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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 19-428

JOHNATHAN I. ALCEGAIRE,

Appellant,

v

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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INTRODUCTION IN REPLY

One of the many ways that Merriam Webster Dictionary defines "theory" is: (i) "a hypothesis assumed for the sake of argument or investigation"; (ii) "an unproved assumption: conjecture"; and (iii) an "abstract thought: speculation". Merriam-Webster.com; https://www.merriam-webster.com/dictionary/hyperbole; (last accessed January 14, 2020). Florida law permits the State to advance any theory of the crime "that is reasonably supported by the evidence" provided it does "not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." *Garcia v. State*, 622 So. 2d 1325, 1331 (Fla. 1986).

The State's theory of this case was that victim, D.W., was a drug dealer and Andrew Joseph, Appellant's brother, was one of his suppliers. (AB 57). D.W. had "done **something** to make Andrew Joseph very angry, and Andrew Joseph sent his soldiers to Polk County to take care of it." (11 T 2721). (Emphasis supplied). The State never articulated precisely what D.W. did to anger Joseph and simply argued that "**whatever** they did to Andrew Joseph, there was a different way to punish them, not like this." (11 T 2756). (Emphasis supplied).

In its Answer Brief (AB), the State avers that the "something" or "whatever" D.W. did to anger Andrew Joseph was that he got behind on his payments to Joseph.

The State provides no record citation to support the articulation of this theory below. A thorough review of the record demonstrates that, not only is this theory not expressly articulated to the jury, there is no evidence in the record that the State can point to that would convert this theory from speculation and conjecture to proof. Much as it did below, the State merely asserts its belief and asks that the truth of its avowals be taken on faith.

Nowhere in the AB does the State provide any evidence of the substance of any communications between Appellant and any of his co-defendants. There is no direct evidence that Joseph directed Appellant to go to Lakeland and certainly no evidence that he directed him to rob and kill the victims. There is no direct evidence that anyone in the home of D.W. on the morning of the murders was there at the behest of Joseph. There is no direct evidence that Appellant intended to kill or rob anyone and only weak and speculative evidence that Appellant actually killed anyone.[1]

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[1] In declining to instruct the jury on whether or not Appellant possessed or discharged a firearm, the trial judge stated that the circumstances were not strong enough to put a gun in the hand of Appellant or for the jury to make a decision that he actually discharged a firearm. The court stated that "[o]ne could weakly conclude that it was him. It would be speculation as to whether it's Mr. Mack or Mr. Alcegaire who was finishing the job..." (10 T 2653).

Contrary to the State's claim that the surviving victim, Felix, testified that Appellant was an active participant, Felix merely identified Appellant as being in the home on the morning of the murders. And, as argued *infra,* Felix's testimony has been seriously undermined with post-trial statements that he gave to the State and give rise to a reasonable doubt whether Appellant was even present on scene on the morning of the murders.

In arguing that the evidence supports its theory of the crime, the State is asking this Court to engage on inference upon inference and hold that the pyramiding of those inferences amounts to proof beyond a reasonable doubt. The law expressly forbids such a means to affirmance. *See I.Y.D v. State*, 711 So. 2d 202, 203 (Fla. 2d DCA 1998)(*citing Brown v. State*, 672 So. 2d 648, 650 (Fla. 4th DCA 1996)).

REPLY - ARGUMENT I

A. Appellant's Motion for New Trial Should Have Been Granted.

Prior to filing the Motion for New Trial at issue here, Appellant sought relief under Fla. R. Crim. P. 3.850 based on "Newly Discovered Evidence" of surviving victim, Felix's, post-trial statements to the State. (R 3104-3108). The Court later struck Appellant's *pro se* motion as nullity since he was represented by counsel. (R 3115). The subject of Appellant's 3.850 motion is identical to the subject of trial counsel's

subsequent Motion for New Trial. Thus, Appellant promptly and diligently notified the Court that newly discovered evidence existed that warranted a new trial.

In advancing its argument that the trial court did not evaluate Appellant's Motion for New Trial under the newly discovered evidence standard, the State simply ignores Appellant's earlier prayers for relief and the Court's express language in its order. The order makes clear that the Court was, in fact, cognizant that the motion was based on newly discovered evidence and that such motions "should not be delayed until after the death sentence is final, but instead, should be brought as soon as possible after the discovery of the new evidence." (R 3409-10).

In concluding that it should address the motion on its merits, the Court cited to *Farina v. State*, 191 So. 3d 454 (Fla. 2016). Thus, it is evident that the Court sought guidance on how it should resolve the pending motion and presumably believed it was following the dictates that this Court demands in evaluating newly discovered evidence claims. As outlined in *Farina*, newly discovered evidence claims must meet two prongs:

> First, in order to be considered newly discovered, the evidence '"must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by use of diligence." *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324-25 (Fla. 1994).

> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1994).

Farina, 191 So. 3d at 456 (*quoting Jones v. State*, So. 2d 512, 521 (Fla. 1998)).

The State in its AB does not dispute that the evidence could not have been known at the time of trial. Thus, the crux of this issue lies in prong two: probability of a different outcome. As set forth in detail in Appellant's Initial Brief (IB), the import of the testimony of Felix, and its probable effect on the jury, cannot be overstated. The State conceded that Felix was the only direct evidence they had of Appellant's involvement in the crime. (11 T 2871-72). On more than one occasion, the prosecutor told the jury that she would not have had a case without Felix. (11 T 2713, 2859). The State in its AB makes no attempt to diminish the significance of Felix's testimony and, as below, relies wholly on his testimony as the only direct evidence of Appellant's alleged guilt.

In its argument to this Court that the evidence below was sufficient to sustain the conviction, the State sets forth its theory, circumstances that would suggest Appellant's guilt, and inferences it asks this Court to draw from the circumstantial evidence.[2] (AB

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[2] There is no direct testimony that Joseph was upset with D.W. or that D.W. owed him anything. There is no direct testimony that Joseph directed Appellant to travel to Lakeland. Nor is there any direct testimony that Joseph directed Appellant to rob or kill anyone. There is no direct testimony that Appellant recruited co-defendants Smith and Mack to rob and kill. The State provided no direct testimony that

57). The State then cites Felix's testimony as identifying Appellant as an active participant in the crimes.[3] As such, the State implicitly concedes that, absent Felix's testimony, this Court would be reviewing the sufficiency of the evidence in this case under the special standard of review required for cases predicated on nothing but circumstantial evidence. *See Rocker v. Sta*te, 122 So. 3d 898, 901 (Fla. 2d DCA 2013)("Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.")); *see, also Knight v. State*, 186 So. 3d 1005 (Fla. 2016).

As Appellant maintained in his IB, his primary defense was that he traveled to Lakeland that morning, but he did not travel to the incident address at 2314 E. Magnolia and was not present when the shootings occurred. All the circumstantial evidence presented in this case did not contradict that defense. The only evidence

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Appellant intended to rob and kill anyone. And finally, there is no direct testimony that Appellant did rob or kill anyone.

[3] In declining to instruct the jury on whether or not Appellant possessed or discharged a firearm, the trial judge stated that the circumstances were not strong enough to put a gun in the hand of Appellant or for the jury to make a decision that he actually discharged a firearm. The court stated that "[o]ne could weakly conclude that it was him. It would be speculation as to whether it's Mr. Mack or Mr. Alcegaire who was finishing the job..." (10 T 2653). Thus, while Felix did testify that he saw Appellant at the crime scene, he did not provide any direct evidence that Appellant himself robbed or killed anyone.

that contradicted it was Felix's testimony. This trial came down to Felix's testimony. As the State conceded below, she would not have had a case without Felix. (11 T 2713, 2859). Without the testimony of Felix, Appellant maintains that the State's conviction could not be sustained on appeal.

Contrary to the State's claim that Felix's post-trial statements did not conflict with his trial testimony identifying Appellant, his post-trial statements posited a far different version of events than what Felix told the jury. Despite telling the jury that he knew Appellant was there because he saw him when he came into his room, Felix never actually saw Appellant on the morning of the murders. (5 T 1322, 1395-96, 1400)(R 3235-36). Despite telling the jury that he knew it was Appellant, co-defendant Smith, and co-defendant Mack because he had seen them all at the house together just weeks prior, Felix never saw Mack and does not believe he was even there. ((5 T 1317; 1358-62)(R 3235-36). Despite telling the jury he knew it was Appellant, Smith, and Mack, Felix simply assumed the three were all there because they had been together before and he saw a picture of the three of them in a car. (R 3235-36). And despite Felix now claiming he can identify Appellant based on a recognition of his voice, he provides no substance of any conversation or dialogue that he ever heard Appellant utter in the house that morning.

Furthermore, he was also adamant he recognized Mack's voice, until he later admitted that he did not. (R 3235-36).

As the State noted in its AB, Felix was a reluctant witness and the State struggled to adduce his testimony. However, "[e]ventually the State got him to agree..." (AB 30). In fact, the majority of the testimony that Felix gave to the jury were simple yes or no responses to the State's leading questions. The trial court characterized Felix as a reluctant witness who, at times, gave contradicting answers. (R 3118). Felix's post-trial statements provide even more evidence of equivocation and confusion in his testimony and further undermine his credibility.

Following Felix's post-trial statements, the strength of the evidence that the State was able to get Felix to agree to is now a far cry from the evidence it put forth before the jury. While his post-trial statements may not represent a complete exoneration of Appellant, they substantially and material diminish the only direct evidence the State put forth to suggest Appellant's guilt. The post-trial statements were of such a nature that it produced a Nolle Prosequi for Tavaris Mack. (R 3231, 3117). They are of such a nature that they would likely produce an acquittal of Appellant on retrial and Appellant's Motion for New Trial should have been granted.

B. It was error to summarily deny Appellant's Motion for New Trial.

As set forth above, the trial court properly evaluated Appellant's motion on its merits and under the newly discovered evidence standard. As argued, *supra*, Appellant is entitled to relief under that standard of review. However, should this Court accept the State's argument that the Court did not evaluate the motion under that standard, then the proper remedy should be to relinquish jurisdiction to the trial court with instructions to either conduct an evidentiary hearing or submit a new order articulating its reasoning and rationale for determining that the newly discovered evidence does not warrant relief.

REPLY - ARGUMENT II

A. Facts Not in Evidence

The State theorized that the murders in this case happened because victim D.W. angered Appellant's brother, Andrew Joseph, so Joseph sent Appellant and his co-defendants down to Lakeland to kill and rob him. There was no actual evidence adduced that Joseph was angry at D.W. or harbored any animosity with him. The State never averred that Appellant harbored any animosity with D.W. There was no actual evidence that Joseph directed Appellant or any of the co-defendants to go to Lakeland and kill or rob the victims. Except for the circumstance that D.W. and Joseph were acquainted through the drug trade and Appellant and his other co-defendants had been

to D.W.'s house before, there was no actual evidence that tied this crime to Andrew Joseph in any way or demonstrated that either he or Appellant intended to kill or rob the victims.

Perhaps given the paucity of any evidence of motive and intent, the prosecutor manufactured a nexus to Joseph by arguing to the jury that a conversation occurred between co-defendant Smith and D.W. wherein D.W. said he "gave all the rest of it to Z or Zo"[4] and Smith demanded to know where "the rest of it" was. (11T 2721). Significantly, however, that conversation appears nowhere in the record.

The State concedes in its Answer Brief that there was no testimony to support either of the foregoing statements. It then goes on, however, to argue that the conversation "might have" happened, despite not putting it before the jury. (AB 35). Thus, in asking this Court to view the prosecution's unsupported argument as essentially harmless, the State is urging this Court to engage in speculation and pure conjecture of what the evidence might have been, not what it actually was.

It is incumbent on this Court to view the argument's effect on the trier-of-fact. *See State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986). Contrary to the State's claim

[4] Z and Zo were Andrew Joseph's nicknames.

that the prosecutor "suggested" that the dialogue happened, she never qualified her statement or posited it as a hypothetical; she affirmatively argued that those actual words were exchanged between the two. (AB 34)(11 T 2721). What the jury heard was powerful, yet entirely unproven, argument of the motive and intent behind these murders. The State's assertion that the statements were relatively inconsequential because they went more to the question of motive rather than any of the elements of the offense ignores the very fact that it provided no actual or direct proof that Appellant intended to kill or rob any of the victims. The State's theory of motive for Andrew Joseph was the entire premise of its argument that Appellant committed the acts at the behest of his brother.

Just as it did in the foregoing issue, the State conceded that there was no testimony in the record that victim E.B. referred to D.W. as her husband, or that D.W. loved her desperately, or that she was the love of his life. (AB 36). The State proceeds again, however, to argue that she might have called him husband, that she "may well have been" the love of his life, and it is "at least possible" that one of the two loved the other desperately. (AB 36). Thus, the State is again urging this Court to engage in speculation and pure conjecture of what the evidence might have been, not what it actually was.

Appellant argued in his IB that the foregoing argument would undoubtedly appeal to the emotions of the jurors. The State makes no attempt to dispute the inherently emotional and sympathetic nature of the argument. It instead argues that Appellant misconstrues the State's argument and avers that the purpose of the appeal to the jury was to establish that co-defendant Smith could not have been the lone gunman of the group because D.W. would not have permitted him to walk away to shoot the woman he called his wife. Of course, the State's proposition presumes that the inference it posits is true. But as it relates to the effect on the jury, and even assuming for argument purposes that the State's proposition is true, that is not what the jury heard. Contrary to the State's claim that the prosecutor merely "suggested" that the two called each other husband and wife, were desperately in love, and she was the love of his life, the State affirmatively argued it as fact. (AB 35)(11 T 2719; 2862; 2863).

B. Impermissible and Unsupported Bolstering.

As the State noted in its AB, Felix was a reluctant witness and the State struggled to adduce his testimony. However, "[e]ventually the State got him to agree..." (AB 30). In fact, the majority of the testimony that Felix gave to the jury were simple yes or no responses to the State's leading questions. The trial court

characterized Felix as a reluctant witness who, at times, gave contradicting answers. (R 3118).

Perhaps because Felix provided contradicting answers, and the State had told the jury that it would not have been able to prove its case without Felix, the prosecutor went to great lengths to try and bolster his credibility. This included, as the State conceded in its AB, embellishment. (AB 39).

C. Denigrating the defense and defendant.

In one of the surveillance videos from the Monte Carlo Apartments that the State showed, Appellant and co-defendant are seen in the elevator just prior to the van exiting the complex and traveling to Lakeland. There is no audio to the video and, thus, no ability to know what the two were conversing about. Appellant argued that the State took that video and made the inflammatory, imagined, sarcastic, and vituperative scenario, and argued it to the jury:

> He was in that elevator, high-fiving Jamaal Smith, whoop, whoop, excited to come to Lakeland to kill these people. They were happy and ready to go to come down here and take the lives of these four young people who had such futures ahead of them.

(11 T 2755).

The State concedes that the video does not show Appellant and Smith "high-fiving" or saying anything like "whoop whoop." (AB 42). The State does not address whether Appellant's characterization of the argument as inflammatory, imagined,

sarcastic, or vituperative was incorrect. The State merely asserts that the prosecutor was clearly engaging in "hyperbole." (AB 42). Whether hyperbole is even appropriate in the context of her argument, there is nothing in the words she utilized to express to the jury that she was not intending for them to take her words literally.

The State further posits that perhaps the prosecutor was merely wanting to let the jury know that the calm, smiling demeanor of Appellant should not be misconstrued by the jury to mean he was not capable of horrific violence. That's not, however, what the jury heard. Given the dearth of any actual evidence that Appellant was traveling to Lakeland to kill anyone, the effect of this argument on the jury, hyperbolic or not, was particularly egregious.

D. Expressions of Personal Belief and Opinion.

The State concedes that the prosecutor offered "her opinion" that Alcegaire was a "soldier" for his brother and he recruited Smith to come handle the situation in Lakeland. (AB 43). The State then goes on to cite a number of circumstances that suggest that her opinion was a reasonable inference. The State does not cite to any direct record evidence that: (i) Appellant's brother was actually angry with D.W. or harbored any animosity with him; (ii) Appellant harbored any animosity with D.W.; (iii) Appellant was a soldier for his brother; or that (iv) Joseph directed

Appellant or any of the co-defendants to go to Lakeland and kill or rob the victims. Except for the circumstance that D.W. and Joseph were acquainted through the drug trade and Appellant and his other co-defendants had been to D.W.'s house before, there was no actual evidence that tied this crime to Andrew Joseph in any way or demonstrated that either he or Appellant intended to kill or rob the victims and only weak and speculative evidence that Appellant actually did kill anyone.[5]

What the State tried to do to "prove" its theory is to argue assumption upon assumption and inference upon inference in an effort to get the jury to conclude that her theory was right. And to conclude her final words to the jury, the State wrapped up what all that assumption and inference meant to her with the following closing salvo:

> We all talked about Tavaris Mack a lot in this case. It's not his trial. We talked a little bit more about Jamaal Smith in this case. Jamaal Smith was only there because, **I think** Johnathan Alcegaire recruited him to come. **I think** the same thing for Tavaris Mack. **I think** Johnathan Alcegaire was there because, again, **I believe** him to be a soldier for his brother. **I think** that he had a job to do, and he came to Lakeland to do it."

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[5] In declining to instruct the jury on whether or not Appellant possessed or discharged a firearm, the trial judge stated that the circumstances were not strong enough to put a gun in the hand of Appellant or for the jury to make a decision that he actually discharged a firearm. The court stated that "[o]ne could weakly conclude that it was him. It would be speculation as to whether it's Mr. Mack or Mr. Alcegaire who was finishing the job..." (10 T 2653).

(11 T 2873). (Emphasis supplied).

Contrary to the State's claim, trial counsel did not effectively address this claim with his simple argument that no witness ever used the word "soldier" to describe Appellant. (AB 43). Because the above are some of the final words to the jury in this case, Appellant never had any opportunity to address these expressions of her personal belief of the evidence. The State effectively told the jury that her opinion was not simply a theory anymore, it had the force of truth because she believed it to be so.

E. Justice for the Victims.

The State concedes that the prosecutor made "justice for the victim" arguments and Florida law forbids such argument. (AB 44-45). The State, however, argues that the argument was inconsequential because Appellant's trial counsel never disputed that the victims were entitled to justice and effectively chose to address the matter in his closing. The State does not expound on how, precisely, trial counsel remedied this error in his closing. Appellant is at a loss to understand how trial counsel's recognition of the horrific nature of the crime was, in effect, a tacit acknowledgement that the victims deserved justice and, in turn, an acceptance that justice was conviction.

Furthermore, the State's position that the argument was not strongly emphasized is belied by the fact that the prosecutor consciously chose to advance it to the jury early in her initial closing argument, at the end of her initial closing, and then finally and the conclusion of its final remarks to the jury. It appears reasonably certain that the prosecutor was fully cognizant of the theories of primary and recency and made certain that her strongest points were made at the beginning and end of her closing argument.

F. False and misleading argument in rebuttal.

The false and misleading prosecutorial arguments are outlined in detail in Argument III, *infra*. For purposes of cumulative error review and, for the sake of brevity, counsel asks that the allegations and factual matters contained in that argument be fully incorporated herein by specific reference.

REPLY - ARGUMENT III

In the title of its heading to this issue, the State asserts that the prosecutor's argument in rebuttal was not improper. (AB 46). In the body of the issue, however, the State concedes that the argument made by the prosecutor was directly contrary to the evidence produced. (AB 47-48). The prosecutor falsely claimed that she had "figured out" whether Appellant's claim that he was at another residence in Lakeland and not the crime scene was possible

and she concluded it was not. In support of her argument, she produced a demonstrative aid that the State now concedes in no way supported her argument and, in fact, aligned entirely with Appellant's defense. With its concession, the State implicitly admits that the argument was false and misleading.

The materiality of the false and misleading argument cannot be overstated; it struck at the very heart of the defense theory of the case. The State essentially admits to the materiality by conceding that the demonstrative aid, contrary to the argument of the prosecutor, should have given the jury additional support for the defense. The State then, however, urges this Court to ignore the false nature of the argument and presume that the jury understood that the prosecutor was misleading them. This argument ignores the fact that the prosecutor held the demonstrative aid and argument until her rebuttal and, thus, deprived Appellant of any opportunity to explain the falsity of the prosecutor's argument and its significance to the defense.

Instead of focusing on the effect of the false and misleading argument on the jury, the State urges this Court to simply presume that it ignored the State's argument and properly identified the aid as being beneficial to the defense. That presumption is deeply flawed. The testimony about the route the van took was placed before the jury many days

before it listened to the prosecutor's argument and saw the map the she produced. Furthermore, the jury had heard nothing about the alternate location of 2031 W. Magnolia at the time the route evidence was presented. The demonstrative aid was not introduced in evidence and, thus, was not in the jury room for the jury to study it during its deliberations. Thus, the State's assumption that the jury disregarded the false argument defies logic. If any juror was feeling a reasonable doubt due to Appellant's argument that he was at 2031 W. Magnolia and not the crime scene, that doubt was undoubtedly extinguished when the prosecutor told them that her demonstrative aid proved it to be impossible.

REPLY - ARGUMENT IV

As the State notes in its AB, the State was required to establish the existence of sufficient aggravating factors to secure a death sentence. The State then avers that "it did this through presentation of short written statements from family members of the three victims." (AB 49). Of course, victim impact evidence is not an aggravating factor and the jury is not to consider it as an aggravator. (13 T 3229).

While the State attempts to diminish the significance and emphasis of the victim impact evidence by noting that the total length of the testimony amounted to only 14 pages, that argument fails to account for the fact that the entire presentation of testimony in the penalty phase amounted to only 14 pages. (AB 49) (13 T 3165-3179). The victim impact

evidence was the only additional evidence given to the jury in the penalty phase to justify a death sentence and, thus, its singular nature alone gave it inherent emphasis.

REPLY - ARGUMENT V

No reply necessary.

CONCLUSION

For the reasons stated herein and in the Initial Brief, Appellant respectfully requests that this Honorable Court reverse Appellant's judgments and sentences and remand to the trial court for a new trial. In the alternative, Appellant requests that as to Argument I, this Court remand for an evidentiary hearing on Appellant's Motion for New Trial.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that the foregoing Initial Brief was generated in Times New Roman 14-point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Assistant Attorney General Timothy Freeland, at timothy.freeland@myfloridalegal.com and capapp@myfloridalegal.com, and to Appellant, Mr. Johnathan Alcegaire, DC #M61417, Union Correctional Institution, P.O. Box 1000, Raiford, Florida, on this 14th day of January, 2020.

Respectfully submitted,

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