IN THE SUPREME COURT OF FLORIDA

BERRY KESSLER,	:	
Appellant,	:	
vs.	:	Case No. 90,035
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

PAUL C. HELM
Assistant Public Defender
FLORIDA BAR NUMBER O229687

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831

(941) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

PRELIMINARY STATEMENT

This brief is filed on behalf of the appellant, Berry Kessler, in reply to the Answer Brief of Appellee, the State of Florida.

Page references to the record on appeal are designated by a Roman numeral for the volume number, R for the record proper, and T for the trial transcript. Page references to the appendix to the Initial Brief of Appellant are designated by A.

ARGUMENT

ISSUE I

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO TRIAL BY AN IMPARTIAL JURY BY DENYING HIS CAUSE CHALLENGE TO JUROR MENGEL.

In essence, appellee argues that juror Mengel was properly qualified to serve on Kessler's jury, despite having read the extremely prejudicial newspaper article in the Pasco addition of the St. Petersburg Times [A 6-7], because he said he could put that information aside, presume Kessler innocent, and base his verdict on the law and the evidence presented in court. Answer Brief, at 5-11. However, appellee concedes that juror Mengel's assurances about his ability to be fair and impartial are not dispositive of the issue, citing Rolling v. State, 695 So. 2d 278, 285 (Fla.), cert. denied, 118 S. CT. 448, 139 L. Ed. 2d 383 (1997); Davis v. State, 461 So. 2d 67, 69 (Fla. 1984), cert. denied, 473 U.S. 913 (1985); and Copeland v. State, 457 So. 2d 1012, 1017 (Fla. 1984), cert. denied, 471 U.S. 1030 (1985). Answer Brief, at 10.

The test for determining Mengel's competency as a juror is whether there was any reasonable doubt about his ability to render an impartial verdict. If there was a reasonable doubt about his ability to render an impartial verdict, he should have been excused for cause when challenged by defense counsel. See Turner v. State, 645 So. 2d 444, 447 (Fla. 1994); Bryant v. State, 601 So. 2d 529,

532 (Fla. 1992); Hamilton v. State, 547 So. 2d 630, 632 (Fla. 1989); Hill v. State, 477 So. 2d 553, 556 (Fla. 1985).

There was a reasonable doubt about juror Mengel's ability to be fair and impartial because he read all of the prejudicial newspaper article in the Times, and based on the article, he "assumed that someone else had formed an opinion and found [Kessler] guilty." [XIV, T 594] In fact, the newspaper article reported that Kessler had been convicted in federal court for the killing of John Deroo and an Ohio businessman, that he was serving a life sentence without parole, that he was convicted of trying to arrange a hit on another business partner, and that he was a suspect in five other slayings that had not been solved. [A 6-7] This information was never presented to the jury at Kessler's trial, and as argued in the Initial Brief, at 81-82, it could not have been admitted because it was not relevant and it was prejudicial. See Jackson v. State, 545 So. 2d 260, 263 (Fla. 1989) (reversible error for trial court to allow prosecutor to cross-examine defendant about his previous trial and conviction for the same crime); Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990) (evidence of irrelevant collateral crimes is inadmissible and presumed prejudicial). Evidence is not admissible when the danger of unfair prejudice outweighs its probative value. Sexton v. State, 697 So. 2d 833, 837 (Fla. 1997); § 90.403, Fla. Stat. (1995).

Because juror Mengel read the extremely prejudicial newspaper article, it would have been difficult, if not impossible for him to put the information it contained completely out of his mind and reach a verdict based solely on the evidence presented at trial. Singer v. State, 109 So. 2d 7, 24 (Fla. 1959). This case is very similar to Reilly v. State, 557 So. 2d 1365 (Fla. 1990), in which this Court found reversible error in the denial of a defense cause challenge to a prospective juror who read a newspaper article reporting that Reilly had confessed despite the juror's denial that he had formed an opinion about Reilly's guilt and his assurances that he could set aside his impressions from what he read and decide the case on the evidence presented at trial. As in Reilly, the trial court erred in denying Kessler's cause challenge to juror Mengel.

Appellee argues that appellant has the burden of demonstrating that prejudicial error occurred pursuant to section 924.051(7), Florida Statutes (1996 Supp.). Answer Brief, at 11-12. Appellant has demonstrated prejudicial error in the denial of the cause challenge to juror Mengel in his Initial Brief, at 79-85, and in this Reply Brief, supra. However, section 924.051(7) does not apply to this issue. The denial of the cause challenge violated Kessler's constitutional right under the Sixth and Fourteenth Amendments to an impartial jury. See Ross v. Oklahoma, 487 U.S. 81, 85 (1988) (Sixth and Fourteenth Amendments guarantee right to

impartial jury). Whether Kessler's conviction can stand when the state has violated his federal constitutional rights is a federal question governed by standards established by the United States Supreme Court. Chapman v. California, 386 U.S. 18, 21 (1967).

The Supreme Court has distinguished two kinds of federal constitutional error. Structural defects in the constitution of the trial mechanism, such as deprivation of the right to counsel at trial, violation of the right to an impartial judge, or unlawful exclusion of members of the defendant's race from the grand jury, defy analysis by harmless error standards and require automatic reversal of the conviction because they infect the entire trial process. Sullivan v. Louisiana, 507 U.S. 275, 281 (1993); Brecht v. Abrahamson, 507 U.S. 619, 629-30 (1993); Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991). On the other hand, trial errors which occur during the presentation of the case to the jury and may be quantitatively assessed in the context of other evidence presented are subject to harmless error review in determining whether the error in a particular case requires reversal. Sullivan, at 281; Fulminante, at 306-308.

The Supreme Court has not expressly ruled on the question of whether violation of the right to an impartial jury is a structural or a trial error. However, the Court's opinions strongly suggest that it is a structural error. The right to an impartial jury is analogous to the right to an impartial judge. Violation of the

right to an impartial judge is structural error. Sullivan, at 279; Fulminante, at 309. In Vasquez v. Hillery, 474 U.S. 254 (1986), the Court held that racial discrimination in the selection of the grand jury requires reversal of a conviction and cannot be found harmless. In reaching this conclusion, the Court noted that when a petit jury has been exposed to prejudicial publicity, the Court has required reversal of the conviction because the effect of the violation cannot be ascertained. Id., at 263 (citing Sheppard v. Maxwell, 384 U.S. 333, 351-52 (1966)). In Rose v. Clark, 478 U.S. 570, 474 (1986), the Court explained, "Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may present evidence before an impartial judge and jury." Therefore, if the right to an impartial jury is violated, the effect of the violation cannot be ascertained, and there is no proper basis for harmless error review.

Even if violation of the right to an impartial jury was trial error rather than structural error, the question of whether the error was harmless or required reversal would be controlled by the harmless error standard announced in Chapman, which this Court adopted and explained in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). This standard places the burden on the state, as the beneficiary of the error, to demonstrate beyond a reasonable doubt that the error did not contribute to the conviction or affect the

jury's verdict. Chapman, at 23-24; DiGuilio, at 1135. The state has not met its burden in this case.

It is impossible to determine beyond a reasonable doubt whether the jury's verdict was affected by the denial of the cause challenge to juror Mengel. It is reasonably likely that Mengel's knowledge of the prejudicial information in the newspaper affected his decision to find Kessler guilty. It is also reasonably possible that Mengel told the other jurors about the contents of the newspaper article and affected their decision to find Kessler guilty. This Court must find that the denial of Kessler's cause challenge to Mengel was not harmless and requires reversal of the conviction and sentence for a new trial.

ISSUE II

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS AGAINST SELF-INCRIMINATION AND TO DUE PROCESS OF LAW BY ADMITTING HIS INVOLUNTARY STATEMENTS TO FBI INFORMANT BARKETT.

It is true that this Court has held that a trial court's ruling on a motion to suppress is presumed correct. Henry v. State, 613 So. 2d 429, 431 (Fla. 1992), cert. denied, 114 S. Ct. 699, 126 L. Ed. 2d 665 (1994). Nonetheless, this Court studied the record in Henry before it agreed with the trial court's conclusion that Henry made his statements knowingly and voluntarily. Id.

The United States Supreme Court has ruled that "the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination." Arizona v. Fulminante, 499 U.S. 279, 287 (1991); Miller v. Fenton, 474 U.S. 104, 110 (1985). Questions of law are generally subject to de novo review on appeal. See Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997) (whether circumstance is mitigating is question of law subject to de novo review); Murray v. State, 692 So. 2d 157, 164 (Fla. 1997) (admissibility of DNA evidence is subject to de novo review); Walsingham v. Dockery, 671 So. 2d 166, 172 (Fla. 1st DCA 1996) (questions of law are subject to de novo review).

Regarding motions to suppress evidence alleged to have been seized in violation of the Fourth Amendment, the First District has explained that the standard of review for the trial court's factual

findings is whether competent substantial evidence supports the ruling, while the standard of review for the trial court's application of the law to the facts is de novo. Butler v. State, 706 So. 2d 100, 101 (Fla. 1st DCA 1998); State v. Baldwin, 686 So. 2d 682, 684 (Fla. 1st DCA 1997). The Third District has also ruled that the trial court's decisions on legal questions in search and seizure cases are subject to de novo review. State v. R.R., 697 So. 2d 181, 182 (Fla. 3d DCA 1997). Determinations of reasonable suspicion and probable cause are subject to de novo review on appeal. Ornelas v. United States, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911, 920 (1996); DeLeon v. State, 700 So. 2d 718, 719 (Fla. 2d DCA 1997).

Because the ultimate question of the voluntariness of a confession is a question of law, this Court should apply a de novo standard of review in deciding whether the trial court erred by denying Kessler's motion to suppress his statements to FBI informant Steve Barkett on the ground that they were involuntary.

Appellee misstates the history of the United States Supreme Court's analysis of the admissibility of confessions in state cases. Brief of Appellee, at 14. The Court began treating the admissibility of confessions in state court as a question of due process under the Fourteenth Amendment in 1936 with its decision in Brown v. Mississippi, 297 U.S. 278 (1936). Withrow v. Williams, 507 U.S. 680, 688 (1993). Under this approach, the Court examined

the totality of the circumstances to determine whether a confession was made freely, voluntarily, and without compulsion or inducement of any sort. Withrow, at 688-89. This was done because the Court did not recognize the applicability of the self-incrimination clause of the Fifth Amendment to state cases until 1964 in Malloy v. Hogan, 378 U.S. 1 (1964). Withrow, at 688. The decision in Malloy opened the doctrinal avenue of Bram v. United States, 168 U.S. 532 (1987), for the analysis of state cases. Withrow, at 689. However, the Court continues to employ the totality of the circumstances approach when addressing a claim that the introduction of an involuntary confession has violated due process. Withrow, at 689; Arizona v. Fulminante, 499 U.S. at 285-86.

Appellee incorrectly argues that voluntariness determinations are made only in cases involving custodial interrogation. Answer Brief, at 14-15. Police custody is required for claims that the protections afforded by Miranda v. Arizona, 384 U.S. 436 (1966), and its progeny have been violated. Thompson v. Keohane, 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383, 388 (1995). Police custody is also required for claims that Miranda type protections provided by Article I, section 9, Florida Constitution, have been violated. Traylor v. State, 596 So. 2d 957, 965-66 (Fla. 1992). However, the requirement for claims that a confession is not voluntary under the Fourteenth Amendment is coercive police activity, not custody.

Colorado v. Connelly, 479 U.S. 157, 167 (1986); Bonifay v. State, 626 So. 2d 1310, 1312 (Fla. 1993).[1]

Again, the voluntariness of a confession under both the Fourteenth Amendment and Article I, section 9, Florida Constitution, is determined by an examination of the totality of the circumstances. Withrow, at 689, 693; Walker v. State, 707 So. 2d 300, 311 (Fla. 1997); Traylor, at 964. Police custody is just one of the circumstances to be considered. Withrow, at 693-94.

Appellee incorrectly asserts that there is no evidence of police coercion in this case. Answer Brief, at 16. The state's own witness, FBI informant Steve Barkett, testified at the pretrial hearings that the "investor," actually the FBI, was supposed to provide $50,000 to Kessler, and Barkett convinced Kessler to give him information about the Deroo homicide to assure the investor that he had the ability to go through with the new deal. [V, R 708-09, 723-24] Barkett repeatedly asked Kessler how to convince the investor he would go through with the deal. [V, R 791-92, 812] Barkett kept telling Kessler that before the investor would put up any more money, he had to have proof that they were setting up the corporation and the insurance was in place. [V, R 787] A more complete and detailed explanation of the state's evidence,

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[1] In Mirabal v. State, 698 So. 2d 360 (Fla. 4th DCA 1997), the Fourth District found that coercive activity by the defendant's employers rendered the defendant's confession to them involuntary under Article I, section 9, Florida Constitution.

including the videotapes, which showed Barkett's coercive activity under the direction of the FBI is contained in the Initial Brief, at 87-98.

Barkett's actions on behalf of the FBI were coercive because Kessler was being promised a benefit, $50,000, in exchange for his statements. "[I]f a government official induces a defendant to make a statement using language which amounts to a direct or implied promise of benefit, the statement must be excluded because it is given involuntarily." State v. Feroben, 677 So. 2d 980, 981 (Fla. 5th DCA 1996); see also, Bram v. United States, 168 U.S. 532, 542-43 (1897); Johnson v. State, 696 So. 2d 326, 329 (Fla. 1997).

Appellee's reliance on Echols v. State, 484 So. 2d 568 (Fla. 1985), cert. denied, 479 U.S. 871 (1986), Answer Brief at 17-19, is entirely misplaced. Echols did not involve a claim that the defendant's statements to the Indiana police informant were involuntary. Instead, the issue was whether statements legally recorded in Indiana were inadmissible in Florida because the recording would have been illegal under Florida law had it been done in Florida. This Court correctly reasoned that it could not deter the conduct of the Indiana police which was legal in Indiana by excluding the recording from evidence in Florida. Such reasoning has no place in the consideration of whether Kessler's statements to FBI informant Barkett were admissible. Because the statements were obtained through police coercion, they were

obtained in violation of Kessler's rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 9, Florida Constitution and could not be used against him no matter where the statements were made.

Appellee's reliance on Hill v. State, 422 So. 2d 816 (Fla. 1982), cert. denied, 460 U.S. 1017 (1983), Answer Brief, at 17, 19-20, is equally misplaced. Like Echols, Hill did not involve a claim that the defendant's statements to a police informant were involuntary. Instead, the issues were whether the statements were legally recorded and whether there was a Miranda violation.

ISSUE III

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO MAKE EVIDENCE OF OTHER CRIMES OR BAD ACTS BY APPELLANT A FEATURE OF THE TRIAL SO THAT THE DANGER OF UNFAIR PREJUDICE OUTWEIGHED THE PROBATIVE VALUE OF THE EVIDENCE.

Appellant disagrees with appellee's assertion that he has failed to carry his burden to establish that the trial court's error in allowing the evidence of other crimes or bad acts to become a feature of the trial was harmful. Answer Brief, at 28. The ultimate point of appellant's argument is that the danger of unfair prejudice from the admission of the other crimes evidence outweighed its probative value. This error requires reversal because a finding of prejudice to appellant is necessarily included in finding that the trial court erred. See Sexton v. State, 697 So. 2d 833, 837 (Fla. 1997); Steverson v. State, 695 So. 2d 687, 688-89 (Fla. 1997).

Moreover, appellant disputes appellee's argument that appellant has the burden to demonstrate prejudice. In State v. Lee, 531 So. 2d 133, 136 (Fla. 1988), this Court held that the erroneous admission of other crime evidence is subject to the harmless error analysis set forth in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In DiGuilio, this Court adopted and explained the harmless error test established by Chapman v. California, 386 U.S. 18 (1967). This standard places the burden on the state, as

the beneficiary of the error, to demonstrate beyond a reasonable doubt that the error did not contribute to the conviction or affect the jury's verdict. Chapman, at 23-24; Lee, at 136; DiGuilio, at 1135.

Section 924.051(7), Florida Statutes (1997), purports to place the burden on appellant to demonstrate prejudice:

> In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

However, in Lee, at 136 n. 1, this Court considered similar predecessor harmless error statutes, sections 59.041 and 924.33, Florida Statutes (1983), and stated:

> We have previously recognized that the authority of the legislature to enact harmless error statutes is unquestioned. . . . The Court retains the authority, however, to determine when an error is harmless and the analysis to be used in making the determination. [Citation omitted; emphasis added.]

Thus, this Court retains the authority to continue to apply the harmless error test provided by Chapman and DiGuilio.

ISSUE IV

THE TRIAL COURT ERRED BY ADMITTING IRRELEVANT EVIDENCE OF APPELLANT'S FEDERAL TAX OFFENSE CONVICTIONS.

This issue concerns the trial court's error in admitting the judgments and sentences showing Kessler's prior convictions for federal tax evasion upon redirect examination of Detective Lawless during the state's case-in-chief. The arguments presented in the Initial Brief are based upon defense counsel's arguments to the trial court in opposition to the admission of the judgments. [XVII, T 1332-49] The prosecutors argued in favor of admitting the judgments on the ground that the convictions would come out later when Kessler testified. [XVII, T 1335-37] Defense counsel argued that the state would be limited to cross-examining Kessler about the number of his prior convictions, and the actual convictions would not come in if Kessler answered correctly. [XVII, T 1337-38] The court overruled defense counsel's objections and ruled that it would admit the judgments and sentences. [XVII, T 1338] Defense counsel asked the court to review a case, Cummings v. State, 412 So. 2d 436 (Fla. 4th DCA 1982), which supported his argument. [XVII, T 1340] The court stated that Cummings did not alter its ruling. [XVII, T 1341] The court admitted the judgments and sentences over defense counsel's further objections. [XVII, T 1342, 1345-49] Defense counsel then moved for a mistrial based

upon the improper introduction of the exhibits, which the court denied. [XVII, T 1349]

Despite this procedural history, appellee argues that appellant's claim is barred because he has argued grounds that were not raised by objection at the time Kessler was cross-examined. Brief of Appellee, at 32-34. Because the error argued by appellant is the admission of the judgments and sentences during Lawless's testimony for the state, which was preserved by defense counsel's objections and motion for mistrial, appellee's procedural default argument is without merit.

Appellee also argues that defense counsel opened the door to redirect examination of Lawless about Kessler's federal tax evasion convictions by asking Lawless about Kessler's admission that he had been indicted for tax evasion. Answer Brief, at 30-31. However, defense counsel's question did not open the door to admission of the judgments and sentences because defense counsel's cross-examination of Lawless on this point did not mislead the jury. "To open the door to evidence of prior bad acts, the defense must first offer misleading testimony or make a specific factual assertion which the state has the right to correct so that the jury will not be misled." Bozeman v. State, 698 So. 2d 629, 630 (Fla. 4th DCA 1997).

ISSUE V

THE TRIAL COURT ERRED BY ADMITTING IRRELEVANT AND PREJUDICIAL EVIDENCE THAT KESSLER DISPLAYED NO SYMPATHY OR SORROW FOR THE DEATH OF DEROO.

Appellee's argument that testimony by two state witnesses, Douglas Stammler and Cheryl Hamilton Trotter, that Kessler did not express any sympathy or sorrow for Deroo or his family, was relevant because it demonstrated his guilty knowledge, Answer Brief, at 39, ignores this Court's decision in Randolph v. State, 562 So. 2d 331 (Fla.), cert. denied, 498 U.S. 992 (1990). In Randolph, this Court ruled that the trial court was clearly correct in sustaining defense counsel's objection that testimony about the defendant's lack of remorse was not relevant to the issue of the defendant's guilt. Id., at 338.

Appellee's argument that the evidence of lack of remorse was not considered by the trial court in its sentencing order, Answer Brief, at 39, ignores the Supreme Court's decision in Espinosa v. Florida, 505 U.S. 1079 (1992). The jury's consideration of an invalid aggravating circumstance violates the Eighth Amendment because the trial court gives great weight to the jury's penalty recommendation. Id.

Appellee incorrectly argues that appellant has the burden to show harmful error. Because the admission of the irrelevant and improper evidence of lack of remorse is likely to have affected the

jury's sentencing recommendation and therefore violated the Eighth Amendment, it is a federal constitutional violation subject to harmless error review under the standard established by the United States Supreme Court in Chapman v. California, 386 U.S. 18 (1967), which this Court adopted and explained in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). This standard places the burden on the state, as the beneficiary of the error, to demonstrate beyond a reasonable doubt that the error did not contribute to the conviction or affect the jury's verdict. Chapman, at 23-24; DiGuilio, at 1135. The state has not met its burden of demonstrating harmless error in this case.

ISSUE VI

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS FOR MISTRIAL WHEN STATE WITNESSES AND THE PROSECUTOR MADE REMARKS ABOUT APPELLANT'S PRIOR TRIAL IN FEDERAL COURT.

Appellee's description of the Third District's decision in Lawson v. State, 304 So. 2d 522 (Fla. 3d DCA 1974), Answer Brief, at 43, is misleading because appellee describes only the first of two grounds for reversal in Lawson. In the Initial Brief, at 124, appellant relies upon the second ground for reversal in Lawson, that the denial of the defendant's motion for mistrial was reversible error when a defense witness on cross-examination inadvertently mentioned that the defendant had been found guilty, referring to an earlier, vacated conviction for the same offense. Id., at 524.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of November, 1999.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

PAUL C. HELM
Assistant Public Defender
Florida Bar Number O229687
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/pch