IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1645

JOHN M. BUZIA.,
Petitioner,
v.

Walter A. McNeil
Secretary, Department of Corrections
Respondent.

REPLY PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Any claims not addressed in this Reply are not waived. Petitioner stands on the merits as raised in his Habeas Petition.

Citations shall be as follows: The record on appeal from Mr. Buzia's trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. The post conviction record on appeal shall be referred to as "ROA" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MR. BUZIA'S CONVICTIONS AND SENTENCES.

Appellate counsel was ineffective for failing to raise on appeal the trial court's denial of Mr. Buzia's motion of judgment of acquittal on the Burglary charge.

Respondent fails to address the merits of Mr. Buzia's argument that he did not commit a Burglary. Instead, Respondent argues that because the trial court "gave no weight to the burglary/robbery during-a-felony aggravating circumstance," Mr. Buzia would not be entitled to relief even if appellate counsel had raised the issue. Response at p. 6. Respondent appears to have misapprenhended Mr. Buzia's arguments. In his Petition for Writ of Habeas Corpus, Mr. Buzia did not argue that appellate counsel was ineffective for failing to challenge the weight given to aggravating circumstances. In fact, appellate

counsel did challenge the trial court's findings regarding the aggravating factors. Instead, Mr. Buzia argued that appellate counsel failed to raise the improper denial of Mr. Buzia's motion for judgment of acquittal on the Burglary and failed to challenge his conviction for Felony Murder based on the crime of Burglary as the underlying felony.

Further, regardless of whether the trial judge gave the circumstance no weight, the jury was still instructed on it, and the State urged the jury to find it as an aggravating circumstance. In a case where the vote was only 8-4, it is likely that without the Burglary charge as an aggravator, the jury would have voted for a life sentence.

Without addressing the merits of Mr. Buzia's argument at all, Respondent concludes generally "Buzia's claims have no merit under the facts of this case, and appellate counsel is not required to raise meritless claims." Response at p. 7. Respondents failed to address the case law on Burglary and whether Mr. Buzia's actions in fact constituted a Burglary.

At trial, Mr. Buzia's counsel argued that this Court's ruling in Delgado v. State offered Mr. Buzia a complete defense to the charge of Burglary, since he was given consent to enter and his "remaining in" was not done surreptitiously. Delgado v. State, 776 So.2d 233, 236 (Fla. 2000). The Burglary statute states in pertinent part:

> For offenses committed on or before July 1, 2001, "burglary" means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or *invited to enter* or remain.

Fl. Stat. 810.02(1)(a)(2010)(emphasis added). In Delgado, this Court construed the statute to mean that in order to establish an affirmative defense to Burglary, "the defendant can establish that: (1) the premises were open to the public, (2) the defendant was a licensee, or (3) the defendant was an invitee." Delgado at 236. It is undisputed that Mr. Buzia was given consent from Mrs. Kersch to enter the enclosed patio and pool area to wait for Mr. Kersch. There was no evidence that Mr. Buzia gained entry through fraud or trick. On the contrary, Mr. Buzia was employed by the Kersch's and was expected to arrive for work on the day of the crime.

The Burglary statute defines "dwelling" as "a building or conveyance of any kind, including any attached porch…and the curtilage thereof." Fl. Stat. 810.011(2). As a result, the patio area at the Kersch home is considered the same part of the "dwelling" as the family area of the home. Once Mr. Buzia was invited into the enclosed patio area of the home, he was treated as an invitee to the entire dwelling. While Mr. Buzia may not have had Mrs. Kersch's explicit consent to enter particular areas of the home, under its plain language, the burglary statute is

designed to prevent unauthorized *entry* into a dwelling, not unauthorized movement between areas of the dwelling.

> In the context of an occupied dwelling, burglary was not intended to cover the situation where an invited guest turns criminal or violent. Rather, burglary was intended to criminalize the conduct of a suspect who terrorizes, shocks, or surprises the unknowing occupant.

Delgado at 240. In Mr. Buzia's case, it is a "situation where an invited guest turn[ed] criminal or violent." Mr. Buzia had been working for the Kersch's for some time. He was familiar to both Mr. and Mrs. Kersch, and it was not unusual for him to arrive at their house to do work. He had gotten advances in pay from them before, a fact that was evident when Mrs. Kersch told him to wait on the patio for her husband, who handled those matters. TR Vol. 8, p. 717,720.

Moreover, there is no indication that Mr. Buzia remained in the home surreptitiously. Surreptitiously remaining in has been interpreted as requiring some sort of concealment. Dixon v. State, 855 So.2d 1245,1247 (Fla. 4th DCA 2003); See also Johnekins v. State, 823 So.2d 253,256(Fla. 3rd DCA 2002). Mr. Buzia was wandering around the house in a daze after the attack on Mrs. Kersch when Mr. Kersch came home. TR Vol. 8, p. 704. While Mr. Buzia had placed Mrs. Kersch in back bedroom and put a blanket over her, there was no evidence presented at trial that he had done so in an attempt to conceal his presence in the house. Mr. Buzia left blood and other evidence in the home, including his shirt

and the murder weapon. His disorganized and frenzied actions at the crime scene do not support a finding that his "remaining in" was done surreptitiously.

As such, under Delgado, because Mr. Buzia had consent to enter the dwelling and did not have an intent to commit an offense therein, he should not have been found guilty of Burglary. The trial court's rulings violated Mr. Buzia's rights to due process under the federal constitution. The lower court's rulings were also a violation of the ex post facto clause of the federal constitution. U.S. CONST., Art. I, §10, para. 1; Beazell v. Ohio, 269 U.S. 167,169-70, 46 S.Ct. 68 (1925). As noted above, the Burglary charge was also an underlying felony to support a finding of Felony Murder. Therefore, the conviction for Felony Murder is also improper. Respondent has failed to address any of these arguments.

This issue was properly preserved below and appellate counsel's failure to raise it on appeal constitutes ineffective assistance of appellate counsel. This error is not harmless. Confidence in the outcome of the appellate process is undermined because had appellate counsel raised this issue on appeal, there is a reasonable probability that Mr. Buzia would not have been sentenced to death.

Appellate counsel was ineffective for failing to raise on appeal that Mr. Buzia's jury was instructed on an uncharged crime, Kidnapping, in order to support an aggravating circumstance.

Again, Petitioner fails to address the merits of Mr. Buzia's claim that his actions did not constitute a Kidnapping. Instead, Respondent argues generally that

because Florida Statute 921.141(5)(d) does not require a defendant to be charged or convicted of the enumerated felonies, Mr. Buzia is not entitled to relief. Response at p. 8. Respondent fails to address Mr. Buzia's arguments that his Fifth Amendment right to due process and Sixth Amendment right to be notified of the charges again him were violated when the trial court, to avoid any improper doubling problems with the Robbery and Burglary, allowed the jury to be instructed on the Kidnapping of Mrs. Kersch, a crime for which Mr. Buzia was never charged. TR Vol. 15, p. 1947.

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation...." This guarantee is applicable to the states through the due process clause of the Fourteenth Amendment. In re Oliver, 333 U.S. 257, 273-74, 68 S.Ct. 499, 507-08, 92 L.Ed. 682 (1948)(recognizing reasonable notice of the charges against a person as a basic right in our system of jurisprudence). Moreover, "[t]he Sixth Amendment guarantees a criminal defendant a fundamental right to be clearly informed of the nature and cause of the charges in order to permit adequate preparation of a defense." Sheppard v. Rees, 909 F.2d 1234, 1236 (9th Cir. 1989)(citing Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948)).

Mr. Buzia was never charged with Kidnapping in the indictment and the defense did not learn that the State was planning on using Kidnapping as an

aggravator until its opening statement at the penalty phase. TR Vol. 15, p. 1933. This cannot be considered reasonable notice.

Moreover, Mr. Buzia's actions do not constitute Kidnapping. This Court has held that in order to uphold a conviction for Kidnapping under those circumstances, the movement or confinement:

> (a)Must not be slight, inconsequential and merely incidental to the other crime;
> (b)Must not be of the kind inherent in the nature of the other crime; and
> (c)Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Faison v. State, 426 So.2d 963 (Fla. 1983).

This Court applied the Faison test in Berry v. State, 668 So.2d 967 (Fla. 1996). In Berry, this Court hypothesized that if during the commission of a robbery a defendant "confined the victims by simply holding them at gunpoint" or "moved the victims to a different room in the apartment, closed the door, and ordered them not to come out, the kidnapping conviction could not stand. In both hypotheticals, any confinement accompanying the robbery would naturally cease with the robbery" Berry, 668 So. 2d at 969.

Mr. Buzia's actions are analogous to the hypotheticals in Berry. Mr. Buzia put Mrs. Kersch in an unlocked bedroom. She was barely conscious. While there is some evidence that he tried to put duct tape on the door, the record reflects that it was done in an illogical fashion and was in no way securing the door. TR Vol. 15,

p. 1937, 1973. There was also another unsecured door in the room which Mrs. Kersch ultimately left from in order to call the police. Id. at 1937.

The trial court found "this aggravating circumstance has been proven beyond all reasonable doubt." TR Vol. 4, p. 660. However, the trial court gave it no weight. The trial court stated:

> The circumstances associated with the use of this aggravating circumstance as an alternative theory to avoid impermissible doubling troubles the Court. The Court does not have the benefit of a unanimous finding by the jury on the subject of a predicate offense. The Court is not willing to constitutionally find the aggravating circumstance independent of the jury.

Id. The fact that the trial court gave the aggravating circumstance no weight does not diminish the prejudicial effect. The jury was instructed and likely believed that Mr. Buzia was guilty of Kidnapping. The State spent significant time in its closing argument emphasizing why the jury should find that Mr. Buzia committed a kidnapping. The State argued that Mr. Buzia moved Mrs. Kersch so that he could carrying out his plan of murdering Mr. Kersch. The state argued, "And he executed that plan. I mean, in essence, he executed Mr. Kersch." TR Vol. 15, p. 1972. In a case where the vote was only 8-4, it is likely that of they hasd not been instructed on the uncharged crime of Kidnapping as an aggravator, the jury would have voted for a life sentence.

This issue was properly preserved below and appellate counsel's failure to raise it on appeal constitutes ineffective assistance of appellate counsel. This error

is not harmless. Confidence in the outcome of the appellate process is undermined because had appellate counsel raised this issue on appeal, there is a reasonable probability that Mr. Buzia would not have been sentenced to death.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Buzia respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus has been furnished by U.S. Mail to Barbara Davis, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 and John M. Buzia, DOC #E11617, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026 on this ____ day of January, 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

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