IN THE SUPREME COURT OF FLORIDA

RANDLALL T. DEVINEY,

Appellant,

v. **CASE NO. SC10-1436**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **FOURTH** JUDICIAL CIRCUIT,
IN AND FOR **DUVAL** COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

NADA M. CAREY
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. **0648825**
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
nada.carey@flpd2.com
ATTORNEY FOR APPELLANT

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REPLY BRIEF OF APPELLANT

Appellant files this reply brief in response to the arguments presented by the state as to Issues 1, 2, and 3. Appellant will rely on the arguments presented in his Initial Brief as to the remaining issues.

Argument

Issue 1

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS WHERE APPELLANT INVOKED THE RIGHT TO REMAIN SILENT AND THE DETECTIVES FAILED TO SCRUPULOUSLY HONOR THAT RIGHT.

The state has argued that appellant's repeated statements that he was "done" and "ready to go home," and his standing up and attempting to leave the room indicated that he wanted to leave. Appellant agrees. Furthermore, expressing a desire to leave after being brought in for questioning about a murder, being told he could leave whenever he wanted, and then being accused of the crime cannot be construed by a reasonable police officer as anything other than a desire to end the interrogation. Not only should a reasonable officer in these detectives' position have understood Deviney's statements and behavior to be an invocation of his right to end questioning, it is apparent that the detectives actually understood that he was attempting to end the interrogation. In response to his attempts to leave, the detectives told Deviney several, "we can't talk to you," thereby explicitly acknowledging that they understood he had invoked his rights.

At page 35, note 20, the state points out that "R9:1459" does not indicate the police left the room to confer with the prosecutor after appellant attempted to end the questioning.

The page citation is incorrect. Detective Ottinger provided this information at R9:1447, during direct examination by the prosecutor:

> Q At some point did you all stop the interview?
> A We left the room, yes, sir.
> Q Okay. And the purpose of that was to confront – and I was sitting outside, to confer with me and the sergeant and just determine what steps to take next?
> A Yes, sir.

R9:1447.

The state argues the error was harmless because appellant also confessed to his mother and his father. First, as appellant noted in his Initial Brief, appellant's confession to his mother was tainted as the fruit of the earlier violation of his right to end questioning. The "fruit of the poisonous tree" doctrine "forbids the use of evidence in court if it is the product or fruit of a search or seizure or interrogation carried out in violation of constitutional rights." Craig v. State, 510 So.2d 857, 862 (Fla. 1987)(citing Wong Sun v. United States, 371 U.S. 471 (1963), and United States v. Cruz, 581 F.2d 535 (5th Cir. 1978)). Not "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." Wong Sun, 371 U.S. at 487–88. Rather, the issue is "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or

instead by means sufficiently distinguishable to be purged of the primary taint.'" Id. at 488 (quoting Maguire, Evidence of Guilt, 221 (1959)). In deciding this issue, courts must consider three factors: "(1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." State v. Frierson, 926 So. 2d 1139, 1143 (Fla.)(internal quotations and citations omitted), cert. denied, 549 U.S. 1082 (2006).

Here, after Deviney told the detectives what he had done, one of them asked if he had told his mother about it. When Deviney said, "no," the detective asked, "What's she gonna do when I tell her?" The detectives left him alone, then spoke to him again when he knocked on the door and requested a blanket. Deviney asked if they had called his family yet, and was told, "yeah, we called them and their [sic] coming down. Okay? We're gonna talk to your mom here." Deviney asked if he would be able to see her because it "might be my last time." Deviney's mother was then brought into the cell. He told her not to worry, and she told him she was worried about it and that "your whole life's over, you know that, right?" She also told him they were charging him with first-degree murder and that he could get the death penalty. She told him she didn't understand why he did it, asked him why he would be walking around "with that knife on

you," what she was saying that upset him, and asked him, "what about the screaming they said they heard." 4:587-595.

Applying the Frierson factors here requires suppression of Deviney's statements to his mother. First, there was an insufficient break to separate the statement to his mother from the statement to police. The second statements was made in the same room on the same day, not long after the first statement. As for the second factor, there were no intervening circumstances. The detectives spoke to appellant's mother before she went in to talk to him. The questions she asked appellant indicated her knowledge of the prior confession to detectives. The police recorded both statements (surreptitiously) in one continuous tape recording. The second statement was in effect a continuation of the first. Compare Lundberg v. State, 918 So. 2d 444 (Fla. 4th DCA 2006)(taped statements defendant made to girlfriend after interrogation was over were sufficiently attenuated from initial illegality, and thus, were not "fruit of the poisonous tree"). As for the third factor, the detectives' conduct in obtaining appellant's earlier confession was flagrant. What more obvious way could a suspect indicate he wants to end an interrogation than to say, "I'm done," "I'm going," "I'm ready to go," and to then get up and try to walk out of the room? The police flatly ignored appellant's invocation of his right to end the interrogation.

Accordingly, the statements appellant made to his mother also should have been suppressed.

The erroneous admission of appellant's statements cannot be deemed harmless. The harmless error test requires the state to prove beyond a reasonable doubt that the error did not contribute to appellant's conviction or sentence. See State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). The DiGuilio harmless error test does not re-weigh the sufficiency of the evidence but focuses on how the error affects the trier of fact. Id. Although appellant admitted guilt in the jail phone call to his father, he said there only that he didn't know why he did it, he lost it, it wasn't him, and he didn't remember everything. R13:659-664. The statement to the detectives and to his mother was qualitatively different and contained many potentially prejudicial details. He said he attempted to cut her after she fell and that she screamed after she fell, hence his attempt to stab her (which apparently failed). The powerful impact of appellant's confession to the detectives cannot be discounted. The erroneous admission of the confession may well have affected the jury's determination as to the sentence. This error requires a new penalty phase proceeding.

Issue 2

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON ATTEMPTED SEXUAL BATTERY AS THE UNDERLYING FELONY FOR FELONY MURDER AND THE FELONY MURDER AGGRAVATING CIRCUMSTANCE.

On page 55 of its Answer Brief, the state lists the evidence it contends was sufficient to support the charge of attempted sexual battery, including that appellant told a neighbor he thought the victim had been violated, that he cut her bra and panties, and that he removed her jeans, which were found inside the residence by the back door, with blood on the front and back. That appellant told a neighbor he thought she was violated supports what appellant told the detectives, that he undressed and posed the victim to throw suspicion off in case someone had seen him. The removed and torn clothing doesn't prove anything either because all of this occurred after the victim was dead. The physical evidence and appellant's statement show that she was killed swiftly while outside on the patio and was then dragged inside the house, where her clothing was removed. The medical examiner testified that the superficial cuts on her chest were the result of clothing removal as they matched cuts in the shirt she was wearing. The prosecutor didn't even argue to the jury that the torn and removed clothing was evidence of an attempted sexual battery. The prosecutor argued only that "maybe he was trying to do

something sexually to her," R14:813, and "he did some act towards committing a sexual battery, but something or someone prevented him." R15:1103.

Issue 3

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE MITIGATING CIRCUMSTANCE OF EXTREME EMOTIONAL DISTURBANCE WHERE THERE WAS EVIDENCE SUPPORTING THIS MITIGATING FACTOR AND THE TRIAL COURT FOUND AND CONSIDERED THIS MITIGATOR IN IMPOSING SENTENCE.

At page 70, the state argues any error in failing to instruct the jury on this mental mitigator was harmless because defense counsel argued mental mitigation to the jury and the jury was given the catch-all instruction. The jury was never given the authority, however, to consider extreme emotional disturbance as a specific mitigating circumstance. The trial judge's finding indicates he made a mistake, and that error denied appellant a fair penalty proceeding.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand this case for the following relief: Issue 1, vacate appellant's conviction and reverse for a new trial; Issues 2-6, reverse for a new penalty proceeding; Issues 7-8, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

NADA M. CAREY
Assistant Public Defender
Florida Bar No. **0648825**
Leon County Courthouse
301 South Monroe Street, Suite 401
Tallahassee, FL 32301
(850) 606-8500
nadaC@leoncountyfl.gov
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic transmission to **STEPHEN R. WHITE**, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and by U.S. Mail to **RANDALL T. DEVINEY**, #132862, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this date, August 1, 2011.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this brief was typed in Courier New 12 point.

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NADA M. CAREY
Assistant Public Defender