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IN THE SUPREME COURT OF FLORIDA

BARRY TRYNELL DAVIS, JR., :

Appellant, :

v. : Case No. **SC15-1794**

STATE OF FLORIDA, :

Appellee. :

_____/

On Appeal from the Circuit Court of the First Judicial Circuit in and for Walton County, Florida

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REBUTTAL AND ARGUMENT

I. Reversible Error Occurred When the Court Denied Davis' Motion to Suppress and Admitted Evidence Obtained During, and as a Result of, the July 10 Search of His Home.

A. The actions of the officers executing the search warrant at Davis' home on July 10 exceeded the scope of the warrant.

The State appears to argue that the actions of the officers did not exceed the scope of the warrant because "[t]here is no indication in the record that the search team was seeking out any items other than the debit card" or "that any instruction was given to seek out anything other than a debit card," and the "photos taken at the scene do not depict anyone moving items that would not have otherwise been moved during the search for a debit card." [AB 2, 29, 32-33] The State analogizes the present case to Rimmer v. State, 825 So.2d 304 (Fla. 2002). [AB 30-32]

First, ample evidence indicates that the officers took actions that were unrelated to locating Hughes' card. Crime Scene Investigator Gainey testified that during the search, she photographed items if they had general "evidentiary value." [R39 179-80] No nexus with Hughes' card was required. In addition, few, if any, of the 150 photos document items that possess evidentiary value related to Hughes' card. [P2-154]

Second, ample evidence indicates that instructions were given to focus on items completely unrelated to Hughes' card. Officers exercised their discretion to tell Gainey which items needed to be photographed. [R39 183] For instance, Gainey

recalled being specifically told to photograph the moped, the vehicle, and several TVs, including closeup photos of VIN and serial numbers. [R39 186-87; P62-65,71-77, 88-98] When a sergeant became aware of the situation, she directed Gainey to stop taking photos focused on specific items because "that was not within the scope of the search warrant." [R39 187]

Third, regardless of whether the only items moved were items that would "have otherwise been moved during the search for a debit card," the officers executing the warrant lacked authority to widely and intensely gather information on items of general "evidentiary value," unrelated to Hughes' debit card. A physical intrusion on a person's home and effects for the purpose of widely gathering information on, and permanently recording, anything of potential evidentiary value is qualitatively different from such an intrusion for the limited purpose of locating a single item. Even if the two intrusions are similar in a spatial or temporal sense, the former amounts to a "general, exploratory rummaging" through a person's home.

Fourth, the present case is distinct from Rimmer, 825 So.2d at 310-14. The officers in Rimmer had authority to search the day-planner organizer for smaller items listed in the warrant–including trace evidence, shell casings, and bodily fluids. In contrast, the officers in the present case did not have authority to permanently record the presence and appearance of dozens–if not hundreds–of items of general "evidentiary value," neither listed in the warrant nor related to Hughes' debit card,

and to do so throughout Davis' property with great care and thoroughness.

B. The officers' excessive actions in widely and intensely gathering information on anything of potential evidentiary value constituted a Fourth Amendment search separate and apart from the search authorized by the warrant.

The State appears to argue that the actions of the officers did not constitute a separate search because "inspecting a portion of a piece of property that comes into view during and as a result of a lawful search does not constitute a separate, independent search," and "no evidence was presented that the officers moved or repositioned any items, or that any concealed items or spaces were revealed, for the purpose of photographing or videoing them." [AB 27, 30, 32]

First, the State is correct that merely inspecting, or cursorily noticing, items that come into view during a lawful search does not constitute a separate, independent search. As the Supreme Court observed in Arizona v. Hicks: "Merely inspecting those parts of the [stereo equipment] that came into view during the [search for the shooter, victims, and weapons] would not have constituted an independent search, because it would have produced no additional invasion of [Hicks'] privacy interest." 480 U.S. 321, 325 (1987). Or, as the Supreme Judicial Court of Massachusetts recognized in Commonwealth v. Balicki: "It is one thing to be present in a home carrying out the directives of a warrant, and of necessity being in a position cursorily to notice many of its contents." 762 N.E.2d 290, 299-300 (Mass. 2002).

But, second, the officers' actions went beyond merely inspecting, or cursorily noticing, items that came into view during the search for Hughes' card. Instead, the scope of the officers' efforts to gather information unrelated to Hughes' card was wide, and the manner in which they went about that task was intense. The officers created a permanent record of items of potential evidentiary value, unrelated to Hughes' card; they did so throughout Davis' property; and they did so with great care and thoroughness. As the Balicki court also recognized: "It is quite another to inspect the contents of a home and to create a permanent record of it for [future] inspection." Id. at 300.

Third, regardless of whether no items were moved, repositioned, or revealed "for the purpose of photographing or videoing them," the officers' actions in widely and intensely gathering information on anything of potential evidentiary value constituted a separate Fourth Amendment search. That is, those actions constituted a physical intrusion on Davis' home and effects separate and apart from the intrusion related to searching for Hughes' card. See Initial Brief pp. 48-49. In addition, those actions constituted an invasion of Davis' reasonable expectation of privacy separate and apart from the invasion related to searching for Hughes' card. See Initial Brief pp. 49-50.

C. The officers' excessive actions in widely and intensely gathering information on anything of potential evidentiary value were not justified by the plain view doctrine or the general inventory search

exception to the warrant requirement.

The State argues that Davis "mistakenly relies on the plain view doctrine," and contends that the "plain view doctrine makes no provisions for situations where a seizure does not occur, and clearly only applies to seizures of property." [AB 33, 34] The State also appears to argue that the officers' excessive actions were justified by the inventory search exception to the warrant requirement, and analogizes the present case to Rolling v. State, 695 So.2d 278 (Fla. 1997). [AB 31-33]

As an initial matter, Davis does not rely–mistakenly or otherwise–on the plain view doctrine. "'The burden is on those seeking the exemption [from the warrant requirement] to show the need for it.'" Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). Here, it is the State–not Davis–seeking to justify the officers' excessive actions. Regardless, Davis is not mistaken. Under the plain view doctrine, probable cause is required before police can lawfully search items in plain view. Hicks, 480 U.S. at 328 ("[W]hether legal authority to move the equipment could be found only as an inevitable concomitant of the authority to seize it, or also as a consequence of some independent power to search certain objects in plain view, probable cause to believe the equipment was stolen was required."); see also id. at 335 (O' Connor, J., dissenting) ("I agree with the Court that even under the plain-view doctrine, probable cause is required before the police seize an item, or conduct a full-blown search of evidence in plain view."). In the present case, the officers lacked such probable

cause. See Initial Brief pp. 50-51.

Beyond that, the officers' excessive actions in widely and intensely gathering information on anything of potential evidentiary value were not justified by the inventory search exception to the warrant requirement. The State's argument on this point suffers from the same flaws as the trial court's ruling. [R5 992-93]

First, the inventory search exception to the warrant requirement does not apply to searches of homes, as opposed to vehicles or other personal property taken into police custody. See, e.g., United States v. Parr, 716 F.2d 796, 813-14 (11th Cir. 1983) ("[T]he inventory search exception has never been applied to searches of someone's *home*. On the contrary the Supreme Court consistently has afforded greater protection from searches of homes and other private buildings than from searches of automobiles, or arrested persons and their personal effects . . . ."; see also Balicki, 762 N.E.2d at 299 n.12 ("The inventory search exception . . . has not been applied to searches of a person's home.").

Second, even assuming the inventory search exception applied to searches of homes, the officers' excessive actions here did not constitute a valid inventory search. For an inventory search to be valid, certain conditions must be satisfied. For instance, the property being searched must be in the custody of the police. See e.g., Caplan v. State, 531 So.2d 88, 90 (Fla. 1988) ("Central to [an inventory search's] purpose is the necessity of having the automobile in legitimate police custody. Obviously, there is

no need to perform the caretaking function of an inventory when the vehicle is not in the care, custody, and control of the police.") In addition, the search must be conducted in accordance with standardized procedures. See e.g., Florida v. Wells, 495 U.S. 1, 4 (1990) ("Our view that standardized criteria . . . must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for general rummaging in order to discover criminal evidence. . . .").

In the present case, other than the marijuana and paraphernalia found in the bathroom closet, the officers did not take custody or control over the items that they inspected and photographed. Those items remained in Davis' home. As a result, there was no need to perform an inventory search. See Caplan, 531 So.2d at 90 (concluding that "the search in question was *not* an inventory search" where "the evidence indicate[d] that [the defendant] had not transferred custody of his wrecked vehicle to the police officer . . . [n]or was his car impounded, or otherwise placed in police control"). In addition, the general search of Davis' home for information on anything of potential evidentiary value was not even conducted in accordance with the procedures laid out in the sheriff's office general order. That order provided that prior to the execution of a warrant, "the entire area to be searched will be videotaped or photographed," as well as that at "the conclusion of the search, the premises will again be videotaped and/or photographed." [R15 2807; R39 178-79] But during the

search, Gainey photographed specific items if they had general "evidentiary value." [R39 179-80] Officers' exercised their discretion to tell Gainey which items needed to be photographed. [R39 183] Few photos show the general premises or even wide views of specific areas. [P2-154]

Third, the present case is distinct from Rolling, 695 So.2d at 293-94. The object of the search in Rolling was a bag that had been removed from the defendant's campsite and taken into police custody. In contrast, the object of the general search here was Davis' home and property contained therein, neither of which (other than the marijuana and paraphernalia) were taken into police custody. As a result, unlike in Rolling, there was no need to perform an inventory search in the present case.

D. Commonwealth v. Balicki should serve as persuasive authority for concluding that the general search of Davis' home for anything of potential evidentiary value was unlawful.

The State attempts to distinguish the present case from Balicki, 762 N.E.2d at 290. [AB 34-35] But Balicki was not decided on the basis of the plain view doctrine, much less the "unique" Massachusetts requirement that police come across items in plain view inadvertently. While the Balicki court "decline[d] to eliminate the inadvertence requirement from [its state constitutional] jurisprudence," id. at 298, it never concluded that items in "plain view" within the defendant's home could have been searched or seized except that officers did not come across them inadvertently.

In addition, the policy of the police department in Balicki was similar to the

policy of the sheriff's office in the present case. Id. at 295. And, in both cases, the searches were not even conducted in accordance with those policies. See id. In any event, the inventory search exception to the warrant requirement does not apply to searches of homes. See discussion supra p. 6. Finally, the State's contention that in Balicki "[t]here were . . . numerous incidents where officers moved items and property in order to take photographs or video of the items" is not accurate. The Balicki opinion states: "In some instances, the items were moved for the purpose of videotaping or photographing." Id. Further, the number of instances in which items were moved was not a factor in the Balicki court's analysis. Id. at 299-300.

E. The inevitable discovery exception to the exclusionary rule is not applicable.

The State argues that evidence obtained during, and later derived from, the search on July 10 "would be admissible under the inevitable discovery exception to the exclusionary rule." [AB 36-37] More specifically, the State posits that the "officers could have easily described items of furniture, paintings, fixtures, and other property to Hughes' family members and friends during the investigation to seek identification of the items," "eventually established probable cause that these items were stolen from Hughes," and "then secured a warrant." [AB 37]

The inevitable discovery exception is not applicable. Under that exception, "'evidence obtained as the result of unconstitutional police procedure may still be

admissible provided the evidence would ultimately have been discovered by legal means.'" Rodriguez v. State, 187 So.3d 841, 845 (Fla. 2015). The exception "requires a 'reasonable probability' that the evidence would have been discovered despite the improper police procedure." Id. at 846. However, "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts." Nix v. Williams, 467 U.S. 431, 444 n.5 (1984). Thus, "the State cannot argue that some later or future investigation would have inevitably led to the discovery of the evidence; rather, the investigation must be ongoing and the State must show that the facts known by the police at the moment of the unconstitutional procedure would have led to the evidence notwithstanding the police misconduct." Rodriguez, 187 So.3d at 846.

Furthermore,"'[a]t the [Fourth] Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" Id. at 848. Put another way, "the sanctity of the home [is] a bedrock of the Fourth Amendment and an area where a person should enjoy the highest reasonable expectation of privacy." Id. at 849. Thus, for the inevitable discovery exception to apply in the context of warrantless searches of homes, the State must "demonstrate that the police were in the process of obtaining a warrant prior to the misconduct." Id. "[O]nly establish[ing] that a warrant could have been obtained with the information available prior to the misconduct" is not sufficient. Id.

In the present case, prior to the general search of Davis' home for information on anything of potential evidentiary value, there were no legal means present that would have led to the furniture, electronics, and other items of personal property that were suspected to have been stolen from Hughes. In particular, prior to that illegal search, the officers made no effort to obtain a warrant to search for and seize those items. Further, any effort to obtain such a warrant at that point would have been fruitless because probable cause to believe that those items were located at Davis' home did not arise until Hughes' friends and family later identified the items depicted in the pictures from July 10 as Hughes' property. [R39190]

The State's claim that the officers could have "eventually established probable cause" and "then secured a warrant" relies on speculative elements, rather than demonstrated historical facts. The facts known by the officers at the moment they searched Davis' home for information on anything of potential evidentiary value would not have led to the items suspected to have been stolen from Hughes. Instead, additional investigation–including speaking with Hughes' friends and families and then obtaining an appropriate warrant–was necessary.

This Court's decision in Rodriguez, 187 So.3d at 841, should control the outcome on this issue. See id. at 848-50 (concluding that discovery was not inevitable, and reasoning that although "the police were already in possession of the information leading to the evidence before the misconduct" and they "attempted to

gain consent from [the defendant] to enter his home," there were "no legal means present [prior to the misconduct] that would have led to the evidence" because "his consent was found to be coerced" and the officers failed to seek a search warrant).

II. Reversible Error Occurred When the Court Admitted Evidence that Davis Possessed a Revolver "in the Past."

A. That evidence was not relevant.

The State argues that evidence Davis possessed a revolver "in the past" was relevant because it corroborated Steward's testimony that Davis took a gun with him on May 7 and/or that Davis' impeachment of Steward "opened the door" to the State introducing that evidence for that purpose. [AB 39-42] The State analogizes the present case to McCrae v. State, 395 So.2d 1145 (Fla. 1980). [AB 39-42]

First, that evidence corroborated Steward's testimony only because the jury presumed from that evidence that Davis had a propensity to be armed and must have acted in conformity with that propensity on May 7. But "[e]vidence of a person's character or a trait of character is inadmissible to prove action in conformity with it on a particular occasion." § 90.404(1), Fla. Stat. (2016).

Second, Davis' impeachment of Steward did not "open the door" to the State introducing evidence that Davis previously possessed a revolver to corroborate Steward's testimony. "[T]he concept of 'opening the door' allows the admission of otherwise inadmissible testimony to 'qualify, explain, or limit' testimony or evidence

previously admitted." Lawrence v. State, 846 So.2d 440, 452 (Fla. 2003). In the present case, Steward testified that Davis took a gun with him on May 7. [R71 3890-91] But she made clear that she did not see a gun in his possession that evening. [R71 3896-98] She further clarified that she had never claimed to have seen a gun in Davis' possession on May 7. [R71 3907] Instead, she explained that her knowledge that Davis took a gun with him that evening was based on a statement that he later made to her. [R71 3897-98, 3905] Finally, although Steward admitted that she had previously stated that Davis did not have a gun on May 7, she made clear that subsequent to that statement she remembered otherwise and even gave a written statement to that effect. [R71 3893-99]

In those circumstances, evidence that Davis possessed a revolver "in the past" did not qualify, explain, or limit Steward's testimony that Davis took a gun with him on May 7 or her prior inconsistent statement on that subject. Steward's testimony on that subject "was complete, and it required no further explication." Austin v. State, 48 So.3d 1025, 1028 (Fla. 2d DCA 2010). Most importantly, "the State . . . cannot rely on the concept of 'corroboration' to introduce through the back door clearly inadmissible evidence of a gun unrelated to the crime." Agatheas v. State, 77 So. 3d 1232, 1239 (Fla. 2011). "If simply cross-examining a witness opens the door to permitting the State to introduce extrinsic evidence to 'corroborate' the witness's testimony on any matter, even those that were not the subject to cross-examination,

such an exception would eviscerate the extremely important proposition that evidence of bad character, prior bad acts, or propensity is generally inadmissible." Id.

Third, the present case is distinct from McCrae, 395 So.2d at 1151-52. Unlike the defendant's testimony there regarding his prior felony conviction, Steward's testimony was not incomplete or misleading. She was able to explain both the basis of her knowledge that Davis took a gun with him on May 7 and her reasons for giving a prior inconsistent statement. [R71 3893-99, 3905] Further, Davis never attempted to mislead the jury to believe that he had never possessed a gun or that Steward had never seen Davis in possession of a gun.

B. Even if relevant, the probative value of that evidence was substantially outweighed by the danger of unfair prejudice.

The State's argument is two-fold: (1) the probative value of evidence that Davis possessed a revolver "in the past" was great because it corroborated Steward's testimony that Davis took a gun with him on May 7; and (2) the danger of unfair prejudice offered by that evidence was low because Davis did not object to the State's argument that the jury should believe Steward's claim that Davis possessed a gun on May 7 because she had "seen him with a black revolver in the past, and he's not the first drug dealer to have one." [AB 43-44] The State analogizes the present case to Hertz v. State, 803 So.2d 629 (Fla. 2001), and Looney v. State, 803 So.2d 656 (Fla. 2001). [AB 42-43] Finally, the State distinguishes the present case from Green v.

State, 27 So.3d 731 (Fla. 2d DCA 2010). [AB 43-44]

First, to the extent that evidence Davis possessed a revolver "in the past" offered any probative value, that probative value was necessarily outweighed by the danger of unfair prejudice. That evidence corroborated Steward's testimony only because that evidence served as propensity evidence; propensity evidence is inadmissible; and Davis did not "open the door." See discussion supra pp. 12-14.

Second, the lack of objection to the State's argument has no bearing on the degree of unfair prejudice presented by evidence that Davis possessed a revolver "in the past." In fact, that evidence presented a great danger of unfair prejudice. See Initial Brief pp. 65-66. But the court admitted it over Davis' objection. [R71 3907-08] Thus, during its closing, the State was entitled to comment on it.

Third, the present case is distinct from Hertz, 803 So.2d at 642, and Looney, 803 So.2d at 667-68. Unlike the photos of the victims' bodies in Hertz and evidence of the defendant's flight from officers in Looney, evidence that Davis possessed a revolver "in the past" was not probative of any fact in issue. Its sole relevance was to prove Davis' bad character or propensity. Thus, even assuming that evidence was less "emotionally charged" than the evidence in Hertz and Looney, the probative value of the former was still substantially outweighed by the danger of unfair prejudice.

Fourth, Green, 27 So.3d at 737, which this Court discussed with approval in

Agatheas, 77 So.3d at 1236-37, should serve as persuasive authority. The facts–that the victim in Green was killed by a firearm and the firearm recovered from Green's bedroom did not fire the fatal shot–are not meaningful distinctions with the present case. In both cases, the State introduced evidence that the defendant possessed a gun that had no link to the crimes at issue, and that evidence unduly suggested the jury should convict based upon an emotional response to violent or criminal character.

III. Reversible Error Occurred When the Court Allowed the State, During Its Closing, To Display a Photo of Steward Crying on the Witness Stand.

A. The State's display appealed to the jury's sympathy.

The State appears to argue that its display did not appeal to the jury's sympathy because the photo was an accurate reproduction of Steward in that moment. [AB 46-47] The State analogizes the present case to State v. Duncan, 894 So.2d 817 (Fla. 2004), and Brooks v. State, 175 So.3d 204 (Fla. 2015). [AB 46-48]

First, the fact that the photo at issue accurately reproduced Steward crying on the stand does not alter the fact that the photo appealed to the jury's sympathy. The literal accuracy of the photo actually increased the degree to which the photo appealed to the jury's sympathy. See Taylor v. State, 640 So.2d 1127, 1134 (Fla. 1st DCA 1994) (concluding that certain demonstrative aids "appeal[ed] to the emotions of the jurors," and emphasizing that those aids' appearances accurately resembled the victim). That exactness distinguishes the State's display here from a situation in

which a prosecutor simply, but accurately, describes a witness's demeanor on the stand. The State's argument is based on the same mistaken premise as the trial court's ruling. [R73 4186-87]

Second, the present case is distinct from Duncan, 894 So.2d at 829-30, and Brooks, 175 So.3d at 239-40. Unlike in those cases, the photo of Steward crying on the stand was not used to demonstrate what happened during the underlying incident at issue. As a result, in contrast to the utilization of a dummy to represent the attack victim in Duncan, the display of the photo offered little probative value. Furthermore, as opposed to the prosecutor's reenactment of the stabbing attack in Brooks, the display of the photo failed to assist the jury in understanding the underlying evidence presented. On the other hand, the photo of Steward crying was developed during trial, and precisely memorialized her fragile emotional state during a single moment. Consequently, unlike the demonstrations in Duncan and Brooks, the display of the photo in the present case violated rule 2.450(h), Florida Rules of Judicial Administration, which provides that no "still photographs...developed during...a judicial proceeding shall be admissible as evidence in the proceeding out of which [they] arose"; evoked an unfair emotional reaction from the jury; and was used solely to inflame the emotions of the jury.

B. The court's error in allowing the State's display was fully preserved.

The State appears to recognize that in the trial court Davis argued the photo

was an appeal to the jury's sympathy. [AB 49] But the State claims that Davis advances a distinct, non-preserved argument on appeal that the State's display unduly emphasized and bolstered the State's version of events. [AB 48-50]

First, Davis's argument on appeal is that the State's display of the photo of Steward crying on the witness stand at trial appealed to the jury's sympathy. See Initial Brief pp. 66-70. Second, Davis' contention that the State's display unduly emphasized and bolstered the State's version of events is a reason offered in support of that argument on appeal–that is, the photo of Steward memorialized her fragile emotional state during only a single moment of her testimony. Third, no "'magic words'" are required "'when stating an objection as long as counsel articulates the objection with sufficient specificity as to inform the trial judge of the alleged error.'" Braddy v. State, 111 So.3d 810, 872 (Fla. 2012).

IV. Whether Considered Individually or Cumulatively, the Court's Errors–in Admitting Evidence Related to the July 10 Search, Admitting Evidence of Davis' Past Possession of a Revolver, and Allowing the Display of the Photo of Steward Crying–Were Not Harmless.

The State essentially argues that any error in admitting that evidence was harmless because while the role of that evidence was minor, the evidence of guilt was overwhelming. [AB 37-38, 44-45, 50]

The court's errors were not harmless. "The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable

doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986). "Thus, if there is error, it requires reversal *unless* the state can prove beyond a reasonable doubt that the error was harmless." Ciccarelli v. State, 531 So.2d 129, 131 (Fla. 1988). "[A]nd the State bears an extremely heavy burden in cases involving constitutional error." Hurst v. State, No. SC12-1947, 2016 WL 6036978, at *23 (Fla. Oct. 14, 2016).

"Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." DiGuilio, 491 So.2d at 1138. "[T]he harmless error test is to be rigorously applied." Id. at 1137.

This Court has previously discussed why a rigorous application is necessary.

> [H]armless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence. . . . "Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result."

Id. at 1136. With those considerations in mind, this Court has repeatedly stressed:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

Id. at 1139. Ultimately, "'[t]he question is whether there is a reasonable possibility that the error effected the verdict,'" not whether the error substantially influenced the jury's verdict." Knowles v. State, 848 So.2d 1055, 1059 (Fla. 2003).

Finally, it is appropriate to consider the cumulative effect of multiple errors.

> Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because "even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation."

McDuffie v. State, 970 So.2d 312, 328 (Fla. 2007).

In the present case, even assuming that the permissible evidence of guilt was overwhelming, the State cannot prove that there is *no* reasonable possibility that evidence related to the July 10 search, evidence of Davis' past possession of a revolver, and the State's display of the photo of Steward crying contributed to Davis' convictions and/or sentences. On the one hand, the permissible evidence "was not unassailable." Id. First, the State's case hinged on Steward's testimony, but her

credibility was questionable. Steward immediately expressed interest in the $20,000 reward; was offered use immunity in exchange for her cooperation; entered an agreement to testify against Davis in exchange for the dismissal of charges pending against her in multiple cases; and understood that if she cooperated and testified, she would not face charges arising from the deaths of Hughes and Rhodes. [R70 3703-06; R71 3743-44, 3893, 3900-04]

Second, the credibility of other crucial State witnesses was suspect. For instance, Donna Gee ended up in possession of Hughes' furniture; was offered use immunity in exchange for her cooperation; and was never charged with a crime. [R61 1937-42; R62 1954-60, 2008-09, 2041-42] Cecil Galloway had memory problems; ended up in possession of Hughes' scuba and fishing gear; and was concerned about his felony probation being violated. [R62 2090-91, 2129-31, 2153-55; R63 2161-62, 2166-69] Terry Guice was serving a 30-month sentence; had 18 prior felony convictions; ended up in possession of Hughes' furniture; and was never charged with a crime. [R63 2290-92, 2323-29; R64 2373-76]

Third, neither Hughes nor Rhodes were mentioned in the inculpatory comments that Takylah Glenn and Makenzie Roulhac claimed to have overheard. [R61 1866-68, 1885-93, 1907; R63 2237-40, 2255] Fourth, Davis' recorded interviews with Investigator Sunday were generally plausible. Davis essentially explained that Hughes was a good friend; Davis had purchased Hughes' Escalade months prior;

Hughes had a drug problem, owed people a lot of money, and decided to "skip town"; and Hughes paid Davis to help Hughes move out of his residence. [R19 3499-3528; R59 1520-1538] Finally, Hughes' and Rhodes' bodies were never discovered. [R60 1594-96; R69 3449-51]

On the other hand, the impermissible evidence was "a fixture of [the State's] opening statement, case-in-chief, and closing argument." Rigterink v. State, 2 So. 3d 221, 257 (Fla. 2009), vacated on other grounds, Florida v. Rigterink, 559 U.S. 965 (2010). During its guilt-phase opening, the State displayed photos taken during the July 10 and September 7 searches. [R57 990-93] At the same time, it highlighted knowledge that officers acquired during the July 10 search, and referred to the use of that knowledge to later identify Davis in surveillance videos. [R57 991] Further, utilizing photos taken on July 10, the State emphasized that Davis was motivated to murder Hughes in order to obtain the financial means to set up a marijuana growing operation. [R57 993-94] Finally, the State pointed out that property photographed on July 10 was later identified as having been sold on Craigslist. [R57 998-99]

During the State's case-in-chief, more than 100 photos taken on either July 10 or September 7 were admitted. [R21 4017-30; R22 4031-4123; R61 1779-81] Sunday testified that the same hat depicted in a photo taken on July 10 was worn by the individual using Hughes' card in a surveillance video. [R60 1578-80] Gainey testified regarding the execution of the warrant on July 10. [R64 2448-52, 2466-82] She

identified the photos taken that day, recounted the circumstances under which they were taken, and detailed the items depicted. [R64 2451-52, 2466-81] Investigator Armstrong also testified regarding the execution of that warrant. [R64 2433, 2436-39] Crime Scene Technician Carey testified regarding the execution of the search warrant on September 7. [R65 2655-80] He identified the photos taken that day, recounted the circumstances under which they were taken, and detailed the items depicted. [R65 2655-80] The State introduced a luggage tag containing Hughes' initials and address found during the September 7 search. [R65 2675-80] Carey identified property seized from an individual in Crestview as being property previously located at Davis' home by referring to pictures taken on July 10. [R65 2698-2703]

Alexander Ortega identified certain equipment and materials depicted in pictures taken on July 10 as items his business sold to John Davies' sons. [R61 1781-87; 1805-10] The pictures refreshed Ortega's recollection. [R61 1786] Further, Billy Gorman identified property depicted in pictures taken on July 10 and September 7 as belonging to Hughes. [R65 2571-78] In court, James Holloway flipped through pictures taken on September 7, pulled out the photos depicting property that he recognized as belonging to Hughes, and identified that property. [R67 2949-55] Kellie Kamens also identified property depicted in pictures taken on September 7 as belonging to Hughes. [R67 2981-88] The pictures refreshed Kamen's recollection. [R67 2983] Further, William Smith identified a motorcycle depicted in pictures taken

on July 10 as belonging to Hughes. [R67 3017-18]

Hughes' maid, Zaray Rosado, identified property depicted in pictures taken on July 10 and September 7 as belonging to Hughes. [R67 3042-48] Further, State Attorney Office Investigator Vause testified and linked the hat depicted in photos taken on July 10 and September 7 to the hat worn by the individual using Hughes' card in surveillance videos. [R68 3193-94, 3196-97, 3206-07] Finally, Steward identified property depicted in pictures taken on September 7 as property that Davis had not possessed prior to May 7. [R70 3684] She also asserted that Davis possessed a revolver "in the past." [R70 3684; R71 3907-08]

During the State's guilt-phase closing, it argued that the jury should believe Steward's claim that Davis possessed a gun on the day of the murders because she had "seen him with a black revolver in the past, and he's not the first drug dealer to have one." [R73 4218] The State also displayed the closeup photo of Steward crying–with her head in her hands–while on the witness stand at trial. [R73 4185-87; R74 4411-12; SR2 38] Further, the State displayed photos taken during the July 10 and September 7 searches. [S11, 38, 42, 81, 96[1]] While doing so, it argued that the jury should believe that Hughes was dead because Davis "ended up with everything

[1]The record on appeal includes a disc containing the PowerPoint slides used by the State during its guilt-phase closing argument. [SR2 37] On the disc, those slides are labeled numerically. Those slides will be referred to as S followed by the appropriate photo number.

Greg Hughes owned . . . down to the very last spoon in that rack and the very last saltshaker that you see." [R73 4180-81; S11] It contended that Davis was guilty of theft because Davis "took everything he wanted . . . [including] that boat motor and that $1500 painting, and that big TV and stereo system and that fine leather furniture." [R73 4195; S38] The State exhibited a photo from July 10 and asserted: "The evidence proves conclusively that [Davis] took the Yamaha motorcycle." [R73 4196; S42] It insisted that a mop bucket depicted in a photo from September 7 was used to clean Hughes' residence on the night of the murder. [R73 4221-22] Finally, utilizing a picture of equipment taken on July 10, the State emphasized:

> Barry Davis, Jr., murdered Greg Hughes and Hiedi Rhodes. He had a motive . . . [I]t's Greg Hughes' money that built the marijuana grow room . . . That was the motive for the crime. So [Davis] could support himself, and his girlfriend, and his child in that home in Argyle where he would have tall marijuana plants growing and continue to sell marijuana.

[R73 4220-21; S96]

During the penalty-phase trial, additional photos taken during the July 10 search were admitted. [R25 4821-30; R26 4831-33; R77 4939-41, 4944] The photos depicted handwritten lists, computations, and diagrams; an article regarding a 2012 bill regulating "herbal incense" or "synthetic marijuana"; a copy of that 2012 bill; a letter regarding an analysis of a sample for the presence of "synthetic marijuana"; advertisements for "herbal incense"; and banking information for "Source1Herbs."

[R25 4821-30; R26 4831-33] Lieutenant Hogeboom referred to those pictures and testified that during the search of July 10, officers observed evidence that Davis was involved in selling "herbal incense." [R25 4821-30; R26 4831; R77 4942-53] Subsequently, Dr. Prichard noted Hogeboom's testimony and stressed that Davis "was pretty darn good at" selling drugs. [R77 4970] Most importantly, Prichard opined that Davis' capacity to conform his conduct to the requirements of the law was not substantially impaired, and reasoned:

> I think a good example in Mr. Davis' case is what we talked about in his drug business, the recognizing and researching what the laws were in terms of buying those chemicals, trying to conform that behavior in purchasing the chemicals. You know in some of the information that was presented this morning, the contents of this are not illegal or banned, so it's a recognition of what's lawful behavior versus what's not lawful behavior. I think that's a good example in Mr. Davis' case . . . of an ability to conform . . . [I]n the case [of] the murders and the subsequent behavior [i]t's not an inability to conform. It's a decision to not to conform for personal gain.

[R77 5014]

V. Reversible Error Occurred When the Court Found That Sufficient Aggravating Circumstances Existed and There Were Insufficient Mitigating Circumstances To Outweigh the Aggravating Circumstances, and Sentenced Davis to Death.

While the State disagrees, neither it nor Davis had the benefit of this Court's recent decisions in Hurst v. State, No. SC12-1947, 2016 WL 6036978 (Fla. Oct. 14, 2016), and Perry v. State, No. SC16-547, 2016 WL 6036982 (Fla. Oct. 14, 2016), at the time of prior briefing. In Hurst v. State, this Court determined:

> Upon review of the decision in Hurst v. Florida, as well as the decisions in Apprendi and Ring, we conclude that the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury–not the judge–must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty. These necessary facts include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However, the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. . . Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances. . . .
>
> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder–thus allowing imposition of the death penalty–are also elements that must be found unanimously by the jury. Thus, we hold that in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge. . . [W]e also find that in order for a death sentence to be imposed, the jury's recommendation for death must be unanimous. . . .

Hurst, 2016 WL 6036978, at *10. This Court also held "that section 775.082(2) does not require commutation to life under the holding of Hurst v. Florida." Id. at *21.

In Perry, this Court began by highlighting its key holdings in Hurst v. State:

> In that opinion, we held that . . . in cases in which the penalty phase jury is not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury. Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating

circumstances, and unanimity in the final jury recommendation.

Perry, 2016 WL 6036982, at *1. This Court then held that Chapter 2016-13, Laws of Florida, "cannot be applied constitutionally to pending prosecutions." Id.

A. Davis' death sentences were imposed in violation of his Sixth Amendment right to trial by jury and this Court's recent decision in Hurst v. State.

The State argues that Davis' death sentences were not imposed in violation of Hurst v. Florida, 136 S. Ct. 616 (2016), because "a jury finding of one aggravator is sufficient to satisfy Hurst." [AB 51-52] This Court has now rejected that argument. See Hurst, 2016 WL 6036978, at *10 n.7 ("[W]e reject the State's argument that Hurst v. Florida only requires that the jury unanimously find the existence of one aggravating factor and nothing more.").

B. The error in requiring the judge, rather than the jury, to make the findings that sufficient aggravating circumstances exist and there are insufficient mitigating circumstances to outweigh the aggravating circumstances is structural.

The State argues that such error is not structural because "deficient jury factfinding on an individual element does not necessarily corrupt the entire verdict.'" [AB 57-58] The State analogizes the present case to Neder v. United States, 527 U.S. 1 (1999); Washington v. Recuenco, 548 U.S. 212 (2006), and Galindez v. State, 955 So.2d 517 (2007). [AB 57-59] The State's position finds support in Hurst v. State, where this Court recently concluded that the error "in which the judge rather than the

jury made all the necessary findings to impose a death sentence[] is not structural error." Hurst, 2016 WL 6036978, at *22.

However, even if a "Hurst error" does not prevent the jury from returning "beyond a reasonable doubt" jury findings concerning every element at issue, such an error always results in constitutionally insufficient findings concerning the critical elements necessary to impose the death penalty. Including cases in which the jury unanimously recommends a death sentence, those critical findings will always be deficient for two reasons: (1) the jury is not instructed that those findings have to be found beyond a reasonable doubt, and (2) the jury is repeatedly instructed that its decision as to punishment is an advisory recommendation, and the judge is responsible for deciding which punishment to impose. In those circumstances, when a judge imposes a death sentence in a case in which a Hurst error occurs, that judge is essentially directing a verdict for the State on the critical elements necessary to impose the death penalty. Consequently, a trial in which a Hurst error occurs cannot reliably serve its function as a vehicle for determining a defendant's eligibility for the death penalty, and no resulting death sentence can be regarded as fundamentally fair. Thus, unlike errors–such as those in Neder, Recuenco, and Galindez–arising from the jury's failure to return "beyond a reasonable doubt" jury findings as to ordinary criminal elements or sentencing factors, Hurst errors are structural. To the extent that Hurst v. State provides otherwise, this Court should reconsider that decision.

C. Even if the error in requiring the judge, rather than the jury, to make the critical findings necessary to impose the death penalty is not structural, that error was not harmless in the present case.

The State argues that "the evidence . . . overwhelmingly supports the . . . aggravators found by the trial court," and "any reasonable jury would find those aggravators to be proven, and to far outweigh the modest mitigation." [AB 60-61] But in the process of determining that the error in Hurst v. State was not harmless, this Court appeared to consider both whether there was a possibility that the error contributed to the death sentence and whether a rational jury would have made the critical findings absent the error. Id. at *23-25. And under either standard, the State cannot bear its burden to prove that the error was harmless here.

First, the State cannot prove that there is *no* reasonable possibility that the jury's failure to unanimously find beyond a reasonable doubt that sufficient aggravating factors exist and that there were insufficient mitigating circumstances to outweigh the aggravating circumstances contributed to Davis' death sentence. "[I]n the context of Hurst v. Florida error, the burden is on the State . . . to prove beyond a reasonable doubt that the jury's failure to unanimously find all facts necessary for imposition of the death penalty did not contribute to [Davis'] death sentence. . . . 'The question is whether there is a reasonable possibility that the error affected the [sentence].'" Id. at *23.

In the present case, the jury recommended death by votes of 9-3 and 10-2. The

State cannot refute the reasonable possibility that the jurors who did not recommend death found that any existing aggravating circumstances were insufficient and/or that there were sufficient mitigating circumstances to outweigh the aggravating circumstances. Further, the State cannot refute the reasonable possibility that even more jurors would have made comparable findings if they had been instructed that those findings had to be proven by the State beyond a reasonable doubt and/or had not been repeatedly instructed that their decision as to punishment was an advisory recommendation, and the judge was responsible for deciding which punishment to impose.

Conversely, it would be sheer speculation to conclude that although the jury here recommended death by votes of 9-3 and 10-2, it fully appreciated its unique responsibility and unanimously found–beyond a reasonable doubt–that sufficient aggravating circumstances existed and there were insufficient mitigating circumstances to outweigh the aggravating circumstances. This Court's observations in Hurst v. State apply in the present case:

> Because there was no interrogatory verdict, we cannot determine what aggravators . . . the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

Id. at 24.

Second, this Court cannot find *beyond a reasonable doubt* that a properly instructed, rational jury would have unanimously found beyond a reasonable doubt that there were insufficient mitigating circumstances to outweigh the aggravating circumstances. With respect to "the failure to instruct on an element in violation of the right to trial by jury," "the harmless-error inquiry must be . . . : Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" Neder, 527 U.S. at 10; see also Hurst, 2016 WL 6036978, at *25 ("[W]e cannot find beyond a reasonable doubt that no rational jury, as the trier of fact, would determine that the mitigation was 'sufficiently substantial' to call for a life sentence."). In these circumstances, "the harmless error test is not limited to consideration of only the evidence of aggravation, and it is not an 'overwhelming evidence" test. Id. at *24.

In the present case, significant evidence of mitigation was presented. Davis suffered from traumatic brain injury–in particular, a frontal lobe abnormality. [R75 4579-89, 4601-02, 4607-08; R76 4796-4803, 4839-42; R77 4864, 4885, 4914-15] As a result of those injuries, Davis struggled with a mild neuro-cognitive disorder. [R76 4747-48] In turn, Davis endured both executive dysfunction–such as decreases in cognition, impulse control, and social judgment, as well as increases in aggression and violence–and borderline intellectual functioning in the area of perceptual reasoning. [R75 4610; R76 4687-95, 4747, 4804-19, 4825; R77 4878, 4887-89]

Further, Davis suffered generalized anxiety disorder; obsessive-compulsive disorder; and post-traumatic stress disorder. [R76 4747; R77 4875, 4878]

As in Hurst v. State, "[b]ecause we do not have an interrogatory verdict commemorating the findings of the jury, we cannot say with any certainty how the jury viewed the mitigation." Id. at 24. That said, just as the trial court there expressly acknowledged the presence of mitigating circumstances, the trial court here found that Davis' history of traumatic brain injury, his diagnoses of mental disorders, and the following circumstances–Davis was a good father to his son; Davis had previously saved an elderly man from drowning; and Davis' family loved him very much–were mitigating and entitled to moderate or substantial weight. [R13 2416-27] In these circumstances, this Court should employ an approach similar to its approach in Hurst v. State, and "decline to speculate as to why [nine or ten] jurors in this case recommended death and why [two or three] jurors were persuaded that death was not the appropriate penalty." Id. at 25.

VI. As to the State's Additional Arguments, Davis Relies on the Arguments Raised in His Initial Brief.

CONCLUSION

Mr. Davis' convictions and sentences should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished electronically via the Florida Courts E-filing portal to Jennifer L. Keegan, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and by U.S. Mail to Appellant, Barry Trynell Davis, Jr., #P29305, Florida State Prison, P.O Box 800, Raiford, FL 32083, on this 31st day of October, 2016.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Times New Roman, 14 point.

Respectfully submitted,

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