

IN THE SUPREME COURT OF FLORIDA

MICHAEL RENARD JACKSON,

Appellant,

v.

CASE NO. SC10-1646

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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SECOND JUDICIAL CIRCUIT

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ARGUMENT

ISSUE I:

THE COURT ERRED WHEN IT ALLOWED THE STATE TO PLAY A RECORDING OF THE POLICE REPEATEDLY ASKING JACKSON WHY HE KILLED BOYER, THAT DNA EVIDENCE CONCLUSIVELY LINKED HIM TO THE MURDER, AND THERE WAS NO QUESTION HE HAD KILLED HER, AND THE DEFENDANT REPEATEDLY DENYING HE HAD COMMITTED ANY CRIMES AGAINST HER, A VIOLATION OF THE DEFENDANT FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

The State, on pages 31-32 of its brief, says it can present a complete recording of a police interrogation of a defendant if it 1. provokes a relevant response; 2. gives context to the interview; or 3. Shows the techniques used by them to obtain a confession. None of those reasons apply here.

First, Jackson never confessed to killing Boyer. In fact, he repeatedly, consistently, and adamantly denied doing so. There was, therefore, no relevant response, and since there was no confession, no “techniques” were relevant. Moreover, context, like techniques, has some tangential relevance, at best, only if the defendant had confessed.

On the other hand, the interview allowed the prosecutor to introduce and make arguments specifically prohibited by law if he had tried to make them during Jackson’s trial. This is particularly egregious in this case because that questioning produced no confession and had scant relevance to proving anything.

1. Burden shifting.

Repeatedly, the police asked, demanded, and begged Jackson to explain why he had killed Boyer. “It’s up to you whether you want to tell me why it happened. “That’s why I was hoping that you could tell me why this happened so at least I can understand it. Now if I have your side of the story as to why you did what happened then I’ll be able to understand it.” “You have no explanation of how you could have come inside her other than being there raping her and then consequently she dies.” “Were you angry at this girl?” “So how you going to explain your DNA was in our victim?” “Right now you’re sitting here lying to us when we have indisputable evidence, Michael. . . We want to know what made you do it?” “Explain why your DNA is inside Andrea Boyer.” (13 R 913-37)

2. Comments on Jackson’s right to remain silent.

The burden shifting comments also implicated Jackson’s Fifth Amendment right to remain silent, especially when the jury heard insistent demands that the defendant explain himself and what had happened. At trial, the prosecutor could not ask the defendant when he testified the questions asked or the answers the police demanded. Thus, the State should not, by way of evidence of a police interrogation get around that constitutional restriction just because a police officer demanded an explanation. This is particularly true in this case, where the

interrogation had no relevance to any material fact the State had to prove, and, instead, only violated his constitutional right to remain silent.

3. Victim sympathy.

The police sought to get Jackson to admit killing Boyer by painting her in a sympathetic light. That had no relevance in the guilt phase of the defendant's trial, and in the penalty phase, the jury would have been explicitly told it "may not consider this evidence as an aggravating circumstance." In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So. 3d 17 (Fla. 2009). "She was a head veterinarian technician at the vet clinic up there. She was doing well for herself. . . We have a victim who is a 25. . . 26 year old white female that is just beginning her life. Just got married not too long ago, was want to start a family. . . You know, her parents are well to do. They got good jobs. Her husband works. She works. She had two jobs at one point. You know, this is not the case of the victim in this case is a nobody. She was just trying to make a living, OK? That's why she was at the vet clinic that early." . . . "You have a mom and a dad? . . . Would you want her to know what happened to you if somebody killed you?"

Thus, the repeated, insistent demands for Jackson to confess, and his equally repeated and insistent denials had relevance for reasons the prosecutor could not raise or argue. There was, in short, no material fact that this extensive

interrogation tended to prove, and the court erred in allowing the prosecutor to use the police interrogation to present arguments he could not make to the jury.

Again, as conceded in Jackson's Initial Brief at page 28, he has "no problem with Detective Cotchalevoich's method of interrogation, including the repeated accusations of guilt." He does, however, have a problem with those methods of interrogation introduced at trial when they went nowhere, when they resulted in no confession, and exhibited only the State's belief they had their man. When the techniques and context produce nothing except denials what relevance does the interrogation have except the cry that it reflected on the defendant's credibility? It has none, and thus, credibility of Jackson's denials at the time of his questioning by the police becomes the only hook on which the State can hang its argument, as it does on page 38 of its brief. But that means the jury would have had to conclude that when Jackson said no he did not kill Boyer that he really meant yes he did kill her. That conclusion would, however, under the State's analysis of Sparkman v. State, So. 902 So. 2d 253 (Fla. 4th DCA 2005), and Eugene v. State, 53 So. 3d 1104 (Fla. 4th DCA 2011), have led to the exclusion of the police interrogation because of the ambiguity of the defendant's denials being really admissions of guilt. (Answer Brief at pages 36-37). Indeed, the prosecutor drew just that conclusion in its closing argument.

Did the witness at some other time make a statement that is inconsistent with the testimony he gave in court? How many areas of the defendant's videotaped autiotaped statement did Mr. Skinner [the prosecutor] have to say, well is this true or is what you said today true? Because they don't match. Not only do they not match, they're blatant lies.

(15 R 1350)

He is there and he did everything he could in that interview to avoid being there. He is stiff-arming the detectives away to trying to deflect responsibility for what he has done to Andrea Boyer, and I did not say Haley. And the detectives asked him repeatedly in the interview, well, why is your DNA there? Why is it there?

(15 R 1399)

In short, while evidence of police interrogation techniques may have relevance, they do so when they produce a "relevant response." Eugene v. State, 53 So. 3d at 1112. Consistent denials of guilt have relevance in this case only to question Jackson's credibility but, as shown by the State's closing argument quoted above, it created the ambiguity of the adamant and repeated denials of guilt by saying the defendant is lying and he really is guilty. Appellant made no equivocal responses that the jury might have misconstrued, but the State created the uncertainty with its argument. Thus, under the 4th District's rulings in Sparkman and Eugene, and the Second District's rulings in Mohr v. State, 927 So. 2d 1031 (Fla. 2nd DCA 2006) and Pausch v. State, 596 So. 2d 1216, 1218 (Fla. 2nd DCA 1982) this Court should find that the trial court erred in admitting the interrogation of Jackson.

ISSUE III

THE COURT ERRED IN FINDING THAT JACKSON COMMITTED THE MURDER WHILE UNDER A SENTENCE OF IMPRISONMENT OR PLACED ON COMMUNITY CONTROL OR FELONY PROBATION, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The State, on page 53 of its brief claims that Jackson has not preserved this issue for this court's review. Not so. Before trial, he filed a "Motion to Declare Section 921.141(5)(a) Florida Statutes, Unconstitutional as Applied." (4 R 633-637). In that motion, he said or argued that criminal statutes "must bear a reasonable relationship to the legislative objective and must not be arbitrary."(citations omitted.) He traced the development of this aggravator, specifically noting that until at least 1975 this Court had applied it to murders committed by prisoners. Since then, he argued, this Court has unconstitutionally broadened its scope so that the "under sentence of imprisonment" aggravator applies to those not actually in prison but on parole, or in jail as a condition of probation.

The contemporaneous objection rule's requirement that trial counsel object with specificity has its roots in the notion that errors should be brought to the trial court's attention so it can correct them. That is, simple fairness to the lower court and judicial economy require it to have the first opportunity to address an issue. Companiononi v. City of Tampa, 51 So. 3d 452, 455 (Fla. 2010); Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). Hiding issues, by either the State or defense, to

guarantee a win on appeal finds little sympathy with appellate courts. Thus, the crucial appellate inquiry focuses on whether the court had a fair opportunity to consider the point now raised on appeal.

And in this case, Jackson clearly raised the issue at the trial level he now asks this court to decided. His “nexus” argument may not use the same language as used in the motion, but it presents the heart of what he presented at the trial level. He has preserved this issue for appeal.

The State then says on pages 53-54 that “there is no requirement that the State demonstrate a nexus between the ‘under a sentence of imprisonment’ aggravator and the murder. If so, the legislature could enact an aggravator that anyone who committed a first murder would be eligible for a death sentence if they had blue eyes. Obviously that would fail to pass constitutional muster because, as argued here, there must be some rationale or logical connection between the murder charged and the aggravator alleged to justify a death sentence, particularly when that aggravator looks only to the defendant’s status.

Finally, the State relies on the United States Supreme Court’s decision in Tuilaepa v. California, 512 U.S. 967 (1994) to support its argument. That case has little significance here, however, because as the nation’s high court recognized, “These two cases present the question whether three of the §190.3 penalty-phase factors are unconstitutionally vague . . .”Id. at 969-70. As the State noted on page

55 of its brief, and as the defendant concedes, “Jackson does not even allege the aggravator is vague.” Hence, that case has little direct significance to resolving the issue he has presented. The court did note, however, that factors making a defendant eligible for a death sentence “almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to ‘make rationally reviewable the process for imposing a death sentence.’” Id. at 973. (Emphasis supplied.)

From that quote and more specifically from the United States Supreme Court’s holding in Zant v. Stephens, 456 U.S. 410 (1982) that aggravators must genuinely narrow the class of persons eligible for a death sentence, Jackson reiterates the argument he made in the Initial Brief. In order for a sentencer to justify imposing a death sentence because the defendant was under a sentence of imprisonment at the time of the murder, it must show that that fact was somehow linked to the murder. As in the situation where the State wants to use the “avoid lawful arrest” aggravator for a non police officer victim, the prosecutor must show a “dominant purpose” (or similar language) when it seeks to apply the “under sentence of imprisonment” aggravator in a specific instance. Riley v. State, 366 So. 2d 19, 22 (Fla. 1978).

In this case, Jackson was under a sentence of imprisonment because he was on probation at the time of the murder. But in order for that aggravator to apply,

the trial court had to find that the dominant or main reason he committed it was because he was on probation. Without that connection, nexus, or link the court's application of the "under sentence of imprisonment" aggravator was irrational and arbitrary.

ISSUE IV

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THE MAXIMUM SENTENCE JACKSON FACED IF THEY CONVICTED HIM OS SEXUAL BATTERY WAS LIFE IN PRISON, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

On page 59 of its brief the State says the trial court committed no error in failing to instruct the jury on the life sentence Jackson faced for sexually battering the victim in this case because his lawyer repeatedly told the jury that he would never get out of prison. Yet, as the standard jury instructions clearly tell the jury, “what the attorneys say is not evidence or your instruction on the law.” Std. Jury Instr. (Crim.) 2.7.

Moreover, even though the court may have instructed the jury that as to the murder conviction, the defendant faced either a sentence of death or life in prison, the jury may still have had doubts about whether he would actually spend the rest of his days in prison. That uncertainty could have been assuaged or even eliminated had it also known that in addition to whatever sentenced he received for that crime, he also faced life in prison for the sexual battery.

As such, the jury’s recommendation without that additional guidance lacked the certainty demanded of such verdicts in first degree murder cases.

This Court should, therefore, reverse the trial court’s sentence of death and remand for a new sentencing hearing.

CONCLUSION

Based on the arguments presented here and in his Initial Brief, Michael Jackson requests that this Honorable Court to reverse the trial court's judgment and sentence and remand for a new trial, or reverse the trial court's sentence of death and remand for a new sentencing hearing.

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 Capital, Tallahassee, Fl 32399-1050; and by U.S. Mail to **MICHAEL RENARD JACKSON**, #103663, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this ____ day of July 2011. 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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