IN THE SUPREME COURT OF FLORIDA

MATTHEW LEE CAYLOR,

Appellant,

v. **CASE NO. SC09-2366**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE COURT ERRED IN ADJUDGING CAYLOR GUILTY OF FIRST-DEGREE MURDER AND AGGRAVATED CHILD ABUSE BECAUSE THE AGGRAVATED CHILD ABUSE MERGED WITH THE FIRST DEGREE MURDER, A VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

The State, on page 23 of its brief, says, "In addition to the extensive neck injuries caused by manual and ligature strangulation applied separately, the evidence showed that M.H. was subjected to non-consensual sexual intercourse." There is no other evidence that M.H. was subjected non-consensual sexual intercourse. Indeed, the medical examiner found no evidence of forceful sex, particularly around the victim's vagina (20 R 596).

As to Caylor's argument that this Court should apply the reasoning of Brooks v. State, 918 So.2d 181 (Fla. 2005), the State says only "This Court should decline to extend Brooks to the facts of this case," and even if it did it would be harmless error. State's Brief at p. 24, f.n. 11.

Caylor, in his Initial Brief, however, presented two arguments why this Court should not limit application of Brooks to homicides involving only a single act of child abuse. First, when the State charges a defendant with committing a first-degree murder, it preferably will prove the required level of intent by showing that, at the time of the homicide, he or she consciously decided to kill the victim after having had some time to reflect on what they were about to do. Fla. Std. Jury Instr. (Crim.) 7.2. While the law also allows the State to prove a first degree murder if the defendant killed the victim as a consequence and while he or she was engaged in the commission of a narrow class of especially dangerous felonies, it also prefers that the prosecution establish the defendant's intent by proving premeditation. The rationale seems to be that if the defendant intentionally committed a particularly violent crime, either because of that violence or because the defendant must have contemplated killing as part of it, premeditation can be assumed or proven.

The danger arises in the special case of aggravated battery that the defendant may have intended nothing more than committing that crime, but the consequences

led to the victim's death. Rather than proving the highest level of intent the law requires for homicides, it need establish only a lesser intent. That is the danger the merger rule seeks to prevent. If the State has charged the defendant with committing a first degree murder, it should have to prove an intent justifying a guilty verdict for that offense. It should not be allowed to prove only that the defendant intended to hit the victim, and that lesser intent satisfy the premeditation required for first degree murder.

Second, the merger doctrine allows this Court to reconcile the obvious inconsistency created when the legislature added aggravated child abuse to the list of felonies that justifies a felony murder conviction but omitted aggravated battery. That inconsistency arises because, as this Court noted in Brooks v. State, 918 So.2d 181, 199 (Fla. 2005), aggravated child abuse is nothing more than aggravated battery on a child. If the aggravated child abuse has a felonious purpose independent of the murder, the merger doctrine has no application. On the other hand, if it does not, even if it involves more than a single act, that rule prohibits the State from using it to prove the defendant committed a first-degree murder.

In this case, this Court cannot conclude, as a matter of law, that Caylor committed the first-degree murder with some other intent than aggravated child abuse. Thus, his conviction for first-degree murder cannot stand, and this Court

must reverse the judgment and sentence in this case for that offense and remand for a new trial.

II. THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT CAYLOR SEXUALLY BATTERED MELINDA HINSON WITH GREAT FORCE, AS ALLEGED IN THE INDICTMENT, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The State, on page 28 of its brief, says this case is "not wholly circumstantial because Caylor admitted penetrating M.H.'s vagina with his penis." Its argument seems to be that unless every element of the alleged crime involves only circumstantial proof the special rule this Court applies on review of circumstantial evidence case does not apply. That is preposterous because if such were the case, the only case courts in this state would decides was whether Amelia Ehrhardt was murdered when her plane disappeared in the 1930s. That is, in a murder case the State has three elements it has to prove: 1. The victim is dead. 2. The defendant killed him or her. 3. The defendant had the premeditated intent to do so. Fla. Std. Jury Instr (Crim.) 7.2. Rarely is there ever any question the victim is dead, so, under the State's argument, the circumstantial rule is inapplicable because the case in "not wholly circumstantial."

However, as Caylor argues, when one or more of the elements required to prove a crime are established only by circumstantial evidence then the rule applies. For example, in a murder case, there may be no question that the victim was brutally, premeditatedly murdered. The only question is whether the defendant did it, and in this instance no one identified him or her as the one who killed the victim. But, there may be a wealth of other, circumstantial, evidence such as the defendant was seen running away from the murder scene shortly after the murder, he changed out of his bloody clothes (with the victim's blood on them) within a short time after the killing, he had some of the victim's property, and he and the victim may have had a fight earlier that day. The sufficiency of that circumstantial evidence, which is relevant to the defendant's identity as the killer, would have to be measured by the special rule on circumstantial evidence.

If so, this Court should apply that rule to the facts presented in this case, and specifically as to the question of whether the State proved beyond a reasonable doubt that M.H. never consented to having sexual intercourse with Caylor.

The State builds its argument on this issue by relying exclusively on this Court's opinion in McWatters v. State, 36 So.3rd 613 (Fla. 2010). In that case, the defendant raped and murdered three women, and in proving that he killed the woman that led to his conviction for first-degree murder and death sentence, it introduced, as collateral crimes evidence, that he had raped and killed two women.

If we use the three factor test used by this Court and applied to this case in Caylor's Initial brief, we find that it clearly supported its rejection of McWatters' claim that he had consensual sex with his victims. First, and "most importantly," Caranza v. State, 985 So.2d 1199, 1203 (Fla. 2008), McWatters had made inconsistent statements about what had happened. "Before admitting to being an acquaintance of Bradley and having sexual intercourse with her, Mc Watters repeatedly insisted that he was not with her on the night of her murder." McWatters at 643. Second, the physical evidence did not corroborate what he claimed happened. Fitzpatrick v. State, 900 So.2d 495, 509 (Fla. 2005). Refuting his argument that he had consensual sex with the victim, the ground near where the body was found was disturbed, the victim's undergarments were damaged, her jeans were stained with grass and dirt, and her sandals were found about 12 feet apart.

Only the medical examiner found no evidence of forced intercourse around the victim's vagina, but that important factor nonetheless paled in significance when the jury considered the first two factors. Making the case even stronger, this Court noted the "evidence of a pattern of sexual batteries." That is, the jury also knew that he had committed two other, factually similar crimes, which supported the other evidence in leading to the conclusion he had sexually battered the victim in that case.

As to the evidence of other sexual batteries in this case, we have, of course, no similar proof. Moreover, as to the first two factors, any inconsistent statements, and physical evidence that refutes a claim of consent, the evidence in this case, unlike the evidence in McWatters, supports Caylor's claim that he and M.H. had consensual sex before he killed her. That is, first, Caylor never made any inconsistent statements about what happened. Second, also unlike the facts in McWatters, the physical evidence supports his consensual sex defense. The victim's underwear was found under her body, and it was neither torn nor used as a gag to tie her hands. Except for a small spot of blood found on the bed's sheet, which could be innocently explained (20 R 492), the crime scene was remarkably free of any evidence she had resisted Caylor's advances. Indeed, the motel room was so clean of any evidence of a struggle that not until two days after her death and another person had rented, stayed, and then vacated the room did a second cleaning woman happen to look under the bed and find Melinda's body (19 R 420, 426, 440).

Third, the medical examiner's testimony confirmed Caylor's explanation because he found no evidence of forceful sex, particularly around the victim's vagina (20 R 596).

Now, on page 33 of its brief, the State says, "Caylor agreed that the sex/murder was a blitz sort of thing; one second he was having sex with her and

the next second he was choking her. (TR Vol. XX 498)." First, Caylor did not agree that the "sex/murder was a blitz sort of thing." The "blitz" language came from the police officer questioning Caylor. Caylor never said that one second he was having sex with her and the next second he was choking her. The police interrogator suggested that, and the defendant's response to that suggestive question was ambiguous, at best. Well, no it was not because the next question asked was "Were you still having sex with her when you began choking her?" To that inquiry, he unequivocally and clearly said, "Huh-huh, no, I had stopped." (20 R 499)

On the same page, the State says other evidence it presented shows the sex between Caylor and M.H. was not consensual. She was only 13, they had never met or even spoken before the day Caylor murdered her, there was no relationship between them, and she was reserved around strangers.

Yet, she lived in a motel room with her brother, mother, her boyfriend, and another male friend, acquaintance, or whatever. For a child who the State implies was shy, her actions belied that. This homicide happened in the summer, July, and she "hung out at the game room" and the motel's pool, and she was always in and out (19 R 369). If, according to Hillary Clinton, "It takes a village to raise a child," the Valu Lodge Motel was doing that in July 2008. The motel residents formed a community that included outdoor barbecues (19 R 390). Two adult men lived

within a couple of rooms of Caylor, and she had no problems talking with them and eventually convincing one man (on whom she had a crush) to let her walk his dog for a couple of dollars (19 R 369-70, 375, 398). She even spent the evening with him watching movies (19 R 398), and would come by his room five and six times a day (19 R 399). Because someone was "always cooking outside," she and her brother "would always go down there and snatch something off the grill." This 13-year-old girl also smoked cigarettes and had no hesitation asking others for some (20 R 479, 480, 507-509, 517). She also tried to sell marijuana to the motel's residents (19 R 384, 393, 20 R 494).

This evidence hardly exhibits the shyness and hesitation around men that the State tries to convey. To the contrary, what we see is someone who felt at ease enough at the Valu Lodge to flirt with at least one man, walk his dog, visit, and stay with him in the evening, smoke cigarettes, and try to sell marijuana. As such, it should not be surprising that she knocked on Caylor's door, asked for a cigarette, and then invited herself inside. In light of this, voluntarily having sex with him similarly was as plausible.

Hence, the lower court erred when it denied his motion for a judgment of acquittal. This Court should reverse the trial court's judgment and sentence and remand for a new trial.

IV. THE COURT FAILED T O ADEQUATELY CONSIDER THE MITIGATION CAYLOR PRESENTED IN HIS DEFENSE, A VIOLATION OF EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The purpose of a trial court's sentencing order in a death penalty case is not simply to summarize the evidence for and against imposition of that sentence. Instead, it is a detailed analysis of the evidence that justifies that punishment. In particular, the trial court has to examine all the evidence that might mitigate a death sentence and explain why it does not overcome whatever aggravation might be present. It does this in depth analysis of the mitigation to satisfy this Court that in this most serious function a court and human being can have, the judge fully considered all the evidence that might mitigate a sentence of death and found it wanting.

Thus, in this unique sentencing capacity, because "death is different," the trial court's sentencing order must be different than it might otherwise be in a non-death situation. Because of the utter seriousness of what is occurring the trial court cannot do, as it might do in other proceedings, by having the prevailing party prepare the order. Only the trial court can do so. See, Hurst v. State, 18 So.3d 975, 1005 (Fla. 2009).

It follows then that again because "death is different" and the Florida legislature has given this Court the unique obligation to review the correctness of those sentencing orders when death has been imposed that the trial court must

reduce its analysis to writing. If the trial court's order can withstand scrutiny its thinking should be clearly evident. This means that rather than summarizing and ignoring evidence as happened here the sentencer must present a thorough and perhaps exhaustive recounting and evaluation of the mitigation. Patterson v. State, 513 So.2d 1257, 1263 (Fla. 1987)("It insufficient to state generally that the aggravating circumstances that occurred in the course of the trial outweigh the mitigating circumstances that were presented to the jury. It is our view that the judge must specifically identify and explain the applicable aggravating and mitigating circumstances.")

Now, again, in a non death case, where only liberty or property are the values in issue, such a requirement may make little sense. Where a life is at stake, however, it is not too much to ask a lower court to take that extra time and make that extra effort to explain why this defendant must forfeit his life. This is not necessarily an enjoyable task or one that can be dispatched with ease and comfort. Indeed, the trial court should agonize over its decision, and the sentencing order should reflect that struggle by demonstrating in writing that it has accepted all the proven mitigation, weighed it, and then provided a detailed explanation why it failed to tip the scales in favor of life. That is not too much to ask, and indeed, §921.141(3), Fla. Stats. (2008), requires the "set forth in writing it findings upon which the sentence of death is based."

Moreover, because this Court does not impose sentence or reweigh the evidence, but only reviews what the lower court has done, it cannot fully carry out its legislatively mandated function of doing so if the trial court skimps on justifying a death sentence. Instead, the trial court's order should provide enough specific details to satisfy this Court that the trial judge gave serious consideration to all the evidence that might mitigate a death sentence.

In this case, as argued in the Initial Brief, the trial court failed in that basic, legislatively required function. The sentencing order shows only that the trial court went to the judge's school on death penalty, learned the message that its sentencing order must mention something about mitigation, but missed underlying the reason the people of Florida require a written sentencing order. Because of that failure this Court cannot carry out its required duty of reviewing the lower court sentence of death. §921.141(4) Fla. Stats. (2008).

V. DEATH IS PROPORTIONATELY UNWARRANTED.

As mentioned in the opening paragraph on this issue in the Initial Brief, "If this Court accepts Caylor's arguments that the aggravated child abuse merged with the murder, that he had not committed a sexual battery, and that he was on probation from Georgia had no nexus with the murder, an admittedly difficult assumption, then this Court is faced with a one aggravator case." That is the context of the argument in this case, which means this is a one aggravator case

with significant mental mitigation. As such, it is not, as required in order for a death sentence to be sustained on appeal, one of the most aggravated and least mitigated cases this Court has ever considered. As such, under its proportionality review obligation, this Court must conclude that a death sentence is unwarranted.

CONCLUSION

Based on the arguments presented here and the Initial Brief, Matthew Caylor respectfully requests this Honorable Court to reverse the trial court's judgment and sentence and remand for a new trial, reverse the trial court's sentence of death and remand for a new sentencing hearing, or reverse the sentence of death and remand for imposition of a life sentence.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by electronic transmission to MEREDITH CHARBULA, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and by U.S. Mail to **MATTHEW CAYLOR**, #Q23494, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this ____ day of December, 2010. I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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