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IN THE SUPREME COURT OF FLORIDA

Case No. SC13-46
(LC 2010-663-CFB)

MARVIN CANNON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

On direct appeal from final judgments and sentences, including a death sentence, rendered by the Circuit Court of the Second Judicial Circuit, in and for Gadsden County, Florida, on November 15, 2012, in a capital, criminal case.

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The State argues that the trial court did not err in assigning great weight to both the prior violent felony and prior felony and probation aggravators because the two aggravators only overlap to the extent they are based on the "same criminal episode." (AB/25, 28). The State also argues that the felony probation aggravator was based only on the circumstances of the *probation* or Appellant himself, and not on the underlying conviction (AB/28).

However, double counting of aggravators also occurs if they are both based on the same evidence or the same essential facts. *Waterhouse v. State,* 429 So. 2d 301 (Fla. 1983). In this case, the same prior conviction, or criminal episode, was used to justify both aggravators. The only distinguishing characteristics of the two aggravators were that one required the prior felony to be violent, whereas the other required the defendant to still be serving a sentence of incarceration or probation for that felony at the time of the murder. Each aggravator is designed to address a separate evil, justifying both aggravators even when a single conviction serves as the basis for both.

In this case, however, the trial court did not merely rely on the same criminal episode. The weight assigned to the felony probation aggravator was expressly tied to the violent nature of the prior felony carjacking conviction. Therefore, the same "essential fact" that the prior carjacking conviction was violent served as the justification for the weight given to each of the two separate aggravators. This resulted in impermissible double counting and an abuse of discretion because a single essential fact was twice incorporated into the sentencing calculus.

II. THE TRIAL COURT ERRED IN APPLYING HAC AGGRAVATOR TO APPELLANT VICARIOUSLY FOR CONDUCT COMMITTED BY CO-DEFENDANT ABSENT PROOF OF DIRECTING OR KNOWING

The State argues that the HAC aggravator was properly applied to Appellant because the evidence is that Appellant stabbed the victims, and therefore vicarious application of this aggravator is unnecessary (AB/31). The State goes on to say that "[t]he trial court's application of HAC was specifically due to the actions of Appellant, and was in no way reflective of the presumed actions of McMillian." (AB/34-35). This argument is contrary to and wholly unsupported by the record.

The trial court's sentencing order finds that "the evidence did not establish conclusively whether Marvin Cannon alone, Antone McMillian alone, or both Marvin Cannon and Antone McMillian together stabbed Mr. Morgan." (R2/324). The court also found that "[s]ubstantial evidence is consistent with Mr. McMillian stabbing Mr. Morgan," and that "no evidence directly indicates that Mr. Cannon

personally stabbed Mr. Morgan...." (R2/324-5). The trial court's order discusses several cases in which this Court has approved vicarious application of the HAC aggravator based on the actions of a co-defendant, and then makes a finding that Appellant intended the manner of Mr. Morgan's death (R2/322-5).

It is therefore quite clear that the trial court's analysis and application of the HAC aggravator was not based solely on the actions of Appellant, but also on the presumed conduct of Mr. McMillian. Without evidence that Appellant knew McMillian would stab Mr. Morgan as many times as he did and directed him to do so, the HAC aggravator cannot be applied. There was no such evidence presented, nor can knowledge and directing be presumed.

III. THE TRIAL COURT REVERSIBLY ERRED IN SUA SPONTE REINSTRUCTING JURY ON ATTEMPTED VOLUNTARY MANSLAUGHTER

The State argues that this issue was not preserved for review because defense counsel did not object to the trial court's modified manslaughter instruction (AB/38). Appellant submits that on the facts of this case, the issue is not waived due to lack of objection.

First, defense counsel had already stated during the charge conference what instruction Appellant was requesting on attempted manslaughter. The parties and the judge agreed on a manslaughter instruction. This was sufficient to apprise the

judge of what the defense's position was regarding this instruction and the fact that his own crafted instruction was contrary to Appellant's request.

Second, Fla. R. Crim. P. 3.390(d), which provides the contemporaneous objection rule for jury instruction issues, states that an opportunity shall be given to make the objection out of the presence of the jury. *Williams v. State,* 395 So. 2d 1236 (Fla. 4th DCA 1981). No such opportunity was given in this case. The judge made the changes on his own in the middle of closing arguments with the jury present and afforded no opportunity for the parties to provide input or make an objection outside the hearing of the jury. *Cf. Hudson v. State,* 368 So. 2d 437 (Fla. 3rd DCA 1979) (finding issue not preserved where counsel given opportunity to object and stated that he had none). Appellant was therefore denied his procedural right to make a proper objection, in addition to being ambushed by the unexpected changes to the jury instructions.

Therefore, the lack of a contemporaneous objection should not act as a waiver or otherwise bar appellate review of the court's modified instruction. The court denied Appellant an opportunity to be heard before changing the instructions that had already been agreed upon during the charge conference and immediately reading the modified instruction to the jury.

The State also argues in the alternative that the jury instruction error is harmless because there was no evidence supporting a defense of justifiable

homicide (AB/39-40). The State cites Sean Neel's testimony that Appellant's attack on him was unprovoked and that he only picked up a knife after Appellant stabbed him in the neck, and that any argument to the contrary forces the court to speculate on what might have happened and ignore the testimony (AB/40).

However, Mr. Neel admitted during cross-examination that he wasn't certain of the timing of these events and that he did have the knife in his hand already when he was stabbed (T2/147, 150). He also admitted to making a prior inconsistent statement indicating that he probably armed himself with a knife prior to being stabbed (T2/152).

This was sufficient record evidence for Appellant to make a good faith argument that Mr. Neel grabbed a knife first and that Appellant reacted in self-defense, making the attempted homicide of Sean Neel justified. A defendant is entitled to a correct jury instruction on any defense that is supported by the record, no matter how weak the supporting evidence is. *Martinez v. State,* 981 So. 2d 449, 460 (Fla. 2008) (Lewis, C.J., concurring in part and dissenting in part). The State concedes that the modified instruction was misleading (AB/39). Therefore, the failure to correctly instruct the jury on attempted manslaughter was not harmless beyond a reasonable doubt.

IV. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUSTAIN CONVICTION FOR ROBBERY OF ZACHARIAH MORGAN

The State apparently concedes that the evidence was insufficient to prove the taking of U.S. Currency from Mr. Morgan, but argues that the conviction for robbery can stand because the victim's wallet was recovered along Appellant's escape route and the specific value of the wallet is not an element of robbery (AB/42-3). The State cites to this Court's decision in *McKinney v. State* in support of its position.

In *McKinney,* this Court held that dual convictions for robbery and grand theft do not violate double jeopardy because each requires proof of an element that the other does not. *McKinney v. State,* 66 So. 3d 852 (Fla. 2011). Specifically, the conviction for grand theft required the State to prove that the value of the property taken was in excess of $300, a fact which is not an element of robbery. *Id* at 857.

However, *McKinney* does not stand for the proposition that a defendant can be convicted of robbery even if the property taken has no value at all, only that the State need not prove a specific value exceeding $300 or any other threshold amount. In order for the taking of a wallet to be robbery, the State must still offer proof that the wallet had some value, regardless of what specific number the value turns out to be. *Armstrong v. State,* 931 So. 2d 187, 195 n.5 (Fla. 5th DCA 2006). In this case, the State offered no testimony whatsoever concerning the value of the wallet. Contrary to the State's argument, such value is not presumed.

The State also attempts to distinguish *Eutzy v. State,* in which this Court held the evidence for robbery was insufficient because the State failed to prove that the victim had anything of value on him before the murder. *Eutzy v. State,* 458 So. 2d 755, 757 (Fla. 1984). The State argues that *Eutzy* is distinguished because in that case the victim did not have "anything" on him prior to the murder, whereas in the instant case the victim's wallet contained credit cards and bank cards that have inherent value (AB/45).

The State's argument fails because the mere taking of "anything" is insufficient to prove a robbery. The credit cards and bank cards were not alleged in the charging document as subject property in the robbery, nor did the court charge the jury when instructing on robbery to consider these items in rendering their verdict. The charging document and jury instructions only referenced the wallet and U.S. currency. The State failed to prove that currency was taken, or that the wallet had any value. Therefore, the conviction for robbery must be reversed.

V. THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN CONVICTION FOR ATTEMPTED ROBBERY OF SEAN NEEL

The State characterizes Appellant's position as being that the evidence proves he did not have the intent to rob Mr. Neel (AB/46). This is incorrect. Appellant's position is that the State had the burden of proving he did have the intent to rob Mr. Neel and failed to carry that burden. The State makes the conclusory argument that the evidence was sufficient to prove that Appellant

stabbed Sean Neel with the intent to murder him and take any and all personal property on him, but there was no evidence presented at trial that this was Appellant's objective (AB/47).

As the State concedes, the evidence adduced at trial showed that Mr. Morgan was the intended target (AB/47). Contrary to the State's position, proof that Appellant robbed Mr. Morgan is not proof that he intended to rob anyone else who happened to be present. It is well established that multiple convictions for robbery can only stand if the State proves a taking or attempted taking from each victim. *Nesbitt v. State,* 966 So. 2d 447 (Fla. 2nd DCA 2007). At no time did Appellant or co-defendant McMillian demand money or property from Mr. Neel or attempt to remove anything from his person or custody.

Even assuming that the stabbing of Mr. Neel and subsequent robbery of Mr. Morgan is circumstantial evidence of an intent to rob Mr. Neel, that evidence does not exclude the reasonable hypothesis that the stabbing of Mr. Neel was done solely to facilitate the attack on Mr. Morgan, or that it was in response to Mr. Neel arming himself with a knife. As a result, that evidence is insufficient to sustain the conviction for attempted robbery of Mr. Neel. *See Pagan v. State,* 830 So. 2d 792 (Fla. 2002).

VI. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO PROVE INTENT AND CAUSATION ELEMENTS OF ARSON BEYOND A REASONABLE DOUBT

The State argues that the evidence is sufficient to sustain the conviction for arson because there is no reasonable hypothesis that Mr. Morgan *intentionally* started the fire himself (AB/49-50). However, the state fire marshal admitted that the fire could have been started accidentally by a dropped cigarette, lighter or other heat source (T4/478-9), and there is a reasonable hypothesis that Mr. Morgan could have accidentally started the fire himself during a struggle. The State points out that there was no testimony about anyone smoking or using a heat source prior to the attack on Mr. Neel, but the State could not prove what happened in the minutes after Mr. Neel ran away and before police arrived. At the moment Mr. Neel fled the scene, there were three men still inside Mr. Morgan's careening truck, and the evidence does not exclude any of them as potentially starting the fire accidentally.

The State makes a general argument that Appellant intended the "criminal acts" and "incited them" (AB/50), apparently suggesting that Appellant's factual guilt for any offense is sufficient to sustain a conviction for every offense charged. The State also posits that a reasonable conclusion is that Appellant or co-defendant McMillian started the fire and did so intentionally to destroy evidence (AB/51). Unfortunately for the State, a reasonable conclusion is not proof beyond a reasonable doubt. The presence of a third party who is not a principal and had

access to the vehicle during the time when the fire started, combined with the fire marshal's inability to say whether the fire was accidentally or intentionally set by human agency (T4/478-9), renders the circumstantial evidence insufficient to prove beyond a reasonable doubt that Appellant started the fire. *See Moberly v. State,* 562 So. 2d 773 (Fla. 2nd DCA 1990).

VII. THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO GIVE PROPER JURY INSTRUCTION IN RESPONSE TO JURY QUESTION

The State argues that the trial court's response to the jury's question during deliberations was appropriate because it was a correct statement of the law, and that a court cannot abuse its discretion in answering a jury question if its response is a correct statement of the law (AB/56-7). Appellant respectfully disagrees because the trial court's response, while accurate, did not answer the jury's question. The court reworded the question and then answered that.

The text of the jury's question shows that they were not merely asking whether they had to identify the items of property that were attempted to be taken from Mr. Neel in rendering their verdict for attempted robbery, which is the question the trial judge ultimately answered. The verdict forms themselves would answer that question because there is no space for the jury to make such a finding.

Rather, the jurors were asking if they could assume Appellant's guilt for the attempted robbery of Sean Neel based on the taking of Mr. Morgan's wallet and

Morgan's pre-payment for deer corn. Although the State was free to argue that the taking of Morgan's wallet was circumstantial evidence of Appellant's intent to rob Sean Neel and sufficient to sustain a conviction, such a taking would not raise a presumption of guilt, nor would it be proper for the jury to presume Appellant's guilt based solely on that fact without considering that circumstance in light of all other evidence in the case. To the extent the jury was asking if it was proper for them to make such an assumption, the trial court abused its discretion in failing to answer that question and give the requested instruction on single defendant, multiple counts.

The trial court also abused its discretion in failing to address the jury's question about the corn prepayment. The State attacks Appellant's reliance on *Eutzy v. State,* 458 So. 2d 755 (Fla. 1984), and distinguishes that case on the fact that it involved a completed robbery (AB/56). However, that case was cited for the proposition that robbery requires a forceful taking, and failing to pay the victim for services rendered (in that case, a cab fare) does not constitute a robbery. This rationale applies equally in the context of an attempted robbery. Mr. Morgan's prepayment to Appellant for deer corn would support neither a robbery nor an attempted robbery on either Mr. Morgan or Mr. Neel. To the extent the jury was asking if the corn payment to Mr. Morgan supported an attempted robbery charge,

the trial court abused its discretion in failing to correct the jury's misunderstanding of the law.

VIII. THE TRIAL COURT ERRED IN PERMITTING STATE TO INTRODUCE PREJUDICIAL HEARSAY STATEMENTS

In this claim, Appellant asserted that the trial court erred in admitting Mr. Morgan's hearsay statements to Sean Neel about Appellant's bad character and failure to abide by the terms of Morgan's payment for deer corn. Appellant argued that the statements were not admissible to prove their effect on Mr. Neel because the only statement necessary to establish a logical sequence of events and explain why they were meeting Appellant that day was Morgan's statement that it was time to pick up the corn. The rest of the accusatory statements would not be admissible for that purpose.

The State now argues on appeal that Mr. Morgan's out-of-court statements were admissible under the "state of mind" exception to prove their effect on *Appellant,* specifically his motive to murder Mr. Morgan (AB/58). This argument is without merit.

The state of mind exception allows for the admission of out-of-court statements to prove the then-existing mental or emotional condition of the *declarer*, not the hearer. § 90.803(3), Fla. Stat. (2010). A declarant's statement is not admissible to prove another person's state of mind. *See Hodges v. State,* 595 So. 2d 929, 931 (Fla. 1992), *vacated on other grounds,* 506 U.S. 803, 113 S. Ct. 33

(1992) (holding that murder victim's out-of-court statements are not admissible under § 90.803(3) to prove the defendant's state of mind). Therefore, Mr. Morgan's hearsay statements to either Appellant or to Mr. Neel are not admissible under the state of mind exception to prove their effect on Appellant or to prove his state of mind or intent to commit murder.

The State cites to several cases holding that such statements are admissible non-hearsay if offered to show their effect on the hearer and prove the defendant's motive to commit murder (AB/60-61). However, that was not the basis for admitting the evidence in the trial court. When the State argued at sidebar that the statements were non-hearsay offered to prove their effect on the hearer, the court inquired whether Mr. Neel was expecting to receive corn that day and there wasn't any. The State answered in the affirmative, and the court overruled the objection and allowed the testimony (T1/92-93). Clearly, the court's understanding was that the hearer of the statements was Mr. Neel, not Appellant, an understanding fostered by the State. There was no mention of admitting the statements for the purpose of proving Appellant's motive.

Furthermore, most of the challenged statements were only made to Mr. Neel *about* Appellant, not directly to Appellant. Other than Morgan's demand for his money back or delivery of the corn, the rest of the statements would not have had any effect on Appellant because he didn't personally hear them.

For example, Morgan told Neel that Appellant was not answering or returning his calls (T1/96-97). The very nature of this statement excludes Appellant from the conversation. Neel testified that Morgan used Neel's cell phone to call Appellant, and then called Neel on December 24 to say it was finally time to go get the corn. This indicates that there were at least two separate conversations: one between Morgan and Appellant on Neel's phone, and a second one between Morgan and Neel only on the day of the murder. It was during this conversation that Morgan told Neel about the aggravation of dealing with Appellant and his failure to deliver the corn as promised, and how he wanted to see where his heart was during their meeting that day (T1/98-102).

These statements were not admissible to prove their effect on Appellant because he was not the hearer of the statements. Sean Neel was the hearer, and the statements were not admissible to prove their effect on him because Neel's state of mind was not relevant to proving any material disputed fact. As argued in the initial brief, accusatory statements reflecting a defendant's bad character are not admissible to establish a logical sequence of events in explaining why Morgan and Neel were meeting with Appellant on the day of the murder. Therefore, all of the statements to Mr. Neel were inadmissible hearsay.

IX. THE SENTENCE OF DEATH IS DISPROPORTIONATE

The State asserts that consideration of co-defendant McMillian's relative culpability for the murder of Mr. Morgan is not a proper consideration in determining the proportionality of Appellant's death sentence (AB/64, 70). However, the trial court expressly stated that each defendant's level of culpability was a most important factor in its proportionality analysis (R2/337), a point conceded in the State's brief (AB/73).

Furthermore, a comparison of the relative culpability of two co-defendants who participated in a murder is inevitable because increased culpability for one will have a concomitant effect on the degree of culpability for the other. *See Urbin v. State,* 714 So. 2d 411 (Fla. 1998) (stating that fact that co-defendant inflicted the fatal blow on the victim is a mitigating factor regarding imposition of the death penalty); *See also Cardona v. State,* 641 So. 2d 361 (Fla. 1994) (noting that an equally culpable codefendant's sentence is relevant to a proportionality analysis). The court did not give any weight to the mitigating fact that McMillian was the actual killer at Appellant's sentencing, affecting the balance between aggravating and mitigating circumstances and, thus, the question of proportionality.

Appellant's argument was that the trial court refused to consider the totality of the circumstances in determining the relative culpability of the defendants, instead relying solely on McMillian's intellectual disability to distinguish him from

Appellant. Appellant also argued a distinction between ineligibility for the death penalty as a matter of law due to age and ineligibility due to mental disability, which is based as much on a defendant's inability to aid in his own defense as it is on his culpability for the murder.

The State argues that Appellant cannot prove that co-defendant McMillian inflicted the fatal blow and was therefore more culpable on that point (AB/73). However, it is the State that bore the burden of proof in the proceedings under review. The State having failed to prove that Appellant inflicted the fatal blow, the trial court assumed for the purpose of its proportionality review that McMillian is the one who did. That factual determination is res judicata for this review proceeding.

The State also incorrectly asserts that the aggravating circumstances relied on by the trial court are "unchallenged," making the sentence proportionate when compared to similar cases finding the same aggravators (AB/67). However, Appellant has challenged several of the aggravators found by the trial court, including the HAC and prior violent felony aggravators, which the State concedes are among the most important in the proportionality analysis (AB/69). Appellant also challenged the sufficiency of the evidence for both robbery and attempted robbery. If successful, that would negate another potential aggravator.

Furthermore, the State submits that if the Court agrees that consideration of the prior violent felony aggravator resulted in impermissible double counting on the facts of this case, then the attempted murder of Sean Neel would provide an alternative basis for applying that aggravator to Appellant (AB/66 n.9). However, Appellant has also challenged the attempted murder conviction based on the improper manslaughter instruction, a point on which the State has conceded error but argued was harmless.

It is therefore incorrect to say that the aggravating circumstances are unchallenged. Likewise, the State's argument that the mitigating circumstances were weak is diminished by the trial court's failure to give any weight at all to the mitigating fact that McMillian will not be prosecuted despite being the actual killer. Appellant therefore maintains his argument that the trial court erred in its proportionality review, and that remand is required for reconsideration of the sentence in light of the challenged aggravators and totality of the circumstances.

CONCLUSION

For the reasons set forth above, the Court is asked to reverse and set aside the judgments and sentences, including the death sentence, rendered against Mr. Cannon on November 15, 2012, remand the cause to the circuit for a new trial on all counts and grant the defendant such other relief as is deemed appropriate in the premises.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished counsel referenced below at the addresses indicated by email delivery and U.S. mail delivery this 2nd day of January 2014.

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CERTIFICATE OF COMPLIANCE

I further certify that this initial brief of appellant was prepared using a Times New Roman font, 14 point, not proportionally spaced, in accordance with the Florida Rules of Appellate Procedure.

s/ Baya Harrison

Baya Harrison