

Supreme Court of Florida

CASE NO. SC13-442

JOEL LEBRON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON DIRECT APPEAL FROM A FINAL JUDGMENT OF
GUILTY AND DEATH PENALTY FROM THE CIRCUIT
COURT OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLANT'S REPLY BRIEF

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ARGUMENT

I.

LEBRON'S POST-*MIRANDA* STATEMENTS SHOULD HAVE BEEN SUPPRESSED BECAUSE HIS PURPORTED WAIVER OF MIRANDA RIGHTS WAS INVOLUNTARY AND COERCED

A. The State Has Mischaracterized Lebron's Argument That His Confession Was Involuntary:

The State in its Answer Brief demonstrates a misunderstanding of Lebron's argument that his confession was involuntary. This Court should not be persuaded by the mischaracterization of Lebron's argument. The State starts out attempting to limit Lebron's argument to involve only the question whether Lebron's pre-warning statement rendered his post-warning statement inadmissible. There is much more to Lebron's involuntariness argument than that. Therefore, even if this Court should agree with the State's contention that "the lower court properly determined that Defendant's pre-warning statement did not render his post-warning statement inadmissible," that is not the end of the inquiry. "The test thus is one of voluntariness, or free will, which is to be determined *by an examination of the totality of the circumstances surrounding the confession.*" *Ross v. State*, 45 So. 3d 403, 413-14 (Fla. 2010)(emphasis added). This Court should reverse Lebron's

conviction because the State failed in its burden of proving that his confession was voluntary under all of the circumstances.

The State's argument (AB pages 50-51) that "the lower court relied on the following facts" in determining that Lebron's post-*Miranda* confession was admissible is misleading because the State quotes not from any findings by the trial judge, but findings made by the Third District Court of Appeal in a prior interlocutory appellate decision that is not binding on this Court. *See State v. Lebron*, 979 So. 2d 1093 (Fla. 3d DCA 2008). This appeal does not involve review of the Third District's decision reversing the trial court's suppression of Lebron's confession.

Instead, this Court is reviewing the admissibility of that confession *ab initio*. In addition, even if this Court accepts as factually true all of those findings quoted from the Third District's earlier decision in *Lebron I*, the establishment of those facts would not compel the conclusion that Lebron's post-*Miranda* confession was voluntary because that recitation of facts falls far short of reciting all of the facts in the "totality of the circumstances," that must be analyzed in arriving at the voluntariness decision.

The first factor that this Court should consider in determining whether the post-*Miranda* confession was involuntary is "whether the police used improper and

deliberate tactics in delaying the administration of the *Miranda* warnings in order to obtain the initial statement.” *See Ross, supra*, at 424. Here, Lebron was arrested at approximately 1:00 a.m. on April 29, 2002. It was not until after 3:00 a.m. that Lebron was *Mirandized*. A whole lot of activity occurred in between the arrest and the *Miranda* warnings that really accentuated the delay, including him being strip searched in the parking lot, waiting in a marked car for transfer to FDLE headquarters, the hostile encounter with Lebron’s brother-in-law Quinones, and the time spent during the unwarned exchange between Lebron and agent Hidalgo.

Not only was the passage of time between the arrest and administration of the *Miranda* warnings much longer than was necessary, there is evidence that it was the result of improper and deliberate tactics. Agent Hidalgo had interrogated hundreds of suspects at that point in his career and he knew well that he had the duty to advise them of their *Miranda* rights, prior to commencing questioning. No excuse for the unwarranted delay was offered by the State either below or in the Answer Brief filed herein.

Nor did the findings upon which the Third District cited to establish voluntariness reflect any of the incontrovertible evidence that Lebron was in a severely distressed mental or emotional state at the time of the confession. That mental or emotional state included crying uncontrollably for thirty minutes before

the confession, which crying was preceded by the confrontational encounter between Lebron and his brother-in-law, the circumstances of his strip search in the parking lot, and other conditions caused by overreaching by police. Where police tactics improperly contribute to a defendant's weak mental or emotional state, a confession based thereon should be deemed to be involuntary. *See Colorado v. Connelly*, 479 U.S. 157, 166-71 (1986).

B. The State Misconstrues The Standard Of Review:

The State misleadingly suggests that the “lower court” whose decision was made concerning the involuntariness of Lebron’s confession was the Third District Court of Appeal. In its Answer Brief, the State quotes at length from factual statements contained in the Third District’s interlocutory appeal of *State v. Lebron*, 979 So. 2d 1093 (Fla. 3d DCA 2008). Although the State correctly characterizes the standard of review as being that “a lower court’s finding of fact are [sic] presumed correct if they are supported by competent, substantial evidence” (*see* Answer Brief at 50), the juxtaposition of that stated standard with the long quotation of factual matters from the Third District’s interlocutory decision unfairly makes it seem as if this Court is charged with reviewing presumptively-correct findings of the Third District. That is not the case.

Here the only court that made findings of fact concerning the involuntariness of the conviction was the trial court in granting suppression of the confession as involuntarily-obtained. The fact that the trial court over Lebron's objection permitted introduction into evidence of his confession notwithstanding the factual finding of involuntariness was the result of the Third District's interlocutory decision that is itself not under review here. What should be under review is the trial court's factual determination in Lebron's favor, thereby requiring the State to demonstrate that the finding of involuntariness was clearly erroneous. The State has failed in that burden.

II.

LEBRON'S DEATH SENTENCE MUST BE REVERSED FOR FAILURE OF THE COURT TO REQUIRE THE JURY TO EXPRESSLY MAKE FINDINGS OF THE EXISTENCE OF ONE OR MORE AGGRAVATING CIRCUMSTANCES

This Court should reject the State's position that the *Hurst* case did not determine that Florida's death penalty is unconstitutional, only the death penalty "scheme." In *Hurst v. Florida*, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), the Supreme Court of the United States held "that *Ring* [*v. Arizona*, 536 U.S. 584 (2002)] required a jury to find *every fact* necessary to render *Hurst* eligible for the death penalty." *Id.* at 622 (emphasis added). The facts upon which Florida's death penalty

can be imposed are those described in Section 921.141(3), which requires “specific written findings of fact based upon the circumstances in subsection (5) and (6).” *Id.* at (3).

Subsection (5) specifies the fourteen potential “aggravating circumstances” which would support imposition of the death penalty, and which subsection (3) requires to be found by way of “specific written findings of fact.”

Florida’s death penalty law unconstitutionally permits imposition of the death penalty upon such findings being made by the trial judge and not by the jury. In order to constitutionally support imposition of the death penalty, one or more of those aggravating factors must be made by way of “specific written findings of fact” *by the jury*, instead of by the trial judge. Absolutely zero “specific written findings of fact” were made by the jury below, so Florida’s death penalty is unconstitutional, not just the “scheme” which led to the death penalty. Therefore, Lebron must be re-sentenced to life without parole.

III.

THE TRIAL COURT ERRONEOUSLY DENIED LEBRON’S MOTION FOR MISTRIAL BASED UPON AGENT HERNANDEZ’S STATEMENT THAT THIS WAS THE WORST CRIME HE EVER SAW

The State in its Answer Brief addresses only the potential relevance of agent Hernandez’s comparison of the subject crimes to all the others he had seen in his law

enforcement career on the question of his credibility in testifying concerning the contents of Lebron's alleged confession. The State, however, fails to address the unfair prejudice that resulted from Agent Hernandez telling the jury that this crime was the worst he had ever seen in his long career in law enforcement. The fact that evidence may be relevant to an issue before the court does not, in and of itself, render that evidence admissible.

The State does not refute Lebron's argument in his initial brief that Agent Hernandez could have conveyed the same information to the jury about why he was able to recall the details of Lebron's confession—by simply answering that the memorable nature of the acts permitted him to have a good recollection of them—without the need to compare this crime to all those agent Hernandez had experienced as a career law enforcement officer. The additional marginal relevance of this crime being the absolute worst (as opposed to the relevance from explaining that the facts stuck in his mind because they were so serious) did not necessitate the jury having heard the comparison.

To quote from another case dealing with improperly-admitted evidence notwithstanding its relevance: “This is the very type of evidence that is intended to be excluded by the basic rule excluding relevant *but unfairly prejudicial* evidence as that rule is codified in section 90.403, Florida Statutes.” *See Anderson v. State*,

549 So. 2d 807, 814 (Fla. 5th DCA 1989)(emphasis added). Lebron’s motion for mistrial should have been granted, so this Court should reverse based upon the improper denial of that motion.

IV.

A MISTRIAL SHOULD HAVE BEEN GRANTED DUE TO THE STATE’S VIOLATION OF *POSTELL* DURING OPENING STATEMENT

This Court should reject the State’s position that there was no *Postell*¹ violation because the improper insinuation that Lebron’s co-Defendants had inculpated him in the crime was placed before the jury during opening statement, as opposed to being introduced into evidence. Although matters stated by the prosecution during opening statement are not “evidence,” that distinction does not immunize the State from the effects of referring to inadmissible and prejudicial testimony during opening statement.

Even where evidence is not presented to the jury because it is determined to be inadmissible, the State’s improper reference to such evidence in opening statement will necessitate reversal where the Defendant is prejudiced thereby. In *Conahan v. State*, 844 So. 2d 629 (Fla. 2003), although finding the prosecutor’s

¹ See *Postell v. State*, 398 So. 2d 851 (Fla. 1981)

opening statement to have been harmless error, this Court noted that “it was improper for the State to comment in its opening statement upon evidence that was under advisement and which was *ultimately determined to be inadmissible . . .*” *Id.* at 639 (emphasis added).

Other courts have recognized that remarks by the prosecution in opening statement are not proper merely because they are not “evidence.” In *Benoit v. State*, 113 So. 3d 939 (Fla. 5th DCA 2013), although affirming the denial of a motion for mistrial based upon improper opening statement, the court made it clear that the prosecution’s reference to matters in opening statement were not proper simply because opening statement was not evidence. Judge Orfinger in his specially concurring opinion stated:

In her opening statement, the prosecutor referred to matters that the trial court previously ruled were inadmissible. Then, when the mistrial motion was made, the prosecutor claimed that she did not violate the order in limine, arguing that her opening statement was not evidence and the order only precluded the matters referred to from being introduced into evidence. That explanation is *disingenuous at best and fails even the “straight face” test*. The prosecutor should have been sanctioned for what was a blanton violation of the court’s order. The State should demand better from its assistance state attorney.

Id. at 939 (emphasis added).

This case is similar to that of *Hayes v. State*, 932 So. 2d 381 (Fla. 2d DCA 2006), in which the defendant was convicted of first degree premeditated murder.

On appeal, defendant raised as an error the trial court's denial of his motion for mistrial based upon the State's improper opening statement. "In opening statement, the state told the jury that it would present evidence that Mr. Hayes admitted his crime to a fellow inmate, Carlos Brim. This promise went unfulfilled; Mr. Brim testified that he recalled no such conversation. Mr. Hayes moved for a mistrial, arguing that the opening statement tainted the jury. The trial court gave a curative instruction but denied the mistrial motion. This was error." *Id.* at 382.

Likewise, in the present case, the jury was tainted by the *Postell* violation during opening statement, even though no evidence was presented confirming the prosecutor's informing the jury that the reason Mr. Lebron became a suspect was because of what investigators had learned while two of his co-Defendants were in custody. The motion for mistrial should have been granted and the judgment based thereon should be reversed.

V.

THE TRIAL COURT ERRED IN DENYING A MISTRIAL BASED UPON THE EFFECT OF THE VICTIM'S MOTHER IN THE COURTROOM

The State spends most of its argument attempting to support the denial of a mistrial based upon the presence of Ms. Osorio, the victim's mother, in the courtroom during trial on the issue whether her presence in the courtroom colored

her testimony. That was not an argument raised in the initial brief and this Court should not be misled by the State's attempt to erect a "straw man" just to knock it down. Lebron does not take the position that Ms. Osorio's testimony was colored by her presence in the courtroom, so there was no need for the State to spend most of its argument on that issue.

Instead, this case involves the second area of concern with permitting victims' family members to remain in the courtroom throughout the trial. That "second area of concern may be the prejudice potentially caused by emotional reactions of the victim's family members." *Beasley v. State*, 774 So. 2d 649, 669 (Fla. 2000). Contrary to the State's argument in its Answer Brief, this second area of concern is not limited to preventing prejudice from "overt emotional *outbursts* during the proceedings." Compare Answer Brief at 82 (emphasis added). There need not be an "outburst" of emotion to harmfully prejudice the defendant. Here the prosecution expressly invited the jury to be sympathetic to Ms. Osorio and to the prosecution in general, pointing to her and referring to the fact that for more than ten years "we're all sitting here finally waiting" for justice to be done. Lebron was unfairly prejudiced by Ms. Osorio's presence and references thereto by the State. Therefore, the judgment of conviction and sentence should be reversed.

VI.

LEBRON’S DEATH SENTENCE MUST BE REVERSED BECAUSE HE WAS NOT EXPRESSLY INFORMED OF HIS RIGHT TO ALLOCUTE AT SPENCER HEARING

This Court should reject the State’s argument that no record waiver of Lebron’s right to allocution was required because “the Supreme Court has held that a defendant has no constitutional right to allocate at sentencing.” *See* Answer Brief at 86 (*citing Hill v. United States*, 368 U.S. 424, 428 (1962)). In *Hill*, although the Court stated that “[t]he failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed . . . is an error which is neither jurisdictional nor constitutional,” that statement, made in the context of a habeas corpus proceeding, supported the Court’s conclusion on the question “whether a district court’s failure explicitly to afford the defendant an opportunity to make a statement at the time of sentencing furnishes, without more, grounds for a successful *collateral attack* upon the judgment and sentence.” *Id.* at 426 (emphasis added). The present case involves a direct appeal, not a collateral attack subject to different legal standards.

In the context of a direct appeal from a judgment of conviction and sentence, as opposed to collateral proceedings, “[a] defendant has a Fifth Amendment right to allocution at sentencing.” *United States v. Washington*, No. 93-4061, 93-4118, 93-

4187; 1994 U.S. App. LEXIS 42796 at *4 (5th Cir. Jan. 10, 1994). That right of allocution required an express waiver from the Defendant Lebron himself, not mere silence when the court asked only his counsel whether the defense had anything further to present. Therefore, the sentence based thereon should be reversed.

VII.

THE TRIAL COURT ERRONEOUSLY EXCLUDED EVIDENCE OF THE QEEG STUDY UNDER *FRYE*

This Court should reject the State’s argument that the exclusion of QEEG’s evidence, if erroneous, was harmless error because presentation of the QEEG results would have been cumulative. Although there was other evidence concerning Lebron’s brain damage presented at trial, the mere fact that other evidence is offered on the same subject as evidence already admitted does not make the later-offered evidence cumulative. “[C]umulative evidence’ means unnecessary evidence—evidence so repetitive that, notwithstanding its exclusion, it is not reasonably likely a different result would have occurred.” *Withham v. Sheehan Pipeline Constr. Co.*, 45 So. 3d 105, 109 (Fla. 1st DCA 2010). That was not the case here, because the QEEG studies provided qualitatively different evidence of brain damage from that introduced through other means at trial. Therefore, it was not cumulative.

In ruling upon issues involving the introduction or exclusion of evidence argued as cumulative, this Court should recognize that the existence of other evidence from other sources does not automatically render harmless a ruling admitting or excluding other similar evidence. “The cases concerning cumulative evidence do not stand for the proposition that an error in the admission of evidence is harmless simply because there is additional evidence in the record to support the ultimate result below.” *Id.* This Court should hold that the exclusion of evidence erroneously should not be affirmed as harmless error. Where an issue to be proven requires expert testimony and there is such competing testimony that the weight to be given to expert evidence makes the difference, a ruling on the admission or exclusion of such expert testimony will not be deemed to be harmful error. *See Whitham, supra*, at 109-10. Therefore, this Court should reverse the judgment of conviction and sentence.

VIII.

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY SO AS TO DEPRIVE IT OF ITS PARDON POWER

Lebron relies upon the argument authorities contained in his Initial Brief on this issue.

IX.

THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTION FOR MISTRIAL BASED ON THE STATE’S IMPROPER AND REPEATED DRY-FIRING THE REVOLVER USED TO KILL MS. ANGEL

The State in its Answer Brief attempts to justify the prosecutor’s pulling of the trigger on the murder weapon three times during closing argument near the jury as an accurate recreation of the events calculated to convey to the jury how the victim felt at the time she was being shot and killed. That is the epitome of Golden Rule argument that is prohibited under Florida law.

“This Court has long prohibited Golden Rule arguments, which ‘invite the jurors to place themselves in the victim’s position during the crime and imagine the victim’s suffering.’” *Doty v. State*, 170 So. 3d 731, 743 (Fla. 2015). By supposedly accurately portraying for the jury how the victim felt at the time she was being shot, the prosecutor clearly invited the jurors to place themselves in the victim’s position. The clicking of the trigger on the gun improperly emphasized within each juror the feeling of terror and foreboding that Ms. Angel must have felt. Therefore, it was improper Golden Rule argument and Lebron’s conviction and death sentence must be reversed.

X.

**THE CUMULATIVE EFFECT OF ALL THE
ERRORS NECESSITATE REVERSAL**

The State merely argues that none of the individual allegations of error were preserved or have merit. The State only argues that the cumulative error doctrine will not support reversal because there was no reversible error at all. Therefore, the State has tacitly conceded that the presence of more than one of the foregoing errors would support reversal under the cumulative error doctrine. This Court should find more than one error occurred and should determine that the effect of the multiple errors cumulatively requires reversal.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, this Court should reverse Lebron's conviction and death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by email upon Melissa Roca, Attorney General's Office, 444 Brickell Avenue, Suite 650, Miami, FL 33131, <Melissa.Roca@myfloridalegal.com>; and Philip L. Reizenstein, Woodward and Reizenstein PA, 3191 Coral Way, Suite 109, Miami, Florida 33145-3226, <philip@miamicriminallaw.net>; on October 13, 2016.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been computer generated in 14 point Times New Roman and complies with the requirements of Rule 9.210.

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