IN THE SUPREME COURT OF FLORIDA

SHAWN ROGERS,

Appellant,

v.

CASE NO. SC18-150
Lower Tribunal No.
2017CF000804
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

COMES NOW, Appellee, the State of Florida, by and through the undersigned counsel, and pursuant to Florida Rule of Appellate Procedure 9.225, files this notice of supplemental authority related to the pending appeal before this Court.

In support of the State's position on Issue I of the Arguments on Appeal, the State gives notice of the following supplemental authority attached hereto:

A. Hamer v. Neighborhood Hous. Serv. of Chicago, 138 S.Ct. 13, 17 n.1 (2017) (distinguishing forfeiture, which is the "'failure to make the timely assertion of a right,'" from waiver, which is an "'"intentional relinquishment or abandonment of a known right"'") (quoting United States v. Olano, 507 U.S. 725, 733 (1993)).

B. State v. Mason, 108 N.E.3d 56, 64 (Ohio 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound

eligibility decision concerning an offender's guilt of the principal offense and any aggravating circumstances." (citing six federal circuits and six states)).

In support of the State's position on Issue II of the Arguments on Appeal, the State gives notice of the following supplemental authority attached hereto:

C. Zack v. State, 911 So. 2d 1190, 1208-09 (Fla. 2005) (testimony by State's doctor regarding Zack's "hatred toward women" in rebuttal to defense mitigation witnesses who testified about Zack's "low impulse control" was proper).

In support of the State's position in the Statement Regarding Sufficiency of the Evidence, the State gives notice of the following supplemental authority attached hereto:

D. Boyd v. State, 910 So. 2d 167, 182-84 (Fla. 2005) (evidence of binding and attempts to escape can be sufficient to support a conviction of kidnapping).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 28th day of February, 2019, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Richard Bracey, Esq., mose.bracey@flpd2.com, Attorney for Appellee.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ Jennifer A. Donahue
Jennifer A. Donahue
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 50639
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
Telephone: (850)414-3580
Facsimile: (850)414-0997
capapp@myfloridalegal.com
Jennifer.donahue@myfloridalegal.com

COUNSEL FOR APPELLEE

A.

Hamer v. Neighborhood Hous. Serv. of Chicago,

138 S.Ct. 13 (2017)

138 S.Ct. 13
Supreme Court of the United States

Charmaine HAMER, Petitioner
v.
NEIGHBORHOOD HOUSING SERVICES OF CHICAGO, et al.

No. 16–658.
|
Argued Oct. 10, 2017.
|
Decided Nov. 8, 2017.

Synopsis

Background: Former employee brought action against employers alleging violations of Age Discrimination in Employment Act (ADEA) and Title VII. The United States District Court for the Northern District of Illinois, Ruben Castillo, Chief Judge, 2015 WL 5439362, granted summary judgment to employers. Former employee appealed. The United States Court of Appeals for the Seventh Circuit, Yandle, District Judge, sitting by designation, 835 F.3d 761, dismissed the appeal for lack of jurisdiction. Certiorari was granted.

The Supreme Court, Justice Ginsburg, held that the time limit for an extension of time to file a notice of appeal was a nonjurisdictional claim-processing rule, abrogating *Freidzon v. OAO LUKOIL*, 644 Fed.Appx. 52, *Peters v. Williams*, 353 Fed.Appx. 136, and *U.S. v. Hawkins*, 298 Fed.Appx. 275.

Vacated and remanded.

***15** *Syllabus* [*]

An appeal filing deadline prescribed by statute is considered "jurisdictional," meaning that late filing of the appeal notice necessitates dismissal of the appeal. See *Bowles v. Russell,* 551 U.S. 205, 210–213, 127 S.Ct. 2360, 168 L.Ed.2d 96. In contrast, a time limit prescribed only in a court-made rule is not jurisdictional. It is a mandatory claim-processing rule that may be waived or forfeited. *Ibid.* This Court and other forums have sometimes overlooked this critical distinction. See *Reed Elsevier, Inc. v. Muchnick,* 559 U.S. 154, 161, 130 S.Ct. 1237, 176 L.Ed.2d 18.

Petitioner Charmaine Hamer filed an employment discrimination suit against respondents. The District Court granted respondents' motion for summary judgment, entering final judgment on September 14, 2015. Before October 14, the date Hamer's notice of appeal was due, her attorneys filed a motion to withdraw as counsel and a motion for an extension of the appeal filing deadline to give Hamer time to secure new counsel. The District Court granted both motions, extending the deadline to December 14, a two-month extension, even though the governing Federal Rule of Appellate Procedure, Rule 4(a)(5)(C), confines such extensions to 30 days. Concluding that Rule 4(a)(5)(C)'s time prescription is jurisdictional, the Court of Appeals dismissed Hamer's appeal.

Held : The Court of Appeals erred in treating as jurisdictional Rule 4(a)(5)(C)'s limitation on extensions of time to file a notice of appeal. Pp. 19 – 22.

(a) The 1948 version of 28 U.S.C. § 2107 allowed extensions of time to file a notice of appeal, not exceeding 30 days, "upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment," but the statute said nothing about extensions when the judgment loser did receive notice of the entry of judgment. In 1991, the statute ***16** was amended, broadening the class of prospective appellants who could gain extensions to include all who showed "excusable neglect or good cause" and reducing the time prescription for appellants who lacked notice of the entry of judgment from 30 to 14 days. § 2107(c). For other cases, the statute does not say how long an extension may run. Rule 4(a)(5)(C), however, does prescribe a limit: "No extension [of time for filing a notice of appeal] may exceed 30 days after the prescribed time [for filing a notice of appeal] or 14 days after the date [of] the order granting the [extension] motion ..., whichever is later." P. 19.

(b) This Court's precedent shapes a rule of decision that is both clear and easy to apply: If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional; otherwise, the time specification fits within the claim-processing category.

In concluding otherwise, the Court of Appeals relied on *Bowles.* There, Bowles filed a notice of appeal outside a limitation set by Congress in § 2107(c). This Court held that, as a result, the Court of Appeals lacked jurisdiction over his tardy appeal. 551 U.S., at 213, 127 S.Ct. 2360. In conflating Rule 4(a)(5)(C) with § 2107(c) here, the Seventh Circuit failed to grasp the distinction between jurisdictional appeal filing deadlines and deadlines stated only in mandatory claim-processing rules. It therefore misapplied *Bowles*. *Bowles*' s statement that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional,' " *id.,* at 209, 127 S.Ct. 2360, is a characterization left over from days when the Court was "less than meticulous" in using the term "jurisdictional," *Kontrick v. Ryan,* 540 U.S. 443, 454, 124 S.Ct. 906, 157 L.Ed.2d 867. The statement was correct in *Bowles*, where the time prescription was imposed by Congress, but it would be incorrect here, where only Rule 4(a)(5)(C) limits the length of the extension. Pp. 20 – 22.

835 F.3d 761, vacated and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

Jonathan A. Herstoff, New York, NY, on behalf of the Petitioner.

Damien G. Stewart, Washington, DC, on behalf of the Respondents.

Stephanie A. Maloney, Matthew J. Mezger, Ilan Wurman, Winston & Strawn LLP, Brian P. Brooks, Damien G. Stewart, Fannie Mae, Washington, DC, for Fannie Mae.

Jeff Nowak, Gwendolyn B. Morales, Franczek Radelet PC, Chicago, IL, for Neighborhood Housing Services of Chicago.

Opinion

Justice GINSBURG delivered the opinion of the Court.

This case presents a question of time, specifically, time to file a notice of appeal from a district court's judgment. In *Bowles v. Russell,* 551 U.S. 205, 210–213, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007), this Court clarified that an appeal filing deadline prescribed by statute will be regarded as "jurisdictional," meaning that late filing of the appeal notice necessitates dismissal of the appeal. But a time limit prescribed only in a court-made rule, *Bowles* acknowledged, is not jurisdictional; it is, instead, a mandatory claim-processing rule subject to forfeiture if not properly raised by the appellee. *Ibid.*; ***17** *Kontrick v. Ryan,* 540 U.S. 443, 456, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). Because the Court of Appeals

held jurisdictional a time limit specified in a rule, not in a statute, 835 F.3d 761, 763 (C.A.7 2016), we vacate that court's judgment dismissing the appeal.

I

A

"Only Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick,* 540 U.S., at 452, 124 S.Ct. 906 (citing U.S. Const. Art. III, § 1); *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 370, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978) ("[I]t is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction."). Accordingly, a provision governing the time to appeal in a civil action qualifies as jurisdictional only if Congress sets the time. See *Bowles,* 551 U.S., at 211–212, 127 S.Ct. 2360 (noting "the jurisdictional distinction between court-promulgated rules and limits enacted by Congress"); *Sibbach v. Wilson & Co.,* 312 U.S. 1, 10, 61 S.Ct. 422, 85 L.Ed. 479 (1941) (noting "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute"). A time limit not prescribed by Congress ranks as a mandatory claim-processing rule, serving "to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson v. Shinseki,* 562 U.S. 428, 435, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011).

This Court and other forums have sometimes overlooked this distinction, "mischaracteriz[ing] claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis." *Reed Elsevier, Inc. v. Muchnick,* 559 U.S. 154, 161, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010). But prevailing precedent makes the distinction critical. Failure to comply with a jurisdictional time prescription, we have maintained, deprives a court of adjudicatory authority over the case, necessitating dismissal—a "drastic" result. *Shinseki,* 562 U.S., at 435, 131 S.Ct. 1197; *Bowles,* 551 U.S., at 213, 127 S.Ct. 2360 ("[W]hen an 'appeal has not been prosecuted ... within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.' " (quoting *United States v. Curry,* 6 How. 106, 113, 12 L.Ed. 363 (1848))). The jurisdictional defect is not subject to waiver or forfeiture [1] and may be raised at any time in the court of first instance and on direct appeal. *Kontrick,* 540 U.S., at 455, 124 S.Ct. 906. [2] In contrast to the ordinary operation of our adversarial system, courts are obliged to notice jurisdictional issues and raise them on their own initiative. *Shinseki,* 562 U.S., at 434, 131 S.Ct. 1197.

Mandatory claim-processing rules are less stern. If properly invoked, mandatory claim-processing rules must be enforced, but they may be waived or forfeited. ***18** *Manrique v. United States,* 581 U.S. ——, ——, 137 S.Ct. 1266, 1271–1272, 197 L.Ed.2d 599 (2017). "[C]laim-processing rules ... [ensure] relief to a party properly raising them, but do not compel the same result if the party forfeits them." *Eberhart v. United States,* 546 U.S. 12, 19, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) (*per curiam*). [3]

B

Petitioner Charmaine Hamer filed a complaint against respondents Neighborhood Housing Services of Chicago and Fannie Mae alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* The District Court granted respondents' motion for summary judgment on September 10, 2015, and entered final judgment on September 14, 2015. In the absence of a time extension, Hamer's notice of appeal would have been due by October 14, 2015. Fed. Rule App. Proc. 4(a)(1)(A).

On October 8, 2015, before the October 14 deadline for filing Hamer's notice of appeal, her attorneys made two motions. [4] First, they sought to withdraw as counsel because of their disagreement with Hamer on pursuit of an appeal. Second, they sought a two-month extension of the notice of appeal filing date, so that Hamer would have adequate time to engage new counsel for her appeal. App. to Pet. for Cert. 57–59. The District Court granted both motions on the same day and ordered extension of the deadline for Hamer's notice of appeal from October 14 to December 14, 2015. *Id.,* at 60. Respondents did not move for reconsideration or otherwise raise any objection to the length of the extension.

In the docketing statement respondents filed in the Court of Appeals, they stated: "The United States Court of Appeals for the Seventh Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, in that on December 11, 2015, [Hamer] filed a timely Notice of Appeal from a final judgment of the United States District Court for the Northern District of Illinois that disposed of all of [Hamer's] claims against [respondents]." *Id.,* at 63. Respondents' statement later reiterated: "On December 11, 2015, [Hamer] timely filed a Notice of Appeal...." *Id.,* at 64. Nevertheless, the Court of Appeals, on its own initiative, questioned the timeliness of the appeal and instructed respondents to brief the issue. 835 F.3d, at 762. Respondents did so and, for the first time, asserted that the appeal was untimely, citing the relevant Rule confining extensions to 30 days. *Id.,* at 762–763 (citing Fed. Rule App. Proc. 4(a)(5)(C)). Concluding that it lacked jurisdiction to reach the merits, the Court of Appeals dismissed Hamer's appeal. 835 F.3d, at 763. [5] We granted certiorari. ***19** 580 U.S. ——, 137 S.Ct. 1203, 197 L.Ed.2d 245 (2017).

II

A

Section 2107 of Title 28 of the U.S. Code, as enacted in 1948, allowed extensions of the time to file a notice of appeal, not exceeding 30 days, "upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment." Act of June 25, 1948, § 2107, 62 Stat. 963. [6] Nothing in the statute provided for extension of the time to file a notice of appeal when, as in this case, the judgment loser did receive notice of the entry of judgment. In 1991, Congress broadened the class of persons who could gain extensions to include all prospective appellants who showed "excusable neglect or good cause." § 12, 105 Stat. 1627. In addition, Congress retained a time prescription covering appellants who lacked notice of the entry of judgment: "[A] party entitled to notice of the entry of a judgment ... [who] did not receive such notice from the clerk or any party within 21 days of [the judgment's] entry" qualifies for a 14–day extension, [7] if "no party would be prejudiced [thereby]." § 2107(c). In full, § 2107(c) now provides:

> "(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—
>
> "(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
>
> "(2) that no party would be prejudiced,
>
> "the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal."

In short, current § 2107(c), like the provision as initially enacted, specifies the length of an extension for cases in which the appellant lacked notice of the entry of judgment. [8] For other cases, the statute does not say how long an extension may run.

But Federal Rule of Appellate Procedure 4(a)(5)(C) does prescribe a limit: "No extension [of time for filing a notice of appeal] may exceed 30 days after the prescribed time [for filing a notice of appeal] or 14 days after the date [of] the order granting the [extension] motion ..., whichever is later." Unlike § 2107(c), we note, Rule 4(a)(5)(C) limits extensions of time to file a notice of appeal in *all* circumstances, not just in cases in which the prospective appellant lacked notice of the entry of judgment.

***20** B

Although Rule 4(a)(5)(C)'s limit on extensions of time appears nowhere in the text of § 2107(c), respondents now contend that Rule 4(a)(5)(C) has a "statutory basis" because § 2107(c) once limited extensions (to the extent it did authorize them) to 30 days. Brief for Respondents 17. No matter, respondents submit, that Congress struck the 30–day limit in 1991 and replaced it with a 14–day limit governing, as the 30–day limit did, only lack-of-notice cases; deleting the 30–day prescription, respondents conjecture, was "probably inadverten[t]." *Id.,* at 1. In support of their argument that Congress accidentally failed to impose an all-purpose limit on extensions, respondents observe that the 1991 statute identifies Congress' aim as the enactment of "certain technical corrections in ... provisions of law relating to the courts." 105 Stat. 1623. They also note the caption of the relevant section of the amending statute: "Conformity with Rules of Appellate Procedure." *Id.,* at 1627. Because striking the 30–day limit from § 2107 made the statute *less* like Rule 4(a)(5)(C), respondents reason, Congress likely erased the relevant paragraph absentmindedly. Hence, respondents conclude, "there is no reason to interpret the 1991 amendment as stripping Rule 4(a)(5)(C) of its jurisdictional significance." Brief for Respondents 2.

Overlooked by respondents, pre–1991 § 2107 never spoke to extensions for reasons other than lack of notice. In any event, we resist speculating whether Congress acted inadvertently. See *Henson v. Santander Consumer USA Inc.,* 582 U.S. ——, —— – ——, 137 S.Ct. 1718, 1725, 198 L.Ed.2d 177 (2017) ("[W]e will not presume with [respondents] that any result consistent with their account of the statute's overarching goal must be the law but will presume more modestly instead 'that [the] legislature says ... what it means and means ... what it says.' " (quoting *Dodd v. United States,* 545 U.S. 353, 357, 125 S.Ct. 2478, 162 L.Ed.2d 343 (2005))); *Magwood v. Patterson,* 561 U.S. 320, 334, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010) ("We cannot replace the actual text with speculation as to Congress' intent."). The rule of decision our precedent shapes is both clear and easy to apply: If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional, *supra,* at 15; otherwise, the time specification fits within the claim-processing category, *ibid.* [9]

***21** In dismissing Hamer's appeal for want of jurisdiction, the Court of Appeals relied heavily on our decision in *Bowles*. We therefore reiterate what that precedent conveys. There, petitioner Keith Bowles did not receive timely notice of the entry of a postjudgment order and consequently failed to file a timely notice of appeal. *Bowles v. Russell,* 432 F.3d 668, 670 (C.A.6 2005). When Bowles learned of the postjudgment order, he moved for an extension under Federal Rule of Appellate Procedure 4(a)(6), which implements § 2107(c)'s authorization of extensions in lack-of-notice cases. *Ibid.* The District Court granted Bowles's motion, but inexplicably provided a 17–day extension, rather than the 14–day extension authorized by § 2107(c). *Bowles,* 551 U.S., at 207, 127 S.Ct. 2360. Bowles filed his notice of appeal within the 17 days allowed by the District Court but outside the 14 days allowed by § 2107(c). *Ibid.* "Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c)," we explained, the Court of Appeals lacked jurisdiction over Bowles's tardy appeal. *Id.,* at 213, 127 S.Ct. 2360.

Quoting *Bowles* at length, the Court of Appeals in this case reasoned that "[l]ike Rule 4(a)(6), Rule 4(a)(5)(C) is the vehicle by which § 2107(c) is employed and it limits a district court's authority to extend the notice of appeal filing deadline to no more than an additional 30 days." 835 F.3d, at 763. In conflating Rule 4(a)(5)(C) with § 2107(c), the Court of Appeals failed to grasp the distinction our decisions delineate between jurisdictional appeal filing deadlines and mandatory claim-processing rules, and therefore misapplied *Bowles*.

Several Courts of Appeals, [10] including the Court of Appeals in Hamer's case, have tripped over our statement in *Bowles* that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.' " 551 U.S., at 209, 127 S.Ct. 2360 (quoting *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (*per curiam*)). The "mandatory and jurisdictional" formulation is a characterization left over from days when we were "less than meticulous" in our use of the term "jurisdictional." *Kontrick,* 540 U.S., at 454, 124 S.Ct. 906. [11] The statement was correct as applied in *Bowles* because, as the Court there explained, the time prescription at issue in *Bowles* was imposed by Congress. 551 U.S., at 209–213, 127 S.Ct. 2360. But "mandatory and jurisdictional" is erroneous and confounding terminology where, as here, the relevant time prescription is absent from the U.S. Code. Because Rule 4(a)(5)(C), not § 2107, limits the length of the extension granted here, the time prescription is not jurisdictional. See *Youkelsone v. FDIC,* 660 F.3d 473, 475 (C.A.D.C.2011) ("Rule 4(a)(5)(C)'s thirty-day limit on the length of any extension ultimately granted appears nowhere in the U.S. Code.").

***22** For the reasons stated, the Court of Appeals erroneously treated as jurisdictional Rule 4(a)(5)(C)'s 30–day limitation on extensions of time to file a notice of appeal. We therefore vacate that court's judgment and remand the case for further proceedings consistent with this opinion. We note, in this regard, that our decision does not reach issues raised by Hamer, but left unaddressed by the Court of Appeals, including: (1) whether respondents' failure to raise any objection in the District Court to the overlong time extension, by itself, effected a forfeiture, see Brief for Petitioner 21–22; (2) whether respondents could gain review of the District Court's time extension only by filing their own appeal notice, see *id.,* at 23–27; and (3) whether equitable considerations may occasion an exception to Rule 4(a)(5)(C)'s time constraint, see *id.,* at 29–43.

It is so ordered.

All Citations

138 S.Ct. 13, 199 L.Ed.2d 249, 130 Fair Empl.Prac.Cas. (BNA) 879, 99 Fed.R.Serv.3d 179, 17 Cal. Daily Op. Serv. 10,654, 2017 Daily Journal D.A.R. 10,627, 27 Fla. L. Weekly Fed. S 5

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous. "[F]orfeiture is the failure to make the timely assertion of a right [;] waiver is the 'intentional relinquishment or abandonment of a known right.' " *United States v. Olano,* 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)).

2 Subject-matter jurisdiction cannot be attacked collaterally, however. *Kontrick v. Ryan,* 540 U.S. 443, 455, n. 9, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (citing *Des Moines Nav. & R. Co. v. Iowa Homestead Co.,* 123 U.S. 552, 557–559, 8 S.Ct. 217, 31 L.Ed. 202 (1887)).

3 We have reserved whether mandatory claim-processing rules may be subject to equitable exceptions. See *Kontrick,* 540 U.S., at 457, 124 S.Ct. 906.

4 Movants were the attorney appointed by the court to represent Hamer and two other attorneys who entered appearances as co-counsel. App. to Pet. for Cert. 57–59.

5 The Court of Appeals incorrectly stated that respondents, answering the Seventh Circuit's inquiry, asserted that the appeals court "lack[ed] jurisdiction over [Hamer's] appeal." 835 F.3d, at 763. In fact, respondents maintained that "the timeliness of Hamer's appeal d [id] not appear to be jurisdictional according to [Circuit] law." App. to Pet. for Cert. 71 (capitalization and footnote omitted). That was so, respondents explained, because "the time limits found [in] Fed. R[ule] App. P[roc.] 4(a)(5)(C) ... lack a statutory basis." *Id.,* at 77. Even if not jurisdictional, respondents continued, the Rule is mandatory and must be observed unless forfeited or waived. *Ibid.*

6 As enacted, the pertinent paragraph of § 2107 provided in full: "The district court, in any such action, suit or proceeding, may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree." Act of June 25, 1948, § 2107, 62 Stat. 963.

7 The 14–day prescription cuts back the original limit of 30 days.

8 The statute describes the 14–day extension permitted in lack-of-notice cases as a "reopening [of] the time for appeal." § 2107(c). The "reopening" period is the functional equivalent of an extension. See Brief for American Academy of Appellate Lawyers as *Amicus Curiae* 5–6.

9 In cases not involving the timebound transfer of adjudicatory authority from one Article III court to another, we have additionally applied a clear-statement rule: "A rule is jurisdictional '[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.' " *Gonzalez v. Thaler,* 565 U.S. 134, 141, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012) (quoting *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 515, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006)). See also, *e.g., Henderson v. Shinseki,* 562 U.S. 428, 431, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011) (statutory deadline for filing notice of appeal with Article I tribunal held not jurisdictional). "This is not to say that Congress must incant magic words in order to speak clearly," however. *Sebelius v. Auburn Regional Medical Center,* 568 U.S. 145, 153, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013). In determining whether Congress intended a particular provision to be jurisdictional, "[w]e consider 'context, including this Court's interpretations of similar provisions in many years past,' as probative of [Congress' intent]." *Id.,* at 153–154, 133 S.Ct. 817 (quoting *Reed Elsevier, Inc. v. Muchnick,* 559 U.S. 154, 168, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010)). Even so, "in applying th[e] clear statement rule, we have made plain that most [statutory] time bars are nonjurisdictional." *United States v. Kwai Fun Wong,* 575 U.S. ——, ——, 135 S.Ct. 1625, 1632, 191 L.Ed.2d 533 (2015).

10 See *Freidzon v. OAO LUKOIL,* 644 Fed.Appx. 52, 53 (C.A.2 2016); *Peters v. Williams,* 353 Fed.Appx. 136, 137 (C.A.10 2009); *United States v. Hawkins,* 298 Fed.Appx. 275 (C.A.4 2008).

11 Indeed, the formulation took flight from a case in which we mistakenly suggested that a claim-processing rule was "mandatory and jurisdictional." See *United States v. Robinson,* 361 U.S. 220, 224, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960). We have since clarified that "*Robinson* is correct not because the District Court lacked *subject-matter jurisdiction,* but because district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked." *Eberhart v. United States,* 546 U.S. 12, 17, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) (*per curiam*).

* * *

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B.

State v. Mason,

108 N.E.3d 56 (Ohio 2018)

153 Ohio St.3d 476
Supreme Court of Ohio.

The STATE of Ohio, Appellee,
v.
MASON, Appellant.

No. 2017–0200
|
Submitted January 23, 2018
|
Decided April 18, 2018

Synopsis
Background: Following affirmance of murder conviction and imposition of death sentence, 82 Ohio St.3d 144, 694 N.E.2d 932, and after being granted federal habeas corpus relief as to his death sentence, 543 F.3d 766, defendant filed a motion to dismiss death-penalty certification from his indictment on grounds that death-penalty statutory scheme was unconstitutional. The Court of Common Pleas, Marion County, No. 93CR0153, granted motion. State appealed. The Court of Appeals, 2016 WL 7626193, reversed and remanded. The Supreme Court accepted review.

Holdings: The Supreme Court, Fischer, J., held that:

state death-penalty scheme did not violate Sixth Amendment;

weighing process contained in death-penalty statutes did not constitute fact-finding subject to Sixth Amendment right to jury trial;

death-penalty scheme adequately afforded right to trial by jury during penalty phase; and

statutes governing role of trial judge in death-penalty scheme did not violate Sixth Amendment right to jury trial.

Affirmed.

Kennedy, J., concurred with opinion.

West Codenotes

Recognized as Unconstitutional
Fla. Stat. Ann. § 921.141(2, 3)

****58** APPEAL from the Court of Appeals for Marion County, No. 91634, 2016-Ohio-8400.

Attorneys and Law Firms

Ray A. Grogan, Marion County Prosecuting Attorney, and Kevin P. Collins, Assistant Prosecuting Attorney, for appellee.

Carpenter, Lipps & Leland, L.L.P., and Kort Gatterdam, Columbus; and Todd Anderson, for appellant.

Michael DeWine, Attorney General, Eric E. Murphy, State Solicitor, and Michael J. Hendershot, Chief Deputy Solicitor, urging affirmance for amicus curiae Ohio Attorney General.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Christopher D. Schroeder, Assistant Prosecuting Attorney, urging affirmance for amicus curiae Cuyahoga County Prosecutor's Office.

Ron O'Brien, Franklin County Prosecuting Attorney, and Steven L. Taylor, Assistant Prosecuting Attorney, urging affirmance for amicus curiae Ohio Prosecuting Attorneys Association.

Jeffrey M. Gamso, Cleveland and Erika B. Cunliffe, urging reversal for amicus curiae Ohio Association of Criminal Defense Lawyers.

Opinion

Fischer, J.

****59 *477 {¶ 1}** At issue in this case is whether Ohio's death-penalty scheme violates the right to a trial by jury as guaranteed by the Sixth Amendment to the United States Constitution. The Marion County Court of Common Pleas found that it does, but the Third District Court of Appeals reversed the trial court's judgment. Because the Ohio scheme satisfies the Sixth Amendment, we affirm.

I. Facts and Procedural History

{¶ 2} A jury found that appellant, Maurice Mason, raped and murdered Robin Dennis in 1993. *See State v. Mason*, 82 Ohio St.3d 144, 148, 694 N.E.2d 932 (1998). The jury found Mason guilty of aggravated murder with a felony-murder capital specification, rape, and having a gun while under disability. The jury recommended a death sentence, and the trial court sentenced him to death. The Third District Court of Appeals and this court affirmed the convictions and sentence. *State v. Mason*, 3d Dist. Marion No. 9–94–45, 1996 WL 715480 (Dec. 9, 1996); *Mason*, 82 Ohio St.3d 144, 694 N.E.2d 932.

{¶ 3} In 2008, after finding that Mason's trial counsel had provided ineffective assistance, the United States Court of Appeals for the Sixth Circuit granted a conditional writ of habeas corpus and remanded the case to the trial court for a new penalty-phase trial. *Mason v. Mitchell*, 543 F.3d 766, 768 (6th Cir.2008). On remand, Mason moved the trial court to dismiss the capital specification from his indictment, arguing that Ohio's death-penalty scheme violates the Sixth Amendment right to trial by jury. He relied on the United States Supreme Court's decision in *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 624, 193 L.Ed.2d 504 (2016), which invalidated Florida's former capital-sentencing scheme because it "required the judge alone to find the existence of an aggravating circumstance." The trial court granted Mason's motion, and the state appealed to the Third District Court of Appeals, which reversed the judgment and remanded the case.

{¶ 4} On appeal here, Mason argues that Ohio's death-penalty scheme is unconstitutional under *Hurst*.

II. Analysis

A. Standard of Review

{¶ 5} We must presume that the death-penalty scheme enacted by the General Assembly is constitutional. R.C. 1.47. To prevail on his facial challenge, Mason must establish "beyond a reasonable doubt that the legislation and constitutional ***478** provisions are clearly incompatible." *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955), paragraph one of the syllabus. Thus, "doubts regarding the validity of a legislative enactment are to be resolved in favor of the statute." *State v. Gill*, 63 Ohio St.3d 53, 55, 584 N.E.2d 1200 (1992).

B. Ohio's Death-Penalty Scheme

{¶ 6} R.C. 2929.03 and 2929.04 establish what is required for a death sentence to be imposed in Ohio when the defendant elects to be tried by a jury. The essential steps outlined below are required under current law and were required under the versions of R.C. 2929.03 and 2929.04 in effect when Dennis was killed in 1993. *See* Am.Sub.S.B. No. 1, 139 Ohio Laws, Part I, 1, 9–17. Although the Ohio General Assembly has since amended R.C. 2929.03 and 2929.04, because the changes to the wording at issue in this appeal were not substantive, the amendments do not affect the analysis in this case.

{¶ 7} First, to face the possibility of a death sentence, a defendant must be charged in an indictment with aggravated murder and at least one specification of an ****60** aggravating circumstance. R.C. 2929.03(A) and (B). The state charged Mason with aggravated murder under R.C. 2903.01(B) and an aggravating circumstance (committing aggravated murder while committing rape) under R.C. 2929.04(A)(7).

{¶ 8} Second, the jury verdict must state that the defendant is found guilty of aggravated murder and must state separately that he is guilty of at least one charged specification. R.C. 2929.03(B). The state must prove guilt of the principal charge and of any specification beyond a reasonable doubt. *Id.*; R.C. 2929.04(A). The jury found Mason guilty of aggravated murder and the charged aggravating circumstance.

{¶ 9} Third, once the jury finds the defendant guilty of aggravated murder and at least one specification, he will be sentenced either to death or to life imprisonment. R.C. 2929.03(C)(2). When the defendant is tried by a jury, the penalty "shall be determined * * * [b]y the trial jury and the trial judge." R.C. 2929.03(C)(2)(b).

{¶ 10} Fourth, in the sentencing phase, the court and trial jury shall consider (1) any presentence-investigation or mental-examination report (if the defendant requested an investigation or examination), (2) the trial evidence relevant to the aggravating circumstances the offender was found guilty of committing and relevant to mitigating factors, (3) additional testimony and evidence relevant to the nature and circumstances of the aggravating circumstances and any mitigating factors, (4) any statement of the offender, and (5) the arguments of counsel. R.C. 2929.03(D)(1). In this proceeding, the state must prove beyond a reasonable doubt that "the aggravating circumstances the defendant was found guilty of ***479** committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death." *Id.*

{¶ 11} Fifth, the *jury finds* and then recommends the sentence: "If the *trial jury* unanimously *finds*, by proof beyond a reasonable doubt, that the aggravating circumstances * * * outweigh the mitigating factors, the *trial jury* shall recommend to the court that the sentence of death be imposed on the offender." (Emphasis added.) R.C. 2929.03(D)(2). But "[a]bsent such a finding" by the jury, the jury shall recommend one of the life sentences set forth in R.C. 2929.03(D)(2), and the trial court "shall impose the [life] sentence recommended." *Id.* Also, if the jury fails to reach a verdict unanimously recommending a sentence, the trial court must impose a life sentence. *State v. Springer*, 63 Ohio St.3d 167, 586 N.E.2d 96 (1992), syllabus.

{¶ 12} Sixth, if the trial jury recommends a death sentence, and if "the court *finds*, by proof beyond a reasonable doubt, * * * that the aggravating circumstances * * * outweigh the mitigating factors, [the court] shall *impose* sentence of death on the offender." (Emphasis added.) R.C. 2929.03(D)(3). Then, the court must state in a separate opinion "the reasons why the aggravating circumstances * * * were sufficient to outweigh the mitigating factors." R.C. 2929.03(F).

C. Sixth Amendment Caselaw

1. *Apprendi*, *Ring*, and *Hurst*

{¶ 13} Mason's Sixth Amendment claim principally relies on *Hurst*, which, in turn, relied on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). *Apprendi* involved New Jersey's "hate crime" law, which allowed a trial court to enhance an offender's penalty if the trial judge found that the offender had been motivated by racial or other bias in committing an offense. *Apprendi* at 468, 120 S.Ct. 2348. The question in *Apprendi* was whether such an aggravating fact must be found by a jury based on proof beyond a ****61** reasonable doubt. *Id.* at 469, 120 S.Ct. 2348. *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. 2348.

{¶ 14} Two years later, in *Ring*, the Supreme Court applied *Apprendi* to invalidate Arizona's former death-penalty scheme, which permitted imposition of a death sentence based *solely* on a trial judge's finding of the existence of a statutory aggravating circumstance. *See Ring* at 609, 122 S.Ct. 2428. The *Ring* court concluded that an aggravating circumstance in a capital case was " 'the functional equivalent of an element of a greater offense' " that must be submitted to a jury. *Id.*, quoting *Apprendi* at 494, 120 S.Ct. 2348, fn. 19. Arizona's death-penalty law violated the Sixth Amendment ***480** because that law required the trial judge alone to find the aggravating facts necessary to sentence a defendant to death. *See id.* at 609, 122 S.Ct. 2428.

{¶ 15} The Supreme Court applied *Apprendi* and *Ring* in *Hurst*. A jury found Timothy Hurst guilty of first-degree murder. Although that offense was a capital felony under Florida law, the jury's verdict alone did not qualify Hurst for the death penalty: at the time of his conviction, Florida law provided that " '[a] person who has been convicted of a capital felony shall be punished by death' only if an additional sentencing proceeding 'results in findings by the court that such person shall be punished by death.' " *Hurst*, — U.S. ——, 136 S.Ct. at 620, 193 L.Ed.2d 504, quoting former Fla.Stat. 775.082(1), C.S.H.B. No. 3033, Ch. 98–3, Laws of Fla. In Hurst's sentencing proceeding, the jury, as required by former Fla.Stat. 921.141(2), C.S.H.B. 207, Ch. 96–302, Laws of Fla., rendered an "advisory sentence" recommending death, but Florida law did not require the jury to specify the aggravating circumstances that influenced its decision. *Id.*, citing former Fla. Stat. 921.141. The sentencing judge then imposed a death sentence after independently determining and weighing aggravating circumstances and mitigating factors. *Id.*, citing former Fla.Stat. 921.141(3). Hurst's sentencing judge, who explained her findings in writing, found that two aggravating circumstances existed. *Id.*

{¶ 16} The United States Supreme Court began its review of Hurst's Sixth Amendment claim by reciting *Apprendi*'s basic tenet: "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Hurst* at ——, 136 S.Ct. at 621, quoting *Apprendi*, 530 U.S. at 494, 120 S.Ct. 2348, 147 L.Ed.2d 435. It then explained that the *Apprendi* rule had required invalidation of Arizona's death-penalty scheme in *Ring* because Arizona had allowed the imposition of the death penalty based solely on judicial fact-finding of the aggravating facts. *Hurst* at ——, 136 S.Ct. at 621, citing *Ring*, 536 U.S. at 591–593, 597, 604, 122 S.Ct. 2428, 153 L.Ed.2d 556. The *Hurst* court concluded that under the same analysis, Florida's scheme had to be invalidated, because Florida did "not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at ——, 136 S.Ct. at 622. The court observed that the Florida jury's advisory sentence was immaterial for Sixth Amendment purposes, because it did not include " 'specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation [was] not binding on the trial judge.' " *Id.*, quoting *Walton* v. *Arizona*, 497 U.S. 639, 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). The court held that Florida's ****62** scheme violated the Sixth Amendment because Florida law "required the judge alone to find the existence of an aggravating circumstance." *Id.* at ——, 136 S.Ct. at 624.

***481** 2. Past Sixth Amendment Challenges to Ohio's Death-Penalty Scheme

{¶ 17} After the *Ring* decision was issued in 2002, we held that Ohio's death-penalty scheme does not violate the Sixth Amendment right to a jury trial. *See State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 68–70. We explained that in contrast to Arizona's scheme, Ohio's capital-sentencing scheme places the responsibility for making all factual determinations regarding whether a defendant should be sentenced to death with the jury. *Id.* at ¶ 69. We noted that "R.C. 2929.03 charges the jury with determining, by proof beyond a reasonable doubt, the existence of any statutory aggravating circumstances and whether those aggravating circumstances are sufficient to outweigh the defendant's mitigating evidence." *Id.*, citing R.C. 2929.03(B) and (D). *See also State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 221.

{¶ 18} After the *Hurst* decision, we revisited the issue in *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶ 59, stating that "Ohio's capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst*." In reaching that conclusion, we reasoned that Ohio law requires a jury in a capital case to make the findings required by the Sixth Amendment, because "the determination of guilt of an aggravating circumstance renders [an Ohio] defendant eligible for a capital sentence," *Belton* at ¶ 59, and the weighing of aggravating circumstances against mitigating factors "is *not* a fact-finding process subject to the Sixth Amendment" (emphasis sic), *id.* at ¶ 60. Mason argues that *Belton* is not controlling here, because the *Hurst* question was not squarely presented in that case.

D. Ohio's Death-Penalty Scheme and the Sixth Amendment

{¶ 19} The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." This entitles criminal defendants "to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 U.S. at 589, 122 S.Ct. 2428, 153 L.Ed.2d 556. *See also Hurst*, —— U.S. ——, 136 S.Ct. at 619, 193 L.Ed.2d 504 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death"). Ohio's death-sentence scheme satisfies this right.

{¶ 20} When an Ohio capital defendant elects to be tried by a jury, the jury decides whether the offender is guilty beyond a reasonable doubt of aggravated murder and—unlike the juries in *Ring* and *Hurst*—the aggravating-circumstance specifications for which the offender was indicted. R.C. 2929.03(B). Then the jury—again unlike in *Ring* and *Hurst*—must "unanimously find[ ], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors." R.C. 2929.03(D)(2). An Ohio jury recommends a death sentence only after it makes this finding. *Id.* ***482** And without that recommendation by the jury, the trial court may not impose the death sentence.

{¶ 21} Ohio law requires the critical jury findings that were not required by the laws at issue in *Ring* and *Hurst*. *See* R.C. 2929.03(C)(2). Ohio's death-penalty scheme, therefore, does not violate the Sixth Amendment. Mason's various arguments to the contrary misapprehend both ****63** what the Sixth Amendment requires and what it prohibits.

1. Death Eligibility

{¶ 22} Mason's arguments focus on the sentencing phase within Ohio's death-penalty scheme—namely, the "weighing" process that follows after a defendant has been found guilty of aggravated murder and at least one capital specification. He contends that the jury does too little during this phase (merely recommending a death sentence), while the trial court does too much (imposing the sentence based on its own specific, written findings). Before addressing these points, it is

necessary to consider a threshold question: does the weighing that occurs in the sentencing phase—after the jury already has found the existence of an aggravating circumstance—constitute fact-finding under the Sixth Amendment?

{¶ 23} *Hurst* does not answer, or even address, this question. The question in *Hurst* was more basic: did the Florida scheme require that a Florida jury make a finding of fact as to an aggravating circumstance before a sentence of death was imposed? *See Hurst*, —— U.S. ——, 136 S.Ct. at 622, 193 L.Ed.2d 504. Florida's former capital-sentencing scheme was unconstitutional because, instead of requiring the jury to make the critical finding before making its recommendation, it "required the judge alone to find the existence of an aggravating circumstance." *Id.* at ——, 136 S.Ct. at 624. The *Hurst* court did refer to Florida's weighing process by mentioning the role mitigating facts play in capital sentencing. *Id.* at ——, 136 S.Ct. at 622, quoting *Walton*, 497 U.S. at 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (a Florida jury " 'does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances' "); *id.*, quoting former Fla.Stat. 921.141(3) ("The trial court *alone* must find 'the facts * * * [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances' " [emphasis, ellipsis, and brackets sic]). But those references merely described Florida's scheme; the court's holding did not address the weighing process. In the end, the court held only that Florida's sentencing scheme violated the Sixth Amendment because it "required the judge alone to find the existence of an aggravating circumstance." *Id.* at ——, 136 S.Ct. at 624. With that in mind, it is necessary to consider additional caselaw on the subject.

***483** *a. The nature of the weighing process*

{¶ 24} The United States Supreme Court has recognized "two different aspects of the capital decision-making process: the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 971, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). For purposes of the Eighth Amendment, a defendant is eligible for the death penalty if the trier of fact finds him guilty of murder and at least one aggravating circumstance. *Id.* at 972, 114 S.Ct. 2630. This determination is necessarily factual. *Id.* at 973, 114 S.Ct. 2630. *See also Kansas v. Carr*, —— U.S. ——, 136 S.Ct. 633, 642, 193 L.Ed.2d 535 (2016) (stating that "the aggravating-factor determination (the so-called 'eligibility phase') * * * is a purely factual determination"). "The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure [sic] an assessment of the defendant's culpability." *Tuilaepa* at 973, 114 S.Ct. 2630. This, the Supreme Court has said, "is mostly a question of mercy," involving an exercise of judgment. *Carr* at ——, 136 S.Ct. at 642. *See also Tuilaepa* at 978, 114 S.Ct. 2630 ("at the selection stage, the States are not confined to submitting to the jury specific ****64** propositional questions"). Thus, the selection decision does not obviously involve a determination of fact.

{¶ 25} The eligibility/selection distinction is relevant under the Sixth Amendment in capital cases because the Sixth Amendment requires a jury to find beyond a reasonable doubt all *facts* that make a defendant death-eligible. *See Hurst* at ——, 136 S.Ct. at 619 (referring to "each fact necessary to impose a sentence of death"); *Ring*, 536 U.S. at 589, 122 S.Ct. 2428, 153 L.Ed.2d 556 ("Capital defendants, no less than noncapital defendants * * * are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"). *See also Blakely v. Washington*, 542 U.S. 296, 309, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (referring to "the jury's traditional function of finding the facts essential to lawful imposition of the penalty"); *Apprendi*, 530 U.S. at 483, 120 S.Ct. 2348, 147 L.Ed.2d 435 (referring to "the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense").

{¶ 26} Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principal offense and any aggravating circumstances. *See United States v. Gabrion*, 719 F.3d 511, 532–533 (6th Cir.2013) (rehearing en banc); *United States v. Runyon*, 707 F.3d 475, 516 (4th Cir.2013); *United States v. Mitchell*, 502 F.3d 931, 993–994 (9th Cir.2007); *United States v. Sampson*, 486 F.3d 13, 31–32 (1st Cir.2007); *United States v. Fields*, 483 F.3d 313, 345–346 (5th Cir.2007); *United States v. Purkey*, 428

F.3d 738, 749 (8th Cir.2005); *Ritchie v. State*, 809 N.E.2d 258, 268 (Ind.2004); ***484** *Oken v. State*, 378 Md. 179, 251, 835 A.2d 1105 (2003); *Commonwealth v. Roney*, 581 Pa. 587, 601, 866 A.2d 351 (2005); *State v. Gales*, 265 Neb. 598, 628, 658 N.W.2d 604 (2003); *Nunnery v. State*, 127 Nev. 749, 770–775, 263 P.3d 235 (2011); *State v. Fry*, 2006-NMSC-001, ¶ 37–38, 138 N.M. 700, 126 P.3d 516.

{¶ 27} But some post-*Hurst* decisions have held otherwise. *See Smith v. Pineda*, S.D.Ohio No. 1:12–cv–196, 2017 WL 631410, *3, 2017 U.S. Dist. LEXIS 22082, *6 (Feb. 16, 2017) (finding that Ohio's scheme satisfies the Sixth Amendment but also finding that "the relative weight of aggravating circumstances and mitigating factors is a question of fact akin to an element under the *Apprendi* line of cases"); *Chinn v. Jenkins*, S.D.Ohio No. 3:02–cv–512, 2017 WL 631412, *2, 2017 U.S. Dist. LEXIS 22088, *5 (Feb. 13, 2017) (same); *Davis v. Bobby*, S.D.Ohio No. 2:10–cv–107, 2017 WL 4277202, *2-3, 2017 U.S. Dist. LEXIS 157948, *6–7 (Sept. 25, 2017); *Rauf v. State*, 145 A.3d 430, 434 (Del.2016).

{¶ 28} In *Gabrion*, the Sixth Circuit (analyzing the federal death-penalty statute) explained that the weighing process requires "not a finding of fact in support of a particular sentence * * * [but] a determination of *the sentence itself*, within a range for which the defendant is already eligible." (Emphasis sic.) *Id.* at 533. This analysis is persuasive and applies to the Ohio scheme, which expressly makes the weighing process a determination of the sentence itself. *See* R.C. 2929.03(C)(2)(b) ("if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender * * * shall be determined * * * [b]y the trial jury and the trial judge, if the offender was tried by jury"). In other words, after completing its role as the fact-finder concerning a defendant's guilt, an Ohio jury assumes a different role as a "sentencer" (albeit in conjunction with the trial court). *See* ****65** *Brown v. Sanders*, 546 U.S. 212, 216, 126 S.Ct. 884, 163 L.Ed.2d 723 (2006) ("Once the narrowing requirement has been satisfied, the sentencer is called upon to determine whether a defendant thus found eligible for the death penalty should in fact receive it"). *But see State v. Rogers*, 28 Ohio St.3d 427, 429, 504 N.E.2d 52 (1986) (recognizing the trial court as the ultimate "sentencing authority"), *rev'd on reconsideration on other grounds,* 32 Ohio St.3d 70, 512 N.E.2d 581 (1987).

b. Ohio's statutory scheme does not violate the Sixth Amendment

{¶ 29} Based on the above analysis, we were correct to state in *Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, at ¶ 60, that "[w]eighing is *not* a fact-finding process subject to the Sixth Amendment." (Emphasis sic.) The Sixth Amendment was satisfied once the jury found Mason guilty of aggravated murder and a felony-murder capital specification. *See State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 269 ("Adams became death-eligible when the jury unanimously found him guilty of aggravated murder in the course of some predicate felony"); ***485** *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 189 ("the jury's verdict, and not the judge's findings, made Davis eligible for the death penalty"); *State v. Gumm*, 73 Ohio St.3d 413, 417, 653 N.E.2d 253 (1995) ("At the point in time at which the factfinder * * * finds the defendant guilty of both aggravated murder and an R.C. 2929.04(A) specification, the defendant has become 'death-eligible,' and a second phase of the proceedings (the 'mitigation' or 'penalty' or 'sentencing' or 'selection' phase begins"). *See also Jenkins v. Hutton*, —— U.S. ——, 137 S.Ct. 1769, 1772, 198 L.Ed.2d 415 (2017) (stating that Hutton was death-eligible under Ohio law when the jury found him guilty of aggravated murder and two aggravating circumstances). Accordingly, we approve our analysis in *Belton* and reject Mason's claim that Ohio's death-penalty scheme is unconstitutional under *Hurst*.

2. The Jury's Role in Sentencing

{¶ 30} While we uphold our conclusion in *Belton* that weighing is not a fact-finding process subject to the Sixth Amendment, we further conclude that even if the weighing process were to involve fact-finding under the Sixth Amendment, Ohio adequately affords the right to trial by jury during the penalty phase. Mason contends that it does not, because the process permits a jury only to *recommend* a death sentence. *See* R.C. 2929.03(D)(2). Here, he emphasizes

the statement in *Hurst* that "[a] jury's mere recommendation is not enough," —— U.S. ——, 136 S.Ct. at 619, 193 L.Ed.2d 504. But he fails to appreciate the material difference between the process by which an Ohio jury reaches its death recommendation and the Florida process at issue in *Hurst*.

{¶ 31} The Florida statute required the jury to render an "advisory sentence" after hearing the evidence presented in a sentencing-phase proceeding:

> Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant ****66** should be sentenced to life imprisonment or death.

Former Fla.Stat. 921.141(2). In *Hurst*, the court held that the Florida scheme violated the Sixth Amendment because it did not require the jury to find that Hurst was guilty of committing a specific aggravating circumstance. *Hurst* at ——, 136 S.Ct. at 622, 624.

***486** **{¶ 32}** Ohio law, in contrast, requires a jury to find the defendant guilty beyond a reasonable doubt of at least one aggravating circumstance, R.C. 2929.03(B), before the matter proceeds to the penalty phase, when the jury can recommend a death sentence. Ohio's scheme differs from Florida's because Ohio requires the jury to make this specific and critical finding.

{¶ 33} Mason disputes this conclusion, relying on this court's statement in *Rogers*, 28 Ohio St.3d at 430, 504 N.E.2d 52, that Florida's system "is remarkably similar to Ohio's." But *Rogers* involved a different question. *See id.* at 429–430, 504 N.E.2d 52. *Rogers* noted that the systems are similar in that they both allow for jury recommendations; it did not consider the findings that the jury was required to make before recommending a sentence.

{¶ 34} Mason also argues that Ohio's scheme is inadequate under the Sixth Amendment because it requires the jury to render "only a general verdict." Here, Mason relies on *Hurst*'s reference to the " 'specific factual findings' " by a jury that were lacking under Florida's scheme. *See Hurst*, —— U.S. ——, 136 S.Ct. at 622, 193 L.Ed.2d 504, quoting *Walton*, 497 U.S. at 648, 110 S.Ct. 3047, 111 L.Ed.2d 511. He contends that this requires a jury to *explain why* it concluded that the aggravating circumstances are sufficient to outweigh the mitigating factors. He contrasts the jury's general verdict to the trial court's sentencing opinion, which indeed must explain "the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors," R.C. 2929.03(F).

{¶ 35} While it is true that a trial court must fully explain its reasoning for imposing a sentence of death, Mason does not provide any support for the proposition that the Sixth Amendment requires *a jury* to explain why it found that the aggravating circumstances outweigh the mitigating factors. In citing *Hurst* for this proposition, Mason fails to appreciate that Florida's statutory scheme violated the Sixth Amendment because the jury did not specify its finding of which aggravating circumstance supported its recommendation, not because the jury did not explain why it found that the aggravating circumstances were not outweighed by sufficient mitigating circumstances.

{¶ 36} On a related point, Mason contends that the jury's sentencing-phase finding and recommendation are insufficient because they provide no guidance to the trial court for its own findings and sentence determination. His argument relies on the statement in *Hurst* that " '[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona,' " *Hurst* at ——, 136 S.Ct. at 622, quoting *Walton* at 648, 110 S.Ct. 3047.

{¶ 37} Mason misses a key distinction between Ohio's statutory scheme and the Florida and Arizona statutory schemes at issue in *Hurst* and *Walton*: in Ohio, a ***487** jury is required to find the defendant guilty of a specific aggravating circumstance, thus establishing the aggravating circumstance that a trial court will weigh against the mitigating factors in its independent determination of punishment. *See* **67 R.C. 2929.03(D)(3); *State v. Wogenstahl*, 75 Ohio St.3d 344, 662 N.E.2d 311 (1996), paragraph one of the syllabus. Mason does not explain why further guidance for the trial court is constitutionally required.

{¶ 38} Mason also complains that Ohio's statutory scheme does not require the jury to make findings regarding mitigating factors or to specify the factors that it considered in mitigation. There is only limited support for the argument that a jury must do so: *Hurst*, again quoting *Walton*, notes that Florida's former scheme did not require the jury to " 'make specific factual findings with regard to the existence of mitigating or aggravating circumstances.' " *Hurst*, —— U.S. ——, 136 S.Ct. at 622, 193 L.Ed.2d 504, quoting *Walton*, 497 U.S. at 648, 110 S.Ct. 3047, 111 L.Ed.2d 511. Notably, however, neither *Ring* nor *Hurst* held that the Sixth Amendment requires a jury to find mitigating facts. *See State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 186. Rather, they recognized that the Sixth Amendment guarantees that a jury will determine the facts that serve to *increase* the maximum punishment. *Ring*, 536 U.S. at 589, 122 S.Ct. 2428, 153 L.Ed.2d 556; *Hurst* at ——, 136 S.Ct. at 619. *See also Apprendi*, 530 U.S. at 490–491, 120 S.Ct. 2348, 147 L.Ed.2d 435, fn. 16 (stating that "[c]ore concerns animating the jury and burden-of-proof requirements are thus absent" when a trial judge alone finds a mitigating fact that reduces an offender's sentence). Because a finding that mitigating facts exist is not "necessary to impose a sentence of death," *Hurst* at ——, 136 S.Ct. at 619, this aspect of Mason's claim has no merit.

3. The Trial Judge's Role and the Sixth Amendment

{¶ 39} One of Mason's main concerns is the last step in Ohio's capital-sentencing process: the trial judge's independent findings that culminate in a written sentencing opinion. *See* R.C. 2929.03(D)(3) and (F). He contends that the trial judge must "make additional 'specific findings' beyond those made by the trial jury" and that an offender is not eligible for the death penalty until this judicial task is complete. Relying on *Hurst*, he says that a death sentence can be imposed in Ohio only after the trial judge makes these "independent factual determinations." But Mason misapprehends the issue, framing it as a question whether a death sentence "can be imposed," instead of whether it "will be imposed." Ohio does not permit the trial judge to find *additional* aggravating facts but requires the judge to determine, independent of the jury, whether a sentence of death *should* be imposed. *See State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 160.

***488** **{¶ 40}** Two significant flaws are apparent in Mason's claim. First, unlike the Arizona scheme found unconstitutional by the United States Supreme Court in *Ring*, under the Ohio scheme, the trial court cannot *increase* an offender's sentence based on its own findings. Rather, the trial court safeguards offenders from wayward juries, similar to how a court might grant a motion for acquittal following a jury verdict under Crim.R. 29(C).

{¶ 41} Second, Mason wrongly supposes that the Sixth Amendment prohibits judicial fact-finding. To be sure, *Hurst* and *Ring* both decry judicial fact-finding to some extent. But they do so in the context of reviewing statutory schemes that fail to provide for any *jury* fact-finding on critical questions. *See Hurst*, —— U.S. ——, 136 S.Ct. at 622, 193 L.Ed.2d 504 (noting "the central and *singular* role the judge play[ed] under Florida law" [emphasis added]); *Ring*, 536 U.S. at 592, 122 S.Ct. 2428, 153 L.Ed.2d 556 (noting that the court alone made the factual determination **68 of an aggravating factor under Arizona law). The Supreme Court made clear in *Blakely*, 542 U.S. at 308, 124 S.Ct. 2531, 159 L.Ed.2d 403, that "the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury." *See also Alleyne v. United States*, 570 U.S. 99, 116, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion,

informed by judicial factfinding, does not violate the Sixth Amendment"); *United States v. Booker*, 543 U.S. 220, 233, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range").

{¶ 42} Mason suggests that under *Hurst*, the Sixth Amendment requires the jury alone to decide whether a sentence of death will be imposed. But *Hurst* did not create this requirement. Ohio trial judges may weigh aggravating circumstances against mitigating factors and impose a death sentence only after the jury itself has made the critical findings and recommended that sentence. Thus, "the judge's authority to sentence derives wholly from the jury's verdict." *Blakely* at 306, 124 S.Ct. 2531. Under Ohio's death-penalty scheme, therefore, trial judges function squarely within the framework of the Sixth Amendment.

III. Conclusion

{¶ 43} We conclude that Ohio's death-penalty scheme does not violate a defendant's right to a trial by jury as guaranteed by the Sixth Amendment. For this reason, the trial court erred in granting Mason's motion to dismiss the death-penalty specification from his indictment. We accordingly affirm the judgment of the Third District Court of Appeals.

Judgment affirmed.

O'Connor, C.J., and Jensen, French, Hall, and DeWine, JJ., concur.

Kennedy, J., concurs, with an opinion.

James D. Jensen, J., of the Sixth District Court of Appeals, sitting for O'Donnell, J.

Michael T. Hall, J., of the Second District Court of Appeals, sitting for O'Neill, J.

Kennedy, J., concurring.

***489** **{¶ 44}** Because the majority's judgment is in line with our holding in *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, I concur in that judgment. Although the majority never explicitly addresses Mason's argument that the analysis of *Hurst v. Florida*, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), in *Belton* is dictum, its failure to cite *Belton* as binding precedent that resolves this case implies that the majority agrees that our holding in *Belton* is dictum.

{¶ 45} With regard to dicta, Chief Justice Marshall wrote the following almost 200 years ago in *Cohens v. Virginia*: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821). For this reason, a court is not bound to follow its own dicta from a prior case in which the point at issue "was not fully debated." ****69** *Cent. Virginia Community College v. Katz*, 546 U.S. 356, 363, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006); *see also Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.*, 70 Ohio St.3d 281, 284, 638 N.E.2d 991 (1994) (explaining that dicta in a prior case had no binding effect on a court's decision in a later case).

{¶ 46} This is so because " '[t]he problem with dicta, and a good reason that it should not have the force of precedent for later cases, is that when a holding is unnecessary to the outcome of a case, it may be made with less care and thoroughness than if it were crucial to the outcome.' " *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 89 (O'Donnell, J., concurring in part and dissenting in part), quoting *Bauer v. Garden City*, 163 Mich.App. 562, 571, 414 N.W.2d 891 (1987).

{¶ 47} Our determination in *Belton* that Ohio's death-penalty statutes do not contravene the holding in *Hurst*, however, is not dictum. The issue presented in the third proposition of law in *Belton* was whether Ohio's death-penalty statute violated the Sixth Amendment right to a jury trial. The court quoted Belton as asserting that

> ***490** "even if a capital defendant enters a guilty plea to Aggravated Murder and the accompanying death specifications, he has a right to a jury trial to determine the existence of any mitigating factors and to determine whether the aggravating circumstance or circumstances to which he would plead guilty outweigh those factors by proof beyond a reasonable doubt."

Belton, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, at ¶ 55. In effect, Belton argued that the Sixth Amendment guarantees a capital defendant the right to have a jury make additional factual determinations before sentencing—that notwithstanding his having waived the right to have a jury determine guilt, only a jury can make the finding that the aggravating circumstances outweigh the mitigating factors. The court answered the question squarely presented by the parties by applying *Hurst*—then the United States Supreme Court's most recent pronouncement on the issue—and explaining that the Sixth Amendment right to a jury trial is not implicated by a sentencing scheme that requires the trial judge to weigh aggravating circumstances against mitigating factors before selecting death as the appropriate sentence.

{¶ 48} The fact that the court could have analyzed the question presented in a different way—for instance, by considering whether Belton's waiver of a jury trial relinquished any right to a jury's participation in sentencing—does not mean that the way we did answer it is dictum. In *Richards v. Mkt. Exchange Bank Co.*, 81 Ohio St. 348, 367, 90 N.E. 1000 (1910), we rejected the view that "the determination of a question fairly presented by the record becomes mere dicta if there happens to be another proposition on which the decision might have been based."

{¶ 49} That a case could be distinguished on some factual basis from another case does not affect the authority of the rule of law it announced or reduce its holding to mere dictum. *See United States v. Schuster*, 684 F.2d 744, 748 (11th Cir.1982), *adopted on reh'g*, 717 F.2d 537 (11th Cir.1983) (en banc) ("Virtually all cases are factually distinguishable, but that does not vitiate the underlying rule of law to be derived from [a prior decision]"); *State v. Rice*, 169 N.H. 783, 795, 159 A.3d 1250 (2017) (acknowledging that the case was distinguishable from a prior case on the facts, but concluding that the "factual distinction" did not "justif[y] a difference in ****70** outcome"). Our decision in *Belton* is binding precedent controlling the outcome of this appeal, because its holding did not go beyond the facts and issues then before the court and its analysis was necessary for our ruling. Therefore, our holding in *Belton* is not dictum.

{¶ 50} Applying *Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, I agree that Ohio's death-penalty statutes do not violate the Sixth Amendment right to a jury trial as construed by ***491** *Hurst*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504. As we explained in *Belton*, the weighing of aggravating circumstances and mitigating factors required to ensure that only a defendant deserving of the ultimate penalty is sentenced to death "is *not* a fact-finding process subject to the Sixth Amendment" (emphasis sic), *id.* at ¶ 60, but rather "amounts to 'a complex moral judgment' about what penalty to impose upon a defendant who is already death-penalty eligible," *id.*, quoting *United States v. Runyon,* 707 F.3d 475, 515–516 (4th Cir.2013).

{¶ 51} Once the jury found Mason guilty of aggravated murder and at least one aggravating circumstance, under former R.C. 2929.03(C)(2), Am.Sub.S.B. No. 1, 139 Ohio Laws, Part I, 1, 10, the court could impose only one of the following penalties: "death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment." Therefore, the maximum penalty authorized by the statute following the jury's verdict at the trial phase was death, and no judicial fact-finding could expose Mason to any greater punishment.

{¶ 52} Because Mason was eligible for capital punishment based on the jury's verdict at the end of the trial phase, his argument that Ohio's death-penalty scheme violates the Sixth Amendment because it does not require the jury to make

specific findings of fact regarding the mitigating circumstances or why the mitigating circumstances were outweighed by the aggravating circumstances is not well taken. Accordingly, the majority correctly affirms the judgment of the court of appeals, and I concur.

All Citations

153 Ohio St.3d 476, 108 N.E.3d 56, 2018 -Ohio- 1462

C.

Zack v. State,

911 So. 2d 1190 (Fla. 2005)

911 So.2d 1190
Supreme Court of Florida.

Michael Duane ZACK, Appellant,
v.
STATE of Florida, Appellee.

No. SC03–1374.
|
July 7, 2005.
|
Rehearing Denied Sept. 16, 2005.

Synopsis
Background: After affirmance of his murder conviction and death sentence, 753 So.2d 9, defendant sought postconviction relief. The Circuit Court, Escambia County, Linda Lee Nobles, J., denied relief. Defendant appealed and petitioned for writ of habeas corpus.

Holdings: The Supreme Court held that:

counsel did not perform deficiently in failing to request *Frye* hearing to determine admissibility as expert scientific evidence of results of polymerase chain reaction (PCR) method and restriction fragment length polymorphisms (RFLP) method of DNA testing of blood and sperm;

counsel did not perform deficiently in preparing defendant to testify at guilt phase;

counsel did not perform deficiently in conceding defendant's identity as perpetrator and focusing the defense on the issue of intent;

prosecutor's closing argument regarding heinous, atrocious, or cruel aggravator at penalty phase, asking jury to "imagine" the terror that was coursing through victim during her last few minutes of life, did not rise to level of fundamental error; and

testimony of state's medical expert, that defendant exhibited hatred toward women, was not improper nonstatutory aggravating circumstance at penalty phase.

Affirmed; petition denied.

Attorneys and Law Firms

***1195** Linda McDermott of McClain and McDermott, P.A., Wilton Manors, FL, for Appellant/Petitioner.

Charles J. Crist, Jr., Attorney General, Charmaine M. Millsaps, Assistant Attorney General, Tallahassee, FL, for Appellee/Respondent.

Opinion

PER CURIAM.

Michael Duane Zack, a prisoner under sentence of death, appeals an order of the trial court denying a motion for postconviction relief under Florida Rule of Criminal Procedure 3.851 and petitions the Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. For the reasons discussed below, we affirm the trial court's order denying postconviction relief, and we deny relief on Zack's petition for writ of habeas corpus.

FACTS

The underlying facts in this case are fully set forth in this Court's decision on direct appeal. *See Zack v. State,* 753 So.2d 9 (Fla.2000). Zack murdered Ravonne Smith after a nine-day crime spree which began on June 4, 1996. During his crime spree, Zack also murdered Laura Rosillo. Additionally, he stole a vehicle, a rifle, a handgun, and money from other victims. Zack killed Smith on June 13 after meeting her in a bar. They smoked marijuana ***1196** and went back to Smith's house. Immediately upon entering the house, Zack hit Smith with a beer bottle, pursued her down the hall to the master bedroom, and then sexually assaulted her. Zack also pursued Smith throughout the house, beat her head against the bedroom's wooden floor, and stabbed her in the chest four times with an oyster knife. Afterwards, Zack cleaned the knife, put it away, and washed the blood from his hands. He put Smith's bloody shirt and shorts in her dresser drawer. He took a television, a VCR, and Smith's purse, and then left in Smith's boyfriend's car. He attempted to pawn the television and VCR which led to his apprehension several days later. Zack confessed to Smith's murder. He claimed that he and Smith had consensual sexual contact and that he attacked Smith only after she made a comment about his mother being murdered.

At trial, defense counsel argued that Zack suffers from fetal alcohol syndrome (FAS) and posttraumatic stress disorder (PTSD), and because of this, Zack was impulsive, under constant mental and emotional distress, and could not form the requisite intent to commit premeditated murder. Zack testified in his defense, explaining what happened when he returned to Smith's home with her on the night of the murder, that any sexual contact was consensual, and that he reacted as a result of comments she made about his mother. The State was allowed to present evidence of collateral crimes, also called *Williams* [1] Rule evidence, and presented the evidence of the Rosillo murder. The State presented expert testimony regarding DNA evidence in order to identify blood found on both Smith and Rosillo's clothes, as well as Zack's clothing.

The jury convicted Zack of first-degree murder, sexual battery, and robbery, and recommended a sentence of death by a vote of eleven to one. The trial court sentenced Zack to death. This Court affirmed Zack's conviction and sentence on direct appeal. *See Zack v. State,* 753 So.2d 9, 20, 25 (Fla.2000).

Zack's registry counsel raised six issues in a motion for postconviction relief: (1) whether counsel was ineffective for failing to object to the DNA evidence and failing to request a *Frye* [2] hearing; (2) whether the trial court erred in failing to *sua sponte* hold a *Frye* hearing; (3) whether trial counsel was ineffective for calling Zack to testify without preparing him for cross-examination or explaining to him that he had a choice to testify or not; (4) whether the death penalty is disproportionate due to the possibility that Zack suffers from a possible brain dysfunction and mental impairment, both of which are in the same category as mental retardation, thereby prohibiting execution under *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); (5) whether trial counsel was ineffective in closing arguments to the jury; and (6) whether the sentence is unconstitutional pursuant to *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The trial court summarily denied issues two, four, and six, but held an evidentiary hearing on issues one, three, and five.

At the evidentiary hearing, both Zack and his trial attorney, Elton Killam, testified. The trial court denied all postconviction relief. Zack appealed the trial court's order and filed a petition for writ of habeas corpus.

*1197 LAW AND ANALYSIS

Postconviction Relief

Zack raises six issues for review of the trial court's order denying postconviction relief. He argues that trial counsel was ineffective for failing to challenge the DNA testimony presented by the State; that counsel was ineffective because he failed to prepare Zack to testify at trial; that counsel was ineffective because he made prejudicial remarks to the jury in the opening statement and closing argument; that the trial court erred in summarily denying claims raised in his motion for postconviction relief involving Zack's right to a *Frye* hearing and the constitutionality of the death sentence under *Atkins;* that Florida's capital sentencing scheme is unconstitutional under *Ring;* and that collateral counsel was ineffective. We address each claim below, and deny relief.

1. DNA Evidence

Zack's first claim is that trial counsel was ineffective because he failed to challenge certain DNA evidence presented by the State. There were two types of DNA evidence presented by the State: Polymerase Chain Reaction (PCR) DNA evidence and Restriction Fragment Length Polymorphisms (RFLP) DNA evidence. Both types of DNA evidence were introduced to prove identity. Zack argues that the PCR DNA evidence was inadmissible and that his trial counsel should have requested a *Frye* hearing and challenged the qualifications of the State's expert. He contends that counsel failed to do so because he did not understand the science of DNA evidence.

In a successful ineffective assistance of counsel claim, the proponent must establish two things: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. *See Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

The State presented two expert witnesses who testified about DNA evidence, Tim McClure and Karen Barnes, both from Florida Department of Law Enforcement (FDLE). According to these experts, the DNA evidence showed that Zack had Smith's blood on him, and that Zack's sperm was found in Smith's body. In his opening statement, defense counsel told the jury that he was not going to cross-examine the State's expert witnesses about DNA, fingerprints, or blood spatters because he was not going to challenge that evidence. At the close of trial, defense counsel reiterated that Zack did not challenge the DNA evidence. At the postconviction hearing, Zack's trial counsel stated that he did not challenge the evidence because he did not dispute Zack's identity as the person who caused the death of the victim. In fact, Zack confessed that he killed Smith, and he said they had consensual sexual contact. The only issue at trial was the issue of intent.

Zack argues that trial counsel should have requested a *Frye* hearing on the admissibility of the PCR DNA evidence, which would have resulted in the exclusion of this evidence. Under Florida law, a *Frye* hearing is utilized in order to determine if an expert scientific opinion is admissible. *See Flanagan v. State,* 625 So.2d 827, 829 (Fla.1993). Such opinion must be based on techniques that have been generally accepted by the relevant scientific community and found to be reliable. ***1198** *See Frye,* 293 F. at 1014. However, *Frye* is only utilized where the science at issue is new or novel. *Brim v. State,* 695 So.2d 268 (Fla.1997).

Zack relies on *Murray v. State,* 692 So.2d 157 (Fla.1997), to support his contention that PCR DNA testing is new or novel and is subject to *Frye* testing. The *Murray* decision was released several months prior to Zack's trial. [3] Zack also asserts that his trial counsel lacked any understanding of DNA evidence and had no idea that it should have been excluded. The trial court, however, agreed with trial counsel's assessment that because Zack admitted to sexual contact with Smith and admitted to causing her death, the DNA evidence did not prove any fact at issue in this case. Based on this conclusion, the trial court concluded that trial counsel's strategy was sound and did not constitute ineffective assistance of counsel.

A trial court's resolution of a *Strickland* claim is a mixed question of law and fact. *See Strickland,* 466 U.S. at 698, 104 S.Ct. 2052 ("Ineffectiveness is ... a mixed question of law and fact."); *Stephens v. State,* 748 So.2d 1028, 1033 (Fla.1999). Thus, we defer to the trial court's factual findings, but review de novo the trial court's legal conclusions. *See Stephens,* 748 So.2d at 1033.

The factual findings indicate that trial counsel did not challenge the DNA evidence and that Zack conceded the fact that he had engaged in sexual contact with Smith and was responsible for her death. Thus, the PCR and RFLP DNA evidence was offered to demonstrate facts that Zack did not dispute. Trial counsel told the jury that he would not dispute this evidence because doing so would have served no purpose for the defense at trial. Based on these facts, we agree with the trial court's legal conclusion and find trial counsel's strategy sound. Trial counsel's decision to not challenge the DNA evidence did not constitute deficient performance in this case.

In addition, Zack has not shown that he suffered any prejudice from trial counsel's decision not to challenge the DNA evidence. Zack admitted to engaging in sexual contact with Smith and confessed to causing Smith's death. Thus, the facts supported by either type of DNA evidence were already established. *See Zack v. State,* 753 So.2d 9, 14 ("After he was arrested, Zack confessed to the Smith murder and to the Pope and Chandler thefts."). The issue at trial was Zack's level of intent. The PCR DNA evidence did not go to Zack's level of intent. Therefore, the evidence did not undermine Zack's defense. Had this evidence been challenged, we are confident that the outcome of the trial would not have been affected. We therefore deny relief on this claim.

2. Preparation to Testify

Zack argues that trial counsel failed to adequately prepare him to testify at trial and failed to inform him about what would occur during cross-examination. Zack contends that had he been adequately prepared and informed of the hazards of cross-examination, he would not have testified. Zack stated that trial counsel gave him no choice but to testify, and that he was only told that he was going to testify after trial began.

***1199** Trial counsel stated that he fully discussed the procedure of the trial with Zack. According to trial counsel's testimony, he discussed Zack's version of the events, and the fact that Zack would have to take the stand and testify if he wanted to get his story into evidence so that it could be argued to the jury. Prior to trial, he fully informed Zack about the necessity that he testify and that Zack completely understood that the State would cross-examine him. He also advised Zack as to the specifics of what to expect while on the witness stand, and that Zack never indicated that he did not want to testify.

As the trial court found, the trial record supported trial counsel's statement that Zack never conveyed a desire not to testify. In fact, Zack admitted at the postconviction hearing that he wanted the jury to hear his version of the events. At the postconviction hearing, Zack also complained that he was cross-examined about the Rosillo murder. However, there was no cross-examination about the Rosillo murder as trial counsel had successfully argued at trial that such questioning should not be permitted.

The trial court made a specific finding on credibility and chose to accept Killam's sworn testimony over Zack's sworn testimony that he was not prepared to testify or to be cross-examined. The trial court is in a superior position "to

evaluate and weigh the testimony and evidence based upon its observation of bearing, demeanor, and credibility of the witnesses." *Shaw v. Shaw,* 334 So.2d 13, 16 (Fla.1976); *see Guzman v. State,* 721 So.2d 1155, 1159 (Fla.1998), *cert. denied,* 526 U.S. 1102, 119 S.Ct. 1583, 143 L.Ed.2d 677 (1999). However, it is our obligation to independently review the record and ensure that the law is applied uniformly in decisions based on similar facts and to ensure that the defendant's representation is within constitutionally acceptable parameters. *See State v. Coney,* 845 So.2d 120, 141 (Fla.2003) (Pariente, J., concurring); *Stephens v. State,* 748 So.2d 1028, 1035 (Fla.1999) ("Based on the trial court's findings of fact and our review of the record, we agree with the trial court's conclusions as to both *Strickland* prongs and the ultimate finding of ineffective assistance of counsel."). Although Zack cites several cases in support of his claim, none involves a defendant who claims he or she was inadequately prepared to testify. *See, e.g., Kimmelman v. Morrison,* 477 U.S. 365, 384–88, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) (addressing the failure of defense counsel to request discovery); *Henderson v. Sargent,* 926 F.2d 706 (8th Cir.1991) (addressing the failure to conduct pretrial investigation), *modified on other grounds,* 939 F.2d 586 (8th Cir.1991); *Chambers v. Armontrout,* 907 F.2d 825 (8th Cir.1990) (en banc) (addressing the failure to interview potential self-defense witnesses); *Nixon v. Newsome,* 888 F.2d 112 (11th Cir.1989) (addressing counsel's failure to obtain a transcript of a witness's testimony at a codefendant's trial); *Code v. Montgomery,* 799 F.2d 1481, 1483 (11th Cir.1986) (addressing the failure to interview potential alibi witnesses).

Furthermore, Zack's own trial testimony does not support this claim. Zack gave his version of the events during direct examination, and although he was argumentative during cross-examination, he did not deviate from his version of the events. He told the jury that he was responsible for Smith's death, but that he did not plan it. He argued with the prosecutor when the prosecutor implied something other than what Zack had already stated. Zack did not always answer "yes" and "no." His answers indicated a desire to explain himself.

***1200** We accept the trial court's finding of facts that defense counsel was a more credible witness and that Zack was adequately prepared to testify at trial. We also find that Zack failed to establish that trial counsel was deficient in preparing him to testify at trial. Additionally, even if counsel had inadequately prepared Zack to be cross-examined, Zack suffered no prejudice. Zack complained about being inadequately prepared for cross-examination about the Rosillo murder, but the record indicates that the prosecutor did not cross-examine him about the Rosillo murder. We defer to the factual findings made by the trial court and, based on these facts, conclude that Zack has failed to establish that he is entitled to relief on his claim of ineffective assistance of counsel in preparing him to testify at trial.

3. *Nixon/Cronic* Claim

Zack argues that trial counsel was ineffective for conceding guilt at trial without his permission, which violates the mandates of *Nixon v. Singletary,* 758 So.2d 618 (Fla.2000), and *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). He also argues that appellate counsel was ineffective for failing to raise a *Nixon/Cronic* claim on appeal. The issue of ineffective assistance of appellate counsel is not properly raised in a 3.851 motion; rather, it is appropriately raised in a petition for writ of habeas corpus. *See Parker v. State,* 904 So.2d 370, 381 (Fla.2005) ("The proper method by which to raise a claim of ineffective assistance of appellate counsel is by petition for writ of habeas corpus directed to the appellate court which considered the direct appeal.") (quoting *Ragan v. Dugger,* 544 So.2d 1052, 1054 (Fla. 1st DCA 1989)).

We find no merit in Zack's claim that trial counsel was ineffective. Zack relies on this Court's decision in *Nixon v. Singletary,* which held that *Cronic* rather than *Strickland* is the standard for assessing ineffectiveness of counsel when a defendant's attorney concedes guilt to the crime charged without the defendant's express consent. Under *Cronic,* counsel's deficiency is presumed. *See Nixon v. Singletary,* 758 So.2d at 622. However, the United States Supreme Court recently overruled the standard applied in *Nixon* and stated that a defendant's ineffective assistance of counsel challenge based upon counsel's concession of guilt to the crime charged, even without the defendant's consent, must be evaluated under the standard set forth in *Strickland. See Florida v. Nixon,* 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004). Thus, in a case such as this, the defendant must show that counsel's strategy to concede guilt was unreasonable. *See id.*

Because Zack confessed to the killing, trial counsel's strategy was to dispute the intent element of first-degree murder. Trial counsel made a strategic decision to discuss the evidence that was admitted at trial in an attempt to alleviate the damage it would cause if he ignored the evidence. His goal was to get Zack a life sentence, which was a reasonable trial strategy. In closing argument at trial, counsel agreed with the State's argument concerning the messiness and evident brutality of the crime scene. At the postconviction hearing, trial counsel stated that the word "brutality" was not equal to "premeditation," and he wanted to show that the murders were the result of an unintended rage. Trial counsel stated that he knew the crime scene photos would be shown, and those photos made the crime scene "look real bad" and they would not have made sense unless they were shown to have been created by a person who was not in control of his own impulses. Trial ***1201** counsel stated that he wanted to maintain his credibility with the jurors.

The trial court found that, taking all of counsel's remarks in the context of the entire trial, counsel's intent was to dilute the damaging testimony that the jury would hear. We agree with the trial court's findings, and conclude that there was no deficient performance. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *See Strickland,* 466 U.S. at 700, 104 S.Ct. 2052. Thus, relief on this claim is denied.

4. Failure to Order *Frye* Hearing and *Atkins* Claim

Zack next makes two claims. He first argues that the trial court should have *sua sponte* ordered a *Frye* hearing on the issue of DNA evidence. On this claim, we find that the trial court properly summarily denied relief. Zack also argues that he is effectively mentally retarded and cannot be executed under *Atkins.* We also find relief was properly denied on this issue.

A. *Frye* Hearing.

Zack argues that although defense counsel failed to request a *Frye* hearing on the issue of whether PCR DNA was generally accepted in the scientific community, the trial court should have conducted a hearing *sua sponte.* Because counsel did not request a *Frye* hearing, this is simply a rewording of Issue 1 above. Zack argues that pursuant to *Arnold v. State,* 807 So.2d 136 (Fla. 4th DCA 2002), the failure to order a *Frye* hearing on new or novel scientific evidence is fundamental error. Actually, *Arnold* states that the trial court needs to give all the parties an opportunity to be heard at a *Frye* hearing, and that the opposing party should be permitted to offer evidence in rebuttal. *Arnold* does not address a trial court's duty to *sua sponte* order a *Frye* hearing.

We have considered and rejected Zack's claim that a *Frye* hearing was necessary. We will not reverse this conviction based on the trial court's failure to order its own *Frye* hearing when we have determined that the admission of the disputed evidence was not prejudicial.

B. *Atkins* Claim

The evidence in this case shows Zack's lowest IQ score to be 79. Pursuant to *Atkins v. Virginia,* 536 U.S. 304, 317, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), a mentally retarded person cannot be executed, and it is up to the states to determine who is "mentally retarded." Under Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below. *See* § 916.106(12), Fla. Stat. (2003) (defining retardation as a significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age eighteen, and explaining that "[s]ignificantly subaverage general intellectual functioning" means performance which is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the department); *Cherry v. State,* 781 So.2d 1040, 1041 (Fla.2000) (accepting expert testimony that in order to be found retarded, an individual must score 70 or below on standardized intelligence test).

Zack does not dispute the facts in the record. Zack argued at the *Huff*[4] hearing that although this Court did a proportionality analysis on direct appeal, it is unclear whether it considered all the factors that ***1202** render Zack effectively mentally retarded. As stated in our opinion on direct appeal, this Court reviewed the evidence of Zack's brain

damage and his mental age in considering mitigation. Postconviction counsel admitted there was no new evidence to support the argument that Zack is mentally retarded. Additionally, at the postconviction hearing, the State pointed out that Zack's mental health was explored at trial and nothing in the evidence offered at trial establishes that he is mentally retarded under the Florida statute. The prosecutor stated that if there was any new or different evidence than that presented at trial, it should be explored in the evidentiary hearing. Zack's postconviction counsel offered no new or different evidence.

In order to prevail on a postconviction claim of ineffective assistance of counsel, Zack must establish that counsel was deficient in some regard. *Gaskin v. State,* 737 So.2d 509, 516 (Fla.1999). Zack has not done that. In this claim, Zack alleges that he is mentally retarded, which is a bar to the imposition of the death penalty. Such a claim falls under Florida Rule of Criminal Procedure 3.203 and should be addressed pursuant to the procedures set forth in that rule. Therefore, the trial court properly summarily denied relief on this claim, and we affirm the trial court's denial.

5. *Ring* claim

Zack argues that Florida's capital sentencing statute and his death sentence violate his constitutional rights under *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In *Bottoson v. Moore,* 833 So.2d 693 (Fla.2002), and *King v. Moore,* 831 So.2d 143 (Fla.2002), this Court denied relief under *Ring.* Subsequently, this Court has rejected postconviction challenges to section 921.141 that rely on *Ring. See, e.g., Gamble v. State,* 877 So.2d 706, 719 (Fla.2004) (rejecting appellant's similar claim that Florida's death penalty scheme is unconstitutional under *Ring*); *Rivera v. State,* 859 So.2d 495, 508 (Fla.2003); *Wright v. State,* 857 So.2d 861, 877–78 (Fla.2003); *Jones v. State,* 855 So.2d 611, 619 (Fla.2003); *Chandler v. State,* 848 So.2d 1031, 1034 n. 4 (Fla.2003); *Banks v. State,* 842 So.2d 788, 793 (Fla.2003).

This Court has also rejected claims that *Ring* requires aggravating circumstances be individually found by a unanimous jury verdict. *See Hodges v. State,* 885 So.2d 338, 359 n. 9 (Fla.2004); *Blackwelder v. State,* 851 So.2d 650, 654 (Fla.2003); *Porter v. Crosby,* 840 So.2d 981, 986 (Fla.2003).

Additionally, the jury found Zack guilty of first-degree murder, sexual assault, and robbery. *See Zack v. State,* 753 So.2d 9, 12 (Fla.2000). On appeal, this Court found ample evidence to support both of the felony convictions and to support the first-degree murder conviction based on the commission of these felonies and on premeditation. *Id.* at 17–19. This Court also found the aggravating factor that the murder was committed in conjunction with a robbery and sexual battery to be valid. *Id.* at 25. We have explained that a defendant is not entitled to relief under *Ring* where the aggravating circumstance that the murder was committed during the course of a felony was found and the jury unanimously found the defendant guilty of that contemporaneous felony. *See, e.g., Gamble v. State,* 877 So.2d at 719 (finding death sentence was not invalid under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring* where jury found defendant guilty of first-degree murder and the felony of armed robbery); *Grim v. State,* 841 So.2d 455, 465 (Fla.2003) (explaining that defendant was not entitled to relief under *Ring* where aggravating circumstances ***1203** of multiple convictions for prior violent felonies and contemporaneous felony of sexual battery were unanimously found by jury); *Kormondy v. State,* 845 So.2d 41, 54 n. 3 (Fla.2003) (explaining that defendant was also convicted by jury of violent felonies of robbery and sexual battery, that murder was committed during course of burglary, and that death sentence could be imposed based on these convictions by the same jury); *see also Lugo v. State,* 845 So.2d 74, 119 n. 79 (Fla.2003) (attributing denial of relief on *Apprendi*/ *Ring* claim to rejection of claims in other postconviction appeals, unanimous guilty verdicts on other felonies, and "existence of prior violent felonies"); *Doorbal v. State,* 837 So.2d 940, 963 (Fla.2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions").

In regard to Zack's claim of retroactivity, a majority of this Court has now concluded that *Ring* does not apply retroactively in Florida under the test of *Witt v. State,* 387 So.2d 922 (Fla.1980), to cases that are final. *See Johnson v. State,* 30 Fla. L. Weekly S297 (Fla. Apr. 28, 2005). We therefore deny relief on this claim.

6. Ineffective Assistance of Postconviction Counsel

Zack also argues that his postconviction counsel was ineffective. Under Florida and federal law, a defendant has no constitutional right to effective collateral counsel. This Court has stated that "claims of ineffective assistance of postconviction counsel do not present a valid basis for relief." *Lambrix v. State,* 698 So.2d 247, 248 (Fla.1996); *see also King v. State,* 808 So.2d 1237, 1245 (Fla.2002) (upholding the trial court's denial of relief on the ineffective assistance of postconviction counsel claim because it did not state a valid basis for relief). In *Pennsylvania v. Finley,* 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), the Supreme Court refused to extend a due process requirement for effective collateral counsel to situations where a state, like Florida, has opted to afford collateral counsel to indigent inmates. Thus, Zack has failed to state a valid basis for relief, and we therefore deny relief on his claim that postconviction counsel rendered ineffective assistance.

Conclusion

For these reasons, we affirm the trial court's denial of postconviction relief.

PETITION FOR WRIT OF HABEAS CORPUS

Zack raises six claims in his petition for writ of habeas corpus. He argues that appellate counsel was ineffective for failing to raise a claim regarding the State's racially motivated peremptory challenge during jury selection, that appellate counsel should have argued that the prosecutor made impermissible argument to the jury, that the State introduced nonstatutory aggravating factors, that appellate counsel was ineffective for failing to raise a claim on appeal regarding prejudicial and gruesome crime scene photos that were admitted into evidence, that the trial court erred in admitting evidence of other crimes, and that appellate counsel was ineffective in failing to raise on appeal the claim that the trial court erroneously admitted irrelevant and prejudicial evidence. For the following reasons, relief on these claims is denied.

1. Peremptory Challenges

Zack argues ineffective assistance of appellate counsel based on appellate ***1204** counsel's failure to raise the issue of two alleged racially motivated peremptory challenges. Claims of ineffective assistance of appellate counsel are properly raised in a habeas petition. *See Rutherford v. Moore,* 774 So.2d 637, 643 (Fla.2000). The criteria for proving ineffective assistance of appellate counsel parallels the *Strickland* standard for ineffective assistance of trial counsel. *See Wilson v. Wainwright,* 474 So.2d 1162, 1163 (Fla.1985). Thus, the Court must consider

> first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Teffeteller v. Dugger, 734 So.2d 1009, 1027 (Fla.1999) (quoting *Suarez v. Dugger,* 527 So.2d 190, 192–93 (Fla.1988)). "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." *Rutherford v. Moore,* 774 So.2d at 643 (quoting *Williamson v. Dugger,* 651 So.2d 84, 86 (Fla.1994)). Likewise, appellate

counsel is not "necessarily ineffective for failing to raise a claim that might have had *some* possibility of success; effective appellate counsel need not raise *every conceivable* nonfrivolous issue." *Valle v. Moore,* 837 So.2d 905, 908 (Fla.2002).

In this claim, both parties rely on *Melbourne v. State,* 679 So.2d 759 (Fla.1996), to explain the proper procedure for preserving a claim that a peremptory challenge is racially motivated. In *Melbourne,* this Court explained that a party objecting to the other side's use of a peremptory challenge on racial grounds must: (1) make a timely objection on that basis; (2) show that the venireperson is a member of a distinct racial group; and (3) request that the court ask the striking party its reason for the strike. The burden then shifts to the proponent of the strike to present a race-neutral explanation. If the explanation is facially race-neutral and the court believes that the explanation is not a pretext, the strike will be sustained. But even if the procedure is followed precisely, the issue is not preserved for appellate review if the party objecting to the challenge fails to renew the objection before the jury is sworn. *See Franqui v. State,* 699 So.2d 1332, 1334 (Fla.1997); *Joiner v. State,* 618 So.2d 174 (Fla.1993). By not renewing the objection prior to the jury being sworn, it is presumed that the objecting party abandoned any prior objection he or she may have had and was satisfied with the selected jury. *See Joiner,* 618 So.2d at 176 ("[C]ounsel's action in accepting the jury led to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection. It is reasonable to conclude that events occurring subsequent to his objection caused him to be satisfied with the jury about to be sworn.").

Defense counsel objected at the time the State exercised its peremptory challenge, but when the jury was sworn, he made no objection to the final jury. The issue is therefore deemed abandoned. Appellate counsel has no obligation to raise an issue that was not preserved for review and is not ineffective for failing to raise an unpreserved issue on appeal. *See Randolph v. State,* 853 So.2d 1051, 1068 (Fla.2003). Because this issue was not preserved for review and appellate counsel does not have an obligation to raise this issue on appeal, appellate counsel cannot ***1205** be deemed ineffective. We therefore deny relief on this claim.

2. Prosecutorial Misconduct

Zack next alleges that appellate counsel was ineffective in failing to raise on appeal several issues involving prosecutor misconduct. He alleges that the prosecutor referred to Zack as a liar, erroneously told the jurors they were acting on behalf of the community, and made inappropriate "golden rule" arguments.

A. "Liar"

It is "unquestionably improper" for a prosecutor to state that the defendant has lied. *Washington v. State,* 687 So.2d 279, 280 (Fla. 2d DCA 1997) (quoting *O'Callaghan v. State,* 429 So.2d 691, 696 (Fla.1983)). This is especially true in an instance where the defendant takes the stand in his own defense because the prosecutor's reference to the defendant as a liar encroaches on the jury's job by improperly weighing in with his or her own opinion of the credibility of the witnesses. *See, e.g., Gomez v. State,* 751 So.2d 630, 632 (Fla. 3d DCA 1999). However, courts have held that where such commentary is supported by the evidence, there will be no reversal. *See, e.g., Lugo v. State,* 845 So.2d 74, 107–08 (Fla.2003) (holding that where the evidence substantially proved the defendant's deceitful actions, the prosecutor's remarks calling into question the defendant's veracity were nothing more than appropriate comments on the evidence). In *Craig v. State,* 510 So.2d 857, 865 (Fla.1987), this Court stated that when the prosecutor called the defendant a "liar" it was "somewhat intemperate." However, this Court also stated that when it can be understood that the name "liar" is made in reference to that person's testimony, then the prosecutor is merely submitting to the jury a conclusion he has drawn from the evidence. *Id.* It is only when, viewed in the totality of the case, the prosecutor's comments drift far afield from the evidence adduced at trial that they may constitute fundamental error. *Lugo,* 845 So.2d at 101.

This issue was preserved for review, and appellate counsel did not raise it on appeal. In all probability, however, had this issue been raised, it would have been deemed meritless. Thus, appellate counsel's failure to raise this meritless issue cannot be deemed ineffective assistance. *See Valle v. Moore,* 837 So.2d at 908; *Rutherford,* 774 So.2d at 643.

The prosecutor's comments refer to Zack's testimony and the evidence at trial. Zack testified on direct examination that he had lied in the past. He was asked if he had problems stealing and lying and if he had lied to the jury about what happened with Smith. Zack said, "No, I did not lie, and I did not lie to [the police]." Defense counsel was dealing with this negative evidence up front so the prosecutor could not introduce it first. On cross-examination, the prosecutor asked Zack if he was a convicted felon, admitted thief, and an admitted liar. Zack responded that he was. Zack again disputed the accusation that he was lying in this trial.

In closing arguments for the guilt-phase trial, the prosecutor told the jurors to look at the evidence, that Zack testified, and that his testimony was to be considered the same as any other witness. The prosecutor asked if Zack was straightforward and honest in answering the questions, whether he had self-interest, and whether his testimony was consistent with the other evidence at trial. The prosecutor asked the jury to consider whether Zack had previously been convicted of a crime, and told them that Zack admitted to having committed five crimes. He asked the jurors to assess the testimony of the other ***1206** witnesses by the same considerations, i.e., to consider whether they were straightforward and whether their testimony was consistent with the other evidence. The prosecutor then pointed to an inconsistency in the evidence and said that Zack did not tell the truth at one point. He talked about lies in general, saying there is usually an element of truth in a lie. He told the jurors to use their common sense and go through the evidence and pick out the truth. Defense counsel moved for a mistrial saying that this was the second time the prosecutor made reference to the defendant as a liar. The court denied the motion for mistrial, but told the prosecutor not to use the word "liar."

When considered in context, the prosecutor did not call Zack a liar; rather, he examined the totality of Zack's testimony as well as the other evidence presented and drew a conclusion that he was lying. The failure to raise this claim on direct appeal does not amount to deficient performance on the part of appellate counsel because the commentary was supported by the evidence and because the claim would have been unsuccessful on appeal. *See Rutherford v. Moore,* 774 So.2d at 643 (the failure of appellate counsel to raise what in all probability would be a meritless issue will not render appellate counsel's performance ineffective). We therefore deny relief on this claim.

B. "Send a Message" Argument

Zack next argues that the prosecutor's admonition to the jury to act on behalf of the community amounts to an inappropriate send-a-message argument. An example of a classic send-a-message argument is the prosecutor telling the jury to send a message to other drug dealers, and deter drug dealers from bringing drugs into our communities and into our homes. *See, e.g., United States v. Sanchez–Sotelo,* 8 F.3d 202, 211 (5th Cir.1993). The defendant in *Sanchez–Sotelo* argued that the admission of this evidence was reversible for three reasons: first, it influenced the jury to convict the defendant based on broad policies against drugs and not based on the evidence of the case; second, the court gave no cautionary instruction to curtail the effect of the argument; and third, the evidence of guilt was "extremely thin." *Id.* at 211. The Fifth Circuit disagreed and held that the trial court did not abuse its discretion or commit plain error because: first, a prosecutor may appeal to the jury to act as the conscience of the community; second, the district court sufficiently instructed the jury to disregard the comments regarding women, children, and parents; and third, there was ample evidence produced at trial, so that the send-a-message comments did not cast serious doubt on the propriety of the jury's verdict. *Id.* In this case, the prosecutor did not tell the jury to send a message to other defendants. Rather, he told the jury to act on behalf of the community. Furthermore, in light of the ample evidence produced at trial, we conclude that there is no reasonable possibility that the objected-to comments contributed to the jury's verdict. Appellate counsel did not perform deficiently by failing to raise this claim.

To the extent that the prosecutor's comment can be considered a "conscience of the community" argument, relief is also denied. In *Smith v. State,* 818 So.2d 707, 710–11 (Fla. 5th DCA 2002), the district court considered the same type of argument. The prosecutor told the jury: "[Y]ou are citizens that speak on behalf of your community.... You are citizens that speak on behalf of your community in rendering a verdict in this case." *Id.* While the district court found that the prosecutor approached the line of propriety and may have gone beyond, it concluded that the ***1207** trial court's refusal to grant a mistrial based on these comments was not an abuse of discretion. *Id.* The district court concluded that the

reference to the jury speaking for the community did not permeate the closing argument, that it was near the end of the argument, and it was not repeated after the defense objected. Thus, the court concluded, this isolated and limited comment would not appear to be so prejudicial as to vitiate the entire trial and thus a mistrial was not warranted. *See also Card v. State,* 803 So.2d 613 (Fla.2001) (finding prosecutor's conscience of the community argument in penalty phase was not so prejudicial as to vitiate the entire trial and thus court did not abuse its discretion in denying request for mistrial; prosecutor's reference to the term was isolated and he did not continue with the argument after the defense objected); *Otero v. State,* 754 So.2d 765 (Fla. 3d DCA 2000) (concluding that impermissible conscience of the community argument did not warrant a reversal; argument was made at the very end of the State's rebuttal argument and did not otherwise permeate the State's closing argument).

Appellate counsel is not ineffective for failing to raise an issue that is meritless.

C. Sympathy in the Jury Room.

Zack argues appellate counsel was ineffective for failing to claim reversible error on appeal because the prosecutor told the jury not to allow sympathy in the jury room and to decide the case only on the evidence. This Court addressed the prosecutor's comments in its opinion on direct appeal. *See Zack,* 753 So.2d at 24. In addressing whether the trial court erred in refusing to instruct the jury on the role of sympathy in the deliberative process, this Court refused Zack's invitation to recede from the case law which was unfavorable to his argument. *Id.* at 23. "[C]laims raised in a habeas petition which petitioner has raised in prior proceedings and which have been previously decided on the merits in those proceedings are procedurally barred in the habeas petition." *Porter v. Crosby,* 840 So.2d 981, 984 (Fla.2003). Thus, Zack is not entitled to relief on this claim.

D. Golden Rule.

Zack argues that appellate counsel was ineffective for failing to argue on appeal that the prosecutor made an improper "golden rule" argument. A "golden rule" argument asks the jurors to place themselves in the victim's position, to imagine the victim's pain and terror, or to imagine how they would feel if the victim were a relative. *See Pagan v. State,* 830 So.2d 792, 812–13 (Fla.2002). Zack argues that the prosecutor told the jurors to imagine themselves as the victim. In penalty phase closing argument, the prosecutor systematically went through the aggravators. When he got to heinous, atrocious, or cruel, the prosecutor told the jurors that the court would instruct them on what heinous means, what atrocious means, and what cruel means. However, the prosecutor went on to define each term, and then argued that the specific evidence met those definitions. The prosecutor argued:

> Did the defendant's acts during the course of this murder show any conscience or compassion for a human being? Does his acts show any pity for the victim? Can any one of us imagine, except to look at the evidence, the terror that was coursing through the victim during her last few minutes of life? Beaten down in her own home by a person that she extended trust to, clothes ripped off of her, thrown bleeding into her bed, raped in her bed, chased into another part of the house, caught, thrown to the floor, head slammed to the floor. Look at this, ***1208** ladies and gentlemen, and ask yourselves whether or not this is torture in the classic sense.

Trial counsel made no objection to this argument. If the prosecutor's comments were error, it was not preserved for review and thus not cognizable on appeal. *See Chandler v. State,* 702 So.2d 186, 191 (Fla.1997); *Kilgore v. State,* 688 So.2d 895, 898 (Fla.1996). Counsel is not ineffective for failing to raise an issue that has not been preserved for appellate review.

The only exception to this procedural bar is where the prosecutor's comments constitute fundamental error. *See Urbin v. State,* 714 So.2d 411, 418 n. 8 (Fla.1998); *Bonifay v. State,* 680 So.2d 413, 418 n. 9 (Fla.1996). Fundamental error is 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." *Urbin,* 714 So.2d at 418 n. 8 (quoting *Kilgore,* 688 So.2d at 898).

The alleged "golden rule" comment was just one line made during the prosecutor's discussion of the heinous, atrocious, or cruel aggravator. That comment, while using the term "imagine," does not rise to the level of fundamental error or "reach down into the validity of the trial itself." *See, e.g., Davis v. State,* 604 So.2d 794, 797 (Fla.1992) (holding that comment by prosecutor during penalty phase closing argument that "it might not be a bad idea to look at [the knife] and think about what it would feel like if it went two inches into your neck" was improper, but it was not so egregious as to undermine jury's recommendation). We therefore deny relief on this claim.

3. Nonstatutory Aggravation

The defense's theory at trial was that Zack has low impulse control and would lose control if someone pushed his "hot button." Zack presented expert evidence on this theory. In rebuttal, the State presented Dr. Harry McClaren, who testified that Zack exhibited hatred toward women, not just low impulse control. Trial counsel objected to this testimony, and Zack now argues this amounted to the presentation of a nonstatutory aggravator. Zack further argues that the admission of evidence relating to a nonstatutory aggravator is a constitutional error in light of the fact that the United States Supreme Court has upheld Florida's statutory scheme, and the statutory scheme does not permit the introduction of nonstatutory aggravators. Zack contends that appellate counsel was ineffective for failing to raise this claim on appeal.

The only matters that may be considered in aggravation are those set out in the death penalty statute. *See Winkles v. State,* 894 So.2d 842, 846 (Fla.2005) (*citing Vining v. State,* 637 So.2d 921, 927 (Fla.1994)). Thus, initially the Court must determine if the trial court erred in admitting Dr. McClaren's testimony about Zack's hatred of women. While relevant evidence should not be excluded merely because it points to the commission of a separate crime, it must be relevant to a material issue other than propensity or bad character. *See, e.g., Williams v. State,* 143 So.2d 484 (Fla.1962). Viewed in context, this testimony was offered in rebuttal to the defense, not as a nonstatutory aggravator.

Zack's reliance on *Perry v. State,* 801 So.2d 78 (Fla.2001), is misplaced, as that case is distinguishable. In *Perry,* as the first witness of the State's penalty phase case, the State presented the testimony of the defendant's ex-wife about numerous instances of domestic violence. *Id.* at 90. While the State alleged that defense counsel ***1209** "opened the door" to this testimony during the guilt phase of the trial by claiming that the defendant was nonviolent, the record did not support this claim. *Id.* Thus, the ex-wife's testimony regarding the defendant's prior violent acts, all unrelated to the crime at issue and not offered in support of any aggravating circumstance, constituted impermissible nonstatutory aggravation, not "anticipatory rebuttal." *Id.*

In contrast, here the State only presented Dr. McClaren's testimony in rebuttal to the defense's mitigation witnesses who testified about Zack's low impulse control and the defense's theory that Zack murdered the victim because his "hot button" had been pushed. The record supports the conclusion that this was proper rebuttal testimony, not improper evidence of a nonstatutory aggravator.

Even if the admission of this evidence was error, it was harmless. *State v. DiGuilio,* 491 So.2d 1129, 1135 (Fla.1986). The prosecutor did not argue Zack's alleged hatred of women in closing argument. Additionally, the trial court properly instructed the jurors as to the aggravating factors they could consider. Thus, even if Dr. McClaren's testimony was improperly admitted, any error would be harmless beyond a reasonable doubt. *See Walker v. State,* 707 So.2d 300, 313–14 (Fla.1997) (holding that where prosecutor interjected a nonstatutory aggravating circumstance into the proceedings, the error was harmless because the prosecutor rephrased the improper question and did not argue this point in closing

argument and because the instance of misconduct was isolated and the trial court properly instructed the jurors as to the aggravating factors they could consider).

We therefore deny habeas relief on this claim.

4. Gruesome and Prejudicial Photographs

Defense counsel objected to the admission of certain photos of the victim by the prosecutor. The court allowed two of the photos into evidence. Counsel also objected to slides showing scenes from the Rosillo murder, and the trial court allowed three of these slides into evidence. The photos and slides in question were used by the medical examiner when discussing the victims' injuries and used to demonstrate similarities for purposes of *Williams* Rule evidence. Admission of photographic evidence is within the trial court's discretion, and a trial court's ruling will not be disturbed on appeal unless there is a showing of clear abuse. *See Wilson v. State,* 436 So.2d 908 (Fla.1983). Zack now argues appellate counsel was ineffective for failing to argue this issue on appeal.

In order to obtain relief on this claim, appellate counsel would have had to show that the trial court erred in admitting the photographs and that the admission of the photos was so prejudicial that the defendant should have a new trial. Given the evidence in this case, including Zack's confession, the photos that were admitted did not contribute to the defendant's conviction. "The test for admissibility of photographic evidence is relevancy rather than necessity." *Pope v. State,* 679 So.2d 710, 713 (Fla.1996); *see also Provenzano v. Dugger,* 561 So.2d 541, 549 (Fla.1990) ("Photographs must only be excluded when they demonstrate something so shocking that the risk of prejudice outweighs [their] relevancy."). There were only a limited number of photos that the medical examiner used during his testimony, and these photos were relevant to the issues addressed by the medical examiner. We conclude that appellate counsel was ***1210** not ineffective for failing to raise this nonmeritorious issue on appeal.

5. *Williams* Rule Evidence

Zack next argues that despite proper objection at trial, appellate counsel failed to raise the issue regarding the improper use of the *Williams* Rule evidence to prove aggravating circumstances at the penalty phase. This claim simply refashions a claim that was unsuccessfully raised on direct appeal. On direct appeal, Zack argued that the trial court erred in admitting evidence of other crimes because these crimes were not sufficiently similar to the crimes charged, did not prove intent or disprove voluntary intoxication, were not inextricably intertwined, and became a feature of the trial. *Zack,* 753 So.2d at 16. This Court held that the evidence was relevant as part of a prolonged criminal episode demonstrating Zack's motive, intent, modus operandi, and the entire context from which this murder arose. *Id.* Zack does not challenge the admissibility of the *Williams* Rule evidence in his habeas claims; rather, he argues that the evidence was used excessively and inappropriately. This claim reasserts the *Williams* Rule claim raised on direct appeal. It is well recognized that a defendant may not couch a claim decided adversely to him on direct appeal in terms of ineffective assistance of counsel in an attempt to circumvent the rule that postconviction relief proceedings may not serve as a second appeal. *See Cherry v. State,* 659 So.2d 1069, 1072 (Fla.1995); *see also Parker v. Dugger,* 550 So.2d 459, 460 (Fla.1989) ("[H]abeas corpus petitions are not to be used for additional appeals on questions which ... were raised on appeal or in a rule 3.850 motion...."); *Rutherford v. Moore,* 774 So.2d 637, 645 (Fla.2000) (holding that when a claim is actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to present additional arguments in support of the claim on appeal). Thus, the *Williams* Rule claim is procedurally barred in this habeas proceeding.

6. Prejudicial Evidence

Zack next argues that a baseball cap introduced by the State was irrelevant and prejudicial because Zack's identity was not in dispute, there were other items that the State could have used to establish identity, and the State should not have used the hat because the Confederate flag image on the hat portrayed Zack as a racist to the jurors. Defense

counsel objected to the introduction of the baseball hat. He objected again when the prosecutor referenced Zack's actions following the murder. Zack now argues that appellate counsel was ineffective for failing to argue this issue on appeal.

A trial court has broad discretion in determining the relevance of evidence, and such a determination will not be disturbed absent an abuse of discretion. *See Heath v. State,* 648 So.2d 660, 664 (Fla.1994). The trial court overruled the objection to the hat because it showed what Zack was doing after he took Smith's boyfriend's car, and the hat identified him as the person who walked into the pawn shop with Smith's stolen property. The pawn shop owner testified that the hat looked like the one Zack was wearing. Because Zack has not shown an abuse of the trial court's discretion, he has also failed to demonstrate that appellate counsel was ineffective for not arguing this meritless issue. *See Rutherford v. Moore,* 774 So.2d 637, 643 (Fla.2000).

Zack also argues he was prejudiced when the trial court did not redact a portion of his statement to police in which he said he had been arrested "a million times" before. Because there was no objection at ***1211** trial to this statement, appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue on appeal. *See Randolph v. State,* 853 So.2d 1051, 1066 (Fla.2003).

Because appellate counsel was not ineffective for failing to raise what would have been a meritless issue with regard to the hat, and because the issue of whether the trial court should have redacted statements that Zack had previously been arrested was not preserved and not fundamental error, Zack is not entitled to habeas relief on this claim.

CONCLUSION

We affirm the trial court's order denying postconviction relief, and we deny relief on Zack's petition for writ of habeas corpus.

It is so ordered.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

All Citations

911 So.2d 1190, 30 Fla. L. Weekly S591

Footnotes

1 *Williams v. State,* 110 So.2d 654 (Fla.), *cert. denied,* 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

2 *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923).

3 Although PCR DNA testing was still being challenged in September and October 1997, when this case was tried, the PCR method of DNA testing is now generally accepted by the scientific community and is not subjected to *Frye* testing. *See Lemour v. State,* 802 So.2d 402, 404–5 (Fla. 3d DCA 2001).

4 *Huff v. State,* 622 So.2d 982 (Fla.1993).

D.

Boyd v. State,

910 So. 2d 167 (Fla. 2005)

910 So.2d 167
Supreme Court of Florida.

Lucious BOYD, Appellant,
v.
STATE of Florida, Appellee.

No. SC02–1590.
|
Feb. 10, 2005.
|
As Revised on Denial of Rehearing June 16, 2005.
|
Rehearing Denied Aug. 24, 2005.

Synopsis

Background: Defendant was convicted by jury in the Circuit Court, Broward County, Ronald Rothschild, J., of first-degree murder, armed kidnapping, and sexual battery, for which he was sentenced to death. Defendant appealed.

Holdings: The Supreme Court held that:

trial court did not abuse its discretion in refusing to question jury regarding allegations that jurors had discussed extrajudicial information;

state's failure to turn over list of potential matches to fingerprints did not constitute *Brady* violation;

evidence supported conviction for sexual battery;

evidence supported conclusion that defendant had acted with premeditation in murdering victim;

evidence supported conviction for armed kidnapping;

it was not an abuse of discretion to permit cross-examination of defendant to cover variety of subjects relating to murder and evidence linking defendant to murder;

trial court did not abuse its discretion in refusing to order second competency hearing for defendant following guilt phase; and

death sentence was proportionate.

Affirmed.

Attorneys and Law Firms

***174** Carol Stafford Haughwout, Public Defender, and Gary Lee Caldwell, Assistant Public Defender, Fifteenth Judicial Circuit, West Palm Beach, FL, for Appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, FL, and Leslie T. Campbell, Assistant Attorney General, West Palm Beach, FL, for Appellee.

Opinion

PER CURIAM.

We have on appeal judgments of conviction of first-degree murder, armed kidnapping, and sexual battery, and a sentence of death. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons that follow, we affirm the convictions and the sentence of death.

FACTS

The evidence presented at trial revealed the following facts. In the early morning hours of December 5, 1998, Dawnia Dacosta's car ran out of gas while she was on her way to her home in Deerfield Beach, Florida, from a midnight church service. She had just exited from Interstate 95 (I–95) onto Hillsboro Beach Boulevard and pulled onto the shoulder. She then took a red gas can she kept in her car, walked about a block east to a nearby Texaco gas station, and bought a gallon of gas. At approximately 2 a.m., during the time she was at the gas station, Dacosta spoke with two other customers, Lisa Bell and Johnnie Mae Harris. She asked Bell for a ride back to her car, but Bell had walked to the station and so could not give Dacosta a ride. Bell and Harris then watched Dacosta speak with a black male in a van in the station's parking lot. Harris asked the man if he was going to help Dacosta, and the man nodded, indicating yes. Bell later told the police that the van she saw was greenish-blue in color, while Harris said that she thought the van was burgundy. Though somewhat unsure about the van's color, Harris was certain that she saw the word "Hope" on its side. In a photo lineup and at trial, Harris identified the man ***175** she saw in the van that night as Lucious Boyd.

Boyd spent the evening of December 4 with Geneva Lewis, his girlfriend, at her mother's home. Boyd left the house around 10 or 11 p.m., and Lewis did not see him again until the morning of December 5, at around 9 or 10 a.m. Lewis testified that on December 4 and 5, Boyd was driving a green church van with writing on its side and that the van belonged to Reverend Frank Lloyd of the Hope Outreach Ministry Church, for whom Boyd performed occasional maintenance work.

Dacosta's family began searching for her after she did not return home on December 5. They found her car at an I–95 exit and began circulating fliers with Dacosta's photograph, indicating that she was missing, throughout the area. Bell and Harris saw the fliers, recognized Dacosta as the woman with the gas can at the Texaco station on December 5, and contacted the police with their information.

On December 7, Dacosta's body was discovered in an alley behind a warehouse on 42nd Street in Deerfield Beach. The body was wrapped in a shower curtain liner, a brown, flat bed sheet, and a yellow, flat bed sheet. A purple duffel bag and two large black trash bags covered her head. It was determined that she had been dead for between thirty-six and seventy-two hours.

At trial, it was stipulated that Dacosta died due to a penetrating head wound and that the bruising on her head was consistent with but not exclusive to the face plate of a reciprocating saw. Wounds to her chest, arms, and head were consistent with but not exclusive to a Torx brand torque screwdriver, and she had defensive wounds on her arms and hands. There was bruising to her vagina that was consistent with sexual intercourse, although the medical examiner could not determine whether the intercourse was consensual or nonconsensual. Dacosta had thirty-six superficial wounds on her chest, four on the right side of her head, and twelve on her right hand, some being consistent with defensive wounds

and some being consistent with bite marks. One fatal wound to the head perforated the skull and penetrated Dacosta's brain.

On March 17, 1999, while Detectives Bukata and Kaminsky of the Broward County Sheriff's Office were investigating another crime unrelated to Dacosta's death, they saw a green van in the Hope Outreach Ministry Church parking lot. The van had burgundy writing on it that read "Here's Hope." Bell would later identify the church's van as the same van she had seen on the morning of December 5 at the Texaco station. The detectives decided to investigate, and their inquiries as to the owner of the van led them to Reverend Lloyd. When the detectives questioned Lloyd about the location of the van on the night of December 4, Lloyd's secretary, who was present at the questioning, remarked that Lucious Boyd had driven the van on that weekend. On December 4, Boyd had taken Reverend Lloyd to pick up a rental car in the church's green 1994 Ford van. Reverend Lloyd further testified that he instructed Boyd to take the van back to the church but that Boyd did not return the van until Monday, December 7. Reverend Lloyd also stated that when he left the van with Boyd, various tools owned by the church, including a set of Torx brand screwdrivers and a reciprocating saw, were in the van, as well as a purple laundry bag that the pastor used to deliver his laundry to the cleaners. When Reverend Lloyd returned on December 15, he discovered that the screwdrivers, the saw, and the laundry bag were missing.

Boyd was arrested for Dacosta's murder on March 26, 1999. Seminal fluid taken ***176** from Dacosta's inner thigh matched the DNA profile of Boyd. Tests also did not eliminate Boyd as a match for a hair found on Dacosta's chest. A DNA profile consistent with Boyd's was found in material taken from under Dacosta's fingernails. In addition, fingerprints taken from the trash bag found around the victim's head matched fingerprints of Boyd's girlfriend, Geneva Lewis, and her son, Zeffrey Lewis. Tire marks on a sheet covering the victim's body were consistent with the tires on the church van, although trial expert Terrell Kingery, a senior crime laboratory analyst for the Orlando Regional Crime Laboratory, testified that he could not say for certain that the van's tires made the marks because over 1.5 million tires could have made the tracks on the sheet. Dr. Steven Rifkin, a private dentist and a forensic odontologist with the Broward County Medical Examiner's Office, testified that bite marks on Dacosta's arm were, within a reasonable degree of certainty, made by Boyd's teeth.

On April 1, Detective Bukata obtained a warrant to search the apartment of Boyd and Lewis, which was a block east of the Texaco station. Detective Bukata arrived at the apartment and told Lewis to leave with her children for a few days so that the officers could fully search the apartment. The investigators found blood at various locations throughout the apartment. Blood found on the underside of the carpet and on the armoire matched Dacosta's DNA profile. The shower curtain rings were unsnapped, and there was no liner to the shower curtain. Carpet fibers taken from the yellow sheet in which Dacosta's body was wrapped matched characteristics of carpet samples taken from Boyd's apartment.

Lewis had previously lived with Boyd at his apartment but had moved out in October of 1998. While living with Boyd, Lewis had purchased a queen-size bed, which she left at the apartment when she moved. Lewis and her three children moved back in with Boyd in February of 1999 and discovered that the bed was no longer at Boyd's apartment. When she asked about it, Boyd told her that he had given it away but would get it back. When she inquired about it again, Boyd told her that she would not want that bed and that he would get her another one. Lewis also identified the flat bed sheets, one brown and one a "loud yellow," that were found around Dacosta's body as similar to ones she had owned while living at Boyd's apartment but that she no longer knew where they were or if they were at Boyd's apartment or at her mother's home.

A jury convicted Boyd of first-degree murder, sexual battery, and armed kidnapping. The trial court subsequently conducted a penalty phase proceeding, during which both sides presented evidence. The jury unanimously recommended that Boyd be sentenced to death. The trial court followed the jury's recommendation and imposed a death sentence, finding and weighing two aggravating factors,[1] one statutory mitigating factor,[2] and five nonstatutory mitigating factors.[3] *State v.* ***177** *Boyd,* No. 99–5809 (Fla. 17th Cir. Ct. order filed June 21, 2002) (sentencing order). The trial

court also sentenced Boyd to fifteen years' imprisonment for the sexual battery and to life imprisonment for the armed kidnapping charges.

Boyd appeals his convictions and the trial court's sentence of death, raising fifteen issues.[4]

ISSUE 1. JUROR MISCONDUCT

Boyd argues that the trial court erred in refusing to make an inquiry of the jurors and in denying a mistrial upon hearing testimony that jurors had discussed extrajudicial information. Following Boyd's presentation of mitigation evidence, Margaret Woods–Alcide, a friend of Boyd's family, provided a letter to the court in which she alleged that she had overheard jurors in the restroom discussing extrajudicial information during the guilt phase of the trial. According to Woods–Alcide, three female jurors spoke about Boyd's past crimes, and one stated that Boyd's father had in the past always saved him from legal troubles. Although the procedure followed by the deputies throughout the trial was to keep the jurors sequestered from the public, making it unlikely this incident could have occurred, the trial court held a hearing concerning the allegation and heard testimony from Woods–Alcide. In her testimony, Woods–Alcide could not remember precisely when this conversation had occurred but stated that it was just before the jury began deliberation. She could only vaguely identify which jurors had been in the restroom and stated that two were white and one was black. Woods–Alcide told the court that she did not have a very good memory because of a brain tumor she had had removed in 1993. She claimed to know one of the jurors she saw in the restroom, but she could not recall how she knew the juror or the juror's name.

During the State's examination, Woods–Alcide stated that she had informed Boyd ***178** of the juror incident on the previous Saturday or Sunday, which was nearly five weeks after the alleged incident had taken place. Woods–Alcide stated that she had not told Boyd sooner because she did not want to tell him about the incident in the courtroom in front of his mother and was waiting for him to call. She could not remember at what time of day the incident had occurred, but she knew it was in the afternoon during a break in the trial. The rest of her letter about this incident included six observations that she made about the sufficiency of the State's evidence. The trial court denied Boyd's motion to conduct an inquiry of the jurors or grant a mistrial.

Dealing with allegations of juror misconduct is within the discretion of the trial court. *Doyle v. State,* 460 So.2d 353, 357 (Fla.1984). Before making an inquiry, a court is to determine whether the allegations of juror misconduct constitute "matters that inhere in the verdict and are subjective in nature, or are extrinsic to the verdict and objective." *Marshall v. State,* 854 So.2d 1235, 1240 (Fla.2003). Once it is determined that the misconduct does not inhere in the verdict, the trial court may make a judicial inquiry. However, the trial court may also decide not to make an inquiry when the allegations are "frivolous or incredible." *Id.* at 1244 (quoting *State v. Brown,* 235 Conn. 502, 668 A.2d 1288, 1305 (1995)).

We hold that the trial court did not err in refusing to question the jury about Woods–Alcide's allegations. The trial court made a judicial inquiry into the alleged incident by taking testimony from Woods–Alcide. That testimony revealed that Woods–Alcide was confused about which jurors had been involved in the incident, when the incident had occurred, and why she had waited so long to come forward with these allegations. The trial court also could have concluded Woods–Alcide was not credible because the standard procedure was to prohibit the jury from mingling with the public during their breaks. The trial court continued to inquire as to whether the jurors had discussed the trial with or in the presence of third parties, or whether they had received any outside information. The jurors always responded that they had not. The trial court did not entertain any "serious doubt" as to whether juror misconduct had occurred because of the incredibility of the witness and the circumstances of the alleged incident. *See Baptist Hosp. of Miami, Inc. v. Maler,* 579 So.2d 97, 100 (Fla.1991).

The trial court did not abuse its discretion in coming to this decision, because a trial court has the discretion to not make an inquiry when it concludes that misconduct allegations are not credible. *See Shere v. State,* 579 So.2d 86, 95 (Fla.1991) (trial court did not abuse its discretion in not making inquiry of jurors or granting mistrial when anonymous letter to newspaper alleged juror misconduct). Competent, substantial evidence supports this decision because Woods–Alcide's testimony regarding the incident was neither coherent nor credible. We therefore find no error in the trial court's denial of Boyd's motion to make an inquiry of the jury.

Boyd also argues that the trial court should have granted a mistrial. A new trial may be granted following a conviction if "[n]ew and material evidence, which, if introduced at the trial would probably have changed the verdict or finding of the court, and which the defendant could not with reasonable diligence have discovered and produced at the trial, has been discovered." Fla. R.Crim. P. 3.600(a)(3). For the above-stated reasons ***179** regarding the trial court's assessment of Woods–Alcide's credibility, we hold that the trial court did not abuse its discretion in denying Boyd's motion for a mistrial.

ISSUE 2. DISCOVERY CLAIMS

Boyd next argues that the trial court reversibly erred in overruling the defense's request for *Brady* material, denying the defense motion to strike the testimony of the fingerprint examiner, and not conducting a *Richardson* hearing. The testimony at the heart of this claim was that of Thomas Mesick, a latent fingerprint examiner for the Broward County Sheriff's Office. Although seven fingerprints were found on the trash bag covering Dacosta's head, only three were of value. Mesick examined these three fingerprints and matched two of them to Geneva Lewis, Boyd's girlfriend, and Zeffrey Lewis, her son. Before he made these matches, Mesick digitally enhanced the prints and ran them through the Automated Fingerprint Identification System (AFIS), which returned a list of possible matches from across the state. Upon further examination, Mesick determined that none of those possibilities were actual matches for the prints. He then discarded the list, which might have included twenty to fifty possible matches. Mesick testified, outside of the presence of the jury, that unless an actual match is made, it was his routine to discard the list. Defense counsel asked that the court either order the list regenerated or strike Mesick's testimony from the record because this list was favorable evidence withheld in violation of *Brady.* The trial court denied the defendant's motion, finding there was no reasonable possibility that the list could be recreated as it had appeared when it was made, which was two to three years prior to trial, and it contained no material the exclusion of which was detrimental or prejudicial to the defendant.

The *Brady* rule requires that the prosecution not suppress evidence favorable to an accused where that "evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87, 83 S.Ct. 1194. We have stated that the three elements required to make a *Brady* claim are:

> (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice to the defendant must have ensued.

Lugo v. State, 845 So.2d 74, 105 (Fla.); *cert. denied,* 540 U.S. 920, 124 S.Ct. 320, 157 L.Ed.2d 216 (2003).

We hold that Boyd's *Brady* claim is without merit. The defense was not prejudiced by the absence of the list of potential matches to the fingerprints. Two of the prints on the bag actually matched the fingerprints of Geneva and Zeffrey Lewis, who lived with Boyd up until a few months before the crime. The third print was not matched because it was not clear what part of the body the print came from (i.e., it could have been a palm or footprint). Mesick determined that the list of potential matches generated by the AFIS had no actual matches to the fingerprints on the bag. A list of potential matches,

with no actual matches, was not material to Boyd's defense. This motion, at best, raised only the mere possibility that there could have been a print on the trash bag not belonging to Boyd or someone in Boyd's household, and "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v.* ***180** *Agurs,* 427 U.S. 97, 109–10, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Given the substantial amount of other evidence against Boyd, there is no reasonable probability that this list would have affected the outcome at trial. *Hegwood v. State,* 575 So.2d 170, 172 (Fla.1991). Thus, we hold that no *Brady* violation occurred.

Once a defendant asserts a discovery violation, a hearing is required before the trial court may conclude that the defendant was not prejudiced by the prosecution's discovery violation. *State v. Hall,* 509 So.2d 1093, 1096 (Fla.1987). This inquiry should "cover at least such questions as whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what effect, if any, did it have upon the ability of the defendant to properly prepare for trial." *Richardson v. State,* 246 So.2d 771, 775 (Fla.1971) (quoting *Ramirez v. State,* 241 So.2d 744, 747 (Fla. 4th DCA 1970)).

We hold that Boyd's claim is meritless because the trial court conducted a hearing sufficient to satisfy *Richardson.* Both parties had an opportunity to question the fingerprint examiner, outside of the presence of the jury, as to why he discarded the list. Mesick explained that the list contained no actual matches, and thus he discarded it, as was his routine practice. The trial court was presented competent, substantial evidence as to why the list did not exist, that the discarding of the list was not willfully meant to prejudice the defense, and that any violation was not harmful to the defendant's case. The trial court could thus properly conclude that any potential discovery violation did not prejudice the defendant. We hold that the trial court properly conducted a *Richardson* hearing after the defense asserted the discovery violation, and we find no error.

ISSUE 3. SUFFICIENCY OF THE EVIDENCE

Boyd asserts that the evidence presented at trial was not sufficient to support the verdicts for sexual battery, premeditated murder, and armed kidnapping and that the trial court erred in denying the motions for judgment of acquittal on these charges. We assess a trial court's ruling on a motion for judgment of acquittal on a de novo standard of review and affirm the conviction if it is supported by competent, substantial evidence. *Pagan v. State,* 830 So.2d 792, 803 (Fla.2002).

A trial court should not grant a motion for judgment of acquittal "unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law." *Lynch v. State,* 293 So.2d 44, 45 (Fla.1974). However, a special standard of review applies when a case is based wholly on circumstantial evidence. *Darling v. State,* 808 So.2d 145, 155 (Fla.2002). In considering a motion for a judgment of acquittal in a circumstantial evidence case,

> [i]t is the trial judge's proper task to *review* the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences.... The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. *See Toole v. State,* 472 So.2d 1174, 1176 (Fla.1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

***181** *State v. Law,* 559 So.2d 187, 189 (Fla.1989) (footnote omitted). Thus, if the State's evidence creates an inconsistency with the defendant's theory of innocence, the trial court should deny the motion for judgment of acquittal and allow the jury to resolve the inconsistency. *Woods v. State,* 733 So.2d 980, 985 (Fla.1999). Boyd's theory of innocence as to the sexual battery, premeditated murder, and armed kidnapping charges was that he had never met Dacosta and that the evidence against him was planted by Detective Bukata.

Sexual Battery Charge

We hold that Boyd's motion for judgment of acquittal as to the sexual battery charge was properly denied by the trial court. Section 794.011(3), Florida Statutes (1997), provides in pertinent part:

> A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury commits a life felony....

Sexual battery is defined as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another." § 794.011(1)(h), Fla. Stat. (1997). Consent is defined as "intelligent, knowing, and voluntary consent and does not include coerced submission. 'Consent' shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender." § 794.011(1)(a), Fla. Stat. (1997).

The State presented substantial evidence that Boyd sexually battered Dacosta, including evidence that Boyd and Dacosta did not know each other before she encountered Boyd while looking for a ride back to her vehicle after obtaining gas at the Texaco station; that Boyd's semen was on Dacosta's inner thighs; that Dacosta's blood was in Boyd's apartment; and that Boyd's DNA was in material found under Dacosta's fingernails. The State also presented testimony establishing the chain of custody of the evidence collected, providing evidence against Boyd's theory that Detective Bukata planted evidence so that it would match Boyd's and Dacosta's DNA. Bruising on Dacosta's inner thighs and vaginal area was consistent with either consensual or nonconsensual intercourse. Dacosta was last seen alive with Boyd. Viewing this evidence in a light most favorable to the State, the evidence does create inconsistencies with Boyd's theory of innocence, and the judgment of acquittal was therefore properly denied. *Orme v. State,* 677 So.2d 258, 262 (Fla.1996). Any question as to whether the evidence was sufficient to overcome all hypotheses of innocence was for the jury to decide. *Washington v. State,* 653 So.2d 362, 366 (Fla.1994). We hold that there was competent, substantial evidence to support the jury's guilty verdict for sexual battery.

Premeditated Murder Charge

We also hold that the trial court properly denied the motion for judgment of acquittal as to the premeditated murder charge. Premeditation exists when there "is a fully formed conscious purpose to kill." *Wilson v. State,* 493 So.2d 1019, 1021 (Fla.1986). Premeditation may "be formed in a moment and need only exist 'for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.' " *DeAngelo v. State,* 616 So.2d 440, 441 (Fla.1993) (quoting *Asay v. State,* 580 So.2d 610, 612 (Fla.1991)). Premeditation can be inferred from circumstantial evidence such as "the nature of the weapon used, ... the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." ***182** *Sochor v. State,* 619 So.2d 285, 288 (Fla.1993) (quoting *Larry v. State,* 104 So.2d 352, 354 (Fla.1958)). Moreover, "[t]he deliberate use of a knife to stab a victim multiple times in vital

organs is evidence that can support a finding of premeditation." *Jimenez v. State,* 703 So.2d 437, 440 (Fla.1997), *receded from on other grounds by, Delgado v. State,* 776 So.2d 233 (Fla.2000).

In this case, the evidence established that Dacosta was stabbed with a Torx screwdriver thirty-six times in the chest and four times in the head. One of the stab wounds to the head penetrated her brain, causing the wound that killed her. She had twelve wounds on her right hand that were consistent with defensive wounds. The State also presented testimony that eyewitnesses had last seen Dacosta alive with Boyd, that her blood was in Boyd's apartment, that Boyd's DNA was on material found under Dacosta's fingernails, and that items at the scene where Dacosta's body was discovered were consistent with items from Boyd's apartment. Under these facts, there was competent, substantial evidence to create an inconsistency with Boyd's theory of innocence and to support the conviction for premeditated murder. *See Francis v. State,* 808 So.2d 110 (Fla.2001) (twenty-three stab wounds to one victim and sixteen to another supported finding of premeditation as to both victims).

Even if the evidence was insufficient, the State argues that the evidence also supports a first-degree murder conviction on the basis of felony murder. We agree. Since Boyd was also convicted of sexual battery and armed kidnapping, the conviction for first-degree murder would stand even absent sufficient evidence of premeditation. *See San Martin v. State,* 717 So.2d 462, 470 (Fla.1998) ("[R]eversal is not warranted where the general verdict could have rested upon a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which the evidence was sufficient.").

Armed Kidnapping Charge

We hold that the trial court properly denied the motion for judgment of acquittal as to the armed kidnapping charge. Section 787.01(1)(a), Florida Statutes (1997), defines kidnapping as

> forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to:
>
> ....
>
> 2. Commit or facilitate commission of any felony.
>
> 3. Inflict bodily harm upon or to terrorize the victim or another person.

Boyd was charged with armed kidnapping, meaning that during the commission of the kidnapping he possessed, carried, displayed, or used a deadly weapon, under both of these theories of intent.

Eyewitness testimony established that although Dacosta entered Boyd's vehicle voluntarily, she was at the station to get gas and return to her car. Dacosta first approached Bell and Harris, both women, asking only for a ride back to her car. When she accepted a ride from Boyd, who was driving a church van, the jury could have inferred that it was with the sole purpose of receiving a ride back to her car. Although Dacosta had never met Boyd before, her blood was found in his apartment. Boyd's apartment was east of the Texaco station, while Dacosta's car was located only a block west of the station—in the opposite direction. The State relied on this circumstantial evidence, as well as the defensive and other wounds she received from the screwdriver and reciprocating saw, as evidence to establish that Boyd ***183** kidnapped Dacosta. The trial court concluded in its sentencing order that "[a]lthough initially Ms. Dacosta voluntarily entered Mr. Boyd's borrowed van, there was some point in time, during the entire episode when Ms. Dacosta was forcibly restrained against her will, as evidenced by the defensive wounds she suffered and the bite marks Mr. Boyd inflicted on her body prior to her death." Sentencing Order at 3. We agree.

This issue raises concerns similar to those in *Conahan v. State,* 844 So.2d 629, 636–37 (Fla.2003). In *Conahan,* the victim initially went freely with the defendant after the defendant offered him money to pose for nude photographs. The defendant was convicted of premeditated murder and kidnapping after the victim was discovered dead and bound to a tree at the site of the photo shoot. We held that there was competent, substantial evidence to support the kidnapping charge because even though the victim initially went freely with the defendant and even might have also initially consented to being tied up, the victim's extensive ligature wounds indicated that "the victim was confined against his will at some point and apparently struggled for his life." *Id.* at 637.

Also instructive is this Court's opinion in *Gore v. State,* 599 So.2d 978 (Fla.1992). In that case, we affirmed the trial court's denial of a motion for judgment of acquittal on a kidnapping charge, even though the victim, whose body was found in Florida, had initially gone willingly with the defendant when they left a party together in Cleveland, Tennessee. *Id.* at 985. We concluded that the evidence was sufficient to deny the motion because it showed that the victim had planned to return home at some point on the night she was with the defendant and because a shoestring found tied around her wrist indicated that she had been held against her will. *Id.; see also Schwab v. State,* 636 So.2d 3, 6 (Fla.1994) (after victim's nude body was found in a footlocker in a remote location, and evidence revealed that victim died from manual asphyxiation, we concluded that "[a]lthough the victim may have gone willingly with Schwab initially, the conclusion that at some point he was held against his will is inescapable"); *Peede v. State,* 474 So.2d 808 (Fla.1985) (motion for judgment of acquittal on kidnapping charge properly denied where evidence indicated that although victim went willingly with defendant, she had no intention of leaving Miami or Florida, and her body was recovered in Georgia); *cf. Anderson v. State,* 841 So.2d 390 (Fla.2003) (evidence insufficient to prove kidnapping because victim went willingly with defendant, and no evidence indicated that she ever tried to escape), *cert. denied,* 540 U.S. 956, 124 S.Ct. 408, 157 L.Ed.2d 292 (2003).

While no evidence existed of any binding of the victim, as it did in *Conahan* and *Gore,* the defensive wounds on Dacosta do indicate that at some point she was in a struggle for her life and was held against her will. As in *Gore,* Dacosta's family had expected Dacosta to return home immediately following her prayer meeting, and all of Dacosta's actions at the gas station were consistent with this intention. Eyewitness testimony and the evidence of Dacosta's blood at Boyd's apartment suffice to dispute Boyd's theory of innocence that he had never met Dacosta. Thus, there is also competent, substantial evidence sufficient for the jury to conclude that Dacosta was confined at some point against her will under either of the statutory theories of intent and that Boyd used a deadly weapon during the kidnapping.

Boyd also argues that any confinement that did take place was incidental to the other felonies charged. We have held that to find kidnapping under the ***184** theory of intent in section 787.01(1)(a)(2), the resulting movement or confinement:

> (a) Must not be slight, inconsequential and merely incidental to the other crime;
>
> (b) Must not be of the kind inherent in the nature of the other crime; and
>
> (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Faison v. State, 426 So.2d 963, 965 (Fla.1983) (quoting *State v. Buggs,* 219 Kan. 203, 547 P.2d 720, 731 (1976)). Competent, substantial evidence supports the State's contention that Boyd's movement and confinement of Dacosta from the Texaco station away from her car made the sexual battery and murder of Dacosta substantially easier to commit and lessened the risk of the crimes being detected while they were being perpetrated.

Boyd was also charged with kidnapping under section 787.01(1)(a)(3) of the kidnapping statute. This subsection requires that the kidnapper have the intent to "[i]nflict bodily harm upon or to terrorize the victim or another person." Competent, substantial evidence supports the finding that Boyd had the intent to harm or terrorize Dacosta while confining her after she voluntarily entered the van. Thus, even if Dacosta's kidnapping did not meet the requirements of *Faison,* Boyd would still be guilty of kidnapping under section (1)(a)(3) of the statute.

ISSUE 4. IMPROPER ADMISSION OF EVIDENCE

Next, Boyd argues that the trial court erred in admitting evidence that Boyd had failed to pay a train fare and in allowing the State to use the citation in its cross-examination of Boyd. The citation was dated two days before Dacosta's disappearance, and it had Boyd's name and address on it. The trial court admitted the citation into evidence over a defense objection after the State argued that the defense, in its opening statement, had put into question Boyd's residence at the time of Dacosta's disappearance. The pertinent portion of the opening statement was:

> But remember what the [State's] opening statement was. We did this, did that, did the other thing. On April the 1st, on April the 1st, 1999, we got this evidence. We got this evidence. We have a search warrant for Lucious' apartment where the evidence is going to show you he didn't live. The evidence is going to show that Geneva Lewis lived there. A long-time girlfriend of Lucious and that she was evicted from that apartment by BSO who showed up with a search warrant and threw she and the kids out for two days while unfettered, unsupervised, and unobserved they did what they wanted in that apartment.

Boyd argues that this statement only addressed the fact that he did not live in the apartment in question on the date of the search, April 1, and that he never contested living in the apartment in December 1998, when Dacosta was murdered. The trial judge "overrule[d] the defendant's objection as to relevancy based on the location issue that the parties have raised."

"[A]ny fact relevant to prove a fact in issue is admissible into evidence unless its admissibility is precluded by some specific rule of exclusion." *Bryan v. State,* 533 So.2d 744, 746 (Fla.1988) (quoting *Williams v. State,* 110 So.2d 654, 658 (Fla.1959)). This Court will not overrule a judge's ruling on the relevancy of evidence unless it finds an abuse of discretion. *Heath v. State,* 648 So.2d 660, 664 (Fla.1994). While the opening statement might have only been referring to the fact that Boyd did not live at the apartment on the day of the search, it was not an abuse of ***185** discretion for the trial court to admit the citation into evidence under these circumstances.

Even if the admission of this citation was an abuse of discretion, it would not warrant a new trial because any error was harmless. Boyd claims that the citation, since it relates to his honesty, casts doubt on his credibility. Given the substantial amount of DNA evidence against Boyd, as well as eyewitness testimony indicating that he was the last person seen with Dacosta, we hold that any error caused by admitting the citation is harmless. *See State v. DiGuilio,* 491 So.2d 1129, 1135 (Fla.1986) (error is harmless when there is no reasonable possibility that the error contributed to the verdict).

ISSUE 5. CROSS–EXAMINATION OF DEFENDANT

In his fifth claim, Boyd argues that the trial court erred in overruling the defense's objections to the State's cross-examination of Boyd. On direct examination, Boyd denied raping, kidnapping, and murdering Dacosta and stated that he was on trial because the Broward County Sheriff's Office was "going to get [him]." Boyd alleged that during his interrogation by the police, Detective Bukata called him a racial slur and then said, "[W]e told you we was going to get you." In its cross-examination of Boyd, the State proceeded to question him as to the work he performed at his family's funeral home business. The trial court overruled the defense objection to this cross-examination being outside the scope of direct examination but asked the State to limit its cross-examination to more immediate matters. Defense counsel put forth an ongoing objection as to all of the matters discussed on cross-examination, which covered areas including Boyd's relationship with Geneva Lewis, his work for Reverend Lloyd, the locations of various points in the community

relevant to the crimes, the fliers about Dacosta's disappearance, the bed purchased by Lewis that was no longer in the apartment, blood that was found in the apartment, items that were in Reverend Lloyd's van the weekend of the murders, the sheets wrapped around Dacosta's body, Boyd's whereabouts on the night of the murders, whether he knew Dacosta, his interrogation by the Broward County Sheriff's Office, and the DNA evidence associated with the crimes.

Section 90.612(2), Florida Statutes (2001), states, "Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in its discretion, permit inquiry into additional matters." The permissible bounds of cross-examination are defined as follows:

> [W]hen the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts ... or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, 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, contradict, rebut or make clearer the facts testified to in chief....

Coco v. State, 62 So.2d 892, 895 (Fla.1953) (quoting 58 Am.Jur. *Witnesses,* § 632, at 352 (1948)). We review trial court decisions as to the scope of cross-examination on an abuse of discretion standard. *McCoy v. State,* 853 So.2d 396, 406 (Fla.2003).

***186** This Court, in considering an objection to the scope of cross-examination, stated that a defendant "opened the door to be examined or impeached with evidence that linked him to the murder" when he denied the crime charged. *Geralds v. State,* 674 So.2d 96, 100 (Fla.1996). Thus, we hold that it was not an abuse of discretion for the trial court to permit the cross-examination to cover a variety of subjects relating to the murder and the evidence linking Boyd to the murder. These matters related to the impeachment of the defendant, and it was not an abuse of discretion for the trial court to allow this cross-examination.

Furthermore, any error that was committed was harmless error. The State did not question Boyd on any relevant matter that was not already in evidence, and therefore there is no reasonable possibility that the error contributed to Boyd's conviction. *See Chandler v. State,* 702 So.2d 186, 197 (Fla.1997) (defendant could be cross-examined on variety of matters after denying he killed victims, and any error that had occurred was harmless).

ISSUE 6. COMPETENCY EVALUATION

Boyd next argues that the trial court erred in its failure to consider reports and take testimony from doctors who found Boyd incompetent. In October 2000, prior to trial, defense counsel requested a competency hearing because Boyd indicated he wished to waive penalty phase proceedings if the jury found him guilty. Three psychiatrists examined Boyd. Dr. Shapiro, retained by the defense, found that Boyd was not competent to waive penalty proceedings, for although "he was aware of the charges against him and of their seriousness," he was "delusional" as he believed that God had spoken to him and told him that the jury would find him not guilty. Dr. Haber, appointed by the trial court, found Boyd competent, because he understood the charges against him, the possible penalties, and the adversary system and could assist his attorney in the case. Dr. Block–Garfield, also appointed by the trial court, found Boyd incompetent to stand trial, because he was not willing to entertain the possibility of being found guilty and appeared to be "giving lip service" to the doctor's questions so that she would find him competent.

At the hearing on March 26, 2001, Boyd called only Dr. Haber, who testified, consistent with his report, that Boyd was competent. The trial judge noted that he also had Dr. Block–Garfield's report, that he had read it, though it was not in evidence, and that it troubled him because it conflicted with Dr. Haber's testimony. Defense counsel responded that "it was not by whim or speculation" that Boyd had elected not to present the other two doctors. He remarked that there had been cultural differences between Boyd and Dr. Shapiro, such that Dr. Shapiro's report was not reliable. Nor was Dr. Block–Garfield's report reliable, as she had used Shapiro's report in her conclusions. Defense counsel and the defendant wanted a finding of competency, so they did not present testimony from these doctors or enter their reports into evidence. Based on the evidence presented, the trial court concluded that Boyd was competent.

"In determining whether a defendant is competent to stand trial, the trial court must decide whether the defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him.' " *Hardy v. State,* 716 So.2d 761, 763 (Fla.1998) (quoting ***187** *Dusky v. United States,* 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)). Trial courts are to order competency hearings whenever it appears necessary based on the defendant's history or behavior in court. *Gibson v. State,* 474 So.2d 1183, 1184 (Fla.1985). The trial court's function in making this determination is to resolve factual disputes arising from different expert opinions. The competency determination must be based on all relative evidence, and the decision will stand absent an abuse of discretion. *Carter v. State,* 576 So.2d 1291, 1292 (Fla.1989). When the evidence supports the decision, we have held that the trial court did not abuse its discretion. *Mora v. State,* 814 So.2d 322, 328 (Fla.2002).

While Boyd recognizes that the trial court did conduct a competency hearing, he contends that this hearing did not satisfy constitutional requirements because the judge did not consider the reports of Drs. Shapiro and Block–Garfield. However, Boyd's claim is barred, since at trial he asked that the trial court not call these witnesses or consider their reports. Boyd argues that the trial court had the responsibility to call the witnesses when his defense counsel did not. Either the court or a party may call the experts preparing the reports as witnesses. Fla. R.Crim. P. 3.212(a). However, the only impetus placed on a trial judge is to conduct a hearing when events indicate that the defendant is incompetent or upon a motion to do so, and to consider all of the evidence presented. *Carter,* 576 So.2d at 1292. When the defendant refuses to present evidence, he cannot later argue that the trial court erred in not considering the evidence.

The trial court, the State, and defense counsel all agreed that Boyd understood the proceedings against him and had reason to believe that he would not be found guilty, thus having no need for a penalty phase, because he had previously been acquitted of similar charges in other cases.[5] Thus, there was evidence in the record supporting the finding that Boyd was competent. *See Mora,* 814 So.2d at 328.

ISSUE 7. COMPETENCY HEARING FOLLOWING GUILT PHASE

Boyd asserts that the trial court erred in not ordering a competency hearing at sentencing. At the start of penalty proceedings, defense counsel requested a withdrawal because Boyd still refused to present any mitigation.[6] Defense counsel indicated that the trial court needed to address Dr. Shapiro's continuing serious concerns about Boyd.

Once a defendant is determined competent to stand trial, a presumption of competence attaches to the defendant in later proceedings. *Durocher v. Singletary,* 623 So.2d 482, 484 (Fla.1993). However, another competency hearing is required if a bona fide question as to the defendant's competency has been raised. *Hunter v. State,* 660 So.2d 244, 248 (Fla.1995). We will affirm the trial court's decision absent an abuse of discretion. *Id.*

We hold that the trial court did not err in refusing to order a second competency hearing. The record reflects that ***188** the trial judge interviewed Boyd on the issue of what mitigation was to be presented and determined that he understood the potential consequences of his decision, that his decision was deliberate, and that he made the decision freely and

voluntarily. The record reflects no new evidence that should have raised a bona fide question as to Boyd's mental capacity sufficient to require another hearing, nor did defense counsel specifically ask for a competency hearing. *See Hall v. State,* 742 So.2d 225, 230 (Fla.1999) (trial judge had no obligation to order competency hearing or make determination of competency when defendant did not request a hearing, and there was no reason to believe defendant's mental capacity had changed at 1990 resentencing since he had been found competent at 1978 trial).

ISSUE 8. WAIVER OF MITIGATION

Boyd claims that the trial court did not comply with the requirements of *Koon* in accepting his waiver of mitigation. In *Koon,* the defendant ordered his penalty phase counsel not to present any testimony or evidence. 619 So.2d at 249. While counsel followed Koon's wishes, he still presented an argument for mitigation based upon testimony presented during the guilt phase. *Id.* at 250. This Court emphasized that it has "repeatedly recognized the right of a competent defendant to waive presentation of mitigating evidence." *Id.* at 249. However, we also held that when a defendant waives presentation of mitigation against his attorney's wishes, the trial court must be informed of this decision, the attorney must indicate on the record whether there is mitigating evidence that could be presented and what that evidence would be, and the defendant must confirm that he has discussed these matters with his attorney and that despite his attorney's recommendation, he still wishes to waive mitigation. *Id.* at 250. This ensures that a defendant knowingly and intelligently makes a waiver of mitigation. *Chandler v. State,* 702 So.2d 186, 200 (Fla.1997). Thus, the record should "reflect a defendant's knowing waiver of his or her *right* to present mitigating evidence." *Mora v. State,* 814 So.2d 322, 332–33 (Fla.2002).

We hold that this case is distinguishable from *Koon* because Boyd did not ultimately waive his *right* to present mitigation. After discussing matters with his friends and family, Boyd elected to testify during the penalty phase and allowed his pastor to testify. Thus, the requirements of *Koon* are not applicable in this case because Boyd presented mitigating evidence.

Moreover, the record reflects that the trial judge inquired about the mitigation issue several times and concluded that the mitigation presented was all Boyd wished to present. He stated that Boyd was "making the decision freely and voluntarily with the assistance of able counsel." Additionally, several times defense counsel commented that it had mitigation witnesses to testify on behalf of Boyd, including his mother and brother. Thus, the trial court was aware of the potential mitigation evidence available for Boyd. The record also reflects that the trial court was wholly aware of and was seeking to act in compliance with this Court's decision in *Mora.* Accordingly, we hold that the trial court did not err. *See Waterhouse v. State,* 792 So.2d 1176, 1184 (Fla.2001) (*Koon* requirements were met when defendant made it "abundantly clear" that he was waiving mitigation); *Chandler,* 702 So.2d at 200 n. 19 (as long as it was demonstrated that waiver was made knowingly, intelligently, and voluntarily, defense counsel was not required to go into explicit ***189** detail about what the favorable mitigation evidence would be).

ISSUE 9. WEIGHT GIVEN TO JURY'S PENALTY RECOMMENDATION

Boyd next asserts that the trial court erred in giving great weight to the jury's recommendation of the death sentence. Boyd bases this argument on our opinion in *Muhammad,* where we held that the trial court erred in giving great weight to a jury's recommendation of the death penalty "when that jury did not hear any evidence in mitigation." 782 So.2d at 363. As stated in our discussion of Issue 8, Boyd did not waive all mitigation but only limited the matters presented on mitigation. Thus, we hold that *Muhammad* is inapplicable to this case.

ISSUE 10. CONTROL OF PRESENTATION OF MITIGATION

Next, Boyd argues that the defendant's waiver of mitigation was invalid because it is the attorney's obligation to decide what evidence is to be presented in the penalty phase of trial. We review decisions of the trial court in its handling of mitigation issues for abuse of discretion. *Spann v. State,* 857 So.2d 845, 854 (Fla.2003). Boyd attempts to distinguish a long line of cases holding that a pro se defendant may waive the presentation of mitigating evidence because Boyd was represented by counsel and his counsel should have controlled the presentation of mitigating evidence. This argument is without merit.

As stated above, we have long recognized that a competent defendant may waive the right to present all mitigating evidence. *Hamblen v. State,* 527 So.2d 800 (Fla.1988). This right is not altered when the defendant has counsel. Again, Boyd did not waive his *right* to present mitigating evidence. Instead, he limited the presentation of such evidence to his testimony and that of his pastor. Boyd argues that the trial court erred in failing to comply with *Koon* (discussed above under Issue 8) and *Mora v. State,* 814 So.2d 322 (Fla.2002), in accepting Boyd's presentation of mitigating evidence.

In *Mora,* the defendant objected to penalty phase counsel contacting his relatives that lived overseas as part of counsel's investigation of mitigating evidence. The trial court relied on *Koon* in refusing to allow the defendant to waive any mitigating evidence before counsel had investigated all such evidence. *Id.* at 331. The defendant refused to allow counsel to contact his family and proceeded pro se during the penalty phase, where he presented no mitigating evidence. *Id.* at 332. We reversed the death sentence because the trial court misapplied *Koon* in holding that it barred a defendant from waiving mitigation before counsel first investigates all possible mitigation. *Id.* Instead, *Koon* simply developed a procedure so that the record clearly reflects "a defendant's knowing waiver of his or her *right* to present mitigating evidence." *Id.* at 332–33. The defendant received a new penalty phase, because the record reflected that he had only wished to waive a portion of the mitigating evidence and had done so knowingly, intelligently, and voluntarily.

Thus, a defendant possesses great control over the objectives and content of his mitigation. *See Farr v. State,* 656 So.2d 448, 449 (Fla.1995) (no error when defendant takes stand to refute and disclaim any possible mitigation because defendant is entitled to control overall objectives of counsel's argument). Whether a defendant is represented by counsel or is proceeding pro se, the defendant has the right to choose what evidence, if any, the defense will present during the penalty ***190** phase. *See Grim v. State,* 841 So.2d 455, 461 (Fla.), *cert. denied,* 540 U.S. 892, 124 S.Ct. 230, 157 L.Ed.2d 166 (2003).

The record provides extensive support to substantiate that Boyd understood his rights and understood the consequences of his choice to present only the testimony of his pastor and himself. Boyd was exercising his right to be the "captain of the ship" in determining what would be presented during the penalty phase. *See Nixon v. Singletary,* 758 So.2d 618, 625 (Fla.2000). Therefore, we hold that the trial court correctly allowed Boyd to make a knowing and voluntary decision as to what testimony was to be presented in mitigation.

Boyd attempts to analogize the instant case to that of *Klokoc v. State,* 589 So.2d 219 (Fla.1991), where this Court held that a defendant cannot prevent his counsel from challenging a sentence on appeal. However, this analogy confuses the distinction between a defendant's rights during a trial versus his rights on appeal. The differences between the trial and appellate levels were succinctly defined in *Ocha v. State,* 826 So.2d 956, 964 (Fla.2002):

> Thus, *Klokoc* reiterates this Court's interest in ensuring that every death sentence is tested and has a proper basis in Florida law.
>
> This proposition is not ... inconsistent with our *Hamblen* opinion. *Hamblen* and its progeny operate under the premise that a competent defendant may direct his own defense at trial. *See Farr v. State,* 656 So.2d 448, 449 (Fla.1995). However, on appeal, this Court must examine [a defendants] death sentence to ensure the uniform application of law,

> evidentiary support, and proportionality. *See Alston,* 723 So.2d at 160. To facilitate the Court's duty, *Klokoc* requires that the defendant have appellate counsel. Therefore, it is not inconsistent for [a defendant] to waive his right to present mitigating evidence at the trial level, yet have appellate counsel appointed against his wishes.

Therefore, a lawyer is fully within the confines of his professional duties in honoring a knowing, intelligent, and voluntary waiver to present mitigation during the penalty phase.

ISSUE 11. HAC AND FELONY MURDER AGGRAVATORS

Boyd argues that the evidence does not support the HAC aggravator. The sentencing order states that the trial court found beyond a reasonable doubt that the manner of Dacosta's death indicated "a complete disregard for the suffering of another human being":

> The evidence at trial indicated that Mr. Boyd stabbed Ms. Dacosta in the chest 36 times with an instrument consistent with the design of a torque screwdriver. The injuries to Ms. Dacosta's chest consisted of superficial puncture wounds, which did not penetrate her sternum. The injuries to the chest occurred in a pattern, indicating that Mr. Boyd inflicted the wounds at the same time.
>
> While Mr. Boyd repeatedly stabbed Ms. Dacosta, she was conscious and struggled against her assailant, as reflected by the defensive wounds about her hands and arms.... These wounds were in addition to the bite marks evident on her hands.
>
> ....
>
> ... The evidence indicates that Ms. Dacosta was aware of her impending death, as she fought against Mr. Boyd, through the pain, fear, and suffering that Mr. Boyd inflicted with each of the ***191** 36 blows to her chest, and up until the fatal blow to her brain.

Sentencing Order at 2–3.

In reviewing a trial court's finding of an aggravating factor, we review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent, substantial evidence supports its finding. *Willacy v. State,* 696 So.2d 693, 695 (Fla.1997). "For HAC to apply, the crime must be conscienceless or pitiless and unnecessarily torturous to the victim." *Davis v. State,* 859 So.2d 465, 478 (Fla.2003). We hold that the trial court here did not err in finding HAC as an aggravating factor against Boyd.

We have consistently affirmed the HAC aggravator where the victim was repeatedly stabbed and remained conscious during part of the attack. *Id.* Boyd argues that the evidence did not prove that Dacosta was alive or conscious while being stabbed. However, Dr. Joshua Perper, the Chief Medical Examiner for Broward County, testified that the bruising around the wounds on Dacosta's chest, hands, and arms indicated she was alive when the wounds were inflicted. Dr. Perper also testified that Dacosta could not have raised her arm, and thus could not have sustained the defensive wounds she received, if she had been unconscious. While the exact order of wounds could not be established, there was competent, substantial evidence to support the trial court's finding that Dacosta was alive and conscious for some of the attack, and was struggling with her attacker.

Boyd also argues that the trial court erred in applying the aggravator that the murder was committed in the course of committing another felony because there was insufficient evidence to support his convictions for sexual battery and armed kidnapping. As discussed above, we hold that there was sufficient evidence to support the sexual battery and armed kidnapping convictions, and thus the trial court did not err in finding the aggravator that the murder was committed in the course of a felony.

Boyd argues that should we agree with him that the trial court erred in finding either of the above aggravators, we should reverse his sentence because a death sentence cannot stand when it is based on only one aggravator. Since we affirm the trial court's finding of both aggravators, we need not consider whether a death sentence is proper when only one aggravator is found. However, we note that this Court has affirmed sentences where there was only one aggravator and little mitigation evidence. *See Butler v. State,* 842 So.2d 817, 833 (Fla.2003).

ISSUE 12. AUTOPSY PHOTOS

Boyd next asserts that the trial court erred in admitting autopsy photographs of the victim during the penalty phase of trial. The photographs challenged were: (1) Exhibit 2, which showed Dacosta's right forearm and the defensive wounds inflicted by the screwdriver; (2) Exhibit 5, which showed the thirty-six stab wounds on her chest; (3) Exhibit 6, which was a close-up of the stab wounds; and (4) Exhibit 7, which showed the fatal head wound. The trial court admitted the photographs because they were relevant in the penalty phase to the HAC factor and supplemented the medical examiner's testimony.

We will not disturb a trial court's ruling on the admissibility of a photograph absent a clear abuse of discretion. *Mansfield v. State,* 758 So.2d 636, 648 (Fla.2000). Photographic evidence is admissible if it is relevant to a material fact in dispute. Thus, "autopsy photographs, ***192** even when difficult to view, are admissible to the extent that they fairly and accurately establish a material fact and are not unduly prejudicial." *Rose v. State,* 787 So.2d 786, 794 (Fla.2001). This Court has upheld the admission of photos to demonstrate the HAC factor during the penalty phase. *See id.* at 795; *Mansfield,* 758 So.2d at 648. This Court has also repeatedly upheld the admission of photographs when they are necessary to explain a medical examiners testimony, the manner of death, or the location of the wounds. *See, e.g., Davis v. State,* 859 So.2d 465, 477 (Fla.2003); *Floyd v. State,* 808 So.2d 175, 184 (Fla.2002); *Pope v. State,* 679 So.2d 710, 713–14 (Fla.1996).

Exhibits 2, 5, and 6 were properly admitted. None of these exhibits were unduly prejudicial, and thus the trial court did not err in admitting them. The admissibility of Exhibit 7 (showing the fatal head wound, as well as the top portion of the victim's body) is a closer call. The photograph is somewhat gruesome, because decomposition of the body had begun, resulting in the victim's eyes bulging significantly. Also, fragments of the brain are visible. However, we have affirmed the admissibility of even gruesome photographs when they are "independently relevant or corroborative of other evidence." *Czubak v. State,* 570 So.2d 925, 928 (Fla.1990). Because this photograph was the only depiction of the manner of death, assisted the medical examiner in his testimony, and was relevant to the HAC aggravating factor, we hold that the trial court did not err in admitting the photo. *See Harris v. State,* 843 So.2d 856, 865 (Fla.2003) (admission of crime scene photographs of the decomposed body of the victim were relevant, since they demonstrated the manner of death and assisted officer in testimony at trial about the crime scene). The trial judge carefully considered the relevance of each photo before admitting it and even sustained objections to another photograph in order to ensure that the evidence was not repetitious. *See Floyd v. State,* 808 So.2d 175, 184 (Fla.2002).

ISSUE 13. MITIGATING CIRCUMSTANCES

Boyd claims that the trial court erred in its assessment of mitigating circumstances. The trial court found and gave weight to one statutory and five nonstatutory mitigators. The trial court accorded minimal weight to the nonstatutory mitigating circumstances. The relevant parts of the sentencing order challenged under this claim stated:

1) The Defendant is religious.

> Pastor Lester E. Matthews, Mr. Boyd's prison minister, ... testified that while in the county jail, Mr. Boyd has been a model Christian, exhibiting forgiveness to those who have wronged him, and sharing his beliefs with other prisoners.
>
> This Court finds that Mr. Boyd's religious beliefs, however, did not prevent him from brutally assaulting, raping, and murdering Dawnia Dacosta. The forgiveness professed by Mr. Boyd is directed towards members of the Broward Sheriff's Office and the Office of the State Attorney, as Mr. Boyd believes that he was framed by these agencies.
>
> The mitigator involving religion has been proven by a preponderance of the evidence. The Court gives it minimal weight.
>
> ....
>
> **4) Lucious Boyd came from a good family.**
>
> Pastor Williams testified that Mr. Boyd came from a good family, and that he was raised by his parents with love and with the highest standards of integrity. ***193** Nevertheless, this Court finds that the positive influence of Mr. Boyd's loving family background did not prevent him from committing the brutal murder of Dawnia Dacosta, who also came from a good family; and, it is therefore especially tragic that, because of Mr. Boyd's actions, two good, loving families are made to suffer.
>
> This factor has been proven by a preponderance of the evidence. The Court gives it minimal weight.

Sentencing Order at 6–8. Boyd argues that the trial court's rationale for according minimal weight to these mitigating circumstances was in error because this Court has held that the trial court should not rely on the jury's verdict to reject proposed mitigating factors. *Morgan v. State,* 639 So.2d 6, 13 (Fla.1994). However, we do not read the trial court's order to state that the judge relied upon the verdict to reject these mitigating factors. The order states that the mitigation was proven but gives minimal weight to this mitigation. Boyd also argues that the trial court's reasoning is also illogical, since it could be used to accord less weight to mitigating factors in every murder trial.

However, trial courts have the sound discretion to determine what weight, if any, to accord to mitigating factors. *Stephens v. State,* 787 So.2d 747, 761 (Fla.2001). This Court sustains a trial court's assessment of the weight given to a mitigating factor absent an abuse of discretion and when the evidence supports the conclusions. *Anderson v. State,* 863 So.2d 169, 178 (Fla.2003), *cert. denied,* 541 U.S. 940, 124 S.Ct. 1662, 158 L.Ed.2d 363 (2004). Because trial courts are in the best position to observe the unique circumstances of a case, they have broad discretion in their decisions as to how much weight to assign to a particular mitigator. *See Foster v. State,* 679 So.2d 747, 755 (Fla.1996) ("As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion."). Though deference is given to trial courts in this weighing of mitigation, we do point out the existence of mitigation evidence is not to be determined on the basis of whether the mitigating factor prevented the crime.

Moreover, in this case any error committed by the trial court in this part of the sentencing order was harmless error beyond a reasonable doubt. The trial court was presented very little evidence in mitigation and found there to be two weighty aggravators which we have found to be supported by competent, substantial evidence.

ISSUE 14. PROPORTIONALITY OF DEATH SENTENCE

Boyd next asserts that his death sentence was not proportionate. To determine whether death is a proportionate penalty, we consider the totality of the circumstances of the case and compare the case with other capital cases where a death sentence was imposed. *Pearce v. State,* 880 So.2d 561, 577 (Fla.2004).

Considering the totality of the circumstances surrounding this case, the aggravating and mitigating circumstances, and other similar cases, the death sentence imposed upon Boyd is proportional. *See, e.g., Mansfield v. State,* 758 So.2d 636, 647 (Fla.2000) (death sentence was proportionate where trial court found two aggravating factors, HAC and murder committed during sexual battery, measured against five nonstatutory factors that were given little weight); *Davis v. State,* 703 So.2d 1055, 1061–62 (Fla.1997) (death sentence was proportionate where trial court found two aggravating factors of HAC and committed during course of sexual battery outweighed ***194** slight nonstatutory mitigation); *Geralds v. State,* 674 So.2d 96 (Fla.1996) (death sentence was proportionate where trial court found two aggravating circumstances, HAC and murder in course of felony, and some nonstatutory mitigation).

ISSUE 15. TRIAL COURT'S COMPLIANCE WITH *MUHAMMAD V. STATE*

Finally, Boyd argues that the trial court erred in assigning great weight to the jury's death recommendation because of this Court's holding in *Muhammad v. State,* 782 So.2d 343 (Fla.2001). In *Muhammad,* we set out procedures to apply when "the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence," including the preparation of a PSI or permitting the defendant to address the jury. *Id.* at 363. As explained in the analysis under Issue 8, Boyd did not waive all mitigation. Thus, we hold that the trial court did not err in its sentencing of Boyd.

CONCLUSION

Accordingly, we affirm Boyd's convictions and sentence of death.

It is so ordered.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

All Citations

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Footnotes

1 The aggravating factors were that the crime (1) was especially heinous, atrocious, or cruel (HAC) (accorded great weight), and (2) was committed while the defendant was committing or attempting to commit kidnapping and sexual battery (accorded moderate weight).

2 The statutory mitigating factor was that the defendant had no significant prior criminal history, to which the court accorded medium weight.

3 The nonstatutory mitigating factors were all accorded minimum weight and were that the defendant (1) is religious, (2) has a good jail record, (3) has family and friends who care for and love him, (4) came from a good family, and (5) expressed remorse for the victim and her family.

4 Boyd claims that (1) the trial court erred in refusing to make an inquiry of jurors and in denying a mistrial upon hearing testimony that jurors had discussed extrajudicial information; (2) the trial court erred in overruling the defense's request for material withheld in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), denying the defense's motion to strike the testimony of the fingerprint examiner, and not ordering a hearing in compliance with *Richardson v. State,* 246 So.2d 771 (Fla.1971); (3) the State's evidence was insufficient to support the convictions for sexual battery, first-degree murder, and armed kidnapping; (4) the trial court erred in overruling the defense's objection to evidence that Boyd had received a citation for failure to pay a train fare, and in overruling the defense's objection to the use of the citation in Boyd's cross-examination; (5) the trial court erred in overruling the objections to the State's cross-examination of Boyd; (6) the trial court erred in failing to consider two experts' reports and testimony as to Boyd's competency; (7) the trial court erred

in not ordering a competency hearing at sentencing; (8) Boyd's waiver of mitigation did not comply with *Koon v. Dugger,* 619 So.2d 246 (Fla.1993); (9) the trial court erred in giving great weight to the jury's death penalty recommendation; (10) Boyd's presentation of mitigation was invalid because the decision of whether to call witnesses and present evidence is for counsel to make; (11) the evidence does not support the HAC and murder in the course of a felony aggravating factors, and section 921.141, Florida Statutes (1997), does not allow a death sentence when there is only one aggravating circumstance; (12) the trial court erred in overruling the objection to the introduction of photographs of the victim during penalty proceedings; (13) the trial court erred in its assessment of mitigating circumstances; (14) Boyd's death sentence is not proportionate; and (15) the trial court failed to comply with *Muhammad v. State,* 782 So.2d 343 (Fla.2001), in sentencing Boyd.

5 Boyd's Presentence Investigation Report (PSI) reveals numerous drug and driving related charges against Boyd. Also reflected in the report are his acquittals of second-degree murder in 1993, armed kidnapping and armed sexual battery in 1998, and sexual battery in 1999.

6 After the State's presentation during penalty proceedings and after discussing matters with his family and friends, Boyd did eventually elect to present mitigation and allowed testimony from his pastor, and then Boyd read his own statement to the jury.

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