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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

JOHNNY MACK SKETO CALHOUN,

Appellant,

v. **CASE NO.: SC12-1086**

STATE OF FLORIDA,

Appellee.

_____/

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

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant, Johnny Mack Sketo Calhoun, relies on the Initial Brief to reply to the State's Answer Brief with the following additions to Issues I:

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO PRESENT CALHOUN'S STATEMENT TO THE POLICE UNDER THE RULE OF COMPLETENESS, AFTER THE STATE INTRODUCED SELECTED PARTS OF THE STATEMENT, ON THE GROUNDS THAT CALHOUN'S STATEMENT WAS EXCULPATORY.

The State has failed to acknowledge that the trial court labored under a misunderstanding of the law of the rule of completeness in ruling on this issue. This Court in Larzelere v. State, 676 So. 2d 394, 401-402 (Fla. 1996), discussed the requirement of the rule of completeness that flows from Section 90.108 Florida Statutes. Once the State introduces a portion of a statement, that admission "opens the door" to the contemporaneous introduction of the remainder of the statement. The only limitation on the defendant's right to have the entire statement admitted is that the State can seek redaction of "totally extraneous matters." See, Correll v. State, 523 So. 2d 562, 566 (Fla 1988). The court can exercise discretion to allow additional portions on the basis of fairness to the proceedings. However, the State cannot exclude portions of the statement because they contain self-serving hearsay. See, e.g., Kaczmar v. State, __ So. 3d __, case no. SC10-2269 (Fla. Oct. 4, 2012); Larzelere v. State, 676 So. 2d at 401-402 (Fla. 1996); Whitfield v. State, 933 So. 2d 1245, 1248-1249 (Fla. 1st DCA 2006).

In this case, the State's only assertion at trial was that the

remainder of the statement included self-serving hearsay. (T15:953-954; T16:983-984) The defense explained that while the statement included self-serving portions, those portions also provided the needed context for the parts of the statement the prosecutor was allowed to introduce. (T15:953-954) At this point, the State had the right to seek exclusion of the remainder of the statement that was "totally extraneous" to the case, but the State had no grounds to exclude solely on the basis that the remainder included self-serving hearsay. However, the state failed to assert any grounds other than the statement included self-serving hearsay. (T15:953-954; T16:983-984) The court improperly excluded the statement on the State's argument that it contained self-serving hearsay. (T15:953-954; T16:983-984) See, e.g. Whitfield v. State, 933 So. 2d 1245, 1248-1249 (Fla. 1st DCA 2006).

A similar issue was addressed in Whitfield v. State, and the First District Court addressed it as follows:

> Here, the State is correct that appellant's statement that John Wilson left him in the apartment or that he had the permission of the owner or lessee of the apartment to be there would generally constitute inadmissible hearsay. *See Guerro, 532 So.2d at 76; Barber, 576 So.2d at 830.* However,, the statement is one related to appellant's subsequent statement that he went to the apartment to smoke cocaine that, in fairness, was necessary for the jury to accurately perceive the entire context of what transpired between appellant and Deputy Behl. *See Johnson v. State, 653 So.2d 1074, 1075 (Fla. 3d DCA 1995); Eberhardt, 550 So.2d at 105.* While such fairness determination is usually left within the discretion of the trial court, *see, Larzelere, 676 So.2d at 402*, the trial court in this case ruled the statement at issue was inadmissible solely on the ground that it

> was hearsay without making any fairness determination on the record. The content of the statement would have served to amplify or explain the subsequent statement because, even if appellant entered the apartment with the intent to smoke cocaine inside, if his related statement that he did so with John Wilson's permission was allowed to be elicited on cross-examination, such evidence may have convinced the jury that appellant was not guilty of burglary....
>
> * * * *
>
> Standing alone, the later statements left the jury with the mistaken impression that appellant did not assert that he had permission to be in the apartment when he was initially confronted by Deputy Behl and, thus, the exclusion of the statement gave the jury an incomplete picture of the events. *See Johnson, 653 So.2d at 1075.* Based on the foregoing, we conclude the trial court abused its discretion in granting the State's motion in limine.

Whitfield v. State, 933 So. 2d at 1248-1249. The same error occured in this case —- the trial court denied the defense the right to present the remainder of the statement because the statement included self-serving hearsay. Since the trial court's ruling completely prohibited the hearsay portions, the question of "fairness" of admitting these additional portions of the statement was never addressed. The court never reached the point of exercising its discretion on the admission of the statements on the basis of fairness.

Several assertions the State makes in the answer brief are inaccurate or irrelevant, because of the trial court's improper ruling on excluding self-serving hearsay.

1. The State contends that the defense did not offer any "fairness" argument for admission of any part of the statement. (AB

35-38) Defense counsel asked to introduce the remainder of the statement for context, but the trial court accepted the State's position that any self-serving hearsay could not be admitted for that reason. (T15:953-954; T16:982-983) Defense counsel acknowledged the self-serving character of much of the relevant part of the statement. (T15:953-954) As threshold matter, the trial court's erroneous ruling on excluding hearsay cut of any argument that portions of that hearsay material should be admitted in the interest of fairness, just like the trial judge ruled in Whitfield, as discussed above. Asserting a further basis for introduction of the evidence, i.e., in the interest of fairness, was then a futile act. When defense counsel again asked to introduce the material in the defense case-in-chief, the State inserted the same hearsay objection, and the trial court again ruled on the basis of the hearsay exclusion. (T16:983-984)

2. On pages 39-40 of the answer brief, the State asserts, "[D]efense counsel was allowed to cross-examine Lt. Raley unimpeded by any objection whatsoever.... Indeed, on cross-examination, defense counsel was given unfettered leeway ...." This assertion is inaccurate. The trial court had already prohibited introduction of any portion of the statement containing self-serving hearsay. Defense counsel's "leeway" was already tightly restricted by that ruling. The fact that defense counsel did not try to present those portions on cross-examination was a lawyer respecting and complying

with the court's erroneous ruling.

3. The State also claims that defense counsel did not take other opportunities to seek to introduce the statement before resting the defense case. (AB 41-45) In fact, defense counsel, at the beginning of the defense case presentation asked to introduce the statement. (T16:983-984) The prosecutor asserted the same objection about self-serving hearsay, and the trial court again confirmed its ruling excluding such hearsay. (T16:983-984)

Calhoun was entitled to introduce the statements he made to the detective under the rule of completeness. The trial court's ruling precluding admission of the statement as self-serving hearsay was erroneous. Calhoun has been denied his rights to due process and fair trial.

CONCLUSION

For the reasons presented the Initial Brief and this Reply Brief, Calhoun ask this Court to reverse his convictions and order a new trial on the basis of Issue I. Alternatively, for the reasons in Issues II and III, Calhoun asks that his death sentence be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Carlolyn Snurkowski, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at Capapp@myfloridalegal.com as agreed by the parties, and to appellant, Johnny Calhoun, DC #Q26629, F. S. P., 7819 N.W. 228th St., Raiford, FL 32026, on this 5th day of March, 2013.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,

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