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IN THE SUPREME COURT OF FLORIDA

ELIJAH BROOKINS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No.: SC14-418

L.T. No. 12-478CFA

ON DIRECT APPEAL FROM A FINAL JUDGMENT AND DEATH SENTENCE RENDERED BY THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, GADSDEN COUNTY, FLORIDA, JONATHAN SJOSTROM, CIRCUIT JUDGE

REPLY BRIEF OF APPELLANT

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Preliminary Statement

References to the record on appeal are designated "R," followed by the volume and page number. References to the State's answer brief are designated "AB," followed by the page number.

Reply Argument

I. WHETHER THE CIRCUIT COURT ERRED IN ADMITTING COLLATERAL CRIME EVIDENCE FOR IMPEACHMENT

The State argues in the answer brief that the trial court did not err in admitting collateral crime evidence of Appellant's possession of a knife on another occasion as impeachment for four reasons: (1) because the evidence would have been admissible during the State's case-in-chief to prove a material fact in issue, (2) because the evidence would have been admissible during the State's case-in-chief as similar fact evidence to prove Appellant's identity as the murderer, (3) because Appellant opened the door to impeachment during his direct examination testimony, and (4) because the error was harmless beyond a reasonable doubt (AB 20-29). Appellant addresses each argument in turn as follows.

1. Whether admissible to prove material fact in issue:

The State asserts first that the collateral crime evidence was admissible to prove Appellant's "preparation, plan and knowledge of how to carry and conceal a weapon in jail during a strip search," and that this knowledge was a material fact at issue in this case (AB at 22). This is incorrect.

The State filed a pretrial notice of intent to introduce evidence of other crimes under § 90.404, Fla. Stat. (2012) (R. 1/71-72). During a pretrial hearing on the State's notice and Appellant's objection thereto, the State announced that it

would not seek to introduce this evidence during its case-in-chief (R. 13/20). The State argues that this was not an admission that the evidence was inadmissible. However, as a result of this concession, Appellant did not make any further argument on the admissibility of the evidence under § 90.404, nor did the trial court make the findings required by statute before the evidence could be admitted.

Before a collateral crime may be introduced as substantive evidence, the defendant is entitled to notice and hearing and the trial court is required to make four findings: (1) whether the defendant committed the collateral crime, (2) whether the collateral crime meets the similarity requirement, (3) whether the collateral crime is too remote to be relevant, and (4) whether the prejudicial effect of the collateral crime evidence would outweigh its probative value. *McWatters v. State,* 36 So. 3d 613 (Fla. 2010). If these due process safeguards are not provided, the State cannot rely on § 90.404 to justify admission of a collateral crime in evidence. *Downs v. State,* 40 So. 3d 49, 52 (Fla. 5th DCA 2010).

In this case, the State's announcement removed the question of admissibility under § 90.404 from the trial court's consideration, and induced Appellant to withhold further argument on why the evidence should not be admitted. Regardless of whether the State conceded the inadmissibility of the evidence or not, the statement that the evidence would not be introduced during the State's case-in-chief, combined with the trial court's subsequent failure to make the required

findings, had the effect of rendering the evidence inadmissible under § 90.404. The State is therefore barred from arguing on appeal that there is no error because the evidence could have been admitted under that section.

In addition, the State would not have prevailed on any argument that the collateral crime was admissible to prove Appellant's knowledge of how to conceal a knife during a strip search. Appellant's handwritten statement admitting possession of the knife states that he dropped the knife down his pant leg and onto the floor when he discovered that he was being taken to the cell block to be strip searched by jail guards (R. 1/73). If anything, this incident suggests that Appellant did not believe his concealment of the knife in his clothing was sufficient to avoid detection, as he attempted to discard the knife before the strip search even began but it was discovered by guards when another inmate kicked it with his foot (R. 1/73). As a result, the collateral crime would not prove Appellant's knowledge or ability to get a knife through a strip search undetected, or even that he would attempt to do so.

The collateral crime evidence would also not prove Appellant's preparation and plan to commit the instant offense, as the knife possession occurred after the instant murder and was not shown to be for the purpose of stabbing anyone. The collateral crime was not sufficiently similar to establish a common plan. Whereas in the instant case Appellant allegedly stored the knife in an elastic holster sewn

into the waistband of his pants, which had to be torn open in order to retrieve the knife, the collateral crime involved a much less elaborate string handle that allowed Appellant to keep the knife on the inside of the leg of his pants. There was also no description of the second knife provided to compare it to the one used in the instant murder, which was long and had to be repeatedly bent back into shape, according to eyewitnesses on the bus.

Thus, the only similarity between the two incidents was Appellant's alleged possession of a shank in a correctional facility, one of which was abandoned to avoid a strip search and one that allegedly eluded a strip search by being sewn into the clothing. Such general similarity is insufficient to establish admissibility under § 90.404. *See Blevins v. State,* 756 So. 2d 1052, 1053 (Fla. 4th DCA 2000) (requiring collateral crime to be unique or unusual if it is offered to establish that the defendant committed the crime charged). Therefore, the evidence was not admissible during the State's case-in-chief to prove knowledge or plan.

2. Whether admissible to prove identity

The State's second argument is that the collateral crime was admissible in its case-in-chief to prove Appellant's identity as the murderer. This is also incorrect. When collateral crime evidence is offered to prove identity, a striking similarity akin to a fingerprint is required. *See McWatters,* 36 So. 3d at 628. The charged and collateral crimes are not nearly similar enough to meet this stringent requirement.

As detailed above, the manner of carrying, concealing and removing the weapons from the clothing was different in the two cases, and no similarity between the actual weapons was even suggested. One incident occurred on a prison transport bus following a strip search, while the other occurred in the county jail prior to a strip search. One knife was used to commit a murder while the other was not used to commit any violent act and was voluntarily abandoned in an attempt to avoid detection. Appellant readily admitted possession of one knife in a written statement and emphatically denied carrying the other. And again, because of the State's announcement that the collateral crime would not be offered as substantive evidence, the trial court made no findings on similarity between the two incidents.

It is a harsh reality that inmates serving life sentences in violent institutions occasionally feel the need to carry a concealed weapon. The fact that Appellant carried a knife on one occasion does not establish his identity as the person who used a different knife on a different day in a different location to kill Mr. Sexton. The collateral crime only tends to prove Appellant's identity to the extent it shows his propensity to carry a knife in a correctional setting, which is a prohibited use of such evidence under § 90.404(2)(a).

3. Whether Appellant opened the door on direct examination

Appellant's primary argument in the initial brief on this issue was that the trial court erred in admitting the collateral crime evidence as impeachment after

Appellant gave his direct examination testimony. The State asserts that Appellant opened the door to that impeachment by implying in his testimony that it was impossible to get a knife through a strip search or that he lacked the knowledge of how to do so, and that the collateral crime evidence proved otherwise (AB 25-28). The State's argument fails for four reasons.

First, Appellant's testimony about the strip search was during the early portion of his direct examination and was offered to show the sequence of events leading up to the inmates boarding the transport bus (R. 19/300-301). Appellant made no misleading suggestion, direct or implied, that he lacked the knowledge of how to conceal a weapon in his clothing so as to avoid detection by guards during a strip search. Appellant also stopped well short of saying that it was impossible for guards to miss a weapon during a strip search. He simply said that the guards go through every piece of clothing.

Second, the State had already elicited from several of its own witnesses that the prisoners were strip searched before they got on the bus (R. 15/49, 81). Appellant's testimony, while more detailed, was largely cumulative to that of the prison guards.

Third, Appellant's description of the strip search procedure would not make him any more or less likely to be the murderer than any of the other inmates being transported. All of the inmates on the bus went through the same strip search

procedure in the property room before boarding the bus. Since it is undisputed that one of them brought the knife onto the bus and committed the murder, the fact that prison guards conducted a thorough strip search of all inmates hardly implies that it was impossible to smuggle a knife onto the bus. It was clearly not impossible because it did in fact occur.

Fourth, even if Appellant's direct examination testimony could be read to suggest that he lacked the opportunity to smuggle the knife onto the bus because it would have been detected during the strip search, the collateral crime evidence is not relevant to prove otherwise. As detailed above, Appellant abandoned the second knife and dropped it down his pant leg and onto the floor when he realized that he was being taken back to the cell block to be searched by jail guards. As a result, he was not in possession of the knife during a strip search, nor did he successfully prevent the guards from detecting it. The collateral crime incident therefore fails to prove Appellant's knowledge or ability to get a knife through a strip search, which was the State's stated reason for using this crime to impeach Appellant's testimony.

In sum, Appellant's direct examination testimony did not open the door to impeachment with evidence of other crimes or wrongs as asserted by the State. The evidence did not tend to rebut any misleading statement offered by Appellant on

direct examination, nor did it tend to prove knowledge or any other material fact at issue in the case.

d. Whether the error was harmless beyond a reasonable doubt

Finally, the State acknowledges that the error is presumptively harmful, but asserts that it was harmless on the facts of this case because three eyewitnesses identified Appellant as the killer and Appellant was the only one with the victim's blood and DNA on his clothing (AB 28-29). However, all three eyewitnesses were fellow prison inmates with felony convictions and possible motives to lie. Appellant testified that the real killer was among them, Mr. Hunt, and that Mr. Hunt was falsely implicating Appellant in order to divert blame from himself. Appellant also testified that several other inmates helped Mr. Hunt go through the victim's property and steal from it, possibly including the other two witnesses. The defense also established that the inmate witnesses would be eligible for sentence reductions if their testimony assisted the State in convicting Appellant.

Thus, the State's three star witnesses had serious credibility problems and were not disinterested observers whose veracity is beyond question. The only independent witnesses who should have been able to identify the real killer were the prison guards, but they were unable to do so either because the physical layout of the bus prevented them from seeing what happened or from their own incompetence and lack of concern. Despite owing a duty of care, custody and

control toward all of the inmates on the bus, and procedures that called for regular visual inspections of the inmates, the guards saw nothing of what happened (R. 15/51-52, 66), even after the inmates fled to the back of the bus for more than an hour after the stabbing (R. 18/131, 183, 196).

The Department of Corrections could not even be bothered to put a camera on the bus to observe the inmates while the officers' attention was diverted, yet the State now seeks to benefit from this lack of reliable proof of who the killer is, asserting that three inmate witnesses with something to gain from Appellant's conviction are sufficient proof to render a prejudicial error harmless beyond a reasonable doubt. The presumption of prejudice carries far more weight than this, and the State is not entitled to the benefit of the harmless error rule simply because they have three witnesses and Appellant had only one. There were more than 20 other inmates on the bus who did not testify and whose recollection of the event will never be known. Winning the numbers game does not render this error harmless beyond a reasonable doubt.

Furthermore, Appellant testified that he got the victim's blood on him because the victim fell into his lap after Mr. Hunt stabbed him, not because he was the killer (R. 19/305-306). He also said that he pulled the knife out of the victim's body while he was still alive (R. 19/306). This testimony directly contradicts that of the three other inmate witnesses and explains the scientific evidence. The

physical evidence does not refute this explanation or establish which version of the facts is correct. While the presence of the victim's blood on Appellant's clothing and his DNA on the knife may be suggestive of guilt, it is not so conclusive as to obviate the need for a fair trial free of error. Appellant testified that he was not the person who carried a knife onto the bus and stabbed the victim, and he was entitled to a presumption of innocence and a fair weighing of his credibility without the tainting effect of collateral crime evidence suggesting a violent character and the propensity to carry a knife. The judgment of guilt should be reversed for a new trial.

II. WHETHER THE CIRCUIT COURT ERRED IN OVERRULING DEFENSE OBJECTION TO COMMENT ON APPELLANT'S RIGHT TO REMAIN SILENT

In this claim, Appellant asserts a violation of right to remain silent between the time of his arrest and invocation of Miranda[1] rights in July of 2012 and the trial in December of 2013. The violation was the result of the State eliciting on cross-examination of Appellant that his trial testimony was the first time he had told anyone his defense that Mr. Hunt was the murderer (R. 19/319-320, 323). The prosecutor also argued this fact in closing (R. 20/401).

In the answer brief, the State begins by arguing the admissibility of Appellant's pre-arrest and pre-Miranda statement and silence when exiting the transport bus shortly after the victim's death (AB 31-32). The State asserts that the failure to identify Mr. Hunt as the killer when Appellant made a statement to Officer Bell was admissible.[2] The State also argues that Appellant opened the door to the additional questions about his failure to implicate Mr. Hunt at any time prior to trial "through his own testimony regarding the statement made to Ofc. Bell and the reasons he kept the information to himself *until trial."* (AB 34) (emphasis added). The State likewise asserts that the closing argument about Appellant not speaking up until trial was permissible because Appellant "first offered the

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[1] *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602 (1966)

[2] Appellant does not challenge the introduction of his pre-arrest, pre-Miranda silence or the statement he made to Officer Bell.

explanation as to why he did not identify Theodus Hunt *until trial."* (AB 35-36) (emphasis added).

The State's argument is factually inaccurate. Appellant did not testify on direct examination that he never told anyone about Mr. Hunt being the killer until taking the stand at trial, nor did he offer any reason for keeping that information to himself *until trial*. Appellant's direct examination testimony was that he told Officer Bell that a dude went crazy on the bus, but that he did not identify who it was because he did not want to be perceived as a snitch or as "the police" by other inmates (R. 19/308-309). This is a reasonable explanation for Appellant's failure to identify Mr. Hunt at the scene in front of the other inmates who had also just exited the bus, particularly since Mr. Hunt was among them and may have heard if Appellant had mentioned his name.

The record shows that counsel's direct examination questions and Appellant's answers were limited to the time immediately following the inmates disembarking from the transport bus and being questioned by guards about what transpired (R. 19/308-309). Appellant readily admitted what he did and did not say to Officer Bell at the scene and his reason for doing so, and the substance of the statement was confirmed by Officer Bell (R. 20/366). All of this occurred prior to Appellant's arrest and invocation of rights and was properly subject to examination and cross-examination. However, there was no suggestion made, direct or implied,

that Appellant continued to remain silent about Mr. Hunt being the killer from that day forward. He merely explained his reason for not telling Officer Bell who the dude was that went crazy on the bus.

This limited testimony did not open the door to evidence and argument about Appellant's post-arrest, post-Miranda silence during the ensuing 18 months. The State ignores the clear distinction in the law between permissibly questioning a defendant about any statements he made or failed to make prior to his arrest and improperly questioning him about his post-Miranda failure to make an exculpatory statement. *See Chamblin v. State,* 994 So. 2d 1165 (Fla. 1st DCA 2008). This Court should reject the State's attempt to broaden the scope of Appellant's testimony in order to justify a constitutional error.

III. WHETHER THE CIRCUIT COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED

The State argues in the answer brief that there was competent and substantial evidence to support application of the cold, calculated and premeditated ("CCP") aggravating circumstance (AB 39). The State's argument is without merit.

First, the State repeatedly characterizes Appellant's stabbing of the victim as an "unprovoked attack" without any provocation (AB 39, 43). This assertion is refuted by the testimony of one of the State's own witnesses. Theodus Hunt, who was seated directly behind the victim and was in the best position of any witness to both see and hear the victim prior to the stabbing, testified that Appellant and the victim argued about the victim selling a cigarette to another inmate. He also testified that a shoving match ensued, with the victim and Appellant both repeatedly pushing each another and the victim actually standing up to push Appellant (R. 18/190-192). This was immediately followed by Appellant tearing open his pants to remove the knife and stab the victim (R. 18/191-192). Other State witnesses reported that Appellant was so enraged by this time that he repeatedly called the victim a "piece of shit who deserved to die" and destroyed his family pictures and other property (R. 18/137, 172). The State, having relied on this testimony in order to secure a conviction, now spins it as proof of an unprovoked attack following cool and calm reflection.

The State attempts to minimize the effect of Hunt's testimony on the CCP aggravator by mischaracterizing Appellant's argument with Mr. Sexton. The State represents that the argument resulted from Appellant asking the victim for a cigarette and being refused, and then argues that this rejection alone was not sufficient provocation to provide a pretense of moral or legal justification for the killing (AB 43). The record shows that the argument concerned Mr. Sexton selling a cigarette to a third party, not that Appellant wanted a cigarette for himself and was refused (R. 18/190). And, it was not merely the verbal argument that prompted the stabbing, but also the physical altercation that followed, with the victim standing up to shove Appellant and pushing him at least twice. This negates the CCP aggravator because it suggests a sudden killing in response to a fight, without the requisite calm reflection and heightened premeditation.

The State also argues the wrong legal standard for provocation (AB 43), citing *Rivers v. State* for the proposition that the provocation of the defendant must be "adequate or sufficient provocation to excite the anger or arouse the sudden impulse to kill in order to exclude premeditation and a previously formed design." *Rivers v. State,* 78 So. 343, 345 (Fla. 1918). This is the reasonableness standard applicable to a defense of provocation to reduce a charge of first degree premeditated murder to manslaughter, and is much higher than the pretense of justification necessary to defeat the CCP aggravator. Appellant is not challenging

the conviction for first degree murder or the element of premeditation based on the provocation issue, but only the CCP aggravator based on the fact that there was no intent to kill until the last minute when the fight broke out.

This point also undercuts the State's next argument that Appellant procured gloves and a weapon prior to getting on the bus "in order to carry out the attack." (AB 41). This presumes that Appellant had a preformed intent to murder and/or rob Mr. Sexton before he ever got on the transport bus, and that he obtained the knife and gloves specifically for that purpose. There is no evidence of this, and Appellant gave unrebutted testimony that he did not know that he was being transferred until awakened by prison guards and ordered to pack his bag, and that he was unaware that Mr. Sexton was also going to be transferred and would be on the bus.

As the State points out on page 42 of the answer brief, the CCP aggravator is based on a defendant's state of mind, intent and motivations. *Ballard v. State,* 66 So. 3d 912, 919 (Fla. 2011). In this case, Appellant's intent, motivations and state of mind prior to getting on the bus are essentially unknown. Appellant was carrying all of his property with him as part of the transfer. The State did not establish when Appellant obtained the knife and gloves, much less that he did so specifically out of a preformed intent to attack Mr. Sexton. There was no evidence of malice or ill will by Appellant toward Mr. Sexton until the fight over the

cigarette, and there is no evidence to refute the hypothesis that the killing and robbery were a spontaneous reaction to the fight.

As a result, the advance procurement of the gloves and knife do not support application of the CCP aggravator in this case. The totality of the circumstances indicates a lack of the heightened premeditation and cool, calm reflection and absence of provocation required in a CCP case. This aggravator is not supported by competent and substantial evidence and should be stricken.

IV. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN ASSIGNING MINIMAL WEIGHT TO SEVERAL MITIGATING FACTORS BASED ON APPELLANT'S AGE AND A FINDING THAT HIS BACKGROUND WAS REMOTE IN TIME TO CAPITAL MURDER

The State argues that the trial court did not err in assigning minimal weight to the mitigating circumstances based on Appellant's deprived and abusive childhood. The State attempts to distinguish those cases requiring some intervening positive influence in the defendant's life between the childhood experiences and the capital felony before the trial court can dismiss the mitigators as too remote. Specifically, the State cites the absence of other crimes committed by Appellant in prison prior to the murder as proof that he can make rational decisions, and the example set by his sisters, who grew up in the same environment yet have no significant criminal history.

The example set by Appellant's sisters does not establish a break between his deprived childhood and the capital felony because the sisters were not incarcerated in prison since the age of 15 like Appellant was. Whereas Appellant went from the dysfunctional home to prison while still a juvenile, the sisters did not. Appellant was thereby denied any positive influences or environment which the sisters may have enjoyed after escaping the abusive childhood environment. Therefore, their lack of criminal history is irrelevant because they were not in the same environment as Appellant during the intervening years.

As to the absence of a pattern of criminal behavior, none is required to establish the mitigating effect of a defendant's abusive childhood. Appellant is not claiming a lack of impulse control or an inability to conform his conduct to the requirements of the law as a statutory mitigating circumstance. Rather, Appellant is asserting that his childhood background reduces his culpability for the murder and weighs against imposition of the death penalty. This is properly raised as a non-statutory mitigating circumstance irrespective of any statutory mental health mitigators. *Nibert v. State,* 574 So. 2d 1059 (Fla. 1990).

What the State is essentially arguing is that even in the absence of any positive environment, the mere passage of time between when the abusive childhood finally ended and the commission of the capital felony renders the mitigating circumstances remote unless there was an ongoing and unbroken chain of criminal behavior during the intervening years. This is the type of argument that this Court specifically rejected in *Nibert.* The State cites no authority for such a rule, nor did the trial court rely on the lack of other criminal behavior as the rationale for assigning minimal weight to Appellant's mitigating factors. The failure to give any significant mitigating weight to Appellant's proven mitigators due solely to the passage of time constitutes an abuse of discretion and deprived Appellant of his sole defense to the death penalty.

V. WHETHER CUMULATIVE PREJUDICIAL EFFECT OF EVIDENTIARY ERRORS UNDERMINED APPELLANT'S CREDIBILITY AND DEPRIVED HIM OF A FAIR TRIAL

The State argues that no error occurred in Appellant's trial, but also offers an alternative argument that each of the errors was individually harmless. As to the guilt phase, the State asserts that the errors in admitting collateral crime evidence in Issue I and Appellant's post-Miranda silence in Issue II were harmless.

However, both errors went directly to the question of Appellant's character and credibility as a witness. The collateral crime suggested Appellant's propensity to carry a knife, bolstering the State's witnesses who said it was Appellant who stabbed the victim with a concealed knife in this case. The use of Appellant's constitutionally protected silence then suggested to the jury that his trial testimony was a recent fabrication, and that he would have made a statement identifying Mr. Hunt as the killer prior to trial if it was true.

Appellant was the only guilt phase witness for the defense, and his testimony was critical to the defense because it was the only evidence contradicting the version of events offered by the State's three inmate witnesses. The testimony was also necessary to explain that the presence of the victim's blood and DNA on Appellant's person and clothing was the result of the victim falling into Appellant's lap after being stabbed by Mr. Hunt, and that Appellant left DNA on the knife handle when he pulled it out of the victim. Without credible testimony on

these points, the State's evidence identifying Appellant as the killer would be unrebutted.

The cumulative effect of these errors denied Appellant a fair trial by influencing the jury to find that Appellant was not a credible witness and disregard his testimony. This deprived Appellant of his sole defense. But for these errors, the jury would have had a reasonable doubt about which version of events was accurate and whether the blood evidence established Appellant's identity as the killer, and returned a not guilty verdict.

VI. WHETHER CUMULATIVE EFFECT OF PENALTY PHASE ERRORS REQUIRES NEW SENTENCING PROCEEDING

The State asserts that no error occurred during the penalty phase, but also argues in the alternative that the errors in finding the CCP aggravator in Issue III and minimizing his mitigating evidence in Issue IV were each harmless because there were four other strong aggravating circumstances present. However, the combined effect of these two errors shifted the penalty phase balance in the State's favor by bolstering the State's case for death while virtually eliminating any counterweight. This effectively deprived Appellant of any meaningful penalty phase proceeding. Removing the CCP aggravator and assigning fair weight to Appellant's mitigating circumstances would have resulted in a life sentence.

Conclusion

Based on the foregoing, the Appellant requests that the judgment of the circuit court be REVERSED, and this cause remanded for a new trial and/or penalty phase proceeding.

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Certificate of Service

I HEREBY CERTIFY that I have furnished a true and correct copy of the foregoing reply brief by electronic service to the Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399, and by U.S. mail to Elijah Brookins, DC# P01395, Florida State Prison, 7819 NW 228th St., Raiford, Florida 32026, on this 26th day of January, 2015.

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Certificate of Compliance

I CERTIFY that the foregoing document was prepared in Times New Roman 14-point font, per Fla. R. App. 9.210.

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