In the Supreme Court of Florida

DONALD JAMES SMITH,

Appellee,

v.

CASE NO.: SC18-822
CAPITAL CASE

STATE OF FLORIDA,

Appellant.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

CHARMAINE M. MILLSAPS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
primary email:
capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com

COUNSEL FOR THE STATE

TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The record on appeal will be referred to as "RDA" for record in the direct appeal, followed by the appropriate page number which is at the bottom center of the page. The trial transcripts will be referred to by "T" followed by the appropriate page number which is at the top right of the page. Appellant, Donald James Smith, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. The initialism "IB" refers to the initial brief, followed by the appropriate page number. All double underlined emphasis is supplied.

STATEMENT REGARDING ORAL ARGUMENT

This is a direct appeal of a capital case. This Court's standard policy is to hold an oral argument in the direct appeal of a capital case.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is a direct appeal of a capital case. The Honorable Mallory Cooper presided at trial. Smith was represented by Julie Schlax and Charles Fletcher. The prosecutors were elected State Attorney Melissa Nelson, Assistant State Attorney Mark Caliel and Assistant State Attorney Vanessa Wheeler-Sanchez.

The jury convicted Smith of first-degree murder, kidnapping, and sexual battery of a person under 12 years old. By special verdict, the jury convicted him of both premeditated and felony murder with kidnapping and sexual battery as the underlying felonies. In the penalty phase, the jury unanimously found six aggravating factors and unanimously recommended a death sentence. The trial court found the same six aggravating factors including the prior violent felony based on a prior attempted kidnapping of a 13 year-old girl, as well as the heinous, atrocious, and cruel aggravator (HAC), and the cold, calculating, and premeditated aggravator (CCP). The trial court gave five of the six aggravators great weight but gave the CCP aggravator "very great weight" and sentenced Smith to death. As Judge Cooper observed in her sentencing order, the aggravating factors "heavily outweigh the mitigating circumstances" and sentence of death is the "only proper penalty for the murder of Cherish Perrywinkle." (RDA 3134).

Facts of the murder

On Friday, June 21, 2013, a mother, Rayne Perrywinkle, and her three daughters: eight-year-old Cherish, five-year-old Destiny, and four-year-old Nevaeh, were shopping for clothes at the Dollar General on Edgewood Avenue in Jacksonville, Florida. The family had walked to the store because Rayne did not have a car. The mother went to the counter for a price check of a dress for Cherish but she did not buy the dress because she did not have enough money.

Smith, who was standing near her, overheard the conversation with the cashier about the price of the dress. Smith waited outside the store and then approached the mother telling her that he would buy the dress for her daughter. He also told her that he had a $150 gift card from Walmart. He additionally offered to drive them all to the Walmart on Lem Turner Road, which was about five miles away.

After driving the family to the Walmart in his white van and the family shopping for a couple of hours, Smith kidnapped eight-year-old Cherish Perrywinkle. He told her mother that he was going to buy them all cheeseburgers at the McDonald's inside the store because it was late and the family had not eaten dinner. But instead of going to the McDonald's inside the store, Smith left the store with Cherish at 10:44 p.m. and walked across the parking lot with her towards his white van. The white van then drove off. Walmart, which has "a lot" of surveillance cameras, captured Smith leaving the store with Cherish, as well as them both walking in the parking lot towards the van and the van driving off shortly afterward.

Cherish's mother, when the store announced it would be closing at 11:00 p.m., realized that Cherish was missing. Rayne looked for Cherish for some time inside the store, and then borrowed a cell phone from an employee and called 911 to report her missing. Law enforcement reviewed the store surveillance's videotapes and saw Smith leaving the store with Cherish and then put out an BOLO on the white van. Several hours later, at 4:21 a.m. on Saturday, June 22, 2013, law enforcement also put out an Amber Alert to the general public on Cherish and the white van.

Smith brutally raped the child both vaginally and anally and then strangled her to death with a ligature.[1] Early the next morning, Saturday, June 22, 2013,

[1] The ligature was never found.

Smith dragged the child's dead body to a shallow creek behind Highlands Baptist Church covering the body with debris. He then returned to his white van and drove off. An officer pulled Smith over in response to the BOLO that had been issued several hours earlier on the white van. Inside Smith's van were the items Rayne had purchased at the Family Dollar and the Dollar General, were she had left them to go shopping in the Walmart. When Smith was arrested, the arresting officer, Officer Wilkie, noticed that Smith's pants were "soaking" wet prompting the officer to shout that the child would be found near water.

Earlier that morning, two citizens, a mother and her daughter, had called 911 to report a suspicious white van parked behind Highlands Baptist Church in response to the Amber Alert that had been issued earlier for Cherish and the white van. After arresting Smith, Officer Wilkie drove to the church to talk with the citizens. Officer Wilkie following the lead of his K-9, named Gator, then found the child's body in a shallow creek off of Trout River, behind the church, which is a few miles away from the Walmart.

Law enforcement learned that Smith, while in jail awaiting trial, was talking to another inmate through a pipe chase that connected the cells. Law enforcement placed a recording device in the chase to record their conversations. On the jail recording, Smith is heard saying that he targets young girls in the age range of 12 to 13 years old and is heard discussing the size of Cherish's butt.

Smith's DNA profile matched the DNA found on the victim's neck and anus at one in thirty-five quintillion and his DNA profile matched the semen from the victim's vagina at one in twelve quadrillion. (T. 1345, 1349, 1358).

Pretrial

On July 16, 2013, the State filed a notice of intent to seek the death penalty in this case. (RDA 28). On May 3, 2016, the State filed its notice of aggravating factors seeking six aggravators. (RDA 1256).

On December 10, 2013, the defense filed a motion in limine to exclude the autopsy photographs. (RDA 176-177). On January 24, 2018, the defense filed a another motion to exclude the autopsy photographs. (RDA 1449-50).

On October 16, 2015, the defense filed a motion for change of venue based on the publicity the case received, including on social media, in Duval County. (RDA 914-938). On November 4, 2015, the defense filed an amended motion for change of venue. (RDA 939-966, 3582). The trial court held a hearing on the motion for change of venue but reserved ruling until after jury selection.[2]

Jury selection[3]

On February 5-9, 2018, the trial court conducted a week-long jury selection process. (T. 1-990). Due to pretrial publicity, the trial court used a written juror questionnaire and individual voir dire as part of the jury selection process. Both the State and the defense used all ten of their peremptory challenges. (RDA 972). The defense, however, explicitly and specifically declined to request any additional peremptory challenges. (T. 972). The final jury was: juror #7; juror #13; juror #15; juror #17; juror #18; juror #24; juror #29; juror #33; juror #34; juror #46;

---

[2] The State is limiting its discussion to the pretrial motions that are being raised on appeal as issues. More details regarding both the motion for change of venue and the motion to exclude the autopsy photographs are given in the body of the answer brief inside the respective issues.

[3] Because one of the issues on appeal relates to jury selection, more details regarding jury selection are provided in the answer brief under ISSUE I.

juror #62 and juror #63. (RDA 973). And the four alternate jurors were: juror #64; juror #70; juror #79 and juror #83. (RDA 976). None of the alternate jurors served on the jury in either the guilt or penalty phase. (T. 1470,1472, 2172-73).[4]

Guilt phase[5]

On February 12-14, 2018, the trial court conducted the guilt phase of the trial. The prosecutor presented opening statement. (T. 1008-1023). During opening statement the prosecutor, when discussing the victim's mother panic when she realized her daughter was not in the store, stated "every mother's darkest nightmare became Rayne Perrywinkle's reality." (T. 1015). Defense counsel objected on the basis it was "argumentative." (T. 1015). The trial court overruled the objection. The prosecutor continued with opening statement.

The defense also presented opening statement. (T. 1023-26). Defense counsel highlighted that Cherish's mother went with Smith in his van with her three young girls even though she thought he was "creepy." (T. 1024-25). The mother went with a "complete stranger" to Walmart and did not "flinch" when Cherish repeatedly "wanders off with this stranger." (T. 1025). Defense counsel told the jury that there was 39 minutes between Cherish wondering off with Smith to get cheeseburgers and her mother calling 911. (T. 1025).

The State then presented 19 witnesses: 1) Rayne Perrywinkle, the victim's mother, who testified regarding her family's encounter with Smith that day and, during her testimony, her 911 call reporting her daughter missing was played for

---

[4] The juror's name, address, date of birth, occupation, and employer are available on the written questionnaires by juror number. (RDA 2002-2709).

[5] The trial was continued for years based on the ongoing litigation in *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016).

the jury (T. 1025-1076);[6] 2) Brad Calhoun, an Assistant Manager at the Edgewood Dollar General, who testified about his conversation with Smith that day at the Dollar General including Smith asking him about Rayne being unable to pay for the dress and if it would be forward for him to pay for the dress and his then seeing Smith talking to Rayne for 15 to 20 minutes outside the store which was captured on the store's surveillance cameras and Smith driving away with the family (T. 1078-1092); 3) Samantha Bray, a security employee at the Lem Turner Walmart, who testified regarding Walmart's surveillance cameras of which there were "a lot" of such cameras and who gave the officers who responded to the 911 call a disk of the footage from those cameras (T. 1093-1099); 4) Christopher Iber, an FBI video analyst, who testified regarding the stores' video surveillance from both the Dollar General and Walmart showing Smith's interactions with Rayne and her three daughters at both stores (T. 1100-1114); 5) Christopher Rozier, an eyewitness in the Walmart parking lot, who was in a gold Corolla with his wife, which was parked near the garden center that night, testified that Smith drove up in the white van and told them that they were going to get cheeseburgers (T. 1115-1127); 6) Ashley Chappell, Rozier's wife, who was in the gold Corolla with her husband, also testified that Smith drove up to their car and told them that they were going to get cheeseburgers which made her "very confused" (T. 1127-1139); 7) Marquita Howard, a citizen, who testified that she saw a suspicious white van parked in the back of the Highlands Baptist Church early Saturday morning, on June 22, 2013, between 7:00 a.m. and 7:20 a.m. that had its back doors open, which matched the Amber Alert she had heard about and then, along with her daughter, called 911 to report it (T. 1140-48); 8) Christina Howard, a citizen, who

[6] Smith instructed his attorneys not to cross-examine the victim's mother. The trial court conducted an on the record colloquy with Smith regarding the waiver of cross-examination. (T. 1073-75).

also testified that she and her mother saw a suspicious white van with the back doors open parked in the back of the Highlands Baptist Church that matched the Amber Alert early Saturday morning around 7:15 a.m. on June 22, 2013, who called 911 to report it (T. 1148-57)[7]; 9) Brenda Fillingim, another citizen who lived near Highlands Baptist Church for 40 years, testified that she saw a white van parked near the Highlands Baptist Church early Saturday morning at about 7:30 a.m. on June 22, 2013, she then drove to the Dunn Avenue substation to report it after hearing about a missing child in a white van on TV (T. 1158-63); 10) Officer Tina Henson, who with the Jacksonville Sheriff's Office (JSO), while on patrol, spotted Smith's white van on I-95, early Saturday morning at approximately 9:00 a.m. and, in response to the BOLO that had been put out on the white van, assisted in the felony traffic stop (T. 1164-1171); 11) Officer Charles Wilkie, who commanded the felony traffic stop, arrested Smith and testified that Smith's pants were "soaking" wet prompting him to think the victim was in the water and who then, along with his K-9 dog, Gator, located the victim's body behind the Highland Baptist Church (T. 1172-1200); 12) Kimberly Long, a detective with the crime scene unit of the JSO, who testified that she photographed Smith's van at 9:17 a.m. on the morning of June 22, 2013, and then she went to Highlands Baptist Church, where she took photographs of the victim's body, drew a diagram of the crime scene, discussed the aerial photographs taken by detectives in a helicopter, the photographs of the tire tracks, the photographs of the asphalt and branches and other debris placed on the victim's body and that she took swabs from the victim's neck for DNA testing, as well as from other areas of the victim's body. (T. 1201-1231); 13) Jerome

[7] The tape of their 911 call reporting the white van was played for the jury. (T. 1154-56).

Burton, who was the custodian of his dead uncle's house off Broward Road, near the Highlands Baptist Church, testified that, while cutting the grass of the house, he found the children's blue stroller on the side of the house, which matched the blue stroller that Rayne had left in Smith's van while shopping in Walmart (T. 1242-48); 14) James Carter, a retired major crimes investigator with JSO, who testified that he recovered the blue stroller from the house at 2339 Broward Road on August 10, 2013, as well as pink flip flops and an umbrella from Dollar General (T. 1249-1256); 15) Dr. Valerie Rao, the chief medical examiner, who performed the autopsy on the victim, testified as to child's injuries and cause of death (T. 1256-1306); 16) Nichole Lee, an DNA analyst with the Florida Department of Law Enforcement (FDLE), testified regarding the DNA test results, she testified that Smith's DNA profile matched the DNA found on the victim's neck and anus at one in thirty-five quintillion and his DNA profile matched the semen from the victim's vagina at one in twelve quadrillion. (T. 1308-1362, 1345, 1349, 1358); 17) Robert Hinson, who was now a pastor, but who had been a homicide investigator with the State Attorney's Office, testified that he learned that Smith and another inmate were talking through a pipe chase about this case and who listened to all of the tapes of the recordings from the device that had been placed in the chase in June of 2015. (T. 1366-1372); 18) David Gonzalez, an undercover detective with JSO, who works in the technology support unit with recording devices, testified that he placed a recording device in the chase on June 23, 2015 (T. 1373-1381); and 19) Charles Carter, a corrections officer with JSO in the intelligence unit, testified that he assisted Detective Gonzalez with placing the recording device in the chase (T. 1382-1395).

During Officer Carter's testimony, the prosecutor played the jail recordings between Smith and the other inmate from the device placed in the chase for the jury. (T. 1391-1395). Officer Carter, who worked at the jail, repeatedly identified

the voice on the recording as Smith's voice. Smith is heard saying that he likes young girls in the age range of 12 to 13 years old and is heard discussing the size of Cherish's butt.

The defense moved for judgment of acquittal without any supporting argument. (T. 1396). The trial court denied the motion. (T. 1396).

The defense did not present any witnesses during the guilt phase. (T. 1396, 1397). Smith did ***not*** testify during the guilt phase. (T. 1397). The trial court conducted an on-the-record colloquy regarding his right to present defense witnesses and his right to testify and then found the waiver of the right to present a defense and to testify was freely and voluntarily made. (T. 1397-1400). The defense waived sequestration of the jury during the guilt phase deliberations. (T. 1401). The defense rested. (T. 1403).

The trial court held a jury instruction conference with the State and the defense. (T. 1404-13). The prosecutor presented closing argument in the guilt phase. (T. 1419-1437). The defense waived closing argument. (T. 1437). The State did not present rebuttal closing argument. (T. 1437).

The trial court instructed the jury. (T. 1438-1468, RDA 2889-2892). The trial court instructed the jury on first-degree murder and the lesser-included offenses of second-degree murder and manslaughter. (T. 1439-1444). The trial court instructed the jury on kidnapping and the lesser-included offense of false imprisonment. (T. 1444-1447). The trial court instructed the jury on sexual battery on a person less than 12 years of age and the lesser-included offense of battery. (T. 1447-1448).

The jury deliberated from 11:09 a.m. until 11:28 a.m. on the issue of guilt. (T. 1471, 1475). The jury convicted Smith of first-degree murder; kidnapping with a finding that the victim was under 13 years of age; and sexual battery upon a person under 12 years of age. (T. 1477, RDA 2889-2892 - verdict form). The jury

convicted Smith by special verdict of both premeditated murder and felony murder with both kidnapping and sexual battery as the underling felonies. (T. 1477, RDA 2889). The jury was polled. (T. 1477-78).

Penalty phase

On February 20-22, 2018, the trial court conducted the penalty phase. The prosecutor asked for an on-the-record colloquy between the trial court and Smith based on his view that the defense strategy at the penalty phase was going to be the functional equivalent to a concession to a lesser-included offense, in that the defense attorneys were going to present evidence that presented Smith in a "very bad light" in an attempt to support the defense theory that Smith was damaged. (T. 1488). The prosecutor noted that the defense presentation would open the door to the State presenting evidence, such as prior Jimmy Ryce commitments and nonviolent prior convictions, that would otherwise be inadmissible at the penalty phase. (T. 1488-89). The trial court conducted a colloquy. (T. 1489-94). The trial court found the defendant's agreement to the defense penalty phase strategy was knowing, intelligent, and voluntary. (T. 1493). The defendant also agreed on the record that he understood his wearing jail clothes was part of the defense strategy. (T. 1497).

The trial court gave the jury preliminary instruction regarding the penalty phase. (T. 1503-1515).

The prosecutor, elected State Attorney Melissa Nelson, gave opening statement in the penalty phase. (T. 1515-22). She discussed the aggravating factors based on the evidence already presented during the guilt phase but focused on the new evidence of a 1993 attempted kidnapping conviction in which Smith had attempted to kidnap a 13-year-old girl. (T. 1519-20).

The defense also gave opening statement in the penalty phase. (T. 1522-30). Defense attorney Fletcher discussed mental illness. He admitted that the crime was exactly what the prosecutor had described it as every parent's "worst nightmare." (T. 1523-24). The defense attorney stated that Smith was a "pedophile" which was something he did not choose to be. (T. 1524). The defense attorney acknowledged that Smith was convicted in his early 20s of masturbating in front of a young girl and after that 1978 conviction, Smith was labeled as a "mentally disordered sex offender." (T. 1524). So, in defense counsel's word's, "this train has been coming down the track for years." (T. 1524). Defense counsel referred to the 1993 conviction for attempted kidnapping that the prosecutor had discussed in her opening statement stating that was how "strong" Smith's sickness was. (T. 1524). Defense counsel also referred to a 1999 evaluation performed on Smith while he was in custody that found that Smith met the criteria for being a violent sexual predator who was likely to reoffend but the petition was dismissed. (T. 1524-25). So, Smith "fell through the cracks." (T. 1525). Defense counsel then referred to Smith impersonating an employee of the Department of Children and Families Services in 2009 to try to lure a young girl out of her house. (T. 1525). Defense counsel stated that Smith has pedophilic disorder but observed that "nobody wakes up and says I think I'll be a pedophile." *Id*. Rather, it is a mental disorder. (T. 1525). Defense counsel explained that two weeks before the murder, Smith was on a "cocaine binge." (T. 1525). Smith had attempted to have himself Baker Acted but the mental health facility turned him away. (T. 1526). "He is wired differently." (T. 1527). Defense counsel discussed Smith's MRI and PET scans, that the defense mental health experts would testify about during the penalty show to show Smith's brain is "corrupted." (T. 1528). Smith's brain is "tattered" but he did not choose to be that way. " (T. 1528). Defense counsel urged the jury to show mercy. (T. 1529). Defense counsel pointed

out that Smith would be wearing prison garb, that he was currently wearing, "until the day he dies" and would only leave prison "in a pine box." (T. 1530).

The State presented one witness at the penalty phase to establish the prior violent felony aggravator. (T. 1530-39). Kerri-Anne Buck, who was the victim of a 1992 attempted kidnapping, testified that, in 1992, when she was 13 years old and living in Jacksonville, she was walking to a friend's house after church on a Sunday. (T. 1531-32). Smith approached her in a van. (T. 1532). Smith ordered her to get in the van but she ran away because she knew that Smith was "going to hurt her." (T. 1532-33, 1538). Smith chased her in his van to a friend's house and then chased her to a playground where she hid in a tube slide. (T. 1533-34). When Smith could not find her, he drove away. (T. 1534). She then ran to her sister's friend's house and called her mother and the police. (T. 1536). A few weeks later, she saw Smith in his van outside her house. (T. 1536-37). She told her mother and her mother and her followed Smith in his van in their car and got his license number. (T. 1537). They called the police with the tag number. Smith served six years. (T. 1539). The State and the defense entered a stipulation regarding the 1993 attempted kidnapping conviction. (T. 1494). The trial court read the stipulation to the jury. (T. 1540).

The defense presented nine witnesses during the penalty phase: 1) Dr. Heather Holmes, a forensic psychologist (T. 1569-1617); 2) Dr. Daniel Buffington a clinical pharmacologist (T. 1618-1660); 3) Michael Bossen, a local criminal attorney (T. 1662-1706); 4) Dr. Geoff Colino, a forensic neurologist, who testified regarding the defendant's MRI results showing abnormalities (T. 1708-1761); 5) Dr. Joseph Wu, a neuropsychiatrist (T. 1774-1847); 6) Dr. Joseph Sesta, a neuropsychologist (T.

1848-1884);[8] 7) James Aiken, a prison security and classification expert (T. 1899-1930); 8) Dr. Brooke Butler, a mitigation specialist (T. 1930-1983); and 9) Donald Smith, Jr., the defendant's son, who testified as to the close relationship he had developed with his father since his father had been incarcerated (T. 1990-1995). The defense rested. (T. 1996).

Smith did not testify at the penalty phase either. After excusing the jury, the trial court conducted an on the record colloquy with Smith regarding his decision not to testify at the penalty phase. (T. 1996-99). The defendant also waived the right to have the jury sequestrated during the penalty phase deliberations. (T. 2000).

The trial court conducted a penalty phase jury instruction conference. (T. 2002-2066). The prosecutor gave closing argument in the penalty phase (T. 2077-2119). The defense gave closing argument in the penalty phase in which he pleaded for mercy and a life sentence due to Smith's mental illness. (T. 2124-2138). The defense proposed three statutory mitigating circumstances including both statutory mental mitigating circumstances and age for the jury to consider. The defense also proposed 68 catch-all mitigating circumstances for the jury to consider.[9]

---

[8] There was a discussion between the trial court and the attorneys regarding whether the jury would ask questions because the jury had asked if they were permitted to do so. The trial court told the jury that they could write down questions for the court and the attorney to review before answering the question. (T. 1898-1899).

[9] 1) defendant's biological father left before he was born and as a result he never had a relationship with him (not found by the jury, little weight by the judge); 2) defendant's parents were forced to divorce by his maternal grandparents who openly disapproved of his biological father (not found by the jury, little weight by the judge); 3) defendant's mother was seventeen when she gave birth to him (not found by the jury, no weight by the judge); 4) defendant was born premature with a low birth weight (not found by the jury, no weight by the judge); 5)

defendant's mother wanted to give him up for adoption (not found by the jury, no weight by the judge); 6) mental illness runs in both sides of his family (not found by the jury, no weight by the judge); 7) addiction runs in the family (not found by the jury, no weight by the judge); 8) emotional instability leading to physical violence runs in his father's side of the family (not found by the jury, no weight by the judge); 9) Smith's paternal uncle shot his grandfather to death (not found by the jury, no weight by the judge); 10) his mother spent very little time with him as a baby, instead focusing all of her attention on finding a man (not found by the jury, little weight by the judge); 11) Smith moved out of his grandparents' home when his mother married Clifton Smith, the man who formally adopted him, which was extremely traumatic (not found by the jury, little weight by the judge); 12) his adopted father, Clifton Smith, was verbally and emotionally abusive to him and locked him outside as punishment (not found by the jury, some weight by the judge); 13) his adoptive father was physically abusive to him (not found by the jury, some weight by the judge); 14) defendant was traumatized by his step-father's treatment of him and became clingy, stopped eating, and wet the bed long past the normal age (not found by the jury, no weight by the judge); 15) his adoptive father was paranoid and obsessed with violence and terrified him (not found by the jury, no weight by the judge); 16) the adoptive father's job in the insurance business forced them to move regularly repeatedly uprooting him from his home, adding to the instability of his living environment (not found by the jury, little weight by the judge); 17) due to frequent moves, he was frequently bullied which caused him to feel alienated, detached, despondent, and angry (not found by the jury, some weight by the judge); 18) he was sexually molested at the age of eight by two neighborhood teenagers (not found by the jury, no weight by the judge); 19) those teenagers coerced him into watching them violently sexually molest several girls which he found confusing and frightening (not found by the jury, no weight by the judge); 20) he did not reveal the sexual abuse to his mother (not found by the jury, no weight by the judge); 21) his mother suspected that her sister's husband, Bob, molested her son but she did not confront them (not found by the jury, no weight by the judge); 22) he never received treatment for the sexual abuse (not found by the jury, no weight by the judge); 23) the adoptive father Clifton was sexually inappropriate with him touching him on his buttocks and calling him sexually explicit names (not found by the jury, little weight by the judge); 24) when his mother divorced his adoptive father after seven years of marriage this was yet another change that brought instability into his life (not found by the jury, little weight by the judge); 25) his second step-father, Dr. Marlin Moore, was a cold, self-centered, and aloof man who did not have any time for children and insisted that his wife and step-son call him Dr. Moore (not found by the jury, little weight by the judge); 26) Dr. Moore was verbally and physically abusive to him (not found by the jury, little weight by the judge); 27) as a teenager

he began self-medicating with pills from Dr. Moore's home office (not found by the jury, little weight by the judge); 28) his drug abuse escalated to regularly using marijuana, LSD, PCP, MDA, Mescaline, Peyote, Quaaludes, and cocaine (not found by the jury, little weight by the judge); 29) he dropped out of school in the tenth grade and although he was intelligent, he had lost all motivation due to his drug use, depression, and anger (not found by the jury, little weight by the judge); 30) as a teenager, he began to get arrested (not found by the jury, no weight by the judge); 31) at the age of 15, he began engaging in voyeurism (not found by the jury, no weight by the judge); 32) he was raped while incarcerated (not found by the jury, some weight by the judge); 33) when he was released from jail, his drug use became a full-blown crack addiction (not found by the jury, little weight by the judge); 34) while on crack, his inability to control his impulses was intensified to the point that he felt like another person, he became notorious on the streets for his behavior while high, and he was paranoid, manic, unstable, and impulsive (not found by the jury, little weight by the judge); 35) his mother enabled his drug addiction by driving him to pay off his drug debts or paid them off herself for decades (not found by the jury, little weight by the judge); 36) at the age of 20, he attempted suicide for the first time by driving into an oak tree on Orange Picker Road and he flipped the car but survived the accident but did not seek treatment for the injury (not found by the jury, no weight by the judge); 37) he experienced dissociative episodes due to his drug use where he lost time (not found by the jury, no weight by the judge); 38) he made a second suicide attempt in the Duval County Jail (not found by the jury, no weight by the judge); 39) In 1977, he was designated a mentally disordered sex offender and committed to the North Florida Evaluation and Treatment Center (not found by the jury, no weight by the judge); 40) throughout his adult life, he spent hundreds of dollars per day on crack and during 2002 he spent more than $90,000 in a four-month period, going on binges lasting for weeks and during these episodes he did not eat or sleep (not found by the jury, very little weight by the judge); 41) he fathered a son in 1992 and married his son's mother but the relationship was short-lived (not found by the jury, no weight by the judge); 42) he was far from the perfect father, however, he has tried to the best of his ability (not found by the jury, no weight by the judge); 43) his son has developed a close relationship with him since he has been incarcerated (found by the jury 7-5, little weight by the judge); 44) he has been repeatedly diagnosed as having antisocial personality disorder, polysubstance dependence, pedophilia, and cocaine dependence (not found by the jury, moderate weight by the judge); 45) in 1999, he was designated as a sexually violent predator and subsequently committed to the Martin Treatment Center through the Jimmy Ryce Civil Commitment Act but he did not complete the treatment plan developed for him (not found by the jury, little weight by the judge); 46) while at the Martin Treatment Center, he engaged in a sexual relationship with another patient who

was known for being HIV-positive which was regarded as his third suicide attempt (not found by the jury, no weight by the judge); 47) in spite of not participating in counseling, he was released from the Martin Treatment Center based on a decision made by members of the Duval County State Attorney's Office (not found by the jury, no weight by the judge); 48) once he was released from the Martin Treatment Center, he was required to receive a psychosexual evaluation and treatment and Dr. James Valley who evaluated him concluded that he was highly likely to reoffend (not found by the jury, no weight by the judge); 49) he was arrested for dealing in stolen property and burglary which could have resulted in 30 years incarceration as an habitual offender but members of the Duval County State Attorney's Office permitted him to plead to a sentence of four years in prison and he was not placed on any form of supervision upon his release from prison (not found by the jury, no weight by the judge); 50) in 2006, the state psychological assessment determined that he did not meet the criteria for civil commitment in the Jimmy Ryce Civil Commitment Center, although he had never received any meaningful rehabilitation (not found by the jury, no weight by the judge); 51) in 2011, he Baker Acted himself and reported homicidal thoughts, auditory and visual hallucinations, admitted using cocaine and Lortab, and he was diagnosed as having a potential for homicide, suicide, and violence and the center recommended one-on-one counseling and let him stay three or four days although he never followed up with therapy (not found by the jury, some weight by the judge); 52) in 2009, he was arrested for attempting to lure a none-year- old girl while posing as a Department of Children and Families worker and could have been sentenced to ten years incarceration, but members of the State Attorney's Office agreed to a plea agreement allowing a county jail sentence which bypassed further screening into the Jimmy Ryce Civil Commitment Center (not found by the jury, no weight by the judge); 53) on June 1, 2013, he was released from Duval County Jail but not placed on any kind of supervision (not found by the jury, no weight by the judge); 54) three weeks before the capital murder, he went to Shands Hospital and then was Baker Acted because he stated he was having violent thoughts and wanted to get into a residential program but he was not admitted to the program (not found by the jury, moderate weight by the judge); 55) neuropsychological testing indicates that his brain functioning is abnormal and he has deficits in executive functioning and poor impulse control (not found by the jury, moderate weight by the judge); 56) his neuropsychological disorders are exacerbated by his substance abuse and addiction (not found by the jury, some weight by the judge); 57) medical testing, specifically PET, MRI, and DTI scans, reveal that his brain functioning is abnormal (not found by the jury, moderate weight by the judge); 58) his brain abnormalities are consistent with someone who has suffered brain damage (not found by the jury, no weight by the judge); 59) he has suffered from significant mental illness for most of his life (not found by the

The trial court instructed the jury. (T. 2139-2173, RDA 3016-3031). The jury started the penalty phase deliberations at 12:55 p.m. and returned at 3:03 p.m. with a recommendation. (T. 2174, 2179).

The jury unanimously found six aggravating factors: 1) the prior violent felony aggravator based on a 1993 attempted kidnapping conviction of a 13-year-old girl; 2) the felony murder aggravator based on the contemporaneous convictions for kidnapping and sexual battery; 3) the avoid arrest aggravator; 4) the HAC aggravator; 5) the CCP aggravator; and 6) the victim under 12 years old aggravator. (T. 2181-82, RDA 2988-2989). The jury unanimously found one statutory mitigating circumstance, that of age, out of the three proposed statutory mitigating circumstances. (T. 2182, RDA 2990). The jury rejected both statutory mental mitigating circumstances. (T. 2182, RDA 2990). The jury also rejected the vast majority of the 68 proposed catch-all mitigating circumstances. (T. 2182-2192, RDA 2991-3010). The jury found only one catch-all mitigating circumstance, by a seven to five vote, which was the defendant had developed a close relationship with his son while incarcerated, out of the 68 proposed catch-all

---

jury, some weight by the judge); 60) his mental illness is not something he has chosen (not found by the jury, no weight by the judge); 61) he did not choose his family (not found by the jury, no weight by the judge); 62) he did not choose the way his family treated him (not found by the jury, no weight by the judge); 63) he did not choose to be sexually molested (not found by the jury, little to no weight by the judge); 64) his childhood experiences shaped the person he became as an adult (not found by the jury, no weight by the judge); 65) at the time of the capital murder, he was 56 years old and he is now 61 year old (not found by the jury, no weight by the judge); 66) he has been diagnosed with chronic obstructive pulmonary disease (COPD), heart disease, Hepatitis B, and Hepatitis C (not found by the jury, no weight by the judge); 67) he has been a strong support system for his mother who is receiving treatment for breast cancer (not found by the jury, little weight by the judge); and 68) he has not been a threat to correctional officers or other inmates (not found by the jury, very little weight by the judge). (RDA 2182-92).

mitigating circumstances. (T. 2188, RDA 3003). The jury found the aggravating factors outweighed the mitigating circumstances. (RDA 3011). The jury unanimously recommended a death sentence. (T. 2193, RDA 3012).

Spencer hearing[10]

On March 28, 2018, the trial court held a *Spencer* hearing. The trial court first denied the motion for new trial. (T. 2205). The State presented victim impact testimony from the victim's mother, Rayne Perrywinkle, and a victim impact statement from the victim's father, Billy Jarreau. (T. 2207-10; 2211-14). Smith did not present any witnesses at the *Spencer* hearing. (T. 2205-2206).

Sentencing

The State filed a sentencing memorandum arguing for a death sentence. (RDA 3039-53). The State's sentencing memo summarized the facts of the crime. (RDA 3039-43). The State's sentencing memo also summarized the procedural history of the case as well. (RDA 3043-44). The State's memo urged the trial court to find the same six aggravating factors that the jury found: 1) the prior violent felony aggravator based on a 1993 attempted kidnapping conviction of a 13-year-old girl; 2) the felony murder aggravator based on the contemporaneous convictions for kidnapping and sexual battery; 3) the avoid arrest aggravator based on Smith's knowledge that he would have been captured on the stores' surveillance cameras;[11] 4) the HAC aggravator; 5) the CCP aggravator; and 6) the victim under 12 years old aggravator. (RDA 3044-49). The State's memo urged the trial court to give each of the six aggravating factors great weight. (RDA 3044-49). The

---

[10] *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

[11] Smith had also shown Rayne Perrywinkle his driver's license.

State's memo discussed the three statutory mitigating circumstances. (RDA 3049-51). The State's memo then discussed the one mitigating circumstance found by the jury of the 68 catch-all mitigating circumstances proposed by the defense, which was that the defendant had established a close relationship with his son while being incarcerated. (RDA 3051-52). The State's memo argued that the relationship spoke more to the character of the son than to the character of the defendant. (RDA 3051). The State's memo noted that only seven of the twelve jurors found that one mitigating circumstance and urged the trial court to give it little weight. (RDA 3052). The State's memo concluded by arguing the two mitigating circumstances of age and a close relationship with his son did not outweigh the six aggravating factors and urged the trial court to sentence Smith the death. (RDA 3052).

The defense also filed a sentencing memorandum arguing for a life sentence. (RDA 3063-80). The defense memo addressed the aggravating factors. (RDA 3064-68). The defense memo addressed the mitigating circumstances. (RDA 3068-3077). The defense memo addressed the three statutory mitigating circumstances of 1) extreme mental or emotional disturbance, 2) capacity substantially impaired, and 3) the age of the defendant. (RDA 3069-70). The defense memo addressed 68 proposed catch-all mitigating circumstances. (RDA 3070-78). The defense memo addressed weighing of the aggravating factors and the mitigating circumstances. (RDA 3078-79).

On May 2, 2018, the trial court sentenced Smith to death. (T. 2229-2233). In the written sentencing order, the trial court recounted the procedural history of the case. (RDA 3113-3144, 3113-3116). The trial court found the same six aggravating factors as the jury: 1) the prior violent felony aggravator based on a 1993 attempted kidnapping conviction of a 13-year-old girl; 2) the felony murder aggravator based on the contemporaneous convictions for kidnapping and sexual

battery; 3) the avoid arrest aggravator based on Smith's knowledge that he would have been captured on the stores' surveillance cameras; 4) the HAC aggravator; 5) the CCP aggravator; and 6) the victim under 12 years old aggravator. (RDA 3117-3123). The trial court gave five of the six aggravators "great" weight but gave the CCP aggravator "very great" weight. (RDA 3117-3123,3123). The trial court found three statutory mitigating circumstances: 1) extreme mental or emotional disturbance which it gave moderate weight; 2) capability to appreciate or conform was substantially impaired which it gave significant weight; and 3) age which it gave moderate weight. (RDA 3125-3128). The trial court considered the 68 proposed catch-all mitigation circumstances of which it found and gave weight to 29 of them. (RDA 3128-3142). Most of the catch-all mitigation circumstances, the trial court gave little or some weight butthe trial court did gave moderate weight to a couple of them. (RDA 3128-3142). The trial court's written sentencing order concluded that she agreed with the jury recommendation of death. (RDA 3143). The trial court concluded the aggravating factors "heavily outweigh the mitigating circumstances" and that a sentence of death was the "only proper penalty for the murder of Cherish Perrywinkle." (RDA 3134).

The trial court also sentenced Smith to life in prison for count 2, which was the kidnapping conviction and to life in prison for count 3, which was the sexual battery on a child under 12 years of age conviction. (RDA 3081- 3089 - judgment & sentence).

Motions for new trial

On March 5, 2018, the defense filed a motion for new trial arguing among other claims, that the trial court erred in denying the motion to exclude the autopsy photographs, in denying the motion for change of venue, in overruling the defense objection to the prosecutor's comment in opening statement of the guilt

phase about the crime being every "mother's darkest nightmare," and in denying the motion for mistrial made during the medical examiner's testimony. (RDA 3032-35). On April 30, 2018, after the sentencing and after the original motion for new trial had been denied, the defense filed an amended motion for new trial arguing the same claims in the original motion for new trial but now asserting a claim of fundamental error regarding the prosecutor's comment in closing argument of the guilt phase about the victim crying out from the grave. (RDA 3054-59, 3057-58).

Direct appeal

Smith, represented by H. Kate Bedell of Bedell & Kunitz, now appeals his convictions and death sentence to this Court, raising five issues. The State addresses those five issues in its answer brief, as well as the additional issues of sufficiency of the evidence of the convictions and the proportionality of the death sentence.

SUMMARY OF THE ARGUMENT

ISSUE I

Smith asserts that the trial court abused its discretion in denying his motion for change of venue due to widespread publicity. IB at 20. The issue of venue, however, was abandoned when defense counsel did not obtain a ruling from the trial court on the motion for change of venue and the issue is not one of fundamental error. As to the merits, under *Skilling v. United States*, 561 U.S. 358 (2010), no presumption of prejudice arose. Nor did Smith establish the five factors of *Rolling v. State*, 695 So.2d 278 (Fla. 1997), that this Court uses as a test for change of venue claims. There was over four years between this crime and jury selection. Furthermore, Duval County is a large diverse county with hundreds of thousands of eligible jurors of which it is difficult to believe that twelve unbiased jurors, uninfluenced by the publicity and indifferent to, or even totally unaware of, social media posts, could not be found. And, while the defense used all of its peremptory challenges, defense counsel explicitly and specifically declined to request any additional peremptory challenges. Smith fails at least three of the five *Rolling* factors. This Court has held that "a change of venue was not warranted in several cases involving much more extensive pretrial publicity." *Ellerbee v. State*, 232 So.3d 909, 920 (Fla. 2017) (citing and discussing *Rolling v. State*, 695 So.2d 278 (Fla. 1997)). The trial court did not commit fundamental error in not changing the venue of the trial.

ISSUE II

Smith asserts the trial court abused its discretion denying the motion for mistrial when the medical examiner hesitated during her testimony and requested a recess. IB at 31. Contrary to opposing counsel's characterization, while some of the jurors teared up while looking at the autopsy photographs, the medical

examiner did not. It is the trial court that could actually see the extent of Dr. Rao's reaction to some of the jurors becoming emotional as well as the other juror's reaction to the medical examiner's hesitation. For that reason, this Court should defer to the trial court's judgment. The medical examiner's momentary hesitation and request to take a break to compose herself did not vitiate the entire trial and the trial court did not abuse its discretion in denying the motion for mistrial.

ISSUE III

Smith asserts the trial court abused its discretion in admitting autopsy photographs of the victim during the medical examiner's testimony. IB at 34. The trial court properly admitted the autopsy photographs, which were relevant to establish both premeditated murder and sexual battery in the guilt phase, as well as the HAC aggravator in the penalty phase. The medical examiner used the autopsy photographs during her testimony to establish the victim's injuries and cause of death. Smith complains that the autopsy photographs are graphic but, as this Court has observed of autopsy photographs, defendants "whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." *Davis v. State*, 207 So.3d 142, 170 (Fla. 2016). There was no error in the admission of the autopsy photographs. Alternatively, any error in admitting any of the photographs was harmless in light of the videotape of the kidnapping and the DNA evidence of the sexual battery and murder. The trial court did not abuse its discretion in admitting the autopsy photographs.

ISSUE IV

Smith asserts the trial court abused its discretion by overruling an objection to a prosecutor's comment in opening statement that this crime was "every mother's darkest nightmare." IB at 37. Smith also claims that the trial court committed fundamental error by not *sua sponte* ordering a mistrial regarding the prosecutor's comment in closing argument of the guilt phase that the victim was "crying out from the grave," despite there being no objection. IB at 37. The prosecutor's comment in opening statement did not vitiate the entire trial and the other prosecutor's comment in closing argument of the guilt phase was not fundamental error. Using the factors used by the United States Supreme Court in *Darden v. Wainwright*, 477 U.S. 168 (1986), neither of the comments was reversible error. The comment in opening statements was not reversible error because the comment fails to meet the *Darden* factors. And the prosecutor's comment during closing argument was not reversible error either, much less fundamental error. The trial court did not abuse its discretion in overruling the objection to the comment in the opening statement and did not commit fundamental error by not *sua sponte* ordering a mistrial regarding the prosecutor's comment in closing argument of the guilt phase.

ISSUE V

Smith asserts that the errors in his trial considered cumulatively warrant a new trial. The cumulative error claim was not properly presented on appeal. Alternatively, there is no cumulative error. For there to be cumulative error, two or more errors are required. But there are not two meritorious preserved errors in this case. And, even if this Court were to find multiple errors occurred, the multiple errors, even considered collectively, would remain harmless in this case given the DNA evidence and the videotape of the beginning of the kidnapping.

Sufficiency of the evidence

There is competent substantial evidence to establish that Smith committed this murder. The DNA evidence alone establishes his guilt beyond any doubt. Smith's DNA profile matched the DNA found on the victim's neck and anus at one in thirty-five quintillion. (T. 1345, 1349). And the semen obtained from the victim's vaginal area matched Smith's DNA profile at one in twelve quadrillion. (T. 1358).

Furthermore, there is a videotape of the beginning of the kidnapping. The store's surveillance cameras captured Smith leaving the store with the child victim instead of taking her to the McDonald's inside the store, as he told her mother he was going to do. The videotape shows Smith walking with Cherish through the parking lot to Smith's white van before the white van drives off. The videotape also establishes that Smith was the last person seen with the child victim at 10:44 p.m. that night before her body was found the next morning by a deputy and his K-9, named Gator. This evidence is more than sufficient to support the first-degree murder conviction.

Proportionality

The death sentence is proportional. Smith kidnapped, brutally raped, and then murdered an eight-year-old child. "This Court has repeatedly affirmed the death penalty where the defendant has kidnapped, sexually battered, and murdered a child victim." *Cozzie v. State*, 225 So.3d 717, 734 (Fla. 2017). Furthermore, there were six aggravating factors found in this case including the HAC, CCP, and prior violent felony aggravators, which are the most serious aggravators under this Court's caselaw. Smith had a prior violent felony conviction involving an attempted kidnapping of another child that was the basis for the prior

violent felony aggravating factor. Both the facts of the case and law of aggravating factors support this death sentence. The death sentence is proportionate.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR FOR NOT CHANGING THE VENUE OF THE TRIAL TO ANOTHER COUNTY BASED ON PRESUMED PREJUDICE DUE TO PRETRIAL PUBLICITY? (Restated)

Smith asserts that the trial court abused its discretion in denying his motion for change of venue due to widespread publicity. IB at 20. The issue of venue, however, was abandoned when defense counsel did not obtain a ruling from the trial court on the motion for change of venue and the issue is not one of fundamental error. As to the merits, under *Skilling v. United States*, 561 U.S. 358 (2010), no presumption of prejudice arose. Nor did Smith establish the five factors of *Rolling v. State*, 695 So.2d 278 (Fla. 1997), that this Court uses as a test for change of venue claims. There was over four years between this crime and jury selection. Furthermore, Duval County is a large diverse county with hundreds of thousands of eligible jurors of which it is difficult to believe that twelve unbiased jurors, uninfluenced by the publicity and indifferent to, or even totally unaware of, social media posts, could not be found. And, while the defense used all of its peremptory challenges, defense counsel explicitly and specifically declined to request any additional peremptory challenges. Smith fails at least three of the five *Rolling* factors. This Court has held that "a change of venue was not warranted in several cases involving much more extensive pretrial publicity." *Ellerbee v. State*, 232 So.3d 909, 920 (Fla. 2017) (citing and discussing *Rolling v. State*, 695 So.2d 278 (Fla. 1997)). The trial court did not commit fundamental error in not changing the venue of the trial.

The trial court's ruling

Years before the trial in 2018, on October 16, 2015, the defense filed a motion for change of venue based on the publicity the case received, including on social media, in Duval County. (RDA 914-938). The motion did not attach any exhibits of the coverage rather the motion stated that the exhibits would be provided to the prosecutor at a later date. But the motion did summarize several articles. The vast majority of the news articles cited in the motion with internet addresses were from 2013. (RDA 916-923). The Facebook page referred to in the motion was from March of 2014. (RDA 917). On November 4, 2015, the defense filed an amended motion for change of venue (there was no substantive change to the amended motion but it contained affidavits as required by rule 3.240). (RDA 939-966, 3582).

On November 5, 2015, the trial court held a hearing on the amended motion for a change of venue. (RDA 3579-3600). Defense counsel noted that "prominent" former prosecutors and legislators had commented on the case. (RDA 3584, 3586). By August of 2013, Smith had been referred to as a monster in 44 articles. (RDA 3587). The defense noted that the publicity included inadmissable evidence of Smith's prior criminal record. (RDA 3584). The publicity also referred to Smith as a sexual predator although he was never designated a sexual predator. (RDA 3584). The defense discussed the case of *Rolling v. State*, 695 So.2d 278 (Fla. 1997), pointing out that the motion for venue in *Rolling* was made during jury selection rather than pretrial, as was the motion in this case. (RDA 3584-86). The defense also discussed the five *Rolling* factors. (RDA 3585-88). The articles assumed Smith's guilt and expressed the opinion that the only appropriate punishment was the death penalty. (RDA 3586, 3588-89). The defense advocated that the trial's venue be changed to either Miami or Tampa. (RDA 3588).

The prosecutor discussed the facts of the *Rolling* case. (RDA 3589-90). The prosecutor discussed the five *Rolling* factors as well, noting the size of Gainesville where the Rolling trial was held was "quite small" compared to the size of Jacksonville. (RDA 3590-91). The prosecutor explained that while the law did not require that the jurors be totally unaware of the crime, the prosecutor also noted, given the size of Jacksonville, it was possible that some of the jurors could be unaware of the crime. The prosecutor also noted that the only possible problem was those prospective jurors who had heard of Smith's prior crimes, particularly his prior crimes involving children. (RDA 3591). The prosecutor noted that under *Rolling* the motion for change of venue may have been premature and advocated trying to select a jury in Duval County. (RDA 3592). The prosecutor conceded that there was extensive publicity regarding the case but noted that many of the articles cited in the defense motion were from 2013. (RDA 3592). The prosecutor argued that the inflammatory articles were from June of 2013 and would not still be fresh in the minds of the prospective jurors by the time of jury selection. (RDA 3592). Based on the fifth *Rolling* factor of whether all the defense peremptory challenges had been exhausted, the prosecutor advocated attempting to select a jury before the trial court made a ruling on the motion for change of venue. (RDA 3595). The trial court reserved ruling until she read all the materials. (RDA 3597-98).

On December 15, 2015, the trial court reserved ruling on the motion to change venue until the parties attempted to choose a jury in Duval County. (RDA 3613). The trial was continued for years due to the ongoing *Hurst* litigation regarding the constitutionality of Florida's death penalty statute.

On February 5-9, 2018, the trial court conducted a week-long jury selection. (T. 1-990). At the start of jury selection, the defense renewed the motion for change of venue. (T. 4). The defense supplemented the motion with more recent

articles that detailed Smith's prior convictions, labeled him a sexual offender, and referred to inadmissible evidence which had been published over the prior weekend. (T. 4). The defense noted the agreement regarding redactions of the 911 call prior to releasing the tape to the media but stated that the articles had quoted verbatim the 911 call. (T. 4). The prosecutor did not object and the trial court granted the motion to supplement the pending motion for change of venue. (T. 5).

The trial court employed both written questionnaires, which are included in the record, and individual voir dire during jury selection. (RDA 2002-2709). There were approximately 300 prospective jurors. (T. 9). The trial court divided the prospective jurors in groups of 100 to have them fill out a written questionnaire. (T. 8). The written questionnaire asked the prospective juror to list their social media accounts and provided four blank lines to answer that question. The written questionnaire contained a short factual statement regarding the date and basic facts of the crime and then asked a series of questions regarding whether the prospective juror had read or heard about Donald Smith or the victim, Cherish Perrywinkle, or the victim's mother, Rayne Perrywinkle. The questionnaire asked the prospective juror what they had read or heard about the case and from what source and provided six blank lines to answer that question. The trial court had the three groups of 100 jurors fill out the written questionnaire and then in turn excused that group for that day. (T. 9).

The trial court then conducted a two-stage jury selection process. The first stage involved questioning of those prospective jurors whose answers to the written questionnaire raised concerns. Many of those prospective jurors were then dismissed.

The trial court then selected 80 prospective jurors whose answers to the written questionnaire did not raise any obvious concerns to be further questioned by the parties. The final jury was selected from that first group of 80 prospective

jurors. Both the State and the defense used all ten of their peremptory challenges. (T. 972). The defense explicitly and specifically declined to request any additional peremptory challenges. (T. 972). The final jury was: juror #7; juror #13; juror #15; juror #17; juror #18; juror # 24; juror # 29; juror #33; juror #34; juror #46; juror #62 and juror #63. (T. 973).[12]

Juror #7 testified that she was a student who moved to Jacksonville in 2014 and was unaware of this case until she filled out the questionnaire the previous day. (T. 160-61). Juror #13 testified to having seen the news years prior, when the crime originally occurred, but did not know anything about the defendant's past. (T. 171-72). Juror #15 testified as to having seen the news outlining the nature of the case "the other day" but other than that had no knowledge of Smith or the crime. (T. 183-84). Juror #17 testified as to having no prior knowledge about the case prior to filling out the questionnaire. (T. 220-21). Juror #18 testified that he had seen news coverage of the case and knew what the defendant was accused of but did not have any additional knowledge about the defendant or the case. (T. 221-22). Juror #24 testified as to having seen news reports of the crime but also testified as to not knowing any additional information about Smith or the crime other than the location "Dunn Avenue" was involved in the case. (T. 243-45). Juror #29 testified as to seeing the news about Smith and the victim in the case and knowing the trial was coming up, but also testified as to not having any additional information about Smith, the victim's mother, or the case itself beyond the allegations against the defendant. (T. 266-67). Juror #33 testified that she had no knowledge of Smith or the case beyond someone outside the courthouse telling her it might involve the "kidnapping of a man." (T. 270-71).

---

[12] The juror's name, address, date of birth, occupation, and employer are available on the written questionnaires by juror number. (RDA 2002-2709). The alternates did not serve in either the guilt phase or the penalty phase.

Juror #34 testified that she knew about Smith, the victim, and the victim's mother from the news, but she did not know anything about any of their pasts and she could serve on the jury impartially because she saw Smith as a human being. (T. 271-75). Juror #46 testified that he had heard about the case on the news two to three years ago, but he had no knowledge of Smith's past, the victim's mother's past, or anything else about the case beyond the allegations against the defendant. (T. 295-96). Juror #62 testified to knowing about the general allegations in the case from the news but testified as to not knowing anything about Smith's past or the victim's mother's past. (T. 339-40). Juror #63 testified that he had not heard anything about the case at all prior to filling out the questionnaire. (T. 340-41).

The trial court informed the jury that, no doubt, there would be "a lot of coverage" of the case. (T. 986). The trial court instructed the jurors not to watch the news and not to read the newspapers. (T. 986). She cautioned against letting any family or friends discuss the case with them as well. At the end of jury selection, the trial court inquired of the attorneys if there were "any exceptions or objections" or anything else. (T. 988). Defense counsel responded: "No, Your Honor." (T. 988). The defense did not renew the motion for change of venue or request a final ruling on the motion.

At the start of the trial on February 12, 2018, the trial court swore the jury without objection or any request for a final ruling on the motion for change of venue. (T. 998). The trial court inquired of the jurors whether they had followed her instructions of not receiving any outside information on the case and all the jurors agreed that they had followed those instructions. (T. 999). The defense did not renew the motion for change of venue or request a final ruling on the motion at that point either.

During the preliminary instructions before the start of the testimony in the guilt phase, the trial court instructed the jury not to use their cell phones or any other electronic device to "find out any information about this case" or to talk with anyone about the case. (T. 1002). The trial court also instructed the jury that the case must be tried only on the evidence presented during the trial and not to conduct any investigation on their own which included reading the newspapers, watching television, using a computer or cell phone to get information related to the case. (T. 1003).

At the end of the guilt phase, the defense waived sequestration of the jury during the guilt phase deliberations. (T. 1401). The trial court instructed the jury again not to discuss the case with anyone and not to look at the news or internet, not to listen to the radio, or read the paper. (T. 1403). The trial court told the jury that the they "can only have the information that you get in the courtroom" to "make your decision." (T. 1403). The defendant also waived the right to have the jury sequestrated during the penalty phase deliberations. (T. 2000).

There was no ruling from the trial court on the motion for change of venue.[13]

Preservation/abandonment/fundamental error

There are two separate types of denial of an impartial jury claims. *United States v. Campa*, 459 F.3d 1121, 1143 (11th Cir. 2006) (en banc) (noting the two methods). The first type is a claim that the defendant was denied a fair trial due to widespread publicity, where prejudice is presumed, regardless of the actual

[13] Opposing counsel states that the trial court denied the motion for change of venue both in the fact section and in the argument section of the initial brief but does not provide a citation to the record in support of that statement in either place in the brief. IB at 10, 20. The initial brief states Issue I as a claim of fundamental error in the table of contents but not as one of fundamental error in the body of the brief. IB at 20.

jury. The second type is a claim that the defendant was denied a fair trial because a member of the jury was actually prejudiced against him. *Id.* at 1143.

The second type of claim, that of an actually biased juror, was not raised below and therefore, is not preserved. The defense explicitly declined to request any additional peremptory challenges. (RDA 972). And the defense failed to identify any particular juror who the defense thought was biased due to pretrial publicity. And indeed, the defense fails to do so in this Court either. The initial brief does not identify any particular juror who was biased by the publicity. Any issue regarding the change of venue based on actual bias was not preserved in the trial court or properly presented on appeal to this Court.

Only the first type of claim regarding presumed prejudice was raised in the trial court in this case. So, the only issue before this Court is the issue of whether the pretrial publicity was so inflammatory and pervasive that prejudice must be presumed. But there does not seem to be any final ruling from the trial court on the motion for change of venue. The trial court originally reserved ruling on the motion until after jury selection. While the defense renewed the motion at the beginning of jury selection, the defense did not obtain a ruling on the motion at the end of jury selection. At the beginning of jury selection, the trial court only ruled on the motion to supplement the motion for change of venue, not on the motion for change of venue itself. The trial court may not have understood which of the two types of claims the defense was raising because defense counsel never clarified which of the two types they were raising. The trial court understandably may have thought that the defense was satisfied with the jury at the end of jury selection when it did not request any additional peremptory challenges and did not renew the motion for change of venue or request a final ruling on the motion. Indeed, when the trial court inquired of the attorneys at the end of jury selection

if there were "any exceptions or objections" or anything else, defense counsel responded: "No, your Honor."

The motion for change of venue was abandoned by the failure to obtain a ruling. *Sparre v. State*, 289 So.3d 839, 848 (Fla. 2019) (explaining that to preserve an issue for appeal, a party must obtain a ruling from the trial court); *Simpson v. State*, 3 So.3d 1135, 1146 (Fla. 2009) (stating that a party's failure to obtain a ruling on a motion fails to preserve the issue for appeal citing *Armstrong v. State*, 642 So.2d 730, 740 (Fla. 1994)).

But a change of venue based on presumed prejudice is not fundamental error. As Justice Scalia, writing for the majority in *Puckett v. United States*, 556 U.S. 129, 134 (2009), observed, appellate courts, by not enforcing the contemporaneous objection rule, encourage sandbagging where counsel intentionally remains silent and then belatedly raises the error only if the case does not conclude in his favor. Relief based on unpreserved error should be, in the *Puckett* Court's words, "strictly circumscribed." *Id.* Expansive views of fundamental error by appellate courts are "fatal" to criminal trials. *Puckett*, 556 U.S. at 134. The concept of fundamental error should be, in this Court's own words, "very guardedly" applied. *Martin v. State*, ___ So.3d ___, 45 Fla. L. Weekly S21, 2020 WL 238546,*22 (Fla. Jan. 16, 2020) (quoting *Farina v. State*, 937 So.2d 612, 629 (Fla. 2006)). The failure to obtain a ruling can be a form of sandbagging as well as silence.

But the presumed prejudice type of claim is not fundamental error. Only the second type of claim, the claim of actual bias of a particular juror, can be raised as fundamental error. *Cf. Skilling v. United States*, 561 U.S. 358, 425 (2010) (Alito, J., concurring) (advocating that there only be one claim regarding an impartial jury, which would be a claim of actual bias of an actual juror, because that is the only type in the text of the constitution and pointing out the difficulty in gauging when pretrial publicity is severe enough to warrant a presumption of prejudice).

While Justice Alito was the single voice advocating that view in *Skilling* where the issue had been properly preserved, the rest of the Court would likely agree with that view if such a claim was raised as a claim of structural error. There was no fundamental error in not changing the venue of the trial to a different county.

Standard of review

The standard of review for a trial court's ruling on a motion for a change of venue is abuse of discretion. *Overton v. State*, 976 So.2d 536, 572 (Fla. 2007) (citing *Rivera v. State*, 859 So.2d 495, 511 (Fla. 2003)); *Straight v. State*, 397 So.2d 903, 906 (Fla. 1981) ("A motion for change of venue is a matter addressed to the sound discretion of the trial court. . . ."). The standard of review for a claim of fundamental error, however, is *de novo*. *State v. Smith*, 241 So.3d 53, 55 (Fla. 2018) (stating that whether an error is fundamental "is a question of law we review *de novo*"). Smith has obtained a more favorable standard of review in the appellate court by failing to obtain a ruling from the trial court on his motion for change of venue in the trial court. *Grant v. State*, 266 So.3d 203, 205 (Fla. 4th DCA 2019) (noting that while normally the standard of review is an abuse of discretion, because there was no objection, the standard of review became *de novo*). This is but one of the myriad of problems with an expansive view of the concept of fundamental error and another reason that fundamental error should be, in this Court's own words, "very guardedly" applied. *Martin v. State*, ___ So.3d ___, 45 Fla. L. Weekly S21, 2020 WL 238546, *22 (Fla. Jan. 16, 2020) (quoting *Farina v. State*, 937 So.2d 612, 629 (Fla. 2006)).

Merits

The defendant is constitutionally entitled to an impartial jury. U.S. Const. amend. VI (providing that in all criminal prosecutions the accused shall enjoy the

right to a speedy and public trial, by an impartial jury); Art. I, § 16(a) Fla. Const. (providing that in all criminal prosecutions the accused shall have the right to a speedy and public trial by impartial jury). But, under Florida law, a "defendant may move for a change of venue on the ground that a fair and impartial trial cannot be had in the county where the case is pending for any reason other than the interest and prejudice of the trial judge." *Ellerbee v. State*, 232 So.3d 909, 919 (Fla. 2017) (citing Fla. R. Crim. P. 3.240). The change of venue statute, section 47.121, Florida Statutes (2020), provides: "A change of venue shall be granted when it appears impracticable to obtain a qualified jury in the county where the action is pending."

Again, there are two different types of impartial jury claims. *United States v. Campa*, 459 F.3d 1121, 1143 (11th Cir. 2006) (en banc) (noting the two types). The first type is a claim that the defendant was denied a fair trial due to publicity, where prejudice is presumed, regardless of the bias of the actual petit jury. The second type is a claim that the defendant was denied a fair trial because a juror was actually biased against him. *Id.* at 1143. Smith seems to be raising the presumed prejudice type of claim.

Presumed prejudice from publicity

Smith argues that the publicity regarding his case was so extensive and inflammatory that the motion for change of venue should have been granted based on a presumption of prejudice in the community, regardless of the actual jury selection. Opposing counsel invokes the presumed prejudice line of cases such as *Rideau v. Louisiana*, 373 U.S. 723 (1963), *Estes v. Texas*, 381 U.S. 532 (1965), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966), as well as this Court's decision in *Manning v. State*, 378 So.2d 274 (Fla. 1979), as support. IB at 25-27.

But pretrial publicity by itself does not establish that a defendant was deprived of a fair trial, even if the publicity was pervasive and adverse to the defendant. *Skilling v. United States*, 561 U.S. 358, 384 (2010) (noting that pretrial publicity "even pervasive, adverse publicity" does not inevitably lead to an unfair trial). As the United States Supreme Court observed long ago, regarding high-profile criminal prosecutions, "scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits." *Reynolds v. United States*, 98 U.S. 145, 155-56 (1878). As this Court has observed many times, pretrial publicity is "normal and expected in certain kinds of cases, and that fact standing alone will not require a change of venue." *Ellerbee v. State*, 232 So.3d 909, 919 (Fla. 2017) (quoting *Griffin v. State*, 866 So.2d 1, 12 (Fla. 2003)). "Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue." *Morris v. State*, 233 So.3d 438, 445 (Fla. 2018) (quoting *McCaskill v. State*, 344 So.2d 1276, 1278 (Fla. 1977)); *see also In re Tsarnaev*, 780 F.3d 14, 15-16 (1st Cir. 2015) (observing that knowledge about the crime "does not equate to disqualifying prejudice"). "Extensive pretrial publicity is not enough to raise the presumption" and "qualified jurors need not be totally ignorant of the facts and issues involved in a case." *Morris v. State*, 233 So.3d 438, 445 (Fla. 2018) (quoting *Bundy v. State*, 471 So.2d 9, 19-20 (Fla. 1985)). Rather, some unusual prejudice must flow from the publicity. *See, e.g., Ex parte Smith*, 282 So.3d 831, 844 (Ala. 2019) (concluding change of venue was required in a case where the judge in a pretrial hearing commented that he did not believe the defendant's testimony in open court with the media present which then widely reported the judge's comment).[14]

[14] The widespread prejudice in the community in a motion for change of venue cannot be based solely on a general distaste for crimes against children because that distaste would be present in other venues as well. Jacksonville is

Opposing counsel's reliance on *Rideau v. Louisiana*, 373 U.S. 723 (1963), *Estes v. Texas*, 381 U.S. 532 (1965), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966), is misplaced. *Rideau* involved a confession to bank robbery in Lake Charles, Louisiana. The robber kidnapped three bank employees and then killed one of them. *Rideau*, 373 U.S. at 723-24. Rideau confessed to the crime at the sheriff's office and his confession was televised three times and was watched by a large percentage of citizens of the population of the parish. *Id.* at 724. As many as 97,000 people out of a population of 150,000 in the parish may have seen one of the multiple broadcasts of the confession. *Id.* *Rideau* can be read as creating a presumption of jury prejudice when a large percentage of citizens hear about very damning evidence, such as a confession, that was not admitted at trial. The confession was not admitted at trial in *Rideau*. *Rideau*, 373 U.S. at 730 (Clark, J., dissenting) (noting "neither the filmed interview nor any transcript of it was shown or read to the jury"). The confession was not suppressed based directly on a *Miranda* violation because *Rideau* was decided in 1963 which was three years prior to the decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). But the *Rideau* majority expressed *Miranda*-like concerns with the confession at the sheriff's office being like a trial conducted in "a jail, presided over by a sheriff, where there was no lawyer to advise Rideau of his right to stand mute." *Rideau*, 373 U.S. at 727. The *Rideau* majority's concern was that a large percentage of the parish's population knew about that "kangaroo court" at the sheriff's office that lead to the confession. *Id.* But this case, unlike *Rideau*, did *not* involve widespread reports or social media posts of a full confession that was not admitted at trial. *In re Tsarnaev*, 780 F.3d 14, 22 (1st Cir. 2015) (affirming the denial of a motion for

---

hardly unique in its distaste for violent crimes with young victims and defense counsel certainly did not attempt to establish that the citizens of Duval County are particularly strident in their views of these types of crimes.

change of venue in the Boston Marathon case, in part, because there was no confession in the case unlike *Rideau*). While some of the articles in this case involved facts that would not be admitted at trial as evidence such as Smith's non-violent criminal history and his asking for an attorney after being confronted with the videotape of his leaving the store with the victim, there was no inadmissible confession in this case. *Rideau* does not apply here just as it did not in *Tsarnaev*.

Estes and *Sheppard* primarily involved media interference with courtroom proceedings during trial where the media created a carnival atmosphere during the trial. *Sheppard*, 384 U.S. at 355, 358 (characterizing the trial as "bedlam" and a "carnival atmosphere"). In *Sheppard*, 20 reporters were allowed to establish a press table inside the bar and were permitted to handle and photograph the trial exhibits during recesses. *Sheppard*, 384 U.S. at 355 (characterizing the reporters being permitted inside the bar as "unprecedented"). While opposing counsel speak of the media presence at all the hearings in this case, the mere presence of the media does not equate to "bedlam" and a "carnival atmosphere." *Estes* and *Sheppard* do not apply either.

Smith's reliance on *Manning v. State*, 378 So.2d 274 (Fla. 1979), is equally misplaced. IB at 26-27. Columbia County where the murder of the two deputies sheriffs occurred, was, in 1976, in this Court's words, a "small rural community." *Id*. at 274. Columbia County's population at that time was approximately 30,000. See U.S. Census Bureau. Duval County's current population is over 30 times that size. See U.S. Census Bureau. Furthermore, there was a racial aspect to *Manning* that is not present in this case. Both the victim and the defendant in this case were white.

Opposing counsel only cites in passing the later cases from the United States Supreme Court dealing with the presumption of prejudice that arises from publicity. *United States v. Tsarnaev*, 2014 WL 4823882, *3 (D. Mass. Sept. 24,

2014) (noting that *Rideau*, *Estes,* and *Sheppard* are all are about fifty years old and observing "both the judicial and media environments have changed substantially during that time"). But, under that more current caselaw, the presumption of prejudice does not arise.

In *Skilling v. United States*, 561 U.S. 358 (2010), the United States Supreme Court affirmed the conviction of an Enron executive. Enron grew from its headquarters in Houston, Texas, into the seventh highest-revenue-grossing company in America but then went bankrupt. *Id.* at 367-68. Skilling was at one time Enron's president and then he was its chief operating officer, and later, he was chief executive officer. *Id.* at 368. The Government alleged Skilling and other executives were part of an "elaborate conspiracy" to overstate the company's finances. *Id.* at 368-69. Enron's bankruptcy caused unemployment as well as adversely effecting retirement pensions, with that economic harm being centered in the Houston area.

Skilling moved for a change of venue out of the Houston area due to the extensive pretrial publicity which he supported with "hundreds" of news reports. *Skilling*, 561 U.S. at 369. The district court denied the motion concluding, that while there had been some "intemperate commentary" on the case, the coverage had mostly been "objective and unemotional." *Id.* at 370. The district court did, however, employ an extensive questionnaire during jury selection that asked the prospective jurors 77 questions relating to their exposure to Enron-related publicity and conducted individual *voir dire* of some of the prospective jurors. *Id.* at 370-74.

The Fifth Circuit had ruled that a presumption of prejudice arose due to the economic harm the collapse of Enron caused to Houstonians but concluded that presumption was rebutted based on the jury selection procedures employed by the trial judge. *Skilling*, 561 U.S. at 375-76. The Fifth Circuit based its finding of

prejudice "based primarily on the magnitude and negative tone" of the coverage. *Id.* at 384. But the High Court disagreed with this finding because "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Id.* (citing *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554 (1976)).

In the United States Supreme Court, Skilling argued that the publicity was so extensive that a presumption of prejudice under *Rideau v. Louisiana*, 373 U.S. 723 (1963), arose. The High Court held that no presumption of prejudice arose. *Skilling*, 561 U.S. at 368, 385. The High Court noted that its decisions "have rightly set a high bar" for claims of presumed prejudice due to pretrial publicity noting the societal value of newspaper coverage of the court system. *Id.* at 399, n.34. The High Court first discussed the case of *Rideau* noting that the defendant's confession had been televised repeatedly and was watched by tens of thousands of people in the community. *Skilling*, 561 U.S. at 379. The Court also discussed the cases of *Estes v. Texas*, 381 U.S. 532 (1965), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966). *Skilling*, 561 U.S. at 379-80. The *Skilling* Court explained that in each of the cases where it had overturned a conviction based on a presumption of prejudice due to publicity, the convictions had been obtained in a trial atmosphere that was "utterly corrupted" by publicity. *Id.* at 380. The Supreme Court stated that the presumption of prejudice due to adverse press coverage "attends only the extreme case." *Id.* at 381. The *Skilling* Court noted that the Court's prior decisions had "emphasized" both "the size and characteristics of the community in which the crime occurred." *Id.* at 382 (citing *Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991), and *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044 (1991)). The High Court in *Skilling* observed that Houston, in contrast to the parish at issue in *Rideau*, was "the fourth most populous city in the Nation" with more than 4.5 million eligible jurors. The *Skilling* Court reasoned that given "this large, diverse pool of potential jurors, the suggestion that 12

impartial individuals could not be empaneled is hard to sustain." *Id*. at 382. The Court concluded that "Houston's size and diversity diluted the media's impact." *Id*. at 384.

The Court observed that, while the press coverage of Skilling was "not kind," the news stories contained no suppressed confession or other blatantly prejudicial information of the type prospective jurors could not reasonably be expected to ignore. *Skilling*, 561 U.S. at 382-83. Unlike Rideau's dramatic confession which was "likely imprinted indelibly in the mind of anyone who watched it," there was no smoking-gun evidence in the coverage. The Court also noted that several years has passed between Enron's collapse and Skilling's trial. *Id*. at 383. It had been over four years between Enron's bankruptcy and Skilling's trial. The Court observed that, although the coverage continued during the trial, the "decibel level" of the coverage, diminished. The Court also considered that the jury had acquitted Skilling of nine counts. *Id*. at 383. The Court additionally considered the "widespread community impact" of Enron's failure and the guilty plea of a co-defendant shortly before trial but concluded the district court's "extensive screening questionnaire and follow-up *voir dire*" was well suited to the task of identifying biased jurors. *Skilling*, 561 U.S. at 384-85. The *Skilling* Court concluded that no presumption of prejudice arose. *Id*. at 385.

Justice Alito concurred in *Skilling*. *Skilling*, 561 U.S. at 425 (Alito, J., concurring). But, in his view, the requirement of an impartial jury "is satisfied so long as no biased juror is actually seated at trial." He explained, based on the text of the Sixth Amendment, what is required is "an impartial jury" and if the jury that sits and returns a verdict was impartial, "a defendant has received what the Sixth Amendment requires." *Id*. at 426. He pointed to the difficulty in gauging when pretrial publicity is severe enough to warrant a presumption of prejudice. He also explained that *Sheppard* and *Estes* primarily "involved media interference

with courtroom proceedings during trial" and *Rideau* involved "unique events in a small community." *Id.* In others words, Justice Alito does not think that the courts should ever just presume prejudice from publicity and there should be only one type of legal claim regarding juries which would be that an actually biased juror sat on the defendant's jury.

The *Skilling* Court identified seven factors to determine whether the publicity warrants a change of venue: 1) media interference with courtroom proceedings; 2) the magnitude and tone of the coverage; 3) the size and characteristics of the community in which the crime occurred; 4) the amount of time that elapsed between the crime and the trial; 5) the jury's verdict; 6) the impact of the crime on the community; and 7) the effect, if any, of a codefendant's publicized decision to plead guilty. Considering all of these factors, the Court held that no presumption of prejudice arose. *See also In re Tsarnaev*, 780 F.3d 14 (1st Cir. 2015) (denying a petition for mandumus regarding the denial of a motion for change of venue in the Boston Marathon bombing in which three people were killed and over 200 people were injured relying on *Skilling*).

Other state supreme courts apply the seven *Skilling* factors to determine if prejudice from publicity should be presumed. *State v. Miller*, 427 P.3d 907, 920-24 (Kan. 2018) (applying the seven *Skilling* factors in a case where the publicity involved a retrial which informed the public that the first jury had convicted him and concluding that a presumption of prejudice was not warranted under "the extremely high standard" the Kansas Supreme Court set for such claims).

Applying the seven *Skilling* factors to this case, no presumption of prejudice arises. Regarding the first factor of media interference, there is no allegation that the media interfered in any manner whatsoever with any of the courtroom proceedings. Regarding the second factor of the magnitude and tone of the coverage, while the coverage continued during the trial, the "decibel level"

diminished. There was no publicity regarding an inadmissible confession in this case because there was no actual confession. And while some of the articles referred to facts that would not be admitted into evidence, the smoking-gun evidence in this case was the videotape of Smith leaving the Walmart with Cherish and the DNA evidence and both of those were admitted at trial. Opposing counsel points to no actual juror who served on the jury who knew about Smith's prior convictions. Regarding the third factor of the size and characteristics of the community, Jacksonville is a large city. At the time of this trial in February of 2018, the population of Duval County was slightly over 900,000 people. *See* U.S. Census Bureau. While Houston's population in January of 2006 when the jury selection in the *Skilling* case occurred, was certainly much larger than Jacksonville's population, both are large cities. *Skilling*, 561 U.S. at 373. Jacksonville, like Houston, which was the setting for the trial in *Skilling* and like Boston, which was the setting for the trial of the Marathon Bomber, "is a large, diverse metropolitan area." *In re Tsarnaev*, 780 F.3d at 21. Jacksonville's population is over 30% African-American and nearly 10% Hispanic. *See* U.S. Census Bureau. Here, as in *Skilling*, given "this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empaneled is hard to sustain." *Skilling*, 561 U.S. at 382. Regarding the fourth factor of the amount of time that elapsed between the crime and the trial, several years had elapsed between the crime and the trial. This crime occurred in June of 2013 but jury selection occurred over four years later, in February of 2018. Regarding the fifth factor of the jury's verdict, this factor is neutral. While the jury convicted Smith of all counts, there is no hint of overconviction given the videotape of the kidnapping and the DNA evidence of the rape and murder. Regarding the sixth factor of the impact of the crime on the community, there was little impact. The crime had no economic impact on Jacksonville, unlike *Skilling* and because Smith

was arrested early the next day, there was no widespread fear in the community, unlike the situation in Gainesville in the case of *Rolling v. State*, 695 So.2d 278 (Fla. 1997). And, while the victim's funeral at the Highlands Baptist Church, where she had been found, drew a large crowd, that was understandable and does not inculpate Smith. Mourning a victim does not equate to condemning a particular defendant. Regarding the seventh factor of a codefendant's plea, there was no codefendant in this case. Smith committed this crime alone. That factor does not apply at all. Under the *Skilling* factors, this claim of presumed prejudice from the pretrial publicity fails.

Additionally, here, as in *Skilling*, there was a written juror questionnaire and individual voir dire. As in *Skilling*, the juror questionnaire and individual voir dire was "well suited" to the task of identifying any biased jurors. *Skilling*, 561 U.S. at 384-85. The trial court in this case had 300 prospective jurors fill out the written questionnaire and the final jury was selected from those without any obvious bias based on that questionnaire. As in *Skilling*, no presumption of prejudice arose in this case due to publicity.

Eleventh Circuit precedent

In *United States v. Campa*, 459 F.3d 1121, 1142-55 (11th Cir. 2006) (en banc), the Eleventh Circuit affirmed the denial of a motion for change of venue in a prosecution for conspiring to act as unregistered Cuban intelligence agents based on a claim that the defendants were unable to obtain a fair and impartial trial, due to the "pervasive community prejudice against the Cuban government." *Id.* at 1126. Before the trial, four defendants moved for change of venue based on a telephone survey of the Miami–Dade County community showing 40% of those surveyed said "they would find it difficult to be impartial" and newspaper articles. *Id.* at 1127-29. The Government opposed the change of venue pointing out that

the newspaper articles were "accurate, objective, and unemotional," not sensational like in the cases where prejudice was presumed. *Id.* at 1130. The district court denied the motion for change of venue finding the pretrial publicity was not sufficiently pervasive and inflammatory to raise a presumption of prejudice. *Id.* at 1131. The district court, with input from the attorneys, developed an "exhaustive" list of questions for voir dire and employed a small group jury selection process over the seven days of jury selection. *Id.* at 1132-35. The district court granted the defense extra peremptory challenges but the defense did not use all of their peremptory challenges. *Id.* at 1135. The defense also struck every Cuban–American prospective juror. *Id.* at 1135-36. The district court empaneled the jury without objection and the defense stated that they were "very happy" with the jury and did not renew the motion for change of venue. *Id.* at 1137. During the trial, however, the defense renewed their motion for change of venue twice based on "community events and trial publicity." *Id.* at 1138. The judge inquired if any of the jurors had seen or heard the media accounts of the trial but none of the jurors raised their hands. *Id.* at 1138-39. The district court denied the renewed motion. After the trial, the defense renewed the motion for change of venue, despite the actual jury being accepted without any objection, asserting that a fair and impartial jury simply could not be seated in Miami–Dade County. *Id.* at 1140. The district court again denied the renewed motion detailing the numerous steps taken to insure an impartial jury.

The Eleventh Circuit, in an en banc decision, held that the district court did not abuse its discretion in finding that the pretrial publicity was not so inflammatory and pervasive as to raise a presumption of prejudice. *Campa*, 459 F.3d at 1144. The en banc Court explained that the defendant had the burden to establish that inflammatory pretrial publicity "saturated" the community and that burden was an "extremely heavy one." *Id.* at 1143. Unless the media coverage

"utterly corrupted" the atmosphere, courts do not presume prejudice. *Id.* at 1144, n.198 (citing *Dobbert v. Florida*, 432 U.S. 282, 303 (1977), and *Murphy v. Florida*, 421 U.S. 794, 798 (1975)). The Eleventh Circuit noted that the High Court had distinguished between publicity that was "largely factual" and that which was "inflammatory" in *Murphy v. Florida*. The *Murphy* Court had also distinguished between jurors who were familiar with the defendant and the crimes and jurors who were predisposed against the defendant. The *Campa* Court concluded that the news materials submitted by the defendants fell "far short of the volume, saturation, and invidiousness of news coverage sufficient to presume prejudice." *Id.* at 1145. The Eleventh Circuit explained that many of the articles submitted by the defense were published a year before and were "too factual" to be considered inflammatory or prejudicial. *Id.* at 1145. The Eleventh Circuit noted that "not a single juror" indicated that he or she was in any way influenced by the coverage. *Id.* The Eleventh Circuit concluded the defendants had failed to show their trial was "utterly corrupted" by the coverage. The *Campa* Court observed that Miami–Dade County was a "widely diverse, multi-racial community of more than two million people." *Id.* at 1154. The Court concluded that the threshold for a change of venue is "rightfully a high one" and the defendants had not satisfied it. *Campa*, 459 F.3d at 1154.

Here, as in *Campa*, the media materials presented to this Court by opposing counsel falls "far short of the volume, saturation, and invidiousness of news coverage sufficient to presume prejudice." *Campa*, 459 F.3d at 1145. All opposing counsel has shown is that there was a great deal of media coverage of this case, mainly at the time of the crime in 2013. That is not nearly enough to invoke the presumed prejudice line of cases. The atmosphere of Duval County was not "utterly corrupted" by the coverage.

Florida Supreme Court precedent

This Court has held that a change of venue was not warranted in several cases involving much more extensive pretrial publicity than was present in this case. *Ellerbee v. State*, 232 So.3d 909, 920 (Fla. 2017) ("We have held that a change of venue was not warranted in several cases involving much more extensive pretrial publicity" citing and discussing *Rolling v. State*, 695 So.2d 278, 287 (Fla. 1997)). The *Ellerbee* Court noted that *Rolling* involved the serial killings of five college students which "deeply affected" the college town of Gainesville and had "generated overwhelming local and national media attention," yet this Court affirmed the denial of the motion for change of venue in *Rolling*. *Ellerbee*, 232 So.3d at 920.

In *Morris v. State*, 233 So.3d 438, 444-46 (Fla. 2018), this Court affirmed the denial of motion for change of venue in a direct appeal. The trial court had originally granted a change of venue but then granted the State's motion to hold the trial in the original county due to the time that had elapsed between the crimes and the trial. Morris murdered five victims including two law enforcement officers and there was "significant" publicity including publicity surrounding the "massive manhunt" for him. *Id*. at 444. And once again, this Court affirmed the denial of a motion for change of venue.

This Court often employs five factors in determining whether a motion for change of venue should be granted. *Dubose v. State*, 210 So.3d 641, 654 (Fla. 2017) (citing *Rolling v. State*, 695 So.2d 278, 285 (Fla. 1997), and affirming the denial of a motion for change of venue despite the publicity surrounding the case including that multiple disparaging remarks about the defendants that had been made by the Jacksonville Sheriff's Office had been reported). The five factors are: 1) the length of time that has passed from the date of the crime to the date of jury selection and when, within that time, the publicity occurred; 2) whether the

publicity consists of inflammatory accounts rather than straight, factual accounts; 3) whether the publicity consists of the police's or the prosecutor's version of events to the exclusion of the defendant's version; 4) the size of the community; and 5) whether the defendant exhausted all of his peremptory challenges. *Ellerbee*, 232 So.3d at 919 (citing *State v. Knight*, 866 So.2d 1195, 1209 (Fla. 2003); *Dubose*, 210 So.3d at 654 (citing *Rolling*, 695 So.2d at 285).

Regarding the first factor of the time that has elapsed, nearly five years had elapsed between the crime and the jury selection. The crime occurred in June of 2013 and jury selection was in February of 2018 which was over four-and-a-half years later. And, as opposing counsel admits, many of the articles and social media posts, as well as the television coverage, such as the coverage of the funeral, were around the time of the crime in 2013. IB at 9. Prospective jurors are not going to remember details such as a local prominent attorney's comments on the case in articles they read over morning coffee more than four years earlier. Regarding the second factor of whether the publicity was inflammatory or consisted of mainly of factual accounts, no doubt some of the coverage and social media posts were "not kind." But due to their limited audience, social media posts should not be considered, or, if considered, should not be weighed heavily because such posts are simply one person's opinion made in a forum known for being intentionally provocative. *Skilling v. United States*, 561 U.S. 358, 383 (2010) (quoting *United States v. Chagra*, 669 F.2d 241, 251-52, n.11 (5th Cir. 1982) ("A jury may have difficulty in disbelieving or forgetting a defendant's opinion of his own guilt but have no difficulty in rejecting the opinions of others because they may not be well-founded.")). Moreover, while the coverage referred to Smith's prior crimes against other children, again, opposing counsel points to no actual juror

who served on the jury who knew about Smith's prior convictions.[15] Regarding the third factor of the slant of the accounts toward the prosecution, the prosecutor's office did not make any inflammatory statements in this case, as in *Irvin v. Dowd*, 366 U.S. 717 (1961), or as in *Dubose v. State*, 210 So.3d 641, 654 (Fla. 2017). Regarding the fourth factor of the size of the community, again, Jacksonville is a large diverse community. *Dubose*, 210 So.3d at 655 (noting that argument was made that the defendants could not receive a fair trial in Duval County, based on the size of the county). In a county with hundreds of thousands of eligible prospective jurors, like Duval County, it is difficult to believe that twelve unbiased jurors, uninfluenced by the publicity and indifferent to, or even totally unaware of, social media posts, could not be found. *Skilling*, 561 U.S. at 382 (reasoning that given "this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empaneled is hard to sustain"). Regarding the fifth factor of exhausting all peremptory challenges, while the defense used all of its peremptory challenges during jury selection, the defense explicitly and specifically declined to request any additional peremptory challenges. (RDA 972). A trial court that engaged in this elaborate and lengthy

---

[15] Opposing counsel insists that the news stories "contained blatantly prejudicial information" of the type readers cannot "reasonably be expected to shut from sight" without identifying any particular story or what date that story was published. IB at 28. Opposing counsel also asserts, in an equally *ipse dixit* manner, that the publicity favored the prosecution without citation to any particular story. IB at 28. The State cannot be expected to guess which story in the massive supplemental materials opposing counsel is referring to in these statements. Properly identifying the particular stories in the reply brief is too late for the State to have an opportunity to respond in writing. *Sparre v. State*, 289 So.3d 839, 849 (Fla. 2019) (concluding that an issue was not timely and fairly preserved for appeal because counsel did not point out the specific deposition testimony at issue until after the evidentiary hearing in the written closing arguments which was "too late for the State to respond" because the State had already filed its written closing).

jury selection process is likely to have granted additional peremptory challenges if requested, if defense counsel had identified a particular juror or two and articulated particular concerns about those jurors.

Smith fails most, if not all, of these factors. Even if the publicity was more than just straight, factual accounts and favored the prosecutor's version of events, Smith has not established the other factors. Under the *Rolling* factors, the trial court properly denied the motion for change of venue.[16]

As for a claim of actual bias, given that the defense did not identify any particular juror that it believed to be actually biased against Smith and specifically declined to request any additional peremptory challenges, any actual bias claim necessarily fails. A defendant must identify a specific juror as well as the exact nature of that juror's bias in the trial court and ask for an additional peremptory challenge and have that request denied before raising an actual biased juror claim. A defendant may not identify the particular jury and the nature of the bias for the first time on appeal, much less a defendant who did not request an additional peremptory challenge to strike that juror. Indeed, appellate counsel does not identify any particular juror or the nature of that particular juror's

---

[16] Many of this Court's five *Rolling* factors overlap with United States Supreme Court's seven *Skilling* factors. But the *Skilling* factors of the media interference; the jury's verdict; the impact of the crime on the community; and a codefendant's publicized plea are not considered in the *Rolling* factors. And the *Rolling* factor regarding peremptory challenges was not considered by the *Skilling* Court. This Court also typically requires an attempt to select a jury before granting a change of venue. *Morris v. State*, 233 So.3d 438, 445 (Fla. 2018) (stating, absent an extreme or unusual situation, the need to change venue should not be determined until an attempt is made to select a jury). Provided that this Court is not confusing the two types of claims by considering peremptory challenges and requiring an actual attempt to select a jury, the *Rolling* factors may satisfy the constitutional test of *Skilling* and would not be viewed as adopting Justice Alito's concurring view that there is only one type of impartial jury claim, which is not the view of the entire High Court.

alleged bias even on appeal. So, an actual bias claim was neither properly preserved in the trial court nor properly presented to this Court. *Hoskins v. State*, 75 So.3d 250, 257 (Fla. 2011) (explaining that an issue not raised in an initial brief is deemed abandoned); *United States v. Farias*, 836 F.3d 1315, 1326 (11th Cir. 2016) (explaining that arguments raised for the first time in a reply brief are not properly before a reviewing court). Any actual bias claim necessarily fails.

Accordingly, the trial court did not commit fundamental error by not changing the venue of the trial.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING THE MOTION FOR MISTRIAL MADE DURING THE MEDICAL EXAMINER'S TESTIMONY BASED ON THE MEDICAL EXAMINER'S STUTTERING DURING HER TESTIMONY AND ASKING FOR A RECESS? (Restated)

Smith asserts the trial court abused its discretion denying the motion for mistrial when the medical examiner hesitated during her testimony and requested a recess. IB at 31. Contrary to opposing counsel's characterization, while some of the jurors teared up while looking at the autopsy photographs, the medical examiner did not. It is the trial court that could actually see the extent of Dr. Rao's reaction to some of the jurors becoming emotional as well as the other juror's reaction to the medical examiner's hesitation. For that reason, this Court should defer to the trial court's judgment. The medical examiner's momentary hesitation and request to take a break to compose herself did not vitiate the entire trial and the trial court did not abuse its discretion in denying the motion for mistrial.

The trial court's ruling

Prior to the trial, the medical examiner, Dr. Rao, testified at the hearing on the admissibility of the autopsy photographs. (RDA 3980). The State presented her to testify regarding the autopsy photographs. (RDA 3984). Dr. Rao testified that she directed the taking of the photographs of the child's body at the crime scene. (RDA 3985-86). Dr. Rao also testified that she directed the photographs that were taken by the forensic photographer to document the victim's injuries during her autopsy of the victim. (RDA 3986).

Dr. Valerie Rao, the Chief Medical Examiner in Duval County, who performed the autopsy of the victim, testified at trial. (T. 1257-1306, 1262). Dr. Rao used the autopsy photographs during her testimony to illustrate the injuries to various

parts of the victim's body. (T. 1263, 1266-1290). Dr. Rao, while testifying regarding the dissection of the victim's throat, began stammering and requested a recess, stating: "I just need a break." (T. 1290). The trial court granted a ten-minute recess. (T. 1290-91). The jury left the courtroom. (T. 1291). After the jury left the room, defense counsel moved for a mistrial. (T. 1291). Defense counsel argued: "we have the Chief Medical Examiner on the stand crying during the testimony about her autopsy and she's previously testified that she has done thousands of autopsies" and moved for a mistrial. (T. 1291). "We believe this is so prejudicial that it cannot be cured by any kind of instruction." (T. 1291). The trial court denied the motion for mistrial. (T. 1291). Subsequently, defense counsel argued that the prejudice from the medical examiner crying before the jury was greater because she was a "professional witness." (T. 1292). The defense noted that showing the autopsy photographs was a "trying time for everybody" which was why the defense moved to exclude them. (T. 1292). The prosecutor noted that the medical examiner's response was to some of the jurors "showing visible emotion" and were "tearing up" during her testimony. (T. 1292-93). The prosecutor also noted that the medical examiner did not start "sobbing"; rather, she asked to take a moment. (T. 1292). The trial court again denied the motion for mistrial. (T. 1293). After the recess, the jury returned. (T. 1293). And the medical examiner continued her testimony for several more pages without further incident. (T. 1295-1303). Defense counsel then cross-examined Dr. Rao. (T. 1303-06).

Preservation

This issue is preserved for appeal. § 924.051(3), Fla. Stat. (2019); *Sparre v. State*, 289 So.3d 839, 848 (Fla. 2019) (explaining that to preserve an issue for appellate review, a party must present the issue to the trial court "in a timely,

specific manner and obtain a ruling" citing *Corona v. State*, 64 So.3d 1232, 1242 (Fla. 2011), and *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008)). Defense counsel properly objected and moved for mistrial and properly obtained a ruling from the trial court denying the motion.

But the related issue regarding the trial court's failure to give a curative instruction or poll the jury regarding the medical examiner's testimony is not preserved. Defense counsel did not request a curative instruction or request that the jury be polled. Indeed, defense counsel stated that it could not be "cured by any kind" of curative instruction. (T. 1291). A party may not reject a remedy in the trial court and then raise the lack of that exact remedy as part of the claim of error on appeal. Any part of the claim based on a lack of a curative instruction was affirmatively waived and any part of the claim based on the lack of jury polling was forfeited. *United States v. Olano*, 507 U.S. 725, 733 (1993) (explaining the difference between waiver and forfeiture as being waiver is the "intentional relinquishment or abandonment of a known right," by contrast, forfeiture refers not to affirmative conduct but rather to a "failure to make the timely assertion of a right"). Only the mistrial issue is preserved.

Standard of review

The standard of review of a trial court's ruling on a motion for mistrial is abuse of discretion. *Guzman v. State*, 214 So.3d 625, 632 (Fla. 2017) (citing *Gosciminski v. State*, 132 So.3d 678, 695 (Fla. 2013)). Under the abuse of discretion standard of review, the trial court's ruling will be upheld unless it is arbitrary, fanciful, or unreasonable, "which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." *Guzman*, 214 So.3d at 632 (quoting *Banks v. State*, 46 So.3d 989, 997 (Fla. 2010)).

There is good reason for this standard of review, especially when an issue that concerns matters that are hard to glean from a cold record. It is the trial court that could actually see the extent of Dr. Rao's reaction to some of the jurors becoming emotional as well as the other juror's reaction to the medical examiner's hesitation. *Thomas v. State*, 748 So.2d 970, 980 (Fla. 1999) (stating that when considering a motion for mistrial based on a witness's emotional outburst, "appellate courts should defer to trial judges' judgments and rulings when they cannot glean from the record how intense a witness's outburst was"). The trial court did not abuse its discretion; it was reasonable for the trial court to deny a mistrial.

Merits

A motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial. *Salazar v. State*, 991 So.2d 364, 372 (Fla. 2008) (citing *England v. State*, 940 So.2d 389, 401-02 (Fla. 2006)). That an error is prejudicial is not sufficient to warrant a mistrial. Instead, the error must be so prejudicial that it vitiates the entire trial. *Guzman v. State*, 214 So.3d 625, 632 (Fla. 2017) (citing *Gosciminski v. State*, 132 So.3d 678, 695-96 (Fla. 2013), and affirming the denial of a motion for mistrial).

The medical examiner's momentary hesitation and request for a recess did not vitiate the entire trial. The medical examiner did not break down on the stand. She was not crying or even tearful. She hesitated and then asked for a recess. It is the trial court that could actually see the extent of Dr. Rao's reaction to some of the jurors becoming emotional as well as the other juror's reaction to the medical examiner's hesitation. While a video of the medical examiner's testimony is in the record, which establishes that she was not visibly or audibly crying, the trial court still is in the best position to judge the effects of the medical examiner's

hesitation on the jury. As this Court observed in a capital case, in which the State's chief witness suffered an emotional breakdown after the prosecutor asked her to identify the defendants at trial by standing next to the defendants, when considering a motion for mistrial based on a witness's emotional outburst, "appellate courts should defer to trial judges' judgments and rulings when they cannot glean from the record how intense a witness's outburst was." *Thomas v. State*, 748 So.2d 970, 980 (Fla. 1999).

In *Talley v. State*, 260 So.3d 562 (Fla. 3d DCA 2019), the Third District held that the trial court did not abuse its discretion in denying a motion for mistrial when some of the victim's family became emotional and left the courtroom. *Id.* at 568-69. In a first-degree murder trial, during the State's opening statement, the prosecutor made remarks regarding the medical examiner's expected testimony. *Id.* at 565, 567. "Two or three" of the victim's family members became emotional and left the courtroom "visibly and audibly crying." *Id.* at 569, 568. Defense counsel moved for a mistrial. *Id.* at 567. The trial court denied the motion concluding that the upset family members "acted in an appropriate manner by exiting from the courtroom." *Id.* The trial court, at defense counsel's request, gave a curative instruction to disregard the disruption and to base their verdict "on the evidence." *Id.*

The Third District explained that granting a mistrial is not based on whether an error is prejudicial but rather whether an error is so prejudicial as to vitiate the entire trial. *Talley*, 260 So.3d at 568 (quoting *Salazar v. State*, 991 So.2d 364, 372 (Fla. 2008)). The Third District also noted the trial court gave a curative instruction and observed that "strong" curative instructions alleviated the possible prejudice. The Third District concluded that the family members' emotional outburst did not vitiate the entire trial.

Here, as in *Talley*, the medical examiner's hesitation did not vitiate the entire trial. Here, as in *Talley*, the medical examiner "acted in an appropriate manner" by asking for a short recess when she was unable to continue her testimony. But, here, unlike the situations in *Talley* and *Thomas*, there was *no* outburst. The cases of *Talley* and *Thomas* dealt with true outbursts, not with a witness who merely hesitated during her testimony and asked for a recess. If a mistrial is not warranted in outburst cases such as *Thomas* and *Talley*, it certainly is not warranted in hesitation cases, such as this case.

Regarding polling the jury, in addition to being unpreserved, the decision of whether to poll the jury is "better left to the discretion of trial judges who are in the best position to assess the intensity of the outburst and its potential effect on jurors." *Talley*, 260 So.3d at 569, n.4 (declining to adopt a policy requiring polling of jury in an outburst case).

Furthermore, given the evidence in this case, the jury would have convicted Smith even if a robot had testified in the place of the medical examiner. There is both DNA evidence and a videotape of the kidnapping. Smith was captured on the store's surveillance cameras leaving the store with the victim despite telling her mother that they were only going to go to the McDonald's inside the store as well as walking with the victim across the parking lot toward his white van which drove off moments later. The DNA evidence definitively establishes that Smith repeatedly raped this young girl both vaginally and anally to the exclusion of every other human being on the planet. And his DNA on the victim's neck, as well as the timing, establishes that Smith strangled Cherish to death.

The medical examiner's momentary hesitation and request to take a break to compose herself did not vitiate the entire trial and the trial court did not abuse its discretion in denying the motion for mistrial.

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING THE MOTION TO EXCLUDE AUTOPSY PHOTOGRAPHS USED DURING THE MEDICAL EXAMINER'S TESTIMONY? (Restated)

Smith asserts the trial court abused its discretion in admitting autopsy photographs of the victim during the medical examiner's testimony. IB at 34. The trial court properly admitted the autopsy photographs, which were relevant to establish both premeditated murder and sexual battery in the guilt phase, as well as the HAC aggravator in the penalty phase. The medical examiner used the autopsy photographs during her testimony to establish the victim's injuries and cause of death. Smith complains that the autopsy photographs are graphic but, as this Court has observed of autopsy photographs, defendants "whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." *Davis v. State*, 207 So.3d 142, 170 (Fla. 2016). There was no error in the admission of the autopsy photographs. Alternatively, any error in admitting any of the photographs was harmless in light of the videotape of the kidnapping and the DNA evidence of the sexual battery and murder. The trial court did not abuse its discretion in admitting the autopsy photographs.

The trial court's ruling

On December 10, 2013, prior to the trial, the defense filed a one-page motion in limine to exclude "gruesome or inflammatory" photographs asserting that "any and all" autopsy photographs should not be admitted. (RDA 176-177). The defense argued in the motion that the autopsy photographs were "unduly gruesome" and created a substantial danger of undue prejudice. (RDA 176) (citing § 90.401, Fla. Stat. and § 90.403, Fla. Stat.). The motion included a stipulation as to the identity of the victim but, while not objecting to the medical examiner

testifying as to the victim's injuries, the defense objected to the autopsy photographs of the victim's injuries including autopsy photographs of the victim's "head and neck." (RDA 176). The motion did not identify any particular autopsy photographs that the defense believed were particularly gruesome or inflammatory.

On January 24, 2018, the defense filed a another motion to exclude the autopsy photographs. (RDA 1449-50). The defense objected because the autopsy photographs showed a "naked child with injuries to her vagina and anus." (RDA 1449). The defense also objected because the medical examiner removed the skin from the victim's throat and removed skin from the victim's skull. (RDA 1449-50). The defense objected to all of the autopsy photographs on the basis they were cumulative to the medical examiner's testimony and they were "extremely prejudicial" outweighing any probative value because the majority of jurors will have never seen any autopsy photographs (RDA 1450).

On January 24, 2018, the trial court held a hearing on the admissibility of the autopsy photographs. (RDA 3980). At the motion hearing, the State called the medical examiner, Dr. Rao, to testify regarding her autopsy of the victim and the autopsy photographs. (RDA 3984). Dr. Rao testified that she directed the taking of the photographs of the child's body at the crime scene. (RDA 3985-86). Dr. Rao also testified that she directed the photographs that were taken during the autopsy by the forensic photographer to document the victim's injuries. (RDA 3986). Dr. Rao testified that she reduced the total number of autopsy photographs down from all the photographs that were taken to those necessary to aid her testimony at trial. (RDA 3986-87). Dr. Rao explained that while she could talk about petechia, a "lay person does not really understand" but photographs "really brings it home." (RDA 3994-95). The prosecutor then went through with the medical examiner the various photographs the State intended

to introduce at trial, including the autopsy photographs of the victim's neck that the medical examiner would use to establish the cause of death being strangulation. (RDA 3988-4006, 4003-05, 4009).

During the argument to the trial court, defense counsel argued that the medical examiner's unchallenged testimony would be "sufficient" and due to the "shocking" nature of autopsy photographs, they were inflammatory and their probative value was outweighed by the prejudice. (RDA 4014-15, 4011). Defense counsel argued that "every single one" of the autopsy photographs should be excluded. (RDA 4015). The State argued that it was "very well-established" by caselaw that the photographs were admissible because they would aid the medical examiner's testimony. (RDA 4015). The State noted of the 74 autopsy photographs taken the State was only seeking to introduce 30 of the photographs. (RDA 4015). On February 1, 2018, the trial court orally denied the motion in limine regarding the autopsy photographs. (R. 4050).

Dr. Valerie Rao, the medical examiner, who performed the autopsy of the victim, testified at trial. (T. 1257-1307; 1262). Dr. Rao used the autopsy photographs during her testimony to illustrate the injuries to various parts of the victim's body, including the damage to the victim's anus from being sodomized and the damage to her eyes from being strangled. (T. 1263; 1266-1290). The defense renewed the objection to the autopsy photographs prior to their admission at trial. (T. 1267). Some of the autopsy photographs were tendered but were not used by the medical examiner during her testimony or published to the jury. (T. 1307). The autopsy photographs were not used by the prosecutor during the prosecutor's closing argument of the guilt phase. (T. 1434-35).

Preservation

The issue of the admissibility of the autopsy photographs of the victim was properly preserved for appeal. Defense counsel objected on the same ground below in the trial court that he raises on appeal and properly obtained a ruling from the trial court. § 924.051(3), Fla. Stat. (2019); *Sparre*, 289 So.3d at 848. The objection to the photographs made below, however, was a general objection to the use of any of the autopsy photographs, not a specific objection to the use of any particular photograph, except perhaps to the photographs where the medical examiner removed skin from the throat and skull. So, only a general objection to the use of all of the photographs was preserved.

Opposing counsel's alternative argument regarding the use of repetitive autopsy photographs where several photographs from different angles of the same injury were admitted was not preserved below in the trial court. IB at 36. The defense did not argue for exclusion based on repetitiveness or identify which particular photographs it considered repetitive below. The alternative argument regarding repetitiveness was also not properly presented on appeal. Opposing counsel does not identify by exhibit number (or in any manner) which photographs of which injuries she believes were repetitive. The State cannot argue whether the photographs were actually repetitive without knowing exactly what photographs opposing counsel is referring to. Additionally, because some of the autopsy photographs were tendered but not used by the medical examiner or published to the jury, it is not known whether the unidentified "repetitive" photographs were even used at trial. (T. 1307). Obviously, autopsy photographs not used at trial cannot possibly be error. The "repetitive" part of this issue was not preserved below and was not properly presented on appeal either.

Standard of review

The admissibility of evidence, including the admissibility of autopsy photographs, is reviewed for an abuse of discretion. *Sparre v. State*, 289 So.3d 839, 856 (Fla. 2019) (stating that the admission of photographic evidence of a murder victim is within the discretion of the trial court, and its ruling will not be disturbed on appeal absent a clear showing of abuse of that discretion citing *Rodriguez v. State*, 919 So.2d 1252, 1286 (Fla. 2005)); *Campbell v. State*, 271 So.3d 914, 933 (Fla. 2018) ("The admission of photographic evidence is reviewed for abuse of discretion" and concluding that a "graphic" autopsy photograph was relevant and admissible "to illustrate the nature and extent of the victim's injuries."). There was no abuse of discretion because the trial court was merely following this Court's well-established precedent permitting the use of autopsy photographs by the medical examiner to illustrate her testimony.

Merits

A defendant has both a federal and a state constitutional right to a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses); Art. I § 9, Fla. Const. But the admission of autopsy photographs does not violate that right. In *Hill v. Sec'y, Fla. Dep't of Corr.*, 578 Fed. Appx. 805, 810 (11th Cir. 2014), the Eleventh Circuit held that the state court's admission of photographs was not contrary to, or an unreasonable application of, Supreme Court precedent. The Eleventh Circuit explained that generally, the introduction of photographs does not violate a defendant's right to a fair trial. *Id.* at 810 (citing *Futch v. Dugger*, 874 F.2d 1483, 1487 (11th Cir. 1989)). The Eleventh Circuit noted that autopsy photographs are admissible, "even when difficult to view," if they fairly and accurately establish a material fact and are not unduly prejudicial. *Id.* at 810. The Eleventh Circuit

concluded that the autopsy photographs were properly admitted for the purpose of explaining the medical examiner's testimony about the victim's injuries. *See also Weimer v. Allbaugh*, 766 Fed. Appx. 728, 733-34 (10th Cir. 2019) (finding no denial of the right to a fair trial due to the admission of "graphic" autopsy photographs of the child victim's head in an Oklahoma first-degree murder prosecution).

Florida statutes and caselaw

Under Florida's Evidence Code, relevant evidence is "evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. (2018); Charles W. Ehrhardt, *Florida Evidence* § 401.1 (2019) (relevant evidence is evidence that has "a logical tendency to prove or disprove a fact which is of consequence to the outcome of the action" and its relevance "is not affected by the availability of alternative proof" citing *Old Chief v. United States*, 519 U.S. 172, 179 (1997)). And "all relevant evidence is admissible." § 90.402, Fla. Stat. (2018). Relevant evidence should only be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (2018).

But it is important to remember in relation to any claim that the State's evidence should be excluded including any claim of balancing under section 90.403, that the State has a beyond a reasonable doubt standard of proof it must meet, which is the highest standard of proof in the law, and the State needs a cornucopia of evidence to meet that high standard. *In re Winship*, 397 U.S. 358, 364 (1970) (holding due process requires the prosecution to "proof beyond a reasonable doubt of every fact necessary to constitute the crime" in a criminal case); *In re Winship*, 397 U.S. at 369-74 (Harlan, J., concurring) (discussing the beyond a reasonable doubt standard of proof). For that reason, evidence should

not be excluded based solely on delicate sensibilities or the availability of other evidence. Photographs are powerful evidence because photographs allow the jury to see for themselves the facts they are required to determine, such as whether the murder was heinous, atrocious, and cruel, as this jury was required to do. If a murder was heinous, photographs of that murder will inevitably be heinous as well.

The test for determining the admissibility of photographs "is relevance, not necessity." *Ault v. State*, 53 So.3d 175, 198 (Fla. 2010) (citing *Brooks v. State*, 787 So.2d 765, 781 (Fla. 2001)). Autopsy photographs are relevant to show the manner of death, location of wounds, the identity of the victim, or to assist the medical examiner in explaining the victim's injuries and are generally admissible. *Patrick v. State*, 104 So.3d 1046, 1061 (Fla. 2012) (citing *Ault v. State*, 53 So.3d 175, 198-200 (Fla. 2010)). Autopsy photographs "are admissible if they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted." *Ault*, 53 So.3d at 199-200. The mere fact that photographs may be "gruesome does not mean they are inadmissible." *Patrick*, 104 So.3d at 1061-62 (quoting *Ault*, 53 So.3d at 199).

In *Sparre v. State*, 289 So.3d 839, 855-56 (Fla. 2019), this Court recently rejected a claim that appellate counsel was ineffective for failing to raise a claim that the trial court abused its discretion in admitting dozens of autopsy photographs during the guilt phase. This Court observed that autopsy photographs "can be relevant to explain a medical examiner's testimony and to show the manner of death and the location of wounds" or "more generally, to show the circumstances of the crime and the nature and extent of the victim's injuries." *Id.* at 856. This Court observed that a trial court should limit the number of gruesome photographs shown to the jury, "so that unnecessarily repetitive photos are not admitted." *Id.* (emphasis added). This Court reasoned that, while 35

photographs were admitted, that was "because Sparre inflicted approximately 88 wounds on the victim, her injuries could not be fully understood through only a few photographs." *Id.* This Court observed that the photographs "provided a much clearer understanding of the victim's injuries than what could have been accomplished through the medical examiner's testimony alone" and were probative of premeditation. *Id.* This Court concluded that the probative value of the photographs "was not substantially outweighed by the danger of unfair prejudice" under section 90.403. This Court also found that any error in the admission of 3 of the 35 photographs that "arguably should have been excluded" was harmless. *Id.* at 856-57.

Here, as in *Sparre*, the autopsy photographs were relevant to show the victim's injuries to establish both the sexual battery and the premeditated nature of the murder. As in *Sparre*, the autopsy photographs "provided a much clearer understanding of the victim's injuries than what could have been accomplished through the medical examiner's testimony alone." Here, as in *Sparre*, numerous photographs were necessary because of the extensive damage Smith did to various parts of the victim's body, including her vagina, rectum, neck, eyes, and head. But here, unlike *Sparre* where 35 photographs were admitted, the State originally only sought to admit 30 of the 74 total autopsy photographs taken and actually admitted even less than 30 photographs at the trial. (RDA 4015; T. 1307). So, in this case, as in *Sparre*, the probative value of the photographs "was not substantially outweighed by the danger of unfair prejudice" under section 90.403.

Opposing counsel points to the photographs of a naked child with "severe" injuries to her vagina and anus as being graphic but those photographs established the sexual battery. IB at 11. Opposing counsel also points to the photographs of the victim's throat with the skin removed to show the deep bruising to the trachea as being graphic but those photographs established the

extent of the victim's injuries and that the cause of death was strangulation which tends to prove premeditation as a basis for the first-degree murder count. As in *Sparre*, the photographs were probative of premeditation. *Sparre*, 289 So.3d at 856. And those photographs of the victim's neck showing that the cause of death was strangulation also establishes the HAC aggravator. *Frances v. State*, 970 So.2d 806, 815 (Fla. 2007) (explaining that because "strangulation of a conscious victim involves foreknowledge and the extreme anxiety of impending death, death by strangulation constitutes prima facie evidence of HAC" and noting "this Court has repeatedly held that HAC applies to murders by strangulation of a conscious victim because a killing by this method is inherently torturous" citing cases). While Smith complains about the graphic nature of the photographs, the only real basis for his claim of prejudice under section 90.403 is the prejudice that naturally flows from his own actions. As this Court has repeatedly observed, "those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." *Davis v. State*, 207 So.3d 142, 170 (Fla. 2016) (citing *Arbelaez v. State*, 898 So.2d 25, 44 (Fla. 2005)); *Smith v. State*, 28 So.3d 838, 861 (Fla. 2009) (quoting *Henderson v. State*, 463 So.2d 196, 200 (Fla. 1985)).

The autopsy photographs were properly admitted for the purpose of explaining the medical examiner's testimony about the victim's injuries and to establish the sexual battery and premeditated murder in the guilt phase as well as the HAC aggravator in the penalty phase. There was no violation of section 90.403, Florida Statutes (2018).

The trial court did not abuse its discretion in denying the motion to exclude the autopsy photographs.

Harmless error

The erroneous admission of autopsy photographs, like other types of trial errors, is subject to harmless error analysis. *Sparre*, 289 So.3d at 856-57 (finding the error, if any, in the admission of autopsy photographs was harmless); *Armstrong v. State*, 73 So.3d 155, 170-171 (Fla. 2011) (noting the erroneous admission of photographs is subject to harmless error analysis and finding any error to be harmless).[17]

---

[17] The *Armstrong* Court stated that it was "well-established that the harmless error test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test." *Armstrong*, 73 So.3d at 170. That quote is from Chief Justice Roger J. Traynor's book, *The Riddle of Harmless Error* (1970). But Justice Traynor wrote his book just a few years after the Supreme Court first adopted the direct appeal harmless error test in *Chapman v. California*, 386 U.S. 18, 21 (1967). The quote does not reflect the past 50 years of United States Supreme Court caselaw regarding harmless error analysis. The United States Supreme Court often looks at the sheer strength of the State's case as part of a harmless error analysis. In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the Supreme Court listed factors to consider in conducting a harmless error test under *Chapman*, stating that "of course," the "overall strength of the prosecution's case" was one of those factors. *Van Arsdall*, 475 U.S. at 684. In *Neder v. United States*, 527 U.S. 1, 16-17, n.1 (1999), the United States Supreme Court found the error was harmless based on its conclusion that "the evidence of materiality" was "overwhelming" and was "so overwhelming" that Neder did not even dispute it at trial or on appeal. The *Neder* Court's test was that when the fact at issue was "supported by overwhelming evidence," the error was harmless. A harmless error test looks at the other evidence relating to the error. *Yates v. Evatt*, 500 U.S. 391, 403 (1991) (stating the test for harmless error is whether the error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record"). If the error relates to identity of the perpetrator and there is overwhelming evidence of the identity, then that error is necessarily harmless. One must first identify what element or issue the error relates to but, if there is other overwhelming evidence proving the same element or issue in question, then the overwhelming evidence of that element or issue is properly considered in any harmless error analysis. Indeed, there is no other way to conduct a harmless error analysis other than to look at the evidence. So, overwhelming evidence on the issue related to the error is a critical part of a

The error, if any, in admitting the autopsy photographs was harmless error in light of the overwhelming evidence. Smith's DNA profile matched the DNA found on the victim's neck and anus at one in 35 quintillion which is 35,000,000,000,000,000,000. (T. 1345, 1349). And Smith's DNA profile matched the semen from the victim's vagina at one in 12 quadrillion, which is 12,000,000,000,000,000. (T. 1358). Furthermore, there is a videotape of the beginning of the kidnapping from Walmart's surveillance cameras showing Smith leaving the store with Cherish and walking through the parking lot with her toward his white van. Any rational jury would have convicted Smith of kidnapping, sexual battery, and murder based on the DNA evidence and the videotape without being shown a single photograph. As will be explained in greater detail in the sufficiency of the evidence section, it is an understatement to describe the evidence in this case as being "overwhelming." Given the videotape and the DNA evidence, any error regarding the autopsy photographs was harmless.

---

proper harmless error analysis. *Al-Amin v. Warden, Ga. Dep't of Corr.*, 932 F.3d 1291, 1301 (11th Cir. 2019) (explaining to determine whether a trial error was harmless, the court typically considers the magnitude of the error, the effect of any curative instruction, and whether the prosecution otherwise presented overwhelming evidence of guilt to the jury and finding the prosecutor's comment on the defendant's failure to testify to be harmless, despite the error being "substantial" and the curative instruction doing "little to cure the error," due to the overwhelming evidence including the victim's eyewitness identification of the defendant as being the shooter), *cert. denied*, *Al-Amin, v. Ward*, 2020 WL 1668291 (Apr. 6, 2020) (No. 19-573).

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY OVERRULING AN OBJECTION TO A PROSECUTOR'S COMMENT DURING OPENING STATEMENT OR COMMITTED FUNDAMENTAL ERROR BY NOT *SUA SPONTE* ORDERING A MISTRIAL REGARDING THE PROSECUTOR'S COMMENT IN CLOSING ARGUMENT OF THE GUILT PHASE? (Restated)

Smith asserts the trial court abused its discretion by overruling an objection to a prosecutor's comment in opening statement that this crime was "every mother's darkest nightmare." IB at 37. Smith also claims that the trial court committed fundamental error by not *sua sponte* ordering a mistrial regarding the prosecutor's comment in closing argument of the guilt phase that the victim was "crying out from the grave," despite there being no objection. IB at 37. The prosecutor's comment in opening statement did not vitiate the entire trial and the other prosecutor's comment in closing argument of the guilt phase was not fundamental error. Using the factors used by the United States Supreme Court in *Darden v. Wainwright*, 477 U.S. 168 (1986), neither of the comments was reversible error. The comment in opening statements was not reversible error because the comment fails to meet the *Darden* factors. And the prosecutor's comment during closing argument was not reversible error either, much less fundamental error. The trial court did not abuse its discretion in overruling the objection to the comment in the opening statement and did not commit fundamental error by not *sua sponte* ordering a mistrial regarding the prosecutor's comment in closing argument of the guilt phase.

The trial court's rulings

During the opening statement of the trial, the prosecutor, elected State Attorney Melissa Nelson, was discussing the victim's mother, Rayne Perrywinkle's reaction to discovering that her young daughter was missing. (T. 1015). The prosecutor said: "Twenty minutes later she still had not found Cherish" inside the

Walmart. *Id*. The prosecutor said: "Every mother's darkest nightmare became Rayne Perrywinkle's reality." (T. 1015). Defense counsel objected stating: "Objection, your honor argumentative." (T. 1015). The trial court overruled the objection. (T. 1015). And then the prosecutor repeated the statement: "Every mother's darkest nightmare became Rayne Perrywinkle's reality." (T. 1015).

During closing argument of the guilt phase, the prosecutor Mark Caliel was responding to defense attorney's allegation in opening statement that the prosecutors were trying to anger the jury. (T. 1421). The prosecutor told the jury repeatedly not to base the verdict on emotion or anger and that reason, not emotion, should guide their deliberations. (T. 1421-22). The prosecutor later said: Back in jury selection one of your fellow jurors commented that "Cherish did not have a voice in this courtroom." (T. 1436). The prosecutor disagreed with the juror's observation and referred to the physical and biological evidence, he stated: "through that evidence she has a voice." (T. 1436). The prosecutor then stated: "And from the grave she's crying out to you, Donald Smith raped me." (T. 1436). "Donald Smith sodomized me." "Donald Smith strangled me until every last breath left my body." (T. 1436). Defense counsel did ***not*** object. (T. 1437). The defense then waived closing argument in the guilt phase. (T. 1437). The prosecutor did not give rebuttal closing argument. (T. 1437). There was no ruling from the trial court regarding this comment because there was no objection.

Preservation and fundamental error

The claim of error regarding the prosecutor's comment in opening statement that this crime was "every mother's darkest nightmare" was preserved by contemporaneous objection. § 924.051(3), Fla. Stat. (2019); *Sparre v. State*, 289 So.3d 839, 848 (Fla. 2019). Defense counsel objected on the basis that the comment was argumentative in opening statement, but on appeal, opposing

counsel expands that objection to include a claim that the comment was prejudicial because it was an "emotional charged description of events" that was inflammatory and an appeal to passion. IB at 38. That aspect of this claim is not preserved because defense counsel did not object on any of those bases in the trial court. *Smith v. State*, 139 So.3d 839, 844 (Fla. 2014) (explaining that an issue is not preserved if a defendant does not raise in the trial court the same grounds that he is raising on appeal citing *Archer v. State*, 613 So.2d 446, 448 (Fla.1993)); So, only the claim that the comment was argumentative was preserved.

But the claim of error regarding the prosecutor's comment in closing argument of the guilt phase regarding the victim "crying out from her grave" was not preserved at all. There was no objection to that comment and therefore, no ruling from the trial court. That claim of error regarding that comment is being raised as fundamental error. This Court has cautioned that appellate courts should be "very" guarded in concluding that a prosecutor's comment amounts to fundamental error. *Martin v. State*, 45 Fla. L. Weekly S21, ___ So.3d ___, 2020 WL 238546, *22-*23 (Fla. Jan. 16, 2020) (quoting *Farina v. State*, 937 So.2d 612, 629 (Fla. 2006), and concluding that the prosecutor's comments were not fundamental error).

Standard of review

An appellate court reviews a trial court's ruling regarding prosecutorial comments for abuse of discretion. *Campbell v. State*, 271 So.3d 914, 931 (Fla. 2018) (stating that a trial court's ruling on a motion for mistrial due to a prosecutor's comment is reviewed for an abuse of discretion citing *England v. State*, 940 So.2d 389, 402 (Fla. 2006)); *Salazar v. State*, 991 So.2d 364, 371 (Fla. 2008) ("We have repeatedly held" that this Court reviews a trial court's ruling on

a motion for mistrial based on the prosecutor's comments under an abuse of discretion standard citing numerous cases).

Claims of fundamental error, however, are reviewed *de novo*. *State v. Smith*, 241 So.3d 53, 55 (Fla. 2018) (stating that whether an error is fundamental "is a question of law we review *de novo*"). Smith has obtained a more favorable standard of review in the appellate court by failing to object in the trial court. *Grant v. State*, 266 So.3d 203, 205 (Fla. 4th DCA 2019) (noting that while normally the standard of review was an abuse of discretion, because there was no objection, the standard of review became *de novo*). This is but one of the myriad of problems with an expansive view of the concept of fundamental error and another reason that fundamental error should be, in this Court's own words, "very guardedly" applied. *Martin v. State*, ___ So.3d ___, 45 Fla. L. Weekly S21, 2020 WL 238546, *22 (Fla. Jan. 16, 2020) (quoting *Farina v. State*, 937 So.2d 612, 629 (Fla. 2006)).

Merits

In *Darden v. Wainwright*, 477 U.S. 168 (1986), the United States Supreme Court, while condemning the prosecutor's comments, held that the comments were not a due process violation and did not deprive the defendant of a fair trial. The prosecutor's comments included calling the defendant an "animal"; expressing a personal wish for Darden's death by saying: "I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his (Darden's) face off. I wish that I could see him sitting here with no face, blown away by a shotgun." The prosecutor, referring to Darden, said: "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." *Darden*, 477 U.S. at 180, n.12. The High Court observed that these "comments undoubtedly were improper." *Id.* at 180. But the High Court explained that it is not enough that the prosecutor's comments are "undesirable or even

universally condemned"; rather, the relevant question is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 181 (citing *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). The *Darden* Court relied upon six factors in evaluating a due process claim arising from a prosecutor's inappropriate comments in closing argument: 1) whether the prosecutor manipulated or misstated the evidence, 2) whether the comments implicated other specific rights of the accused (such as the right to remain silent), 3) whether the comments were invited by or responsive to defense counsel's arguments, 4) whether the trial court's instructions ameliorated the harm, 5) whether the evidence weighed heavily against the defendant, and 6) whether the defendant had an opportunity to rebut the prosecutor's comments. The *Darden* Court concluded that the prosecutor's comments "did not deprive petitioner of a fair trial." *Id.* at 181. *See also Parker v. Matthews*, 567 U.S. 37 (2012) (rejecting a claim that the prosecutor's argument, which insinuated that the defendant colluded with his lawyer and expert to manufacture an extreme emotional disturbance defense, violated the due process test established in *Darden* and noting that *Darden* involved a prosecutor's comments that were "considerably more inflammatory," such as referring to the defendant as an "animal").

Furthermore, as the Eleventh Circuit has noted, the United States Supreme Court has never granted relief based on a prosecutor's comments. *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1287-88 (11th Cir. 2012) (observing that the Supreme Court has "never" held that a prosecutor's closing arguments were so unfair as to violate the right to due process); *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1294 (11th Cir. 2012) (Martin, J., concurring) (agreeing that "it is true that the Supreme Court has never granted habeas relief based upon a prosecutor's closing argument"). This is because the United States Supreme

Court has a very high barometer regarding what a prosecutor must say to amount to a denial of due process. Many arguments that state courts find to be error, or even fundamental error, such as comments where the prosecutor argues that the jury should "show the defendant the same mercy he showed the victim" or that the jury has a duty to recommend an appropriate sentence are viewed as proper arguments by the federal courts.[18]

Every mother's darkest nightmare

Using the *Darden* factors, there was no violation of due process from the prosecutor's comment in opening statements that this crime was every mother's darkest nightmare. Regarding the first *Darden* factor, the prosecutor's comment did not manipulate or misstate the evidence or the law. The comment accurately reflects the nature of this crime and reflects the common view of this type of crime. Indeed, the defense attorney in opening statement of the penalty phase agreed that this crime was every parent's "worst nightmare." (T. 1523-24). Regarding the second *Darden* factor, the prosecutor's comment did not implicate

---

[18] *See, e.g., Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1287-88 (11th Cir. 2012) (denying habeas relief in a case where the prosecutor urged the jury to show the defendant "the same sympathy, the same pity" that he showed to the victim which was "none"); *but see Merck v. State*, 975 So.2d 1054, 1062 (Fla. 2007) (stating that the defense's objection to the prosecutor's comment that the jury should not show mercy should have been sustained because this "Court has repeatedly condemned" prosecutor's comments that "ask the jury to show to the defendant the same amount of mercy as the defendant showed to his or her victim" citing cases but not reversing the conviction); *Leonard v. Warden, Ohio State Penitentiary*, 846 F.3d 832, 850-52 (6th Cir. 2017) (finding no violation of due process where the prosecutor told the jury it was their duty to convict and that they needed to be fair to the State and fair to the victim and observing that "a prosecutor has no less right to discuss a jury's duty to impose the death penalty if legally warranted than a defense counsel has the right to discuss a jury's duty to acquit (or give a life sentence) if legally warranted" in a federal habeas case quoting *Strouth v. Colson*, 680 F.3d 596, 606 (6th Cir. 2012)).

any other constitutional rights of the accused. Regarding the third *Darden* factor, while prosecutor's comment was not invited by defense counsel's arguments, it was a valid comment on the nature of the crime itself. Regarding the fourth *Darden* factor, the trial court did not give a curative instruction because the trial court overruled the objection. The prosecutor's comment does not warrant a curative instruction because it is just a common sense observation about how a mother would react to her daughter going missing from the store and upon whom it is dawning that a man she had just met a couple of hours ago had taken her child.[19] Regarding the fifth *Darden* factor, the evidence certainly "weighed heavily against the defendant." Smith's DNA profile matched the DNA found on the victim's neck and anus at one in thirty-five quintillion and his DNA profile matched the semen from the victim's vagina at one in twelve quadrillion. (T. 1345, 1349, 1358). The DNA evidence in this case alone establishes the defendant's guilt beyond any doubt. As will be explained in greater detail in the sufficiency of the evidence section, it is an understatement to describe the evidence in this case as overwhelming. Regarding the sixth *Darden* factor, the defense had an opportunity to rebut the prosecutor's comment. The defense in its opening statement could have responded to the prosecutor's comment, as well as in its closing argument, if defense counsel wished to do so. But the defense did not respond in her opening and then waived closing argument at the end of the guilt phase. But, honestly, that is because there is no possible counter-argument to the prosecutor's comment because this crime is, in fact, every mother's darkest nightmare. This comment fails to meet five of the six *Darden* factors.

---

[19] The *Darden* Court was dealing with a case where it was crystal clear the prosecutor's comments, such as calling the defendant an animal that should have a leash on him, were improper, but that is not the case here. A curative instruction is not required for a proper comment.

The Eleventh Circuit has rejected a due process challenge to a similar comment from a prosecutor regarding a crime being "every woman's worst nightmare." In *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1287-88 (11th Cir. 2012), the Eleventh Circuit denied habeas relief in a case where the prosecutor referred to the crime as "every woman's worst nightmare"; suggested that the defendant would be released on parole if not sentenced to death; stated that while the defendant was a cute puppy, he grew up to be a "vicious dog"; and urged the jury to show the defendant "the same sympathy, the same pity" that he showed to the victim which was "none." The *Reese* Court denied the due process claim under both the special federal habeas standard of review and under a *de novo* standard of review.

This Court had earlier rejected a claim of improper prosecutorial comment based on those comments during closing argument of the penalty phase as being "without merit." *Reese v. State*, 694 So.2d 678, 685 (Fla. 1997). This Court found that the prosecutor "neither implored the jury to place themselves in the victim's shoes nor impermissibly influenced the jury by suggesting Reese could be paroled if the jury recommended life." *Id.* This Court also rejected the due process attack on the prosecutor's comment about a "cute little puppy" who grows up to be a "vicious dog" as appropriate rebuttal because Reese's past character was presented to the jury, so the prosecutor could argue that "past character was not a determinant of present character." This Court reasoned that the prosecutor's story about the dog "did not constitute name calling, and was not prejudicial." *Id.* This Court concluded that the prosecutor's comment did not rise to the level of misconduct. This Court held there "was no error." *Id.* at 685; *see also People v. Medina*, 2018 WL 5004159, *5, *7 (Cal. Ct. App. Oct. 16, 2018) (unpublished) (finding the prosecutor's comment in opening statement of a prosecution for rape that the crime was "a woman's worst nightmare" was a "fair comment" on the

events that transpired and noting that, even if the prosecutor had overstated the severity of the crime, using "colorful or hyperbolic language" will not generally establish prosecutorial misconduct), *cert. denied*, *Medina v. California*, 140 S.Ct. 968 (Jan. 27, 2020) (No. 19-6754).[20] The prosecutor's comment that this crime was every mother's darkest nightmare was a reasonable observation about the nature of this crime that did not violate due process.

The trial court properly overruled the objection to the comment in opening statement.

Crying out from the grave

The challenge to the prosecutor's comment that the victim was crying out from the grave in closing argument of the guilt phase was not preserved and therefore, must amount to fundamental error, which it does not. This Court has recently addressed a claim of fundamental error regarding a prosecutor's comment and stated that fundamental error is a "high burden" which requires an error that goes to the foundation of the case and be equivalent to a denial of due process. *Bright v. State*, ___ So.3d ___, ___, 2020 WL 1592942, *8, *10 (Fla. April 2, 2020) (quoting *Bailey v. State*, 998 So.2d 545, 554 (Fla. 2008), and finding, based on the State's concession of error, that a prosecutor's comment that mitigation must be proven to a reasonable certainty (instead of at the lesser standard of the greater weight of the evidence) was a misstatement of the law and therefore, was error but did not amount to fundamental error); *see also Jordan v. State*, 176 So.3d 920, 929

[20] The red flag on the *Medina* case is due to the California courts' policy of not permitting citation to unpublished opinions, not because a higher court overruled the case. Florida, however, has no prohibition on the citations of unpublished opinions and Florida courts may consider unpublished opinions. *See generally* 11th Cir. R. 36.2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority.").

(Fla. 2015) (finding a prosecutor's comment, "Don't let him get away with this," to be improper but not fundamental error); *Davis v. State*, 136 So.3d 1169, 1206 (Fla. 2014) (finding both the prosecutor's comments about the victim's young siblings in the future wanting to know what justice was done and a prosecutorial expertise argument were improper but neither was fundamental error).

Using the *Darden* factors, the comment that the victim was crying out from the grave was not reversible error, much less fundamental error. First, the comment did not manipulate or misstate the evidence or the law. Rather, the prosecutor was making the observation that the evidence in the case was the victim's voice. Second, the comment did not implicate other constitutional rights of the defendant such as the right to remain silent. Third, while the comment was not an invited response to defense counsel's arguments, it was a response to a juror's observation about the victim not having a voice in the courtroom. The prosecutor was responding to that by saying the evidence was the victim's voice. Fourth, while the trial court did not ameliorate the harm by giving a curative instruction, that was because there was no objection to the comment. Fifth, the evidence weighs heavily against the defendant. Smith's DNA profile matched the DNA found on the victim's neck and anus at one in thirty-five quintillion and his DNA profile matched the semen from the victim's vagina at one in twelve quadrillion. (T. 1345, 1349, 1358). The DNA in this case alone is overwhelming evidence of Smith's guilt. As will be explained in greater detail in the sufficiency of the evidence section, it is an understatement to describe the evidence in this case as overwhelming. And sixth, defense counsel had the opportunity to rebut the prosecutor's comments in his closing argument but waived closing argument instead. This comment fails to meet at least five of the six *Darden* factors.

While certainly not an advisable argument, the prosecutor's comment that the victim was crying out from the grave was not reversible error, much less

fundamental error. *People v. Cloutier*, 687 N.E.2d 930, 943 (Ill. 1997) (affirming in a capital case where the prosecutor argued in closing of the penalty phase "what is at stake here is nothing short of human justice," because "from their graves there are two women who cry out for human justice. And in this whole world of ours there are only 12 people that could hear them and answer their cries, and that's the 12 of you" because the comments were "not so inflammatory as to constitute reversible error"); *Bush v. State*, ___ So.3d ___, 45 Fla. L. Weekly S145, 2020 WL 2479140, *26 (Fla. May 14, 2020) (urging prosecutors not to make arguments that the jury should "have the courage to impose the death penalty" in closing arguments but holding the comment was not fundamental error due to the "extremely weighty aggravation" consisting of five aggravators, including HAC, CCP, and the prior violent felony aggravator).

This Court often considers how often the prosecutor invoked the theme to determine whether the comment was fundamental error. *Bright v. State*, ___ So.3d ___, 45 Fla. L. Weekly S111, 2020 WL 1592942, *10 (Fla. Apr. 2, 2020) (concluding that the prosecutor's "single misstatement of the law" regarding the burden of proof was not fundamental error); *Lowe v. State*, 259 So.3d 23, 48 (Fla. 2018) (concluding that the prosecutor's comments comparing the worth of the victim's life to that of the defendant was not fundamental error because the comments "represented a very brief portion" of the State's entire closing argument), *cert. denied*, *Lowe v. Florida*, 139 S.Ct. 2717 (2019); *Jordan v. State*, 176 So.3d 920, 929 (Fla. 2015) (concluding that the prosecutor's comment: "Don't let him get away with this," while improper was not fundamental error in part because the prosecutor only made the comment once). Here, as in *Bright*, *Lowe* and *Jordan*, the prosecutor only discussed the victim crying out from the grave for a very small portion of the initial closing argument and did not repeat that argument later in the closing argument or in rebuttal closing argument. Indeed,

after the defense waived closing argument, the prosecutor did not give a rebuttal closing argument. This Court also looks at the amount of evidence to determine if the comment was fundamental error. *Braddy v. State*, 111 So.3d 810, 838 (Fla. 2012) (concluding that the prosecutor's comments that counsel must have been "in a different trial" because their arguments make "absolutely no sense," and that the defense was to try to blame the victim was not fundamental error due to the "abundant evidence" of guilt). And, here, as in *Braddy*, there is "abundant evidence" of Smith's guilt including DNA evidence.

The prosecutor's comment was not fundamental error. The trial court was not required to interrupt the prosecutor and without any objection or motion for mistrial being made and *sua sponte* order a mistrial based on that one comment.

Harmless error

Preserved claims of prosecutor comments are not subject to harmless error analysis because the test for granting a mistrial itself requires that the prosecutor's comment vitiate the entire trial. If a comment vitiated the entire trial, it could not be harmless. Furthermore, one of the *Darden* factors already considers the strength of the State's case in determining whether there is error at all. The fifth *Darden* factor is whether the evidence weighed heavily against the defendant. *But see Truehill v. State*, 211 So.3d 930, 948 (Fla. 2017) (stating that comments to which the defense objected and the trial court erroneously overruled defense counsel's objection, "we apply a harmless error test" citing *Snelgrove v. State*, 921 So.2d 560, 568 (Fla. 2005), *Doorbal v. State*, 837 So.2d 940, 956-57 (Fla. 2003), and *Belcher v. State*, 961 So.2d 239, 255 (Fla. 2007)).

But, if this Court believes harmless error applies to prosecutorial comments and mistrials, then the prosecutor's comment regarding this crime being every mother's darkest nightmare was harmless error. Smith's DNA profile matched the

DNA found on the victim's neck and anus at one in thirty-five quintillion and his DNA profile matched the semen from the victim's vagina at one in twelve quadrillion. (T. 1345, 1349, 1358). The DNA evidence in this case alone establishes the defendant's guilt beyond any doubt. Additionally, there is a videotape showing the beginning of the kidnapping when Smith left the store with the eight-year-old victim and walked across the parking lot toward his white van with her. As will be explained in greater detail in the sufficiency of the evidence section, it is an understatement to describe the evidence in this case as overwhelming. The preserved comment was harmless error, if error at all.[21]

Accordingly, the trial court did not abuse its discretion in overruling the objection to the prosecutor's comment that this crime was every mother's darkest nightmare and did not commit fundamental error by not *sua sponte* ordering a mistrial over the prosecutor's comment regarding crying out from the grave.

---

[21] The unpreserved comment regarding the victim crying out is not subject to harmless error analysis. Claims of fundamental error are also not subject to harmless error review. *Reed v. State*, 837 So.2d 366, 369-70 (Fla. 2002) (explaining fundamental error is not subject to harmless error review because by "its very nature, fundamental error has to be considered harmful" because if "the error was not harmful, it would not meet our requirement for being fundamental"). But the prosecutor's comment, as explained in the merits section, was not fundamental error.

ISSUE V

WHETHER THE TRIAL ERRORS CONSIDERED CUMULATIVELY WARRANT A NEW TRIAL? (Restated)

Smith asserts that the errors in his trial considered cumulatively warrant a new trial. IB at 41. The cumulative error claim was not properly presented on appeal. Alternatively, there is no cumulative error. For there to be cumulative error, two or more errors are required. But there are not two meritorious preserved errors in this case. And, even if this Court were to find multiple errors occurred, the multiple errors, even considered collectively, would remain harmless in this case given the DNA evidence and the videotape of the beginning of the kidnapping.

Standard of review

The concept of cumulative error is based on the due process right to a fair trial and due process claims are reviewed *de novo*. *Norvil v. State*, 191 So.3d 406, 408 (Fla. 2016) (stating that the issue of whether the trial court violated the defendant's due process rights was a pure question of law reviewed *de novo* citing *Cromartie v. State*, 70 So.3d 559, 563 (Fla. 2011)); *see also United States v. Brown*, 822 F.3d 966, 971 (7th Cir. 2016) (reviewing *de novo* a claim that the cumulative errors were so serious that the defendants did not receive the due process); *United States v. Morales De Carty*, 300 Fed. Appx. 820, 829 (11th Cir. 2008) (reviewing a claim of cumulative error *de novo*).

Not properly presented

The issue of cumulative error was not properly presented on appeal to this Court. This Court concluded in *Dufour v. State*, 905 So.2d 42, 75 (Fla. 2005), that a claim of cumulative error was not sufficiently articulated to warrant relief where

appellate counsel "simply" referred to the "sheer number and types of errors." The *Dufour* Court stated that the purpose of an appellate brief is to present arguments in support of the points on appeal. *Id.* at 75 (quoting *Duest v. Dugger*, 555 So.2d 849, 852 (Fla. 1990)); *see also Porter v. Crosby*, 840 So.2d 981 (Fla. 2003) (finding a claim of cumulative error to be insufficiently pled on appeal because the brief only generally asserted there were errors). This claim of cumulative error is nearly as bare bones as the claim in *Dufour*. The entire claim of cumulative error is a mere four sentences in the appellate brief with no analysis or application of the law that is cited to this particular case. *Greenwood v. State*, 754 So.2d 158, 160 (Fla. 1st DCA 2000) (declining to address an issue raised in one sentence in the appellate brief followed by a "smorgasbord" of case citations). This Court recently condemned defense postconviction counsel for merely mentioning the basis for a claim in the postconviction motion but not actually developing the claim until the written closing arguments when it was too late for the State to respond, *Sparre*, 289 So.3d at 849. But the same observation applies to appellate briefs. Appellate counsel should not be permit to raise an issue but merely hint at the basis for the claim and then only fully develop the argument in the reply brief filed after the State has filed its answer brief. The claim is not properly presented on appeal.

Merits

Alternatively, the claim of cumulative error is meritless. The Constitution entitles a criminal defendant to a fair trial, not a perfect one. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986); *Taylor v. State*, 232 So.3d 453, 455 (Fla. 2d DCA 2017) ("A defendant is entitled to a fair trial, not a perfect trial" quoting *State v. Anderson*, 537 So.2d 1373, 1375 (Fla. 1989)). If there are no errors, then there necessarily is no cumulative error. *Foster v. State*, 132 So.3d 40, 74 (Fla. 2013) (explaining because the Court found no error at all, there was no error "that can

be considered cumulatively with any other errors"). If an alleged error is found meritless by this Court on appeal, then that claim may not be considered in any cumulative error analysis. *Matthews v. State*, 288 So.3d 1050, 1065 (Fla. 2019) (explaining where the "individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error also necessarily fails" quoting *Israel v. State*, 985 So.2d 510, 520 (Fla. 2008)). Courts do not perform cumulative error analysis on the "cumulative effect of non-errors." *Thacker v. Workman*, 678 F.3d 820, 849 (10th Cir. 2012).

Moreover, for cumulative error to apply, this Court must determine that there are at least two errors of merit. "A single improper comment in closing argument does not support a cumulative error analysis." *Bright v. State*, ___ So.3d ___, ___, 2020 WL 1592942, *11 (Fla. Apr. 2, 2020); *see also United States v. Bailey-Snyder*, 923 F.3d 289, 296 (3d Cir. 2019) (stating that cumulative error "requires more than one error"), *cert. denied*, *Bailey-Snyder v. United States*,140 S.Ct. 847 (2020); *Weimer v. Allbaugh*, 766 Fed. Appx. 728, 734 (10th Cir. 2019) (stating that a court undertakes a cumulative error analysis "only if there are at least two errors" citing *Lott v. Trammell*, 705 F.3d 1167, 1223 (10th Cir. 2013)); *United States v. Hall*, 945 F.3d 1035, 1048, n.7 (8th Cir. 2019) (rejecting a claim of cumulative error based on a single error).

Opposing counsel highlights both the issue regarding the admission of the autopsy photographs and the issue of the prosecutor's comments regarding the victim crying out from the grave as the main basis for the claim of cumulative error. IB at 37,41. But the prosecutor's comment regarding crying out from the grave was not objected to in the trial court and is being raised as a claim fundamental error. Claims of fundamental error cannot form part of the basis for a claim of cumulative error. First, for an error to be fundamental it must amount to a denial of due process. *Calloway v. State*, 210 So.3d 1160, 1191 (Fla. 2017).

Such an error would necessarily be reversible error by itself. Second, cumulative error is a form of harmless error analysis but fundamental error is not subject to harmless error analysis. *Reed v. State*, 837 So.2d 366, 369-70 (Fla. 2002) (explaining fundamental error is not subject to harmless error review because by "its very nature, fundamental error has to be considered harmful" because if "the error was not harmful, it would not meet our requirement for being fundamental"); *Ramroop v. State*, 214 So.3d 657, 665 (Fla. 2017) (same). Cumulative error analysis is limited to preserved claims. So, a fundamental error claim may not be considered in a cumulative error analysis.[22]

The only remaining basis for the claim of cumulative error is the preserved claim regarding the admission of the autopsy photographs. But there was no error in the admission of the autopsy photographs at all, as explained above. And, even if this Court were to view the admission of the photographs as error, a single error is not a sufficient basis to raise a cumulative error claim.[23] There are not

---

[22] While the federal courts will perform cumulative error analysis on both preserved and unpreserved errors, that is because the federal courts have plain error review under their rules. Florida does not have plain error review. Florida's concept of fundamental error is more akin to the federal concept of structural error, not plain error. And the federal courts require that the cumulative errors meet the higher plain error test when they perform cumulative error analysis involving both preserved and unpreserved errors anyway. *See United States v. Anaya*, 727 F.3d 1043, 1061 (10th Cir. 2013).

[23] While claims of cumulative error are proper in direct appeals, such claims are not proper in postconviction appeals. There is a due process right to a fair trial but there is no constitutional right to a postconviction proceeding. *Forrest v. Fla. Dep't of Corr.*, 342 Fed. Appx. 560, 565 (11th Cir. 2009) (noting the absence of United States Supreme Court precedent applying the cumulative error doctrine to postconviction claims of ineffective assistance of counsel). And this Court certainly should not permit defendants to mix and match direct appeal claims with postconviction claims as a basis for a claim of cumulative error.

two meritorious preserved errors to perform a cumulative error analysis upon in this case.

Harmless error

Cumulative error is really the concept that two or more errors that are individually harmless are no longer harmless when considered together. *Hanson v. Sherrod*, 797 F.3d 810, 852 (10th Cir. 2015) (explaining that cumulative error analysis merely aggregates all the errors that individually have been found to be harmless but then analyzes whether their cumulative effect was such that collectively they can no longer be determined to be harmless); *Noeling v. State*, 40 So.2d 120, 121 (Fla. 1949) (explaining that while any one of the errors may not in and of itself constitute reversible error, but when considered together the errors are such that the ends of justice requires a new trial).[24] So, cumulative error, although a stand alone claim, is really a collective harmless error analysis.

[24] *Foster v. State*, 132 So.3d 40, 74 (Fla. 2013) (explaining that where multiple errors are discovered, even if each standing alone is considered harmless, the cumulative effect of such errors may deny the defendant a fair trial citing *Troy v. State*, 57 So.3d 828, 844 (Fla. 2011), and *McDuffie v. State*, 970 So.2d 312, 328 (Fla. 2007)); *Lukehart v. State*, 70 So.3d 503, 524 (Fla. 2011) (explaining that if "multiple errors are found and deemed harmless individually, this Court has recognized that the cumulative effect of such errors may deny the defendant a fair and impartial trial citing *Brooks v. State*, 918 So.2d 181, 202 (Fla. 2005)); *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010) (explaining the cumulative error doctrine as the recognition that there may be multiple errors committed in trial proceedings, each of which in isolation constitutes mere harmless error, but when considered in the aggregated, the cumulative effect is so great as to require reversal in order to preserve a defendant's right to a fair trial); *United States v. Toles*, 297 F.3d 959, 972 (10th Cir. 2002) (explaining cumulative error analysis "aggregates all errors found to be harmless" and analyzes whether their cumulative effect "is such that collectively they can no longer be determined to be harmless" citing *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990) (en banc) (finding no cumulative error).

But given the DNA evidence in this case as well as the videotape of the kidnapping, any error, including any cumulative error, is still harmless. Smith's DNA profile matched the DNA found on the victim's neck and anus at one in thirty-five quintillion and his DNA profile matched the semen from the victim's vagina at one in twelve quadrillion. (T. 1345, 1349, 1358). Furthermore, there is a videotape of the beginning of the kidnapping from Walmart's surveillance cameras showing Smith leaving the store with Cherish and walking through the parking lot with her toward his white van. As will be explained in greater detail in the sufficiency of the evidence section, it is an understatement to describe the evidence in this case as overwhelming. Any cumulative error remains harmless.

Sufficiency of the evidence

Even though not raised as an issue on appeal, this Court reviews the sufficiency of the evidence for the first-degree murder conviction in every capital case. *Truehill v. State*, 211 So.3d 930, 951 (Fla. 2017) ("This Court has a mandatory obligation to determine the sufficiency of the evidence to sustain the homicide conviction" citing *Jones v. State*, 963 So.2d 180, 184 (Fla. 2007)); Fla. R. App. P. 9.142(a)(5) (providing: "On direct appeal in death penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief."). In conducting a sufficiency review, this Court "views the evidence in the light most favorable to the State to determine whether a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *Cozzie v. State*, 225 So.3d 717, 733 (Fla. 2017) (quoting *Rodgers v. State*, 948 So.2d 655, 674 (Fla. 2006)).

In *Cozzie*, this Court found that there was competent substantial evidence to support the conviction for first-degree murder in part on the DNA evidence and

because Cozzie was "the last person seen with the victim prior to her murder." *Cozzie*, 225 So.3d at 733-34. The DNA evidence "linked Cozzie to numerous items recovered at the scene, including the victim's bikini bottoms, sunglasses on which the victim's blood was found, a blue multi-colored shirt on which the victim's blood was found, and a swab from the victim's left thigh" and the victim's DNA "matched a swab taken from under Cozzie's fingernail at 12 of 13 genetic markers." *Id.* at 722.

Here, there is competent, substantial evidence to establish that Smith committed this murder, kidnapping, and sexual battery. Smith's DNA profile matched the DNA found on the victim's neck and anus at all fifteen DNA markers. (T. 1338-44). The odds of the DNA profiles matching to that level was one in thirty-five quintillion. (T. 1345, 1349). Smith's DNA on the victim's neck is exactly where one would expect to find the perpetrator's DNA in a strangulation murder. The semen obtained from the victim's vaginal area matched Smith's DNA profile at one in twelve quadrillion. (T. 1358). DNA evidence at these odds excludes every other human being that ever lived as being the rapist. There is competent, substantial evidence to establish that Smith committed the sexual battery. The DNA evidence alone establishes Smith's guilt beyond any doubt.

Furthermore, there is a videotape of the beginning of the kidnapping. Smith was captured by Walmart's surveillance cameras on videotape leaving the store with Cherish at 10:44 p.m. on a Friday night. (RDA 1059,1185).[25] Smith, who

---

[25] As Justice Kennedy once observed, apart from a defendant's own confession, a videotape of the crime is the most "damaging" evidence of guilt that the State can present. *Arizona v. Fulminante*, 499 U.S. 279, 313 (1991) (Kennedy, J., concurring). Justice Kennedy, however, made that statement in 1991 before the widespread use of DNA testing in criminal prosecutions. But regardless of how one ranks a videotape of the crime in comparison with DNA evidence, the evidence is sufficient because this case has both.

had no prior relationship with the victim, whose family he had just meet a few hours earlier at a nearby Dollar General, had told the victim's mother that he was going to get them cheeseburgers at the McDonald's inside the Walmart, when, in fact, instead, Smith left the store with the victim. The videotape also shows Smith walking with Cherish across the parking lot to Smith's white van before the white van drives off. The videotape also establishes that Smith was the last person seen with the child victim that night before her body was found the next morning. This case involves both a videotape of the start kidnapping and DNA evidence of the rape and murder. So, this case involves both scientific evidence and silent eyewitness testimony in the form of a videotape.[26]

Additionally, Smith was arrested the next morning while driving a white van matching the white van in the videotape and with the same license tag. According to the officer who arrested Smith, Officer Wilkie, Smith's pants were "soaking" wet, prompting him to shout out to the other officers that the victim would be found near water. Earlier that Saturday morning, in response to the Amber Alert that the Sheriff Office had issued a few hours earlier, at 4:21 a.m, two citizens had called 911 and reported seeing a suspicious white van parked at the back of Highlands Baptist Church. In response to the citizens' reports, shortly after

---

[26] Videotapes are often referred to by courts as being silent witnesses. They are not silent witnesses; they are silent **eye**witnesses. *Richardson v. State*, 228 So.3d 131, 133-34 (Fla. 4th DCA 2017) (explaining the admissibility of videotapes under the "silent witness" theory); *Wagner v. State*, 707 So.2d 827 (Fla. 1st DCA 1998) (explaining the admissibility of videotapes under the "silent witness" theory citing John Henry Wigmore, 3 *Evidence in Trials at Common Law* § 790, at 219-20 (Chadbourn rev. 1970)). Indeed, because surveillance cameras do not suffer from faded memory or stress perception problems of humans, videotapes are more reliable than the average eyewitness. *Jones v. State*, 197 So.3d 1085, 1091 (Fla. 2d DCA 2015) (listing some of the possible flaws of eyewitness testimony including faded memory and stress from the situation such as when the perpetrator has a gun). With a videotape, a jury can calmly see exactly what the surveillance camera saw.

arresting Smith, Officer Wilkie, went to the Highlands Baptist Church, with his K-9, named Gator. Following the lead of his dog, the officer found the victim's body in a shallow creek off of Trout River behind the church.

Smith also made admissions to another inmate in the jail, Randall Deviney, that were recorded by law enforcement, in which he admitted to liking young girls in the age range of 12-13 years old. (T. 1387-95). In the recording, the other inmate used the victim's name "Cherish" and Smith responded by referring to the size of her butt.

All this evidence is more than sufficient to support the convictions for first-degree murder, kidnapping, and sexual battery on a person under 12 years old.

Proportionality

Even though not raised as an issue on appeal, this Court reviews the proportionality of the death sentence in every capital case. *Truehill v. State*, 211 So.3d 930, 957 (Fla. 2017) ("Although Truehill does not raise this issue on appeal, this Court has an independent obligation to review the proportionality of a sentence of death regardless of whether it is raised by a party citing *England v. State*, 940 So.2d 389, 407 (Fla. 2006)); Fla. R. App. P. 9.142(a)(5) (providing: "On direct appeal in death penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief."); *but see Yacob v. State*, 136 So.3d 539, 557 (Fla. 2014) (Canady, J., dissenting) (explaining that proportionality review is prohibited under Florida's constitutional conformity clause).

Standard of review

There is no standard of review because proportionality review is a function of this Court, not the trial court. *Cf. Brant v. State*, 197 So.3d 1051, 1078 (Fla. 2016) ("Proportionality review is a unique function of this Court's review in capital cases" to foster uniformity). This Court is not reviewing any action or inaction of the trial court in performing its traditional proportionality review.

Merits

Assuming this Court continues to perform proportionality review, the death sentence in this case is proportional. For purposes of proportionality review, the Court compares the case to other capital cases, not to non-capital cases. *Brant*, 197 So.3d at 1078 (citing *Hunter v. State*, 8 So.3d 1052, 1072-73 (Fla. 2008), which had specifically rejected the argument that proportionality review was legally insufficient because such review only considered other cases in which a death sentence was imposed). While this Court compares the case to other capital cases, this Court does not reweigh the aggravating factors and the mitigating circumstances. Rather, this Court accepts the trial court's weighing of the aggravating factors and the mitigating circumstances. *Rogers v. State*, 285 So.3d 872, 892 (Fla. 2019) (citing *Hayward v. State*, 24 So.3d 17, 46 (Fla. 2009)). Proportionality review "is not a comparison between the number of aggravators and mitigators"; rather, it is a "qualitative review of the totality of the circumstances" which compares the present case with other capital cases. *Damas v. State*, 260 So.3d 200, 216 (Fla. 2018) (quoting *Russ v. State*, 73 So.3d 178, 198-99 (Fla. 2011)). Proportionality review is not "a numbers game." *Rogers v. State*, 285 So.3d 872, 892 (Fla. 2019) (quoting *Rigterink v. State*, 66 So.3d 866, 899 (Fla. 2011), and rejecting a disproportionate argument mainly due to the

"relatively weak" mitigation, noting that many of the mitigating circumstances were "repetitive and cumulative").

Smith was convicted of both premeditated and felony first-degree murder by special verdict, kidnapping, and sexual battery on a person under 12 years of age. The jury found six aggravating factors: 1) prior violent felony based on the stipulation to a 1993 attempted kidnapping conviction of a 13 year-old girl; 2) felony murder with kidnapping and sexual battery as the underlying felonies; 3) avoid arrest; 4) HAC; 5) CCP; and 6) victim under 12 years of age. The trial court also found those same six aggravators. (RDA 3113-3143). The trial court gave five of the six aggravators "great" weight and gave the CCP aggravator "very great" weight. The trial court found three statutory mitigating circumstances: 1) extreme mental or emotional disturbance which it gave moderate weight; 2) capability to appreciate or conform was substantially impaired which it gave significant weight; and 3) age which it gave moderate weight. And, although the jury had found only one catch-all mitigating circumstance, the trial court found 29 catch-all mitigating circumstances which it gave from little or some weight to moderate weight.

"This Court has repeatedly affirmed the death penalty where the defendant has kidnapped, sexually battered, and murdered a child victim." *Cozzie v. State*, 225 So.3d 717, 734 (Fla. 2017) (quoting *Smith v. State*, 28 So.3d 838, 875 (Fla. 2009)); *see also Smith v. State*, 28 So.3d 838, 874-76 (Fla. 2009) (concluding the death sentence was proportionate in a case where the defendant was convicted of first-degree murder, capital sexual battery, and kidnapping of an eleven-year-old girl, where the trial court found five aggravating factors: 1) committed while on probation given moderate weight; 2) committed while engaged in the commission of a sexual battery or kidnapping given significant weight; 3) committed for the purpose of avoiding arrest given great weight; 4) HAC given great weight; and 5) the victim was under the age of twelve given great weight, and 13 nonstatutory

mitigating circumstances, most of which were given little weight); *Crain v. State*, 894 So.2d 59, 76-78 (Fla. 2004) (concluding the death sentence was proportionate in a case where the defendant was convicted of first-degree murder and kidnapping of a seven-year-old girl, where the trial court found three aggravating factors: 1) prior violent felonies given great weight; 2) committed during the course of a kidnapping given great weight, and 3) the victim was under the age of twelve given great weight and eight nonstatutory mitigating circumstances, most of which were given moderate or some weight); *Chavez v. State*, 832 So.2d 730, 766-67 & n.44 (Fla. 2002) (concluding the death sentence was proportionate in a case where the defendant was convicted of first-degree murder, capital sexual battery, and kidnapping of a nine-year-old boy, where the trial court found three aggravating factors: 1) during the course of a kidnapping; 2) committed for the purpose of avoiding arrest; and 3) HAC and six mitigating circumstances, most of which were given some or little weight citing *Wike v. State*, 698 So.2d 817, 823 (Fla. 1997); *Schwab v. State*, 636 So.2d 3, 7 (Fla. 1994); and *Carroll v. State*, 636 So.2d 1316 (Fla. 1994)); *James v. State*, 695 So.2d 1229, 1230, 1233, 1237-38 (Fla. 1997) (concluding the death sentence was proportionate in a case where the defendant entered a plea to the first-degree murder of an eight-year-old girl and attempted sexual battery, kidnapping and the first-degree murder of her grandmother among other charges, where the trial court found three aggravating factors: 1) HAC; 2) prior violent felony aggravator based on the contemporaneous crimes; and 3) felony murder aggravator and 16 mitigating circumstances, including both statutory mental mitigators both of which were given significant weight).[14] Here,

[14] The Court did not list the weight given to the aggravators by the trial court in either the *Chavez* or *James* opinions.

as in *Cozzie*, *Smith*, *Crain*, *Chavez*, and *James*, a death sentence for the kidnapping, rape, and murder of a young child is proportionate.

In *Cozzie*, this Court found the death sentence proportionate where the defendant had "kidnapped, abused, and sexually battered" and then strangled and beat to death a 15-year-old victim. *Cozzie*, 225 So.3d at 734-35. *Cozzie* involved three aggravating factors: 1) the felony murder aggravator based on the sexual battery, aggravated child abuse, and kidnapping; 2) HAC; and 3) CCP, all of which were given great weight. *Id.* at 734. The sentencing court in *Cozzie* found age as a statutory mitigating circumstance, which was given moderate weight. *Id.* The sentencing court in *Cozzie* also found 25 nonstatutory mitigating circumstances, none of which it gave more than moderate weight. *Id.* at 734. This Court held that Cozzie's death sentence was proportionate. *Id.* at 735.

Here, as in *Cozzie*, the defendant kidnapped and sexually battered and then beat and strangled to death a child. *Cozzie*, 225 So.3d at 721-22, 734. But, here, unlike *Cozzie* where there were three or four aggravators, there are six aggravators in this case including the prior violent felony aggravator for another crime against a 13 year-old girl.[15] Both the prior violent felony aggravator and the victim under 12 years old aggravators are present in this case; whereas, neither of those aggravators were present in *Cozzie*. Here, as in *Cozzie*, the statutory age mitigator was found and given moderate weight. *Cozzie*, 225 So.3d at 734. But, while Cozzie was 21 years old at the time of his crime, Smith was 56 years old at the

[15] The trial court in *Cozzie* found four aggravators: 1) the felony murder aggravator based on the sexual battery, aggravated child abuse, and kidnapping convictions; 2) HAC; 3) CCP; and 4) avoid arrest, all of which it assigned great weight. *Cozzie*, 225 So.3d at 734. But the avoid arrest aggravator had not been submitted to the jury. *Id.* at 729. While unclear, this Court may have stricken the avoid arrest aggravator on appeal but then may have used that aggravator in the proportionality analysis anyway. *Id.* (concluding the error in finding the avoid arrest aggravator was harmless); *but see Cozzie*, 225 So.3d at 734.

time of this crime. In *Cozzie*, the trial court found 25 nonstatutory mitigating circumstances, which it assigned either no weight or, at most, moderate weight. *Id*. at 725, n.5. Here, the trial court found 29 nonstatutory mitigating circumstances which it also gave, at most, moderate weight and more often little weight. While admittedly both statutory mental mitigators were found by the trial court in this case, unlike *Cozzie,* it was only the substantially impaired statutory mental mitigator that the trial court assigned significant weight to. So, while there are some differences regarding statutory mitigation and the number of nonstatutory mitigators between this case and *Cozzie*, the aggravation is greater in this case overriding those differences.

In *James v. State*, 695 So.2d 1229, 1233, 1237 (Fla. 1997), the trial court also found the substantially impaired statutory mental mitigators and gave it significant weight but this Court still found the death sentence proportionate, despite the presence of a statutory mental mitigation. Furthermore, the trial court in *James* also found the "ability to appreciate or conform" mitigator but as nonstatutory mitigation which it gave significant weight. *Id.* at 1233, 1237 (upholding the trial court treating the "ability to appreciate or conform" mitigator as nonstatutory mitigation instead of statutory mitigation). The *James* case involved two first-degree murders including the first-degree murder and sexual battery of an eight-year-old girl. Here, as in *James*, the death sentence is proportionate despite the presence of statutory mental mitigation.

As in *Cozzie* and *James*, the death sentence in this case is proportionate.

Additionally, there are six aggravators in this case including HAC, CCP, and the prior violent felony aggravators. *Bush v. State*, ___ So.3d ___, 45 Fla. L. Weekly S145, 2020 WL 2479140, *28 (Fla. May 14, 2020) (concluding a death sentence was proportionate in a case with five aggravators of HAC, CCP, prior violent felony, felony murder, and pecuniary gain which were all assigned great weight).

The *Bush* Court observed that the HAC, CCP, and prior violent felony aggravators have "repeatedly been identified by this Court as among the most serious aggravating factors." *Id.* at *28. And those same three "serious" aggravating factors of HAC, CCP, and prior violent felony are present in this case as well.

Accordingly, the death sentence is proportional with other capital cases.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the convictions and the death sentence.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

/s/ Charmaine Millsaps
CHARMAINE M. MILLSAPS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE
primary email:
capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com

COUNSEL FOR THE STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via e-portal to H. KATE BEDELL of Bedell & Kuritz and Associates, 200 East Forsyth Street, Jacksonville, FL 32202; phone: (904) 355-1999; email: kate@kuritzlaw.com and RICHARD R. KURITZ of Bedell & Kuritz and Associates, 200 East Forsyth Street, Jacksonville, FL 32202; phone: (904) 355-1999; email: contact@kuritzlaw.com this 7th day of July, 2020.

/s/ Charmaine Millsaps
Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was generated using Bookman Old Style 12-point font.

/s/ *Charmaine Millsaps*
Charmaine M. Millsaps
Attorney for the State of Florida