IN THE SUPREME COURT OF FLORIDA

JUAN RAUL CUERVO,

Petitioner,

v. CASE NO. SC06-1156

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATEMENT OF FACTS

The State submits the following additions/corrections to the Petitioner's Statement of Facts:

After a jury trial, the Defendant was convicted of attempted first degree murder with a weapon and burglary of a conveyance with an assault or battery with a weapon. (T. 236-37).

The victim testified at trial that she had known the Defendant for approximately five months before the incident took place. (T. 29, 32). She met the Defendant when he began frequenting the restaurant where she worked. (T. 27-28). They talked and saw each other daily, and she felt sorry for the Defendant because he had no family in this country and was living in his car. (T. 28).

After vacationing with the Defendant in North Carolina, the victim moved in with her sister in Orlando, allowing the Defendant to live there as well, in the garage. (T. 29-30). The victim testified that she and the Defendant were only friends, although the Defendant wanted more than that and would grow angry when she disputed his claim that she would learn to love him. (T. 28, 31).

On July 25, 2003, the victim and the Defendant spent the day at a local mall with the victim's family, then returned home so the victim could go to work. (T. 32-33). After taking

a bath and changing into her uniform, the victim got into her car and prepared to drive to work. (T. 33-34). Her daughter got the bags out of the car as the victim was leaving. (T. 35). The victim had not seen the Defendant since they got home from the mall. (T. 34).

As the victim was driving, she heard a thump in the car; the next thing she knew she had a knife at her throat. (T. 36). The Defendant, who had been hiding in the back seat, came into the front seat and told her to keep driving. (T. 36). The Defendant was dressed all in black, and the streets were very dark. (T. 35, 60, 149-51).

The Defendant told the victim that her day had come, and she was going to die. (T. 36). He stabbed her repeatedly; she tried to defend herself to no avail. (T. 36-37). The Defendant told her to turn down a side street, and after doing so the victim threw herself out of the car and tried to escape. (T. 37-38). The Defendant followed her out of the car and stabbed her two more times in the back. (T. 38).

The victim managed to get into the middle of the road, where she flagged down a passing motorist and called 911. (T. 39). The Defendant got back in the victim‘s car and drove away. (T. 39). The 911 call was played for the jury. (T. 40-44). The victim later picked the Defendant‘s picture out of a photo line- up. (T. 145).

The good Samaritan motorist confirmed the victim's story, testifying that she saw the victim in the road, screaming for help. (T. 67-68). Photos of the inside of the victim's car confirmed the presence of blood throughout. (T. 74-76).

The victim was taken by helicopter to the Orlando Regional Medical Center's Trauma Center. (T. 45, 156-57). Such a transport is used for individuals with potentially lethal injuries. (T. 157). The victim in this case had multiple stab wounds, a collapsed lung, a fractured rib, multiple wounds to her hands and arm, and a fractured bone in her finger; she was bleeding into her chest cavity. (T. 158-60).

The Defendant was apprehended the following day as he was walking down the road. (T. 78-79, 82). He was questioned by the case detective, with a patrol deputy translating from Spanish to English. (T. 82-83). In his statement, the Defendant admitted stabbing the victim, but stated that he did not intend to do so when he got in the car; he only intended to talk with her, but became angry and "his mind was just completely closed." (T. 98-108).

Before trial, the Defendant filed a motion to suppress his statement to police. A hearing was conducted, during which the two officers present during the questioning testified and a tape of the interview itself was played and translated. (R. 13-39).

The tape revealed that, when asked if he wished to

talk about the matter and make a statement, the Defendant replied "no, I don't want anything." (R. 34-39; S.R.[1] 2). Later, when asked if he wanted to give his side of the story, the Defendant stated that he did not want to if the victim had already made her story, as she and her mother had been in this country for thirty years and they could use anything against him. (S.R. 2-3).

After considering this evidence, the trial court found that the Defendant never unequivocally exercised his right to remain silent and accordingly his rights were not violated. (R. 55-58). This ruling was affirmed by the Fifth District Court of Appeal. Cuervo v. State, 929 So. 2d 640 (Fla. 5th DCA 2006).

[1] "S.R." refers to the transcript of the interview, included as a supplemental record on appeal. As established at the hearing on the motion to suppress, this transcript was accurate with the exception of the Defendant's statement on page 2, where, in response to the deputy's question as to whether he wanted to give a statement, he responded "no, I don't want anything," rather than "no, no I don't want, not now." (R. 34-39).

SUMMARY OF ARGUMENT

The trial court properly denied the Defendant's motion to suppress where the Defendant never unequivocally invoked his right to remain silent. The officers properly asked clarifying questions where the Defendant's responses were unclear and confusing, and the Defendant has failed to demonstrate any violation of his Fifth Amendment rights. No substantive questions were asked of the Defendant until he clearly waived his right to remain silent.

Further, the record in this case demonstrates that any error in allowing the Defendant's statement to be admitted into evidence was at worst harmless. The other evidence of guilt was overwhelming, and the Defendant's statement was used to his own benefit at trial.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENT, AND THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED.

The Defendant contends that the district court erred in affirming the trial court's finding that he never unequivocally invoked his right to remain silent. When reviewing a trial court's order on a motion to suppress, an appellate court must accord a presumption of correctness to the trial court's determination of the facts, reversing only if not supported by competent substantial evidence in the record; the application of the law to these facts is reviewed de novo. Connor v. State, 803 So. 2d 598, 608 (Fla. 2001), cert. denied, 535 U.S. 1103 (2002). Applying this standard here, the trial court's decision was properly affirmed.

The Right to Silence

If a suspect undergoing custodial interrogation indicates that he wishes to remain silent, the interrogation must cease. Miranda v. Arizona, 384 U.S. 436, 473-74 (1966). The admissibility of statements obtained after a suspect has decided to remain silent depends on whether the suspect's right to cut off questioning was "scrupulously honored." Michigan v. Mosley, 423 U.S. 96, 104 (1975).

Such a right to cut off questioning, while closely guarded, should not be transformed into an irrational obstacle to legitimate police investigative activity. Such would be the

case if officers were required to cease all questioning even where they do not reasonably know whether or not the suspect wishes to proceed.

Accordingly, the United States Supreme Court has limited the reach of the "scrupulously honored" language, holding that such cessation of questioning is demanded only where the suspect *unambiguously* seeks to invoke his rights. Davis v. United States, 512 U.S. 452, 458-59 (1994). If a suspect's reference is ambiguous or equivocal "in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking" his rights, cessation of questioning is not required. Id. at 459 (emphasis in original). In so holding, the Supreme Court refused to require police officers to "make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong." Id. at 461.

The Court's holding in Davis, which specifically addressed the invocation of the right to counsel, applies equally to the invocation of any right under Miranda, including the right to silence. State v. Owen, 696 So. 2d 715, 717-18 (Fla.), cert. denied, 522 U.S. 1002 (1997). Further, this Court has held that the rule is the same under both the Federal and the Florida Constitutions: a defendant

who has received proper Miranda warnings and validly waived his Miranda rights must unequivocally and unambiguously invoke those rights if he wishes police to terminate an interview. Id. at 719.

The Defendant's Statement

Here, the trial court found that the Defendant never clearly indicated that he did not want to talk and in fact affirmatively stated that he wanted to speak before any substantive questions were asked. (R. 55-58). This finding is fully supported by the record and was properly affirmed by the district court.

After he was apprehended walking down the highway the day after the attempted murder, the Defendant was transported to the sheriff's office to be interviewed. (T. 82). The detective assigned to this case did not speak Spanish, so the road patrol deputy, Deputy Garcia, stayed to translate. (T. 82-83).

At the beginning of the interview, the detective made sure that no one else had spoken with the Defendant. (S.R. 1). Deputy Garcia then went through each of the Defendant's rights under Miranda, making sure that the Defendant understood each right as he read them. (S.R. 1-2). After the Defendant stated that he understood all these rights, Deputy Garcia asked him the following question:

> Okay. Do you wish to talk about the matter and make a statement, yes or no? You have to talk loudly

please for the recording.

S.R. 2). The Defendant responded "no, no, I don't want anything." (R. 37-39).[2]

Deputy Garcia informed the detective that "he does not wish to talk with us." (S.R. 2). Concerned that the Defendant did not understand what was going on and wanting to give him a full opportunity to make a decision, the detective asked the Defendant to initial each numbered right on the Miranda waiver form and place his signature at the bottom, if he understood each one. (S.R. 2; R. 15-16). After going through this process, Deputy Garcia then reiterated the right to silence, as follows:

> Okay, she [the detective] is explaining that now would be your opportunity if you wish to speak and explain your side of the story, your version of what happened. **If you wish to talk, you don't have to. You are not obligated to**, but if you wish to talk there's still time.

(S.R. 2-3) (emphasis added). In response, the Defendant stated that he did not wish to talk if the victim and her mother had already talked, as they had been in this country for thirty years and could use something against him. (S.R. 3).

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[2]On the transcript, the Defendant's response is noted as "No, no I don't want, not now." (S.R. 2). At the suppression hearing, it was discovered that this translation was incorrect. Deputy Garcia testified that this statement was "basically" translated as "I don't want to say anything." (R. 37). However, an accurate, word for word translation was provided by the interpreter at the hearing, confirmed by Deputy

After asking if the Defendant had a lawyer they could speak to (he did not), the detective then clarified the Defendant's position as follows:

> Detective Palmieri: Okay, so at this time he's refusing to talk?
>
> Deputy Garcia: Okay, so at this time you don't wish to talk to us or answer any questions?
>
> Defendant: You can ask questions and I'll answer if I (inaudible).
>
> Deputy Garcia: So you do wish to talk to us because we need to have that clear (inaudible)
>
> Defendant: I want to talk to everyone.
>
> Deputy Garcia: Okay.
>
> Defendant: Who ever wants to talk to me talk.
>
> Deputy Garcia: Okay. Uh, he says um, he ... if you answer (sic) him questions he'll answer them. Um, unless he feels that he doesn't wanna' answer that one then he won't answer that one.
>
> Detective Palmieri: Tell him that (sic) fine he doesn't have to answer any question that I ask.
>
> Deputy Garcia: Ok, she says it's alright, that we'll talk, but uh (inaudible) that you don't have to feel obligated to answer any question that you don't wish to answer. If at anytime you wish to stop the interview you can stop it and say that you don't wish to talk anymore until your attorney is present. Do you understand?
>
> Defendant: Mm, hm.

(S.R. 3-4). Only then did the detective ask any questions about the circumstances surrounding the crime.

Garcia, and accepted as accurate in a factual finding by the trial court. (R. 37-39, 55-56).

No Unequivocal Invocation

The trial court's finding that the Defendant never unequivocally invoked his right to remain silent is fully supported by the record. A statement is "equivocal" when it is capable of having more than one meaning. BLACK'S LAW DICTIONARY 486 (5th Ed. 1979). The Defendant's statements in the instant case clearly fall under this definition.

In evaluating a suspect's responses, ambiguity may be found in the circumstances leading up to the invocation of his rights or in the invocation itself. Smith v. Illinois, 469 U.S. 91, 96-98 (1984). Such is the case here.

As the detective explained at the suppression hearing, she spoke no Spanish and could not tell exactly what Deputy Garcia was saying to the Defendant or exactly what the Defendant was saying in response. (R. 13). Clearly, Deputy Garcia was not providing a word-for-word translation of the Defendant's responses, and the Defendant's confusion was well-illustrated by his concern that his relatively recent arrival in this country would allow the victim, and her mother, to hold things against him.

Moreover, the Defendant's responses were themselves ambiguous. When asked if he wanted to talk or provide a statement, he answered "no, I don't want anything." When later told that this was his opportunity to speak, if he

wanted to, he stated that he did not want to talk if the victim and her mother had told their stories, as they had been in the country for thirty years. When the detective attempted to clarify the situation by asking if the Defendant was refusing to talk, the Defendant said that he was not refusing and would answer certain questions as he saw fit.

The Defendant's statements, viewed in context, cannot be considered clear and unambiguous invocations of his right to remain silent. Compare Smith v. State, 915 So. 2d 692, 693 n. 1 (Fla. 3d DCA 2005) (suspect's immediate statement that he "had nothing to say" and did not want to talk was unequivocal request to remain silent); Shook v. State, 770 So. 2d 1261 (Fla. 1st DCA 2000) ("get me an attorney right now" was an unequivocal request for counsel) with Davis, 512 U.S. at 462 ("*maybe* I should talk to a lawyer" was not an unequivocal request for counsel) (emphasis added); Owen, 696 So. 2d at 717 n. 4 ("I'd rather not talk about it" and "I don't want to talk about it" in response to certain questions were not unequivocal assertions of right to silence); Alvarez v. State, 890 So. 2d 389, 393-95 (Fla. 1st DCA 2004) ("from here on, I'm *not supposed to* talk about it" was not an unequivocal invocation of right to silence) (emphasis added).

While the Defendant answered "no" when asked if he wanted

to talk, courts have recognized that there should be no per se rule that a such a response means the officer cannot go forward with questioning no matter what, as the answer "no" can be ambiguous under certain circumstances. See State v. Pitts, 936 So. 2d 1111, 1130-31 (Fla. 2d DCA 2006); Medina v. Singletary, 59 F.3d 1095, 1104-05 (11th Cir. 1995), cert. denied, 517 U.S. 1247 (1996). This is especially true where, as here, the officer did not simply ignore the Defendant's equivocal response and forge ahead with the interview, but instead did her best to ensure that the Defendant understood his options and truly wanted to waive his rights and speak to them.

Before Davis was decided, officers faced with an equivocal invocation of rights were required to stop any substantive questioning and clarify the suspect's intent. See, e.g., State v. Moya, 684 So. 2d 279, 280 (Fla. 5th DCA 1996). While such clarification is no longer constitutionally required, it remains a good police practice, as the Davis Court explained:

> Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. ... Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement.

512 U.S. at 461-62.

This is exactly what the detective sought to do in the instant case – clarify the Defendant's intentions. Only when the Defendant made it abundantly clear that he did indeed want to talk to the officers did they move on to any substantive questions.

As the court below recognized, the brief exchange between the detective and the Defendant, with Deputy Garcia translating, was "[a]t the very least, ... sufficiently uncertain to allow clarifying questions." Cuervo, 929 So. 2d at 642. While much of the confusion may have stemmed from the Defendant's lack of familiarity with this country's legal system and the language barrier between him and the detective, a person speaking to the police through a translator is still subject to the same standards as a person fluent in English.

Even with a translator present, a language barrier certainly increases the potential for ambiguity, as this situation well illustrates. This does not, however, change the basic requirement that a suspect clearly and unambiguously exercise his rights. As the Court explained in Davis:

> We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who – because of fear, intimidation, lack of linguistic skills, or a variety of other reasons – will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection afforded suspects subject to custodial interrogation is the

> Miranda warnings themselves. "Full comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process."

512 U.S. at 460 (citation omitted).

Here, there is no contention that the Defendant was not given proper Miranda rights, nor is there any contention that he was somehow coerced or tricked into waiving those rights. Rather, the record reflects that the detective made every attempt to ensure that the Defendant fully understood and voluntarily waived his rights before he was asked any questions. Under these circumstances, the Defendant's voluntary statement was properly admitted into evidence. Cf. State v. Glatzmayer, 789 So. 2d 297, 304-05 (Fla. 2001) (refusing to suppress statement in face of suspect's question regarding right to counsel where officers did not engage in gamesmanship, did not try to give an evasive answer or skip the question, and did not attempt to steam-roll the suspect).

Harmless Error

Finally, even if the Defendant's statement should have been suppressed, reversal is still not warranted in this case. The evidence against the Defendant was overwhelming. The surviving victim, who had known the Defendant for several months before the incident, described the Defendant's actions in great detail, and her description was corroborated by other witnesses and by physical evidence. The only issue at

trial was whether the Defendant intended to kill the victim, and in support of his argument that he did not have such an intent the Defendant relied completely on his own statement to police. (T. 171-74, 177-80, 193-95).

In light of the other evidence of guilt and the relatively exculpatory nature of the Defendant's statement, then, there is no reasonable possibility that the allegedly erroneous admission of the statement affected the jury's verdict. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). The Defendant's convictions should be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court approve the decision of the district court.

Respectfully submitted, CHARLES J. CRIST, JR. ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief on the Merits has been furnished to Leonard R. Ross, counsel for Petitioner, 444 Seabreeze Boulevard Suite 210, Daytona Beach, Florida 32118, by hand delivery to the Public Defender's Basket at the Fifth District Court of Appeal, this _____ day of November, 2006.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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