' testimony and 911 call as showing that Defendant committed the murders. (S76/2294) Defendant did not object. (S76/2294) During his closing argument, Defendant insisted that he had gone to the center at Canady's request, that the physical evidence had been planted or manipulated, that the Sanchezes had selective memories, that the police conducted a sloppy investigation, that his testimony should be believed because he was not required to testify and

that the fact he had not sought assistance after allegedly discovering the bodies should be ignored because he was not raised in Florida and he was not thinking straight at the time. (S76/2298-2311)

During the charge conference, Defendant requested the standard alibi instruction, and the State objected because Defendant had never presented an alibi as his defense. (S76/2317-18) Defendant responded that he was not required to present a notice of alibi and that the fact he was at the scene covered in the victims' blood was not sufficient proof that he committed the murders. (S76/2319) The trial court denied the request for the instruction. (S76/2319)

The following morning, Defendant moved for a mistrial claiming that the trial court's statements the previous day concerning the need for the jury to be available in 2 weeks implied that he was guilty. (S77/2323-24) The trial court denied the motion. (S77/2324-25)

After considering the evidence and arguments, the jury found Defendant guilty as charged on both counts. (V9/1691-92; S76/2358-59) The trial court adjudicated Defendant in accordance with the verdict. (V11/2018, V52/3391)

During the penalty phase, Frank O'Farrill, Defendant's parole officer, testified that Defendant had been on parole

since 1997 as a result of a 1970 conviction for bank robbery from the Western District of Kentucky. (V50/3124-27, V13/2443-48) Defendant did not attempt to cross examine O'Farrill, and did not object to the admission of the judgment, sentence and parole documents. (V50/3127) Maxine Schwartz testified that she was working at a bank in Indiana on March 27, 1984, when Defendant and another man robbed the bank. (V50/3128-38) During the robbery, Defendant jumped the teller counter and took \$1250 while his codefendant stood in the lobby holding the tellers at gun point. (V50/3129-38) Defendant was convicted of bank robbery as a result of this incident. (V50/3138-39) Defendant limited his cross examination to the facts that Defendant had not been holding the gun during the robbery and that the robbery occurred in 1984. (V50/3139-40)

Before Dr. Steven Nelson, the medical examiner, testified, the State moved in limine to prevent Defendant from attempting to elicit testimony regarding Canady's blood alcohol level at the time of her death. (V50/3147, 3151) Defendant argued that he believed that such testimony was relevant to whether the cold, calculated and premeditated (CCP) aggravator applied. (V50/3148) While he suggested that the evidence would be insufficient to prove CCP, he did not suggest that the State was precluded from arguing CCP by double jeopardy. (V50/3148-50) The trial court

denied the motion. (V50/3149)

Dr. Nelson then testified that he had reviewed the autopsy reports and autopsy and crime scene photos, spoken to Dr. Volnikh and reviewed the prior testimony of Dr. Volnikh and Dr. Sam Gulino. (V50/3153-55) Dr. Nelson opined that the attack on the victims began in the car using the knife. (V50/3160-66) He averred that given the nature of the tire thumper, the confined area of the car's interior and the extent of the victims' blunt trauma injuries, it was unlikely that the victims were beaten in the car. (V50/3166-67) He opined that the presence of the bloody hand marks on the exterior of the car suggested that the victims were still standing after exiting the car. (V50/3167-69) The blood spatter patterns on the road in the cul-de-sac suggested that the victims collapsed in the road after escaping the car and were then dragged into the woods by their feet. (V50/3176-78) He averred that it would have taken a significant period of time to inflict all of the injuries on the victims. (V50/3183) He opined that the injuries to the victims showed that they had struggled with their attacker and that the injuries would have been very painful. (V50/3185-86)

On cross, Dr. Nelson stated that he believed the victims had to have remained conscious long enough after their throats were slit to have exited the car. (V50/3188) Canady's blood

alcohol level was .15. (V50/3194)

After Dr. Nelson finished testifying, the State indicated that it had additional documents it could present to prove the prior convictions but had not done so because they also discussed other crimes. (V50/3195) Defendant agreed that the State had proven the priors and did not need to introduce additional evidence. (V50/3195) The State later proffered the additional documentation it could have presented had Defendant contested his prior convictions. (V51/3355-56, V14/2498-84)

During his opening statement at the penalty phase, Defendant stated that he would ask the jury in closing what good would come from killing him. (V50/3201-02) He acknowledged that Defendant had prior convictions. (V50/ 3200)

In mitigation, Brian Moore and David Scott, Defendant's coworkers, testified that Defendant was hard working and trustworthy. (V50/3203-07; V51/3275-76, 3277-78) Moore added that Defendant was a good pitcher for the company softball team, that he had seen Defendant was his family and that Defendant appeared to have a good relationship with his wives. (V50/3206-07) Scott added that Defendant helped him establish a fitness routine and was good with Scott's children, including one with Down's syndrome. (V51/3276-77) Both Moore and Scott were unaware of Defendant's criminal history and the fact he was on parole.

(V50/3208, V51/3280)

G.T. Groce, Defendant's first cousin, grew up with Defendant in Talladega, Alabama and stated that no one knew Defendant's father and his mother died when they were toddlers. (V50/3210-11) Defendant's uncle Prince then took Defendant to live with him and his wife Mary, who died when Defendant was in his early teens. (V50/3211-14) Prince was very reliable and made a decent living but had to travel a lot for his work. (V50/3212) As a result, Defendant frequently stayed with other relatives. (V50/3212) The men in the family were not very loving and could be abusive, but the women in the family were loving and protected the children. (V50/3214) Despite these difficulties, Defendant was always a happy child and was in a band. (V50/3217-18)

When they were young, Defendant and Groce had to walk to their segregated school and frequently were called names, had rocks thrown at them and were threatened during the walks because of the racial environment in the community at the time. (V50/3210, 3214-15) They were also subjected to segregated public facilities. (V50/3216)

Groce stated the family was very involved in their church when they were young. (V50/3217) In the 70's, Defendant changed his religion and his name. (V50/3216-17)

In their late teens, both Groce and Defendant left Alabama because of the lack of opportunities there. (V50/3218-19) They eventually ended up together in Indiana, working for GM. (V50/3219-20) At one point, Defendant was offered a supervisory position but rejected it because he did not want to give orders. (V50/3220) Groce never knew Defendant to be violent and recent became aware that Defendant had prostate cancer. (V50/3220-21)

Helen Barclay, another of Defendant's cousins, testified that Defendant lived with her family after his mother and Aunt Mary had died. (V50/3228-29) Barclay stated that Aunt Mary had no children of her own and treated Defendant like a son. (V50/3231-32) Defendant did not have this same relationship with Barclay's parents. (V50/3232-33) Barclay's mother told her that Uncle Prince abused Defendant in the guise of providing discipline. (V50/3225)

Gwendolyn Pearson, another cousin, testified that Defendant was protective of her when they were young. (V51/3266-68) She stated that Defendant began to get in legal trouble after his Aunt Mary died. (V51/3268-69) While they had not kept in touch as adults, Pearson had visited Defendant once while he was with Canady and observed that Defendant and Canady seemed to have a good loving relationship and that Defendant seemed to be good to Canady's children. (V51/3269-73)

James Ross testified that he had been Defendant's neighbor and friend and that Defendant was always helpful to others. (V51/3250-53) Murray testified that she met Defendant through a prison ministry in 1987, and married him in 1991. (V51/3255-56) She considered Defendant a good, non-violent husband and believed he had a good relationship with the one of her children he knew. (V51/3256-57) Defendant was very religious and attended Muslim prayer services regularly. (V51/3258) Murray never knew Defendant to drink, smoke or use drugs. (V51/3258-59) After 11 years of marriage, they divorced because Defendant was cheating on Murray. (V51/3256, 3260) While Defendant regularly paid Murray alimony, they seldom saw one another after the divorce. (V51/3260)

By stipulation, the jury was informed that Canady had told Calandra Wade, her coworker, that Defendant was good to her and her children, provided for her family and assisted Canady in turning her life around. (V51/3285-86) Canady was unaware that Defendant was on parole and was devastated when she found out. (V51/3286) Solomon testified that Defendant met her mother when he saw her at a bus stop and offered her a ride. (V51/3289) During Defendant and Canady's relationship, Defendant was good to the family, bought them things and convinced Canady to move to a nicer home. (V51/3289-94)

During the charge conference, Defendant raised no objection to the instructions on the aggravators. (V51/3300) The State asked that the trial court to mention the 2 cases in which Defendant had been convicted of bank robbery during the prior violent felony aggravator because it believed that there was an issue about doubling of aggravators. (V51/3300-01) Defendant asked the trial court to move the mention of the earlier robbery to the instruction on the under a sentence of imprisonment aggravator because he believed there was a doubling issue. (V51/3301) The trial court accepted the parties' arguments. (V51/3301-02) Defendant objected to the giving of the CCP instruction because there was insufficient evidence to support it. (V51/3303) The trial court overruled that objection. (V51/3304)

During its closing argument, the State reviewed the evidence supporting the aggravators and mitigators and argued that the aggravators outweighed the mitigators. (V51/3323-36) In the course of doing so, it reminded the jury that Defendant had asked the jury what good would come of killing him and averred that the jury was not responsible for killing Defendant and that it was only responsible for making a sentencing recommendation. (V51/3334-35) Defendant did not object. (V51/3334-35)

During his closing argument, Defendant again asked the jury

to consider what good would come from killing him. (V51/3336) He acknowledged that the jury would not kill him personally but argued they were responsible for their sentencing recommendation. (V51/3337) He conceded that the prior violent felony and under a sentence of imprisonment aggravators had been proven. (V51/3339)

Immediately before the jury was instructed, Defendant again stated that he did not object to the form of the instructions on the prior violent felony and under a sentence of imprisonment aggravators. (V52/3362-63) In instructing the jury, the trial court informed it that Defendant's convictions for the contemporaneous murders and 1984 bank robbery were violent felonies and that Defendant was on parole for the 1970 bank robbery when the murders were committed in this case. (V52/3369, 3371) After deliberating, the jury recommended that Defendant be sentenced to death for both of the murders by votes of 11 to 1. (V52/3384-85, V9/1770-71)

At the Spencer hearing, Defendant called Hyman Eisenstein, a neuropsychologist. (V56/3413-15) Eisenstein evaluated Defendant by interviewing him, administering tests and reviewing records. (V56/3416) Based on this evaluation, Eisenstein opined that Defendant felt abandoned and suffered from attachment disorder that allegedly made it difficult for Defendant to form

relationships with women but not their children. (V56/3417-20) He averred that Defendant had suffered several head injuries during his life mainly through involvement in sports. (V56/3423-26) He described the tests he performed as including tests of malingering and neuropsychological functioning. (V56/3429-32) He stated that the results indicated that Defendant was not malingering, that his IQ was 97 and that his academic achievement, attention and concentration, language abilities and motor skills were normal. (V56/3433-41) However, based on the results of the Stroop Color Word Naming test, the Tactile Performance test, Category test and Wisconsin Card Sort test, Eisenstein opined that Defendant had severe frontal lobe impairment. (V56/3443-54) He believed that Defendant was under extreme mental or emotional disturbance at the time of the murder. (V56/3461-62)

On cross, Eisenstein admitted that his opinion regarding the mental or emotional disturbance mitigator was based entirely on his test results. (V56/3469) While he had access to the trial transcripts and evidence concerning Defendant's activities on the day of the murders, he did not consider the testimony or evidence. (V56/3470)

Defendant again argued that CCP did not apply because the evidence was allegedly insufficient both in his sentencing memo

and at the Spencer hearing. (V56/3482-85, V10/1935-38) However, he did not argue that CCP was barred by double jeopardy. Id.

After considering the evidence and arguments, the trial court followed the jury's recommendations and sentenced Defendant to death for both murders. (V10-11/1992-2015) In doing so, it found 4 aggravators applicable to both murders: prior violent felony, based on a contemporaneous conviction for other murder and 1984 bank robbery-great weight and significant weight, respectively; CCP-significant weight; heinous, atrocious or cruel (HAC)-great weight; and under a sentence of imprisonment-significant weight. (V11/2005-10) It found 2 statutory mitigators: age-slight weight and extreme mental or emotional disturbance-moderate weight. (V11/2011, 2013) As non-statutory mitigation, the court found Defendant's current age-slight weight; his potentially terminal illness-slight weight; the fact he never knew his father-moderate weight; his loss of 2 mothers at young age-moderate weight; his exposure to racism as a child-moderate weight; the fact that he was a victim of, and was exposed to, corporal punishment as a child-moderate weight; his lack of substance abuse-slight weight; his religious devotion-slight weight; his employment history-slight weight; the fact that he was a good friend-slight weight; and the fact that he provided for his family-slight weight. (V11/2010-13)

In its sentencing order, the trial court stated that it would still have sentenced Defendant to death even if it had not found CCP. (V11/2014) It also included a section entitled proportionality that was separate from its consideration and weighing of the aggravators and mitigators in which it recognized that this Court conducted the proportionality review and stated that jury recommendations should only be overturned where there was no reasonable basis for the recommendations. (V11/2014) This appeal follows.

SUMMARY OF THE ARGUMENT

Defendant's claim regarding speedy trial and his motion for disqualification of Judge Fernandez is meritless. Defendant's notice of expiration and motion for discharge were premature because Defendant had withdrawn his October 24, 2012 demand. Moreover, Defendant's assertion that the trial court coerced Defendant into withdrawing the demand is meritless. The trial court acted properly when Defendant sought to reinstate his demand and his notice of expiration and motion for discharge would still have been premature if the trial court had been required to place Defendant back in the position he was in when he withdrew the demand. Defendant's motion for Judge Fernandez's disqualification was largely untimely and provided no basis for disqualification of a second judge.

The trial court did not abuse its discretion in denying Defendant's motion to suppress the physical evidence seized from him and his van based on a lawful stop. Defendant's other complaints have not been preserved and are meritless.

Defendant's claims regarding Hernandez are unpreserved and meritless. The trial court properly appointed Hernandez as counsel and denied the motions to discharge Hernandez as standby counsel because there was no conflict and no evidence of Hernandez being ineffective. Defendant's other complaints are meritless.

The trial court did not abuse its discretion in admitting the 911 tape over the objections Defendant made below. Defendant's other complaints regarding the admissibility of the tape and the use of the transcript are unpreserved and meritless.

The trial court did not abuse its discretion in denying the request for an alibi instruction because there was no nexus between the evidence and an alibi defense.

The trial court did not abuse its discretion in denying Defendant's motion for mistrial based on comments it made during the guilt phase. Defendant's complaints about the admissibility of the photos of the victims are largely unpreserved and entirely meritless.

Defendant's claim regarding the evidentiary rulings merits

no relief because when viewed individually, the claims are largely unpreserved and entirely meritless.

Defendant's claims of prosecutorial misconduct provide no basis for relief as they are not preserved and meritless. Moreover, the evidence is sufficient to sustain Defendant's convictions.

The claim that Double Jeopardy precluded a finding of CCP is unpreserved and meritless. There was no fundamental error in the penalty phase jury instructions. Moreover, the trial court properly weighed the aggravators and mitigators in its sentencing order. The Ring claim is meritless. Defendant's sentence is proportionate.

ARGUMENT

I. THE CLAIM REGARDING SPEEDY TRIAL AND DISQUALIFICATION IS UNPRESERVED AND MERITLESS.

Defendant first asserts that the trial court committed reversible error by striking his December 17, 2012 notice of expiration of speedy trial and denying his January 2, 2013 motion to discharge. He further contends that the trial court erred in denying his December 17, 2013 motion for disqualification. However, Defendant is entitled to no relief as the trial court properly determined that Defendant's notice of expiration and motion for discharge were premature. Moreover, the trial court's denial of the motion for disqualification was

proper because the motion was not timely and the record does not refute the reasons the trial court provided for denying the disqualification motion.

A notice of expiration filed before the expiration of the 50 day period from the filing of a demand for speedy trial is premature and properly stricken as such. Brown v. State, 798 So. 2d 773, 774-75 (Fla. 2d DCA 2001). When a notice of expiration is properly stricken as premature, a motion for discharge is properly denied. Id. Moreover, any continuance by a defendant before he is entitled to discharge waives a defendant's rights under the speed trial rule. State v. Nelson, 26 So. 3d 570, 579-80 (Fla. 2010).

Applying these principals here, the trial court properly struck notice of expiration and denied his motion for discharge. When the case was first reversed and remanded by this Court, Defendant waived his right to be tried with 90 days of this Court's mandate. (V7/1392-99) While he filed a demand for speedy trial on October 24, 2012, he withdrew that demand and took a continuance on November 19, 2012. (V31/678-96) The trial court then construed a pleading entitled motion to be heard as a new demand but that pleading was not filed until November 28, 2012. (V32/701, 721-22, 726-34) Since the December 17, 2012 notice of expiration was filed less than 50 days after this second demand,

the trial court properly struck it as premature and properly denied the motion to discharge. It should be affirmed.

Defendant attempts to avoid this result by claiming that his decision to withdraw his demand and take a continuance was coerced and should be ignored. He bases these assertions on a claim that the trial court improperly offered him a deal to permit him to engage in pretrial litigation if he waived his right to self representation. However, Defendant's arguments regarding the existence of a deal are based on taking statements out of context. When read in context, the trial court was doing nothing more than ensure that Defendant understood the dangers of self representation given his evident confusion about the law.

As the Court has recognized, a defendant does not need to have the legal skills to represent himself to be permitted to do so. Faretta v. California, 422 U.S. 806, 835 (1975). However, a decision to represent one's self must be made with an understanding of the dangers of self representation. Id. Here, given the inconsistent positions Defendant was taking, the trial court appropriately questioned Defendant's understanding of his position.

Defendant filed a demand for speedy trial on October 24, 2012, despite the fact that he had numerous discovery requests

and pretrial motions outstanding. As the trial court attempted to explain to Defendant at the hearing on his demand, Defendant could not both continue to engage in pretrial litigation and demand a speedy trial simultaneously. See Jones v. State, 449 So. 2d 253, 262 (Fla. 1984); State ex rel. Ranalli v. Johnson, 277 So. 2d 24, 25 (Fla. 1973). When the trial court attempted to explain this inconsistency to Defendant, Defendant continued to insist that he believed that he could engage in pretrial litigation and maintain his demand. (V29/594-607) While Defendant stated at the end of the October 30, 2012 hearing that he understood that he had to choose between continued pretrial preparation and his demand for a speedy trial and that he was choosing to proceed with his demand, Defendant continued to attempt to engage in pretrial litigation and preparation. (V29/608, V7/1386-90, V30/637-45) Moreover, when the trial court attempted to explain to Defendant that he would not have time to complete the pretrial preparations he was attempting within the time under his demand and that it would not continue the trial despite his lack of preparation as a result of his demand, Defendant ignored the trial court's advice and accused the trial court of learning of privileged materials. (V30/637-45) Given this evident confusing about his legal position, the trial court's statements at the November 19, 2012 hearing were not an

attempt to offer Defendant any deal. They were simply an attempt to ensure that a defendant who was taking inconsistent positions understood that the danger of doing so was that he would proceed to trial unprepared and the advantage of having counsel appointed was that he would not. Since a trial court is required to ensure that a defendant who is choosing to represent himself does so with such an understanding of the ramifications of his decision, the record does not support that the trial court ever offered Defendant any deal or coerced him into withdrawing his demand. As such, the trial court properly refused to allow Defendant to rescind his decision to withdraw his demand. It should be affirmed.

Moreover, Defendant's suggestion that the trial court acted improperly when Defendant indicated that he had changed his mind and wanted to proceed pro se again also provides no basis for relief. First, this Court has held that the proper method for a defendant who had previously requested a continuance and waived an opportunity to have a speedy trial to seek a speedy trial anew is for the defendant to file a demand for speedy trial. State v. Naveira, 873 So. 2d 300, 306 (Fla. 2004). Here, the trial court treated the pleading Defendant filed indicating that he had changed his mind as a new demand and tried him within the period for that demand. As such, the trial court provided the

proper remedy and should be affirmed.

Second, Defendant would not be entitled to any relief even if the trial court had been required to place him back in the position he would have been in had he not taken the continuance. At the point Defendant took the continuance, there were still 25 days remaining in the demand period. Placing Defendant back into the position he would have been in when he announced his desire to rescind his prior request for a continuance on November 28, 2012, would entail put him back under a demand with 25 days remaining and would cause the speedy trial period not to expire until December 24, 2012. Since Defendant filed his notice of expiration on December 17, 2012, it would still have been premature and properly stricken as such. Thus, Defendant would still be entitled to no relief.

While Defendant makes a conclusory assertion that he was denied his constitutional right to speedy trial, this statement entitled him to no relief. Defendant only asserted his right to speedy trial under Fla. R. Crim. P. 3.191 below. As this Court has recognized, the right to speedy trial under that rule is not the same as the constitutional right to speedy trial. Naveira, 873 So. 2d at 308. As such, this issue is not preserved. Steinhorst v. State, 498 So. 2d 414, 414-15 (Fla. 1986).

Moreover, to assert a claim about a constitutional right to

speedy trial, a defendant must show that the balancing of 4 factors favors him. Barker v. Wingo, 407 U.S. 514, 530 (1972). However, Defendant does not even mention those 4 factors, much less show that the balance of those factors favored him. Thus, the issue has been waived for failing to brief the issue properly. Doorbal v. State, 983 So. 2d 464, 482 (Fla. 2008).

Moreover, the balancing of the 4 factors does not favor Defendant. The less than 3 years between the issuance of this Court's mandate and the beginning of the retrial was not extraordinary and much of that time was consumed with Defendant delaying the proceedings by seeking to relitigate the same issues repeatedly. Further, Defendant did not even bring to assert any right to speedy trial until October 24, 2012, less than 3 months before his retrial started, and then did so only under Florida law. Further, nothing in the record even suggests that Defendant was prejudiced by any delay. As such, any constitutional speedy trial claim is meritless. See Barker, 407 U.S. at 533-36.

Alternatively, Defendant requests that this Court grant him a new trial before a different judge. However, there is no basis for such relief as the motion for disqualification was untimely and properly denied.

"A motion to disqualify shall be filed within a reasonable

time not to exceed 10 days after discovery of the facts constituting the grounds for the motion." Fla. R. Jud. Admin. 2.160(e). Here, Defendant did not file his motion to disqualify until December 17, 2012. (V8/1441-51) As such, only those actions that Defendant could have learned on, or after, December 7, 2012, would be timely. However, in his motion, Defendant's only complaints regarding actions on or after that date were to claim that the trial court has somehow acted improperly by allowing Hernandez to comment that the second chair counsel he had selected might not be willing, or able, to represent Defendant if he was representing himself at the guilt phase and that it had answered Hernandez's inquiry about whether he needed to be prepared to handle the case if there was a change in Defendant being allowed to represent himself when trial began. Id. As such, all of Defendant's other allegations were untimely and properly denied as such.

Moreover, even if Defendant's allegations could be considered timely, Defendant would still be entitled to no relief. After this case was remanded, Defendant successfully sought the removal of one judge, and the motion about which Defendant complains concerned an attempt to obtain the removal of a second one. (V6/1170-75, 1179) As this Court has recognized such a successor judge is entitled to pass on the truth of the

allegations in the disqualification motion and the denial of the motion will only be reversed if "the record clearly refutes the successor judge's decision to deny the motion." Kokal v. State, 901 So. 2d 766, 772-75 (Fla. 2005).

Here, the record does not refute the lower court's determination that it was not biased. As argued above, the record, when considered as a whole, does not support a claim that the trial court made an improper deal with Defendant. Instead, it reflects that the trial court was merely attempting to make sure that a defendant who was taking inconsistent positions and continued to do so even when informed of such inconsistent positions understood what he was doing and was choosing to represent himself with an understanding of the advantages and disadvantages of doing so. Since a trial court is required by Faretta to do so, the record does not refute the trial court's determination that its actions do not evidence bias.

Moreover, Defendant's insistence that the record refutes his claim regarding hold a hearing without him being present also does not provide a basis for relief. While Defendant points to a transcript of September 21, 2012, and suggests it shows that the trial court held an ex parte hearing, a review of the transcript shows that the trial court, the State and standby

counsel merely discussed resetting the matter to a different date and had no substance discussions about any matters that day. (S33/571-82) This Court has repeatedly held that such administrative discussions do not constitute ex parte hearings sufficient to grant a motion to disqualify an initial judge. Roberts v. State, 840 So. 2d 962, 970 (Fla. 2002); Florida Bar v. Carlon, 820 So. 2d 891, 896 (Fla. 2002); Arbelaez v. State, 775 So. 2d 909, 916 (Fla. 2000); Rose v. State, 601 So. 2d 1181, 1185 (Fla. 1992). As such, they do not provide a basis to find the trial court erred in denying this motion.

II. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS.

Defendant claims the trial court erred in denying his motion to suppress the physical evidence obtained from him and his van because the State failed to meet its burden of proving the reasonable suspicion necessary to justify the initial stop and the probable cause necessary for the ensuing detention. However, the trial court properly denied the motion to suppress and should be affirmed.

In reviewing a trial court's motion to suppress, this Court accepts the trial court's factual findings if they are supported by competent, substantial evidence. Connor v. State, 803 So. 2d 598, 608 (Fla. 2001) However, this Court reviews the application of the law to those facts de novo. Id.

Here, the trial court denied the motion to suppress, finding the Sanchezes had informed 911 that they had seen an African-American man dressed in white and covered in blood walk to a van, get into it and begin to drive away, that the information they provided was accurate, that the Sanchezes' identified Defendant immediately after the stop, that the officers observed the bloody items consistent with the Sanchezes' information without searching the van, that Defendant was sweating and had blood on his shirt and that the officers found items covered in blood when they investigated the area from which the Sanchezes had seen Defendant emerged. (V6/1017-35) Based on these facts, it determined that the officers had reasonable suspicion when they stopped the van and probable cause when they arrested Defendant. Because the factual findings are supported by competent, substantial evidence and the legal conclusions are correct, this Court should affirmed.

The factual findings are supported by the 911 tape and the testimony of the Sanchezes and deputies Stahlschmidt and Mason. (S80/741-43, 753-55, 758, 836; S23/233-34, 230-34, 269-71, 280-81; S82/880-86) As such, they are binding on this Court.

Given the facts, the trial court properly found that the responding deputies had reasonable suspicion at the time they stopped the car. The police knew that Defendant had been seen

walking around a business area late at night covered in blood and carrying a shiny object, that he had changed his clothing behind some bushes and that he then entered a van and attempted to leave the area. This information was sufficient to establish reasonable suspicion necessary to stop the van. People v. Doll, 948 N.Y.S.2d 471, 480-82 (N.Y.App. Div. 2012), aff'd on other grounds, 998 N.E.2d 384 (N.Y. 2013); see also State v. Cremer, 563 So. 2d 817, 818-19 (Fla. 5th DCA 1990). Moreover, once the van was stop, they observed Defendant was nervous and behaving erratically, the bloody jumpsuit and boots were visible in the van, Defendant had blood on the clothing he was still wearing and he provided an excuse for the presence of the bloody items that did not account for the amount of blood found. When the officers followed the path the Sanchezes had seen Defendant taking, they found Canady's blood soaked car crashed into a wall, blood on the street and the bodies of the victims. This information was sufficient to provide probably cause to arrest Defendant. Stevens v. State, 251 So. 2d 565, 568 (Fla. 1971); see also Hayward v. State, 24 So. 3d 17, 37 (Fla. 2009).

In attempting to show that there was no reasonable suspicion to stop the van, Defendant first asserts that the deputies could not rely on any information given by the Sanchezes because the information had not been provided to the

officers personally and the dispatcher who relayed the information to them was a civil employee. However, the fellow officer rule applies to impute the knowledge of one officer in the chain of investigation to another. United States v. Hensley, 469 U.S. 221, 231-32 (1985). Moreover, this Court has applied this rule to information from a police dispatcher without mentioning the employment relationship between the dispatcher and the police agency. State v. Maynard, 783 So. 2d 226, 229 (Fla. 2001). Defendant also attempts to rely on statements regarding the officers' subjective beliefs about the information they had to show that there was no reasonable suspicion or probable cause. However, the deputies' subjective belief does not matter; the objective facts do. Whren v. United States, 517 U.S. 806 (1996). Thus, as discussed above, the deputies had reasonable suspicion to stop Defendant and subsequent developed probable cause to detain Defendant. This Court should affirm.

Next, Defendant attempts to claim that the Sanchezes were anonymous tipsters and not citizen informants, but this is not true. The Sanchezes identified themselves on the 911 call, were present following Defendant at the scene of the stop, and remained with the police even thereafter. Thus, they qualified as citizen informants. Maynard, 783 So. 2d at 229.

Defendant alleges that the information provided by the

Sanchezes was insufficient to suggest that a crime had occurred or was about to occur. However, the information provided to the dispatcher was that there was an unknown male covered in blood with a shiny knife-like object in his hand running around, he attempted to hide and changed his clothes and he then drove away from the center. Such information was sufficient to provide reasonable suspicion. Doll, 948 N.Y.S.2d at 480-82; Cremer, 563 So. 2d at 818-819.

Defendant's final allegation is that the stop lasted too long. However, this issue is not properly before this Court. While Defendant insisted that the officers should have never stopped below, he never argued that the stop was too long. (V3/469-83; V4/222-27) As such, the assertion that the evidence should have been suppressed because the stop lasted too long is not preserved. Perez v. State, 919 So. 2d 347, 359 (Fla. 2005). Thus, it should be rejected.

Even if the argument was properly before this Court, it should still be rejected because it is meritless. As the United States Supreme Court has made clearly, the determination of whether a detention had lasted too long is based on whether the police have acted diligently and whether the purpose of the stop had been achieved. Rodriguez v. United States, 2015 WL 1780927, *5 (Apr. 21, 2015). Applying this standard, the stop was not

overly long. As noted above, Defendant was stopped because he had been seen walking around an office park late at night covered in blood and carrying a shiny object and had covertly change his clothing before attempting to drive away. As such, the purpose of the stop was to determine whether Defendant's bloody condition was the result of some violent criminal activity. Rather than dispelling any suspicion that the blood was the result of criminal activity, what the police found after they stopped Defendant merely heightened their suspicions. Upon being stopped, Defendant was found to be sweating profusely and acting erratically and to have blood on the clothes he was still wearing even though the bloody suit he had been wearing was visible in the van. See C.E.L. v. State, 24 So. 3d 1181, 1186 (Fla. 2009). When asked about the blood on the clothing he was still wearing, Defendant claimed to have killed a rabbit earlier in the day. However, this explanation was inconsistent with the amount of blood observed on the jumpsuit and underclothing and did not dispel the officers' suspicions that the police was the result of criminal activity. Finally, the officers had the Sanchezes show them where Defendant had been coming from, which lead to the discovery of the crashed, blood soaked car in a street that was covered in blood and ultimately to the victims' bodies. Since the mission of the stop was not fulfilled until

the bodies were found, at which point, the police had probable cause to arrest Defendant, the stop was not too long. The lower court should be affirmed.

III. THE CLAIM REGARDING HERNANDEZ MERITS NO RELIEF.

In Defendant's next challenge, he argues that the trial court erred in appointing Hernandez as counsel and in denying Defendant's motions to discharge Hernandez as standby counsel. Moreover, Defendant attempts to argue that the trial court improperly elevated Hernandez beyond his role as standby counsel. As Defendant's claims are unpreserved and meritless, Defendant is entitled to no relief, and the trial court should be affirmed.

Although Defendant first claims that the trial court should not have appointed Hernandez because he allegedly had a conflict of interest, this is unpreserved and meritless. Steinhorst v. State, 498 So. 2d 414, 414-415 (Fla. 1986); Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973). Defendant did not object to Hernandez's appointment as standby counsel in September of 2010. (V1/128-29) He then permitted Hernandez to represent him for more than a year before seeking his removal. When Defendant did seek Hernandez's removal, he never claimed that Hernandez had been found to have a conflict of interest. Instead, in all of his 3 motions to remove Hernandez, Defendant merely asserted his

general dissatisfaction with Hernandez. (V5/921-23; V6/1180-84; V7/1328-31) As such, Defendant's allegation that Hernandez should not have been appointed as standby counsel is unpreserved, and the trial court should be affirmed. Steinhorst, 498 So. 2d at 414-15.

Even if the issue was preserved, Defendant is still entitled to no relief. While Defendant acts as if the trial court found that Hernandez has a conflict when he removed him before the first trial, this is not true. Instead, the record reflects that Defendant had presented the trial court with a motion to discharge Hernandez in which he insisted that one of the crime scene officers had lied at a hearing regarding having not taken a particular photo and that Hernandez had played a role in hiding some evidence from him. (S42/844-51) At the hearing on motion, Defendant added that he had allegedly given Hernandez a pro se motion in limine and that Hernandez had not adopted the motion. (S60/677-78) The trial court responded to these assertions by informing Defendant that it would not appoint a new attorney for him if he discharged Hernandez, and then discharged Hernandez without making any finding that there was a valid basis to remove Hernandez. (S60/678-80) Since a trial court is required to appoint a new attorney if it finds good cause to discharge the existing attorney, Nelson, 274 So.

2d 256, the trial court's actions show that it did not believe there was a basis to remove Hernandez. Thus, Defendant's claim that Hernandez had a conflict before the first trial is meritless and should be rejected.

Further, Defendant's suggestion that he subsequently created a conflict of interest with Hernandez by filing a bar complaint against Hernandez is meritless. This Court has recognized that the mere fact that a defendant filed a bar complaint against his counsel does not show that there is a conflict of interest. Owen v. Crosby, 854 So. 2d 182, 193-94 (Fla. 2003). In fact, this Court has repeatedly refused to allow a defendant to attempt to create a conflict of interest through his own actions and then benefit from the situation by providing the defendant with new counsel. Wike v. State, 698 So. 2d 817, 820-21 (Fla. 1997); Waterhouse v. State, 596 So. 2d 1008, 1015 (Fla. 1992). Thus, the fact that Defendant filed a bar complaint against Hernandez did not show that there was a conflict of interest and require his removal. The trial court should be affirmed.

The fact that there was no constitutional conflict of interest is all the more clear when one considers the definition of such a conflict. As both this Court and the United States Supreme Court have held, a defendant only demonstrates a

constitutional conflict of interest when he shows that his attorney actively represented conflicting interests and that doing so adversely affected counsel's performance. Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); Hunter v. State, 817 So. 2d 786, 791-92 (Fla. 2002). The Court has stated that it has never found such a conflict to exist except where an attorney is simultaneously representing more than one participant in the trial. Mickens v. Taylor, 535 U.S. 162, 174-76 (2002). Since none of Defendant's accusations against Hernandez showed that he was actively representing conflicting interests or that there was any adverse effect on his ability to serve as standby counsel, there was no conflict of interest. The trial court should be affirmed.

Moreover, the trial court also did not abuse its discretion in refusing to discharge counsel based on Defendant's repeated motions to do so.¹ In all of his motions to remove Hernandez and all of the hearings on those motions, Defendant never presented any grounds to believe that Hernandez was being ineffective. (V5/921-23; V6/1180-84; V7/1328-31; S27/477-79; V26/451; V31/655-71) Instead, he merely expressed his general dissatisfaction and disagreement with Hernandez. As this Court

¹ This Court reviews a trial court's decision on whether to discharge counsel for an abuse of discretion. Guardado v. State, 965 So. 2d 108, 113 (Fla. 2007).

had repeatedly held, such general dissatisfaction and disagreement does not provide a basis to remove counsel. McKenzie v. State, 29 So. 3d 272, 282 (Fla. 2010); Morrison v. State, 818 So. 2d 432, 440 (Fla. 2002); Sexton v. State, 775 So. 2d 923 (Fla. 2009); Davis v. State, 703 So. 2d 1055, 1058-59 (Fla. 1997); Watts v. State, 593 So. 2d 198, 203 (Fla. 1992). As such, the trial court did not abuse its discretion in denying these motions. It should be affirmed.

Additionally, Defendant's suggestion that the trial court erred by interfering with his right to self representation by allegedly ordering Defendant to communicate with the court through standby counsel and by holding ex parte hearings with standby counsel is not meritorious. As the United States Supreme Court has recognized, the participation of standby counsel in the proceedings even over a pro se defendant's objection only impedes the defendant's right of self representation when actions of standby counsel prevent the defendant from making decisions regarding the presentation of his defense or create the appearance to the jury that the defendant is not truly representing himself. McKaskle v. Wiggins, 465 U.S. 168, 178-80 (1984). Here, nothing the trial court did with standby counsel implicated either of these concerns.

While Defendant suggests that the trial court required him

to channel his communications with the court through standby counsel, the record refutes this notion. Instead, it shows that the trial court advised Defendant that Hernandez had been helpful to him by communicating with the court regarding setting motions, making copies and issuing summons. (S27/479) Moreover, both at the hearing and in the order denying his motion to discharge standby counsel, the trial court affirmatively informed Defendant that he could use standby counsel as Defendant saw fit. (S27/479; V5/981) Immediately after making the statement at the hearing, the trial court proceeded to allow Defendant to present his own arguments on matters of substance. (S27/480-515) Given these circumstances, the trial court's statement about its using the attorneys as conduits to communicate with Defendant does not show that the trial court allowed standby counsel's participation to interfere with Defendant's right to self representation.

The same is true of the 2 allegedly ex parte hearings. As the transcript of the September 21, 2012 hearing shows, the trial court did nothing more than reschedule a hearing for a later date. (S33/571-82) Moreover, the transcript of the October 1, 2012 hearing shows that it was nothing more than a request for interim payment of fees, which was granted. (S34/584-89) This Court has recognized that it is not improper for a trial

court to hold ex parte hearing on such administrative matters because they do not affect the merits of the case. Roberts, 840 So. 2d at 970; Carlton, 820 So. 2d at 896; Arbelaez, 775 So. 2d at 916; Rose, 601 So. 2d at 1185. Thus, the holding of such hearings could not have permitted counsel to make decisions that concerned the merits of the case. This is particularly true of the October 1, 2012 hearing was not even held before the trial judge. As such, the trial court's actions did not interfere with Defendant's right to represent himself. Defendant's contrary claim should be rejected, and the trial court affirmed.

IV. THE ADMISSION OF THE 911 CALL AND USE OF ITS TRANSCRIPT PROVIDES NO BASIS FOR RELIEF.

Defendant next argues that the trial court erred in admitting the recording of the 911 call and in allowing the State to use a transcript of the 911 call as a demonstrative aid. However, the trial court did not abuse its discretion in admitting the 911 recording over the objections Defendant made below. Moreover, the additional arguments Defendant presents on appeal regarding the admissibility of the tape and the use of the transcript are unpreserved and meritless.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. Davis v. State, 121 So. 3d 462 (Fla. 2013). Here, the trial court did not abuse its in determining that the authenticated 911 recording was admissible as an

excited utterance. To qualify as an excited utterance, "the statement must be made: (1) 'regarding an event startling enough to cause nervous excitement'; (2) 'before there was time to contrive or misrepresent'; and (3) 'while the person was under the stress or excitement caused by the event.'" Hudson v. State, 992 So. 2d 96, 107 (Fla. 2008) (quoting Henyard v. State, 689 So. 2d 239, 251 (Fla. 1996)). Importantly, "[i]f the statement occurs while the exciting event is still in progress, courts have little difficulty finding that the excitement prompted the statement." Id.

Here, Defendant's actions in walking around the center covered in blood caused Mr. Sanchez to become afraid and worried to such an extent that he did not want Ms. Sanchez to leaving the building where she was working and insisted that she wait for him to pick her up. (S68/1040-41) Mr. Sanchez's unexpected phone call and instant direction to stay where she was caused Ms. Sanchez to become scared since she had only just arrived at the building and had intended to use her golf cart to conduct inspections of the work performed by her crew. (S68/1041-42) After Mr. Sanchez picked her up and they were driving back, Ms. Sanchez called 911 when she saw Defendant covered in blood and walking around the center as well, which caused her to become fearful, scared and nervous. (S68/1042-43) In fact, observing

Defendant covered in blood, disappearing behind buildings, changing clothing and carrying a shiny knife-like object caused Ms. Sanchez to perceive Defendant as dangerous. These circumstances were sufficient to establish the statements were excited utterances. Hudson, 992 So. 2d at 108.

Further, Ms. Sanchez's statements to the 911 operator were made while she was still observing Defendant. In fact, she remained on the call until the police arrived and made contact with Defendant. (S68/1052) Thus, the fact that Ms. Sanchez made the statements while the event was ongoing negated the likelihood that she had time to contrive or misrepresent her observations of Defendant. Id. at 107-09.

Defendant's assertion that the trial court improperly admitted the 911 recording as an excited utterance because Ms. Sanchez responded negatively to the State's question of whether she was "excited" while observing Defendant does not show an abuse of discretion. (S68/1043) An affirmative response to whether someone is "excited" is not a requirement to meet the excited utterance exception. Id. Further, Ms. Sanchez stated that Defendant's actions caused her to be very afraid, very scared and concerned. (S68/1044) Moreover, her response to the operator that she did not know the source of the blood that covered Defendant certainly did not negate her perception that

Defendant created a dangerous situation that caused her nervous excitement, fear and anxiety. As such, the trial court did not abuse its discretion in finding the call qualified as an excited utterance. Id.

While Defendant now claims that the call is double hearsay because Ms. Sanchez relayed statements by Mr. Sanchez, this issue is not preserved. It is well settled in Florida that a specific objection on the grounds raised on appeal is necessary to preserve an issue for appeal. Chamberlain v. State, 881 So. 2d 1087, 1100 (Fla. 2004). Here, Defendant never made a contemporaneous objection to the 911 tape because it contained double hearsay. Instead, his argument was limited to the assertion that the tape had been altered and that it was all hearsay. (V3/463-65, 582-85; S68/1036-39) As such, this claim is not properly preserved for this Court's review.

Even though this issue is not properly before this Court, Defendant's claim also fails on its merits. Mr. Sanchez's eyewitness accounting of the events he was witnessing is admissible as an excited utterance for the same reasons that Ms. Sanchez's statements are admissible as an excited utterance. He too made his statements as he was witnessing a startling event and while under the excitement of that event. Hudson, 992 So. 2d at 107-09. In fact, Mr. and Ms. Sanchez were together in their

pickup truck observing Defendant's behavior and actions throughout the call. Thus, the fact that Ms. Sanchez relayed such statements to 911 does not render such statements inadmissible.

While Defendant complains about the admission of the statement about dangerousness, the trial court did not abuse its discretion in admitting this statement either. The statement regarding dangerousness was properly admitted as lay opinion testimony. Martinez v. Vega, 751 So. 2d 1268, 1270 (Fla. 3d DCA 2000). The trial court should be affirmed.

Defendant's assertions about a confrontation violation also provide no basis for relief. Defendant never made a contemporaneous objection that the admission of the call would violate the Confrontation Clause. As such, this issue is not properly preserved for review. Williams v. State, 967 So. 2d 735, 747 n.11 (Fla. 2007).

Even if the issue was properly before this Court, Defendant's claim would still be meritless. In Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004), the Court held that the Confrontation Clause does not apply where the hearsay declarant testifies or where a statement is not offered for its truth. Here, the Sanchezes testified. Thus, the Confrontation Clause was inapplicable to their statements. Moreover, the introduction

on the tape was not offered for its truth.

Defendant's assertions about the alleged lack of authentication also provide no basis for relief. Defendant objected to the tape on the grounds that it was not the original. He did not object that the contents of the tape were not authentic. (S68/1036-38) As such, this issue is also unpreserved.

Even if Defendant has preserved a challenge to the authenticity of the tape, he would still be entitled to no relief because the trial court did not abuse its discretion in finding the tape to be authentic. As this Court has held, the authentication merely requires the proponent to show that the evidence is what he claims it to be. Justus v. State, 438 So.2d 358, 365 (Fla. 1983). "In determining whether the evidence submitted is sufficient for this purpose, the trial judge must evaluate each instance on its own merits, there being no specific list of requirements for such a determination." *Id.* Here, Ms. Sanchez testified that she had listened to the tape and confirmed that it accurately represented the conversation she had with the 911 operator in the presence of her husband. (S68/1035-36) This evidence was sufficient to show that the tape was what it purported to be. Id. As such, the trial court did not abuse its discretion in finding the tape authentic.

In attempting to show that there was error, Defendant complains that the tape admitted had an introduction identify what the tape was. However, the fact that the tape included a statement showing it was the 911 call did not detract from a showing that the tape was what the State claimed it was as the heading was fully consistent with Ms. Sanchez's testimony regarding what was on the tape. As such, the trial court did not abuse its discretion.

Even if there had been any error in the admission of the tape, it would be harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The Sanchezes provided testimony regarding what they observed when they saw Defendant at the center. Thus, the tape was cumulative to their testimony. Moreover, Defendant was seen in the backseat of Canady's car immediately before the murders. The physical evidence showed that the attack on the victims began, and the fatal knife wounds, were inflicted in the car by an assailant who was seated in the backseat. Defendant was found in possession of the murder weapons immediately after the crime. His clothing and face were covered in the victims' blood. He had gone to the center knowing the victims would be in a commercial area late at night such that they could be easily isolated. Defendant provided inconsistent testimony regarding his actions that night. Moreover, Defendant's actions in

attempting to hide the bodies, remove the murder weapons from the scene and flee evidenced a consciousness of his guilt. Given the cumulative nature of the tape and the overwhelming evidence of his guilt, any error in the admission of the tape was harmless.

Moreover, Defendant's complaints about the transcript do not entitle him to any relief. While Defendant raised issues regarding whether the tape presented to the trial court was the original and indicated a concern regarding which transcript the State was using, he never raised any issue regarding the accuracy of the transcript or its use and did not request an instruction regarding the use of the transcript at trial. (V3/463-65, 582-85; S68/1036-39) In fact, other than complaining about the addition of the introduction to the tape and noting that the transcript includes translations of Spanish, Defendant does not suggest that there are any inaccuracies in the transcript even on appeal. As such, this issue is unpreserved. Chamberlain, 881 So. 2d at 1100.

Because the issue is unpreserved, Defendant would only be entitled to relief if he could show fundamental error. Smith v. State, 28 So. 3d 838, 857 (Fla. 2009). However, he cannot do so. As previously noted, Defendant does not suggest that anything in the transcript is inaccurate. Moreover, the jury was only able

to look at the transcript while tape was played. As noted above, the tape itself was cumulative to the Sanchezes' testimony about their observations of Defendant, and the other evidence of Defendant's guilt was overwhelming. As such, any error in the use of the transcript does not constitute fundamental error. The trial court should be affirmed.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE REQUEST FOR AN ALIBI INSTRUCTION.

Defendant next contends that the trial court erred in failing to give an alibi instruction. However, the trial court did not abuse its discretion in refusing to give such an instruction.²

As this Court has recognized, a trial court does not abuse its discretion in refusing to give an instruction on a defense "where there is no nexus between the evidence in the record and the requested instruction." Mora v. State, 814 So. 2d 322, 330 (Fla. 2002); see also Wheeler v. State, 4 So. 3d 599, 604-05 (Fla. 2009); Hooper v. State, 476 So. 2d 1253, 1256 (Fla. 1985). Here, Defendant never claimed to have been elsewhere when the murders occurred. In fact, he was arrested before he could even leave the center. Instead, his initial story was that he went to the center and met Canady to assist in looking for an allegedly

² This Court reviews a trial court's decision regarding the giving of jury instructions for an abuse of discretion. Coday v. State, 946 So.2d 988, 994 (Fla. 2006).

lost ring. While he claimed to have briefly left Canady's side, he admitted that he remained close enough that he could see a signal from her. On cross, Defendant admitted that even this claim was false. Instead, he testified that he was in car with the victims, and in attempt to explain his bloody clothing, he acknowledged that he had been in contact with the bodies before they were discovered by the police. In fact, when the State objected to the alibi instruction based on the lack of evidence, Defendant made no attempt to suggest that there was evidence to support the instruction (and does not do so in his brief). Instead, he argues that "the fact that [he] was on the scene and had blood on him" was insufficient to prove that he committed the murder. (S76/2319) Moreover, during the closing argument that he had already given before the instruction was denied, Defendant did not argue that he had an alibi. Since there was no nexus between the evidence and an alibi defense, the trial court did not abuse its discretion in refusing to give an instruction on the alibi defense.

VI. THE COURT'S COMMENTS MERIT NO RELIEF.

Defendant next asserts that the trial court committed reversible error by discussing the dates the jury needed to be available for a potential penalty phase before he rested his defense. However, Defendant is entitled to no relief because the

only issue he preserved was the denial of a motion for mistrial, and the trial court did not abuse its discretion in denying a motion for mistrial.

While Defendant briefs this issue as if he had a preserved issue regarding the propriety of the trial court's comments as a comment on the evidence, this is not true. Defendant's argument is based on combining comments made at the beginning of voir dire about scheduling and voir dire comments made about the manner in which capital cases are tried with a comment about scheduling made near the end of the presentation of evidence at the guilt phase, approximately a week later. However, Defendant made no contemporaneous objections to any of the comments. Instead, he merely moved for a mistrial the day after the last comment was made. As such, the only issue that is preserved for review is the denial of a motion for mistrial. See Parker v. State, 456 So. 2d 436, 442-43 (Fla. 1984).

"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 v. State, 417 So. 2d 639, 641 (Fla. 1982) (citing Salvatore v. State, 366 So. 2d 745, 750 (Fla. 1978)). Such absolute necessity is demonstrated when the granting of a mistrial "is necessary to ensure that the defendant receives a fair trial.'" Gore v. State, 784 So. 2d

418, 427 (Fla. 2001) (quoting Goodwin v. State, 751 So. 2d 537, 547 (Fla. 1999)). Here, the trial court did not abuse its discretion in finding that there was no absolute necessity for a mistrial.

While Defendant acts as if the trial court's comments regarding scheduling as the evidence drew to a close directly indicated that the reason why the juror needed to remain available was that the penalty phase would occur in 2 weeks, the trial court never mentioned the penalty phase at all in her comments. Instead, after informing the jury that it expected deliberations to begin the next morning, it responded to juror questions regarding future dates without mentioning the penalty phase at all. (SV76/2209-13) Instead, as Defendant admitted in making his motion for mistrial, the jury would have had to have drawn an inference that the trial court was referring to the penalty phase based on the trial court's voir dire comments about taking a break and about the manner in which a capital case was tried to have understood that the comments referred to the penalty phase at all. (SV77/2323-24) However, the voir dire comments had been made at least a week earlier. Thus, the likelihood of that inference even being drawn was slim. See United States v. Dilg, 700 F.2d 620, 625 (11th Cir. 1983). Further, the trial court repeatedly qualified its statement

about needing the jury available on the dates the penalty phase was scheduled by stating it was "possible," proceedings would be held on those days "if . . . required by law" and "if we get to that point." This Court has previously rejected the assertion that such comments are even improper and held that they do not require a mistrial. Wyatt v. State, 71 So. 3d 86, 114 (Fla. 2011); Henderson v. State, 463 So. 2d 196, 200 (Fla. 1985). As such, the trial court did not abuse its discretion in denying the motion for mistrial and should be affirmed.

The cases upon which Defendant relies do not compel a different result. In both Raulerson v. State, 102 So. 2d 281, 284-85 (Fla. 1958), and Hamilton v. State, 109 So. 2d 422, 423-24 (Fla. 1959), the trial courts made direct statements that a fact had issue had been proven. Moreover, in Raulerson, the defendant had preserved an issue regarding the propriety of the comment through a contemporaneous objection. Raulerson, 102 So. 2d at 285. Here, even Defendant admitted that an inference had to be made, and the issue is limited to denial of a motion for mistrial. As such, they do not apply.

VII. THE CLAIM REGARDING THE ADMISSION OF PHOTOS PROVIDES NO BASIS FOR RELIEF.

In his seventh claim, Defendant alleges the trial court erred in failing to exclude every photograph showing the bodies of Canady and Singleton. (IB/103-04) However, Defendant is

entitled to no relief because the issue is largely unpreserved and entirely meritless.

While Defendant acts as if he preserved an issue regarding every photograph of the bodies through a motion in limine and a contemporaneous objection, this is not true. (IB/103) As has been recognized, a motion in limine only preserves an issue if a trial court makes a definitive ruling on the issue. McGirth v. State, 48 So. 3d 777, 791 (Fla. 2010). Here, the trial court did not make a definitive ruling on the admissibility of all the photographs in response to Defendant's motion in limine. (S68/989, 996-97) Instead, it instructed Defendant that he would have to make specific objections to the photographs when they were introduced. (S68/997) As such, the fact that Defendant presented a motion in limine preserved nothing. McGirth, 48 So. 3d at 791.

At trial, Defendant made no specific objection to the admission of any of the crime scene photos showing the bodies. While he objected to the autopsy photos, he did so generally on the basis that all of the autopsy photos were inflammatory. (S69/1179-80) He made no mention of any stipulation or concession to any of the elements of the crimes. Thus, this objection did not preserve the issue presented on appeal. Steinhorst, 498 So. 2d at 414-15.

Because this issue was not preserved, Defendant would only be entitled to relief if he could show that fundamental error occurred. Smith v. State, 28 So. 3d 838, 857 (Fla. 2009). Fundamental error has been defined as the type of error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. Hayward v. State, 24 So. 3d 17, 42 (Fla. 2009).

Here, Defendant cannot show fundamental error because the trial court did not abuse its discretion in admitting the photos at all.³ This Court has long held that photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance. Jennings v. State, 123 So. 3d 1101, 1126 (Fla. 2013). "The test for admissibility of photographic evidence is relevancy rather than necessity." Douglas v. State, 878 So. 2d 1246, 1255 (Fla. 2004) (quotation omitted). Crime scene photographs are relevant to establish the manner in which the murders were committed, to show the position and location that the victims were found by police, and to assist crime scene technicians in explaining the condition of the crime scene when the police arrived. Id. Additionally,

³ This Court reviews a trial court's decision regarding the admission of photographs for an abuse of discretion. Doorbal v. State, 983 So. 2d 464, 497 (Fla. 2008).

autopsy photographs are relevant to explain the testimony of the medical examiner, the manner of death, and the location of the wounds. Id.

Applying these principles here, the trial court did not abuse its discretion in admitting the photographs of the victims. The crime scene technicians used the photographs to describe the injuries they observed and the evidence they collected. (S69/1191-1201; S70/1326-42, 1344-55). During Dr. Volnikh's testimony, she used the photographs of the victims' bodies from the crime scene and the morgue to explain her testimony regarding the location of the wounds, the nature and extent of the injuries and the manner in which they were inflicted, as well as her determination of the victims' cause of death. (S74/1985-87, 1989-91, 1993, 1998-99, 2000). As such, the photographs were properly admitted to aid the witnesses' testimony, to show the victim's injuries, and explain the condition of the crime scene. Jennings, 123 So. 3d at 1127.

Furthermore, Defendant's stipulation was limited to the legal identity of the victims. (S69/1157, 1165-66) He did not concede premeditation or the nature of the victims' injuries. Moreover, Defendant actively contested the identity of the murder weapons and the murderer and the application of HAC and CCP. A large part of the State's showing that he was the

murderer was the Sanchezes' testimony that they observed him coming from the crime scene in the blood soaked Tyvek suit, evidence Defendant had blood on the clothing that would have been under the suit, evidence that the blood on Defendant and his clothing was the victims' and evidence that he possessed the suit and weapons consistent with the victims' injuries when he was stopped by the police. Moreover, the State's arguments regarding the application of both HAC and CCP relied heavily on the fact that Defendant slit the victims' throats while they were still in the car, chased them as they attempted to escape the car, beat them in the head and stabbed them in their heads and necks in the street and then dragged the bodies into a wooded area.⁴ As such, the photos were relevant to issues that were still in dispute, and the trial court did not abuse its discretion in admitting the photos. Seibert v. State, 64 So. 3d 67, 88 (Fla. 2010).

VIII. THE CLAIM REGARDING EVIDENTIARY RULINGS MERITS NO RELIEF.

Defendant next asserts that the cumulative effect of the trial court's alleged errors in 6 evidentiary rulings reflect a judicial bias in favor of the State and deprived him of a fair

⁴ Evidence that Defendant repeatedly stabbed and beat the victims in their vital organs provides sufficient evidence to sustain Defendant's convictions for premeditated murder. Jimenez v. State, 703 So. 2d 437, 440 (Fla. 1997).

trial. Because these alleged errors, when viewed individually, are either procedurally barred, facially insufficient, or without merit, Defendant's claim of cumulative error also fails. Armstrong v. State, 73 So. 3d 155, 174 (Fla. 2011). As such, this Court should affirm Defendant's conviction.

Defendant first claim is that the trial court erred when it refused to admonish Mr. Sanchez for allegedly providing nonresponsive answers that injected improper opinion testimony as to Defendant's guilt. However, this claim is largely unreserved and entirely meritless.

While Defendant acts as if he repeatedly asked the trial court to admonish Mr. Sanchez for providing nonresponsive answers and that the trial court never admonished Mr. Sanchez, the record reflects Defendant only actually requested that Mr. Sanchez be admonished 3 times. (S71/1515, 1518, 1533) Moreover, the trial court did actually admonish Mr. Sanchez twice. (S71/1518, 1524) As such, any claim that Defendant is making that the trial court should have admonished Mr. Sanchez on other occasions or that other testimony from Mr. Sanchez was improperly admitted is not preserved for review. Anderson v. State, 841 So. 2d 390, 401-02 (Fla. 2003).

Moreover, the trial court did not abuse its discretion in refusing to admonish Mr. Sanchez on the 2 occasions when it did

refuse to admonish him. On the first occasion, Defendant had asked Mr. Sanchez about the distance between them when Mr. Sanchez first saw Defendant and his prior testimony concerning the distance for the third time even though Mr. Sanchez had already shown the jury where they were on an aerial photo and stated that he did not know the exact distance. (S70/1432, 1438-40, S71/1506-11, 1514-15) Mr. Sanchez responded that he did not know the exact distance again but was sure that he had seen the man. (S71/1515) Since Mr. Sanchez's answer was responsive to Defendant question, the trial court did not abuse its discretion in finding the answer responsive and refusing to admonish Mr. Sanchez. Sanders v. State, 707 So. 2d 664, 667 (Fla. 2008).

On the second occasion, Defendant asked Mr. Sanchez, "what did your wife see." (S71/1533) Mr. Sanchez responded by describing Defendant's activity in going into the bushes, changing his clothes, going to the side of the van, walking back around the van, getting in the driver's seat, starting to drive away, and getting the tag number of the van for the 911 operator and observing Defendant after he was stopped by the police. (S71/1533) Since this answer was responsive to Defendant's question, the trial court did not abuse its discretion in finding that it was and refusing to admonish Mr. Sanchez. (S71/1533-34) It should be affirmed.

Moreover, while Defendant characterized Mr. Sanchez as a hostile witness, the record actually reflects that it was Defendant who repeatedly badgered Mr. Sanchez. During his cross, Defendant repeatedly attempted to question Mr. Sanchez about the distance between them when he first saw Defendant even though Mr. Sanchez had not provide a distance on direct and had stated in response to the first question that he did not know the distance. He repeatedly attempted to get Mr. Sanchez to remember his deposition even though Mr. Sanchez consistently stated that he had testified on so many occasions that he did not recall them all, that he did not know what a deposition was, that he did not recognize a copy of the deposition and that he could not read English. Defendant repeatedly averred that Mr. Sanchez could not have been concerned for his wife because he had briefly followed Defendant before picking her up even though he was the danger that concerned Mr. Sanchez and was not in a position to harm Ms. Sanchez. Defendant repeatedly questioned Mr. Sanchez about his ability to tell the object in his hand was shiny and to say that he was covered in blood even though Mr. Sanchez had responded to these inquiries. He repeatedly questioned Mr. Sanchez regarding where they were during Mr. Sanchez's observations even though Mr. Sanchez had testified about the locations. Moreover, Defendant repeatedly accused Mr.

Sanchez and the trial court of hiding evidence when Defendant did not get the answers he wanted. Given these circumstances, Defendant's claim that Mr. Sanchez was hostile should be rejected.

Defendant's second allegation claims that the trial court erred in admitting the portion of the 911 tape in which Ms. Sanchez told a third party that the person she was seeing was dangerous. However, this claim is also unpreserved and meritless.

While Defendant now claims that the trial court should not have admitted the statement regarding dangerousness as an improper opinion regarding his guilt, Defendant's only objection to this statement at the time of trial was that Ms. Sanchez's statement was not based on personal knowledge of his character. Since the argument on appeal differs from the objection, this issue is not preserved. Anderson, 841 So. 2d 390 at 401.

Even if this claim was preserved, Defendant is entitled to no relief. The evidence at issue does not concern Ms. Sanchez offering an opinion to the jury that Defendant was guilty. Instead, it concerns Ms. Sanchez's statements to a third party during the 911 call that the person she had seen covered in blood had something in his hand and the third party should be cautious. (S68/1047-48) "As it is practically impossible to

describe another's appearance in such a manner as to convey to a jury an accurate picture of the emotions shown by him at the time, in criminal cases, a witness may testify that a person was angry, threatening, or pretty mad." Shiver v. State, 564 So. 2d 1158, 1160 (Fla. 1st DCA 1990). Since this is all the statement did, the trial court did not abuse its discretion in admitting the statement.

Defendant's third allegation claims that the trial court erred in overruling Defendant's objections to leading questions. However, this claim is unpreserved in part and entirely meritless.

Defendant cites to three circumstances for his allegation. (S71/1567; S68/1057, 1068) However, Defendant did not object to the first instance he cites on the basis that the question was leading; he objected that the Mr. Sanchez was not competent to answer the question based on his personal knowledge. (S71/ 1567) Because Defendant did not specifically object to the question as leading, this claim is not preserved for review. Anderson, 841 So. 2d 390 at 401.

Further, the trial court would not have abused its discretion in overruling a leading objection to the first instance and did not abuse its discretion in overruling the leading objection to the second instance. "This Court has long

held that a question is not a leading question simply because it calls for a 'yes' or 'no' answer but rather where the question points to the desired answer." Happ v. State, 922 So. 2d 182, 192 (Fla. 2005). Here, while the State's redirect question regarding whether Mr. Sanchez had been referring to Defendant when he identified the person he had seen during cross and its question to Ms. Sanchez about her interaction with the officers after Defendant had been stopped may have been questions that only required a yes or no answer, the questions did not suggest an answer. Because the State's question did not point to the desired answer, this claim is meritless and should be denied.

The trial court also did not abuse its discretion in overruling Defendant's objection to the third instance of allegedly leading questions. This Court has long held that it is permissible, for purposes of refreshing the witness's recollection, "to direct the witness's attention to previously given statements or testimony when the party calling the witness is surprised by [that witness's] testimony." Hernandez v. State, 22 So. 2d 781, 786 (Fla. 1945). Here, the State's question did nothing more than remind Ms. Sanchez that she had previously described the object she saw in Defendant's hand as looking like a knife. As such, the trial court did not abuse its discretion in overruling Defendant's objection. This is all the more true

as Ms. Sanchez had already answered the question before Defendant objected. Had the trial court sustained the objection at that point, the State would have been free to have simply rephrased the question and the answer would have been repeated. As such, this claim is meritless, and the trial court should be affirmed.

Defendant's fourth allegation claims that the trial court erred in allegedly refusing to allow him to impeach Mr. Sanchez with a prior inconsistent statement. However, the trial court's ruling on this issue was not an abuse of discretion.

As this Court has held, before extrinsic evidence of a prior inconsistent statement may be admitted, a proper foundation must be laid by calling the witness's "attention the time, place, and person to whom he made the prior inconsistent statements, quot[ing] from the prior statements, and g[iving the witness] an opportunity to explain his prior statements. Pearce v. State, 880 So. 2d 561, 569-70 (Fla. 2004). If the witness does not admit making the prior statement and the content of the prior statement concern a material issue, the party may then present extrinsic evidence that the witness did make the prior inconsistent statement, which may include a properly authenticated writing. Id.

Here, the record reflects that Defendant never properly

laid this predicate. Instead, the record shows that in the questions shortly before Defendant attempted to admit pages from Mr. Sanchez's prior testimony, Defendant drew Mr. Sanchez's attention to, and quoted from, questions that Mr. Sanchez had been asked on October 29, 2007, and Mr. Sanchez acknowledged that the questions had been asked and answered them again. (S71/1508-09) Having not drawn Mr. Sanchez's attention to any of his prior answers or attempting to authenticate anything, Defendant then simply stated that he wanted to admit a portion of the transcript of Mr. Sanchez's prior statement. (S71/1511) However, because Defendant had yet to confront Mr. Sanchez with having made a prior inconsistent statement and Mr. Sanchez had yet to deny or refuse to distinctly admit having made any such statement, the trial court indicated a reluctance to admit the extrinsic evidence. (S71/1511-12) Given that Defendant had yet to lay the proper predicate, the trial court's reluctance was not an abuse of discretion.

Moreover, at that point, the State offered to stipulate to the admission of the entirety of Mr. Sanchez's testimony from the first trial, and Defendant and the trial court accepted the stipulation. (S71/1512-14) However, when the State subsequently provided the court with a copy of the prior testimony, Defendant indicated that he did not wish to abide by the stipulation and

only wanted to admit certain portions of the prior testimony. (S71/1558-63) Given that Defendant had not laid the proper predicate to admit the portions he wanted and would not abide by the terms of the stipulation, the trial court did not abuse its discretion in refusing to admit the portions Defendant wanted. It should be affirmed.

This is all the more true as it does not even appear that Mr. Sanchez had provided an inconsistent statement on the issue on which Defendant wanted to admit the extrinsic evidence. In the question that Defendant had quoted from the prior testimony, Mr. Sanchez had been asked if the "street in front of the maintenance building where he first saw Defendant" was a real street, and he had responded that there was a small street in the back where cars passed. (S6/596-97, S71/1509) In claiming the right to present extrinsic evidence of an inconsistent statement, Defendant claimed that Mr. Sanchez had provided an inconsistent statement regarding where he was sitting when he first saw Defendant. (S71/1512) However, since Mr. Sanchez's prior answer did not concern where he was sitting, there was no inconsistent statement and no basis to impeach on the alleged inconsistency. The trial court should be affirmed.

Defendant's fifth allegation claims that the trial court erred in admitting a crime scene diagram that was allegedly

inaccurate and limiting cross-examination with respect to its accuracy. However, this claim is also unpreserved and meritless.

As noted above, to preserve an issue regarding the admissibility of evidence, a defendant must make a contemporaneous objection on the grounds asserted on appeal to preserve an issue. Anderson, 841 So. 2d 390 at 401. Here, while Defendant informed the trial court that he consider the diagram inaccurate because it did not depict the "total station" before the State even attempted to lay a predicate for the diagram and attempt to admit it, it shows that after Chancey testified that she had been to the crime scene and that it the diagram fairly and accurately depicted the cul-de-sac, Defendant's only objection was that Chancey lacked personal knowledge. (S67/970, 971-72) Given Chancey's testimony, the trial court properly admitted the diagram. Kirkland v. State, 91 So. 2d 656, 657 (Fla. 1956). It was not until the next day when Service testified that Defendant argued that the diagram was inaccurate and presented evidence that the diagram was not to scale. (S69/1187, 1221-22) Given that the diagram was admitted the previous day based on Chancey's testimony, any issue regarding the diagram being admissible because it was not to scale is not preserved.

Moreover, the State also presented aerial photos of the

entire center and individual photos of the crime scene and evidence. Through Service's testimony, the jury became aware that the diagram was not to scale. The State's case was not premised on the distances between objects in the cul-de-sac. It was based on DNA evidence showing that Defendant had the victims' blood on his clothing and person and on evidence that Defendant had the murder weapons in his van immediately after the murders. Given these circumstances, any error in the admission of a crime scene diagram that was not to scale was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Defendant's sixth allegation claims that the trial court erred in refusing to allow Defendant to proffer testimony when the trial court allegedly excluded evidence. However, this issue is specious. While Defendant cites to 12 instances in the record where the trial court allegedly precluded him from making proffers, a review of the record shows that in 9 of these instances the trial court did not refuse to allow Defendant to make a proffer at all. Instead, in each of these instances, Defendant simply used the word "proof" or the phrase "offer of proof" in objecting to a trial court ruling without attempting to make a proffer and without the trial court precluding him from doing so. (S71/1450; S72/1673-74, 1688, 1691; S73/1800; S75/2091, 2116, 2128; S76/2207) Since the record refutes

Defendant's allegation that the trial court precluded him from making proffers in these 9 instances, Defendant's claim that the trial court abused its discretion in doing so is meritless.

Moreover, the trial court did not abuse its discretion in refusing to permit Defendant to make proffers in the 3 instances where the trial court did actually rule that Defendant could not present a proffer. An offer of proof is only necessary when a trial court's ruling excludes evidence and the substance of the evidence is not apparent from the context. Hammett v. State, 908 So. 2d 595, 596 (Fla. 2d DCA 2005); §90.104(1)(b), Fla. Stat. Here, the trial court's rulings at the time it refused to the proffers did not exclude evidence and the answers were apparent from the context. As such, the trial court did not abuse its discretion in refusing to allow Defendant to make the proffers.

Here, the first time that the trial court refused to permit Defendant to make a proffer was when the trial court sustained an objection to the argumentative way in which Defendant attempted to ask Crime Scene Tech. Service about the accuracy of the crime scene diagram. (S69/1223-24) However, the trial court merely sustained an objection to the form of the question, and it ordered Defendant simply to phrase the question. As such, the trial court's ruling did not exclude evidence. Moreover, Service had already testified that the distance on the diagram appeared

greater than the distances were and that she did not know the measurements of the crime scene. (S69/1221, 1222-24) As such, the fact that the diagram was not to scale and could not be used to judge distances was already apparent. The trial court did not abuse its discretion in refusing to allow Defendant to make a proffer. It should be affirmed.

The second and third times the trial court ruled that Defendant could not make a proffer both occurred when the trial court sustained objections that questions had already been asked and answered during cross examination of Mr. Sanchez. (S71/1444, 1565-66) In fact, the record reflects that Mr. Sanchez had already testified about Defendant's demeanor when he saw Defendant, his lack of prior knowledge of Defendant and his lack of mental health training. (S70/1442-44) He had also already testified that he was with other people when he first saw Defendant. (S70/1432) As such, the trial court's sustaining objections to Defendant's attempts to reask Mr. Sanchez about his demeanor and prior knowledge of Defendant and about whether he was with others first saw Defendant did not exclude evidence and the answers were apparent from the record. Thus, the trial court did not abuse its discretion in refusing to allow proffers to these questions either. It should be affirmed.

IX. THE CLAIMS OF PROSECUTORIAL MISCONDUCT PROVIDE NO BASIS FOR RELIEF.

Defendant next contends that the State asked improper questions and made improper comments in closing that implicated his right to remain silent, expressed personal opinions about his guilt and diminished the jury's sense of responsibility for sentencing. However, this issue should be rejected because it is unpreserved and meritless.

While Defendant now cites to a plethora of questions during his cross examination and comments in both the guilt and penalty phase closing and avers that they were improper, Defendant did not object to any of the questions or comments at trial. (S76/2239-85, 2294; V51/3334-35) As such, any issue regarding the propriety of the questions and comments is not preserved for review. Castor v. State, 365 So. 2d 701 (Fla. 1978).

Because the issue is unpreserved, Defendant would need to show that the questions and comments constituted fundamental error to obtain relief. Smith, 28 So. 3d at 857. This he cannot do because the comments and questions were not even improper.

First, Defendant insists that the State's questions regarding not reporting the murders to the police officers after he was stopped constituted comments on his post-Miranda silence. However, the record reflects that Defendant made statements to the police both before and after he was given Miranda warnings

and did not remain silent. (R23/389-92, 400-01) As this Court has recognized, a defendant cannot claim that the State improperly commented on his right to remain silent when the defendant did not remain silent. Hudson, 992 So. 2d at 110-11; Hutchinson v. State, 882 So. 2d 943, 955 (Fla. 2004). Thus, the claim is meritless.

This is all the more true as Defendant attempted to explain the fact that the victims' blood was on his clothing and person by stating that he had found the victims' bodies before he was stopped. (S76/2233-35) He attempted to explain his behavior when he was stopped by claiming that the NAACP had trained him to behave that way. (S76/2236-37) By doing so, Defendant placed his failing to inform the police of the murders at issue and opened the door to the State's questions. Harris v. New York, 401 U.S. 222, 226 (1971). The trial court should be affirmed.

Second, Defendant avers that the State injected its personal opinion of Defendant's guilt into the case through cross examination of him and a comment in closing. However, these claims are also meritless. Cross-examination is allowed "(1) to weaken, test, or demonstrate the impossibility of the testimony of the witness on direct examination and, (2) to impeach the credibility of the witness, which may involve, among other things, showing his possible interest in the outcome of

the case.” Steinhorst v. State, 412 So. 2d 332, 337 (Fla. 1982). “Cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, rebut, contradict or make clearer the facts testified to in chief.” Patrick v. State, 104 So. 3d 1046, 1058 (Fla. 2012). Here, the State’s questions during cross examination proper.

During his testimony, Defendant had claimed that he had found the bodies after they were killed, been in contact with them and then took the tire thumper and returned to his truck before he was stopped by the police. (S76/2233-35) On cross, Defendant admitted that he had thought the tire thumper was a murder weapon when he removed it from the crime scene. (S76/2259, 2262) As such, the State’s question regarding whether Defendant removed the tire thumper to dispose of it was a proper question.

The use of the word story was also not improper in context. During direct, Defendant provided an account of the crime in which he and Canady merely parked next to each other, spoke and then separated slightly before the killings. (S76/2230-32) However, when confront on cross about having been seen by Ware and Perez, Defendant changed his testimony and admitted that he had walked up to Canady’s car and entered it just before the

murders. (S76/2266-68) When the State attempted to question details of this new version, Defendant repeatedly responded by stating that he needed to discuss events that had occurred earlier. (S76/2268-69) As such, in context, the State's question was merely an attempt to allow Defendant to do as he requested and not improper. (S76/2269)

The same is true of the question regarding why Defendant had killed the victims. (S76/2272) Defendant had just provided his new version of the event in which he placed himself in the position that the physical evidence showed the murderer had to have been just before the murders. As such, accusing Defendant of committing the crimes and asking why he did so was not improper.

The admonishments to Defendant regarding the subject matter of his answers were also proper. Since Defendant had just changed his testimony and placed himself in the position of the murderer, the State inquired if he had any other changes or additions to his version of the murders. (S76/2272) Rather than respond to that question, Defendant started talking about how hard he had worked on the day the murders occurred. (S76/2272-73) Thus, the State asking questions designed to direct Defendant's attention back to the subject of the trial were not improper.

Finally, the exchange regarding the complete story was also proper in context. At a point when no question was pending, Defendant spontaneously made a statement about having been in the bushes before being seen by Ware because he was urinating. (S76/2276-77) When the State asked why Defendant had made the statement, Defendant averred that he wanted to provide a complete account of his actions. (S76/2276-77) By doing so, Defendant invited the State to challenge whether he had done so. As such, this exchange was also not improper.

Moreover, this Court has recognized that a comment regarding what the evidence has shown is not an improper comment that expresses the prosecutor's personal belief but a proper comment on what the evidence has shown. See Marquardt v. State, 156 So. 3d 464, 485-86 (Fla. 2015); Williamson v. State, 994 So. 2d 1000, 1011-12 (Fla. 2008). Here, when viewed in context, the State's comment was such a proper comment. The State had already reviewed the evidence showing that the victims' blood was found on Defendant's person and clothing and that the murder weapons had been recovered from his van. (S76/2292-94) It then pointed to the evidence the Sanchezes had provided and argued that all of this evidence proved that Defendant was the murderer. (S76/2294) As such, in context, the State's comment was not an expression of personal opinion. Defendant's contrary claim

should be rejected.

Finally, Defendant contends that the State violated Caldwell v. Mississippi, 472 U.S. 320 (1985), by commenting that the jury's role was not to kill Defendant but to make a sentencing recommendation to the court. However, this comment was not erroneous because it was made in fair response. Scott v. State, 66 So. 3d 923, 930 (Fla. 2011). During his opening statement, Defendant had contended that the question the jury needed to answer at the penalty phase was what good would come from killing him. (V50/3201-02) This invited the State's response. (V51/3334-35) As such, the claim that the comment merits relief should be rejected.

This is all the more true as the comment did not violate Caldwell. As the United States Supreme Court has recognized, a comment only violates Caldwell when it misleads the jury regarding their role in sentencing under local law. Romano v. Oklahoma, 512 U.S. 1, 9 (1994). As this Court has explained, the jury's role in sentencing in Florida is to make a recommendation to the trial court such that comments that inform the jury of this role do not violate Caldwell. Combs v. State, 525 So. 2d 853, 855-58 (Fla. 1988). As such, Defendant's claim that the State's comment that the jury was not being asked to kill anyone and was merely being asked to follow the law and render a

recommendation to the trial court violated Caldwell is meritless. The trial court should be affirmed.

X. DEFENDANT'S CLAIM REGARDING CCP IS MERITLESS.

Defendant next claims that the finding of CCP was improper because such a finding was allegedly barred by Double Jeopardy. However, this claim is unpreserved and meritless.

In the trial court, Defendant never objected to CCP on the basis that its application would violate Double Jeopardy. As such, this issue is not preserved for review and should be rejected. Castor v. State, 365 So. 2d 701 (Fla. 1978).

Even if the issue had been preserved, Defendant would still be entitled to no relief. As the United States Supreme Court has recognized, an "acquittal of the death penalty" only occurs when a sentencer has determined, based on its application of the facts to the law, that a life sentence is appropriate. Sattazahn v. Pennsylvania, 537 U.S. 101, 112-13 (2003) (no acquittal of death penalty, where death sentence imposed as a matter of law after jury hung); Arizona v. Rumsey, 467 U.S. 203, 209-11 (1984) (defendant acquitted of death penalty, where trial court determined based on consideration of the evidence that a life sentence was appropriate). In fact, the Court has held that Double Jeopardy did not bar a death sentence where a trial court has found one aggravator present and an appellate court had

determined that the evidence was insufficient to support that aggravator but that there was sufficient evidence to support a different aggravator. Poland v. Arizona, 476 U.S. 147, 149-51, 154-55 (1986). It explained that when a defendant has been sentenced to death during the first proceeding, he has not been acquitted; he has been convicted. Id. at 156. Applying that standard here, Defendant was not acquitted of death penalty at his first trial. The jury recommended death for both murders, and the trial court imposed death for both murders. As such, Defendant was not acquitted and cannot seek the protections of Double Jeopardy based on a nonexistent acquittal.

Rather than truly being based on a theory that Defendant was acquitted of anything, Defendant appears to be arguing that the finding of CCP was improper because the determination that CCP did not apply should be given preclusive effect at the second trial under a theory of collateral estoppel. However, that theory is no more meritorious than the first. As the United States Supreme Court has recognized, collateral estoppel is a doctrine available only to prevailing parties because any finding in favor of a losing party cannot be necessary to the judgment. Bobby v. Bies, 556 U.S. 825, 829, 833-34 (2009). Thus, Defendant's claim that the application of CCP was barred by Double Jeopardy is meritless.

Consistent with this approach, this Court has held that a trial court's findings on particular aggravators and mitigators are not binding on a trial court after a new sentencing hearing has been order. Preston v. State, 607 So. 2d 404, 407-09 (Fla. 1992). As such, Defendant's assertion that the finding of CCP was improper because it was not found at the first trial is meritless. The trial court should be affirmed.

Even if the trial court had erred in allowing the presentation of CCP, any error would be harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The evidence the State relied upon to argue CCP were the facts that Defendant attacked the victims in their car from behind after coming to the center where he knew his wife and stepdaughter would be, donning the jumpsuit and entering the car, that he pursued the victims as they attempted to escape the scene and continued his attack and that he then dragged the bodies into a wooded area to conceal them. The evidence to support these arguments was properly before the jury to support Defendant's convictions and HAC and give weight to the prior violent felony aggravator. See Brown v. Sanders, 546 U.S. 212, 220 (2006). Moreover, the trial court also found the prior violent felony aggravator based on the contemporaneous killing of the other victim and a 1984 bank robbery conviction, the under a sentence of imprisonment

aggravator and HAC. The mitigation presented to the jury was extremely weak consisting largely of character testimony from family and friends. Mental health testimony was only presented at the Spencer hearing and was based entirely on Defendant's performance on tests and his self report regarding his background. Defendant's actions at the time of the crimes were not considered. Thus, the mental health mitigation was also weak. Moreover, the trial court directly stated that it would have imposed death sentences even if it had not found CCP. (V11/2014) As such, any error in the finding of CCP would be harmless.⁵ Wilcox v. State, 143 So. 3d 359, 386-87 (Fla. 2014).

XI. NO FUNDAMENTAL ERROR EXISTS IN THE PENALTY PHASE INSTRUCTIONS.

Defendant next asserts that the trial court committed fundamental error in the manner in which instructed the jury on the prior violent felony and under a sentence of imprisonment aggravators. However, Defendant is entitled to no relief because he invited the error with regard to the under a sentence of imprisonment aggravator, and there is no fundamental error.

As this Court has recognized, a defendant who requested a particular jury instruction cannot later complain on appeal that

⁵ Given these 4 strong aggravators and the weak mitigation, Defendant's death sentences are proportionate. Hudson v. State, 992 So. 2d 96, 119 (Fla. 2008); Sochor v. State, 619 So. 2d 285, 293 (Fla. 1993).

the jury instruction was erroneous because he invited the error. Phillips v. State, 39 So. 3d 296, 304 (Fla. 2010). Here, while Defendant now complains that the instruction for the under a sentence of imprisonment aggravator informed the jury that he was on parole for a 1970 bank robbery, Defendant specifically requested that this language be included in the under a sentence of imprisonment during the penalty phase charge conference. (V51/3301) As such, he invited the error about which he now complains.

Moreover, Defendant would not be entitled to any relief even if he had not invited the error in the instruction regarding the under a sentence of imprisonment aggravator and the instruction regarding the prior violent felony aggravator is considered. Defendant did not object to the phrasing of the instructions on either of these aggravators during the charge conference nor did he object to the instructions after they were read. (V51/3300-02) As such, Defendant would need to show that the error in the jury instruction was fundamental error to be entitled to relief. State v. Weaver, 957 So. 2d 586, 588 (Fla. 2007).

As this Court has held, an error in a jury instruction only constitutes fundamental error when "the error must reach down into the validity of the trial itself to the extent that a

verdict of guilty could not have been obtained without the assistance of the alleged error.” State v. Delva, 575 So. 2d 643, 644 (Fla. 1991). Thus, an error in a jury instruction regarding a matter that is not in dispute does not constitute fundamental error. Id. at 645.

Here, Defendant never contest that either the prior violent felony or under a sentence of imprisonment aggravators applied. He did not object to the admission of the documents showing that Defendant was on parole or cross examine the witness who testified about them. (V50/3127) His cross examination of Schwartz was limited to having her reiterate that the codefendant held the gun during the robbery. (V50/3149-50) He acknowledged his prior convictions in opening and conceded the applicability of both the prior violent felony and under a sentence of imprisonment aggravators in closing. (V50/3199-20, V51/3338, 3339) Given these circumstances, the error in the jury instructions on these aggravators was not fundamental error.

Wright v. State, 586 So. 2d 1024 (Fla. 1991), does not compel a different result. There, this Court expressly stated that it was not determining whether the error in the jury instructions constituted fundamental error. Id. at 1030 n.9. In fact, this Court had already determined that an error in jury selection required that the case be reversed and stated that it

was only addressing select other issues to provide guidance to the lower court on remand. Id. at 1029 & n.8. Since Wright did not address the issue of fundamental error, it does not support Defendant's position that fundamental error occurred here.

XII. THE TRIAL COURT PROPERLY WEIGHED THE AGGRAVATORS AND MITIGATORS IN ITS SENTENCING ORDER.

Defendant next contends that his death sentence is improper because the trial court allegedly used a wrong legal standard in its sentence order. However, this claim is meritless.

First, while Defendant contends that a trial court errs in giving great weight to a jury's death recommendation because a trial court only needs to give great weight to a life recommendation, this is not true. This Court has expressly held that a trial court must give great weight to a jury's recommendation even when that recommendation is for death. Ault v. State, 53 So. 3d 175, 200 (Fla. 2010). Thus, the trial court was entirely correct in its statement, and Defendant's claim to the contrary should be rejected.

Second, in claiming that this statement indicated that the trial court failed to weigh the aggravating and mitigating factors independently, Defendant ignores the context of the statement and the content of the sentencing order as a whole. As a review of the trial court's 24 page long sentencing order shows, the trial court extensively reviewed all of the evidence

that was presented in this matter and both parties positions on what aggravators and mitigators had been proven. (V10-11/1992-2015) After reviewing the evidence, the trial court set forth its findings and conclusions of law regarding what aggravators and mitigators had been proven in a section labeled "Court's Analysis." (V11/2005-13) Thus, the order reflects that the trial court did, in fact, independently weigh the aggravators and mitigators. The language that Defendant claims showed that it did not is contained in a section label "proportionality review" and a complete review of that section shows that the trial court understood that it was this Court's job to conduct a proportionality review. (V11/2014) As such, the language would not support Defendant's position that the trial court failed to independently weigh the aggravators and mitigations even if it had been wrong. Delgado v. State, 2015 WL 1825753, *9-*10 (Fla. Apr. 23, 2015). The trial court should be affirmed.

XIII. THE RING CLAIM IS MERITLESS.

Defendant finally contends that Florida's capital sentencing scheme is unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002). Specifically, Defendant complains that the jury's sentencing decision is advisory and that the jury is not required to be unanimous either in finding aggravators or in recommending death. However, this claim

provides no basis for relief.

While Defendant acts as if Ring held that a jury must make the ultimate decision regarding the death penalty after finding that the State has proven that the death penalty is appropriate beyond a reasonable doubt, this is not true. Instead, as the Court in Ring expressly acknowledged, the issue in that case was limited to whether a jury needed to make a finding of a fact necessary to expose a defendant to the possibility of a death sentence, where there was no aggravator based on a prior conviction. Ring, 536 U.S. at 597 & n.4. Further, the Court later confirmed that the Constitution does not require that the State prove that death is an appropriate sentence because the aggravators outweigh the mitigators at all. Kansas v. Marsh, 548 U.S. 163, 170-71 (2006). Moreover, the Court has made clear that a jury is not required to be unanimous regarding how it makes its findings at all. Schad v. Arizona, 501 U.S. 624 (1991); Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972). Given these circumstances, Defendant's assertion that his death sentence is unconstitutional because of a lack of unanimity or the nature of the jury's role in sentencing is meritless. The claim should be rejected.

Moreover, considering the actual holding of Ring, the claim is frivolous. Defendant was convicted of 2 counts of first

degree murder during the guilt phase, which caused the prior violent felony aggravator to apply. As such, the jury did not make finding necessary to make him eligible for a death sentence, and Ring was satisfied. Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003). The sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

/s/Blair Dickert
BLAIR M. DICKERT
Assistant Attorney General
Florida Bar No. 85835
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655
Primary: capapp@myfloridalegal.com
Secondary: Blair.Dickert@
myfloridalegal.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by email to **Karen M. Kinney**, kkinney@pd10.state.fl.us, P.O. Drawer 9000 -- Drawer PD, Bartow, Florida 33831, this 11th day of May, 2015.

/s/Blair Dickert

BLAIR M. DICKERT
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

/s/Blair Dickert

BLAIR M. DICKERT
Assistant Attorney General