IN SUPREME COURT OF FLORIDA

DAVID JAMES MARTIN,

Appellant,

v. Case No. **SC10-539**

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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REPLY BRIEF OF APPELLANT

Appellant files this reply brief in response to the arguments presented by the state as to Issues 1, 2, and 4. Appellant will rely on the arguments presented in his Initial Brief as to the remaining issues.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING MARTIN'S MOTION TO SUPPRESS BECAUSE HIS CONFESSION WAS (A) OBTAINED IN VIOLATION OF HIS FIFTH AMENDMENT RIGHT TO SILENCE, AND (B) PROCURED BY THREATS, PROMISES, LIES, AND IMPROPER INDUCEMENTS AND THEREFORE INVOLUNTARY.

A. Fifth Amendment Violation

On page 16, citing Alvarez v. State, 15 So. 3d 738, 745 (Fla. 4th DCA 2009), the state asserts that alleged invocations of the fifth amendment are more likely to be found unambiguous when made prior

to substantive questioning than when made during the interrogation. Whether or not this statement is true (we have no way of knowing), it is irrelevant because the Court does not use statistical probabilities to determine if a suspect has invoked the Fifth Amendment. Each alleged invocation, whether it occurs before or during substantive questioning, is judged by the same legal standard: did the suspect articulate his desire to cut off questioning clearly and unequivocally. See Davis v. United States, 512 U.S. 452 (1994); Cuervo v. State, 967 So. 2d 155 (Fla. 2007).

At page 21-22, the state cites State v. Jeleniewski, 791 A.2d 188 (N.H. 2002), as similar to the present case. There, after telling police that the victim was safe, the defendant responded, "no, sir," to the officer's questions, "And you've got nothing else to say?" and "Is there anything else you want to tell me." The court concluded defendant's responses to the officer's question were not invocations of the right to silence but assertions that he had no more information to offer about the murders. The Jeleniewski situation is not analogous to the present case, however, as Jeleniewski was answering specific questions posed by the officer, and it would have been bizarre for him to say nothing in response. Here, on the other hand, after repeatedly asserting that he left the victim unharmed, Martin spontaneously asserted that he had nothing to talk about.

On page 23, the state cites Weaver v. State, 705 S.E.2d 627, 632 (Ga. 2011), as an example of a similar ambiguous assertion of

the right to terminate questioning, noting that the court there held defendant's statement, "I don't want to say nothing," was not an attempt to cut off questioning but an expression of the defendant's internal pain and conflict. In Weaver, the defendant had gone into a store and slashed to death his estranged wife, then waited for the police to come, saying he did what he came to do, and wouldn't hurt anyone else (i.e., he had already confessed before police questioned him). When told by police that his wife was dead, Weaver became very emotional and said, "I can't talk right now," which the officer interpreted as expressing a need to compose himself. Weaver then signed a waiver of rights. Shortly after, he said, "I don't want to say nothing. There's so much to say," which the officer interpreted to mean that there was so much to say, he didn't want to get into it at that point, or he didn't know where to start. Viewed in context, Weaver is not similar to the present case.

The state's reliance on State v. Prosper, 982 So. 2d 764 (La. 2008), also fails because even though the defendant said, "I don't have nothing else to say sir 'cause I'm telling the truth. I'm telling the truth. I don't have nothing else to say," the defendant also continued to assert that he did not know where the guns were. See Pierre v. State, 22 So. 3d 759 (Fla. 4th DCA 2009)(finding ambiguity where statement conveying desire to end questioning was followed by another utterance that cast doubt on whether suspect wished to do so).

On page 25, the state asserts that appellant's position is that "only the words on the transcript matter." This is a peculiar assertion. In addition to explicitly noting the importance of context, see Initial Brief of Appellant at 50 ("In determining whether a suspect has invoked his right to remain silent, the court looks at the words used as well as the context in which they are spoken. Relevant considerations include the questions that drew the statement, the officer's response to the statement, and the point at which the suspect invoked the right to remain silent")(citations omitted), much of appellant's argument is devoted to the context of Martin's words.

At page 25-26, the state asserts that United States v. Reid, 211 F. Supp. 2d 366 (D. Mass 2002), does not apply because the disputed statement there was made before substantive questioning began. First, when the statement was made is simply an aspect of the context that must be considered, not the deciding factor, or even the most significant factor. Second, Reid made the alleged statement while being questioned by State Trooper Santiago. Reid had been arrested at the Boston airport for allegedly attempting to detonate an explosive device during an airplane flight. Reid was read his Miranda warning and transported to the State Police barracks, prior to questioning by federal agents. While in the car, Trooper Santiago asked Reid some mundane questions like his name and where he was from but also asked him, "What happened on the plane." Santiago also

responded to Reid's inquiry about the media by saying there were no reports because this was "not going to be a big deal." These questions are interrogation under Rhode Island v. Innis, 446 U.S. 291 (1980). Soon thereafter, Reid said, "I have nothing else to say." Therefore, Reid made his statement while being questioned, albeit casually, by a police officer. The court's analysis in Reid applies here.

B. Involuntariness

On page 27 of the Answer Brief, the state first asserts that appellant's testimony at trial that his confession was a deliberate lie negates his argument that his confession was involuntary: "If Appellant's confession was nothing more than a lie, made with the intent to deceive the detectives, it could not have been coerced by them." Answer Brief at 28.

This argument is meritless. First, appellant admitted to Dr. Krop after the trial that his testimony was a fabrication, the product of panic and fear about what he was facing, and his admission was admitted into evidence. It makes no sense for the state to rely on testimony that Martin himself admitted was a lie. Is the state now asserting that Martin's confession was false? See Answer Brief at 28 ("Appellant was not coerced into a false confession by threats, promises of lenient treatment, or any deception by the detectives; he made an intentionally false confession because he feared for the safety of his mother and girlfriend, a 'fact' wholly unknown to the

detectives"). Third, appellant testified during trial that when the detective talked about the case disappearing, he took that to mean that if he told them what they wanted, it would disappear, and that he thought it would be okay and he would get help once they got back to Clay County where the detectives had all the connections. R13:961-63. Finally, Martin's testimony was presented after the motion to suppress had been denied, and it cannot logically be used to negate what occurred during the interrogation.

The state's primary argument on voluntariness is that the police did no more than appeal to Martin's conscience in an attempt to induce him to tell them what happened to Jacey, that none of the detectives' statement were coercive, and that they were merely telling Martin about the benefits he would derive from telling the truth. Answer Brief at 33-34.

The detectives' comments cannot reasonably be construed as merely appeals to conscience. Telling Martin if he doesn't help them find Jacey, he will be viewed as a monster, and monsters go to Death Row, was not an appeal to conscience. Telling Martin he has "some minor little shit" that could be taken care of, that he could look forward to his future by giving them some answers, and that his life would be over if he didn't cooperate, was not an appeal to conscience. Telling Martin that people--even Jacey's own mother, who was a religious and forgiving woman--could understand and forgive killing

someone for a car was not an appeal to conscience. Telling Martin that killing without planning and writing notes, killing due to lack of control, killing because he wanted a car to go see his fiancee, was "not that bad," and that he was not looking at Death Row, was not an appeal to conscience. Telling Martin that cases just "disappear" sometimes, especially when the defendant tells the truth, was not an appeal to conscience. Telling Martin that if he didn't cooperate, they would testify that he was "cold-blooded," his attitude was "fuck you," and he "meant it to happen," was not an appeal to conscience. Telling Martin he had only that afternoon to cooperate, that the detectives had to get back to Clay County, and after they left, any benefits of cooperating would be lost, was not an appeal to conscience. Telling Martin that if he confessed, they would give favorable testimony at his trial and use their considerable influence to arrange for psychiatric care was not an appeal to conscience. Telling Martin they could arrange a visit with his girlfriend after and only after he confessed was not an appeal to conscience. Telling Martin they weren't lying to him, that everything they had told him was the truth, that he was not a premeditated murderer (because he didn't write notes or plan the crime), that those people deserved the electric chair, was not an appeal to conscience. None of these statements were appeals to conscience; they were, rather, threats, promises, outright lies, and coercive ploys deliberately calculated to deceive Martin as to his true position.

On pages 35-40, the state argues that Brewer v. State, 386 So. 2d 232 (Fla. 1980) is distinguishable because the officers there used an "aggressive, threatening manner," as opposed to the "friendly, trusting atmosphere that the detectives here tried to impart." But appellant's claim is not based on the detectives' manner but on what they said, the threats, the promises, the deceptions, the outright lies. Furthermore, soft tactics are not less coercive, and sometimes are much more so, than patently aggressive behavior or demeanor.

On page 36, the state asserts that appellant's characterizations of the detective's statements are "grossly exaggerated and unreasonable." The detectives' statements speak for themselves, however. Appellant has laid out the offending statements verbatim, in their entirety, and in context, and for the most part, they need no interpretation. How much spin can you put on a detective's statement to a suspect that the suspect will be viewed as a monster if he doesn't help them find the victim, and that monsters go to Death Row? Furthermore, the state's "interpretations" of some of the detective's statements are themselves far-fetched. For example, regarding the detective's statement, "Do you want these folks [the jurors] to hear out of us that David is cold-blooded and he meant this to happen? That this is how he wanted it to be. That he said, You know what, 'I know her mom is upset, but screw her. Give me what I get.' You are definitely going to be in a real bad position," the state asserts the detectives were merely telling

Martin that without evidence that the killing was an accident, the evidence might show the killing was premeditated. Answer Brief at 44. Huh? No reasonable person sitting in appellant's shoes would hear those words the way the state has transcribed them.

On page 45, the state asserts that it was perfectly reasonable for the detectives to suggest to Martin that it could have been an accident. The problem here is that the detectives did much more than suggest to Martin that this was an accident. They told him that killing Jacey to get her car was not first-degree murder; that Martin did not commit premeditated murder; and that they weren't lying to him about this. They also defined premeditated murder, or "the top of the tree" in the diagram they drew for Martin, as "[writing] notes and plann[ing] for this to happen." R4:611-612. Killing someone to get their car is, of course, first-degree felony murder, and premeditation does not require the writing of notes or advance planning. These statements were deceptive ploys calculated to delude Martin as to his true position. Furthermore, the detectives did not tell Martin he had future if he confessed to a lesser degree crime, as suggested by the state on page 47 of its Answer Brief; the detectives told Martin he had a future <u>if he confessed</u>, and that his failure to cooperate would indicate lack of remorse and that he was a monster. Finally, the state's reliance on a general statement in <u>Sheriff v. Bessey</u>, 914 P.2d 618, 621-22 (Nev. 1996), about the permissibility of minimizing the seriousness of the

charges, is misplaced, as Bessey didn't involve statements minimizing the seriousness of the charges but involved giving the defendant a false document showing he was guilty of the crime.

On pages 51-52, the state asserts that the courts in Day v. State, 29 So. 3d 1178 (Fla. 4th DCA 2010), and Ramirez v. State, 15 So. 3d 852 (Fla. 1st DCA 2009), relied on an outdated and rejected standard and are thus fundamentally flawed. According to the state, the courts in Day and Ramirez relied on Bram v. United States, 168 U.S. 532 (1897), in which the Court stated that confessions must not be obtained "by any direct or implied promises, however slight, nor by the exertion of any improper influence." This "standard," says the state, was jettisoned by the Court in Arizona v. Fulminante, 499 U.S. 279 (1991), and replaced with a "totality of the circumstances" test. The state further asserts that the courts in Day and Ramirez did not take into account this Court's decisions in Caraballo v. State, 39 So. 3d 1234 (Fla. 2010), and Blake v. State, 972 So. 2d 839 (2007), which state the proper standard for analyzing involuntariness.

This argument is a red herring. The courts in Day and Ramirez recognized and applied the totality of the circumstances test. In Day, the court said:

> Thus, it is clear and well-settled in the law that "a confession cannot be obtained through direct or implied promises. In order for a confession to be voluntary, the totality of the circumstances must indicate that such confession is the result of a free and rational choice."

29 So. 3d at 1181 (quoting Johnson v. State, 696 So. 2d 326, 329 (Fla. 1997)); see also Ramirez, 15 So. 2d at 856 ("The test for determining whether a particular confession or statement is involuntary is still whether, in considering the totality of the circumstances, the reviewing court can conclude that the defendant was unable to make a choice free from unrealistic hope and delusions as to his true position, due to the officer's conduct").

Furthermore, the standard this Court applied in Blake is the exact standard set forth above in Day. Blake, 972 So. 2d at 843-44. And, last, in Caraballo, 39 So. 3d at 1247, this Court cited the First District's decision in Ramirez with approval in concluding that the facts establishing involuntariness there were "much more excessive" than the facts before it.[1]

At pages 56-58, the state takes issue with appellant's statement that an express "quid pro quo" bargain for a confession will render the confession involuntary as a matter of law, even while recognizing that this appears to be the law in Florida. Another red herring. Although appellant cited the case law on this point and argued that the detectives made such a bargain when they told Martin they would see to it that his girlfriend got a visit after he helped them (i.e., confessed), appellant's argument that his confession was involuntary

[1] The state discussed Caraballo at pages 50-51 in its brief but failed to mention the Court's implicit approval of the decision in Ramirez.

is not predicated on this one promise but on the numerous promises, threats, deceptions, and lies the detectives made, which, in fact, induced him to confess.

The state has failed to address the majority of the statements that appellant has argued were improper and coercive. Nor has the state addressed the totality of the circumstances here. The totality of the circumstances show that Martin's will was overborne by the detectives' overreaching and that his decision to confess was the product of hope and fear.

ISSUE II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THE AGGRAVATING FACTOR OF COLD, CALCULATED, AND PREMEDITATED.

On page 66 of its brief, the state asserts that the circumstantial evidence standard does not apply here because this case was not purely a circumstantial evidence case. The state argues that the conversation between appellant and Erin Urbin about stealing a car to visit her is direct evidence of his cold, calculated, and premeditated intent to kill Jacey. Appellant disagrees. Appellant's conversation with Erin, which they both viewed as joke at the time, is not direct evidence that he planned to kill Jacey. That he talked about stealing a car to visit Erin in a joking fashion and then in response to Erin's question, "how are you going to do that," said he'd just kill them, is not direct evidence of a plan because a plan is only one inference that can be drawn from the

conversation. Furthermore, even when someone threatens to kill a specific person–which did not occur here--, and then kills that person, the threat does not necessarily establish that the killing was committed with premeditation. For example, in Green v. State, 715 So. 2d 940 (Fla. 1998), the day before the victim was killed, the defendant was overheard saying, "I'll kill the bitch," "I'll get even with the bitch." Another witness testified that the defendant told him he and a friend picked up the victim, "the bitch got crazy," and they killed her. Because there were circumstances militating against premeditation, this Court concluded the evidence was insufficient to support premeditation.

The state also takes issue on page 68 with appellant's recitation of the circumstantial evidence standard, that is, that the CCP aggravator must be reversed if the evidence is consistent with a reasonable hypothesis of innocence. This statement is wrong, says the state, because "then the existence of a competing theory alone would defeat the aggravator." Exactly. If there are two theories, both consistent with the evidence, the state has not proved the aggravator beyond a reasonable doubt. Thus, in cases relying on circumstantial evidence, the state is required to provide substantial competent evidence rebutting the defendant's theory of events. Reynolds v. State, 934 So. 2d 1128, 1145 (Fla. 2006). While the state does not have to rebut every possible event variation that might be inferred from the evidence, it has to produce evidence that

contradicts the defendant's theory. Graham v. State, 56 So. 3d 97 (Fla. 4th DCA 2011).

The state offers the following standard instead: evidence that is inconsistent with the defense theory demonstrates that the aggravator is valid." Answer Brief at 69. Or, "[i]t is only when no evidence is inconsistent with Appellant's hypothesis that the aggravator cannot stand." These statements are just different ways of saying the same thing appellant said.

The state then makes the blanket assertion that all of the evidence relied on by the trial court is inconsistent with appellant's hypothesis that this was a spur-of-the-moment killing. The state gives no explanation for this, nor does the state refute or even address the arguments in appellant's Initial Brief to the contrary. In fact, the evidence is susceptible to two inferences: a CCP killing and a non-CCP killing. The state has not identified any competent substantial evidence that rebuts appellant's reasonable hypothesis of a non-CCP killing. Accordingly, the aggravator has not been proved beyond a reasonable doubt.

ISSUE IV

THE TRIAL COURT'S FAILURE TO CONSIDER DR. KROP'S TESTIMONY IN EVALUATING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES DEPRIVED MARTIN OF A FAIR SENTENCING HEARING.

The state first asserts on page 82-83 that this issue was either waived or not preserved because it is the duty of defense counsel to present mitigation to the trial court, the mitigation proposed on appeal was never proposed in the trial court, and the trial court can't be expected to identify non-statutory mitigation. The state has improperly characterized appellant's argument. Dr. Krop's testimony was submitted to the trial court at the Spencer hearing. Defense counsel identified proposed mitigating factors in a memorandum of law, and the state proposed certain aggravating factors in its memorandum. Appellant did not suggest that the trial court was required to identify additional mitigating factors in Dr. Krop's testimony. Appellant argued that the trial court had an obligation to consider Dr. Krop's testimony in determining whether the mitigating and aggravating factors proposed by the parties were proved and what weight should be given to each. .....

The state also asserts on page 86 that a diagnosis of antisocial personality disorder (ASPD) is not mitigation. Appellant has not argued, however, that the trial court erred in not finding ASPD as a mitigating factor. Red herring.

The state also asserts that the trial court's failure to consider Dr. Krop's testimony is harmless error. It's harmless, says the state, because the trial court may have used the diagnosis of ASPD "to rebut any other mitigation." Huh? How does the diagnosis of ASPD rebut other mitigation, the mitigating evidence that appellant was emotionally and sexually abused, for example? ASPD is defined as a pervasive pattern of disregard for and violation of the rights of others since age 15, characterized by at least three of the following: lying, aggressiveness, impulsiveness, lawbreaking, irresponsibility, such as failure to maintain a job, lack of remorse, or disregard for the safety of others. Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV). The diagnosis of ASPD could not possibly rebut sexual, emotional, or any other type of abuse (although abuse could explain lawbreaking, impulsiveness, disregard for the rights of others, etc.).

Finally, the trial court's failure to consider critical mitigating evidence is not subject to the harmless error test. The trial court must consider, evaluate, and weigh any relevant mitigating evidence in the record. See Eddings v. Oklahoma, 455 U.S. 104 (1982). Resentencing is required.

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; Issue 2, reverse for a new penalty proceeding; Issues 3-4, reverse for resentencing by the trial judge; Issues 5-6, vacate appellant's death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic transmission to **THOMAS D. WINOKUR**, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and by U.S. Mail to **DAVID JAMES MARTIN**, #J30258, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this date, June 17, 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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