IN THE SUPREME COURT OF FLORIDA

DONTAE MORRIS, :

Appellant, :

vs. : Case No. SC14-1317

STATE OF FLORIDA, :

Appellee. :

:

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

REPLY (CAPITAL) BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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ISSUE I

WHETHER APPELLANT'S CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY AND TO DUE PROCESS WERE INFRINGED WHEN THE COURT DENIED HIS MOTION TO STRIKE THE JURY PANEL AFTER ONE MEMBER OF THE VENIRE MADE COMMENTS WHICH INDICATED THAT APPELLANT HAD BEEN INDICTED FOR, AND CONVICTED OF, ANOTHER MURDER.

In its Answer Brief, Appellee argues the prospective juror in question, Ms. Kaasa, was referring to "the death penalty in general" and not referring to Mr. Morris or his cases. (Br. of Appellee, pages 13-14) A review of her words shows that is not possible. If interpreted as a comment on the death penalty, Ms. Kaasa's responses do not make sense. Ms. Kaasa explicitly referred to someone being "sentenced for one thing and brought in for the same crime." (20:T889) She was clearly talking about the issue of guilt and not about penalty phase -- "you're guilty, guilty, guilty." Id. She did agree that she would automatically vote for the death penalty "if they were indicted for the second time for murder." (20:T890) Clearly, Ms. Kaasa was talking about Mr. Morris' prior conviction for murder.

When questioned individually, Ms. Kaasa admitted she was talking about the fact that she knew about these murders and she was confused because "he is probably in prison now or was because he had committed a murder prior to that." (20:T906) The prosecutor may have been talking about the death penalty in general, but Ms. Kaasa was not. It makes no difference what the

prosecutor asked, the issue is what Ms. Kaasa answered. Furthermore, Appellee admits on page 17 that, after the comments were made in front of the venire, one of the prosecutors believed that Ms. Kaasa might have been talking about "another murder." (See also 20:T891)

Appellee argues that "the court below made a specific factual finding that the comment was not, directly or indirectly, a comment on Morris's prior record or prior conviction." (Br. of Appellee, page 14) However, immediately after individual questioning of Ms. Kaasa, while the incident was fresh in his memory, the judge acknowledged that Ms. Kaasa did remember that Mr. Morris had been convicted of "another crime" remarking:

> Fortunately, I think you asked to approach the bench and we just left it alone and brought her back afterwards, and out of the presence of the jury that's when she – thank goodness out of the presence of the jury she told us all that she now recalled about a prior situation where this defendant had been – gotten out of prison I think or been convicted of another crime or so.

(21:T983-84) In ruling at that time, the court stated only: "I'll respectfully deny the request to strike the panel and start all over again. I don't think that's sufficient to rise to the level of that remedy." (21:T983-84)

The next morning, November 13, 2013, after more time and effort had been devoted to the long and tedious jury selection, when Mr. Morris' counsel renewed the motion to strike, the judge thought Ms. Kaasa was taking about "was the futility . . . of going through a second phase if in fact the defendant is already

found guilty of first degree murder." (22:T996) That conclusion is not supported by the record because Ms. Kaasa specifically referred to someone being brought in again after being sentenced for the "same crime." She was concerned that this was a "repeat performance" and Mr. Morris was "indicted for the second time for murder." (20:T889-90) It is clear that Ms. Kaasa was not talking about the futility of a second phase, she was talking about the futility of a second murder trial when Mr. Morris had been previously found guilty of murder and sentenced for it.

Perhaps the reason why the parties did not immediately recognize that Ms. Kaasa was talking about the prior murder trial and conviction was because her response was a non sequitur, and because the parties knew the court had already conducted individual voir dire of people who were familiar with the case or Mr. Morris' prior conviction. The parties quickly realized she was talking about a prior conviction for murder, but the damage had already been done.

Appellee argues that there was "no timely objection to Ms. Kaasa's remarks." (Br. of Appellee, page 20) Even if that were required, that is not accurate. Mr. Morris' counsel immediately asked to approach, and the request was denied. (20:T890) In doing so, counsel attempted to bring the problem to the court's attention when it happened. Nevertheless, counsel's interjection stopped the proceedings and the questioning and brought the problem to the court's attention. Because of counsel's request, the prosecutor figured out that there was a problem and asked for

guidance. Then, at a sidebar, defense counsel pointed out that Ms. Kaasa was talking about Mr. Morris being charged for a second time. The prosecution admitted that, in light of her responses, Ms. Kaasa might have knowledge of another murder.

Defense counsel's action was sufficient. An actual "objection" would not have been appropriate because counsel would have been objecting to the juror's remark and not the prosecutor's question. The prospective juror was not a witness and the prosecutor's question was not inappropriate – he simply did not understand that Ms. Kaasa was talking about the prior murder trial and conviction.

Appellee cites Thompson v. State, 619 So. 2d 261, 265 (Fla. 1993), in support of its claim that Appellant's motion to strike the panel was not sufficient to preserve the issue for review without a formal objection. However, it is unclear from the language in Thompson what happened below and what was argued on appeal:

> Thompson, in his second claim, argues that, because the jury was aware that Thompson had already served thirteen years and could be released in as few as twelve years if the death penalty were not imposed, the jury was predisposed to recommend the death penalty. Thompson argues that the trial court should have granted his motion to strike the jury panel or, at least, have conducted an individual voir dire after it became apparent that one of the jurors was concerned that Thompson could be released within twelve years if given a life sentence. We find that this claim is without merit because defense counsel agreed that the problem could be remedied by an instruction from the trial judge that the question of parole was irrelevant to the issues before the jurors. Furthermore, this claim was not preserved for appeal by a timely objection.

Id. In Thompson, it is not clear when the motion to strike was made, or whether the Court thought that counsel had to object to the curative instruction. Therefore, Thompson is not precedent for this issue.

In this case, counsel did bring the problem to the attention of the trial judge and the prosecutor agreed that there was a problem. Furthermore, this issue entails the denial of the motion to strike the venire. A motion to strike a jury panel is timely if made prior to the swearing of the jury. See Blackshear v. State, 521 So. 2d 1083, 1083 n.1 (Fla. 1988) (citing State v. Castillo, 486 So. 2d 565 (Fla. 1986)). Appellant moved to strike the venire well before the jury was sworn, and before the jury was sworn, Appellant reserved his motion to strike the panel. At that time, counsel made it clear that the defense was accepting the jury subject to that exception and counsel specifically stated that the defense was not waiving the motion to strike the panel. (23:T1214)

Furthermore, in many cases, the objectionable comment occurs outside the courtroom, and there is no opportunity or requirement that counsel make a contemporaneous objection. See, e.g., Street v. State, 636 So. 2d 1297 (Fla. 1994), Hutchinson v. State, 882 So. 2d 943 (Fla. 2004), and Larzelere, 676 So. 2d 394 (Fla. 1996). These cases were cited by Appellee in support of its assertion that a mistrial was not required. However, in all of those cases

someone outside the jury during trial expressed an opinion as to the defendant's guilt.

Street, Hutchinson, and Larzelere, are unlike this case because, in those cases, the improper comments were pure expressions of opinion and did not reveal any highly prejudicial inadmissible facts that would have required a mistrial if blurted out by a witness during trial. See also Occhicone v. State, 570 So. 2d 902 (Fla. 1990) (during voir dire a spectator told a prospective juror that she thought Occhicone was guilty). However, "[w]hen a prospective juror comments on a defendant's criminal history and expresses some knowledge of the defendant himself, it is an abuse of discretion not to strike the venire." Reppert v. State, 86 So. 3d 525, 526 (Fla. 2d DCA 2012) (citing Richardson v. State, 666 So. 2d 223, 224 (Fla. 2d DCA 1995); Wilding v. State, 427 So. 2d 1069, 1069 (Fla. 2d DCA 1983)).

Also, in the cases cited by Appellee, the trial judges questioned the jurors about whether or not they heard the statements and whether the improper statements would influence them. In this case, questioning the jury about Ms. Kassa's comments would have highlighted the problem and further tainted the jurors. Furthermore, it has to be presumed that the rest of the panel heard Ms. Kassa's comments because they were in the courtroom and were supposed to be listening.

Appellee also cites Smith v. State, 7 So. 3d 473, 495 (Fla. 2009), in support of its assertion that Appellant has not shown that bias or prejudice occurred. In Smith, this Court refused to

find error because, unlike in this case, "the comment made to the jurors did not disclose evidence or facts not presented at trial." Id. Nothing could be more prejudicial than disclosing to jurors that the defendant had been convicted of, and sentenced for, first-degree murder -- the crime for which he was being tried -- when that evidence was not admissible at trial.

Appellee argues that the fact that a prospective juror named Badgley was concerned about Ms. Logan's comment proved that the jurors were not prejudiced by Ms. Kaasa's statement. The record does not provide any clue as to why Mr. Badgley did not mention Ms. Kaasa, and for that reason, no conclusions can be drawn from Badgley's statement to the court. Also, it cannot be presumed that Mr. Badgley knew that the jury was not going to be told that Mr. Morris had a prior conviction for murder, or that he knew that that kind of information was improper. In fact, while discussing Mr. Badgley's comments, Appellant's counsel pointed out the fact that, unlike Ms. Logan, who expressed an opinion about Mr. Morris' guilt, Ms. Kaasa revealed improper facts that would influence the jury. (23:T1163)

Mr. Badgley was concerned that Ms. Logan said "in my heart right now I've got him guilty" based on what she had seen on television before trial. (22:T1068) That statement happened on the morning of November 7, 2013, and Mr. Badgley asked to speak to the judge immediately after the lunch break. ((23:T1159-62) Ms. Kassa's statement happened the day before, and the jurors

would have realized she was excused. (20:T907) At the time Mr. Badgley spoke to the judge, Ms. Logan had not been excused.

Also, the prosecutor highlighted Ms. Logan's statement, saying, "Ms. Logan, I'm going to tell you, I appreciate you telling me everything you did about your feelings. And I wasn't trying to belittle those feelings. I want to make sure of your ability to be fair and impartial in the case, and I appreciate you doing exactly what you are supposed to do, telling us how you feel." (22:T1081) It might have been the prosecutor's concern that bothered Mr. Badgley, and he might have assumed that the information Ms. Kaasa provided was appropriate and of no concern because the prosecutor did not comment on it.

For the reasons stated above and in Appellant's Initial Brief, reversal is required.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE A REDACTED STATEMENT THAT DID NOT REFER TO THE CRIMES IN THIS CASE AND WHICH WAS MADE BY APPELLANT WHILE HE WAS HAVING A PSYCHOTIC BREAK; AND WHEHTER EXCLUSION OF APPELLANT'S EXPERT AND THE WITNESSES WHO OBSERVED APPELLANT'S MENTAL ILLNESS VIOLATED HIS SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS AND CONFRONTATION AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

In its brief Appellee states: "Morris admits that his unredacted statement ("I repent for killing five people") was a specific acknowledgement of the murders for which he was on trial." (Br. of Appellee, page 32). Nowhere in Appellant's brief does Appellant concede that the unredacted statement was a specific reference to the murders in the instant case. In his Initial Brief Appellant argued that neither the unredacted statement nor the redacted statement specifically referred to these crimes: "Neither the original statement nor the redacted statement specifically refer to the murders of the two police officers. The deputy admitted that Mr. Morris did not mention the officers or any other facts specific to these murders." (See Appellant's Initial Brief, page 50)

Appellee also asserts that "Morris does not dispute the relevance of the specific, unredacted statement, but only the relevancy of the admission as heard by the jury." (Br. of Appellee, page 34) That is not accurate. The unredacted statement is not relevant because it is a general admission to non-specified crimes of the same type for which Appellant was on trial. Mr.

Morris' statement is not a specific admission to the murders of the two officers. In fact, the record shows that the same statement was sought to be used (and subsequently used) in another case involving the murder of Rodney Jones.

In its brief, Appellee does not present an argument in opposition to Appellant's argument that, had the State introduced Mr. Morris' statements into evidence, Appellant would have not have been prohibited under the Florida Rules of evidence from impeaching the statements. That is because, as argued in Appellant's Initial Brief, section 90.806(1), Florida Statutes, allows the presentation of evidence to attack the credibility of the declarant as if the declarant had testified as a witness. Instead of a reasoned argument, Appellee merely dismisses Appellant's argument as "convoluted." (See Br. of Appellee, page 42). Appellee also claims that Appellant is relying on the Federal Rules of Evidence, when Appellant's brief makes it clear that impeachment of the statement is allowed under the Florida Rules of Evidence.

On page 42 of its brief, Appellee argues that in order to impeach Mr. Morris' admission that he repented for killing, Appellant would have to show a defect in his ability to remember or recount the facts constituting the actual crimes. That is not a logical conclusion because Appellant was seeking to attack the credibility of a statement that was made well after the crimes by showing that, at the time the statement was made, Mr. Morris was not in his right mind, and that the statement was a product of

delusional thinking. The expert testimony was not "general character evidence" of mental illness as Appellee claims. Id. The expert testimony would have been offered as proof that the statement was unreliable because it was a product of the specifically-recognized mental condition of psychosis that was present at the time the statement was made.

With regard to Appellant's due process right to present expert testimony of Mr. Morris' state of mind at the time of the statement, Appellee argues that Mr. Morris "failed to proffer with particularity the evidence which it wanted to present to the jury." (Br. of Appellee, page 36) However, Appellee's own brief shows that the proffer was more than adequate.

Appellee acknowledges that Mr. Morris filed the State's deposition of Dr. McClain – a deposition which was taken only because Mr. Morris listed Dr. McClain as a witness to rebut the statement – as an attachment to his motion to reconsider the court's ruling admitting the redacted statement. In fact, in its brief, Appellee sets out Appellant's proffer in exacting detail on pages 27 through 29 and page 36, citing extensively to Dr. McClain's deposition, in which Dr. McClain explained the basis for her opinion that Mr. Morris was suffering from a "break from reality" when he made the alleged admission. On pages 28 and 29, Appellee points out that defense counsel told the court that if the statement was admitted, the defense would need to present a number of witnesses in addition to Dr. McClain, including Appellant's mother and the jail deputies who made the notations in

the jail logs, which were attached to Mr. Morris' original motion.

In this case, there was no dispute that Dr. McClain's opinion, as related in the deposition, was sought with regard to this issue, and there is no dispute regarding what her diagnosis would have been if she testified. "[T]he traditional purpose of a proffer, or offer of proof, is to demonstrate to an appellate court a real error, not an imaginary or speculative one. Although the safest practice would be to proffer the actual evidence, an oral proffer may be sufficient, particularly if there is no dispute as to what the evidence would have been." Holmes v. Bridgestone/Firestone, Inc., 891 So. 2d 1188, 1191 n. 1 (Fla. 4th DCA 2005) (citations omitted). Clearly, Appellant's proffer was sufficient.

Appellee argues on page 29 that "the defense did not have any legal authority to support the position that an expert should be permitted to speak about a declarant's state of mind when the declarations are spontaneous statements rather than the result of an interview or interrogation." If there are no cases directly on point, this Court cannot reject the issue because counsel did not provide case law that did not exist.

However, at the hearing the court itself cited Palmes v. State, 397 So. 2d 648 (Fla. 1981) (13:T68-69), which held that it was error for the trial court to prohibit the defendant's testimony about his state of mind at the time of his confession. In Palmes, this Court wrote: "It is conceivable that a confession, freely and voluntarily given and therefore

admissible, may be untrue. Therefore the defendant must be allowed to tell the jury why he made it." Id. at 653.

At the hearing, the court also cited Dawson v. State, 20 So. 3d 1016 (Fla. 4th DCA 2009), in which the defense wanted to present a psychologist to "impeach the integrity" of the defendant's confession by showing the susceptibility of a 16 year old to suggestion when being interviewed by three detectives. The trial judge excluded the evidence ruling, in part, that the evidence was "irrelevant" and that the testimony would suggest diminished capacity. See id. at 1019. In Dawson, the appellate court reversed, stating that a defendant is entitled to present evidence pertaining to the circumstances under which a confession is made because it is up to the jury to determine the weight to be given to a confession. The court stated that a defendant's state of mind is relevant to that inquiry. See id. at 1020 (citing Palmes, 397 So. 2d at 653).

Both cases are cited in Appellant's brief, and both are analogous to this situation. Therefore, it is clear that the court considered these cases, and the propositions of law underlying them in arriving at its ruling.

It should also be noted that, in his written argument on the motion to reconsider the defense's motion in limine (8:R1446-50) Appellant specifically argued that if the court allowed the statement into evidence, "then at trial the issue of the weight to which the statement is entitled and its trustworthiness and reliability will be at issue." (8:R1449) The defense argued that

"the court will be compelled in fairness [to] permit the defendant to present evidence attacking and rebutting the trustworthiness and reliability of the statement and the arguing that little weight should be given to it by the jury." (8:R1449)

Appellee argues on pages 37 and 38, that the court did not err because Appellant's rebuttal would have been thorny or that Appellant would have chosen not to present evidence that Mr. Morris was delusional because it might have offended Christian jurors. However, it is not, and it never has been, Appellee's place to decide what evidence Appellant would have or would not have presented if the court made the appropriate ruling. It is also not Appellee's prerogative to categorically decide, contrary to expert opinion, that Appellant's recitation of Bible references proved that he was not psychotic.

Even though it is not up to Appellee to decide that would or would not have been good trial strategy, it cannot be said that presentation of only the circumstances surrounding the statement would have been sufficient to ensure Appellant's constitutional right to present evidence impeaching the statement. The trial court's order severely hamstrung Appellant's defense. Lay evidence of Mr. Morris' condition at the time of the statement would have been used as a foundation to support the expert testimony. The court's ruling gutted the importance of the lay evidence because the order would have allowed only a watered-down presentation, which might have revealed prejudicial content, without the expert's testimony to tie it together and give it

meaning.

Without the expert it is easy to see why Mr. Morris chose not to present evidence of his state of mind, but it is not up to the prosecuting entity to decide what would have been best for the defense, and it is not Appellee's place to determine what the defense would have done if his right to present evidence had been honored.

Appellee also makes the unsupported claim that Appellant had some kind of duty to inform the trial court "specifically what evidence he withheld as a result of the trial court's ruling." (Br. of Appellee, page 38) There is nothing in the law that says that Appellant had to inform the court of his trial strategy after an adverse ruling, when it is clear why the defense wanted to present the expert and it is clear that the defense wanted to present the expert but was prohibited from doing so.

Kight v. State, 512 So. 2d 922, 930 (Fla. 1987), does not support Appellee's argument. In Kight, the defendant was trying to elicit from a Detective only whether or not he knew that some inmates with mental conditions were housed on the same floor as Kight. First, this Court held that the evidence was not being introduced to show that Kight's confession was unreliable, it was being introduced to show diminished capacity and to show that the co-defendant was the actual killer because Kight had limited mental faculties. There was no proffer concerning the detective's personal knowledge of Kight's mental condition at the time of the confession, and this Court merely declined to look at testimony

from a suppression hearing, which was not mentioned at the time the court excluded the testimony concerning the detective's knowledge about the jail accommodations.

Kight is also inapplicable because, in this case, it is clear that Appellant had no ulterior motive for introducing evidence to attack the credibility of his highly prejudicial admission. Appellant was not seeking to introduce the expert's testimony as evidence of diminished capacity. Dr. McClain's deposition made it clear that she was opining that Mr. Morris suffered a temporary situational psychotic break in jail at the time he made the statement. To suggest otherwise is disingenuous.

In spite of the fact that the State did not present any evidence or argument at the hearing that Mr. Morris was not suffering a psychotic break, Appellee now argues that Mr. Morris was not mentally ill because he did not have a history of mental illness. (Br. of Appellee, page 37) Appellee also reaches into the competency hearing testimony of Dr. Donald Taylor to support its argument. This Court should disregard both points because neither was presented at the hearing and because there is nothing in the record to suggest that Dr. Taylor considered Mr. Morris' state of mind at the time he made the statements.

Furthermore, because Mr. Morris' psychotic break was transient, Dr. Taylor's evaluation, which did not concern the time period when the admission was made, was irrelevant. But more importantly, Appellee is asserting that the court can violate a defendant's due process right to present evidence simply because

the State might present a witness to contest that evidence.

Appellee also argues that evidence that Mr. Morris was hearing voices was based only on his own self-reporting. That is not true, and even if it were true, "hearing voices" is not the only consideration underlying Dr. McClain's diagnosis of a psychotic break. (It also begs the question of how else a psychologist would determine whether or not a person suffered from hallucinations if self-reporting was not something to be considered.)

From this record, it is clear that Dr. McClain based her opinion on the jail logs and on her interviews with Mr. Morris' mother and sister, as well as interviews with Mr. Morris and a review of his records. As cited in Appellant's Initial Brief on pages 62-65, the jail logs are replete with recorded observations of Mr. Morris carrying on conversations with persons who were not physically present. Mr. Morris also exhibited paranoid ideation and thought his food was poisoned. He thought the guards were going to drug and rape him, and he exhibited other signs of delusional thinking. Guards reported that his speech made no sense and that he thought people in the "mod" were talking about him.

What is telling is that nowhere in its brief does Appellee confront the fact that, absent a compelling state interest, a defendant has a constitutional right to present evidence in his own defense. There are few rights more fundamental than the right of an accused to present witnesses in his or her own defense. See

Chambers v. Mississippi, 410 U.S. 284, 302 (1973). "[T]he right to present evidence on one's own behalf is a fundamental right basic to our adversary system of criminal justice, and is a part of the 'due process of law' that is guaranteed to defendants in state criminal courts by the Fourteenth Amendment to the federal constitution." Gardner v. State, 530 So. 2d 404, 405 (Fla. 3d DCA 1988) (holding that the court erred in prohibiting the defense from presenting evidence that the victim identified people other than the defendant in an informal photographic lineup conducted by the defense). See also Jenkins v. State, 872 So. 2d 388, 389 (Fla. 4th DCA 2004) ("There are few rights more fundamental than the right of an accused to present witnesses in his or her own defense."); Crane v. Kentucky, 476 U.S. 683 (1986) ("In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'").

In response, Appellant also relies on his argument in his Initial Brief.

ISSUE III

WHETHER ALLOWING LAW ENFORCEMENT OFFICERS TO IDENTIFY THE VOICE AND THE IMAGE OF THE SHOOTER ON THE DASHCAM VIDEO AND THE VOICE ON A JAIL PHONE CALL AS THE VOICE AND IMAGE OF APPELLANT INVADED THE PROVINCE OF THE JURY.

In its brief Appellee asserts that Detective Duran had "particular familiarity with Morris." (Br. of Appellee. Page 46) He did not. Detective Duran merely listened to jail phone calls and jail visitation videos and compared the voice and image to the voice and image on the dashcam video. This is something the jury could do, but the State did not trust the jury to do it. Instead, the State used a detective to make the comparison even though he had no special expertise. If this Court condones this type of identification, in future cases, the lead detective in every case will be allowed to act as an untrained and unqualified expert. The State will not have to rely on jurors to make comparisons, law enforcement will do it for them.

Appellee argues that the jurors did not share the officers' familiarity with Mr. Morris because the jurors heard only an audiotape of a phone call from the jail. However, what Appellee neglects to consider is that the jurors spent many hours looking at Mr. Morris in the courtroom, and the only reason why they did not hear many exemplars of his voice is because the State chose instead to have the officers do the comparison. Simply put, the officers usurped the province of the jury. The fact that it was easier for the State, because the State did not have to present

other exemplars of Appellant's voice or image to the jury, does not make this type of identification appropriate or proper.

Appellant relies on his Initial Brief in reply to the remainder of the arguments presented in the Answer Brief on this issue.

ISSUE IV

WHETHER THE COURT ERRED IN ALLOWING A DETECTIVE TO REPEAT WHAT ASHLEY PRICE TOLD HIM REGARDING WHAT MR. MORRIS TOLD HER AND WHETHER THE TESTIMONY IMPROPERLY BOLSTERED PRICE'S TESTIMONY WHEN THERE WAS NO IMPLICATION OF RECENT FABRICATION.

In assessing this issue, it must be remembered that the prosecutor asked Ashley Price on direct examination if she had given the same story to the police and she said that she had. The following occurred on direct examination:

> THE PROSECUTOR: The next day, June 30th, the day after you had this phone conversation, the day after the two police officers were killed, did you in fact go to the Tampa Police Department?
>
> PRICE: Yes.
>
> THE PROSECUTOR: Okay. So you went to them, they didn't come to you?
>
> PRICE: Correct.
>
> THE PROSECUTOR: And did you go there to tell them what you have told these jurors today?
>
> PRICE: Yes.
>
> THE PROSECUTOR: And did you tell them what you told the jurors today?
>
> PRICE: Yes.

(27:T1791)

Although this exchange elicited hearsay, Appellant never claimed that the above-referenced testimony was preserved error, either at trial or in his Initial Brief, and contrary to Appellee's argument on pages 58-59, Appellant is not asserting that this questioning was error. Nevertheless, as argued in

Appellant's Initial Brief, these statements bolstered Price's testimony as anticipatory rehabilitation. See Howard v. State, 152 So. 3d 825 (Fla. 2d DCA 2014). Because the State already made its point and already bolstered Price's testimony, the State should not have been allowed to repeat all of the details of Ms. Price's story through the voice of a law enforcement officer to give the story more credibility. It was clear Ms. Price had given the same information to the police and her testimony was not recently fabricated. As specifically argued below, the testimony was "cumulative" in light of her own testimony about the prior statement. (27:T1858)

Price testified that she gave the same story to the police and it was presumed that the substance of the statements were the same. The defense did not cross-examine Price about facts she related to police from Mr. Morris' confession to her. Therefore, it is obvious the defense was not claiming that Price had changed her story regarding what Mr. Morris confessed to her, and the defense was not claiming that intervening events prompted a recent fabrication of her testimony. Given the above, the only logical implication regarding the impeaching evidence of the monetary assistance from the police would be that Price would have been more obligated to stick with her original story, true or not, because of the assistance, not that she would have been motivated to modify or change her testimony.

Appellee cites Chandler v. State, 702 So. 2d 186 (Fla. 1997), and argues that the fact that the defense in this case asserted

alternative motives for Ms. Price's trial testimony was sufficient to allow the State to present the detective's testimony. However, in Chandler, the prosecutor did not present the testimony of the State Attorney to whom the witness (Chandler's daughter) gave the statement in order to imbue the story with *gravitas*. In Chandler, the statement was presented during the cross-examination of the witness to rebut an insinuation that her story was influenced or exaggerated because of her appearance on the television show, "Hardball," and the payment she received for that appearance.

Unlike in Chandler, where the error was harmless because the jury already knew Mays had related the same facts to others and to the State Attorney, in this case, the fact that the jury knew about the prior statement does not ameliorate the damage. That is because the same facts, when they came out of the mouth of another witness who is a police detective, became evidence of a different magnitude.

Ms. Price is a convicted felon. The danger in admitting a prior consistent statement in evidence is that the statement might acquire added credibility when it is repeated by a more trustworthy witness. Monday v. State, 792 So. 2d 1278, 1280 (Fla. 1st DCA 2001). "[A] police officer testifying about prior consistent statements by a witness is not only hearsay, but also improper bolstering." Carter v. State, 115 So. 3d 1031, 1035 (Fla. 4th DCA 2013) (citing Barnes v. State, 576 So. 2d 439 (Fla. 4th DCA 1991)). In this case, even the trial judge was concerned that "rehashing the details" of what Price told the detective was

problematic. (27:T1859-60)

The defense argued at trial that it was unlikely that Mr. Morris would have confessed to Ashley Price that night because he did not know her very well and because he did not share other, non-incriminating, personal information with her. Having a detective repeat Ashley Price's statement under these circumstances unfairly bolstered Price's incredible claim that Mr. Morris confessed to her even though he had no reason to trust her.

Appellant relies on his initial brief in reply to the remainder of Appellee's argument with regard to this issue.

ISSUE V

WHETHER THE COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR ASKED ASHLEY PRICE IF SHE HAD TO MOVE BECAUSE OF THREATS TO HER AND HER FAMILY WHEN THE STATE CONCEDED THAT THE THREATS HAD NOTHING TO DO WITH APPELLANT.

Appellee argues that a revelation that Ms. Price received threats from the neighborhood after Price testified against Mr. Morris in another murder case would not have been "too prejudicial" to be admissible. (Br. of Appellee, page 66) However, during the bench conference regarding the objection, the court suggested that the evidence was "very dangerous," and the prosecutor agreed, saying, "I know it is." (27:T1828) The prosecutor wanted to ask Ashley Price if people in the neighborhood were threatening her, and the court denied the request, concluding that the subject was "too dangerous." (27:T1831-32)

Appellee suggests that an argument that the curative instruction was not adequate to dissipate the prejudice is waived because the defense agreed to the wording of the instruction. Defense counsel made it clear that a curative instruction was insufficient: "We believe that . . . a combination of information elicited by The State has created irreparable prejudice which cannot be cured or removed by even a curative instruction by this Court and it arises from a complex implication and the inferences drawn from that." (27:T1833) Counsel argued that testimony about the phone call to Ms. Price combined with the insinuation of

threats created a situation where the trial had been "contaminated" and that the prejudice "simply cannot be cured." (27:T1836)

After the prosecutor argued that he was not claiming that Mr. Morris had anything to do with the threats and that Ms. Price had to move because people in the neighborhood threatened her and her sister because they were "snitching," Appellant's counsel argued:

> [W]hile [the prosecutor] has offered an alternative and harmless explanation of what he was referencing, the jury won't know that. Their natural inclination is going to be to draw the inference that I stated, that is, that the threats emanated from Mr. Morris. And I don't see any way to cure that at this stage. That has already been done, the poisoning of the well has already occurred and we can't go back and correct it.

(27:R1838-39) During the discussion of the curative instruction, counsel made it clear he was not waiving the motion for mistrial. (27:T1846-47)

In its brief, Appellee argues: "[T]he jury did not hear any acknowledgement that Price had been threatened, but even if they assumed such from the prosecutor's question, the evidence was not offered as substantive evidence but as legitimate testimony to rehabilitate Price after she was impeached by the suggestion that the police provided financial assistance." (Br. of Appellee, page 67). Assuming that the insinuation would survive a challenge under section 90.403[1], the jury certainly would not have understood that

[1] Section 90.403 states in pertinent part: "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues,

the evidence was not offered as substantive evidence of guilt because that was never explained to them. In his brief, Appellant is not challenging the wording of the curative instruction as Appellee claims on pages 67-68. Appellant is pointing out that the taint was not fully dissipated specifically because the jurors, as laymen, would not have known or understood what "legitimate" purpose the prosecutor had in mind when he mentioned the threats.

Appellant relies on his Initial Brief in reply to the remainder of Appellee's argument with regard to this issue.

(..continued)
misleading the jury, or needless presentation of cumulative evidence."

ISSUE VI

WHETHER THE CUMULATIVE ERROR IN THE GUILT PHASE DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT AND UNDER ARTICLE I, SECTION 9, OF THE FLORIDA CONSTITUTION.

Appellant relies on his Initial Brief in reply to Appellee's argument regarding this issue.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Attorney General's Office at capappTPA@myfloridalegal.com, through the Court's portal, on this 17th day of September, 2015.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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