IN THE SUPREME COURT OF FLORIDA

THOMAS THEO BROWN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC17-1538
L.T. No. 162009CF008160AXXXMA
DEATH PENALTY CASE

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Jurisdiction

The death sentence of Appellant, Thomas Theo Brown, was vacated by the lower court, and Brown was granted a new penalty phase pursuant to a *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), claim raised in his initial motion for postconviction relief. The lower court denied Brown's guilt-phase claims, and Brown appeals the denial of one of the guilt-phase claims. Brown has not yet been resentenced.

Given that Brown's death sentence has been vacated, the State questions this Court's jurisdiction of the case. *See Capehart v. State*, 35 So. 3d 909 (Fla. 2010) (where this Court dismissed the defendant's appeal of his guilt-phase postconviction claims and remanded the case to the circuit court to proceed with the new penalty phase); *Trepal v. State*, 754 So. 2d 702, 706-07 (Fla. 2000) (holding that this Court had jurisdiction to hear an interlocutory appeal arising during capital postconviction proceedings because a valid death sentence was imposed in the defendant's case); and *State v. Preston*, 376 So. 2d 3, 4 (Fla. 1979) (where this Court declined to hear an interlocutory appeal from a murder trial because the death penalty had not yet been entered); *but see Maharaj v. State*, 778 So. 2d 944 (Fla. 2000) (staying the circuit court's

proceeding on the new penalty phase while this Court resolved the defendant's postconviction guilt phase claims). It is the State's position that this Court lacks the necessary jurisdiction to hear the appeal because there is currently no final judgment and sentence of death that has been imposed in Brown's case. *See Capehart*, 35 So. 3d 909; *Preston*, 376 So. 2d at 4.

Record References

References to the direct appeal record will be referred to as "DAR" with the corresponding volume number and page number, as follows (DAR V_/___). The postconviction record will be referred to as "PCR" and cited with the appropriate page number, as follows (PCR p. ___).

STATEMENT OF THE CASE AND FACTS

Appellant, Thomas Theo Brown, was convicted of the first-degree murder of Juanese Miller and sentenced to death. Brown and Miller were co-workers at a Wendy's restaurant. The evidence at trial showed that Miller had poured ice and salt down Brown's back during the week of the murder, which had bothered Brown. *Brown v. State*, 126 So. 3d 211, 213 (Fla. 2013). The following day, Miller again upset Brown by calling him a vulgar name. *Id*. Restaurant management became aware of the conflict between Miller and Brown, and both employees subsequently got some of

their hours "cut." *Id.* Brown and Miller did not work together until three days later, when Brown killed Miller.

That day, Brown engaged in a "heated exchange" with Wendy's franchisee Mike Emami. *Id*. Brown was upset about his hours being "cut" and he yelled, "[Y]ou don't f*cking know me…it ain't going to be no more Wendy's." *Id*. Emami asked Brown to leave the restaurant numerous times, and after Brown failed to do so, Emami called 911. *Brown*, 126 So. 3d at 214. Brown left the restaurant and drove off in his vehicle.

Brown returned within a short timeframe and told a manager, "[S]he [is] the reason why I don't have my job." *Id.* Brown asked for Emami, but he had already left. At that time, Miller was ordering her lunch at the register. Brown walked out of the restaurant, went to his car, and put it in reverse. He then got out of his car and returned to the restaurant, walking directly toward Miller. *Id*. Brown was within two to three feet of Miller when he reached under his shirt, pulled out a firearm, and shot her. *Id*. Brown yelled, "[W]here the f*ck Mike [Emami] at[?]" *Id*.

He fired more shots at Miller then walked toward the door and pushed the door open a little. Brown turned around and walked back toward Miller, who was lying on the floor. Brown stood over her and angrily said, "I told you I would kill you, you f*cking b*tch." *Id*. Brown fired his final shot at Miller.

Before leaving Wendy's, Brown announced, “Now, you can go and tell Mike, tell Mike thanks.” *Id*.

When Brown was arrested, a notebook was found in his vehicle in which he wrote,

> I’ve lost the only two jobs I’ve had in my life for no reason at all, but do people care? No!! The only time people in this world care, is when a person is a threat… I just offed a B*tch cause she was the cause of my life being f*cked up, this time. If she ain’t dead, then she will learn how serous [sic] words can be. I wanted “Mike the owner” to be there, but I guess it ain’t his time yet.

Brown v. State, 126 So. 3d at 214-15.

This Court affirmed Brown’s conviction for first-degree murder and his sentence of death on direct appeal. *Brown*, 126 So. 3d at 221. Brown subsequently filed a motion for postconviction relief that was amended numerous times. The lower court granted an evidentiary hearing on three of Brown’s guilt-phase claims alleging ineffective assistance of counsel for failing to file a motion to suppress, failing to present evidence to rebut premeditation and to support the lesser-included offense of second-degree murder, and for failing to object and move for a mistrial when the prosecutor stated during closing argument that Brown said, “I had it in my mind to kill you, I’ve wanted to kill you for several days. I wanted to kill someone to take out my frustration.” (PCR p. 402).

Despite being granted an evidentiary hearing, Brown's counsel announced at the beginning of the hearing that he would be relying exclusively on the record evidence for the claims in which the hearing was granted. (PCR p. 281). Counsel indicated that he had no evidence to present at the hearing and that the "record speaks for itself" on the issues before the court. (PCR p. 283).

The State argued that Brown's claims must be summarily denied because he was given an evidentiary hearing, and he failed to present any evidence. (PCR pp. 282-84). The court indicated that it would reserve ruling on the issue of summary denial until after the State had presented its evidence and the parties had filed their closing arguments. (PCR pp. 284-85).

As a result, the State presented the testimony of Detective Houghland and Brown's trial attorney Fred Gazaleh. Mr. Gazaleh was an Assistant Public Defender for the Fourth Judicial Circuit. (PCR p. 297). He worked at the Public Defender's Office for thirteen years and had been in private practice for twenty years. (PCR p. 298). Mr. Gazaleh served as lead counsel in Brown's case. (PCR p. 298).

He remembered very well the portion of the prosecutor's closing argument at issue in Brown's postconviction motion. (PCR p. 302). Mr. Gazaleh did not raise a contemporaneous objection

because “the very first statement […] was actually testified to, that was something that Mr. Brown had said during the course of the incident, that I told you I would kill you.” (PCR pp. 302-03). He further explained that when the prosecutor continued to the rest of the statement, he was “half-way up to object, but then it was obvious from her tone, it was obvious from her mannerisms that she was just commenting on what a person – what would go through a person’s mind when they’re doing something.” (PCR p. 303). Mr. Gazaleh confirmed that it was his belief that the prosecutor was not quoting Brown directly. (PCR p. 303). He explained, “I think it was clear to everybody in the room” that the prosecutor was paraphrasing what Brown had said. (PCR p. 303).

Mr. Gazaleh believed that it was a “fair comment on what the evidence was during the course of the trial” and that an objection would have been overruled. (PCR pp. 303-04). Therefore, he ultimately decided not to object. (PCR p. 304).

After the evidentiary hearing and the submission of the parties’ closing arguments, the lower court denied relief on all of Brown’s guilt-phase claims and granted a new penalty phase pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State,* 202 So. 3d 40 (Fla. 2016). As to the ineffective assistance of counsel claim regarding the failure to object to

the closing argument, the lower court found that the decision not to object was reasonable. “While there is no evidence Defendant spoke this exact phrase during the killing, it is undisputed that Defendant stated, ‘I told you I would kill you, you f*cking b*tch right before firing the fourth and final shot into the victim’s head.” (PCR p. 426).

The court further found that State’s quotation was a summary of Brown’s thoughts at the time of the murder. (PCR p. 426). Brown’s entry in his notebook had explained that he “just offed a b*tch because she was the cause of [his] life being f*cked up at this time.” (PCR p. 426). The court concluded that the State’s quotation referenced the evidence adduced at trial showing Brown’s personal decision to kill and his mindset at the time of the murder. (PCR p. 426).

This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied Brown’s claim that his counsel was ineffective for failing to object to the following statement from the prosecutor during closing argument: “I had it in my mind to kill you, I’ve wanted to kill you for several days. I wanted to kill someone to take out my frustration.” First, this claim was waived because Brown’s counsel was granted an evidentiary hearing on this issue, but he failed to present

any evidence. Nevertheless, the prosecutor's statement was a fair comment on the evidence, which had established that Brown had been quarreling with the victim, his co-worker, within the days leading up to the murder and that he had been frustrated with circumstances at work.

Brown had yelled "I told you I'd kill you, b*tch," at the victim after firing his final shot at her. (DAR 16/502). Brown had also written in a notebook that he had "just offed a b*tch because she was the cause of [his] life being f*cked-up[…]"(DAR V16/596). Considering the evidence adduced at trial, there was neither deficient performance of Brown's counsel nor any resulting prejudice by the failure to object to the prosecutor's statement that paraphrased Brown's own words and summarized the State's evidence. The lower court's denial of this claim should be affirmed.

ARGUMENT

BROWN'S CHALLENGE TO THE PROSECUTOR'S CLOSING ARGUMENT IS PROCEDURALLY BARRED, AND HIS CHALLENGE TO HIS COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S STATEMENT IS WAIVED FOR FAILURE OF PROOF AT AN EVIDENTIARY HEARING. THE CLAIM IS ALSO MERITLESS BECAUSE THE PROSECUTOR'S STATEMENT MERELY PARAPHRASED BROWN'S STATEMENTS THAT WERE ADMITTED DURING TRIAL.

Brown challenges the trial court's denial of his claim that his trial counsel was ineffective for failing to object to the prosecutor allegedly misquoting him during closing argument. To the extent that Brown is raising this issue as a substantive improper closing argument claim, this argument is procedurally barred. *See Teffeteller v. Dugger*, 734 So. 2d 1009, 1023 (Fla. 1999) (explaining that substantive claims of improper closing argument are procedurally barred from a collateral proceeding because they should have been raised on direct appeal). In addition, the portion of the claim alleging ineffective assistance of counsel has been waived because although Brown was granted an evidentiary hearing on this issue, he failed to present any evidence. *Hall v. State*, 212 So. 3d 1001, 1030-31 (Fla. 2017); *Gore v. State*, 24 So. 3d 1 (Fla. 2009); and *Ferrell v. State*, 918 So. 2d 163, 173 (Fla. 2005).

Brown Waived this Claim by Failing to Present Evidence at the Evidentiary Hearing.

On the day of the scheduled evidentiary hearing, Brown's counsel announced that he would not be presenting any evidence.

(PCR pp. 281, 283). While the State argued that the court was required to deny Brown's claims for failure to prove his case, the court directed the State to present its witnesses, and it advised that it would rule on the issue of a summary denial after hearing from the witnesses and receiving the parties' closing arguments. (PCR pp. 282-85). After the hearing and the submission of closing arguments, the postconviction court entered an order finding the other two claims subject to the evidentiary hearing waived, but the court made no waiver finding as to the instant claim regarding the failure to object to the closing argument. (PCR pp. 404-05, 410-11, 423, 425-26).

Notwithstanding the lower court's ruling, Brown waived this claim by failing to present evidence at the evidentiary hearing. The State's presentation of evidence should not have impacted Brown's waiver, given that the postconviction court directed the State to call its witnesses. Since the postconviction court ultimately denied this claim, this Court can affirm the denial of relief and find the claim waived pursuant to the "tipsy coachman" doctrine. *See Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) (explaining that the "tipsy coachman" doctrine allows an appellate court to affirm a trial court that "reaches the right result, but for the wrong reasons" so long as "there is any basis which would support the judgment in the record").

Brown had the opportunity to develop this claim during the evidentiary hearing, and he chose not to do so. In *Ferrell*, this Court found Ferrell's claim waived when it required development at an evidentiary hearing, but he "opted to forgo" the presentation of evidence at the scheduled hearing. *Ferrell v. State*, 918 So. 2d 163 (Fla. 2005). Similarly, Brown's unwillingness to present evidence on this claim should also constitute a waiver.

Brown has Failed to Establish that his Counsel was Ineffective for Not Challenging the Prosecutor's Closing Argument.

Even if this Court does not find this claim waived, the lower court's denial of relief requires affirmance because this claim is entirely meritless. Brown had the burden of establishing that his trial counsel rendered deficient performance that prejudiced the defense, as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Deficient performance requires showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Brown v. State*, 846 So. 2d 1114, 1120 (Fla. 2003) (quoting *Strickland*, 466 U.S. at 687). To establish prejudice, Brown needed to show that his counsel's errors affected the fairness and reliability of the proceedings that confidence in the outcome is undermined.

Simmons v. State, 105 So. 3d 475, 487 (Fla. 2012). In reviewing the lower court's resolution of this claim, this Court should apply a mixed standard of review; this Court should conduct an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. *Sochor v. State*, 883 So. 2d 766 (Fla. 2004).

Brown alleges that trial counsel was ineffective for failing to object to the prosecutor purportedly misquoting him during closing argument. Brown's challenge derives from the following portion of the prosecutor's closing argument:

> Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. Even for a moment, ladies and gentlemen, if you didn't believe that shots No. 1, No. 2, and No. 3 were premeditated murder, that last shot alone has to be where he stops, turns, comes back and says, **I told you I'd kill you, I had it in my mind to kill you, I've wanted to kill you for several days. I wanted to kill someone to take out my frustration.** That's what the decision being present in his mind at the time of the killing means. But the State of Florida submits to you that the decision was formed when he first walked into the store with that fully-loaded gun looking for Mike Emami.

(DAR V17/659) (emphasis added). Brown specifically alleges that there was no evidence that he stated, "I had it in my mind to kill you, I've wanted to kill you for several days. I wanted to kill someone to take out my frustration." He, therefore, argues that his trial counsel should have objected when the prosecutor

uttered those words during closing argument.

The trial court properly found that the prosecutor's statement referenced the evidence adduced at trial; therefore, it was reasonable for Brown's counsel to decide not to object to the statement. (PCR p. 426). During the evidentiary hearing, Brown's very experienced trial attorney Fred Gazaleh testified that he had considered objecting to the statement but ultimately decided not to because it was obvious that the prosecutor was not quoting Brown directly. (PCR pp. 302-03). He explained, "I think it was clear to everybody in the room" that the prosecutor was paraphrasing what Brown had said. (PCR p. 303). Mr. Gazaleh believed that it was a "fair comment on what the evidence was during the course of the trial." (PCR p. 303).

The evidence at trial had shown that Brown had been arguing with the victim within the days leading up to the murder, and that he blamed her for problems he was having at work. As the lower court pointed out, it was undisputed that Brown had told the victim, "I told you I would kill you, you f*cking b*tch" right before firing the fourth and final shot into her head. (PCR p. 426). In addition, Brown's entry in his notebook had explained that he "just offed a b*tch because she was the cause of [his] life being f*cked up at this time." (PCR p. 426). In sum, the State's evidence fully supported the prosecutor's

statement that Brown had it in his mind to kill the victim, he wanted to kill her for several days, and that he wanted to kill someone to take out his frustration.

"The proper exercise of closing argument is to review the evidence." *Davis v. State*, 136 So. 3d 1169, 1195 (Fla. 2014) (quoting *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985)). Given that the prosecutor's statement was based on evidence from trial, the closing argument was proper. Counsel cannot be deemed ineffective in failing to object to a closing argument that is not improper. *Rogers v. State*, 957 So. 2d 538 (Fla. 2007); *Mungin v. State,* 932 So.2d 986, 997 (Fla. 2006); *see also Deparvine v. State*, 146 So. 3d 1071, 1093 (Fla. 2014), as revised (Aug. 28, 2014) (citing *Owen v. State*, 986 So.2d 534, 543 (Fla. 2008)) (Trial counsel cannot be ineffective for failing to pursue meritless arguments). Accordingly, Brown failed to show that his counsel was deficient for not objecting to the prosecutor's statement based on the evidence.

Next, even if Brown's counsel could somehow be considered deficient for not lodging the objection, Brown still would not be entitled to relief because he failed to establish any resulting prejudice. As previously stated, trial evidence established that Brown had yelled, "I told you I'd kill you, b*tch" to the victim and had written that he "just offed a b*tch

because she was the cause of [his] life being f*cked-up[…]"(DAR V16/596). Therefore, even if his counsel would have objected, and the objection would have been sustained, the prosecutor could have merely quoted directly from Brown, and the result would not have been any different.

In addition, the prosecutor's statement was isolated, and Brown failed to show that he was prejudiced by the failure to object to the single statement. *See Davis v. State*, 136 So. 3d 1169, 1197 (Fla. 2014) (finding no prejudice by the failure to object to a single reference to the victim's family); *Rose v. State*, 985 So. 2d 500, 508 (Fla. 2008) (the record demonstrates a lack of prejudice by the failure to object to the prosecutor's isolated comment); and *Walls v. State,* 926 So. 2d 1156, 1167 (Fla. 2006) (holding that even if counsel's performance was deficient, defendant failed to establish prejudice from one comment).

Moreover, the prosecutor's statement was not nearly as inflammatory as some arguments made in other cases where this Court did not find prejudice. *See Moore v. State*, 820 So. 2d 199, 208 (Fla. 2002) (denying claim of ineffective assistance of counsel for failing to object to the prosecutor's references to Moore as being "the devil" during closing argument); *Chandler v. State*, 702 So. 2d 186, 200 f. 5 (Fla. 1997) (prosecutor's

closing argument accusing Chandler's counsel of engaging in "cowardly" and "despicable" conduct and calling Chandler a "malevolent" "brutal rapist and conscienceless murderer" was not so prejudicial as to vitiate the entire trial).

Brown, however, argues that the prosecutor's allegedly improper comment misinformed the jury as to whether the crime was premeditated. He claims that he was prejudiced because he was wrongly convicted of premeditated, first-degree murder. This argument is entirely without merit. As this Court previously found on direct appeal, "the evidence was sufficient to support a finding of premeditation by Brown." *Brown v. State*, 126 So. 3d 211, 221 (Fla. 2013). "[B]efore he fired his final shot, Brown walked to the exit door, but then returned to stand over Ms. Miller's body and stated, "I told you I would kill you, you f*cking b*tch." In addition, one of the four bullets went into the back of Ms. Miller's head and several of Ms. Miller's major organs were perforated." *Id*.

Given all the evidence of premeditation in this case, Brown has failed to make any meaningful showing of prejudice, as required under *Strickland*. *See Wright v. State*, 213 So. 3d 881, 911 (Fla. 2017)(vacated on other grounds, *Wright v. Florida*, 138 S. Ct. 360 (2017)) (even if counsel were deficient for failing to object, confidence in the verdict is not undermined when

there was overwhelming evidence of guilt, including confessions, the defendant's fingerprints at the crime scene, and the victim's blood on the defendant's shoe). The prosecutor's statement was certainly insufficient to undermine confidence in the outcome.

For all the reasons that Brown's challenge to his trial attorney's failure to object fail, his arguments that his attorney should have asked for a curative instruction or moved for a mistrial also fail. Brown has certainly not shown that there was any reasonable probability that a mistrial would have been granted if his counsel had made the motion, or that an instruction would have changed the result of the trial. There was no prejudice suffered by Brown, much less prejudice that would rise to the level required under *Strickland* to merit relief. For all these reasons, the trial court's order denying relief on this claim requires affirmance.

CONCLUSION

Appellee respectfully requests that this Honorable Court affirm the portion of the postconviction court's order denying Brown's motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 7th day of February, 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Christopher J. Anderson, Esquire, 2217 Florida Boulevard, Suite A, Neptune Beach, Florida 32266, at **chrisaab1@gmail.com**.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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